Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings

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Maintaining the Integrity of Death: An Argument for Restricting a Defendant’s Right to Volunteer for Execution at Certain Stages in Capital Proceedings

Anthony J. Casey*

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I. Introduction

The acceptance of a death sentence without challenge, often called "volunteering for execution," presents a unique problem for the legal system. This problem lies in a tension between society’s interest in the appropriate application of the death sentence and an individual’s autonomy interests in controlling her own defense. In efforts to resolve this tension, the states that allow death sentences have imposed restrictions on a capital defendant’s ability to waive certain procedures. Unfortunately, the restrictions currently in place produce an illogical result.

There are four crucial stages in the capital proceedings at which a defendant may attempt to volunteer for execution: the pleading stage, the sentencing, the appellate review, and the post-conviction relief proceedings. During pleading a defendant may volunteer for execution by entering a plea of guilty to a crime for which the prosecution is seeking the

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1. Though many people may find surprising a defendant who would choose not to contest in every way possible a sentence of death, death row inmates have done just that on a number of occasions. Some courts refer to these “volunteer” cases as “unusual” or “unique”; however, there are other courts and scholars suggesting that volunteering is in fact quite common. Compare Gilmore v. Utah, 429 U.S. 1012, 1013 n.1 (1976) (Burger, C.J. concurring) (where Gary Gilmore requested to be executed and sought no relief, the Chief Justice noted, “This case may be unique in the annals of the Court.”), Hamblen v. Florida, 527 So.2d 800, 800 (Fla. 1988) (referring to a condemned prisoner who was willing and determined to die as “unusual”), and New Jersey v. Hightower, 518 A.2d 482 (N.J. 1986) (noting the “novelty” of a case where defendant did not wish to appeal his death sentence), with Richard Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. CRIM. L. & CRIMINOLOGY 860, 861 (Fall 1983) (“Such instances of citizens ‘volunteering’ to be executed are by no means uncommon and certainly not ‘unique in the annals of the Court.’”), Richard W. Garnett, Sectarian Reflections on Lawyer’s Ethics and Death Row Volunteers, 77 NOTRE DAME L. REV. 795, 801 (March 2002) (noting the significant number of execution volunteers and concluding that the “death row volunteer problem is not as exotic or ‘anomalous’ as it might at first sound”), and Arizona v. Brewer, 170 Ariz. 486, 495 n.5 (1992) (noting the “many cases in which a defendant pleaded guilty and received the death penalty” and stating, “Defendant is not the first, and likely not the last, person to plead guilty in a death penalty case.”). For what it’s worth, there is no lack of reported cases involving “execution volunteers.”

2. The term “volunteering for execution” is borrowed from Strafer, supra note 1. See also Garnett, supra note 1, at 796 and at 819 (adopting the term “death row volunteer” for lack of a better term). On volunteering also see generally Welsh S. White, Defendants Who Elect Execution, 48 U. PITT. L. REV. 853 (1987).

3. The term “capital proceedings,” in this article refers to all court proceedings involving a capital defendant.

4. The term “defendant” in this article refers to an individual accused of a capital crime at all stages of the capital proceedings. Thus, for ease of language, an individual seeking appellate or post conviction review of a capital case is still referred to as a “defendant.”

5. Outside of the judicial process some may consider confessions or surrender to the police as steps toward volunteering for execution. These issues are beyond the scope of this article. Likewise waivers that do not involve volunteering for execution are beyond the scope of this article. For example, a waiver of trial by jury alone is not volunteering for execution because a bench trial is no less a contestation of guilt than a jury trial.

6. It is worth noting that a plea of guilty involves numerous waivers. See Godinez v. Moran, 509 U.S. 389, 397 n.7 (1993) (listing the rights waived by a guilty plea as “the privilege against self-incrimination, the right to a jury trial, and the right to confront one’s accusers”) (citing Boykin v. Alabama, 395 U.S. 238, 243 (1969)).

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death penalty. Often coupled with a plea of guilty is the second means of volunteering for execution: a defendant’s waiver of the right to present mitigating evidence during sentencing. After conviction and sentencing, a defendant may volunteer for execution by waiving the right to have her case reviewed on appeal. Finally, after the appeal a defendant might volunteer by waiving her right to apply for post-conviction relief.

The number of states imposing restrictions on volunteering varies at each stage. While most states prohibit a waiver of appellate review for capital cases, few states have restrictions at the other stages. Two states prohibit entering a guilty plea, one state prohibits waiving the right to present mitigating evidence, and one state has imposed restrictions on waiving post-conviction relief proceedings. The result is a string of jurisdictions that mandate appellate review of the trial court proceedings in capital cases without actually requiring any meaningful trial court proceedings.

Thus, defying conventional wisdom, the states place a greater emphasis on appellate review of the trial than on the trial itself. This system of laws makes little sense. The interest of the state in preventing execution volunteering is strongest at the earliest stages of capital proceedings; conversely the interest of the defendant in waiving proceedings is strongest at the latest stages. The widespread restrictions on waiving appellate review in capital cases, while not particularly harmful, provide little protection against inappropriate death sentences relative to the protection provided by prohibitions on pleading guilty or by prohibitions on waiving the presentation of mitigating evidence at sentencing.

If waiver restrictions are to serve a beneficial purpose, prohibitions must be imposed upon volunteering for execution during the initial determination of guilt and punishment. This conclusion rests not on claims of constitutional right, but on a logical analysis of the competing interests of the state and the individual defendant.

8. Not every plea of guilty to a capital crime is execution volunteering. A defendant may plead guilty to a crime for which the prosecutor is seeking the death penalty for various strategic reasons hoping or expecting to avoid execution. A defendant may plead guilty to a crime charged or to a lesser non-capital offense such as second-degree murder as the result of a plea bargain with a prosecutor to avoid execution. Plea bargaining is not within the scope of this article.

9. For those defendants seeking to volunteer for execution the presentation of mitigating evidence is probably the most decisive stage in the trial. If no mitigating factors are presented and the prosecution vigorously pursues death in its presentation of aggravating factors, the jury is left to determine the sentence based solely on the aggravating evidence and the death sentence is considerably more likely. See generally Richard J. Bonnie, The Dignity of the Condemned, 74 VA. L. REV. 1363, 1380 (1988) (identifying refusal to present a case in mitigation as one of the “more common and troublesome ways in which these defendants have attempted to ‘volunteer for execution’”).

10. Post-conviction relief for a state conviction may in different cases be sought at the state or the federal levels.

11. See Part II.B.2 infra.
12. See Part II.B.4 infra.
13. See Part II.B.3 infra.
14. See Part II.B.1 infra.
In making this argument I examine execution volunteering at the many different stages of capital proceedings. In Part II of this article, I look at the current law controlling execution volunteers. I first discuss the cases where the United States Supreme Court was faced with questions of execution volunteering and procedural waivers, and then I look at the restrictions states have imposed at different stages. In Part III of the article, I examine the existing debate on restricting execution volunteering. This part presents the arguments relevant to restrictions at each stage of the capital proceedings. I show that these arguments can be reduced to the interest of the state in the appropriate and consistent application of the death sentence on the one side, and the autonomy interests of the defendant on the other. Finally, in Part IV, I argue that a balancing of these interests suggests that while capital defendants should, in some cases and under some circumstances, have a right to accept their death sentence and waive proceedings, this right should never exist at the trial stages of pleading and sentencing.

II. Current Law on Volunteering for Execution

In this part, I look first at the Supreme Court decisions regarding the constitutional issues of execution volunteering and then examine the various restrictions states have placed on waivers at different stages of the capital proceedings.

A. Federal Constitutional Requirements

The United States Supreme Court has faced the issues involved in execution volunteering in a number of cases. The Court has, nonetheless, provided very little guidance on execution volunteering, often avoiding the issues on standing grounds. In this section, I look first at the cases where the Court was faced with claims that the Constitution prohibited a capital defendant from waiving certain procedures. In this context I discuss Gilmore v. Utah\(^{15}\) and Whitmore v. Arkansas\(^{16}\) which raised questions about appellate review, and then Lenhard v. Wolff\(^{17}\) which raised questions about mitigating evidence and implicitly about post-conviction relief. I then turn to presenting and refuting claims that the cases of Godinez v. Moran\(^{18}\) and Faretta v. California\(^{19}\) establish absolute waiver rights that bar the state from restricting the waiver of certain proceedings.

\(^{15}\) 429 U.S. 1012 (1976).
\(^{16}\) 495 U.S. 149 (1990).
\(^{17}\) 444 U.S. 807 (1979).
\(^{19}\) 422 U.S. 806 (1974).
1. **Gilmore v. Utah and Whitmore v. Arkansas**

In two cases, *Gilmore v. Utah*\(^{20}\) and *Whitmore v. Arkansas*,\(^{21}\) dealing with "next friend" standing,\(^{22}\) the United States Supreme Court has essentially foreclosed the possibility of a constitutionally required mandatory and non-waivable appellate review of state death sentences. In both cases third parties sought to challenge the death sentence imposed on a defendant who had waived his right to state appellate review of his conviction and sentence. In these cases the third parties were found to lack standing to bring their case before the Court. In a short *per curiam* opinion, the Court in *Gilmore* found that because "the State's determinations of [Gilmore's] competence knowingly and intelligently to waive any and all such rights were firmly grounded," there was no reason to grant "next friend" standing.\(^{23}\) In *Whitmore* the Court, through Chief Justice Rehnquist, delivered a more lengthy examination of the issue but still concluded that: "[The] prerequisite for 'next friend' standing is not satisfied where an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed and his access to court is otherwise unimpeded."\(^{24}\) As the specific holdings in both cases deal not with whether appellate review is waivable but with a standing issue, the Court has not explicitly ruled that appellate review can be waived.\(^{25}\) However, the practical affect of the opinion is to virtually

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20. 429 U.S. 1012. **Gilmore** involved the death sentence of Gary Mark Gilmore. After being sentenced to death by firing squad Gilmore waived his right to appeal in the Utah courts. In fact Gilmore brought a state *habeas corpus* petition complaining of the delay on the part of the state in carrying out the sentence. *Id.* at 1013, n.1. Gilmore also challenged the standing of his mother to initiate proceedings seeking appellate review of his sentence. *Id.*

21. 495 U.S. 149. **Whitmore** involved the death sentence of Ronald Gene Simmons. Simmons, who was convicted of multiple murders, declared under oath that he desired "that absolutely no action by anybody be taken to appeal or in any way change this sentence." *Id.* at 152.

