

Washington Law Review

Volume 68 | Number 3

7-1-1993

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Recommended Citation

Laura A. Rosenwald, Note, *Death Wish: What Washington Court Should Do When a Capital Defendant Wants to Die*, 68 Wash. L. Rev. 735 (1993).

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DEATH WISH: WHAT WASHINGTON COURTS SHOULD DO WHEN A CAPITAL DEFENDANT WANTS TO DIE

Laura A. Rosenwald

Abstract: The Washington Supreme Court held in *State v. Dodd* that a capital defendant may waive general review of conviction and sentence, and failed to determine whether a defendant may also withhold all mitigating evidence from the sentencing proceeding. The holding limits appellate oversight of death sentences to a degree that fails to ensure Washington's interest in reliable capital punishment. The court should have required general review of both conviction and sentencing in all capital cases. It also should have established a procedure for third-party presentation of mitigating evidence on behalf of capital defendants who insist on withholding such evidence.

In *State v. Dodd*,¹ the Washington Supreme Court for the first time encountered a capital defendant who wanted to die. Westley Allan Dodd confessed to the 1989 rapes and murders of William and Cole Neer, brothers aged ten and eleven, and Lee Iseli, aged four.² Dodd pleaded guilty, was sentenced to death by a jury,³ and waived his appeal rights.⁴

The supreme court held that a capital defendant may waive general review for error of a conviction and sentence,⁵ but that the court was required by the governing statute to review Dodd's sentence to ensure that it was proportional, based on sufficient evidence, and not the result of passion or prejudice.⁶ Although the court failed to decide whether a capital defendant may withhold all mitigating evidence from the sentencing proceeding,⁷ it tacitly conceded that such evidence is indispensable by considering Dodd's mitigating evidence in its statutory review of his sentence.⁸

This Note argues that the *Dodd* court should have required general review for error of a capital conviction and sentence, and should have established a procedure for third-party presentation of mitigating evidence at sentencing when a defendant refuses to offer such evidence. The Note contends that the *Dodd* holding that capital defendants may waive general review compromises the state's interest in reliable capital punishment and sentence review, and results from a flawed analy-

1. 120 Wash. 2d 1, 838 P.2d 86 (1992).

2. *Id.* at 4-6, 838 P.2d at 88-89.

3. *Id.* at 10, 838 P.2d at 90.

4. *Id.*

5. *Id.* at 4, 838 P.2d at 87.

6. *Id.* at 24, 838 P.2d at 97-98.

7. *Id.* at 30-31, 838 P.2d at 101 (Utter, J., dissenting).

8. *Id.* at 24-25, 838 P.2d at 98.

sis. It criticizes the court's failure to establish a procedure to obtain mitigating evidence when a defendant such as Dodd chooses to withhold it.

I. HOW *STATE v. DODD* AROSE

The police arrested Dodd in November 1989, after he tried to kidnap six-year-old James Kirk from a movie theater in Camas, Washington.⁹ Dodd immediately confessed to the murders of three other young boys.¹⁰ Police later found in his apartment a diary in which he had recounted those murders.¹¹

Dodd originally pleaded not guilty to three counts of first degree murder and one count each of attempted murder and kidnapping.¹² He changed his pleas to guilty, however, when the trial judge denied his motions to suppress his confessions and his diary.¹³ A jury was empanelled to determine his sentence.

At the sentencing proceeding, Dodd again moved to exclude his diary.¹⁴ After the judge admitted excerpts, Dodd refused to allow his attorneys to call witnesses to offer mitigating evidence on his behalf.¹⁵ The witnesses would have praised Dodd's performance as a middle school band member, described his parents' feuding and divorce and his physical ineptitude as a boy, and recalled that he once cried in remorse over having molested children.¹⁶

Prosecutors showed the sentencing jury an album with photographs of Iseli before and after his death and of Dodd's bed with the ropes that Dodd used to tie up Iseli.¹⁷ They also read diary excerpts about his crimes and his plans for castration, vivisection, and other torture that Dodd had not performed on his victims.¹⁸ Finally, prosecutors reviewed Dodd's lengthy record of child molestation convictions.¹⁹

9. *Id.* at 5, 838 P.2d at 87.

10. *Id.* at 4-6, 838 P.2d at 88.

11. *Id.* at 6-8, 838 P.2d at 88-89.

12. *Id.* at 8, 838 P.2d at 89.

13. *Id.* at 8-9, 838 P.2d at 89. The trial court accepted Dodd's guilty plea after hearing testimony by a psychiatrist and Dodd's attorney concerning Dodd's competency to plead guilty, and after determining that Dodd's plea was voluntary. *Id.* at 10-13, 838 P.2d at 90-92.

14. *Id.* at 9, 838 P.2d at 89.

15. *Id.*, 838 P.2d at 90. The court appointed a social worker to gather mitigating evidence for Dodd. Brief for Amicus Curiae at Appendix B, *State v. Dodd*, 120 Wash. 2d 1, 838 P.2d 86 (1992) (No. 57414-6).

16. *Dodd*, 120 Wash. 2d at 25, 838 P.2d at 98.

17. Brief for Amicus Curiae at 20-21, *Dodd* (No. 57414-6).

18. *Id.* at 22.

19. *Id.* at 20-23.

