

# California Western Law Review

---

Volume 42 | Number 2

Article 2

---

2006

## Exploring the Intersection of Effectiveness & Autonomy in Capital Sentencing

Justin F. Marceau

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

---

### Recommended Citation

Marceau, Justin F. (2006) "Exploring the Intersection of Effectiveness & Autonomy in Capital Sentencing," *California Western Law Review*: Vol. 42 : No. 2 , Article 2.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol42/iss2/2>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact [alm@cwsl.edu](mailto:alm@cwsl.edu).

# CALIFORNIA WESTERN LAW REVIEW

VOLUME 42

SPRING 2006

NUMBER 2

## EXPLORING THE INTERSECTION OF EFFECTIVENESS & AUTONOMY IN CAPITAL SENTENCING

JUSTIN F. MARCEAU\*

### I. INTRODUCTION

Nowhere is the question of what constitutes ethical representation<sup>1</sup> more relevant than in determining whether a client in a criminal case received constitutionally adequate representation under the Sixth Amendment. Historically, there has been a remarkable shortage of professional or legal guidance regarding the proper allocation of decision-making authority between the client and the lawyer.<sup>2</sup> Capitalizing on the professional uncertainty as to the proper allocation of authority, prosecutors have argued alternately that the client-centered<sup>3</sup>

---

\* Mr. Marceau received his J.D. from Harvard Law School in 2004 and is currently working as an associate in the San Francisco office of Heller Ehrman LLP.

1. Ethical representation is representation consistent with the prevailing norms of the profession. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (declaring the standard to be “reasonableness under prevailing professional norms”).

2. Available sources of guidance include Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 33-46 (1986); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 503-11 (1994); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1250-53 (1993); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 49-72 (1979); and Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 318-19 (1987).

3. See *infra* Part V. In a client-centered model, the client retains the authority over important decisions in his case.

and the lawyer-centered<sup>4</sup> models of representation should immunize the decisions of counsel from a claim of ineffective assistance of counsel.<sup>5</sup> On the one hand, prosecutors call for deference to the failed strategies of trial counsel, where the client had virtually no understanding or input; and on the other hand, prosecutors claim a defendant waived the right to argue a certain decision was constitutionally deficient when the client himself was the impetus for the decision. Both a lawyer's strategy and a client's express request can conflict with the prevailing professional norms, and, therefore, both must be reviewed by appellate courts to determine whether certain minimum constitutional requirements have been satisfied.<sup>6</sup> Arguing that neither the lawyer-centered model nor the client-centered model of representation enjoy normative force in constitutional analysis, this Article concludes that the dignity of clients and the integrity of the Sixth Amendment require appellate courts to step in and articulate certain basic criteria for identifying reasonable attorney strategies and true instances of client autonomy.

This Article contrasts a recent Ninth Circuit decision with a case currently pending before the court. In the first, *Summerlin v. Schriro* (*Summerlin II*), the court rejected the prosecution's argument that counsel's failure to present mitigation evidence, though otherwise unreasonable, was constitutionally adequate because the client expressly rejected presenting mitigating evidence during the penalty phase.<sup>7</sup> In *Correll v. Schriro* (*Correll II*), now pending before the Ninth Circuit, the prosecution argues that defense counsel's decision to forego presenting mitigating evidence during the penalty phase, without adequately consulting the client, was not constitutionally deficient insofar as deference is owed to the tactical decisions of counsel.<sup>8</sup> The facts of these cases provide an appropriate platform for discussing the consti-

---

4. See *infra* Part IV. In a lawyer-centered model, the lawyer selects the most appropriate means of achieving the client's stated goals.

5. Compare *Summerlin v. Schriro* (*Summerlin II*), 427 F.3d 623, 636 (9th Cir. 2005) (in which the State argued that a claim of ineffective assistance of counsel could not be maintained because it was the client's instruction that a mitigation defense not be presented), with Excerpts of the Record at 349-51, *Correll v. Schriro*, No. 03-99006 (9th Cir. argued Sept. 26, 2005) (where counsel argued that the decision not to present mitigation evidence reflected counsel's strategic appraisal of the evidence best presented to the particular judge hearing the case) [hereinafter ER].

6. Compare *Strickland*, 466 U.S. at 689 (noting that counsel's strategic or "tactical decisions" must be afforded a particularly "wide latitude"), with *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (recognizing that certain strategies are unreasonable and, therefore, subject to constitutional scrutiny).

7. *Summerlin II*, 427 F.3d at 636, 639.

8. *Correll v. Schriro* (*Correll II*), No. 03-99006 (9th Cir. argued Sept. 26, 2005).

tutional significance of the client-centered and lawyer-centered models of representation. *Correll II* provides an opportunity to acknowledge that attorney strategies and client directives only enjoy normative constitutional force when certain conditions have been satisfied. The holding in *Summerlin II*, that counsel's decision to follow his client's request amounted to constitutionally ineffective representation,<sup>9</sup> may appear in tension with client autonomy. However, this Article suggests the holding is, in fact, critical to the continued viability and desirability of a client-centered model of representation. Rather than a judicial retreat from the client-centered model, *Summerlin II* represents an essential rejection of the cartoonish approach to client autonomy taken by prosecutors, who would suggest that any representation consistent with client directives escapes constitutional review. After *Summerlin II*, client autonomy, for purposes of the Sixth Amendment, minimally requires clients be adequately informed and consulted.<sup>10</sup>

Both *Summerlin II* and *Correll II* provide the Ninth Circuit with opportunities to extend the judicial trend in capital cases that favors rigorous, fact-specific, constitutional inquiries over broad theoretical frameworks. Ultimately, by contrasting the facts of *Summerlin II* with those of *Correll II*, this Article demonstrates that superficial presentations of either the lawyer-centered or the client-centered models are incapable of providing counsel with a constitutional escape-hatch for otherwise deficient representation. Unreasonable errors of strategy, whether driven by client preference or a misunderstanding of the principles of law at issue, are strategies only in name, and under *Strickland v. Washington*, an unreasonable strategy is no strategy at all.<sup>11</sup>

## II. GAUGING THE ADEQUACY OF A LAWYER UNDER THE SIXTH AMENDMENT

The Sixth Amendment requires that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of

---

9. *Summerlin II*, 427 F.3d at 639-40.

10. Although this conclusion is a fairly straightforward induction from *Summerlin II* and other Ninth Circuit cases, the holdings of these cases are also entirely consistent with emerging U.S. Supreme Court jurisprudence in this area. *E.g.*, *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (stating decisions by counsel not to present mitigating evidence could not be excused as a strategic decision if it was not supported by a reasonable investigation).

11. *Strickland*, 466 U.S. at 690-91; *cf.* *Turner v. Calderon*, 281 F.3d 851, 895 (9th Cir. 2002) (remanding for an evidentiary hearing on whether the failure to investigate mitigating evidence constituted ineffective assistance of counsel to determine “if counsel’s decision was a strategic one, and if so, whether the decision was a sufficiently informed one” (quoting *Hendricks v. Vasquez*, 974 F.2d 1099, 1109 (9th Cir. 1992))).

Counsel for his defence.”<sup>12</sup> Consistent with this requirement, states are prohibited from incarcerating a person who has not enjoyed the assistance of counsel at all stages of the criminal process where substantial rights are affected.<sup>13</sup> Moreover, the right to assistance of counsel has been recognized to include “the right to the *effective* assistance of counsel.”<sup>14</sup> Not until *Strickland v. Washington*, however, was the phrase “effective assistance of counsel” given a practical definition.