22. "Next friend" standing is the concept that under certain circumstances a qualifying party may be able to bring claims as a "next friend" on behalf of the party with proper standing. These claims most frequently occur where a "next friend" appears in court "on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves." *Whitmore*, 495 U.S. at 162. The party seeking to proceed as a "next friend" must be able to show both the inability of the proper party to bring the claims and that the "next friend" is "truly dedicated to the best interests of the person on whose behalf he seeks to litigate." *Id.* at 163. Additionally some courts require that a "next friend" have a "significant relationship with the real party in interest." *Id.* at 164. For further discussions of "next friend" and third party standing, see generally Paul F. Brown, *Third Party Standing – "Next Friends" as Enemies: Third Party Petitions for Capital Defendant's Wishing to Waive Appeal: Whitmore v. Arkansas, 110 S. Ct 171 (1990), 81 J. CRIM. L. & CRIMINOLOGY 981 (1990), and Jane L. McClellan, *Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer Cases, 26 ARIZ. ST. L.J. 201 (1994).*


25. See **Gilmore**, 429 U.S. at 1017 (Burger, C.J. concurring) ("In his dissenting opinion, Mr. Justice White suggests that Gary Mark Gilmore is 'unable' as a matter of law to waive the right to state appellate review. Whatever may be said as to the merits of this suggestion, the question simply is not before us...the court is without jurisdiction to consider the question posed by the dissent."); see also **Gilmore**, 429 U.S. at 1017 (Stevens, J. concurring) (noting that "[w]ithout a proper litigant before it, this Court is without power to stay the execution"); Franz v. Arkansas, 296 Ark. 181, 196 (1988) (Glaze, J. dissenting) (noting, after *Gilmore* but prior to *Whitmore*, that: "[T]he Supreme Court has not
foreclose any consideration of the appellate review issue because the only party with standing to challenge a waiver of appellate review is the defendant who waived the appeal in the first place.\textsuperscript{26} The state of the law after \textit{Gilmore} and \textit{Whitmore} is not clear. Given Chief Justice Burger's statement in his concurrence to \textit{Gilmore} that the question of mandatory non-waivable appellate review was not before the Court,\textsuperscript{27} and given the Court's many opinions stressing the importance of appellate review in the constitutionality of the death penalty,\textsuperscript{28} it is plausible for state courts and legislatures to conclude that, even though the question may be unreviewable, the Constitution nonetheless requires a mandatory appellate review in capital cases. With the widespread imposition of mandatory appellate review by most states,\textsuperscript{29} it is possible that many states have adhered to this view. On the other hand, it is reasonable for states to view the opinion as suggesting that mandatory non-waivable review is not constitutionally required.\textsuperscript{30}

Additionally, the \textit{Gilmore} and \textit{Whitmore} Courts, in basing their decisions on standing, implicitly set a minimum requirement, regardless of standing issues, for mandatory review of the determination of whether a defendant is competent to waive his right to appellate review. This requirement logically proceeds from the fact that the Court, in both \textit{Gilmore} and \textit{Whitmore}, based its decision on a finding that the lower court had rightly found the defendant competent to knowingly and intelligently yet decided the issue as to whether a defendant has the power to waive the right to a state appellate review. . . . As a consequence, the Supreme Court—as well as this court—must still decide whether appellate reviews are mandated in capital cases.

\textsuperscript{26} See \textit{Whitmore}, 495 U.S. at 178-79 (Marshall dissenting) (noting that without relaxation of the standing requirement "judicial consideration of the claim that the Constitution requires appellate review of every capital case would otherwise be virtually impossible"). It may, however, be possible for a defendant to challenge the waiver if 1) she changed her mind after the waiver became effective, 2) the state prohibited her from withdrawing the waiver and 3) the defendant then brought a \textit{habeas corpus} challenge in federal court.

\textsuperscript{27} See note 25 above.

\textsuperscript{28} See generally \textit{Whitmore}, 495 U.S. at 168-171 (Marshall, J. dissenting) (listing cases discussing the importance of appellate review and noting that the "Court has consistently recognized the crucial role of appellate review in ensuring that the death penalty is not imposed arbitrarily or capriciously").

\textsuperscript{29} See Part II.B.2 infra.

\textsuperscript{30} In allowing a defendant to waive appellate review, the Arkansas Supreme Court took this view. Franz v. Arkansas, 296 Ark. 181, 186 (1988). The Arkansas court ignored the same standing issues in question in \textit{Gilmore} and \textit{Whitmore}, choosing to state the Arkansas law clearly because of the "uniqueness and irreversibility" of the death sentence. \textit{Id.} It is worth noting that the capital case at issue in Franz is the same case that later made it to the United States Supreme Court in \textit{Whitmore}. A new third party, Whitmore, was involved at the United States Supreme Court level.
waive his right to appeal. At the very least this review must be mandated at the urging of a third party attempting to proceed as “next friend”; without such review it would be impossible to determine whether the third party has “next friend” standing or not.

2. Lenhard v. Wolff

The Supreme Court has similarly refused to decide whether a defendant must be restricted in refusing to present mitigating evidence at sentencing. This question arose in Lenhard v. Wolff. The Court, with no explanation and presumably based on a lack of standing, refused to address the mitigation issue raised by a third party where the defendant, after refusing to present mitigating evidence, waived his right to pursue federal post-conviction relief. Lenhard also suggests, not surprisingly, that the Supreme Court does not find federal habeas corpus relief to be mandatory and non-waivable.

3. Godinez v. Moran

The Supreme Court has never directly decided whether restricting a defendant from waiving her right to a capital proceeding is prohibited by the Constitution. Some commentators may argue that Godinez v. Moran establishes an absolute right of a defendant to plead guilty. This argument is unconvincing. In Godinez the Court dealt with a case where a capital defendant pleaded guilty, waived his right to counsel and received a death sentence. The Godinez Court was never faced with the question of whether there was an absolute right to plead guilty. The Court was faced with a question of whether a trial court had properly determined the defendant’s

31. For an appreciation of this logic, see Franz, supra note 30 (where the majority required review of the competency determination without explanation and the dissent suggested that the majority’s decision was mandated by the holding in Gilmore).

32. See supra note 22 for a description of the requirements for “next friend” standing.


34. See Id. at 808-815 (Marshall, J. dissenting) (discussing the issues involved in the case); see also Lenhard v. Wolff, 444 U.S 1306 (1979) (Rehnquist, J. acting as Circuit Justice) (same).

35. Lenhard, 444 U.S. at 810 (Marshall, J. dissenting). The defendant had pleaded guilty to the crime and refused to agree to the admission of any evidence of mitigating circumstances. Id. The defendant was sentenced to death and the case had been reviewed by the state supreme court upon a statutorily mandated review over the wishes of the defendant. After the conviction was affirmed, a third party filed a federal habeas corpus petition that was dismissed upon the defendant’s waiver. Id. 809-810.

36. In Lenhard the district court had dismissed the public defender’s federal habeas corpus petition because the defendant had made a valid waiver of his right to pursue federal relief. Id. This ruling was affirmed on appeal to the Ninth Circuit Court of Appeals, and the Supreme Court refused to stay the execution to consider the issue. Lenhard, 444 U.S. at 808. A similar outcome was reached in the case of Evans v. Bennett where the court denied, without opinion, the application for a stay of execution where a third party sought to appeal a dismissal of a federal habeas corpus petition. 440 U.S. 987 (1986).

competency when accepting a plea of guilty. The Supreme Court reversed the Ninth Circuit's finding that the trial court had improperly accepted the plea of guilty, finding the state's competency standard to be constitutionally sufficient. The most this opinion can be read as establishing is that a court may accept a guilty plea from a defendant properly found to be competent, even in a capital case. The case says nothing about whether a court may reject a guilty plea. Thus the case does not establish a right of the defendant to enter such a plea.

This conclusion is not undermined by the two citations in Godinez to Faretta v. California, a case establishing a defendant's constitutional right to self-representation. Faretta was relevant because Godinez dealt not only with a guilty plea but also a waiver of assistance of counsel. Indeed the citations to Faretta appear only with regard to the sections of the opinion dealing with the waiver of counsel.

4. Faretta v. California

Some courts and commentators have also interpreted Faretta v. California as establishing a capital defendant's constitutional right to
waive the presentation of mitigating evidence at sentencing and a constitutional right to enter a guilty plea. These interpretations of the holding in Faretta are flawed. Faretta does not answer the questions of whether a state may prohibit guilty pleas or require the presentation of mitigating evidence. In Faretta the United States Supreme Court established the existence of a right to self-representation under the Sixth Amendment. The Court held that a defendant has a constitutional right to proceed without counsel and that the state cannot "force a lawyer upon him, even when he insists that he wants to conduct his own defense." Faretta stands only for the principle that the defendant has the constitutional right to present her own defense. The case focuses on the defendant’s right to have her voice heard - not the right to silence the voices of others. In Faretta the judge prohibited the defendant from representing himself and, over the defendant’s objections, forced counsel upon him. The defendant was required to present his defense exclusively through counsel. Thus the Supreme Court held that a trial court was barred from interfering, through an appointed attorney, with the accused’s right to present a defense. Later, in McKaskle v. Wiggins, the Court

45. For example the Florida Supreme Court rejected a public defender’s proposal for a court appointed attorney to argue against the death sentence on the reasoning that such a proposal would violate the right established in Faretta. Hamblen v. Florida, 527 So.2d 800 (Fla. 1988); see also Bishop v. State, 95 Nev. 511, 516 (1979) (allowing the waiver of presentation of mitigating evidence because of the requirement under Faretta that “a defendant must...be allowed to represent himself if he so elects”); Bonnie, supra note 9, at 1385 (noting that if the defendant cannot waive his right to present mitigating evidence then the Sixth Amendment right recognized in Faretta will be ignored).

