WHEN LIFE DEPENDS ON IT: SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES

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I. INTRODUCTION

The *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*[1] ("Supplementary Guidelines") are the culmination of three years of work coordinated by the Public Interest Litigation Clinic ("PILC") and the University of Missouri-Kansas City School of Law in cooperation with seasoned capital litigators and mitigation specialists across the United States.[2] This

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1. SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, *in* 36 HOFSTRA L. REV. 677 (2008) [hereinafter SUPPLEMENTARY GUIDELINES].

2. The published Supplementary Guidelines reflect substantial contributions from many experienced capital defense attorneys, mitigation specialists, and mental health professionals who handle capital cases at every stage of litigation, including Chris Adams, Jean Barrett, John Blume, Mickell Branham, Richard Burr, the late Marie LeBoeuf Campbell, Melanie Carr, Ingrid Christensen, Eric M. Freedman, Judy Gallant, Tanya Greene, Lisa Greenman, Scharlette Holdman, John Holdridge, Lori James-Townes, Pamela Blume Leonard, Andrea Lyon, Robin Maher, Jennifer Merrigan, Jill Miller, Lee Norton, Mark Olive, Danalynn Recer, Lisa Rickert, David Ruhnke, Russell Stetler, Ronald Tabak, Naomi Terr, Kathy Wayland, Juliet Yackle, and Denise Young. We gratefully acknowledge their time and expertise, and that of many others who contributed to this project. We are also grateful to organizations that committed resources and expertise to this project, including funding generously provided by the Butler Family Fund and the Wallace Global Fund; and the expert guidance and assistance of A Fighting Chance in New Orleans, Louisiana; the ACLU Capital Punishment Project; the Center for Capital Assistance in San Francisco, California; the Gulf Region Advocacy Center in Houston, Texas; the Habeas Corpus Resource Center in San Francisco, California; the Habeas Assistance and Training Counsel Project funded through the Defender Services Division of the Administrative Office of the United States Courts; the National Association of Criminal Defense Lawyers; the National Association of Sentencing Advocates and Mitigation Specialists, a division of the National Legal Aid and Defender Association; and the Public Interest

Article describes the Supplementary Guidelines and the process by which they were researched and developed. Part II discusses the reasons for undertaking this project. Part III describes the process of investigating, researching, and drafting the Supplementary Guidelines. Part IV identifies the scope and goals of the Supplementary Guidelines, and identifies some of the issues that guided our efforts. Part V analyzes the concept of mitigation and its constitutional and practical role in the sentencing process. Part VI explains the central role of the life history investigation in the development of a mitigation case. Part VII discusses the skills and abilities that are essential to the constitutionally effective performance of the mitigation function of capital defense teams. Finally, Part VIII explains the need for capital jurisdictions to provide adequate funding to fully staff capital defense teams.

II. WHY SUPPLEMENTARY GUIDELINES?

The project to identify performance standards for the mitigation function in capital cases began in the wake of two significant milestones. In 2003, the American Bar Association revised its *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* ("ABA Guidelines") to require that the capital defense team "should consist of no fewer than two attorneys qualified in accordance with ABA Guideline 5.1, an investigator, and a mitigation specialist."[3] The Commentary to ABA Guideline 4.1 describes the mitigation specialist as "an indispensable member of the defense team throughout all capital proceedings," and observes that "the use of mitigation specialists has become 'part of the existing "standard of care"' in capital cases."[4]

Later that same year, the Supreme Court in *Wiggins v. Smith*[5] found that trial counsel's failure to investigate Kevin Wiggins's life history "fell short of the professional standards that prevailed . . . in 1989," noting that a social history investigation was "standard practice," and

Litigation Clinic in Kansas City, Missouri. Finally, we wish to thank the University of Missouri-Kansas City School of Law for the time and resources of faculty and research assistants devoted to this project, and the Hofstra Law School for its sponsorship of this symposium issue.

3. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 4.1(A)(1) (rev. ed. 2003), *in* 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES]. The ABA GUIDELINES are also available online at http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf. The ABA GUIDELINES are reproduced along with helpful commentary and scholarship in a symposium issue of the Hofstra Law Review. *Id.*

4. *Id.* at Guideline 4.1, commentary.