In *Strickland v. Washington*, the Supreme Court announced the now familiar two-part test for determining whether a petitioner has established a colorable claim of ineffective assistance of counsel.<sup>15</sup> First, a petitioner must show that his counsel provided deficient performance,<sup>16</sup> a showing that is inextricably wedded to the norms of the profession.<sup>17</sup> Second, because the Court was unwilling to assume the integrity of a proceeding was compromised whenever an attorney provided deficient performance, to prevail on a claim of ineffective assistance of counsel a petitioner must show that defense counsel’s deficient performance prejudiced him.<sup>18</sup>

In determining whether the deficient performance prong of the *Strickland* test has been satisfied, courts assess whether counsel’s performance was reasonable under “prevailing professional norms.”<sup>19</sup> In making this determination, courts consider counsel’s performance in light of the ABA Standards for Criminal Justice.<sup>20</sup> Citing the ABA standards, the Supreme Court acknowledged in *Wiggins v. Smith* that counsel’s duty to investigate is particularly important in a capital sentencing trial.<sup>21</sup> Where a defendant has been convicted of a capital crime, only through the presentation of mitigation evidence does he

12. U.S. CONST. amend. VI.

13. *E.g.*, *Argersinger v. Hamlin*, 407 U.S. 25, 37-38 (1972).

14. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added); *see also Powell v. Alabama*, 287 U.S. 45, 71 (1932).

15. *Strickland*, 466 U.S. at 687.

16. *Id.*

17. *Id.* at 688; *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

18. *Strickland*, 466 U.S. at 694 (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”).

19. *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688).

20. *Id.* at 524 (recognizing the ABA guidelines as “standards to which we long have referred as ‘guides to determining what is reasonable’” (quoting *Strickland*, 466 U.S. at 688)).

21. *Id.*; *see also Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc). “To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to ‘present[] and explain[] the significance of all the available [mitigating] evidence.’” *Id.* (alteration in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 399 (2000)).

have an opportunity to argue to the sentencer that his life should be spared.<sup>22</sup> In general, objectively reasonable representation at a capital sentencing hearing requires that counsel present mitigation evidence.<sup>23</sup>

The prejudice prong in *Strickland* is satisfied when the attorney's deficient performance is sufficiently egregious as to undermine the reviewing court's confidence in the proceeding.<sup>24</sup> The Supreme Court has acknowledged a strict "outcome-determinative standard" is "not quite appropriate."<sup>25</sup> Nonetheless, in order to establish prejudice the petitioner must show there is a "reasonable probability" that the outcome of the proceeding would have been different.<sup>26</sup> Prejudice exists, in short, where the challenged proceeding "cannot be relied on as having produced a just result."<sup>27</sup>

### III. ADEQUACY OF COUNSEL AT CAPITAL SENTENCING

The protections of the Sixth Amendment apply to "all critical stages of the criminal process."<sup>28</sup> However, "[t]here is no more important hearing in law or equity than the penalty phase of a capital trial."<sup>29</sup>

Thus, if there is merit to the claim that certain allocations of decision-making authority are more effective than others at securing a de-

---

22. In order to understand the role that mitigation evidence plays in determining whether a defendant will be sentenced to death, it is important to understand the basic structure of a capital case.

Capital cases are bifurcated: first, the jury determines whether the defendant is guilty of any of the offenses with which he is charged; then, if the jury has found the defendant guilty of a capital offense, the jury decides whether the defendant will be sentenced to death or a lesser punishment. Although the precise issues to be determined at the penalty trial vary from jurisdiction to jurisdiction, the penalty jury invariably makes its sentencing determination after considering aggravating factors introduced by the prosecution and mitigating evidence introduced by the defense.

Welsh S. White, *A Deadly Dilemma: Choices by Attorneys Representing "Innocent" Capital Defendants*, 102 MICH. L. REV. 2001, 2002 n.1 (2004).

23. *Williams*, 529 U.S. at 393 (noting that a defendant has a "constitutionally protected right to provide the jury with . . . mitigating evidence").

24. *Strickland*, 466 U.S. at 696.

25. *Id.* at 693-94.

26. *Id.*; *Stankewitz v. Woodford*, 365 F.3d 706, 718 n.6 (9th Cir. 2004) (recognizing that the appropriate inquiry is whether there is a reasonable probability that the newly discovered mitigation evidence would have made a difference to at least one juror (quoting *Douglas v. Woodford*, 316 F.3d 1079, 1090 (9th Cir. 2003))).

27. *Strickland*, 466 U.S. at 686.

28. *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004) (citing *Maine v. Moulton*, 474 U.S. 159, 170 (1985)).

29. *Gerlaugh v. Stewart*, 129 F.3d 1027, 1050 (9th Cir. 1997) (Reinhardt, J., concurring and dissenting).

defendant's rights in an adversarial process,<sup>30</sup> then the relative disparity in effectiveness should be nowhere more obvious than at the capital sentencing phase of litigation. Focusing exclusively on the sentencing phase of capital trials, this Article concludes that generic normative rules regarding the proper allocation of decision-making authority between the client and the attorney should be rejected in favor of more fact-specific constitutional inquiries.

#### IV. TRADITIONAL LAWYER-CENTERED REPRESENTATION: REPRESENTATION CONSISTENT WITH THIS MODEL IS NOT IMMUNE FROM CONSTITUTIONAL SCRUTINY

The virtue of the lawyer-centered model of representation was extolled by Justice Burger in *Wainwright v. Sykes*<sup>31</sup> and *Jones v. Barnes*.<sup>32</sup> According to Justice Burger, virtually all decision-making authority and responsibility belongs to the lawyer.<sup>33</sup> One commentator characterized this vision of lawyer-dominance as “[m]ore than just a guiding hand, [the lawyer] has become virtually the whole body and brains of the defense.”<sup>34</sup> Burger understood effective representation to require an allocation of decision-making authority such that counsel is the “master” and the client the “servant.”<sup>35</sup>

In the client-centered model, the client's role is primarily “passive.”<sup>36</sup> The client is tasked with determining the general objectives of the representation, and the lawyer selects the most appropriate means of achieving the client's stated goal.<sup>37</sup> It is not surprising, then, that the model's legitimacy is derived from overtly “paternalistic assumptions.”<sup>38</sup> Proponents of the lawyer-centered model argue that such an allocation of authority is justified by virtue of the lawyer's expertise and emotional detachment.<sup>39</sup> A lack of sophistication on the part of

---

30. Strauss, *supra* note 2, at 340.

31. *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring).

32. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983).

33. *Id.* at 750-54; *Wainwright*, 433 U.S. at 93.

34. Berger, *supra* note 2, at 33.

35. *Id.*

36. Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 7 (1998).

37. *Id.*

38. Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2440 (1996).

39. Uphoff & Wood, *supra* note 36.

the client and technical expertise on the part of the attorney are presumed.<sup>40</sup> In short, the lawyer-centered allocation of authority views the client's decision to have representation as a decision to surrender a significant degree of control. As the California Supreme Court bluntly put it, "[b]y choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to counsel's complete control of defense strategies and tactics."<sup>41</sup>

Scholars continue to disagree about the appropriate role of the lawyer in the lawyer-client relationship, but if the theories espoused in support of the traditional allocation of authority are of any normative value, then representation consistent with this paradigm could not amount to ineffective assistance of counsel. That is to say, if the lawyer-centered allocation of authority is a normative ethical theory, courts could not view representation that is consistent with this model to be inconsistent with the "prevailing professional norms."<sup>42</sup> The Sixth Amendment, however, does not provide unchecked immunity for attorney strategies.

In *Correll II*, a case now pending before the Ninth Circuit Court of Appeals, the court is reviewing the constitutionality of a strategic decision by counsel to forego presenting any mitigation evidence at Correll's sentencing hearing.<sup>43</sup> Regardless of the court's ultimate holding in this case, for purposes of this Article, the facts of *Correll II* will be used to represent a lawyer-centered strategy to forego mitigation.

### A. Facts of Correll

In 1984, Michael Correll was charged with the gruesome roadside execution of three people.<sup>44</sup> After a three-day trial, a jury found Correll guilty on all counts.<sup>45</sup> Following his client's conviction, Correll's attorney "submitted a brief sentencing memorandum" that devoted "less than one page to mitigating circumstances" and failed to mention

---

40. Taylor-Thompson, *supra* note 38.

41. *People v. Hamilton*, 774 P.2d 730, 741 (Cal. 1989) (emphasis omitted).

42. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (recognizing the "prevailing professional norms" as the appropriate measure of attorney performance under the Sixth Amendment).

43. *Correll II*, No. 03-99006 (9th Cir. argued Sept. 26, 2005).

