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# *BLYSTONE v. HORN*: THE THIRD CIRCUIT GUARDS AGAINST INADVERTENT WAIVER OF THE RIGHT TO PRESENT MITIGATING EVIDENCE DURING A CAPITAL CASE

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## I. INTRODUCTION

The fundamental right to effective representation is a cornerstone of the criminal justice system, and at no time is that effective representation more crucial than during the investigation and presentation of mitigating evidence in a capital case.[1] Because the death penalty is reserved for the most heinous of crimes, inextricably interwoven in a capital case is a defendant's right to present mitigating evidence to demonstrate extenuating circumstances that may justify a departure from the death penalty.[2]

* J.D. Candidate, 2014, Villanova University School of Law. This Casebrief would not have been possible without the love and support of my friends and family. Additionally, I would like to thank the members of Volume 58 of the *Villanova Law Review* for their helpful feedback and comments.

1. *See* Dale E. Ho, *Silent at Sentencing: Waiver Doctrine and a Capital Defendant's Right to Present Mitigating Evidence After* Schriro v. Landrigan, 62 FLA. L. REV. 721, 725, 735 (2010) (explaining that right to present mitigating evidence during capital case "is grounded firmly in the Court's capital punishment jurisprudence, arising in response to . . . Eighth Amendment concerns"); Emily Hughes, *Arbitrary Death: An Empirical Study of Mitigation*, 89 WASH. U. L. REV. 581, 582 (2012) ("A capital jury's opportunity to consider mitigating evidence is one of the critical procedures the Supreme Court has endorsed to alleviate arbitrariness in the jury's decision of whether a defendant deserves to die."). Proper investigation of mitigating evidence is an immense task. *See* Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1055 (2001) (explaining challenges in developing mitigating evidence, calling it "an extraordinarily complicated and difficult task that requires the skillful blending of lay and expert testimony").

2. *See* California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (explaining that mitigating evidence, including defendant's "disadvantaged background" or "emotional and mental problems," is extremely significant to consider in capital cases because it may indicate that particular defendant is less culpable than others who lack this type of "excuse"). In the broadest sense, mitigating evidence is any type of factor that could cause a jury to issue anything less than the death penalty. *See* Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 OKLA. CITY U. L. REV. 23, 51–52 (2005) (explaining role mitigating evidence plays in sentencing phase of death penalty case). The Supreme Court has identified a non-exhaustive list of potential mitigating factors. *See id.* at 48 ("[M]itigating factors have included such things as family history; youthfulness; underdeveloped intellect and maturity; favorable prospects for rehabilitation; poverty; military service; cooperation with authorities; character; prior criminal history; mental capacity; age; and good behavior while awaiting trial.") (footnotes omitted).

Therefore, the presentation of mitigating evidence is a critical juncture in a capital case.[3] Put simply, if a defendant does not present any mitigating evidence during the trial or sentencing phase, the defendant faces a highly unfavorable outcome and decreases his or her chance of avoiding the death penalty.[4]

Investigating and presenting mitigating evidence is not an easy task, as a surprising number of "uncooperative" defendants facing the death penalty hinder a defense counsel's attempt to gather or present the evidence.[5] Further, it is not uncommon for defendants in capital cases to be poorly represented.[6] Inadequate representation, coupled with the complexities involved in investigating and presenting mitigating evidence, leads many defendants seeking post-sentencing relief to file claims for ineffective assistance of counsel regarding their representation at the sentencing phase of a capital case.[7] Often, this type of claim hinges on whether the defendant waived the right to present mitigating evidence, which, under the current Supreme Court jurisprudence, procedurally bars a claim of ineffective assistance of counsel.[8]

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3. *See* Robin M. Maher, *The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 763, 771–72 (2008) ("Developing mitigation evidence and making a case for the life of their client is one of the most important tasks defense lawyers must handle."); *see also* Ho, *supra* note 1, at 724 (explaining right to present mitigating evidence "represents a defendant's last line of defense against the imposition of the death penalty"); *Leading Cases, Sixth Amendment—Ineffective Assistance of Counsel:* Schriro v. Landrigan, 121 HARV. L. REV. 255, 263 (2007) [hereinafter *Leading Cases*] ("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.'") (citation omitted).

4. *See* Kamela Nelan, *Restricting Waivers of the Presentation of Mitigating Evidence by Incompetent Death Penalty "Volunteers"*, 27 DEV. MENTAL HEALTH L. 24, 24 (2008) ("An equally significant means by which a defendant can achieve execution is to forgo presenting mitigating evidence during the sentencing phase of the trial, making the imposition of a death sentence a virtual certainty."); *see also* Cooley, *supra* note 2, at 33 ("Typically, one's life will only be spared when sufficient mitigating evidence is presented to outweigh the State's aggravating evidence.").

5. *Leading Cases*, *supra* note 3, at 255 ("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.").

6. *See* Cooley, *supra* note 2, at 24 ("[M]any capital defendants get no meaningful support at the sentencing phase . . . for this reason, claims of . . . ineffectiveness at the penalty phase are among the most common issues raised in habeas corpus petitions by inmates on death row.") (alterations in original) (quoting Ira Mickenberg, *Ineffective Counsel*, NAT'L L.J., Aug. 4, 2003, at S9).

7. For a discussion regarding the history of the development of the ineffective assistance of counsel claim see *infra* notes 27–50 and the accompanying text.

8. *See* Ho, *supra* note 1, at 724 (explaining that once it is determined that defendant waived right to present mitigating evidence, claim for ineffective assistance of counsel is procedurally barred).

Recently, in *Schriro v. Landrigan*,[9] the Supreme Court addressed the impact of an uncooperative defendant's actions on the presentation of mitigating evidence during capital sentencing and alluded to what may constitute a defendant's waiver of the right to present mitigating evidence.[10] Numerous commentators have argued that the majority's decision was a major setback for defendants' rights because it implies that a defendant could waive the right to present mitigating evidence without fully knowing or understanding the consequences of the decision.[11] *Schriro* left lower courts in a difficult position; they now must carefully navigate the determination of whether a defendant waived the right to present mitigating evidence while balancing the need to protect defendants' rights in capital cases.[12]

The United States Court of Appeals for the Third Circuit limited the potentially dangerous consequences of the Supreme Court's precedent by narrowly interpreting *Schriro*, confining its applicability to its specific set of facts.[13] The Third Circuit's approach affords uncooperative defendants substantial leeway before finding a valid waiver of the right to present mitigating evidence.[14] Further, the Third Circuit's approach requires defense counsel to exercise heightened caution in deciding how to proceed in the sentencing phase of a capital case.[15]

This Casebrief will not delve into the contentious issues surrounding the efficacy and morality of the death penalty, nor will it deal with the first

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9. 550 U.S. 465 (2007).

10. *See id.* at 472–73 (explaining issues that Supreme Court would consider for this case).

11. *See* Ho, *supra* note 1, at 725 ("The Court's failure in [*Schriro*] to apply a similar standard where a capital defendant 'waives' his right to present mitigating evidence is incongruous with well-established waiver doctrine, and creates an unacceptable risk of error in capital sentencing."); *Leading Cases*, *supra* note 3, at 255, 264–65 (2007) (explaining that *Schriro* represents departure from prior trend towards protecting right to present mitigating evidence and warns that if *Schriro*'s decision is continued to be adhered to or expanded it "will have deplorable consequences for the rights of capital defendants").

12. *See* Ho, *supra* note 1, at 760 ("In absence of a clear ruling from the Supreme Court, however, the lower courts have issued widely varying rulings on this particular issue and have applied inconsistent standards in determining when the right to mitigation has been validly waived.").

13. *See generally* Blystone v. Horn, 664 F.3d 425 (3d Cir. 2011); Thomas v. Horn, 570 F.3d 105 (3d Cir. 2009); Taylor v. Horn, 504 F.3d 416 (3d Cir. 2007). For a detailed discussion on the development and current state of the Third Circuit's jurisprudence regarding mitigating evidence, see *infra* notes 53–91 and accompanying text.

14. For a discussion of the Third Circuit's approach to handling uncooperative defendants during the penalty phase of a capital case who subsequently file a claim for ineffective representation, see *infra* notes 95–129 and accompanying text.