46. See, e.g., Barry J. Fisher, Judicial Suicide or Constitutional Autonomy? A Capital Defendant’s Right to Plead Guilty, 65 ALB. L. REV. 181, 202 (2001) (applying the reasoning of Faretta to prohibitions on guilty pleas and concluding that the prohibitions violate the Sixth Amendment). There is no debate over whether Faretta applies to waivers of appellate review and post-conviction relief proceedings. The United States Supreme Court held in Martinez v. Court of Appeal of California that the constitutional right to self-representation recognized in Faretta does not apply to appellate review. 528 U.S. 152 (2000). Interestingly, the Court in Martinez also expressed skepticism as to the holding in Faretta. Id. For example the Court at one point notes that “while Faretta is correct in concluding that there is abundant support for the proposition that a right to self-representation has been recognized for centuries, the original reasons for protecting that right do not have the same force when the availability of competent counsel for every defendant has displaced the need—although not always the desire—for self-representation.” Id. In his concurrence Justice Scalia took issue with this skepticism. Martinez, 528 U.S. at 165 (Scalia, J. concurring) (“I do not share the apparent skepticism of today’s opinion concerning the judgment of the Court...in Faretta v. California.”).

47. See Faretta, 422 U.S. at 807. The Sixth Amendment reads, “In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI. The rights established under the Sixth Amendment apply to the states by way of the Fourteenth Amendment. See Faretta, 422 U.S. at 818 (“Because these [Sixth Amendment] rights are basic to our adversary system of criminal justice, they are part of the ‘due process of law’ that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States.”).

48. This right is subject to the requirement that the choice to do so is made knowingly and voluntarily by a defendant competent to do so. Id. at 835.

49. Id. at 807.

50. Faretta, 422 U.S. at 819 (explaining that the constitution “grants to the accused personally the right to make his defense”).


52. Faretta, 422 U.S. at 809-811.

53. Id.; see also McKaskle, 465 U.S. at 173.

54. Faretta, 422 U.S. at 820 (noting that counsel “shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself...
explained that the *Faretta* holding “dealt with the defendant’s affirmative right to participate, not with the limits on standby counsel’s additional involvement.” 57 Nowhere does the holding in *Faretta* suggest that the defendant has a monopoly on the presentation of exculpatory or mitigating evidence or arguments. Indeed *McKaskle* explicitly provides for the presentation of such evidence and arguments by parties other than the defendant:

A *pro se* defendant must generally accept any unsolicited help or hindrance that may come from the judge who chooses to call and question witnesses, from the prosecutor who faithfully exercises his duty to present evidence favorable to the defense, from the plural voices speaking “for the defense” in a trial of more than one defendant, or from an *amicus* counsel appointed to assist the court. 58

As *McKaskle* points out, the only requirement of *Faretta* is that nothing interfere with the defendant’s right to present her own defense. 59 *Faretta* suggests nothing in the Constitution that prohibits a trial court from appointing an independent lawyer to present exculpatory or mitigating evidence, 60 nor anything that prohibits the prosecution itself from presenting both sides of the story when a defendant refuses to present any defense whatsoever. 61

Thus *Faretta* and *McKaskle* leave open the possibility of appointing independent counsel 62 to argue against guilt or against a harsh penalty. 63 Such an attorney could argue innocence or mitigation even were a defendant to refuse to cooperate, or were the defendant to take the stand personally”).

57. Id. at 177.
60. Practically speaking, a prohibition on a plea of guilty likely would only be meaningful if the court was able to appoint an attorney to put on an actual defense. This is evident if we consider a defendant who, though not allowed to plead guilty, presents no defense and takes the stand to confess guilt. For an example of this see Evans v. Bennett, 440 U.S. at 1301 (Rehnquist, J. acting as circuit justice) (noting that at trial defendant did not contest his guilt and he took the stand and confessed to the crime and requested that the jury find him guilty so that he could be sentenced to death).
61. Of course while the Constitution does not prohibit the prosecution from playing this role, the obvious distortion of incentives argues against it.
62. The use of independent counsel also alleviates many ethical dilemmas defendant’s counsel faces when a client desires to volunteer for execution. For a discussion of these ethical dilemmas see Garnett, supra note 1.
63. See *McKaskle*, 465 U.S. at 176 (noting that *Faretta*’s logic indicates “that no absolute bar on standby counsel’s unsolicited participation is appropriate or was intended”); *Faretta*, 422 U.S. at 846 n.7 (Burger, C.J., dissenting) (suggesting that the majority opinion does not foreclose the option of appointing “a qualified lawyer to sit in the case as the traditional ‘friend of the court’”); see also *Martinez*, 528 U.S. at 161-62 (“We have further held that standby counsel may participate in the trial proceedings, even without the express consent of the defendant, as long as that participation does not ‘seriously undermine’ the ‘appearance before the jury’ that the defendant is representing himself.”) (quoting *McKaskle* 465 U.S. at 187); United States v. Taylor, 569 F.2d 448, 452 (7th Cir. 1978) (recognizing that while *Faretta* provided an accused a constitutional right to conduct his defense personally, “[i]t does not inevitably follow however, that this right of self-representation comprehends any correlative right to preclude the trial court from appointing counsel and authorizing him to participate in the trial over the accused’s objection in order to protect the public interest in the fairness and integrity of the proceedings”).
and confess.\textsuperscript{64} As long as appointed counsel does not interfere with the defendant's personal defense, \textit{Faretta} does not prohibit such a course of action.\textsuperscript{65} In the relevant cases, interference should not present a problem. A defendant wishing to volunteer for execution seeks to present no defense. There is a difference between presenting no defense and presenting \textit{no evidence}. A defendant may strategically view the presentation of no evidence as the best shot at acquittal or a lesser punishment. Thus the presentation of no evidence is the defense. \textit{Faretta} and \textit{McKaskle} should prohibit the court from appointing counsel in such a case because the presentation of any evidence would interfere with the personal defense of the defendant. The execution volunteer seeking to plead guilty or refuse to present a mitigating case, however, is not in the position of a defendant who strategically presents no evidence.\textsuperscript{66} The plea of guilty is a refusal to defend, a guarantee of conviction. The Sixth Amendment right, based on a defendant's right to control her own defense, is not implicated.\textsuperscript{67} There is no defense with which to interfere. Moreover, the defendant cannot claim that appointed counsel interferes with her hopes of being found guilty and receiving the death penalty. Neither \textit{Faretta} nor any other case establishes a right to be punished, a right to choose punishment, or a right to assist the prosecution.

Of course, because a defendant prohibited from pleading guilty might pretend to be a defendant strategically presenting no evidence, a standard would have to be established for a court to determine the sincerity of such a strategy. This is totally consistent with \textit{Faretta} where the Court explains, "Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."\textsuperscript{68} The same reasoning applies to distinguishing between a defendant who strategically presents no mitigating evidence and a defendant who, for the purpose of volunteering for execution, presents no case in mitigation.\textsuperscript{69}

When \textit{Faretta} and \textit{McKaskle} are interpreted properly, it is

\textsuperscript{64} For an argument that courts should appoint independent counsel to argue mitigation when a defendant refuses to do so, see Carter, \textit{supra} note 25, 149-151. The most likely case of appointed counsel being effective even after the defendant took the stand to confess or request a death sentence is when counsel is arguing either that the crime was of a lesser degree than charged or counsel is presenting mitigating evidence in the sentencing hearing.

\textsuperscript{65} See notes 55 & 59 above and accompanying text.

\textsuperscript{66} See, e.g., People v. Deere, 41 Cal. 3d 353, 364, n.3 (1985) (recognizing that in "the case at bar, however, the mitigating evidence was excluded not because of an attorney's tactical decision...but because a defendant seeking that penalty barred his counsel from offering any mitigating evidence at all").

\textsuperscript{67} \textit{See Faretta}, 422 U.S. at 819.

\textsuperscript{68} \textit{Faretta}, 422 U.S. at 834 n.46.

\textsuperscript{69} This issue of distinguishing between strategic presentation of no evidence and volunteering for execution was recognized though not reconciled in a concurrence to \textit{Bishop}, 95 Nev. 511 at 518 (Gunderson, J. concurring) ("If the district court had permitted standby counsel to introduce evidence over the appellant's objection, and then had sentenced appellant to death, we would now face the contention that the court had prejudicially interfered with the accused's right to represent himself.") It is my argument in the text accompanying this note that such a claim on appeal (probably brought by appointed appellate counsel) would be easily disposed of where the defendant was attempting to volunteer for execution.
impossible to justify reasoning such as that found in *Hamblen v. Florida.*

There the Florida Supreme Court relied on *Faretta* for the proposition that a trial court could not appoint outside counsel to argue against the death penalty because under the Sixth Amendment right to self-representation "all competent defendants have a right to control their own destinies." *Faretta* does not talk about controlling one's own destiny. The issue in *Hamblen* was not self-representation but the court's ability to appoint an independent counsel to argue against the death sentence. The proposed appointment of counsel in that case would have allowed the defendant to proceed as he saw fit.

The proper interpretation of the holding in *Faretta* is that the Sixth Amendment does not create a constitutional bar to prohibitions on guilty pleas or on waivers of the right to present mitigating evidence at sentencing.

The conclusion of this section is that the Supreme Court has yet to issue a decision dealing directly with the problem of execution volunteering. The ability of the Court to invoke standing limitations to avoid the constitutional questions involved has left observers, such as the state courts and legislators who deal regularly with attempted waivers of capital proceedings, with very little guidance. Some have tried to infer guidance from cases such as *Faretta* and *Godinez,* but this is improper as the decisions in those cases are not on point and do not control the issues involved in volunteering for execution.