44. *Correll v. Stewart (Correll I)*, 137 F.3d 1404, 1408-09 (9th Cir. 1998). This factual narrative is largely a summary of the court's factual description in Correll's first appeal, *Correll I*. For additional details, the reader may refer directly to the opinion.

45. *Id.* at 1410.



“Correll’s psychiatric condition at the time of the murders.”<sup>46</sup> Moreover, at the capital sentencing hearing, counsel made only “a passing allusion to the fact that Correll’s parents had abandoned him when he was fourteen years old [and] made no reference to Correll’s psychiatric condition.”<sup>47</sup> Counsel’s entire sentencing argument took only eight transcript pages and, other than referring the court to the pre-sentence report, consisted of no witness or other evidentiary testimony.<sup>48</sup> In other words, Correll’s attorney presented virtually no evidence in mitigation.<sup>49</sup>

Counsel’s decision not to present mitigation evidence was based on his view that the sentencing hearing in this case would be a “dog-and-pony show.”<sup>50</sup> Correll’s attorney speculated that the sentencing judge would not be receptive to mitigation evidence that was “touchy-feely [sic] fuzzy-headed kind of stuff.”<sup>51</sup> At an evidentiary hearing for Correll’s habeas corpus petitions, counsel testified that he was “basically hoping [the judge] would think it was a one-time incident and want to give Mr. Correll a break and find a mitigating factor.”<sup>52</sup> The strategy of Correll’s counsel, in other words, was to deliberately downplay the evidence that Correll suffered from an “antisocial personality with a drug problem his whole life.”<sup>53</sup> Consistent with this strategy, counsel testified that “[t]he last thing I wanted Judge Howe to think is that Mr. Correll was permanently damaged psychologically.”<sup>54</sup> Other than evidence that may have come out during the guilt phase trial, counsel’s entire case in mitigation was the pre-sentence report.<sup>55</sup> Counsel chose this limiting strategy in the hopes of avoiding damaging rebuttal evidence.<sup>56</sup>

46. *Id.*

47. *Id.*

48. *Id.*

49. *Compare* *Wainright v. Sykes*, 433 U.S. 72, 93-94 (1977) (Burger, C.J., concurring) (implying that the client’s strategies should not be afforded deference because they are grounded in emotion and a lack of experience), *with* *Taylor-Thompson*, *supra* note 38, at 2440 (noting that the lawyer-centered model of representation derives legitimacy by focusing on the detached perspective and technical expertise of counsel).

50. *ER*, *supra* note 5, at 349-50.

51. *Id.* at 351.

52. *Id.* at 476.

53. *Id.* at 353.

54. *Id.* at 450; *see also id.* at 448 (“I didn’t want psychological reports coming in.”).

55. *Id.* at 506.

56. *Id.* at 983. Counsel testified that he purposely excluded his client’s drug addiction from the mitigation evidence to keep out evidence of his client’s antisocial personality disorder. *Id.* at 352-53. Not only did counsel fail to produce any affirmative mitigation evidence, he failed to make any attempt to blunt, what he characterized as, the very harmful information

After hearing the prosecution's case in aggravation, and in the absence of any rebuttal or mitigation by Correll's counsel, the sentencing judge found four aggravating circumstances and no mitigating circumstances and sentenced Correll to death on each of the murder counts.<sup>57</sup> The instant pending appeal requires the court to consider whether Correll received ineffective assistance of counsel as a result of his lawyer's failure to present available mitigation evidence.<sup>58</sup>

### *B. Sixth Amendment Analysis of Counsel's Decision to Forego Mitigation*

The Ninth Circuit has recognized a limitation on the deference that courts are entitled to show to the strategic decisions of a defendant's attorney.<sup>59</sup> The court has held that "an attorney's performance is not immunized from Sixth Amendment challenges simply by attaching to it the label of 'trial strategy.'"<sup>60</sup> Accordingly, in determining whether Correll's counsel provided constitutionally deficient performance by failing to present mitigation evidence, the court must engage in a fact-specific reasonableness inquiry.<sup>61</sup> The court must consider whether counsel's strategy was sufficiently reasonable under the totality of the circumstances so as to constitute effective assistance of counsel.<sup>62</sup>

---

about Correll, in the pre-sentence report. *Id.* at 465. Counsel testified: "I figured it was best to leave [the information he felt was hurtful to Correll's mitigation case] alone." *Id.* at 466.

57. *State v. Correll*, 715 P.2d 721, 731-35 (Ariz. 1986).

On direct appeal, the Arizona Supreme Court affirmed Correll's convictions. However, in its January 28, 1986 opinion, the court concluded that the trial court had erred in determining that Correll had intended to kill Debra Rosen, and that the aggravating circumstance stemming from the commission of "one or more other homicides" had been wrongfully applied retroactively in Correll's sentence. Accordingly, the Arizona Supreme Court modified Correll's death sentence for the murder of Debra Rosen to a sentence of life imprisonment and invalidated the "other homicides" aggravating factor. After reweighing the remaining aggravating circumstances against Correll's claimed mitigating factors, the court affirmed Correll's other three death sentences.

*Correll I*, 137 F.3d 1404, 1410 (9th Cir. 1998) (citations omitted).

58. The Ninth Circuit previously granted an evidentiary hearing on the issue of whether counsel was ineffective at capital sentencing and disposed of all of Correll's other claims. *Correll I*, 137 F.3d at 1413, 1420. The instant appeal focuses on whether the district court erred in denying relief following the evidentiary hearing. *Correll II*, No. 03-99006 (9th Cir. argued Sept. 26, 2005).

59. *See Silva v. Woodford*, 279 F.3d 825, 836-47 (9th Cir. 2002) (discussing when a lawyer's strategy should be reviewed for constitutional deficiency).

60. *Id.* at 846 (citing *United States v. Span*, 75 F.3d 1383, 1389 (9th Cir. 1996)).

61. *See id.* at 838 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

62. *Id.* at 846.

On remand to the district court, counsel elaborated on the strategy he used during Correll's sentencing hearing. Counsel testified that he did not provide any witnesses and relied exclusively on the presentence report and evidence presented at trial for his presentation of mitigation evidence.<sup>63</sup> Correll's attorney stated that he deliberately avoided presenting evidence of Correll's chronic drug addiction, his extremely troubled childhood, and his psychological problems. In counsel's view, the best strategy was to "hope" that without a complete picture of Correll's life-history the judge would treat this as a one-time incident and give Correll a "break."<sup>64</sup> Counsel acknowledged, however, that characterizing the crime as a one-time drug incident was not "in and of itself, . . . something you would find as a mitigating factor."<sup>65</sup> In essence, then, counsel's strategy amounted to a decision not to present any mitigation evidence in the hope that the court would not get a complete picture of Correll's background.

Because unreasonable strategies are not immune from constitutional review, the court is required to second-guess the wisdom of counsel's decision to forego mitigation evidence.<sup>66</sup> The lawyer's judgment gives way to certain specific constitutional duties.<sup>67</sup> Specifically, the duty to investigate potential mitigating evidence does not lose force simply because counsel has strictly adhered to a lawyer-centered model of representation. In *Wiggins v. Smith*, the Supreme Court held that the traditional deference owed to the strategic judgments of counsel is not justified where there was not an adequate investigation "supporting those judgments."<sup>68</sup> This is because "it is imperative that all relevant mitigation information be unearthed for consideration."<sup>69</sup> Accordingly, a decision by counsel not to present mitigating evidence cannot be excused as a strategic decision unless it is supported by reasonable investigations.<sup>70</sup>

---

63. ER, *supra* note 5, at 505-06.

64. *Id.* at 353.

65. *Id.* at 477.

66. *Cf.* *Turner v. Calderon*, 281 F.3d 851, 896-97 (9th Cir. 2002) (granting evidentiary hearing when counsel failed to develop and introduce mitigation evidence at penalty phase trial).

67. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (recognizing a constitutional "obligation to conduct a thorough investigation of the defendant's background").

68. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

69. *Douglas v. Woodford*, 316 F.3d 1079, 1088 (9th Cir. 2003) (quoting *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1998)).