15. For a discussion of the Third Circuit's approach to the actions of the defense counsel during sentencing in a capital case, see *infra* notes 118–29 and accompanying text.

phase of a capital case, the guilt phase.[16] Instead, through an analysis of the recent case *Blystone v. Horn*,[17] this brief will focus on the Third Circuit's interpretation of the effect of a recalcitrant defendant during a capital case in two respects: the effect that uncooperative actions have on waiving a defendant's rights to present mitigating evidence, and the responsibilities of the defense counsel regarding mitigating evidence when representing an uncooperative defendant.[18]

Part II of this brief traces the history of the effective representation requirement and the impact of a recalcitrant defendant on capital cases through the related Supreme Court jurisprudence.[19] Part III evaluates and explains the decision in *Blystone v. Horn* and related Third Circuit cases in light of the Supreme Court's recent guidance.[20] Part IV explains the implications for a practitioner in the Third Circuit.[21] Finally, Part V argues that the Third Circuit's approach to handling questions of waiver and effective representation of counsel during the sentencing phase of a capital case is necessary to protect defendants.[22]

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16. *See* Cooley, *supra* note 2, at 24–25 (discussing increased awareness of capital punishment by American public attributable to flaws in system). It should be noted that there are two distinct phases in a capital case: the guilt phase and penalty phase. *See* Nelan, *supra* note 4, at 28 (explaining that capital trials can be broken down into two components: guilt phase, where defendant's innocence or guilt is determined, and penalty phase, where appropriate penalty is determined). It is worth noting that capital punishment remains a prominent public issue with commentators illustrating many of the problems associated with the death penalty system. *See, e.g.*, Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 768 (2007) ("Overbroad definitions of death-eligibility can be seen as the root cause of most of the problems with the death penalty.").

17. 664 F.3d 425 (3d Cir. 2011).

18. For a discussion of the Third Circuit's approach to waiving the right to present mitigating evidence, see *infra* notes 95–117 and accompanying text. For a discussion of the requirements of defense counsel during the mitigating phase of a capital case in the Third Circuit, see *infra* notes 118–29 and accompanying text.

19. For a discussion of the development of the Supreme Court's effective representation and mitigating evidence jurisprudence, see *infra* notes 23–50 and accompanying text.

20. For an explanation and analysis of the Third Circuit's decisions in *Taylor*, *Thomas*, and *Blystone*, see *infra* notes 51–91 and accompanying text.

21. For a discussion of the practical ramifications for practitioners, including an explanation of the requirements to satisfy the effective representation threshold in the Third Circuit, see *infra* notes 92–129 and accompanying text.

22. For the argument that the Third Circuit applies a proper approach to protect defendants' rights during the sentencing phase, see *infra* notes 130–37 and accompanying text. For a recommendation that the Third Circuit take a further step in protecting defendants' rights by adopting a "knowing and voluntary" requirement to waiver of mitigating evidence at capital sentencing, see *infra* notes 138–44 and accompanying text.

## II. BACKGROUND

This section provides a general overview of the development and subsequent implementation of the right to effective assistance of counsel.[23] First, this section briefly reviews the establishment of the right to effective assistance of counsel.[24] Second, this section examines the Supreme Court's application of the right to effective assistance of counsel in the mitigating evidence phase.[25] Finally, the focus of this section turns to a survey of the Supreme Court's approach to the right of effective assistance of counsel when a defendant acts in an uncooperative manner.[26]

### A. *Establishment of Right to Effective Assistance of Counsel*

The Sixth Amendment guarantees the right to effective assistance of counsel.[27] In 1984, the Supreme Court addressed the standard for evaluating ineffective representation claims in *Strickland v. Washington*.[28] In *Strickland*, the respondent confessed to three murders and was sentenced to death.[29] Following the sentence, the "respondent sought collateral relief," claiming, among other grounds, that his counsel provided ineffective assistance during the sentencing phase.[30]

23. For a general overview of the right to effective assistance of counsel and the subsequent implications, see *infra* notes 27–50 and the accompanying text.

24. For a brief history of the establishment of the right to effective assistance of counsel, see *infra* notes 27–35 and the accompanying text.

25. For an overview of the Supreme Court's application of the right to effective assistance of counsel in the mitigating evidence phase, see *infra* notes 36–39 and accompanying text.

26. For an overview of the Supreme Court's approach to a recalcitrant defendant's right to effective assistance of counsel, see *infra* notes 40–50 and accompanying text.

27. *See* Cooley, *supra* note 2, at 70 (explaining historical development and recognition of right to assistance of counsel under Sixth Amendment).

28. 466 U.S. 668, 683 (1984) (acknowledging that this case represents Supreme Court's first review of attorney's ineffective assistance of representation claim). The right to effective assistance of counsel assumes the constitutional right to counsel that has been established through a long line of Supreme Court cases dating back to 1932. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 340–41 (1963) (explaining that right to counsel is afforded in state proceeding through incorporation of Sixth Amendment through Fourteenth Amendment); Johnson v. Zerbst, 304 U.S. 458, 467–69 (1938) (determining that only legitimate waiver of counsel can vitiate right to counsel); Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that trial judge must appoint counsel for defendants when they cannot employ counsel).

29. *See Strickland*, 466 U.S. at 671–75 (reviewing facts of case). As part of an overall strategy, respondent's attorney chose not to look for certain evidentiary items and limited the evidence presented at sentencing to a plea colloquy between the respondent and the trial judge. *See id.* at 673 (reviewing facts of case).

30. *See id.* at 675 (explaining that respondent sought relief for ineffective assistance of counsel because his attorney "failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts"). The claim eventually made

For the first time, the Supreme Court granted certiorari to address squarely the issue of ineffective assistance of counsel.[31] The Court established a two-prong test to evaluate ineffective assistance of counsel claims: a defendant must prove (1) "deficient" performance by the attorney, and (2) that the deficient performance "prejudiced the defense."[32] A counsel's performance is "deficient" when the attorney fails to represent a client in a reasonable manner.[33] Even if an attorney's representation is unreasonable, however, this will not warrant "setting aside the judgment of a criminal proceeding" unless the unreasonable representation also prejudiced the ultimate result.[34] Therefore, once a defendant proves that the defense counsel did not satisfy the reasonableness standard in the first prong of the *Strickland* test, the defendant must then demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[35]

### B. *Supreme Court Applies* Strickland *Reasonableness Prong to Mitigating Evidence*

Mitigating evidence serves a vital role in capital cases, theoretically ensuring that the death sentence is reserved for the absolute worst

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its way to the Court of Appeals for the Fifth Circuit (part of which is now the Eleventh Circuit) where the Fifth Circuit delineated a framework for evaluating ineffective representation claims and remanded the case based on the new criteria. *See id.* at 680–83 (reviewing Fifth Circuit's attempt to create standard to evaluate ineffective assistance of counsel claims).

31. *See id.* at 683 ("[T]he Court has never directly and fully addressed a claim of 'actual ineffectiveness' of counsel's assistance in a case going to trial.").

32. *See id.* at 687 (explaining two-prong test to evaluate ineffective representation claims).

33. *See id.* at 687–88 (emphasizing that to establish first prong of *Strickland* test "the defendant must show that counsel's representation fell below an objective standard of reasonableness").

34. *See id.* at 692 ("Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.").

35. *See id.* at 694–95 (explaining appropriate standard to determine whether counsel's unreasonable representation prejudiced defendant's case). Commentators have criticized the *Strickland* standard as highly deferential to defense attorneys' decisions, cultivating an environment that fosters bad lawyering. *See* William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 94 (1995) (explaining that *Strickland* standard has been criticized for permitting "abysmal lawyering"). Geimer details the problems that the *Strickland* standard presents. *See id.* at 114 (calling *Strickland* standard "an illogical and unworkable framework for evaluating whether the performance of defense counsel had fallen below a constitutionally required minimum"); *see also* Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials*, 62 ME. L. REV. 97, 99–101 (2010) (detailing significant deficiencies with *Strickland* standard).

crimes.[36] In *Gregg v. Georgia*,[37] the Supreme Court held that mitigating evidence is a foundational requirement for death penalty statutes to be constitutional.[38] Since *Gregg*, the Supreme Court has provided guidance on a case-by-case basis regarding what constitutes a reasonable investigation and presentation of mitigating evidence.[39]

### C. Schriro v. Landrigan: *Effect of Recalcitrant Defendant on Attorney's Duty to Investigate and Present Mitigating Evidence*

The *Strickland* standard is more difficult to apply when unpredictable variables, such as an uncooperative defendant, are added to a capital case.[40] In the 2007 case *Schriro*, the Supreme Court revisited mitigating evidence in a capital case, and for the first time, the Court addressed the issue of an effective investigation and presentation of mitigating evidence when a client obstructs the investigation or advises defense counsel not to

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36. *See* Ho, *supra* note 1, at 725 (explaining that components of death penalty cases must be structured to reserve capital punishment for worst offenders); Maher, *supra* note 3, at 768 ("Mitigation evidence took center stage in death penalty cases as potentially the only way defense counsel could humanize their client and save his life."); Nelan, *supra* note 4, at 49 (explaining vital role mitigating evidence serves in capital cases).