After considering the prosecution evidence, the jury sentenced Dodd to death.²⁰

After sentencing, Dodd wrote to the trial court asking for permission to waive his right to appeal. He also requested that the supreme court limit appellate review of his case to the procedures mandated by statute, and forgo general review of his conviction and sentencing.²¹ The trial court referred Dodd's request to the supreme court.²² The supreme court ordered the trial court to hold a fact-finding hearing to determine whether Dodd was competent to waive appeal and whether Dodd's waiver was voluntary.²³ The court also appointed a new attorney to represent Dodd at that hearing, and redesignated Dodd's appellate counsel as *amicus curiae* to argue the waiver issue and any appeals before the supreme court.²⁴

After the fact-finding hearing, the trial court found Dodd competent to waive his appeal rights.²⁵ In a seven-two decision, the supreme court held that a capital defendant may waive general review;²⁶ as a result, the court did not consider the four errors in Dodd's guilt and sentencing proceedings that amici alleged on appeal.²⁷ The court did not allow Dodd to waive statutory sentence review.²⁸ In reviewing Dodd's sentence, the court considered the mitigating evidence that Dodd had withheld from sentencing.²⁹ It affirmed Dodd's sentence.³⁰ In a concurring opinion, one justice objected to the majority's consideration of the mitigating evidence.³¹ Two other justices dissented, arguing on statutory and policy grounds that a capital defendant may not waive general review.³²

20. *Dodd*, 120 Wash. 2d at 10, 838 P.2d at 90.

21. *Id.* at 10, 838 P.2d at 90.

22. Brief for Amicus Curiae at 11, *Dodd* (No. 57414-6).

23. *Dodd*, 120 Wash. 2d at 10, 838 P.2d at 90.

24. *Id.* at 10, 838 P.2d at 90.

25. *Id.* at 12-13, 838 P.2d at 91-92.

26. *Id.* at 4, 838 P.2d at 87.

27. *Id.* at 30-31, 838 P.2d at 101 (Utter, J., dissenting). Amici argued that the trial court erroneously admitted parts of Dodd's diary in the conviction proceeding and erroneously admitted Dodd's confession and other evidence at the sentencing proceeding; amici also argued that the failure of Dodd's counsel to present mitigating evidence at the sentencing proceeding violated the Sixth and Eighth Amendments of the U.S. Constitution. *Id.*

28. *Dodd*, 120 Wash. 2d at 4, 838 P.2d at 87.

29. *Id.* at 25, 838 P.2d at 98.

30. *Id.* at 29, 838 P.2d at 100.

31. *Id.* at 29-30, 838 P.2d at 100 (Anderson, J., concurring).

32. *Id.* at 30-31, 838 P.2d at 101 (Utter, J., dissenting).

II. THE *DODD* COURT ERRONEOUSLY CONCLUDED THAT CAPITAL SENTENCES DO NOT REQUIRE GENERAL REVIEW OF CONVICTION AND SENTENCING

Although the U.S. Constitution does not require general review of all death penalty convictions and sentences, some state courts have found that such review is necessary to ensure the state's interest in reliable capital punishment. The *Dodd* court's holding that a defendant may waive general review of conviction and sentence for error jeopardizes both the reliability of capital punishment in Washington and the competency of the state supreme court's mandatory sentence review. First, the court cannot ensure the state's interest in reliable capital punishment without reviewing the entire record of each case for error. Second, the court cannot competently perform sentence review without first reviewing the conviction and sentencing for error. Finally, the *Dodd* court based its holding on inaccurate statutory interpretation. The court also relied upon an incomplete analysis of authority, and inapposite U.S. Supreme Court holdings.

A. *Review of Capital Sentences*

1. *Washington's Capital Punishment Statute*

Washington's death penalty scheme provides for bifurcated guilt and sentencing proceedings and mandatory supreme court review of all decisions to impose a death sentence. In the guilt phase, the defendant must be convicted of aggravated first degree murder.³³ For such a conviction, the judge or jury must first find the defendant guilty of premeditated first degree murder, and then identify at least one of ten aggravating circumstances enumerated in the statute.³⁴

The focus of the sentencing proceeding is on mitigation. When deciding whether to impose death or life in prison, the jury or judge weighs the aggravating circumstances against any mitigating evidence to determine whether the defendant deserves leniency.³⁵ In this proceeding, the jury or judge may consider only relevant mitigating evi-

33. WASH. REV. CODE § 10.95.030 (1992).

34. *Id.* § 10.95.020.

35. *Id.* § 10.95.060(4). The statute requires the sentencing jury to answer the question, "[A]re you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

dence and rebuttal of such evidence, the defendant's prior criminal activity, and the statutory aggravating circumstances.³⁶

In sentence review, the supreme court must make three determinations: (1) that the evidence considered at sentencing justifies the death sentence, (2) that the sentence is proportional to other Washington death sentences, and (3) that the sentencing court did not impose the sentence through passion or prejudice.³⁷ The court makes these determinations based on the entire trial record.³⁸ A capital defendant may not waive the limited sentence review required by statute.³⁹

2. Constitutional Requirements

Bifurcated proceedings such as Washington's provide the individualized scrutiny of capital defendants that the Eighth Amendment demands.⁴⁰ The Eighth Amendment further requires adequate statutory guidelines to ensure that judges and juries impose the death pen-

36. *Id.* § 10.95.060(3); see also *State v. Bartholomew*, 101 Wash. 2d 631, 683 P.2d 1079 (1984) (restricting aggravating evidence at sentencing to the record of convictions, statutory aggravating circumstances, rebuttal of mitigating evidence, and, if the jury did not convict, the facts and circumstances of the murder).

37. WASH. REV. CODE § 10.95.100 (1992). The statute states: "Whenever a defendant is sentenced to death, upon entry of the judgment and sentence in the trial court the sentence shall be reviewed on the record by the supreme court of Washington." Section 10.95.130 requires the supreme court to answer three questions in sentence review:

(a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4); and (b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant . . . ; and (c) Whether the sentence of death was brought about through passion or prejudice.