70. *Id.*

Correll's attorney acknowledged that following Correll's conviction he did virtually no additional investigation.<sup>71</sup> Moreover, the mitigation evidence sought by counsel during preparation for the guilt phase of the trial suffered from a severely misguided focus. Indicating his significant misunderstanding of mitigation, the limited attention that Correll's attorney paid to the development of a mitigation defense focused exclusively on discovering evidence suggesting that Correll was a good person and one who had done good deeds.<sup>72</sup> Given the limited nature and misguided focus of counsel's mitigation investigation, the decision not to present mitigation evidence cannot be characterized as having been preceded by a "diligent investigation into [the] client's troubling background and unique personal circumstances."<sup>73</sup>

The district court acknowledged that counsel failed to adequately investigate the potentially available mitigation evidence in this case, but excused the failure on account of counsel's articulated strategy.<sup>74</sup> The district court concluded that counsel's decision not to investigate potentially mitigating evidence was consistent with his general mitigation strategy, which focused on not opening the door to damaging rebuttal evidence from the prosecution.<sup>75</sup> In counsel's view, it was a waste of time to investigate and develop the available mitigation evidence regarding Correll's past in light of the damaging rebuttal evidence he knew existed.<sup>76</sup> Under the Sixth Amendment, a failure by counsel to conduct diligent mitigation investigations can only be ex-

---

71. *E.g.*, ER, *supra* note 5, at 446-47. Counsel testified that he only saw his client "definitely one time that I can recall, but I think two or three times." *Id.* at 446. He also testified that he could not recall that his investigator performed any additional work, nor did counsel file a motion to assess the defendant's mental condition prior to sentencing. *Id.* at 446-47.

72. *E.g.*, *id.* at 481 (counsel explained his sentencing strategy, "[b]asically it was just hoping that Judge Howe liked Mr. Correll"). The most effective form of mitigation evidence, which Correll's counsel completely ignored, is that which portrays the defendant as "a person whose moral sense was warped by abuse, drugs, [and] mental incapacity." *Allen v. Woodford*, 395 F.3d 979, 1007 (9th Cir. 2004). Similarly, in *Karis v. Calderon*, 283 F.3d 1117, 1135 (9th Cir. 2002), the court recognized that it is not the positive aspects, such as good deeds, of the defendant's life and character that will move a sentencer to spare the defendant's life.

73. *Williams v. Taylor*, 529 U.S. 362, 415 (2000) (O'Connor, J., concurring).

74. ER, *supra* note 5, at 1016.

75. *Id.*

76. The record confirms that there was significant rebuttal evidence that may have been presented by the prosecution had counsel opted to present certain mitigating evidence. *See id.* at 981 n.15. For example, there is evidence in the record that Correll had engaged in an incestuous relationship with his younger sister. *Id.* at 1058. The district court placed significant emphasis on the existence of such rebuttal evidence. *Id.* at 1016. However, it is worth noting that although there was significant rebuttal evidence available, there is no indication that the government was aware of this evidence, much less prepared to present it at the sentencing hearing.

cused by “a reasonable decision that makes particular investigations unnecessary.”<sup>77</sup> In other words, though otherwise deficient representation will not give rise to a claim of ineffective assistance of counsel where the attorney’s decisions were consistent with a reasonable strategy, it is a bit circular to suggest that an unreasonable investigation, one that is less than diligent, could give rise to a reasonable strategy.<sup>78</sup> The appropriate inquiry, therefore, requires the court to assess the reasonableness of counsel’s strategy in light of the totality of counsel’s limited investigation and the scope of the rebuttal evidence available to the prosecution.

The question of whether the rebuttal evidence was, as the district court characterized it, so “overwhelming” as to justify counsel’s failure to investigate and present mitigation evidence presents a fairly close question of law as to whether *Strickland*’s prejudice prong is satisfied in this case.<sup>79</sup> Nonetheless, the first prong of *Strickland*, whether Correll received representation consistent with the prevailing norms of the legal profession, requires the court to engage in a constitutional inquiry regarding the adequacy of the strategy and investigation, regardless of whether it was a counsel-made strategy. In short, certain ethical responsibilities—for example, the duty to investigate and present mitigation—take an ethical and constitutional front seat to concerns as to whether the allocation of decision-making authority was traditional or client-centered.

In this case, even if counsel’s investigation had been reasonable, the failure to present mitigation cannot be characterized as a strategic decision deserving of deference. Correll’s attorney articulated his fear of rebuttal evidence as the basis for his strategy to forego mitigation,<sup>80</sup> however, Correll was sentenced in Arizona.<sup>81</sup> Under Arizona law, if any aggravating factors were proven, a death sentence was mandatory unless mitigating evidence that was “sufficiently substantial to call for leniency” was presented.<sup>82</sup> Despite the abundance of available classic

---

77. *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

78. See *Seidel v. Merkle*, 146 F.3d 750, 756 (9th Cir. 1998) (recognizing counsel’s performance as constitutionally deficient when he “failed to conduct even the minimal investigation that would have enabled him to come to an informed decision” (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994))); see also *Rompilla v. Beard*, 125 S. Ct. 2456, 2462 (2005).

79. ER, *supra* note 5, at 1016.

80. *Id.* at 983.

81. See *Correll I*, 137 F.3d 1404, 1408, 1418 (9th Cir. 1998).

82. ARIZ. REV. STAT. ANN. § 13-703(E) (2005); see also *Walton v. Arizona*, 497 U.S. 639, 652 (1990) (recognizing that § 13-703 is not “impermissibly ‘mandatory’” insofar as it

mitigation evidence concerning family history, abuse, physical impairments, and mental disorders, Correll's attorney failed to present any mitigating evidence.<sup>83</sup> Counsel's representation, which virtually assured his client a sentence of death, cannot be characterized as a reasonable strategic choice.<sup>84</sup>

Accordingly, in reviewing a trial decision that is the product of a lawyer-centered model of decision-making authority, courts are prohibited by the Constitution from affording such a decision normative force. Lawyer-centered tactics are entitled to substantial deference, but where the attorney's approach to the case is not reasonable under the totality of the circumstances or applicable law, a claim for ineffective assistance of counsel exists.<sup>85</sup> The general justifications in support of a lawyer-centered model of representation do not, in other words, say anything about the reasonableness, and therefore constitutionality, of a particular strategy.

#### V. CLIENT-CENTERED REPRESENTATION: THE IDEAL OF CLIENT-AUTONOMY, IF INTERPRETED TOO BROADLY, MAY CONFLICT WITH A CLIENT'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Central to the debate about the appropriate allocation of decision-making authority is a call for an acknowledgement of the client's dignity interest.<sup>86</sup> One of the first vocal advocates for a more client-centered allocation of the decision-making authority was Justice Brennan.<sup>87</sup> In Justice Brennan's view, "[t]he right to defend is personal,"<sup>88</sup> and, therefore, ethical representation requires that the defendant retain "ultimate authority" over all important decisions regarding his case and not simply the "most basic structure" of his case.<sup>89</sup> In other words, Brennan acknowledged that in most cases it would be wise for the defendant to defer to counsel's judgment, but points out that the Constitution "does not require clients to be wise, and *other* policies should be weighed in the balance as well."<sup>90</sup>

---

permits the sentencer to consider any type of mitigating evidence), *overruled on other grounds* by *Ring v. Arizona*, 536 U.S. 584 (2002).

83. See, e.g., ER, *supra* note 5, at 482-91.

84. See *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

85. See *supra* text accompanying notes 66-70.

86. Strauss, *supra* note 2, at 315-17.

87. *Jones v. Barnes*, 463 U.S. 745, 758-59 (1983) (Brennan, J., dissenting).

88. *Id.* at 758 (quoting *Faretta v. California*, 422 U.S. 806 (1975)).

89. *Id.* at 758-59.

90. *Id.* at 761 (emphasis added).