B. State Rules Restricting Volunteering at Various Stages

In the absence of a United States Supreme Court decision on whether restricting a defendant from waiving her right to a capital proceeding is prohibited by the Constitution, state courts and legislatures are free to place various restrictions on the waiver of capital proceedings at all stages. I turn now to the state laws regarding these restrictions.

70. 527 So.2d 800 (Fla. 1998).
71. *Id.* at 804.
72. *Hamblen,* 527 So.2d at 806 (Barkett, J. dissenting)(defining the issue as "whether the state has an independent interest in presenting a case for mitigation in those rare instances when the defendant chooses not to present one for himself").
73. *Hamblen,* 527 So.2d at 809.
74. Further support for the argument that *Faretta* does not bar prohibitions on guilty pleas can be found in the Court's previous statements that there is no constitutional right to plead guilty. For example, in *North Carolina v. Alford* the United States Supreme Court stated: "Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court[s]. . . ." 400 U.S. 25, 38 n. 11 (1970). The Court in that case also noted, without criticism, that North Carolina's law at the time prohibited a defendant from pleading guilty to capital murder. *Id.* at 27 n.1. The Court's opinion in *Faretta* never mentioned, much less rejected, these statements.
75. This conclusion does not imply that the defendant has no interest in choosing her own defense. It simply implies that such an interest does not translate into a constitutional right. This interest and how it balances against the state's interest will be discussed *infra* in Parts III.C and IV.C.
1. Post Conviction Relief

Only New Jersey has, through judicial decision, imposed a non-waivable application for post-conviction relief. In *New Jersey v. Martini*, the New Jersey Supreme Court concluded that certain important issues were better raised on application for post-conviction relief and not on appeal. Noting that these issues were "so varied and important" that finality could be achieved only after the court granted or denied post-conviction relief, the court ordered that counsel be appointed for a capital defendant who did not wish to pursue post-conviction relief. The court further ordered that post-conviction relief proceedings should be initiated by such counsel and could not be waived by the defendant. The New Jersey Supreme Court did recognize that there "must be an end to the process" at some point and thus required an expedited procedure for the consideration of post-conviction relief applications when the capital defendant is opposed to the application. The court also expedited the appellate review of the post-conviction relief proceedings.

No other state has addressed the issue of mandating non-waivable post-conviction relief proceedings.

2. Appellate Review

The restriction most commonly imposed upon waivers of capital proceedings is the mandatory appellate review. According to the

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76. *See New Jersey v. Martini*, 144 N.J. 603 (1996). In *Martini* the Public Defender as a third party challenged the death sentence of the defendant who had waived his application for post-conviction relief because he wished "to avoid delaying the inevitable." *Id.* at 612 n. 2. The New Jersey Supreme Court did not find the same standing problems that the United States Supreme Court found in *Gibboney* and *Whitmore*, discussed above in Part II.A.1. The New Jersey court viewed the problem as a question of "not whether the Public Defender has standing to raise an issue on behalf of the defendant, but whether the judiciary, in the discharge of its constitutional and statutory duty to review every judgment of death, must consider the issue in order to ensure the reliability of the decision to execute." *Id.* at 612 (internal quotations and citations omitted). The New Jersey court then noted that while deciding the case on standing issues "may be constitutionally permissible for the United States Supreme Court because it is not part of a state system of administration of the death penalty. . . the New Jersey judiciary is an integral part of the administration of the death penalty." *Id.* at 612-13.

77. 144 N.J. 603 (1996).

78. The court listed, as examples, claims of ineffective assistance of counsel, claims arising from new case law that should be retroactively applied, claims challenging the appellate proceedings themselves, and claims based on testimony outside of the trial court that could not have been raised on direct appeal. *Id.* at 609-10.

79. *Id.* at 613-14.

80. *Id.* at 614-15. (requiring that the application be filed "within thirty days after knowledge that a defendant does not wish to pursue post-conviction relief"). Presumably, under this restriction, if the appointed counsel fails to file the application within the thirty days, the defendant's desire to waive the proceedings will be respected.

81. *Id.* ("An aggrieved party must file with the Supreme Court its notice of appeal with any supplemental briefs within fifteen days after the trial court's ruling. The Court shall thereafter render its own decision within forty-five days of receipt of the notice of appeal and any supplemental briefs or within thirty days of any scheduled oral argument.").
Department of Justice, 37 of the 38 states where the death penalty is on the books provide non-waivable mandatory appellate review. The federal government does not provide for non-waivable appellate review. In some of these states the mandatory review is of sentencing only; however, most states have included review of the entire case in their mandatory appeal. An example of this trend is the rule found in Arizona v. Brewer where the court held that Arizona’s statute mandating appellate review had the following effect: “[O]nce a defendant files an appeal, which is automatic in capital cases, we are expressly required by statute to review issues affecting both judgment and sentencing in our search for fundamental error.” Thus the conviction, as well as the sentence, is normally subject to the mandatory non-waivable appellate review.

South Carolina holds a distinct position today as the only state with capital punishment where appellate review in capital cases is waivable. In State v. Torrence, the South Carolina Supreme Court held that the provisions for automatic appellate review were waivable. Arkansas only recently required a mandatory non-waivable review. Prior to 1999,
Arkansas had in the case of *Franz v. State* 88 directly ruled that appellate review is waivable.89 This holding was tempered only slightly by the court’s requirement that the Arkansas Supreme Court must review the lower court’s finding of competency to waive appellate review.90 However in 1999, in the case of *State v. Robbins*,91 the Arkansas Supreme Court modified the *Franz* rule, holding that while a defendant “may waive his *personal* right to appeal,” the appellate court is nonetheless required to conduct an automatic and mandatory non-waivable review of the record in all death-penalty cases.92

3. Presentation of Mitigating Evidence

In a series of decisions on the constitutionality of the death penalty, the Supreme Court established that the capital sentencer must consider and weigh mitigating evidence when deciding whether to sentence a defendant to death.93 The result is that during a capital sentencing hearing the prosecution presents evidence showing aggravating factors and the defendant is allowed to present evidence of mitigating factors.94

The state rules on waiver in this context are mixed.95 Courts are essentially split between two different approaches to this problem. Some courts have looked at the problem as one of ineffective assistance of counsel. The question is framed as whether an attorney, adhering to her client’s orders, nonetheless provides ineffective assistance of counsel under the Sixth Amendment when she does not present mitigating evidence.

89. Id. The dissent in *Franz* pointed out that Arkansas was then “the only state that actually has chosen not to review a death penalty case.” 296 Ark. at 197 (Glaze, J. dissenting). This statement was true only if one looks exclusively at cases after *Gilmore*: Utah decided not to review Gary Gilmore’s case. See *Whitmore*, 495 U.S. at 174-75 (Marshall, J. dissenting) (“[S]ince the reinstitution of capital punishment in 1976, only one person, Gary Gilmore, has been executed without any appellate review of his case.”) Subsequent to Gilmore’s case Utah passed a statute mandating appellate review. Id. The capital case involved in *Franz* was the same case involved in *Whitmore*, discussed above in Part II.A.1.
90. *Franz*, 296 Ark. at 189-90. The court did not explain this holding but the dissent suggested that it was mandated by the United States Supreme Court’s holding in *Gilmore*. Id. at 196 (Glaze, J. dissenting). See text accompanying notes 31 and 32 above for a discussion of why Gilmore mandates such a holding.
92. Id. at 386. The court stressed that the automatic review of the record in no way interferes with a defendant’s right to waive her personal appeal. Id. at 387; see also *Roberts v. State*, 2002 Ark. Lexis 80 (2002) (following and applying the *Robbins* rule for mandatory review).
94. For a detailed description of the penalty phase in a capital trial, see *Carter*, supra note 25, at 102.
95. The Supreme Court refused to address this issue in *Lenhard*. See supra, Part II.A.2.
Courts have come out on both sides of this question. Deciding the cases on the basis of "ineffective assistance of counsel" only answers questions about the conflicting personal interests of the defendant. This approach ignores the broader conflict between a defendant's claimed interest in choosing to waive her own challenges to the death sentence and the state's interest in a reliable sentencing determination.

The exclusive focus on ineffective counsel claims can lead to illogical results. If counsel's failure to present mitigating evidence, even under orders from the defendant, is ineffective assistance of counsel, then no defendant represented by counsel can waive the right to present mitigating evidence. However, a defendant who exercises her right to self-representation under Faretta cannot subsequently bring a claim of ineffective assistance of counsel. The result of this logic is that a defendant, represented by counsel, cannot make the decision to waive presentation of mitigating evidence while she is nonetheless free to dismiss her counsel and make the decision on her own. This exact result occurred in California. The California Supreme Court first addressed the mitigating evidence issue in People v. Deere. The California court prohibited waivers, basing its opinion both on the importance of state interests and on ineffective assistance of counsel. Inasmuch as the holding in Deere was based on the importance of state interests, that case was later overruled by People v. Bloom. The Bloom court held that a defendant representing himself could waive the right to present mitigating evidence because the ineffective assistance of counsel argument did not apply to self-representation. The rule implied by this holding is that while a defendant cannot order his counsel to refuse to present mitigating evidence, the defendant can dismiss counsel in order to do so herself.

Other courts have, more appropriately, based their decisions on an analysis of the conflicting interest of the state and the individual. Some
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states, basing their decision on Faretta v. California, have resolved this conflict by raising the defendant’s personal interest in preventing the presentation of mitigating evidence to a constitutional right. The Nevada Supreme Court, for example, has allowed waivers because under that court’s understanding of Faretta “a defendant must... be allowed to represent himself if he so elects.” Florida reached the same conclusion in Hamblen reasoning that “all competent defendants have a right to control their own destinies.” The Ohio Supreme Court in State v. Tyler, citing Faretta in passing, based the allowance of waivers primarily on the weight of the defendant’s autonomy interests in choosing her own defense and controlling her own destiny. The court viewed the state’s interest in ensuring proper sentencing as carrying little weight because that interest was already served by the requirement of proving aggravating factors before imposing death. The Illinois Supreme Court had reached a similar conclusion years earlier in People v. Silagy.