38. *Id.* Washington statute requires that the trial court provide the supreme court transcripts of the guilt and sentencing proceedings and the clerk's papers from each capital case. *Id.* § 10.95.110.

39. *State v. Dodd*, 120 Wash. 2d 1, 14-15, 838 P.2d 86, 92-93 (1992).

40. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court held that Georgia's capital punishment statute violated the Eighth Amendment's prohibition on "cruel and unusual punishment" because it allowed juries too much discretion in deciding when to impose death sentences. Four years later, the Court upheld three of the thirty-five state statutes passed in the wake of *Furman*, and struck down two others. The Court upheld statutes in *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976), while striking down statutes in *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976). In *Gregg*, the Court said that bifurcation was likely to cure the deficiencies cited in *Furman* because the sentencer would be able to consider a wider array of mitigating evidence than the trial court could. *Gregg*, 428 U.S. at 192-93. The Court rejected North Carolina's and Louisiana's provision of mandatory death sentences for some crimes on the ground that a sentencer could not consider the characteristics of an individual defendant. *Woodson*, 428 U.S. at 303-04; *Roberts*, 428 U.S. at 331-36.

alty uniformly.⁴¹ States have satisfied this requirement by codifying specific aggravating circumstances and by directing the sentencer to weigh these circumstances against any mitigating evidence before imposing a death sentence.⁴²

The Eighth Amendment does not require appellate review.⁴³ The U.S. Supreme Court has stated that such review safeguards against random or arbitrary imposition of capital punishment.⁴⁴ The Court has not directly addressed whether a capital defendant convicted under a statute with automatic appellate review may waive or limit the scope of that review.⁴⁵

3. *State Statutes and Case Law*

Although the U.S. Constitution does not require appellate review, all but one of the thirty-seven state capital punishment statutes provide for automatic appellate review of conviction, sentence, or both.⁴⁶ Of these thirty-six statutes, only four address a defendant's right to waive appeal or review. One requires supreme court review of both conviction and sentence despite a defendant's failure to appeal.⁴⁷ The other three require sentence review but allow a defendant to waive affirmative appeal and review of conviction.⁴⁸

41. *Gregg*, 428 U.S. at 192-95.

42. *Id.* at 197. The Supreme Court said that statutory enumeration of aggravating circumstances and a requirement that the sentencer consider mitigating evidence provide enough guidance to the judge and jury to satisfy the Eighth Amendment. *See also supra* notes 34-36 and accompanying text.

43. *Pulley v. Harris*, 465 U.S. 37, 54-59 (1984) (Stevens, J., concurring) (noting that in *Gregg*, a plurality rather than a majority stated that appellate review was required, and that neither *Proffitt* nor *Jurek* specifically required appellate review).

44. *Gregg*, 428 U.S. at 206; *see also Proffitt*, 428 U.S. at 250-53.

45. The Court has refused to allow capital defendants to waive certain rights that other criminal defendants may waive, such as presence during trial. *Hopt v. Utah*, 110 U.S. 574, 575-79 (1884).

46. Arkansas is the exception. ARK. CODE ANN. §§ 5-4-601 to -617 (Michie 1991).

47. UTAH CODE ANN. § 26(10) (1992). The statute states: "In capital cases where the sentence of death has been imposed and the defendant has chosen not to pursue his appeal, the case shall be automatically reviewed by the Supreme Court . . ."

48. Missouri's statute states that in addition to sentence review, "there shall be a right of direct appeal of the conviction to the supreme court of Missouri. This right of appeal may be waived by the defendant." MO. ANN. STAT. § 565.035(7) (Vernon Supp. 1992). Nevada's statute provides for automatic appeal of death sentences "unless the defendant or his counsel affirmatively waives the appeal within 30 days after the rendition of the judgment." NEV. REV. STAT. § 177.055(1) (1991). Tennessee's statute provides for automatic review of death sentences, stating that when a defendant "does not appeal the conviction of first degree murder, then the trial court shall certify, within ninety (90) days after the judgment has become final, the record relating to punishment" and transmit it to the supreme court for review. TENN. CODE ANN. § 39-13-206(a)(2) (1992).

Case law on the issue is mixed. Courts in seven states refuse to allow capital defendants to waive or limit appellate review.⁴⁹ These courts hold that waiver or limited review threatens the overriding state interest in reliability of capital punishment. For example, the Utah Supreme Court held that to maintain the integrity of capital punishment, the court must review the entire record for error.⁵⁰ In denying waiver, the Alabama Supreme Court held that waiver is contrary to the state's overriding interest in determining that the death penalty is imposed only for compelling reasons.⁵¹ The Idaho Supreme Court held that the gravity and infrequency of capital punishment demand review of the entire record for error.⁵² On the other hand, four state courts in addition to Washington's allow capital defendants to waive general review.⁵³

The Ninth Circuit Court of Appeals recognizes the right of states to require appellate review of capital convictions and sentences. In *Massie v. Sumner*,⁵⁴ the Ninth Circuit upheld a California statute that provides automatic appeal of all capital sentences regardless of a defendant's wishes.⁵⁵ The Ninth Circuit rejected the defendant's claim that automatic appeal violates due process.⁵⁶ It held that appellate review of death sentences is a duty that the California Legislature imposed upon the state supreme court, and a defendant may not interfere with this duty.⁵⁷ It compared mandatory appeal to other procedures required in criminal cases, such as competency hearings and determinations that a factual basis exists for a guilty plea.⁵⁸ Finally, it

49. *Evans v. State*, 361 So. 2d 666, 667 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979); *State v. Brewer*, 826 P.2d 783, 789-91 (Ariz.), *cert. denied*, 113 S. Ct. 206 (1992); *People v. Stanworth*, 457 P.2d 889, 898-99 (Cal. 1969); *Goode v. State*, 365 So. 2d 381, 384 (Fla. 1978), *cert. denied*, 441 U.S. 967 (1979); *State v. Osborn*, 631 P.2d 187, 192-93 (Idaho 1981); *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978); *State v. Holland*, 777 P.2d 1019, 1021-22 (Utah 1989).