The function of the client-centered movement is overtly moral; its interest in “maximiz[ing] client autonomy”<sup>91</sup> is born out of a perceived need to avoid leaving defendants “to believe that the law contrives against [them].”<sup>92</sup> Commentators had begun to realize that “the legal aid system (like the welfare system, the public housing system and other government-funded social services that preceded it) may be supporting the very inequalities that brought a federally financed legal aid program into being.”<sup>93</sup> The traditional, lawyer-centered model’s denigration of the client’s autonomy was, in other words, identified as “one of the many indignities visited upon someone who has the ill fortune to run afoul of the criminal justice system.”<sup>94</sup> Consistent with this view, scholars suggested that the traditional allocation of authority works such an indignity upon the client as, quite often, to render effective representation virtually impossible.<sup>95</sup>

In sum, under the client-centered model of representation, counsel has an ethical obligation to allow the client to make “all fundamental decisions that are likely to have a substantial” effect on the case.<sup>96</sup> That is to say, the client’s “choices should be respected unless they would require [the] lawyers to violate their consciences, the law, or their duties to the court.”<sup>97</sup>

Given the ethical thrust of the client-centered approach, there is a sort of intuitive appeal to the idea that a client who unequivocally expresses his wishes cannot later complain that representation consistent with his wishes amounted to ineffective assistance of counsel. The decision of whether or not to present mitigation evidence at one’s capital sentencing hearing is unquestionably a fundamental decision, and prosecutors have eagerly pointed out the autonomy issues at stake

---

91. Uphoff & Wood, *supra* note 36, at 8.

92. *Barnes*, 463 U.S. at 762 (Brennan, J., dissenting) (alteration in original) (quoting *Faretta*, 422 U.S. at 834 (1975)).

93. Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, NLADA BRIEFCASE, Oct. 1976, 106, 108. Bellow, a pioneer of the idea of clinical legal education and of client-centered representation, recognized that differences in education, disposition, and socio-economic class make the lawyer-client relationship inherently tenuous. *See generally id.*

94. *Barnes*, 463 U.S. at 764 (Brennan, J., dissenting); *see also id.* (“I cannot accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime.”). Justice Brennan, for example, predicates his support for client-centered representation on the view that counsel’s most important function “is to protect the dignity and autonomy of a person on trial.” *Id.* at 759.

95. *See, e.g.,* Strauss, *supra* note 2, at 340.

96. Uphoff & Wood, *supra* note 36, at 8.

97. *Barnes*, 463 U.S. at 764 (Brennan, J., dissenting).

in failing to bind a defendant to his express directives.<sup>98</sup> But the dignity interests inherent in the client-centered model of representation are absent from the superficial version of the model advanced by prosecutors, who argue that a client's directive relieves counsel from the duties to investigate and consult. Although a client may suggest a particular course of action, such as foregoing mitigation, certain duties of the lawyer are "virtually absolute," as the Court concluded in *Summerlin II*.<sup>99</sup> Thus, unreasonable deference to the requests of the client is incompatible with the Sixth Amendment's representational guarantees. Counsel's failure to adhere to these absolutes, whether the product of "overbroad acquiescence" to client demands or an otherwise unreasonable strategy, gives rise to a claim for constitutionally ineffective counsel.<sup>100</sup> Accordingly, the prosecutors' urging of a sort of absolute autonomy is inconsistent with a true respect for the dignity and autonomy of defendants and is, therefore, also inconsistent with one's right to effective assistance of counsel.

#### A. *Summerlin: Counsel Defers to the Client's Express Wishes*

The circumstances surrounding Warren Summerlin's conviction have been aptly characterized as stranger than legal fiction.<sup>101</sup> Although a Supreme Court reversal of a Ninth Circuit grant of habeas corpus relief in a capital case is becoming less and less newsworthy, the Supreme Court's reversal of the Ninth Circuit's en banc opinion in this case truly is "unthinkable in a society that considers itself both decent and rational."<sup>102</sup> Not only was Summerlin sentenced to death

---

98. See, e.g., Appellee's Brief at 22-23, *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002) (No. 99-99009), 2000 WL 33981109 (arguing that counsel was not engaging in "state assisted suicide," but rather, respecting his client's wishes when he simply limited his investigation to the "narrow walls [Silva] had imposed"); see also *id.* at 25 (indicating that given his instructions to counsel, "Silva may not now fault his counsel for constitutionally inadequate investigation" (citing *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985))). "When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made." *Mitchell*, 762 F.2d at 889.

99. *Summerlin II*, 427 F.3d 623, 638 (9th Cir. 2005) (quoting *Silva*, 279 F.3d at 840).

100. *Silva*, 279 F.3d at 846.

101. *Summerlin v. Stewart (Summerlin I)*, 341 F.3d 1082, 1084 (9th Cir. 2003) (en banc) ("truth is often stranger than fiction because fiction has to make sense" (quoting Mark Twain)).

102. *Id.* at 1122 (Reinhardt, J., concurring).

[E]xecuting people because their cases came too early—because their appeals ended before the Supreme Court belatedly came to the realization that it had made a grievous constitutional error in its interpretation of death penalty law, that it had erred when it failed to recognize that the United States Constitution prohibits judges, rather than jurors, from making critical factual decisions regarding life and death in capital cases—is surely arbitrariness that surpasses all bounds.



under a judge-centered system of sentencing that has since been deemed unconstitutional,<sup>103</sup> but the case involved “an anonymous psychic tip, a romantic encounter [between the public defender and the prosecutor] that jeopardized a plea agreement, an allegedly incompetent defense, and a death sentence imposed by a purportedly drug-addled judge.”<sup>104</sup>

For purposes of considering the interplay between the ethical concerns of client autonomy and the constitutional dictates of the Sixth Amendment, this Article reviews the most recent Ninth Circuit en banc opinion in *Summerlin II*.<sup>105</sup> On remand from the Supreme Court, the en banc court of the Ninth Circuit considered, again, whether Summerlin was eligible for post-conviction relief, this time on account of having “received ineffective assistance of counsel during the sentencing phase of his capital trial in violation of his rights under the Sixth Amendment.”<sup>106</sup>

Summerlin’s ineffective assistance claim turned on the significance of the requests he made to his attorney during the sentencing phase of his trial. Based on the facts of this case, the court correctly concluded that Summerlin’s directives to his attorney were not truly autonomous, and therefore the representation he received was constitutionally deficient.<sup>107</sup> Although the *Summerlin II* decision does not go as far as it should toward discrediting the notion that representation consistent with a client’s uninformed wishes is immune from Sixth Amendment review, the opinion lays a critical foundation for distin-

---

*Id.*

103. See *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002).

104. *Summerlin I*, 341 F.3d at 1084.

105. The case has a truly tortured history. In 1983, the Arizona Supreme Court denied Summerlin’s habeas corpus petition. *State v. Summerlin*, 675 P.2d 686 (Ariz. 1983). In 2001, a divided federal appellate court affirmed in part and reversed in part the federal district court’s denial of Summerlin’s habeas corpus petition. *Summerlin v. Stewart*, 267 F.3d 926 (9th Cir. 2001) (remanding for an evidentiary hearing as to whether the state trial judge was competent when he deliberated on whether to impose the death penalty). Then, before the mandate issued on the appeal, the Supreme Court decided *Ring*, 536 U.S. 584 (holding that the Sixth Amendment right to trial by jury applied to a finding of aggravated circumstances in death penalty sentencing). The Ninth Circuit, sitting en banc, “upheld Summerlin’s conviction, but . . . held that *Ring* applied retroactively so as to require that the penalty of death imposed upon Summerlin be vacated.” *Summerlin II*, 427 F.3d 623, 628 (9th Cir. 2005). The Supreme Court partially granted Summerlin’s writ of certiorari and reversed *Summerlin I*, holding that *Ring* did not apply retroactively. *Schiro v. Summerlin*, 542 U.S. 348, 358 (2004).

106. *Summerlin II*, 427 F.3d at 628. The Ninth Circuit did not reach any other issues raised because it reversed the district court on the issue of ineffective assistance of counsel. *Id.* at 643-44.