Since California overturned the bulk of Deere, New Jersey stands as the only state where the presentation of mitigating evidence is mandatory. In finding the presentation to be mandatory in all cases, the New Jersey Supreme Court relied on the importance of state interests in the presentation of mitigating evidence. The court, however, rejected the ineffective counsel argument as irrelevant to the question of waiving the presentation of mitigating evidence.

The procedure for presenting mitigating evidence over a defendant’s protests must, if such presentation is mandatory, also be determined. In People v. Deere, a concurring judge suggested that courts explore the ideas of either appointing independent counsel to argue the case against death or allowing the court itself to present the mitigating evidence. The majority in that case rejected the suggestion as “impractical” and “unprecedented” placing the responsibility on the

105. For a full discussion of Faretta, explaining why this argument is flawed, see supra, Part II.A.4.
106. Bishop, 95 Nev. at 516 (citations omitted). The capital case at issue in Bishop was the same case at issue in Lenhard, discussed supra in Part II.A.2.
107. Hamblen, 527 So.2d at 804. See Part II.A.4 for an argument that Florida and Nevada have erroneously interpreted the Faretta ruling.
108. 50 Ohio St. 3d 24 (1990).
109. Id. at 27-29.
110. Id.
111. 101 Ill.2d 147, 178-182 (1984).
112. State v. Koedatich, 112 N.J. 225, 329-332 (1988). See also State v. Hightower, 214 N.J. Super 43 (1986) (overturning a death sentence where defendant prevented the presentation of mitigating evidence). Later the New Jersey Supreme Court ruled that while a defendant could not prevent the presentation of mitigating evidence, the defendant was still permitted to make a statement to the jury asking for the death sentence although the statement must be coupled with appropriate instructions from the judge informing the jurors that the defendant’s opinions are not relevant to determining the appropriate penalty. State v. Hightower, 120 N.J. 378 (1990).
114. 41 Cal.3d at 368-370 (Broussard, J. concurring).
defendant’s counsel. The New Jersey Supreme Court, in State v. Koedatich, left the question open suggesting that trial courts should explore these alternatives suggested by the concurrence in Deere.

4. Pleading Guilty

Only the states of New York and Arkansas have outright prohibitions on pleading guilty to a capital crime. Statutes in those states prohibit a defendant from entering a plea of guilty to a crime for which the prosecution is seeking the death penalty.

New York’s capital punishment statutes, enacted in 1995, originally provided that a defendant may not enter a plea of guilty to the crime of first-degree murder except when death is no longer sought as a sentence and with the agreement of the court and the prosecutor. This rule was modified by Hynes v. Tomei, where the Court of Appeals of New York held that the provision allowing a defendant to plead guilty only when the agreed upon penalty is less than death “needlessly encourages guilty pleas” and thus burdens the constitutional right to trial. The result of the holding is that a defendant can only plead guilty to a first degree murder when no notice of intent to seek the death penalty is pending, and

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115. Deere, 41 Cal.3d at 367 n.5. In her article, Linda Carter criticizes this decision, arguing that the court should appoint independent counsel. Carter, supra note 25, at 130-151.
116. 112 N.J. at 336.
117. For a further discussion of the cases dealing with the refusal to present mitigating evidence, see Carter, supra note 25, at 116-29.
118. All the other states allowing the death penalty provide for the acceptance of a guilty plea from a capital defendant. For a list of the statutes concerning guilty pleas for capital crimes in these states and the federal government see Fisher, supra note 46, at 191 n.46. See also Arizona v. Brewer, 170 Ariz. 486 (1992) (affirming capital conviction and death sentence upon a plea of guilty and noting the relative frequency of guilty pleas in capital cases).
119. From 1984 through 1994, New York did not have any capital punishment statute. See e.g., Deborah W. Denno, Getting to Death: Are Executions Constitutional, 82 IOWA L. REV. 319, 370 n.295 (1997) (noting that the death penalty had been abolished in New York from 1984 to 1995); Stewart F Hancock, Annelle McCullough, Alycia A. Farley, Race, Unbridled Discretion, and the State Constitutional Validity of New York’s Death Penalty Statute – Two Questions, 59 ALB. L. REV. 1545, 1556 (noting that the last remaining capital punishment provisions had been struck down by the Court of Appeals in the 1984 case of People v. Smith); Michael Lumer and Nancy Tenney, The Death Penalty in New York: An Historical Perspective, 4 J.L. & POL’Y. 81, 99 (1995) (giving history of capital punishment in New York and noting in a table that there had been 0 executions in New York from 1976-1995). The last remnants of the previous capital punishment statutes were held unconstitutional when the court in People v. Smith invalidated a provision for a mandatory death sentence to be imposed when an inmate serving a life sentence committed a murder. 63 N.Y.2d 41 (1984). Prior to the Smith decision other provisions for capital punishment had been held unconstitutional in People v. Davis. 43 N.Y.2d 17 (1977). These decisions were all based on the mandatory nature of the death penalty statutes then in place. The new death penalty statute in New York does not include these mandatory provisions.
120. See N.Y. CLS CPL § 60.06 (authorizing the death sentence for first-degree murder), §125.27 (defining first-degree murder), § 220.10(5)(c) & § 220.30(3)(b)(vii) (prohibiting a guilty plea to first-degree murder unless the agreed upon punishment is life imprisonment or a term of imprisonment and the plea is entered with prosecution and court consent).
121. 92 N.Y.2d 613 (1998).
122. Id. at 625 (relying on United States v. Jackson, 390 U.S. 570 (1968)).
123. Id. at 629.
thus the prosecution cannot secure a binding plea agreement prior to deciding whether it will seek the death sentence.\textsuperscript{124}

Arkansas has a similar statute on the books which provides that a defendant may not plead guilty to a capital crime "unless... the prosecuting attorney, with the permission of the court, has waived the death penalty."\textsuperscript{125}

California, though it does not prohibit guilty pleas to a capital crime, does require the appearance of counsel before receiving the plea of guilty to a crime where the maximum penalty is life imprisonment or death.\textsuperscript{126}

Though no other states presently have prohibitions on capital guilty pleas, some states have imposed such prohibitions in the past. Until 1995 Louisiana had an enduring prohibition on guilty pleas by capital defendants.\textsuperscript{127} Likewise, case law in North Carolina prohibited capital guilty pleas prior to the passing of a statute to overturn the prohibition in 1977.\textsuperscript{128}

III. The Existing Debate on Execution Volunteering

As we have seen above, the law on when a procedural waiver should be allowed from a defendant who is attempting to volunteer for execution varies from state to state. The issue is far from settled and there are strong views on both sides of the argument. While the arguments for restricting a defendant's ability to volunteer for execution may be more or less persuasive at different stages in the capital proceedings, the premise of the arguments is the same in any context. The arguments against restrictions, however, differ significantly depending on the stage at which a defendant attempts to make a waiver. I will divide the presentation and critique of arguments into three sections: the arguments in favor of

\begin{itemize}
  \item \textsuperscript{124} This limitation proved to have very little effect in \textit{People v. Smelefsky}, 695 N.Y.S.2d 689 (1999). In \textit{Smelefsky} initially the prosecution was prohibited from withdrawing the intent to seek the death penalty where that withdrawal was conditional upon the entering of a guilty plea. However a court appearance was arranged where the defendant under questioning by the court described his participation in the crime, and expressed his desire to plead guilty. Immediately following that questioning the prosecution withdrew his intent to seek the death penalty and then joined the defendant's application to have his plea accepted. The court then accepted the plea. \textit{Id.} at 691-92. Additionally plea-bargaining is allowed in that the defendant may, with the prosecution's consent, plead guilty to a lesser offense not punishable by death even when a notice of intent to seek the death penalty is pending. \textit{Hynes}, 92 N.Y.2d at 629.
  \item \textsuperscript{125} Ark. Code 5-4-608, Ark. Code 31.4; see also Fisher, \textit{supra} note 46, at 192-93.
  \item \textsuperscript{127} \textit{Compare} \textit{State v. Fabre}, 525 So.2d 1222 (discussing the prohibition and the policy behind it), \textit{with} LA C. CR. P. art. 557 (providing for a capital defendant to enter a plea of guilty with permission of the court and prosecution); \textit{see also} Fisher, \textit{supra} note 46, at 193-94 (discussing the history of Louisiana's guilty plea prohibition).
  \item \textsuperscript{128} \textit{Compare} \textit{State v. Watkins}, 283 N.C. 1, 28-30 (1973) (holding that although North Carolina had no statute prohibiting a plea of guilty, it had "long since become the public policy" and it was "generally understood by both bench and bar" that the law required such a prohibition) \textit{with} N.C. G.S. 15A-2001 (1977) (providing a procedure for a capital defendant to enter a plea of guilty), \textit{and State v. Johnson}, 298 N.C. 47 (1979) (explaining the change in public policy).
\end{itemize}
restrictions, the arguments against restrictions at the appellate and post-conviction relief stages, and the arguments against restrictions at the pleading and sentencing stages.

A. The Arguments in Favor of Restrictions

The general argument of those in favor of restrictions is that procedural waivers undermine the state's important responsibility for maintaining the consistent and appropriate application of the death penalty.\(^{129}\) The existence of this responsibility is often attributed to the guarantee against cruel and unusual punishment found in the Eighth Amendment.\(^{130}\) The United States Supreme Court has held that for a death sentence to be constitutional, the Eighth Amendment requires that the sentence be imposed in a non-arbitrary manner.\(^{131}\) The rights created by the Eighth Amendment are not merely personal. They are guarantees to society that the integrity of the criminal justice system will be maintained.\(^{132}\) Therefore, they cannot be waived. A defendant cannot give

\(^{129}\) See, e.g., Carter, supra note 25, at 110 ("[T]he societal interest in precluding arbitrary imposition of the death penalty is strong.").