50. *Holland*, 777 P.2d at 1022 ("[T]he integrity of the law as an institution must be sustained, notwithstanding the desire of an individual defendant.").

51. *Evans*, 361 So. 2d at 667 (recognizing "the State's dominant and overriding interest in ensuring that the death penalty is imposed only for the utmost of compelling reasons").

52. *Osborn*, 631 P.2d at 192-93.

53. *Martin v. Blackburn*, 521 F. Supp. 685, 710-13 (E.D. La. 1981), *aff'd sub nom. Martin v. Maggio*, 711 F.2d 1273 (5th Cir. 1983) (interpreting Louisiana statute), *cert. denied*, 469 U.S. 1028 (1984); *Franz v. State*, 754 S.W.2d 839, 842-44 (Ark. 1988); *Judy v. State*, 416 N.E.2d 95 (Ind. 1981); *Kirksey v. State*, 814 P.2d 1008, 1010 (Nev.), *cert. denied*, 112 S. Ct. 603 (1991).

54. 624 F.2d 72 (9th Cir. 1980), *cert. denied*, 449 U.S. 1103 (1981).

55. CAL. PENAL CODE § 1239(b) (Deering Supp. 1992). The statute states: "When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or her or his or her counsel."

56. *Massie*, 624 F.2d at 73-74.

57. *Id.* at 74.

58. *Id.*

found that California had "a strong interest in the accuracy and fairness of all its criminal proceedings."⁵⁹

B. Limited Sentence Review Does Not Ensure Washington's Interest in Reliable Capital Punishment

Sentence review ensures Washington's interest in reliable capital punishment. The *Dodd* court overlooked the importance of reviewing both conviction and sentence for error when reviewing a capital sentence. The primary purpose of sentence review is to ensure reliable capital punishment; protecting a defendant's rights is a secondary aim.⁶⁰ The supreme court's refusal to allow a defendant to waive sentence review⁶¹ implies this conclusion.⁶²

Capital punishment is not reliably imposed unless the state executes only those defendants whose crimes and characteristics truly merit death sentences. However, errors in the trial or guilty plea process may hamper the sentencing courts' ability to accurately assess defendants' crimes and characteristics. Thus, when a capital defendant chooses not to appeal, the supreme court must scrutinize the complete record of conviction and sentencing on its own initiative. Only then can it determine whether the sentence was appropriate.

In holding that a defendant may limit sentence review, the *Dodd* court misconceived the nature of sentence review. The court considered sentence review to be invariably adversarial; however, this is not so when a capital defendant forgoes appeal. In such a case, sentence review becomes an administrative proceeding intended not to protect the defendant's rights but only to ensure the state's interest in reliable capital punishment. Permitting a defendant to limit the scope of this review thwarts this state interest.

Even if *Dodd's* punishment was appropriate, limited supreme court review of future capital cases with different facts may fail to weed out those cases in which a trial court has imposed an unwarranted capital sentence. The combination of the egregiousness of *Dodd's* crimes, confessions, guilty plea, and waiver suggested that his execution was appropriate. The *Dodd* holding, however, will be invoked by defend-

59. *Id.*

60. *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) (describing appellate review as a provision "designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants").

61. *In re Rupe*, 115 Wash. 2d 379, 388, 798 P.2d 780, 785 (1990).

62. As *Dodd* illustrates, Washington courts place other limits on the rights of criminal defendants, including competency hearings for waiver of appeal and oversight of guilty pleas. *State v. Dodd*, 120 Wash. 2d 1, 8-10, 838 P.2d 86, 89-91 (1992).

ants who maintain their innocence but refuse to appeal in order to avoid life imprisonment without hope of release. In such cases, the court will face a voluminous record and thus a much greater probability of harmful error. To ensure fairness and reliability, the court must review this entire record for error or risk the execution of an innocent defendant.

C. The Supreme Court Cannot Competently Review a Capital Sentence Without Reviewing the Complete Record for Error

Supreme court review of death sentences seeks to determine whether the evidence justified the sentence, whether the sentence was proportional, and whether the sentence resulted from passion or prejudice.⁶³ As *Dodd* illustrates, these findings are not credible if the trial court admitted unfairly prejudicial evidence. To determine whether the evidence justified the sentence, the supreme court must be sure that the trial court properly ruled on the admission of aggravating and mitigating evidence. Because evidence of aggravation that was improperly admitted during the guilt phase will influence the trier's sentencing decision, the court must review the entire record to conduct a meaningful sentence review.

Dodd demonstrates the importance of thorough supreme court review for error. The judge at *Dodd*'s sentencing, over defense objections, admitted excerpts from *Dodd*'s diaries discussing castration, vivisection, and other types of torture that *Dodd* had not inflicted on any of his victims.⁶⁴ These excerpts were highly prejudicial, and the trial court probably should have excluded them.⁶⁵ Had the *Dodd* court so concluded, it would have disregarded the evidence in its evaluation of whether the evidence was sufficient to sustain *Dodd*'s death sentence.

However, the *Dodd* court evaluated the sufficiency of evidence assuming that the trial court properly admitted all evidence.⁶⁶ Thus, it must have considered the prejudicial diary excerpts. Because its evaluation of the sufficiency of the evidence was based on a deficient record, the court could not conclude with any assurance that the evidence justified *Dodd*'s sentence.