107. See *id.* at 638-40.

guishing uninformed instructions from true autonomy. The opinion also recognized that deference to a client's wishes does not, without more, render representation immune from constitutional scrutiny.<sup>108</sup>

"Summerlin's attorney did not present any mitigating evidence during the" capital sentencing hearing of Summerlin's trial.<sup>109</sup> At one point, Summerlin's attorney attempted to call a psychiatrist to the stand to testify about Summerlin's mental disorders, but "before the witness could be sworn in, Summerlin interrupted" and told his attorney not to present the witness.<sup>110</sup> Following Summerlin's interruption, "[c]ounsel requested a five-minute recess."<sup>111</sup> Immediately after the recess, counsel informed the court that "[w]ith the consent of the Defendant, the Defendant has no witnesses in mitigation at this time and . . . we'll rest."<sup>112</sup> Counsel concluded by noting that Summerlin would rest his case in mitigation on the pre-sentence report.<sup>113</sup>

In stark contrast to the decision not to present mitigation evidence in Correll's case, counsel's decision not to present available mitigating evidence in Summerlin's case was, to some extent, a result of Summerlin's express wishes.<sup>114</sup> As discussed below, Summerlin may not have understood exactly what his request entailed,<sup>115</sup> but it is undisputed that Summerlin objected to his counsel's attempt to present cer-

---

108. Because the court understood the factual context of the case as providing an independent basis for rejecting the government's claim that Summerlin's waiver of mitigation evidence deprived him of the right to complain on appeal that he received ineffective assistance of counsel, the opinion appears at times to leave the door open for the government to assert that a complete waiver of mitigation, whether informed or not, could satisfy the Sixth Amendment. *See id.* at 637 ("there is no record of [exactly] what Summerlin said, much less that he instructed his attorney not to present *any* penalty phase defense whatsoever") (emphasis added). However, the court's ultimate holding is unequivocal. "[E]ven if Summerlin had instructed counsel not to present a mitigation defense, that fact would have no effect on the deficient conduct prong of *Strickland*." *Id.* at 638.

109. *Id.* at 634.

110. *Id.*

111. *Id.*

112. *Id.* (alteration in original) (quoting the trial transcript).

113. *Id.* at 635.

114. *Compare Correll I*, 137 F.3d 1404, 1410, 1412 (9th Cir. 1998) (where counsel's strategy included only a five minute meeting with his client between the jury verdict and the pre-sentencing hearing and the presentation of only a single page of mitigating circumstances in preparation for the hearing), *with Summerlin II*, 427 F.3d at 637 (where the attorney's attempt to put on mitigation evidence was thwarted by his client's directives not to call any mitigation witnesses).

115. For example, Summerlin almost certainly was not aware of "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyd v. California*, 494 U.S. 370, 382 (1990) (emphasis omitted) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)).

tain mitigation evidence on his behalf.<sup>116</sup> In light of the sentencing judge's technical description of the purpose of the hearing, Summerlin's waiver of mitigation can fairly be characterized as express and unequivocal.<sup>117</sup>

The practical effect of adhering to Summerlin's request was, of course, to leave the sentencing judge with *no* affirmative mitigation evidence and no evidence to rebut the aggravating factors presented by the State. Similar to Correll, Summerlin was sentenced in Arizona,<sup>118</sup> where the death penalty is mandatory when the defendant has a qualifying prior conviction and substantial mitigating evidence is not presented to the sentencer.<sup>119</sup> In Summerlin's case, the State presented evidence of Summerlin's prior conviction.<sup>120</sup> Accordingly, counsel's decision to forego mitigation evidence, whether the product of his own strategy or that of Summerlin, made a sentence of death all but certain.<sup>121</sup>

### *B. Uninformed Decisions Are Not Consistent with the Autonomy of the Client-Centered Model and Are Not Entitled to Constitutional Deference*

Although presaged by dicta in recent Supreme Court cases,<sup>122</sup> the *Summerlin II* court's rejection of the argument that uninformed client requests can trump the most basic guarantees of the Sixth Amendment serves as a new, valuable model for commentators and courts across the country grappling with the parameters of the Sixth Amendment's

116. See *Summerlin II*, 427 F.3d at 634-37.

117. Not only did Summerlin oppose his counsel's decision to present a particular mitigation witness, when the sentencing judge asked him whether he wished to "present any mitigation witnesses" (or evidence), Summerlin seems to have confirmed that he did not. *Id.* at 637. The judge, addressing Summerlin directly, stated,

[I want] to make sure that . . . you understand that you are facing a potential decision between either life imprisonment or the death penalty, and this is the time in which you must decide whether you present any mitigation witnesses on your behalf.

This is your entitlement. Your lawyer has told me that at this time you do not wish to, and he is telling me that you do not wish to call any mitigation witnesses. If this is correct I'll accept your decision. But I want it to be very clear that this is the time, and only time, that you'll be able to have to do this.

*Id.* (quoting the trial transcript).

118. *Id.* at 627.

119. ARIZ. REV. STAT. ANN. § 13-703(E) (2005); see also *Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988) (recognizing that under Arizona law, once a qualifying prior conviction is shown a death sentence is "inevitable" in the absence of mitigating evidence).

120. *Summerlin II*, 427 F.3d at 634.

121. *Id.* at 640.

122. See, e.g., *Rompilla v. Beard*, 125 S. Ct. 2456 (2005).

protections in the face of a renewed ethical interest in respecting client autonomy. An uninformed directive by the client requesting his attorney to forego mitigation is not, in most cases, a true exercise of free will. The court in *Summerlin II* was correct to conclude that an attorney who has failed to investigate and develop mitigation and consult and educate his client is not insulated from Sixth Amendment scrutiny, even in the face of an unequivocal client directive. After *Summerlin II*, the hallmark for reviewing a client directive is whether the client had the benefit of diligent investigation, adequate information, and dutiful consultation before making the crucial decision. The court's refusal to foreclose constitutional claims where these elements are missing<sup>123</sup> will have important repercussions for lawyers who seek to avoid blame for their deficient performance and judges who seek to enforce death sentences under the guise of respecting client-driven decisions.

The implicit holding in *Summerlin II* is a recognition that a lawyer who adheres to his client's uninformed or unknowing decision, at least in the context of a capital trial, is facilitating deficient representation, not client autonomy.<sup>124</sup> Autonomy in the absence of information and consultation suffers upon the defendant indignities at least as severe as those associated with the traditional, lawyer-centered model of representation and is entitled to no greater deference than that traditionally afforded to counsel under *Strickland*.

The holding in *Summerlin II*, while of profound importance to the emerging body of Sixth Amendment case law reviewing client decisions, is a logical extension of Supreme Court jurisprudence. The Supreme Court has repeatedly "declined to articulate specific guidelines for appropriate attorney conduct,"<sup>125</sup> but, at least in the context of capital sentencing hearings, the Court's "reasonableness" analysis is increasingly willing to recognize certain "norms" of adequate representation.<sup>126</sup> In *Rompilla v. Beard*, for example,<sup>126</sup> the Supreme Court suggested that the "reasonableness under prevailing professional norms"<sup>127</sup> standard in *Strickland* may give rise to a "few hard-edged rules."<sup>128</sup> Specifically, Justice Souter, writing for a majority of the Court, recognized normative constitutional force in the duty to con-

---

123. See *Summerlin II*, 427 F.3d at 639-40.

124. *Id.* at 638-39.

125. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

126. *Rompilla*, 125 S. Ct. at 2462.

127. *Strickland*, 466 U.S. at 688.