\(^{130}\) The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

\(^{131}\) See Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972) (Stewart, J. concurring) (finding the death penalty as applied at that time to be unconstitutional because it was "so wantonly and so freakishly imposed."). The Eighth Amendment requirements on the imposition of the death penalty are different than on other punishments. This is because, as the justices of the Court have repeatedly pointed out, "death is different." For examples of these statements see Thompson v. Oklahoma, 487 U.S. 815, 856 (1988) (O'Connor, J. concurring) ("Under the eighth amendment, the death penalty has been treated differently from all other punishments. Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.") (citations omitted) and Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J. dissenting) ("In the 12 years since Furman v. Georgia, every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.").

\(^{132}\) See Whitmore, 495 U.S. at 171-72 (Marshall, J. dissenting) ("Appellate review is necessary not only to safeguard a defendant's right not to suffer cruel and unusual punishment but also to protect society's fundamental interest in ensuring that the coercive power of the State is not employed in a manner that shocks the community's conscience or undermines the integrity of our criminal justice system"); see also Gilmore, 429 U.S. at 1019 (Marshall, J. dissenting) ("I believe that the eighth amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but that it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments"); Deere, 71 Cal.3d at 368 (Broussard, J. concurring) ("The state of California asserts an interest, independent from that of the defendant, in the accuracy of the penalty determination at a capital trial."); Franz v. Lockhart, 700 F.Supp. 1005, 1024 (1988)("What is at stake here is our collective right as a civilized people not to have cruel and unusual punishment inflicted in our name. It is because of the crying need to vindicate that right, that basic value, that Simmons should be held unable to 'waive resolution in state courts' of the correctness of his death sentence") (citation omitted) (quoting Gilmore, 429 U.S. at 1018 (White, J. dissenting)); Carter, supra note 25, at 144-45 ("However, inherent in the concept of human dignity is an assurance that a penalty is not imposed which offends the dignity and integrity of society. The Eighth Amendment represents a societal interest
the state permission to impose a punishment that would otherwise violate the Eighth Amendment. Proponents of waiver restrictions have continually argued that procedural waivers by a capital defendant undermine the non-arbitrary application of the death penalty and therefore violate the Eighth Amendment.

That being said, it is not necessary to base the argument on the Eighth Amendment. The interest need not have a constitutional origin for it to be relevant in determining the appropriate manner in which a state should deal with execution volunteers. The argument could be made just as persuasively, if less bindingly, as a public policy argument. Indeed the argument I propose in Part IV of this paper is a policy argument balancing the conflicting interests that exist in the realm of execution volunteering and suggesting, as a matter of public policy, the most appropriate set of rules to deal with execution volunteers.

Thus the argument for prohibiting a procedural waiver at any given stage is that the state interest in restricting execution volunteers, arising from the responsibility for consistent and non-arbitrary application of the death penalty, at that stage outweighs the interest of any single defendant in waiving that particular procedure.

Sometimes the state’s interest is described as an interest in not allowing a state administered suicide. Though the rhetoric may be different, this is the same argument. The defendant’s wish is an arbitrary factor in imposing a death sentence. The defendant’s desire to die has no relevance in determining whether she is guilty of a capital crime or in determining whether the death penalty is the appropriate punishment.

above and beyond that of the individual”)

133. Justice White made this point in his dissent in Gilmore: “I believe, however, that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.” Gilmore, 429 U.S. at 1018 (White, J. dissenting).

134. See, e.g., Carter, supra note 25, at 144 (“The Integrity of the criminal justice system in the non-capricious imposition of the death penalty is subverted if a defendant can choose the penalty regardless of the merits”).

135. For an argument that the state’s interest does not arise from the constitution see Bonnie, supra note 9, at 1382 (arguing that the Eighth Amendment right is an individual right and thus the “asserted societal interest is not rooted in the Constitution”).

136. It is worth noting here that the personal interests of the individual defendant that I will balance against the state’s interests are not of a constitutional origin. See Part II.A.4 for this argument.

137. For an example of this balancing process see Marino, 44 at 605 (“The public has an interest in the reliability and integrity of a death sentencing decision that transcends the preferences of individual defendants”; see also Carter, supra note 25, at 128 (“Limits on an individual defendant’s ability to waive constitutional rights are warranted when society’s interests are balanced against those of the defendant”). For my own balancing of the interests, see infra Part IV.

138. See, e.g., Lenhard, 444 U.S. at 815 (Marshall, J. dissenting) (“The Court has permitted the State’s mechanism of execution to be triggered by an entirely arbitrary factor: the defendant’s decision to acquiesce in his own death. In my view, the procedure the Court approves today amounts to nothing less than state-administered suicide”); Deere, 41 Cal.3d at 363 (holding that a waiver by a defendant who “wants to die...would likewise violate the fundamental public policy against misuse of the judicial system to commit state-aided suicide”); State v. Fabre, 525 So.2d 1222, 1228 (La. Ct. App. 1988) (noting in the context of a since revoked prohibition on guilty pleas “a well founded legislative policy against a person accomplishing such judicial suicide”).

139. This is a problem at all stages of capital proceedings. The arbitrariness of the defendant’s
Therefore the state's interest in a non-arbitrary application of the death penalty includes an interest in preventing a defendant's death wish from determining whether the execution will occur. The execution of a convicted capital defendant is only suicide if it is the defendant's arbitrary death wish and not the state's meaningful sentencing and guilt decisions that result in the execution.\textsuperscript{4} A death sentence applied appropriately and consistently cannot take into account a defendant's death wish and thus cannot be considered state administered suicide. Therefore, the interest in not allowing a state administered suicide is the same interest as that against wrongfully executing a defendant or applying the death sentence in an inappropriate or inconsistent manner.

Applying the general argument to the different stages, it is clear that society's interest in non-arbitrary and consistent application requires assurances of guilt and the appropriateness of the death sentence. These assurances are undermined when a defendant volunteers for execution. The entering of a plea of guilty removes the reasonable doubt burden and replaces it with a burden that normally falls around factual basis or factual foundation.\textsuperscript{4} Furthermore the guilty plea eliminates the full presentation of evidence at trial. This has two effects. First, the establishment of guilt is based on a less rigorous proceeding. Second, a later review of the finding of guilt, such as on appeal, must be conducted without the benefit of a full trial record, rendering such a review less effective in assuring a certainty of guilt. The responsibility to ensure non-arbitrary application, if taken seriously, suggests that the burden of proof and presentation of evidence should be constant in all cases.\textsuperscript{142} Recognizing this, one court noted that public policy required the state to impose "the supreme penalty only when a jury of twelve has been convinced beyond a reasonable doubt of the guilt of the accused after a trial conducted with all the safeguards appropriate to such proceedings."\textsuperscript{143}

As the trial proceeds to sentencing the refusal to present mitigating evidence reduces the assurances that the sentence was appropriate for the case. It is well established that a defendant must be allowed to present mitigating evidence to ensure that the death penalty is applied in a non-

\textsuperscript{140} Cf. Bonnie, \textit{supra} note 9, at 1375 (arguing that any talk of the state as agent of suicide is hyperbole unless one considers all executions homicide).

\textsuperscript{141} Most states require a factual foundation. See Bonnie, \textit{supra} note 9, at 1369-70 (noting that the requirement of a factual foundation "appears to be commonly followed in state courts" though some states require a full "evidentiary basis").

\textsuperscript{142} Numerous judges have made such arguments. See, \textit{e.g.}, \textit{Hamblen}, 527 So.2d at 809 (Barkett, J. dissenting) ("Reliability in imposing the death penalty, in my opinion, can be achieved only in the context of a true adversarial proceeding").

\textsuperscript{143} \textit{Watkins}, 283 N.C. at 30. This public policy was later overturned by the legislature. See \textit{supra} note 128.
arbitrary way.\textsuperscript{144} Arbitrariness is no less troublesome when the defendant herself bars the presentation of mitigating evidence than when that presentation is prohibited by an act of the state.\textsuperscript{145} The relevant information contained in the mitigating evidence is not available for the sentencer’s consideration. Without an argument for mitigation, a court cannot be sure that the punishment is appropriate for the defendant before it. The state cannot properly consider the propriety of a sentence when no one is advocating a lesser sentence than death. The evidence in favor of mitigation might be overwhelming. If the requirement of allowing mitigating evidence to be presented is intended to assure that the death penalty is imposed only in certain qualifying cases then the presentation should be mandated in all cases regardless of the defendant’s desire to die.\textsuperscript{146} As the California Supreme Court recognized in \textit{People v. Deere}:

To allow a capital defendant to prevent the introduction of mitigating evidence on his behalf withholds from the trier of fact potentially crucial information bearing on the penalty decision no less than if the defendant was himself prevented from introducing such evidence by statute or judicial ruling. In either case the state’s interest in a reliable penalty determination is defeated.\textsuperscript{147}

Furthermore, any subsequent review of a death sentence arising from a proceeding where the defendant prevented the presentation of mitigating evidence would necessarily be conducted without the benefit of a full trial record, rendering such a review less effective in assuring the appropriateness of the sentence.

Finally, the waiver of appellate review and post-conviction relief removes the safeguard review of the trial and sentencing. Thus as far as a fair trial and sentencing serve the state’s interest in non-arbitrary application of the death sentence by ensuring the accuracy of guilt and sentencing, the appellate review and post-conviction relief serve that interest by ensuring that the trial and sentencing were in fact fair.\textsuperscript{148}

In the end the state has a strong interest, arising from its duty to apply the death penalty in a non-arbitrary manner, in preventing defendants from volunteering for execution. This leads to the question of what weight this interest has relative to competing interests and whether that weight differs at various stages of the capital proceedings.

\textsuperscript{144} See supra note 93 and text accompanying.

\textsuperscript{145} See Carter, supra note 25, at 111 (“Where society’s interest in the reliability of the decision making process in death penalty cases is manifested in an individualized determination based on aggravating and mitigating circumstances, a waiver of one part of this structure invalidates the deliberately balanced protection for safeguarding against arbitrary imposition of the death penalty”).