37. 428 U.S. 153 (1976).

38. *See id.* at 193, 206–07 (emphasizing key role of mitigation in new death penalty statutes that Court found constitutional); *see also* Hughes, *supra* note 1, at 582 ("A capital jury's opportunity to consider mitigating evidence is one of the critical procedures the Supreme Court has endorsed to alleviate arbitrariness in the jury's decision of whether a defendant deserves to die."). Interestingly, commentators have argued that mitigating evidence actually does little to rid capital cases of arbitrary results. *See id.* at 587 (explaining that because of the lack of uniformity in mitigating evidence investigation, arbitrariness remains in capital sentencing decisions); *see also* Jesse Cheng, *Frontloading Mitigation: The "Legal" and the "Human" in Death Penalty Defense*, 35 L. & SOC. INQUIRY 39, 44 (2010) ("[A]nalysts have observed that for all the ado about proceduralizing the death penalty, the judiciary's uneven regulation of capital punishment has done little to alter the reality of arbitrary decision making.").

39. *See, e.g.*, Rompilla v. Beard, 545 U.S. 374, 377 (2005) (holding that under reasonableness prong of *Strickland* test, defense counsel must not rely on defendant and defendant's family's claims that no mitigating evidence exists, and must conduct review of evidence that prosecutor is likely to use "as evidence of aggravation at the trial's sentencing phase"); Wiggins v. Smith, 539 U.S. 510, 522–27 (2003) (finding ineffective assistance of counsel when counsel chose not to present mitigating evidence because that decision was unreasonable and could not have been strategic in light of counsel's deficient investigation into available mitigating evidence); Williams v. Taylor, 529 U.S. 362, 395–96 (2000) (concluding that defense counsel's failure to present evidence that defendant was "'borderline mentally retarded,'" and that defendant assisted law enforcement while in prison, and failure to use witnesses which would cast defendant in favorable terms, amounted to unreasonable conduct and ultimately did not meet *Strickland* standard of effective representation) (citation omitted).

40. *See* Schriro v. Landrigan, 550 U.S. 465, 478 (2007) (explaining difficulties involved in deciding case of ineffective counsel where defendant is recalcitrant).

present mitigating evidence at sentencing.[41] In *Schriro*, the respondent escaped from prison, committed a homicide, and was convicted of first-degree murder.[42] At the respondent's request, his ex-wife and birth mother did not testify during the sentencing phase, and the defense counsel did not present any other mitigating evidence.[43]

In a 5–4 decision, the Supreme Court focused primarily on the prejudice prong of the *Strickland* test and held that any failure in the investigation by the defense attorney did not prejudice the respondent.[44] The respondent's specific requests to not have his birth mother or ex-wife testify and his colloquy with the trial judge made clear that he did not intend or want to present any mitigating evidence.[45] Thus, any failure by his attorney could not have prejudiced his case under the second *Strickland* prong.[46]

According to the dissent, however, it was uncontroverted that the defense counsel's investigation into possible mitigating evidence was insufficient and failed the reasonableness prong of the *Strickland* test.[47] Further, the dissenters focused on whether the respondent produced a "knowing, intelligent, and voluntary" waiver of his right to present mitigating evidence.[48] The dissent argued that this informed and knowing standard exists for a valid waiver of all constitutionally protected rights, even if the Court has not specifically and affirmatively applied the standard to the right to present mitigating evidence.[49] Thus, because the defendant did not know that he was waiving his right to present mitigating evidence, he

41. *See id.* (explaining that Supreme Court has never addressed case "in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court").

42. *See id.* at 469–71 (reviewing facts of case).

43. *See id.* (reviewing facts of case and specifically recounting respondent's actions at sentencing hearing).

44. *See id.* at 473 (remanding case for evidentiary hearing regarding ineffective representation claim). Before the case reached the Supreme Court, the Ninth Circuit delivered an en banc decision concluding that the respondent produced a "colorable claim" that he was provided with ineffective assistance of counsel during the sentencing phase of his capital case. *See id.* at 472 (reviewing procedural history of case).

45. *See id.* at 469–70 (describing defendant's refusal to allow his birth mother and ex-wife to testify, and recounting colloquy between trial judge and defendant regarding defendant's wish not to present this type of mitigating evidence).

46. *See id.* at 480–81 (concluding that defendant "could not establish prejudice").

47. *See id.* at 482 (Stevens, J., dissenting) ("Significant mitigating evidence—evidence that may well have explained respondent's criminal conduct and unruly behavior at his capital sentencing hearing—was unknown at the time of sentencing.").

48. *See id.* at 484 (explaining that constitutional right can only be waived in the limited circumstances when defendant makes "knowing, intelligent, and voluntary" decision).

49. *See id.* at 486 (acknowledging Court had never specifically applied informed and knowing standard to defendant's right to produce mitigating evidence).

did not forfeit his protections or claim for ineffective assistance of counsel.[50]

## III. *TAYLOR V. HORN*,[51] *THOMAS V. HORN*,[52] AND *BLYSTONE*: THE THIRD CIRCUIT BROADLY SAFEGUARDS A DEFENDANT'S RIGHT TO PRESENT MITIGATING EVIDENCE

Since the 2007 Supreme Court ruling in *Schriro*, the Third Circuit has decided three cases involving the effect of a recalcitrant defendant who interferes with a defense counsel's efforts to investigate and present mitigating evidence.[53] Through an examination of these cases, this section tracks the development of the Third Circuit's approach to the ability of recalcitrant clients to waive their right to present mitigating evidence.[54] Although the Third Circuit could have interpreted *Schriro*'s holding broadly and significantly restricted the protection offered to defendants in capital cases, the court instead chose to limit *Schriro*'s application to cases where defendants undeniably waive their rights.[55]

### A. Taylor *and* Thomas *Establish Foundation for Third Circuit's Approach*

In 2007, the Third Circuit heard *Taylor v. Horn*, where the defendant pled guilty to murdering his wife, two children, mother-in-law, and his mother-in-law's child.[56] Pursuant to the defendant's wishes, the defense attorney did not present any mitigating evidence beyond merely mentioning that the defendant had no prior criminal record.[57] The defendant was sentenced to death, and after a lengthy appeals process, the case reached the Third Circuit.[58]

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50. *See id.* at 486–87, 491–92 (concluding that defendant could not have waived his right to present mitigating evidence because he did not understand or know implications of his decisions).

51. 504 F.3d 416 (3d Cir. 2007).

52. 570 F.3d 105 (3d Cir. 2009).

53. *See* Blystone v. Horn, 664 F.3d 425, 425 (3d Cir. 2011) (representing most recent case since *Schriro* to examine effect of recalcitrant defendant on right to present mitigating evidence); *Thomas*, 570 F.3d at 105 (representing second case since *Schriro* to examine effect of recalcitrant defendant on right to present mitigating evidence); *Taylor*, 504 F.3d 416 (representing first case since *Schriro* to examine effect of recalcitrant defendant on right to present mitigating evidence).

54. For a discussion of the Third Circuit's approach to the ability of recalcitrant clients to waive their right to present mitigating evidence, see *infra* notes 95–116 and accompanying text.

55. *See* Bradley A. MacLean, *Effective Capital Defense Representation and the Difficult Client*, 76 TENN. L. REV. 661, 671 (2009) ("Justice Thomas's opinion in *Landrigan* threatens to give lower courts justification to take a myopic view of the scope and nature of capital defense counsel's duties.").

56. *See Taylor*, 504 F.3d at 420 (explaining facts of case).

57. *See id.* at 422 (detailing facts regarding defendant's decisions during sentencing hearing).

58. *See id.* at 422–25 (outlining procedural history of case following trial judge's imposition of death sentence).