63. See *supra* note 37 and accompanying text.

64. See *supra* note 18 and accompanying text.

65. See *State v. Rupe*, 101 Wash. 2d 664, 704-07, 683 P.2d 571, 594-97 (1984) (holding death sentence was improper because of introduction at sentencing of evidence about defendant's gun collection, in violation of WASH. R. EVID. 403).

66. *Dodd*, 120 Wash. 2d at 24-25, 838 P.2d at 97-98.

Whether the trial court properly admitted evidence also affects the supreme court's proportionality determination in sentence review. To determine whether the sentence under review is proportional, the court compares the facts of the crime and the defendant's characteristics to the facts and defendants in other Washington death sentence cases.⁶⁷ The *Dodd* court based its proportionality determination in part upon its finding that Dodd's personal characteristics were similar to those of the defendant in *State v. Rupe*.⁶⁸ Like Dodd, Rupe was sentenced to death even though he lacked a significant criminal history.⁶⁹ The court noted that Dodd exhibited a pattern of predatory, sexually deviant behavior and was dangerous.⁷⁰ Improperly admitted evidence may have influenced this finding, however. Thus, the court's proportionality determination was not meaningful.

D. *The Dodd Court's Statutory Interpretation Was Flawed*

The *Dodd* court's analysis of Washington's capital punishment statute was unconvincing. The court first maintained that the statute makes sentence review mandatory because it states that the supreme court "shall" review all capital sentences.⁷¹ The court then noted that the statute distinguishes between sentence review and appeals.⁷² The language of another provision of the statute specifies the period in which sentence review and appellate review, "if any," must be undertaken.⁷³ From the words "if any," the court concluded that general review is not required.⁷⁴ The court cited the statute's directive that sentence review is "in addition to any [general] appeal" as further evidence that general review may be waived by a defendant.⁷⁵

However, such analysis is irrelevant to the real question in *Dodd*, which is the scope of the mandatory sentence review. The statute does not directly address this matter. A credible review must cover all aspects of the guilt or sentencing proceedings that bear on whether the penalty was properly imposed. Therefore, the statute contemplates only that the defendant may waive review of the actual verdict.

The court also failed to discuss a provision of the statute that implies sentence review requires general review of the conviction.

67. See *supra* note 37.

68. 101 Wash. 2d 664, 683 P.2d 571 (1984).

69. *Dodd*, 120 Wash. 2d at 27, 838 P.2d at 99.

70. *Id.*

71. *Id.* at 14, 838 P.2d at 92.

72. *Id.* at 15, 838 P.2d at 93.

73. WASH. REV. CODE § 10.95.150 (1992).

74. *Dodd*, 120 Wash. 2d at 15, 838 P.2d at 93.

75. *Id.*

This provision requires that the trial court forward the complete record of a capital cases to the supreme court, which must review the sentence “on the record.”⁷⁶ That the statute contains such a provision suggests that the Washington Legislature intended that the supreme court review each conviction for error; otherwise, it would have required that the trial court send only the sentencing record to the supreme court. For example, the Tennessee capital punishment statute specifies that when a defendant chooses not to appeal, the trial court need send only the sentencing record to the reviewing court.⁷⁷ Because Washington’s statute does not include a similar provision, the *Dodd* court should have concluded that the Legislature did not intend that a defendant be allowed to waive review of the record of conviction.

E. The Dodd Court’s Analysis of Relevant Authority Was Incomplete and Misleading

The *Dodd* court misrepresented the weight of authority on the issue of whether capital sentences require general review. In arguing that the weight of authority supports a defendant’s right to waive general review,⁷⁸ the *Dodd* court cited six cases decided in four states that stand for this proposition⁷⁹ and attempted to distinguish four others that reached the opposite conclusion.⁸⁰ The cases upon which the court relied represent only a slice of the authority on the issue.

Only seven of the thirty-seven states with capital punishment allow defendants to waive or limit review: the four cited by the *Dodd* court⁸¹ and the three that expressly allow waiver by statute.⁸² Seven other states have refused to allow waiver, including four cited in *Dodd*⁸³ and three others that the *Dodd* court inexplicably failed to mention.⁸⁴ The remaining states have not addressed the issue.

The *Dodd* court’s attempts to distinguish the adverse authority are unconvincing. The court argued that the Arizona, California, and Florida statutes contain broader language than the Washington statute. It stated that the three states’ statutes require review of the “judg-

76. See *supra* notes 37–38 and accompanying text.

77. See *supra* note 48.

78. *Dodd*, 120 Wash. 2d at 15, 838 P.2d at 93.

79. *Id.* at 18–19, 838 P.2d at 94–95.

80. *Id.* at 20, 838 P.2d at 95–96.

81. See *supra* note 53 and accompanying text.

82. See *supra* note 48 and accompanying text.

83. *Dodd*, 120 Wash. 2d at 20, 838 P.2d at 95–96.