\textsuperscript{146} See Hamblen, 527 So.2d at 808 (Barkett dissenting) (“Without a presentation of mitigating evidence, we cannot be assured that the death penalty will not be imposed in an arbitrary and capricious manner, since the very facts necessary to that determination will be missing from the record”)

\textsuperscript{147} 41 Cal.3d at 364.

\textsuperscript{148} In reviewing the sentencing, the appellate court may review any claims about the constitutionality of sentencing proceedings below or of the state’s statutory provision for the death penalty generally. Both functions serve to ensure that the sentencing comports with the requirement of administering the death penalty in a non-arbitrary manner.
B. The Debate over Appellate Review and Post-Conviction Relief

At the stages of post-conviction relief and appellate review the strongest argument is based on the dignity of a condemned inmate and her choice to accept the punishment that society has handed down. Commentators often compare the situation of the inmate to that of a dying patient who asserts a "right to die." This "right to die" rhetoric is misleading and misdirected.

Properly speaking the inmate has a dignity and autonomy right to expect that the death sentence will be carried out in a humane manner without imposing an undue or torturous burden upon the inmate. The state is responsible for ensuring that this right be respected; however, execution upon request is not always the appropriate means for doing so. The "right to die" rhetoric erroneously views death as the only solution for any burden placed upon an inmate.

Thus the commentators often focus on the unbearable physical condition of death row. One commentator views problems of unbearable conditions as necessitating a choice, arguing that "something must be done to either improve death row conditions, or permit those who wish to terminate that existence through execution of sentence the right to do so." This choice is impermissible. The state does not have the right to choose to impose intolerable conditions upon an inmate and then, when the inmate complains of those conditions, choose to execute the inmate rather than remedy the conditions of incarceration. The abuse of such a system, by way of torturous conditions being imposed to deter inmates from seeking procedural review of their case, could be widespread.

Moreover, if death-row inmates could request execution because of intolerable conditions there is no reason why such a right should be limited to death-row inmates. Why not execute any prisoner who would prefer death rather than unbearable conditions of incarceration? Does a death-
row inmate have a special right to being freed from torture that other prisoners do not? Indeed, the argument that the state must execute, upon request, anyone suffering from burdensome circumstance, taken to the extreme, would suggest that any member of society who is suffering should be allowed to request execution by the state. This cannot be true. Whatever a terminally ill patient’s rights might be to refuse treatment or even be assisted by another individual in committing suicide, the state has never been in the assisted suicide business. 154 Accepting volunteers for execution is not the solution when the physical conditions of incarceration are intolerable. The appropriate solution in this context is to remedy the conditions.

The “right to die” rhetoric has even been used to suggest that, regardless of the conditions, the fact of incarceration itself justifies allowing inmates to volunteer for execution, 155 going as far as to argue that an inmate’s decision to request execution should be respected because “even a reprieve with commutation to life is not always attractive because it usually would not include a chance of parole.” 156 This is irrelevant. There is no right to choose death over imprisonment. And there is especially no right to choose a punishment otherwise prohibited by the Constitution. 157 The state has the right to sentence a defendant to life imprisonment, and no one has yet suggested that inmates serving a life term have a right to request state administered death rather than serve their term. Thus, there is nothing about the threat of lifetime incarceration that suggests that a death-row inmate should be allowed to volunteer for execution.

The physical condition of incarceration aside, there is a burdensome psychological condition inherent to the capital review process. This is the legal limbo in which an inmate is placed. Thus the inmate is dealing with a legal case that never ends, a case that frequently yields a glimmer of hope only to leave the inmate once again sentenced to death. 158

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154. See generally Carter, supra note 25, at 145 (noting that because of state’s active involvement in the death penalty, through administering the penalty and through placing the individual on death row in the first place, and not in other right to die cases, there is an issue of the state’s interest in the integrity and dignity of the penalty, and “[t]he same issue does not exist in noncriminal contexts where the judicial system is not forcing the individual into the situation of choosing life or death”).

155. Some of these arguments have been presented not to justify the execution but to show that the decision to volunteer is not “irrational” and does not suggest the incompetency of the defendant. However, that line is not always observed and the commentators often begin using these arguments as normative reasons for allowing the defendant to request execution. See, e.g., Urofsky, supra note 149; Milner, supra note 149.

156. Urofsky, supra note 149, at 574. Urofsky also argues: “For some on death row, however, the darkest fear is not execution, but the prospect of living out their natural years incarcerated in a six-by-nine cell, under constant surveillance, with little or no hope of ever regaining their freedom.” Id. at 553.

157. Justice White stated this argument best: “I believe, however, that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.” Gilmore, 429 U.S. at 1018 (White, J. dissenting); see also Bonnie, supra note 9, at 1371 (conceding, while arguing in favor of allowing waivers, that a “prisoner is probably not permitted to consent to the imposition of a punishment not authorized by law”).

While the inmate does not have a "right to die," she does have an interest in not suffering this torturous process indefinitely. Every time the sentence is scheduled to be carried out and the inmate is brought to "the brink of death" a psychological punishment is inflicted. The defendant's interest manifests itself in a right to finality and humane application without undue delay. Of course to determine what "undue delay" is we must balance this interest of the inmate against the aforementioned interest of the state.159

C. The Debate over Mitigating Evidence and Guilty Pleas

The "right to die" analogy is not applicable to the sentencing and pleading stages. The defendant who has not yet been sentenced is nothing like a terminally ill patient waiting to die. Prior to trial and sentencing the defendant is not yet "condemned." In that sense the defendant is no different than any other healthy member of society. As such, she has no special right to die. While the dignity of a death row inmate awaiting execution might require that the sentence be carried out with little delay, the dignity of the defendant at trial creates no special right for her to become a death row inmate. There is no dignity interest in an automatic finding of guilt or sentencing of death.

The primary argument against prohibiting a defendant from pleading guilty or from waiving her right to present mitigating evidence at sentencing is that it violates the constitutional right to self-representation established in Faretta v. California.160 For reasons discussed above161 this argument is not persuasive.

Neither does the defendant have an interest in pleading guilty or preventing the presentation of mitigating evidence based on some claimed right to "accept due punishment." A distinction needs to be drawn between accepting punishment and choosing punishment. The defendant is free to accept without protest any punishment the court imposes. This is true regardless of whether mitigating evidence is presented. However the defendant's interest in accepting punishment does not extend to a right to choose punishment. The defendant has no right to demand to be punished or to choose the type of punishment imposed.162 Thus the interest in accepting punishment cannot be claimed as a source of any right to plead

159. See infra Part IV.B for this balancing.
160. 422 U.S. 806.
161. See supra Part II.A.4.
162. This is not to say that a defendant has no interest in providing input into the punishment decision. However, while such an interest may suggest that a defendant should be allowed to argue in favor of punishment or guilt, this does not translate to a right to prevent the court from hearing arguments on the other side, e.g. from amicus, just because the defendant wants to choose her punishment. See Part II.A.4 for a discussion of this distinction.
guilty or to prevent the presentation of mitigating evidence.

Nonetheless, even though the right to plead guilty or waive presentation of mitigating evidence cannot be grounded in a constitutional right to self-representation nor in a right to accept punishment, that does not mean the defendant has no interest in being able to do so. The respect for autonomy and personal dignity inherent in our judicial system suggests an interest of the individual in determining whether an argument will be made on her behalf. This interest involves such factors as a defendant’s interests in avoiding the burdens of a trial, in publicly accepting responsibility for her acts and generally in admitting guilt and showing remorse.163

The interests discussed here, like the dignity interest involved at the appellate or post-conviction stages, must be weighed against the state’s interest in preventing execution volunteering.164

IV. Proposed Rules on Execution Volunteering

Part III of this paper sets forth the interests that conflict when a defendant desires to waive capital proceedings in an attempt to volunteer for execution. Neither the state’s interest in restricting procedural waivers nor the defendant’s interest in being allowed to accept her death sentence without further proceeding is constant. The relative importance of these interests varies at the different stages of the capital proceedings.

The interest in restricting defendants from volunteering for execution is derived from the state’s responsibility to prevent the inconsistent or inappropriate application of the death sentence.165 Therefore, while that preventative responsibility may be constant, the weight of the interest arising from that responsibility is dependent upon the likelihood that such an inappropriate death sentence would be carried out. If there is little or no danger that an execution will be inappropriate the state has a very weak interest in preventing that execution. On the other hand, where there is a large danger that an execution will be inappropriate the state has a very strong interest in preventing that execution until the danger can be reduced through procedural safeguards. Each stage of the proceedings serves as a safeguard against an inappropriate death sentence and the danger of such a sentence diminishes as the case proceeds through each stage. Therefore the strength of a state’s interest in restricting procedural waivers decreases in the later stages.

The defendant’s interest in having her waiver accepted becomes stronger the longer she awaits her uncertain execution and is faced with

163. See generally Minnick v. Mississippi, 498 U.S. 146, 167 (1990) (Scalia, J. dissenting) (explaining that an admission of guilt is a virtue “[n]ot only for society, but for the wrongdoer himself”); Fisher, supra note 46, at 202 & n.102 (arguing that a guilty plea is a virtue in itself and citing Justice Scalia and Jeremy Bentham for support of the proposition) (citing Minnick, 498 U.S. at 167, and Jeremy Bentham, 1 Rationale of Judicial Evidence 316 (1827)).
164. See infra Part IV.C for this balancing.
165. See supra Part III.A.
undue and burdensome delays or the psychological punishment of being brought to the brink of death on numerous occasions. Thus the interest is strongest at the later stage when the defendant has been awaiting execution for the longest period of time and been forced through numerous capital proceedings.