Relying on *Schriro*, the court concluded that based on the defendant's actions during sentencing, he had waived his right to present mitigating evidence, effectively barring his post-sentencing claim of ineffective assistance of counsel.[59] In reaching this conclusion, the court highlighted that the defendant (1) wrote in a confession letter that he wanted "the maximum sentence," (2) instructed his attorney "not to contact any witnesses or medical personnel" that he had spoken to, (3) affirmed that he understood that the likely result of not presenting mitigating evidence would be the "imposition of the death penalty," and (4) declined to present any mitigating evidence at the sentencing hearing.[60] Further, the court held that the defendant was informed and knowing when he waived his right to present mitigating evidence.[61]

In 2009, the Third Circuit revisited the issue in *Thomas v. Horn*, and held that no valid waiver existed when the defendant exhibited a lower degree of recalcitrant behavior than the defendants in *Taylor* and *Schriro*.[62] During trial, the defendant was found guilty of murder, rape, involuntary deviate sexual intercourse, and burglary.[63] The defendant refused to present evidence in the form of witness testimony and refused to stipulate to uncontroverted facts such as his age.[64] Unlike in *Taylor*, however, the court determined that the defendant did not waive his right to present mitigating evidence at sentencing and therefore was not procedurally barred from making a claim of ineffective assistance of counsel.[65]

In *Thomas*, the court distinguished *Taylor* and *Schriro* based on the degree of the defendant's recalcitrant behavior.[66] In *Thomas*, the defen-

59. *See id.* at 455 (explaining that defendant's decision to waive right to present mitigating evidence was clear and "informed and knowing").

60. *See id.* at 421–22 (illustrating multiple factors that led court to conclude that defendant had waived his right to present mitigating evidence which, in effect, barred claim of ineffective assistance of counsel).

61. *See id.* at 447 ("We will therefore affirm the District Court's decision that these waivers were knowing and voluntary.").

62. *See* Thomas v. Horn, 570 F.3d 105, 122, 129 (3d Cir. 2009) (outlining issues to be considered on appeal including ineffective assistance of counsel claim and ultimately holding that defendant's behavior did not equate to waiver of right to present mitigating evidence).

63. *See id.* at 112–13 (explaining procedural history of case).

64. *See id.* at 128–29 (detailing facts pertinent to sentencing phase of case).

65. *See id.* at 129 (holding that defendant's conduct did not rise to level of waiver of right to present all mitigating evidence, which meant that possibility remained that defense counsel's performance prejudiced case).

66. *See id.* at 126–27 (highlighting facts distinguishing *Schriro* and *Taylor* from *Thomas*). The court focused in particular on the extent and scope of the defendants' actions and whether the actions amounted to complete waiver of right to present mitigating evidence. *See id.* at 127 (distinguishing behaviors of *Thomas* defendant from prior cases). The court determined that in *Taylor* and *Schriro*, the defendants' waivers were manifestly apparent while in *Thomas*, it would be too great a leap to classify the defendant's actions as qualifying as a complete waiver. *See id.* at 129 ("Therefore, we cannot conclude that Thomas' conduct at sentencing eliminated all possibility that counsel's performance caused him prejudice.").

dant merely decided not to take the stand himself, rather than refuse to present any mitigating evidence like the defendants in *Taylor* and *Schriro*.[67] The Third Circuit determined that the defendant's actions only resulted in a waiver of the presentation of certain *types* of mitigating evidence but could not be reasonably construed as a complete waiver of the right to present *all* mitigating evidence.[68]

### B. Blystone *Solidifies Third Circuit's Position on Defendant Waiver*

The Third Circuit solidified its approach to handling an uncooperative defendant in *Blystone v. Horn*.[69] The facts of *Blystone* represented the perfect storm—an inexperienced public defender and a defendant who was uncooperative during the sentencing phase of the capital case.[70] A thorough analysis of *Blystone* reveals important facts and circumstances that illustrate the Third Circuit's position on recalcitrant defendants and their right to waive mitigating evidence.[71]

#### 1. *Background Facts and Procedure*

In 1983, Scott Wayne Blystone picked up Smithburger, a hitchhiker, and asked him to contribute money for gas.[72] When Smithburger told Blystone that he could only contribute a few dollars, Blystone told him to get out of the car and proceeded to shoot him six times.[73] At trial, Blystone was found guilty of murder.[74]

Blystone's defense counsel performed a limited investigation into possible mitigating evidence, interviewing only four people.[75] At sentencing,

67. *See id.* at 126–28 (explaining behaviors of defendants in *Taylor* and *Schriro* as compared to defendant in *Thomas* who did not refuse to present all mitigating evidence, but only opposed testifying on his own behalf).

68. *See id.* (explaining that defendant's refusal to present some evidence does not justify Commonwealth's argument that defendant would have refused to present all mitigating evidence).

69. 664 F.3d 397, 426–27 (3d Cir. 2011) (holding that district court's determination that defendant waived right to present all mitigating evidence was unreasonable and that defendant's claim of ineffective representation was not barred).

70. *See id.* at 402–04 (explaining facts of case and in particular, noting that defendant refused to present some mitigating evidence and that defense counsel had only been working as public defender for three months).

71. For a discussion and analysis of *Blystone*'s impact on the Third Circuit, see *infra* notes 72–129.

72. *See Blystone*, 664 F.3d at 402 (recounting facts of case).

73. *See id.* (same).

74. *See id.* at 403 ("On June 13, 1984, a jury empaneled by the Court of Common Pleas of Fayette County, Pennsylvania, convicted [defendant] of first-degree murder, robbery, conspiracy to commit murder, and conspiracy to commit robbery.").

75. *See id.* at 404–05 (noting limited nature of investigation for mitigating evidence). Blystone's attorney interviewed Blystone, his parents, and one of his sisters. *See id.* at 405 (explaining Blystone's defense counsel's investigation for mitigating evidence). Blystone's attorney did not intend to present any testimony elicited from Blystone's family members even though the conversations described

the defense counsel explained to the court that Blystone did not want to present any mitigating evidence.[76] The judge conducted a colloquy with Blystone to ensure that Blystone understood the consequences of his decision not to bring in the mitigating evidence.[77]

After the court sentenced Blystone to death, he filed a petition under the Pennsylvania Post-Conviction Relief Act (PCRA) claiming ineffective assistance of counsel.[78] At the PCRA evidentiary hearing, Blystone presented significant evidence that could have served as mitigating evidence if Blystone had the benefit of an adequate investigation and effective assistance of counsel.[79] However, the court held that Blystone's defense counsel's investigation was not deficient.[80] The Pennsylvania Supreme Court affirmed the PCRA court's decision and further concluded that Blystone waived his right to present mitigating evidence.[81] Thus, the failures of his defense counsel at trial did not cause him prejudice.[82]

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extensive behavior abnormalities and substance abuse issues. *See id.* at 405–06 (describing family members' description of Blystone's troubled past).

76. *See id.* at 403 (recounting facts of case). Blystone's attorney told the court that he and Blystone previously engaged in lengthy discussions regarding the consequences of not presenting any mitigating evidence at trial. *See id.* (noting defense attorney's assertion that he and Blystone discussed "the benefits of presenting a mitigation case"). Furthermore, the defense counsel expressed a strong desire to put Blystone's parents on the stand. *See id.* (describing facts from record).

77. *See id.* at 403–04 (explaining that following colloquy, judge determined that Blystone understood consequences of his decision). For a more detailed discussion of the colloquy between Blystone and the trial judge, and the significance of some of the specific questions asked in colloquies during the penalty phase of a capital case in the Third Circuit, see *infra* notes 102–10 and accompanying text.

78. *See Blystone*, 664 F.3d at 404 (explaining procedural history of case).

79. *See id.* at 404–08 (describing evidence presented by Blystone in attempt to prove ineffective assistance of counsel during PCRA evidentiary hearing).

80. *See id.* at 408–09 (noting PCRA court denied Blystone's petition because sufficient evidence showed defense counsel conducted "sufficient investigation into mitigating circumstances by reviewing all of the available discovery materials").

81. *See id.* at 409 ("'The PCRA court determined that counsel conducted a proper investigation into all possible mitigating circumstances, and we find substantial support in the record to uphold [that] determination.'") (citation omitted).