84. See *supra* note 49 and accompanying text. The court failed to mention Alabama, Idaho, and Utah.

ment” or the “judgment of conviction and sentence,” while Washington’s requires only “sentence” review.⁸⁵ However, the court misrepresented the Arizona and California statutes. The Arizona statute does not mention review of conviction or judgment; it states only that the supreme court must review the entire record whenever a capital defendant appeals a judgment.⁸⁶ The California statute does not mention review at all; it provides for automatic “appeal” whenever a “judgment of death” is imposed.⁸⁷ More importantly, the *Dodd* court overlooked the fact that both the Arizona and California courts based their holdings on their states’ interest in reliable capital punishment rather than on statutory interpretation.⁸⁸

The *Dodd* court also sought to distinguish a Pennsylvania court’s holding requiring review of a capital conviction despite a defendant’s waiver. The *Dodd* court distinguished this case by noting that the Pennsylvania court found Pennsylvania’s death penalty statute unconstitutional, while the Washington Supreme Court has upheld the Washington statute.⁸⁹ This reasoning is flawed, however. Like the Arizona and California courts, the Pennsylvania court based its holding on the state’s interest in ensuring that executions are legal.⁹⁰

The *Dodd* court also relied on inapposite U.S. Supreme Court cases to support its holding that a defendant may waive general review. The cases that the court cited, *Gilmore v. Utah*⁹¹ and *Whitmore v. Arkansas*,⁹² are not in point. Those two cases are similar to *Dodd* only in that the defendant in each case sought to waive appeal of a capital sentence. However, the cases are distinguishable because the defendants were convicted under statutes that, in contrast to the Washington

85. *Dodd*, 120 Wash. 2d at 20, 838 P.2d at 95–96.

86. ARIZ. REV. STAT. ANN. § 13-4035 (Supp. 1992). The statute states: “Upon appeal from a final judgment of conviction, the supreme court shall review all rulings affecting the judgment . . . [T]he supreme court shall review the entire record.”

87. See *supra* note 55.

88. *State v. Brewer*, 826 P.2d 783, 790 (Ariz.), cert. denied, 113 S. Ct. 206 (1992) (rejecting a state claim that a statute required review of “judgment” but not of sentence and holding that such a distinction “would defeat the obvious purpose of requiring mandatory appeals in capital cases, which is to insure that the death sentence is properly and constitutionally applied”); *People v. Stanworth*, 457 P.2d 889, 899 (Cal. 1969) (“It is not entirely [the defendant’s appeal] since the state, too, has an indisputable interest in it which the appellant cannot extinguish.”).

89. *Dodd*, 120 Wash. 2d at 20, 838 P.2d at 95.

90. *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978) (“The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue—the propriety of allowing the state to conduct an illegal execution of a citizen.”).

91. 429 U.S. 1012 (1976).

92. 495 U.S. 149 (1990).

statute, did not provide automatic review.⁹³ The Supreme Court held in both cases that third parties lack standing to appeal on behalf of competent capital defendants.⁹⁴ This was not an issue in *Dodd*; *Dodd* dealt with the scope of statutorily required sentence review, which the state supreme court may initiate and conduct without participation by a third party or the defendant. Thus, contrary to the assertion in *Dodd*, the U.S. Supreme Court has not provided relevant authority on whether a Washington defendant may limit sentence review.⁹⁵

In contrast, the Ninth Circuit provides clear authority for the Washington Supreme Court to require general review in capital cases.⁹⁶ The Ninth Circuit held that a state's interest in reliable capital punishment supersedes a defendant's right to waive review.⁹⁷ The *Dodd* court could have relied upon this as authority for denying a capital defendant the right to waive general review.

In summary, the *Dodd* holding that a capital defendant may waive general review of conviction and sentence for error fails to safeguard Washington's interest in reliable capital punishment. The holding is based on flawed analysis of Washington's capital punishment statute. It also relies upon a misleading analysis of authority from other states and upon inapposite U.S. Supreme Court cases.

III. *DODD* CLOUDED THE ISSUE OF WHETHER AVAILABLE MITIGATING EVIDENCE MUST BE PRESENTED AT THE SENTENCING PROCEEDING

The *Dodd* court left unclear whether mitigating evidence must be presented at sentencing. Specifically, the court failed to satisfactorily address two problems that arise when a capital defendant withholds all available mitigating evidence. First, the sentencer cannot give the defendant the individualized consideration that the Eighth Amendment requires. Second, the reviewing court cannot determine whether a sentence was proportional and justified by the evidence.

93. *Whitmore*, 495 U.S. at 152; *Gilmore*, 429 U.S. at 1016–17. The Utah statute has since been amended to require review. See *supra* note 47.

94. *Whitmore*, 495 U.S. at 151; *Gilmore*, 429 U.S. at 1016–17.

95. Justice White, dissenting in *Gilmore*, claimed that the defendant could not waive appellate review. *Gilmore*, 429 U.S. at 1018. Justice Burger, in the plurality opinion, responded, "Whatever may be said as to the merits of this suggestion, the question is simply not before us." *Id.* at 1017.

96. See *supra* notes 54–59 and accompanying text.

97. See *supra* notes 54–59 and accompanying text.

The *Dodd* court refused to consider amici's argument on appeal that the withholding of all mitigating evidence violated the Eighth Amendment. By considering Dodd's mitigating evidence in its review of his sentence, however, the *Dodd* majority effectively established precedent for requiring presentation of such evidence at sentencing. The court should have dealt with the problem more directly, by establishing a procedure for presenting mitigating evidence when a defendant refuses to offer it.

A. Mitigating Evidence Is Indispensable in Capital Sentencing

Mitigating evidence is indispensable to a constitutional death penalty determination. The U.S. Supreme Court has held that the Eighth Amendment demands that the sentencing court accord all capital defendants individualized consideration.⁹⁸ Individualized consideration is designed to ensure that death sentences do not result from arbitrary and capricious proceedings.⁹⁹ Individualized consideration requires consideration of mitigating evidence, which is the only evidence of a defendant's character and past history that the sentencing court receives. Thus, a court cannot constitutionally impose a death sentence without considering the available mitigating evidence.