Thus, whether waivers of capital proceedings should be allowed or prohibited depends upon the stage at which the defendant attempts to make the waiver. At any given stage a balancing of the interests of the state against the interests of the individuals must be performed. When the state’s interest in preventing procedural waivers outweighs the defendant’s interest in being able to waive a proceeding then a prohibition on the waiver is required. If at some point in the proceedings the defendant’s interest reaches the level of surpassing the state’s interest, the state should no longer be allowed to prohibit the defendant from a procedural waiver. For any gray area in which the interests are marginally different or the crossover cannot be precisely located, the state should be permitted, but not required, to restrict a defendant’s ability to waive procedure.

In this part of the paper I present the balancing for each stage in the capital proceeding. I conclude that the state must, except with specific conditions, allow waivers at the post-conviction stage; that the state may prohibit or allow waivers at the appellate stage; and that the state must prohibit waivers at the trial stage.

A. Post-Conviction Relief

The dignity interest supporting an inmate’s claim to waiver at the post-conviction stage arises from her right to have her punishment carried out in a humane manner without undue delay. This interest comes into existence only after sentencing and becomes stronger and stronger as time passes. Every day that the punishment is postponed is a day closer to the threshold of unreasonable delay. Furthermore, the defendant’s interest in accepting the punishment becomes stronger every time the state allows the torturous circumstance of having an execution scheduled only to have it then be canceled because a third party is seeking to stay the execution. This process continually brings the defendant to the “brink of death” threatening her with the ultimate punishment and then refusing to carry it out. Therefore, the defendant’s interest in accepting punishment is strongest at the latest stages in the proceeding.

166. In Martinez a case involving the right to self-representation, the United States Supreme Court conducted a similar balancing of the state’s interest in the integrity of the trial and the individual’s interest in controlling her case. 528 US at 162 (“Even at the trial level, therefore, the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.”) and at 163 (“Thus, the States are clearly within their discretion to conclude that the government’s interests outweigh an invasion of the appellant’s interest in self-representation.”).

167. See supra Parts III.B and III.C.

168. See supra Part III.B.
The state’s interest on the other hand is weakest at the post-conviction relief stage. A defendant seeking to waive proceedings for the first time at the post-conviction relief stage is more likely to have been appropriately convicted and sentenced than a defendant seeking to waive proceedings at the early stages. Such a defendant has received a full trial, full sentencing hearing and full appellate review. Every stage serves as a checkpoint, an additional safeguard filtering out the impurities. A defendant is less likely to be wrongfully sentenced to death after each stage. Information is gained at the completion of each stage. Any other conclusion would suggest that each proceeding serves no valuable purpose and would degrade the entire capital proceeding to nothing more than a random game of chance. Therefore, because each stage reduces the chance that a defendant has been inappropriately sentenced to death, the risk of arbitrary application of the death penalty is much lower at the post-conviction relief stage than at previous stages.

The strong interest of the defendant and the weak interest of the state require that the state should not generally be able to prohibit a defendant from waiving post-conviction relief. The state should have only a limited number of chances to insure the appropriateness of a penalty. At some point there must be finality.

The state may, in some ways, be able to limit its restriction on waivers at the post-conviction relief stage such that the restriction will be permissible. The solution proposed in Martini where the New Jersey Supreme Court prohibited waiver of post-conviction relief proceedings but set a time limit for the application for relief to be filed is permissible. The procedure set by the court in that case provides finality and eliminates the uncertainty that an inmate faces. The execution is not repeatedly postponed and then rescheduled. The defendant, after appellate review, can express her desire to waive post-conviction relief and be assured of a time frame in which the case will be resolved. Furthermore the time frame, thirty days for the post-conviction relief proceeding and 45 days for appellate review of those proceedings, is not so long as to constitute undue delay. As such the state is justified and should be allowed, though not required, to impose a restriction such as that imposed by New Jersey in Martini.

B. Appellate Review

At the stage of appellate review, the interests both of the defendant and of the state are weak. The state has the full trial and sentencing to give reasonable assurances that the death sentence has been applied appropriately and non-arbitrarily. The defendant has only just been
sentenced. If a non-waivable appeal is required, the execution will not be scheduled till a date subsequent to the appeal and a stay of execution will not be necessary. Assuming that the appeal is heard within a reasonable amount of time, then the defendant will not suffer a burdensome or torturous delay. As such the state should, if it so chooses, be allowed to require a mandatory non-waivable appellate review; on the other hand there is no policy implication suggesting that the state must require such a non-waivable review. Thus states are free to maintain the systems currently in place for appellate review.

C. Mitigating Evidence and Guilty Pleas

At the early stages of sentencing and pleading the state’s interest in preventing waivers is strongest.\textsuperscript{172} Without a proper sentencing procedure, including evidence arguing for and against death, the state can never have an assurance that the death penalty has been applied appropriately.\textsuperscript{173} Similarly the assurance of applying the death penalty non-arbitrarily is undermined a great deal when a defendant pleads guilty. Accepting a plea of guilty, thereby foregoing the rigors of trial, increases the risk of convicting the wrong individual and the risk of convicting her of the wrong crime, e.g. first rather than second-degree murder.

Additionally, the state’s interest in preventing waiver at the early stages is strong because subsequent procedures do not provide adequate substitutes for earlier ones that the defendant has waived. A mistake that is not caught because the early proceedings have been waived is unlikely to be found at the later proceedings especially when the reviewing courts have very little in the way of a trial record to review. To require an appellate or post-conviction review of a trial or sentencing that never occurred makes little sense and cannot possibly make up for the increased danger of an inappropriate sentence or conviction that occurs when the early proceedings are waived.\textsuperscript{174}

In contrast, the defendant’s interests in waiving procedure at trial are very weak. At trial the defendant has no interest in accepting punishment because the state has yet to impose any punishment. The defendant does, however, have some interests in waiving the trial proceedings. First, the defendant has an interest in avoiding the burdens of a trial. While this interest may be significant, it is certainly less than the interests of an inmate facing the burdens of an unduly burdensome delay in execution. The burdens of trial cannot be considered anywhere nearly

\textsuperscript{172} A similar argument is made in \textit{Carter, supra} note 25, at 127-28 (discussing the importance of states interest in the presentation of mitigating evidence).

\textsuperscript{173} See discussion of this in \textit{supra} Part III.C.

\textsuperscript{174} Indeed the multitude of procedural safeguards that have been placed upon capital proceedings and the high scrutiny that these proceedings receive on review make little sense when a defendant is allowed to waive these proceedings through pleading guilty and not presenting mitigating evidence. As Justice Barkett put it in his dissent in \textit{Hamblen}, “This heightened scrutiny is meaningless, however, if the defendant ‘waives’ any part of the proceedings critical to determining the proper sentence.” 527 So.2d at 808 (Barkett, J. dissenting).
equivalent to the burden of awaiting execution and being brought to and from the “brink of death.”

Second, the defendant has an interest in controlling what is said on her behalf. This interest is only minimally implicated. The defendant is not prohibited from speaking on her own behalf; she is only prohibited from barring the state from doing so as well. When the defendant refuses to present a defense the court should appoint independent counsel to present the existing arguments against guilt and against death; nothing in this outcome suggests that a defendant could not be allowed to make a statement in favor guilt or in favor of death.

Finally, the defendant has an interest in admitting guilt. This interest, too, is minimal. The defendant has the opportunity to present her own defense even when the court has appointed counsel to argue against guilt and death. The defendant is free to take the stand and confess guilt or even to request a death sentence. The defendant is not prohibited from making statements of remorse in or out of court. Thus, it is not at all necessary to allow a plea of guilty or a prevention of the presentation of mitigating evidence to satisfy the defendant’s need to admit guilt.

The state’s interest is strong enough to outweigh the interests of the defendant. Therefore the states must require the presentation of mitigating evidence during capital sentencing even over the objections of the defendant and prohibit the capital defendant from pleading guilty. In implementing these restrictions the state should explore the alternative of appointing independent counsel to argue against guilt during the trial and against death at sentencing.

V. Conclusion

This proposed system for capital proceedings requires that a state prohibit guilty pleas and mandate non-waivable presentation of mitigating evidence at sentencing. Additionally the system allows, but does not require, a mandatory non-waivable appellate review, while prohibiting, except under certain limitations, a mandatory non-waivable post-conviction relief proceeding. The system respects both the state’s responsibility in preventing the arbitrary application of the death penalty and the individual’s right to be free from an unduly burdensome or torturous delay in awaiting execution. This system makes more sense than the system in place in most states. To ensure that the death sentence is administered appropriately, almost every state requires an appellate review of the trial.

175. I am, of course, discussing this interest in the context of execution volunteers. In other cases, where the defendant wishes to present an actual defense, Faretta controls and the defendant will be entitled to do so without interference. In those case the defendant is entirely free to present the defense of her choice and silence any third parties who interfere. The volunteering cases are unique because the defendant presents no defense. For a discussion of this distinction, see Part II.A.4, specifically text accompanying notes 58 through 69

176. See supra note 163 and accompanying text.

177. See supra notes 114 through 117 and accompanying text.
proceedings and yet very few states require that the trial proceedings actually occur. Oddly the review of the trial occupies a position of greater importance than the trial itself.\textsuperscript{178} This illogical result is corrected in the system I propose, which provides a guarantee that death will not be administered without full trial proceedings.

The driving argument behind this solution is that the accused murderer cannot waive society's interest in fair and consistent application of the ultimate punishment of death. Therefore a balancing of interests is necessary. As the New Jersey Supreme Court stated in \textit{Martini}, "It is self-evident that the state and its citizens have an overwhelming interest in insuring that there is no mistake in the imposition of the death penalty."\textsuperscript{179}

The death penalty can be administered in an appropriate manner only when this interest is considered and balanced against the interests of the individual defendant.

\textsuperscript{178} The higher priority that appellate review receives is all the more confusing when one considers that the guilty plea, unlike appellate waivers, is the only direct waiver of explicit constitutional rights: "the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers." \textit{Godinez v. Moran}, 509 U.S. 389, 397 n.7 (1993) (citing \textit{Boykin v. Alabama}, 395 U.S. 238, 243 (1990)).

\textsuperscript{179} 144 N.J at 608.