82. *See id.* at 408–09 (explaining Pennsylvania Supreme Court's decision (citing Commonwealth v. Blystone, 725 A.2d 1197, 1206 (Pa. 1999))). Prior to the defendant seeking relief for ineffective assistance of counsel, the United States Supreme Court determined that the Pennsylvania statute mandating the death penalty where aggravating circumstances exist and no mitigating evidence is presented was constitutional and did not impermissibly limit the jury's discretion in deciding the penalty. *See id.* (noting Blystone's constitutional challenge to Pennsylvania statute (citing Blystone v. Pennsylvania, 494 U.S. 299, 303 (1990))). During the PCRA hearing, Blystone presented numerous pieces of evidence to show that "his life history was replete with potentially mitigating evidence, which [his attorney] could have uncovered through a more extensive investigation of his background." *See id.* at 405 (discussing Blystone's argument that further investigation by counsel would have revealed such evidence). Specifically, through a number of lay witnesses,

2. *Analysis of Ineffective Representation Claim Under* Strickland *Test*

On appeal, the Third Circuit delved into the *Strickland* analysis.[83] The court worked through the two prongs of the *Strickland* test separately to develop the court's stance on the interplay between effective assistance of counsel and the impact of a recalcitrant defendant on the right to present mitigating evidence.[84] The court was able to harmonize prior decisions to reach its ultimate conclusion.[85]

a. *Strickland* Reasonableness Prong

The Third Circuit quickly concluded that the investigation for mitigating circumstances failed the reasonableness prong of the *Strickland* test.[86] In reaching its conclusion, the court specifically called attention to expert mental health testimony and institutional records, which were "readily available" to the defense counsel had he performed a proper investigation.[87] Finally, the failure to conduct a thorough investigation was not part of a strategic choice that may otherwise have deserved greater deference under the *Strickland* standard.[88]

b. *Strickland* Prejudice Prong

In analyzing the *Strickland* prejudice prong, the Third Circuit artfully distinguished *Blystone* from the Supreme Court ruling in *Schriro*.[89] In so doing, the court was able to supply its own guidance on examining the interchange between an uncooperative defendant and the subsequent im-

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Blystone presented evidence that he suffered from malnutrition as a child, abused alcohol, engaged in self-mutilation, suffered from untreated brain damage and psychiatric disorders, was abused by his father, and was discharged from the Navy for "'[a]pathy and defective attitudes.'" *See id.* at 405–07 (alteration in original) (citation omitted) (detailing results from Blystone's own investigation for potentially mitigating evidence).

83. *See id.* at 418 ("[The Third Circuit] evaluate[s] claims of ineffective assistance of counsel using the two-pronged test set forth in *Strickland v. Washington*").

84. For a discussion of the Third Circuit's application of the *Strickland* analysis in *Blystone*, see *infra* notes 86–91 and accompanying text.

85. For a discussion regarding the Third Circuit's decision in *Blystone*, see *infra* notes 86–91 and the accompanying text.

86. *See Blystone*, 665 F.3d at 420 ("We need not delve too deeply into the question of whether Whiteko's investigation prior to sentencing was deficient because the Commonwealth's brief all but concedes that it was.").

87. *See id.* at 420–21 (demonstrating deficiencies in defense counsel's investigation and noting PCRA court's determination that such investigations were adequate was "objectively unreasonable in light of the evidence presented in the proceedings before it").

88. *See id.* at 423 (acknowledging that strategic choices are to be treated deferentially, yet concluding that defense counsel employed no such strategy during investigation).

89. *See id.* at 426 ("Despite the Commonwealth's extensive arguments to the contrary, the facts of this case are clearly distinguishable from *Schriro*.").

pact on waiving mitigating evidence.[90] The court reaffirmed *Thomas*, which established that in order for a defendant to waive all rights to present mitigating evidence, the defendant must unambiguously refuse to allow the defense attorney to present *any* mitigating evidence at sentencing.[91]

## IV. KEY FACTORS AND PRACTICAL IMPLICATIONS FOR THIRD CIRCUIT PRACTITIONERS STEMMING FROM *BLYSTONE*

This section explores several key points and practical implications for practitioners as a result of the Third Circuit's recent decisions involving mitigating evidence.[92] First, this section focuses on a defendant's ability to waive the right to present mitigating evidence.[93] Second, this section examines the effect of a recalcitrant defendant on the defense counsel's obligation to investigate and present potentially mitigating evidence.[94]

### A. *Effect of* Blystone *on Defendant's Ability to Waive Right to Present Mitigating Evidence and Resulting Prejudice Under* Strickland *Analysis*

To limit the potentially perilous consequences of ambiguous waivers on defendants in capital cases, the Third Circuit demonstrated that it will limit *Schriro*'s application to those specific facts.[95] For example, in *Thomas* the Pennsylvania Commonwealth argued that *Schriro* was controlling under the facts, the defendant's actions constituted a waiver of his right to present mitigating evidence, and therefore, the prejudice prong of the *Strickland* test could not be established.[96] Rather than accept the Commonwealth's invitation to extend *Schrir*o beyond its facts, the Third Circuit explained that unless a defendant's actions clearly manifest a desire to

90. For a discussion of the Third Circuit's guidance on waiving the presentation of mitigating evidence, see *infra* notes 95–117.

91. *See Blystone*, 664 F.3d at 425 ("[W]e could not conclude on the record before us that Thomas would have interfered with the presentation of *all* mitigating evidence.").

92. For a discussion of recent Third Circuit cases on presenting mitigating evidence, see *supra* notes 56–86 and accompanying text.

93. For a discussion of the effect of *Blystone* on a defendant's waiver of the right to present mitigating evidence, see *infra* notes 95–117 and accompanying text.

94. For a discussion of the practical impact of the Third Circuit's decision in *Blystone* on defense counsel's investigation and presentation of mitigating evidence, see *infra* notes 118–129 and accompanying text.

95. *See Blystone*, 664 F.3d at 426 (limiting applicability of *Schriro* by highlighting language used in Supreme Court's decision: "'[i]n the constellation of refusals to have mitigating evidence presented . . . [*Schriro*] is surely a bright star'") (alterations in original) (citation omitted).

96. *See* Thomas v. Horn, 570 F.3d 105, 126 (3d Cir. 2009) (explaining Commonwealth's position that even if counsel's investigation was unreasonable, no prejudice resulted because, like in *Schriro* and *Taylor*, defendant had completely relinquished his right to present mitigating evidence).

waive the right to present *all* mitigating evidence, no valid waiver exists that would bar a defendant from presenting such evidence during sentencing.[97]

*Blystone* further solidified this reasoning, holding that even when the record provides room for a reasonable interpretation that the defendant tried to issue a complete waiver of the right to present mitigating evidence, a plausible alternative explanation for the defendant's actions may be sufficient to prevent the court from imputing a waiver to the defendant.[98] For example, the Third Circuit may not impute a waiver if the defendant thought that the refusal to present mitigating evidence only extended to a specific type of evidence and not to all evidence.[99] As a result, unless the defendant unequivocally relinquishes the right to present miti-

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97. *See id.* at 128–29 (explaining that case does not resemble *Schriro* because defendant did not make "affirmative declaration against the presentation of *all* mitigating evidence") (emphasis added).

98. *See Blystone*, 664 F.3d at 425–26 (citing *Thomas* while rejecting invitation to extend *Schriro*'s reasoning to facts that do not contain direct affirmation of waiver of right to present any and all mitigating evidence). In *Thomas*, the Third Circuit articulated the view that even if a defendant's particular action or decision may lend credence to the argument that the defendant intended to waive the right to present mitigating evidence, if there is a plausible alternative argument that does not involve the intent to waive the right to present mitigating evidence, the Court will protect the defendant by crediting the alternative argument. *See Thomas*, 570 F.3d at 128–29 (explaining plausible, alternative explanations, other than intent to establish complete waiver of right to present mitigating evidence in regards to defendant's refusal to put on specific type of mitigating evidence). Specifically, in *Thomas* the defendant refused the Commonwealth's offer to stipulate his age and that he graduated from high school. *See id.* at 112 (describing facts of case). When the Third Circuit was asked to decide whether the defendant had a claim for ineffective assistance of counsel, one of the Commonwealth's arguments that the defendant was not prejudiced was that the defendant's refusal to stipulate to these harmless facts indicated that he intended to fully waive his right to present mitigating evidence. *See id.* at 127 (explaining Commonwealth's argument). The Third Circuit acknowledged that the defendant's actions were consistent with the Commonwealth's argument but ultimately rejected the argument because other plausible explanations existed for the defendant's actions:

> Nor does Thomas' refusal to stipulate to his age and education tip the scales in the Commonwealth's favor. We agree with the Commonwealth that Thomas' age and education are relatively innocuous facts, and Thomas' decision not to stipulate to them is odd. We cannot agree, however, that this proves that Thomas was not prejudiced. While Thomas' refusal to stipulate is consistent with the Commonwealth's position, it is equally consistent with other scenarios that the record supports. . . . Thomas' failure to stipulate could be viewed as a symptom of this fundamental misunderstanding, and not as an affirmative declaration against the presentation of all mitigating evidence.