128. *Rompilla*, 125 S. Ct. at 2462.

duct “adequate investigation.”<sup>129</sup> Though the Court recognized that a fairly limited investigation may be appropriate in certain cases, the Court held that the duty to investigate and review the material counsel knows the prosecution is relying on in support of its case in aggravation is so fundamental that the failure to do so by counsel, even when the defendant was “actively obstructive,” constitutes deficient performance.<sup>130</sup>

Taking this one significant step further, the court in *Summerlin II* recognized not just a duty on the part of counsel to review the material that the prosecution will rely on as evidence of aggravation, but a duty to investigate and, in most cases, present available “classic mitigation evidence.”<sup>131</sup> The court in *Summerlin II* concluded that, at the very least, counsel must provide his client with the opportunity to make a fully informed and intelligent decision about the presentation of mitigating evidence.<sup>132</sup> This requires thoroughly investigating and developing the available classic mitigation evidence and educating the client about the function of mitigating evidence at a capital sentencing hearing.<sup>133</sup> This dramatically refines the concept of respecting client directives, one that forecloses attempts to bind the client to a superficial exercise of autonomy. And while the court had extremely favorable facts in *Summerlin II*, which allowed it to carve out a rather narrow holding, the thrust of the court’s analysis and the implication for criminal attorneys is obvious: a trial strategy based on an “overbroad acquiescence” to the uninformed decisions of a client can give rise to constitutionally ineffective assistance of counsel.<sup>134</sup> In this case, counsel’s decision to forego mitigation was not insulated from constitutional review because counsel failed to adhere to certain minimum

---

129. *Id.*

130. *Id.* at 2462, 2464, 2467 (“Rompilla was even actively obstructive by sending counsel off on false leads.”).

131. *Summerlin II*, 427 F.3d 623, 634–35. (9th Cir. 2005) The *Summerlin II* court noted that “there was an abundance of available classic mitigation evidence concerning family history, abuse, physical impairments, and mental disorders.” *Id.* at 635.

132. *Id.* at 638 (emphasizing that in capital cases counsel has a “duty to render ‘extraordinary efforts’” (quoting STANDARDS FOR CRIMINAL JUSTICE 4-1.2(c) (2d ed. 1980))); see also *Silva v. Woodford*, 279 F.3d 825, 847 (9th Cir. 2002) (recognizing a duty on the part of counsel to try to persuade defendant to present mitigating evidence).

133. *Summerlin II*, 427 F.3d at 638.

134. The Court had previously recognized the problem of “overbroad acquiescence” in a three-judge panel opinion, *Silva*, 279 F.3d at 846. *Summerlin II* is the first en banc decision of the Ninth Circuit, and all other circuits, recognizing that deference to client directives can constitute constitutionally deficient representation. Clarifying the holding from another three-judge opinion, *Jeffries v. Blodgett*, 5 F.3d 1180, 1198 (9th Cir. 1993), *Summerlin II* holds that only where the defendant’s autonomous decisions as to trial strategy are “informed and knowing,” will the representation be immune from habeas review. *Summerlin II*, 427 F.3d at 638.

duties that ensure that the lawyer-client relationship is characterized by reasonableness.

The first of counsel's constitutional errors is so fundamental that virtually no failing trial strategy could be excused; the record in *Summerlin II* leaves no doubt that counsel failed to investigate potential mitigating evidence. "He conducted no investigation of Summerlin's family and social history. . . . His development of a mental health defense was based solely on the limited information developed at Summerlin's pre-trial competency examination . . . ."<sup>135</sup> This failure is particularly troubling where there existed a wealth of available classic mitigation evidence. Had counsel conducted a reasonable investigation, he would have discovered mitigation evidence concerning family history, abuse, physical impairments, and mental disorders.<sup>136</sup> Neither the district court that denied Summerlin's habeas petition, nor the government lawyers who opposed the Ninth Circuit's decision to grant habeas relief, contended that counsel's failure to investigate or consult his client was supported by a strategic reason.<sup>137</sup> Rather, in opposing Summerlin's request for relief, the government generally focused on the fact that Summerlin himself expressly opposed his attorney's attempts to offer what little mitigation evidence he was prepared to present.<sup>138</sup> Counsel's failure to investigate deprived Summerlin of the opportunity to assess his options and make an informed decision about whether or not to avoid a death sentence by presenting the abundance of available classic mitigation evidence.

Another principal duty that counsel cannot "strategically" forego simply because the client, and even his family, opposes a case in mitigation is the duty to review the evidence counsel knows the State will produce to support its case in aggravation.<sup>139</sup> In Summerlin's case, counsel was aware of the fact that the State planned to call two psychiatrists during the sentencing phase but "did not contact or interview either of them."<sup>140</sup> A failure by counsel to investigate evidence that counsel knows the State will use is "an obvious" sign that the repre-

---

135. *Summerlin II*, 427 F.3d at 631.

136. *Id.*

137. *See generally id.*

138. *Id.* at 636.

139. *Rompilla v. Beard*, 125 S. Ct. 2456, 2465-66 (2005).

140. *Summerlin II*, 427 F.3d at 632.

sentation was deficient,<sup>141</sup> because such a failure deprives the client of a meaningful opportunity to exercise his autonomy.<sup>142</sup>

An additional consideration which suggested that Summerlin's decision to forego mitigation was not the product of a dignified autonomous relationship is the absence of adequate consultation between Summerlin and his attorney.<sup>143</sup> During the month between the trial and the sentencing phase, "Summerlin's attorney never once met with his client."<sup>144</sup> The failure of Summerlin's counsel to "commit[] to a counseling process"<sup>145</sup> effectively deprived Summerlin of the opportunity to make an informed and knowing decision as to whether he wished to present mitigating evidence. Without consultation or complete information, Summerlin's decision to forego mitigation, no matter how broadly he stated it,<sup>146</sup> cannot fairly be characterized as an autonomous act deserving deviation from the normal requirements imposed on counsel by the Sixth Amendment.

Under the guise of respecting the free will and autonomy of criminal defendants, the State argued that counsel's representational failures are of no consequence in light of Summerlin's directives. In the State's view, counsel's failure to investigate, to consult with Summerlin, and to present mitigation evidence are not "relevant because Summerlin requested that mitigating evidence not be presented in his defense."<sup>147</sup> However, the very failures that render counsel's performance constitutionally deficient in this case render Summerlin's request that mitigation evidence not be presented uninformed and therefore ineffectual.<sup>148</sup> In circumstances such as these, counsel's fail-

141. *Rompilla*, 125 S. Ct. at 2464.

142. Uphoff & Wood, *supra* note 36, at 8-10 (recognizing that true autonomy requires the attorney to gather all "meaningful information so as to empower" the client to make decisions through an informed "counseling process").

143. *See, e.g.*, *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983).

144. *Summerlin II*, 427 F.3d at 633.

145. Uphoff & Wood, *supra* note 36, at 8.

146. As noted previously, *supra* note 108, because there is no record that Summerlin explicitly instructed his attorney not to present any penalty phase defense whatsoever, the court relies in part on Summerlin's spontaneous reaction, which cannot constitute an unequivocal direction not to conduct any penalty phase defense. *Summerlin II*, 427 F.3d at 637. However, following the judge's colloquy with Summerlin, the record leaves little doubt that, while unknowing and uninformed, Summerlin unequivocally chose to waive mitigation. *Id.*

147. *Summerlin II*, 427 F.3d at 636.

148. The *Summerlin II* court also makes a very astute observation with regards to the due process concerns that are at issue when a capital defendant expresses his desire to forego mitigation.

If a client has elected to forego legal proceedings that could avert the imposition of the death penalty, then a court must make [a] determination "whether he has capacity to appreciate his position and make a rational choice with respect to con-

ure to present any mitigation or other rebuttal evidence cannot be characterized as a reasoned tactic on the basis of the prosecution's cartoonish sketch of client autonomy.<sup>149</sup>

The *Summerlin II* decision enshrined the view that, consistent with respect for true autonomy, a lawyer must ensure that a client's decision to forego mitigation is "informed and knowing."<sup>150</sup> The absence of adequate investigation or consultation regarding mitigation absolutely deprives the client of the ability to make an educated decision and renders counsel's representation constitutionally inadequate.<sup>151</sup> To the delight of the client-centered movement, which had suffered from a distortion to the concept of autonomy, and to the benefit of criminal defendants, the court in *Summerlin II* recognized representation as constitutionally deficient when an attorney follows a client's advice to forego presenting mitigation evidence without making "a serious attempt to educate [the client] about the consequences of [the] decision."<sup>152</sup>

The propriety of refining and safeguarding client autonomy was of particular importance in *Summerlin II*. Under applicable Arizona law, Summerlin's decision to forego presenting mitigation evidence mandated a death sentence.<sup>153</sup> Although counsel knew the prosecution planned to present the court with aggravating factors, counsel failed to investigate available mitigation and rebuttal evidence. Without the benefit of investigation typically required under the Sixth Amendment, and in the absence of any meaningful effort by counsel to inform Summerlin about the consequences of his action, it was impossible for Summerlin to make an "'informed and knowing' decision not

---

tinuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."