Mitigating evidence is any evidence that supports sparing a defendant's life despite the defendant's commission of a capital crime.¹⁰⁰ It may include details of a defendant's character, prior acts, and past history; a comparison of the defendant's crime to similar crimes for which other defendants received lesser sentences; and rebuttal of prosecution evidence in favor of execution.¹⁰¹ In Washington, the sentencer weighs this evidence against the aggravating circumstances of the crime to determine whether death or life in prison is the appropriate sentence.¹⁰²

B. Courts Have Split on Whether a Capital Defendant May Withhold All Mitigating Evidence

The U.S. Supreme Court has never decided whether a capital defendant may voluntarily withhold all mitigating evidence. However, the Court has held that the Eighth Amendment prohibits statutory or judicial limits on relevant mitigating evidence that a defendant

98. *Gregg v. Georgia*, 428 U.S. 153, 196-98 (1976).

99. *See supra* notes 40-42 and accompanying text.

100. *See* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 318 (1983).

101. *Id.* at 335-37.

102. *See supra* note 35 and accompanying text.

offers.¹⁰³ It has also held that an attorney may accede to a client's instructions to withhold all mitigating evidence without violating the Sixth Amendment right to effective assistance of counsel.¹⁰⁴

Courts have rejected ineffective assistance claims for various reasons. First, requiring an attorney to offer mitigating evidence despite a client's objections creates an ethical conflict. An attorney must represent a client's interests,¹⁰⁵ including the choice to be sentenced to die. Second, such a holding could enable any defendant to avoid a death sentence by simply withholding all mitigating evidence, and then successfully appealing on the ground that counsel should have offered such evidence.¹⁰⁶ Finally, such a holding might encourage defendants to represent themselves so that they can maintain control over the evidence, at the cost of significant legal advantage.¹⁰⁷

Some state courts, however, have held that a capital defendant may not keep all mitigating evidence from the sentencing court. An example is the California Supreme Court, which relied on the U.S. Supreme Court holdings that state statutes or judges may not prevent consideration of any relevant mitigating evidence.¹⁰⁸ The California court reasoned that, regardless of who keeps mitigating evidence out, doing so prevents the sentencing court from giving the defendant the individualized consideration that the Eighth Amendment requires.¹⁰⁹ The

103. *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982) (holding trial judge could not exclude relevant mitigating evidence); *Lockett v. Ohio*, 438 U.S. 586, 603–04 (1978) (holding Ohio law could not set limits on mitigating evidence a sentencer might consider). Consistent with this view, Washington's statute enumerates some appropriate types of mitigating evidence, but expressly states that any other relevant evidence may be admitted at sentencing. WASH. REV. CODE § 10.95.070 (1992).

104. *Burger v. Kemp*, 483 U.S. 776, 788–96 (1987). The Sixth Amendment guarantees criminal defendants the right to “have the assistance of counsel.” U.S. CONST. amend. VI. Lower federal courts have similarly held that Washington capital defendants who did not offer mitigating evidence were not deprived of effective assistance of counsel. *See e.g.*, *Campbell v. Kincheloe*, 829 F.2d 1453, 1462–64 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988).

105. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1992) (requiring an attorney to “abide by a client's decisions concerning the objectives of representation”). WASH. CT. R.P.C. 1.2(1) contains identical language.

106. *Trimble v. State*, 693 S.W.2d 267, 279–80 (Mo. Ct. App. 1985); *see also* *People v. Bloom*, 774 P.2d 698, 718–19 (Cal. 1989), *cert. denied*, 494 U.S. 1039 (1990).

107. *People v. Lang*, 782 P.2d 627, 653 (Cal. 1989), *cert. denied*, 111 S. Ct. 224 (1990).

108. *People v. Deere*, 710 P.2d 925, 931 (Cal. 1985). Although the California Supreme Court disapproved *Deere* in *Bloom*, 774 P.2d at 718–19, and in *Lang*, 782 P.2d at 653, *Bloom* and *Lang* may be distinguished from *Dodd* because some mitigating evidence was offered in both of those cases. *Bloom*, 774 P.2d at 729 (Mosk, J., concurring and dissenting); *Lang*, 782 P.2d at 653.

109. *Deere*, 710 P.2d at 931–32 (referring to *Lockett v. Ohio*, 438 U.S. 586 (1978)).

Dodd majority, however, refused to consider whether *Dodd*'s withholding of all mitigating evidence was unconstitutional.¹¹⁰

The California court further held that the state's interest in a reliable death penalty determination could not be guaranteed without mitigating evidence.¹¹¹ In addition, a supreme court must consider at least some mitigating evidence in sentence review; such evidence constitutes a significant part of the evidence that the reviewing court examines when deciding whether a death sentence is appropriate.¹¹² The New Jersey Supreme Court adopted similar reasoning in refusing to allow a capital defendant to withhold all mitigating evidence.¹¹³ The New Jersey court concluded that a sentencing jury cannot discharge its statutory or moral duties without mitigating evidence.¹¹⁴

C. The Washington Supreme Court Should Require That a Neutral Party Present Mitigating Evidence on Behalf of Defendants Who Refuse To Offer Such Evidence

The *Dodd* court failed to consider the implications of a sentencing proceeding at which all available mitigating evidence is withheld. Washington's capital punishment scheme demands presentation at sentencing of available mitigating evidence. The judge or jury weighs the aggravating circumstances proved in the guilt phase against the mitigating evidence presented at sentencing to determine whether a death sentence is appropriate.¹¹⁵ The only evidence that the sentencer may consider is that of mitigation, past convictions, and aggravating circumstances enumerated in the statute.¹¹⁶ If all available mitigating evidence is withheld, however, the jury has nothing against which to balance the aggravating circumstances and a death sentence becomes virtually automatic.¹¹⁷

110. *State v. Dodd*, 120 Wash. 2d 1, 40-48, 838 P.2d 86, 106-10 (1992) (Utter, J., dissenting).