*Id.* at 128–29.

99. *See Thomas*, F.3d at 128–29 (providing example of situation when refusing presentation of *some* evidence does not mean defendant refused to present *any* evidence).

gating evidence, the Third Circuit goes to great lengths to protect the defendant from facing an inadvertent waiver.[100]

To clarify this analysis, the Third Circuit has flagged particular facts as insufficient to supply the basis for a waiver of presentation of mitigating evidence.[101] For example, in both *Thomas* and *Blystone*, the trial judges engaged the defendants in a colloquy during the sentencing hearing to ensure that the defendant's wishes regarding the presentation of mitigating evidence were satisfied.[102] In *Thomas*, during the judge's colloquy with the defendant, the court posed a compound question: "And you already told [your counsel], I would like to repeat, but it's your decision not to take the stand at this penalty stage of the hearing *or even to present any evidence*. Is that your independent and voluntary decision?"[103] Although the defendant responded in the affirmative, the court dismissed the Commonwealth's argument that this exchange provided sufficient grounds to support a complete waiver of the presentation of all mitigating evidence.[104] Instead, the court demonstrated that practitioners must focus on the entire context in which the compound question was asked.[105] Specifically, the inquiry should focus on whether it is plausible that the defen-

100. *See Blystone*, 664 F.3d at 426 (rejecting argument that because defendant chose not to testify or to allow two of his family members to testify that that necessarily meant he would have rejected defense counsel's attempts to present other pieces of mitigating evidence); *Thomas*, 570 F.3d at 129 (explaining that defendant's rejection of option to testify and to have other witnesses testify did not mean that defendant would have rejected other forms of mitigating evidence). The Third Circuit's approach was not evident following the ruling in *Schriro*, which left commentators warning that *Schriro* left open the possibility that a defendant's rejection of certain pieces of mitigating evidence could be wrongly treated as a complete waiver to present all mitigating evidence. *See Leading Cases*, *supra* note 3, at 255 (advocating against lower courts interpreting limited refusal to present some mitigating evidence as complete refusal to use any type of mitigating evidence). Additionally, the article advises against interpreting recalcitrant behavior as the basis for concluding that the defendant intended to completely waive the right to present mitigating evidence. *See id.* at 256 (advocating against courts equating recalcitrant behavior with intention to waive right to present all mitigating evidence).

101. For a discussion of the key facts that the Third Circuit has deemed insufficient to constitute a complete waiver, see *infra* notes 102–10 and accompanying text.

102. *See Blystone*, 664 F.3d at 403 (examining defendant's colloquy with court during sentencing hearing); *Thomas*, 570 F.3d at 128 (same).

103. *Thomas*, 570 F.3d at 128 (emphasis added) (reviewing transcript during sentencing hearing).

104. *See id.* ("Thomas' terse answer to this inquiry does not display an intent to interfere with the presentation of mitigating evidence that is strong enough to preclude a showing of prejudice.").

105. *See id.* (determining that defendant's colloquy was "focused narrowly on whether he wanted to take the stand himself," and that compound question did not rise to level of waiver of right to present all mitigating evidence).

dant intended only to waive the right to testify and not to waive the right to present all other mitigating evidence.[106]

In *Blystone*, the trial judge asked the defendant a similar compound question, "Do you wish to testify yourself or to have your parents testify or to *offer any other evidence in this case*?"[107] Because the defendant responded in the negative to this broader question concerning any other evidence in this case, the Third Circuit could have reasonably interpreted the response as the defendant's intent to completely waive his right to present mitigating evidence.[108] However, the court carefully unpacked the questions and determined that at most, the defendant intended to waive his right to "all lay witness testimony," but not his complete right to present any mitigating information.[109] Together, the colloquies in *Thomas* and *Blystone* demonstrate that if there is any reasonable alternative explanation, the Third Circuit will err on the side of caution and find that the defendant did not intend to expand the waiver beyond the most limited reasonable interpretation.[110]

Further, the Third Circuit acknowledges the Supreme Court's position that no "informed and knowing" requirement exists to waive the right to present mitigating evidence.[111] However, the Third Circuit makes it clear that an informed and knowing decision is still relevant to the inquiry.[112] Specifically, the court has referenced a defense counsel's responsibility to keep the defendant informed about decisions regarding the presentation of mitigating evidence.[113]

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106. *See id.* (demonstrating court's broad view of circumstances surrounding defendant's purported waiver to determine scope of relinquishment of rights to present evidence).

107. *See Blystone*, 664 F.3d at 403 (examining colloquy between defendant and trial court during sentencing phase of case).

108. *See id.* (describing colloquy and specifically highlighting defendant's response to questions from trial judge regarding extent of defendant's desire not to present certain type of mitigating evidence).

109. *See id.* at 426 ("We believe it not only incorrect, but also unreasonable, to infer from the colloquy that Blystone would have prevented counsel from presenting *any* mitigating evidence, regardless of the form that it took.").

110. *See id.* (explaining that colloquy must be interpreted in its complete context and exchange not expanded to mean more than is necessarily inferred).

111. *See Thomas*, 570 F.3d at 129 n.9 ("As a result, we offer no opinion on whether a waiver of the right to present mitigating evidence must be 'informed and knowing.'") (citation omitted).

112. *See Blystone*, 664 F.3d at 424 (explaining that *Schriro* and *Taylor* do not control in case at hand by highlighting that defendants in both cases made it obvious that they understood consequence of their decisions not to present mitigating evidence); Taylor v. Horn, 504 F.3d 416, 455–56 (3d Cir. 2007) ("We are also satisfied that Taylor's decision not to present mitigating evidence was informed and knowing.").

113. *See Blystone*, 664 F.3d at 422 n.21 ("After all, counsel also has a duty to provide advice upon which his client can make an informed decision not to present evidence in mitigation.").

Finally, for a defendant to completely waive the right to present mitigating evidence, the Third Circuit requires an affirmative declaration indicating a complete waiver.[114] As discussed above, if a defendant rejects the presentation of a particular piece of evidence, the court will not interpret that action to mean that the defendant has offered a complete waiver.[115] The defendant's statement in *Taylor*, "'I want the maximum sentence,'" illustrates an affirmative declaration sufficient to constitute a complete waiver.[116] Practitioners should assume that nothing short of this type of affirmative declaration is sufficient to establish a waiver.[117]

### B. *Effect of Possible Waiver on Counsel's Investigatory Responsibility*

In the Third Circuit, the duty to conduct an *investigation* for mitigating evidence exists independent of the duty to *present* mitigating evidence.[118] By distinguishing between the investigation into mitigating evidence and the eventual presentation of the evidence, the Third Circuit addressed an issue left open by the Supreme Court in *Schriro*.[119] As a re-

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114. *See id.* at 424–26 (explaining that *Schriro* and *Taylor* were not controlling in *Blystone* in part because defendants in those cases made clear affirmative declarations that they did not want to present any mitigating evidence and that they were willing to face capital punishment). Specifically, in *Schriro* the defendant said, "I think if you want to give me the death penalty, just bring it right on. I'm ready for it." Schriro v. Landrigan, 550 U.S. 465, 470 (2007).

115. *See Blystone*, 664 F.3d at 426 (explaining that it would not be reasonable to extend defendant's limited waiver into complete waiver of right to present mitigating evidence); *Thomas*, 570 F.3d at 128 ("To us, the only thing that Thomas clearly disclaimed at his colloquy was a desire to testify on his own behalf.").

116. *See Blystone*, 664 F.3d at 424 (explaining that defendant's actions in *Taylor* were sufficient and clear enough to determine that defendant intended to completely waive his right to present mitigating evidence).

117. *Compare Taylor*, 504 F.3d at 435 (determining that affirmative declaration that defendant wanted maximum sentence was enough for court to impute waiver), *with Blystone*, 664 F.3d at 426 (indicating that defendant's actions, specifically in regards to colloquy with judge, were not enough to constitute affirmative declaration of complete waiver of right to present mitigating evidence), *and Thomas*, 570 F.3d at 128–29 (explaining that defendant's colloquy rejecting certain type of mitigating evidence was not enough to serve as "an affirmative declaration against the presentation of all mitigating evidence").

118. *See Blystone*, 664 F.3d at 420 (explaining that duty to perform investigation exists independently from duty to present mitigating evidence at sentencing hearing). The Third Circuit further explained that the duty to perform an investigation is necessary to consider what could or should be presented. *See id.* ("In fact, the former is a necessary predicate to the latter: if counsel has failed to conduct a reasonable investigation to *prepare* for sentencing, then he cannot possibly be said to have made a reasonable decision as to what to *present* at sentencing.").