*Id.* at 639 (quoting *Rees v. Peyton*, 384 U.S. 312, 314 (1966)).

149. See *Williams v. Woodford*, 384 F.3d 567, 622 (9th Cir. 2002) ("A defendant's insistence that counsel not call witnesses at the penalty phase does not eliminate counsel's duty to investigate mitigating evidence or to advise the defendant of the potential consequences of failing to introduce mitigating evidence, thereby assuring that the defendant's decision regarding such evidence is informed and knowing." (citing *Silva v. Woodford*, 279 F.3d 825, 838 (9th Cir. 2002))).

150. *Summerlin II*, 427 F.3d at 639 (quoting *Silva*, 279 F.3d at 840).

151. See *Silva*, 279 F.3d at 838.

152. *Id.* at 841; see also *Summerlin II*, 427 F.3d at 639 (concluding that "even when faced with client directives limiting the scope of [the] defense, an attorney 'must conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client'" (quoting *Silva*, 279 F.3d at 846)).

153. "[T]he failure to present a mitigation defense all but assured the imposition of a death sentence under Arizona law." *Summerlin II*, 427 F.3d at 640.



to put on any mitigating evidence.”<sup>154</sup> Accordingly, arguments that a defendant waives his right to raise a claim of ineffective assistance of counsel by expressing his uninformed and ill-advised decision not to present mitigation evidence, such as those made by the State in this case, should be viewed as effectively foreclosed.

*Summerlin II* serves as an important reminder that respecting a defendant’s autonomy requires more than blind deference to the individual’s wishes. Philosophers have generally defined the desirability of autonomy in terms of the ability to make decisions in such a way as to be free from manipulative and distorting forces.<sup>155</sup> But there can be little doubt that a defendant who has just endured a capital trial and a guilty conviction is, without meaningful investigation and consultation by counsel, immersed in a body of manipulative and distorting forces which deprive many of the client’s choices of their autonomous character. It is important to acknowledge that the inherent dignity of the client requires courts to avoid the temptation to equate autonomy with the uninformed decision of an indigent client. To do otherwise would relegate autonomy to the status of a convenient escape hatch through which otherwise deficient representation is immunized from review.

## VI. CONCLUSION

An unchecked lawyer-centered strategy threatens to divest from defendants their traditional constitutional protection against objectively unreasonable strategies. Likewise, insulating from constitutional review representation that accords with client directives denies a reviewing court the opportunity to ascertain whether the decision was the product of a reasoned and consultative process—truly autonomous. Neither a lawyer’s strategy nor a client’s directives are entitled to such deference under the Sixth Amendment.

Certain trial decisions, whether made at the urging of the client or the impetus of the lawyer, will not satisfy the Sixth Amendment. It is important for courts to carry on the tradition of *Summerlin II* and recognize that certain fundamental constitutional mandates trump generic

---

154. *Silva*, 279 F.3d at 846 n.16 (quoting *Jeffries v. Blodgett*, 5 F.3d 1180, 1197 (9th Cir. 1993)). A client’s informed decision to forego mitigation over the objections of an attorney who was prepared to present such evidence does not support a claim of ineffective assistance of counsel. *Jeffries*, 5 F.3d at 1198.

155. See, e.g., Gerald Dworkin, *Autonomy and Behavior Control*, HASTINGS CENTER REPORT, Feb. 1976, at 23. Dworkin recognizes a lack of personal autonomy wherever one has “been influenced in decisive ways by others in such a fashion that we are not prepared to think of it as his own choice.” *Id.* at 25.

considerations of strategy or autonomy. This is not to suggest that client autonomy is not of paramount importance. But deferring to *autonomy* exercised without critical information, just like deferring to a *strategy* developed without investigation, results in a cursory, if not nefarious, review of a defendant's bedrock rights under the Sixth Amendment.

The presentation of mitigation evidence at a capital sentencing hearing is a matter of life or death. For this reason, courts generally agree that in the absence of reasonable *tactical* considerations, "[t]he failure to present mitigating evidence during the penalty phase of a capital case . . . constitutes deficient performance."<sup>156</sup> This Article discussed two scenarios where, in defense of the trial lawyer's representation, the State argued that constitutionally defensible justifications existed for counsel's failure to present mitigating evidence. On the one hand, counsel's decision in *Correll II* to forego mitigation is defended insofar as deference is owed to the independent strategic determinations of counsel. On the other hand, Summerlin's counsel's failure to present mitigation is defended on the grounds that Summerlin expressly requested that mitigating evidence not be presented in his defense. Neither scenario, however, presents a viable route for bypassing certain constitutional mandates, such as the duties to investigate and consult.

First, under the traditional, lawyer-centered allocation of decision-making authority, counsel is not excused from using a reasoned strategy when deciding whether to present mitigation evidence. An uninvestigated and, therefore, uninformed strategy is inherently unreasonable.<sup>157</sup> Accordingly, although the lawyer-centered model of representation stresses that the attorney should control the "means" of obtaining the client's stated objectives, this approach to representation "does not relieve an attorney of the duty to investigate potential defenses, consult with the client, and provide advice as to the risks and potential consequences of any fundamental trial decision."<sup>158</sup> In short, the lawyer-centered model of representation does not in and of itself constitute a "prevailing professional norm[]"<sup>159</sup> that could insulate trial counsel's performance from otherwise cognizable Sixth Amendment challenges.

---

156. *Smith v. Stewart*, 189 F.3d 1004, 1008 (9th Cir. 1999).

157. *See Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *see also Strickland v. Washington*, 466 U.S. 668, 690-91 (1984).

158. *Summerlin II*, 427 F.3d 623, 638 (9th Cir. 2005).

159. *Strickland*, 466 U.S. at 688.

Likewise, “overbroad acquiescence” to the client’s demands does not insulate an attorney’s performance from constitutional scrutiny.<sup>160</sup> In the absence of reasonable investigation and consultation, the ideal of client autonomy may conflict with the client’s right to effective assistance of counsel.<sup>161</sup> Only where a defendant’s decision is the product of a reasoned and considered consultation process will a defendant’s decision to limit his mitigation defense be sustained under the Sixth Amendment.<sup>162</sup>

As the two cases discussed in this Article illustrate, whether counsel forgoes mitigation because he thinks it is in the best interest of his client or because it is what the client wants, this decision remains subject to constitutional scrutiny. A lawyer-centered strategy that is not based on a sufficiently thorough investigation and a reasonable view of the law will give rise to a claim of deficient representation. Similarly, the cartoonish vision of the client-centered model presented by state prosecutors, which calls for unchecked deference to a client’s uninformed decisions, constitutes an unconstitutional abdication of the lawyer’s role. *Summerlin II* is an important evolution in the Ninth Circuit’s growing body of case law regarding a lawyer’s decision to forego mitigation. *Summerlin II* rejects notions of client-centered representation that rest on empty conceptions of autonomy and simultaneously confirms that representation consistent with the traditional model of lawyering is not immune from review.

In light of the holding of *Summerlin II*, the concept of client autonomy has achieved a status that is, at once, consistent with the core beliefs of its leading proponents and the basic requirements of the Constitution. In short, *Summerlin II* is not in tension with the true notion of client autonomy advanced by the client-centered model; it is simply a rejection of the false model of autonomy advanced by prosecutors seeking to bind capital defendants to their uninformed and unknowing trial decisions. After *Summerlin II*, counsel’s duty to investigate, consult, and educate is more firmly entrenched than ever, and the importance of true client autonomy is reaffirmed.

---

160. *Silva v. Woodford*, 279 F.3d 825, 846 (9th Cir. 2002).

161. *See supra* Part V.B.

162. *See Summerlin II*, 427 F.3d at 638-39.