111. *Deere*, 710 P.2d at 931.

112. *Id.* at 930.

113. *State v. Koedatich*, 548 A.2d 939, 997 (N.J. 1988), *cert. denied*, 488 U.S. 1017 (1989).

114. *Id.* at 994. The Missouri Court of Appeals, in *Trimble v. State*, 693 S.W.2d 267 (Mo. Ct. App. 1985), found that a jury that imposed a death sentence without the benefit of mitigating evidence neglected its duty to weigh aggravating circumstances and mitigating evidence, and had no choice but to impose a death sentence. The court stated: "The finding of an aggravating circumstance is but the threshold question. The jury must then weigh the evidence before it imposes the death penalty." *Id.* at 278.

115. *See supra* note 35 and accompanying text.

116. *See supra* note 36 and accompanying text.

117. *See Campbell v. Kincheloe*, 829 F.2d 1453, 1469-70 (9th Cir. 1987) (Fletcher, J., dissenting) (arguing absence of any mitigating evidence rendered death penalty automatic).

As the *Dodd* majority tacitly acknowledged, Washington's capital punishment statute also requires that the supreme court consider mitigating evidence during sentence review. The statute expressly directs the supreme court to consider individual characteristics of the defendant when the court determines whether a death sentence is proportional to other capital sentences imposed in the state.¹¹⁸ Such characteristics might include a history of childhood abuse that would only come to light as mitigating evidence presented at sentencing. This history would be barred during the conviction phase on the ground of irrelevancy.¹¹⁹ In addition, without mitigating evidence a reviewing court has no basis to determine that the sentencer was justified in deciding against leniency.¹²⁰

The *Dodd* majority acknowledged the necessity of considering mitigating evidence in sentence review. In its review of Dodd's sentence, it considered the mitigating evidence that Dodd had withheld from sentencing but that amici had presented on appeal.¹²¹ The majority weighed this evidence in sentence review and concluded that no jury would reach a different verdict after having considered it.¹²²

As the concurring opinion noted, the *Dodd* majority failed to explain why it considered evidence that the sentencing jury never heard.¹²³ When an appellate court concludes that the resolution of an issue on appeal requires additional evidence, the proper procedure is for the court to direct the trial court to develop the additional evidence.¹²⁴ The *Dodd* majority failed to take this step. However, its consideration of the mitigating evidence provides authority for a trial court to ensure that all mitigating evidence will not be withheld.

A more direct approach would be for the Washington Supreme Court to establish a procedure by which a trial court may obtain mitigating evidence when a defendant refuses to supply it. There are at least three appropriate procedures for soliciting such evidence. First, a trial court may appoint a social worker to gather mitigating evidence. For example, in *Dodd* the trial judge appointed a social worker to collect mitigating evidence for Dodd, presumably because defense

118. WASH. REV. CODE § 10.95.130 (1992). The statute states that the court must evaluate the proportionality of the death sentence "considering both the crime and the defendant."

119. WASH. R. EVID. 403.

120. *People v. Deere*, 710 P.2d 925, 930 (Cal. 1985).

121. *State v. Dodd*, 120 Wash. 2d 1, 25, 838 P.2d 86, 98 (1992).

122. *Id.*

123. *Id.* at 29-30, 838 P.2d at 100 (Anderson, J., concurring).

124. WASH. CT. R.A.P. 9.11 (1992).

counsel did not have the time or money to gather such evidence.¹²⁵ Second, the trial court may appoint amici to provide mitigating evidence, just as amici in *Dodd* provided mitigating evidence in sentence review.¹²⁶ Third, a neutral agency may submit to the sentencing court a presentence report that includes mitigating evidence, as the Department of Corrections must in all felony sex offense cases.¹²⁷

Providing mitigating evidence through a "truly neutral" third party would resolve the various dilemmas that traditionally prevented courts from requiring presentation of mitigating evidence. Defense counsel would not have to act contrary to a client's wishes.¹²⁸ Defendants could not automatically avoid a death sentence by simply refusing to offer mitigating evidence and then successfully appealing on the ground of ineffective assistance of counsel.¹²⁹ Nor would they be encouraged to waive counsel to gain control of the presentation of evidence.¹³⁰ A neutral agency is particularly well-suited to this task because it would not complicate the proceedings by arguing a position different from that of the prosecution and defendant.

IV. CONCLUSION

By allowing a capital defendant to waive general review of conviction and sentence for error, the *Dodd* court stripped the statutorily mandated sentence review of features needed to ensure reliable imposition of the death penalty in Washington. By clouding the issue of whether a defendant may withhold all available mitigating evidence at sentencing, the court not only failed to ensure the individualized consideration of capital defendants and crimes that the Eighth Amendment requires, but it also rendered sentence review unreliable and sentencing proceedings virtually meaningless in some cases. The *Dodd* court should have required general review of all capital convictions and sentences and the presentation by a neutral third party of all available mitigating evidence in capital cases regardless of a defendant's wishes.

125. Brief for Amicus Curiae at Appendix B, *State v. Dodd*, 120 Wash. 2d 1, 838 P.2d 86 (1992) (No. 57414-6).

126. *Dodd*, 120 Wash. 2d at 25, 838 P.2d at 98.

127. See, e.g., WASH. REV. CODE § 9.94A.110 (1992). The statute requires the Department of Corrections to submit a presentence report to the trial court in all felony sex offense cases.

128. See *supra* note 105 and accompanying text.

129. See *supra* note 106 and accompanying text.

130. See *supra* note 107 and accompanying text.