119. *See* Nelan, *supra* note 4, at 34 ("The difference between the reasoning of the Court and the Ninth Circuit seemed to be that the Court treated the investigation and presentation of mitigating evidence as one right, whereas the Ninth Circuit saw them as two independent rights that could each give rise to a claim of ineffective assistance.").

sult of this policy, requests by the defendant will not affect the defense counsel's duty to investigate mitigating evidence.[120]

Although beyond the scope of this brief, it is helpful to note where practitioners may find the basic requirements for a reasonable investigation and presentation of mitigating evidence.[121] The American Bar Association (ABA) produced a set of guidelines for capital cases that shape the contours of what constitutes a reasonable investigation for mitigating evidence.[122] Notably, the Supreme Court has referred to the ABA Guidelines in multiple instances to illustrate the scope of a reasonable investigation.[123] Further, some commentators argue that the Guidelines have all but "taken on the force of law."[124] Thus, the ABA Guidelines provide a comprehensive, practical guide to conducting a reasonable investigation for mitigating evidence, and as such, they should be the first reference point for defense teams in capital cases.[125]

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120. *See* MacLean, *supra* note 55, at 666 ("The duty to investigate exists regardless of the expressed desires of a client.").

121. For an overview of general guidelines supplied by the American Bar Association regarding proper mitigating evidence investigation, see *infra* notes 122–25 and the accompanying text.

122. *See* Hughes, *supra* note 1, at 616 ("The [ABA] Guidelines and Supplementary [ABA] Guidelines have had a tremendous impact on developing norms for the profession of mitigation specialists in the short time since their publication.").

123. *See* Cheng, *supra* note 38, at 49 ("Text from both the [ABA] rules and the commentary has been cited in US Supreme Court opinions.").

124. *See id.* at 49–50 (examining Supreme Court's adoption and approval of certain sections of ABA guidelines especially in *Wiggins v. Smith*, *Florida v. Nixon*, and *Rompilla v. Beard*). Perhaps the clearest example of the Supreme Court's affirmation of the importance of abiding by the ABA guidelines came in *Wiggins*. *See* Wiggins v. Smith, 539 U.S. 510, 524 (2003) ("[W]e long have referred [to the ABA Standards] as 'guides to determining what is reasonable.'") (citation omitted); *see also* John H. Blume & Stacey D. Neumann, *"It's Like Deja Vu All over Again":* Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127, 147 (2007) ("The jurisprudential shift is now evident and established. Lower courts must consider the ABA Guidelines and other national standards to determine the reasonableness of counsel's behavior in light of prevailing professional norms as part of the ineffective assistance of counsel analysis.").

125. *See* Cheng, *supra* note 38, at 50 ("Leading defense advocates insist that the Constitution's guarantee of competent counsel requires adherence to the minimum requirements established in the standards."). As a result of the ABA Guidelines' rise in significance, the importance of capital mitigation specialists has increased dramatically over the past decade. *See* Emily Hughes, *Mitigating Death*, 18 CORNELL J.L. & PUB. POL'Y 337, 339 (2009) ("In the past eight years, the United States Supreme Court has been vocal about the importance of capital mitigation specialists in death penalty defense."). In fact, the ABA Guidelines require that a defense team retain mitigation specialists. *See* Maher, *supra* note 3, at 770 ("[The ABA Guidelines] made clear the absolute requirement that capital defenders retain the assistance of a mitigation specialist as an essential member of any defense team."). Mitigation specialists are experts at investigating mitigating evidence. *See* Cooley, *supra* note 2, at 59 ("In general, mitigation specialists are those 'qualified by knowledge, skill, experience, or training as a mental health or sociology professional to investigate, evaluate, and present psychosocial and other mitigating evi-

Additionally, practitioners must take care to distinguish between a defendant's refusal to present all mitigating evidence versus refusal to present certain types of mitigating evidence.[126] This distinction is critical because unlike a blanket refusal to present mitigating evidence, a partial refusal of certain types will not eliminate the possibility of an ineffective assistance of counsel claim.[127] Based on the language and decision in *Schriro*, the Third Circuit's interpretation in favor of protecting the right to present mitigating evidence in the face of a defendant's seemingly contrary actions was not a clear or easy approach for an appellate court to adopt.[128] In effect, the conclusions produced by *Thomas* and *Blystone* serve as reminders for practitioners that the duty to conduct a thorough investigation of mitigating evidence persists irrespective of a defendant's wishes or actions with respect to the presentation of the evidence.[129]

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dence to persuade the sentencing authority . . . that a death sentence is an inappropriate punishment.'") (alteration in original) (citation omitted). The ABA Guidelines require that a mitigation specialist be appointed to the defense team to help in the massive task of uncovering information from every facet of the defendant's life, including potentially critical factors spanning the range of poverty and childhood abuse. *See* Hughes, *supra* note 1, at 591–601 (explaining requirement of mitigation specialist on defense team and type and scope of investigation in which mitigation specialists are expected to engage). Importantly, the ABA Guidelines note that the ultimate responsibility of any presentation of mitigating evidence rests on the defense counsel and not on the mitigation specialist. *See Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 688 (2008) ("Counsel decides how mitigation will be presented.").

126. *See* Blystone v. Horn, 664 F.3d 397, 426 (3d Cir. 2011).

> The fact that Blystone chose to forego the presentation of his own testimony and that of the two family members, which counsel was prepared to put on the stand, simply does not permit the inference that, had counsel competently investigated and developed expert mental health evidence and institutional records, Blystone would have also declined their presentation.

*Id.*; *see also* Thomas v. Horn, 570 F.3d 105, 128–29 (3d Cir. 2009) (explaining that defendant's refusal to present some evidence does not justify Commonwealth's argument that defendant would have refused to present all mitigating evidence).

127. *See Thomas*, 570 F.3d at 128–29 (explaining that defendant's refusal to present some evidence does not negate the right to present other evidence); *see also Blystone*, 664 F.3d at 426 (parroting argument expressed by court in *Thomas*).

128. *See Leading Cases*, *supra* note 3, at 264. The article explains that because of likely appellate court interpretations of *Schriro*, which the Third Circuit rejected,

> [D]efendants 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.

*Id.*

129. *See Blystone*, 664 F.3d at 420 ("As such, 'our principal concern in deciding whether [counsel] exercised "reasonable professional judgment" is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background *was itself reasonable*.'") (alterations in original) (citation omitted).

## V. THE THIRD CIRCUIT'S APPROACH APPROPRIATELY PROTECTS CAPITAL DEFENDANTS' RIGHTS

Not all circuits follow the Third Circuit in employing a significantly limited approach to the application of the Supreme Court's decision in *Schriro*.[130] Considering that a life hangs in the balance during the penalty phase of a capital case and that it has been shown that poor representation correlates with the imposition of the death penalty, the Third Circuit's approach appropriately takes significant precautions to ensure that the defendant's right to present mitigating evidence is vigorously protected.[131] Still, the Third Circuit has the opportunity to expand these protections even further.[132]

### A. *The Third Circuit Takes Step to Affirmatively Protect a Defendant's Right to Present Mitigating Evidence*

By employing a strong presumption against waiver, the Third Circuit properly protects defendants who may be inhibiting a defense counsel's ability to investigate or present mitigating evidence because of the defendant's particularly vulnerable position.[133] Often defendants in capital cases suffer from mental illnesses that may affect their capability to advise

130. *See* Ho, *supra* note 1, at 751 ("Indeed, several lower courts have already cited [*Schriro*] for the proposition that, where a defendant interferes with counsel's presentation of mitigating evidence in some way, that defendant has waived any subsequent claim to ineffective assistance based on deficient performance at sentencing."); *see also* Newland v. Hall, 527 F.3d 1162, 1205, 1214 n.80 (11th Cir. 2008) (determining that client's instruction to defense counsel not to reach out to family members as part of investigation for mitigating evidence was enough to bring case within scope of *Schriro*). In evaluating the client's cooperation in the process of compiling mitigating evidence and whether the client's actions eliminated an ineffective representation claim by nullifying the *Strickland* prejudice prong, the Eleventh Circuit focused on whether the client's actions were passive or active, not on whether the client clearly rejected, or would have rejected, any and all mitigating evidence at sentencing. *See id.* at 1205 ("While petitioner's conduct in this case is not as extreme as the defendant's conduct in *Schriro,* we follow the Court in drawing a distinction between a defendant's passive non-cooperation and his active instruction to counsel not to engage in certain conduct.").

131. *See* Hughes, *supra* note 1, at 585 (explaining that based on study of thirty capital defense attorneys conducted by Welsh S. White, "the worse the attorney's skills, the more certain a defendant will be sentenced to death"); *see also* Ho, *supra* note 1, at 751 (explaining that certain interpretation of *Schriro* "presents an intolerable risk that defendants will be sentenced to death based on an incomplete record); *Leading Cases*, *supra* note 3, at 263 ("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.").

132. For a discussion of the Third Circuit's possible expansion of the protections afforded to defendants with respect to waiving their right to present mitigating evidence, see *infra* notes 138–44 and accompanying text.

133. *See* MacLean, *supra* note 55, at 670 ("Experienced capital defense attorneys commonly encounter clients who, at one point or another, object to the investigation or presentation of mitigation evidence.").

their attorneys in a prudent manner.[134] In other cases, a defendant's judgment may be impaired from the debilitating effects of other underlying issues such as poverty and sexual abuse.[135] It is worth now reiterating the importance of mitigating evidence because if no mitigating evidence is presented, administration of the death penalty is all but a foregone conclusion.[136] Although the Third Circuit has properly implemented an approach in favor of protecting defendants' rights, the court could take this protection even further while still remaining within the bounds of Supreme Court precedent.[137]

### B. *The Third Circuit Should Take the Next Step to Protect a Defendant's Right to Present Mitigating Evidence*

At least one commentator disagrees with the majority's ruling in *Schriro* because it failed to adhere to the well-established convention that a waiver of many constitutionally protected rights must be "knowing and voluntary."[138] The Third Circuit uses the knowing and voluntary standard as a factor in evaluating whether recalcitrant defendants have waived their right to present mitigating evidence; however, the court of appeals has refrained from establishing an official position on whether the knowing and voluntary standard is required for a valid waiver.[139] Although the Supreme Court ruling in *Schriro* noted that the knowing and voluntary standard has never been used in the context of waiving the right to present mitigating evidence, the decision did not foreclose lower courts from

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134. *See* Nelan, *supra* note 4, at 28 ("[T]he evidence seems relatively clear that the thinking of many death row volunteers and in particular defendants who are waiving their right to present mitigating evidence at a capital sentencing hearing is influenced by a mental disorder and these individuals may be incompetent to make such a decision."); *Leading Cases*, *supra* note 3, at 256–62 (highlighting that defendants facing death penalty may exhibit abnormal behavior attributable to mental health condition).

135. *See Leading Cases*, *supra* note 3, at 261 (explaining that large percentage of defendants are poor and many have suffered from physical and sexual abuse).

136. *See* Nelan, *supra* note 4, at 24 (explaining that defendants who choose not to present mitigating evidence will, in all likelihood, face death sentence).

137. For a discussion of how the Third Circuit can take their current line of reasoning to the next logical level, see *infra* notes 138–44 and accompanying text.

138. *See* Schriro v. Landrigan, 550 U.S. 465, 484 (2007) (Stevens, J., dissenting) ("It is well established that a citizen's waiver of a constitutional right must be knowing, intelligent, and voluntary."); Ho, *supra* note 1, at 732 (explaining that Supreme Court has consistently ruled that defendant's waiver of certain constitutionally protected trial rights such as right to a jury trial is invalid unless decision was made knowingly and voluntarily).

139. *See* Thomas v. Horn, 570 F.3d 105, 129 n.9 (3d Cir. 2009) (acknowledging Supreme Court has not affirmatively declared whether waiver of mitigating evidence must be knowing and voluntary and, "as a result, we offer no opinion on whether a waiver of the right to present mitigating evidence must be 'informed and knowing'").

adopting the standard as a prerequisite to a valid waiver.[140] It is well-settled that when waiving other constitutional rights, defendants are afforded the protection of the knowing and voluntary standard.[141]

Since the decision in *Schriro*, lower courts have been hesitant to embrace the knowing and voluntary standard as a requirement to waive the right to present mitigating evidence.[142] However, given the Supreme Court's jurisprudence requiring the knowing and voluntary standard to waive other constitutional rights, and considering *Schriro*'s open-ended language permitting such an interpretation, the Third Circuit should use its discretionary power to establish the knowing and voluntary standard as a mandatory requirement for a defendant to waive the right to present mitigating evidence.[143] Finally, it should be noted that the "knowing, intelligent, and voluntary" standard would not be unfamiliar in the Third Circuit because prior to *Schriro*, courts within the Third Circuit employed this very standard in this context.[144]

## VI. CONCLUSION

In sum, the Third Circuit correctly rejected the Supreme Court's invitation to significantly expand the scope of a defendant's waiver of the right to present mitigating evidence.[145] One of the Supreme Court's pri-

140. *See* Ho, *supra* note 1, at 732 (explaining that decision did not bar lower courts from creating knowing and voluntary standard when addressing validity of waivers of right to present mitigating evidence).

141. *See Schriro*, 550 U.S. at 484 (Stevens, J., dissenting) (noting that "knowing, intelligent, and voluntary" standard are staples in Supreme Court's waiver jurisprudence). "As far back as *Johnson v. Zerbst,* we held that courts must 'indulge every reasonable presumption against waiver' of fundamental constitutional rights." *Id.*; *see also* Ho, *supra* note 1, at 732–33 (listing examples of constitutional rights that defendants may waive but emphasizing that this type of "waiver is permitted only if it is knowing, intelligent, and voluntary").

142. *See* Ho, *supra* note 1, at 721–22 ("Given the confusion amongst the lower courts on this issue, the establishment of a knowing and voluntary requirement in this context makes sense not only from a perspective of judicial economy, but also to minimize the number of capital defendants sentenced to death without presenting a case in mitigation . . . .").

143. *See id.* at 760–62 (arguing that Supreme Court should affirmatively adopt "knowing and voluntary" standard for waivers of right to present mitigating evidence, but until Supreme Court issues this ruling, lower courts should take it upon themselves to adopt such standard).

144. *See, e.g.*, Commonwealth v. Davido, 868 A.2d 431, 443 (Pa. 2005) ("Rather, in Pennsylvania, a capital defendant may waive the right to present mitigating evidence, so long as the waiver was knowing, intelligent, and voluntary."); Commonwealth v. Randolph, 873 A.2d 1277, 1282 (Pa. 2005) ("[A] capital defendant may waive the right to present mitigating evidence, so long as the waiver was knowing, intelligent, and voluntary.") (citation omitted).

145. *See Leading Cases*, *supra* note 3, at 255 ("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."). The Third Circuit's decision to limit *Schriro*'s application fits within the Supreme Court guidance because *Schriro* left the requirements of

mary concerns in the 1970s when deciding the constitutionality of the death penalty statutes was whether the death penalty would be administered in an arbitrary manner.[146] Because of the many variables affecting a defendant during the sentencing phase (e.g., mental illness, prior abuse, and poverty), the Third Circuit recognized that expanding a defendant's limited rejection to presenting certain evidence into a complete waiver would add to the arbitrariness that commentators argue already plagues the system.[147]

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lower courts open-ended, allowing discretion in deciding when a defendant completely waives a right to present mitigating evidence. *See id.* at 262–63 (explaining that court left open issue of whether waiver needs to be knowing and informed: "The majority thus sidestepped the well-established principle that courts are supposed to 'indulge every reasonable presumption against waiver' of fundamental constitutional rights.") (citation omitted).

146. *See* Furman v. Georgia, 408 U.S. 238, 274 (1972) ("[T]he State must not arbitrarily inflict a severe punishment."). Prior to *Gregg*, the Supreme Court invalidated death penalty statutes for a failure to control unbridled discretion that allowed for arbitrary uses of capital punishment, as the arbitrary nature of the penalty ran afoul of the Eighth Amendment's prohibition of cruel and unusual punishment. *See id.* at 241–44 (explaining that historical underpinnings of Eighth Amendment such as English Bill of Rights of 1689 were focused on disallowing "arbitrary and discriminatory penalties of a severe nature").

147. *See Leading Cases*, *supra* note 3, at 261–62.

> Defendants in capital cases commonly suffer from a variety of mental vulnerabilities. Many defendants are poor and a large percentage are victims of physical and sexual abuse. Capital defendants who opt to forego appeals or not to present mitigating evidence are especially likely to suffer from severe mental illness. These death penalty "volunteers" often change their minds about their course of action. 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.

*Id.*