5. 539 U.S. 510 (2003).

that the Public Defender made funds available for that purpose.[6] The Court quoted the Maryland trial judge who "could not remember a capital case in which counsel had not compiled a social history of the defendant, explaining, '[n]ot to do a social history, at least to see what you have got, to me is absolute error. I just—I would be flabbergasted if the Court of Appeals said anything else.'"[7]

Wiggins and the revised ABA Guidelines affirmed what capital defense attorneys had long understood: A mitigation specialist is an indispensable member of any capital defense team. In *Wiggins*, the Court recognized the ABA Guidelines as "[p]revailing norms of practice" that serve as "guides to determining what is reasonable" in evaluating the performance of capital defense counsel.[8] In tandem, the revised ABA Guidelines and the *Wiggins* decision formally institutionalized a defense team structure that is now in its fourth decade of post-*Furman* capital defense practice.

Capital defense teams have long relied upon mitigation specialists to address the unacceptable risk that prosecutors, judges, and juries will make life and death decisions without the benefit of essential information, such as in *Wiggins*, where trial counsel failed to tell the jury of sexual and physical torture Wiggins had endured as a child.[9] The Court found that, "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale," Wiggins's life might have been spared.[10] Although such evidence would be important to anyone charged with making such a weighty decision about another human being, Wiggins's lawyers had failed to find it.

Unfortunately, the *Wiggins* scenario plays out all too often. A comprehensive study of capital cases in America between 1973 and 1995 found that sixty-eight percent of all death sentences were set aside by appellate, post-conviction, or habeas corpus courts due to serious

6. *Id.* at 524.

7. *Id.* at 517.

8. *Id.* at 522 (noting that in *Strickland v. Washington*, 466 U.S. 668, 688 (1984), the Court referred to "[p]revailing norms of practice" such as the "ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ('The Defense Function')" as "guides to determining what is reasonable . . . .").

9. Wiggins's mother abandoned him and his siblings for days, "forcing them to beg for food and to eat paint chips and garbage . . . . She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner—an incident that led to petitioner's hospitalization. [T]he father in his second foster home repeatedly molested and raped him." *Id.* at 516-17 (citations omitted).

10. *Id.* at 537.

error.[11] "[E]gregiously incompetent defense lawyering . . . account[ed] for thirty-seven percent of the state post-conviction reversals . . . ."[12] Following appellate or post-conviction rulings finding serious error in capital cases, eighty-two percent "were found on retrial *not* to have deserved the death penalty, including seven percent . . . who were cleared of the capital offense."[13] Of the cases infected with fatal error, the most common ground for relief was ineffective assistance of counsel so severe that it undermined confidence in the outcome of the trial.[14] Even with this high rate of relief, formidable procedural barriers often result in prisoners being executed in spite of newly uncovered mitigation evidence that could have made a difference to capital decision-makers.[15]

While *Wiggins* and the revised ABA Guidelines give capital defense teams effective tools to become fully staffed, significant concerns remain. State indigent defense systems continue to be chronically underfunded, requiring the ABA Death Penalty Representation Project (the "Project") to recruit law firms to provide *pro bono* representation for death row prisoners on a large scale.[16] The brave and generous lawyers who agree to represent prisoners facing execution are typically inexperienced in the defense of capital cases.[17] When Project Director Robin Maher successfully places an unrepresented death row inmate's *pro bono* case with a law firm, she is frequently asked about mitigation specialists. What is a mitigation specialist? What qualifies a person to be a mitigation specialist? What does such a person

11. James S. Liebman, Jeffrey Fagan, Valerie West, & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1389, 1849-50 (2000).

12. *Id.* at 1850.

13. *Id.* at 1852.

14. *Id.*

15. *See, e.g.*, Sawyer v. Whitley, 505 U.S. 333, 373 (1992) (Stevens, J., concurring in judgment) (Sawyer was executed in spite of counsel's failure to discover records of his involuntary commitments to a psychiatric hospital); Grubbs v. Delo, 977 F.2d 463, 464 (8th Cir. 1992) (Grubbs was executed in 1992 even though the sentencing jury did not know of his "low intellectual functioning."). See also the plaintiffs in *Nave v. Delo*, 62 F.3d 1024, 1034 (8th Cir. 1995), and *Bolder v. Armontrout*, 921 F.2d 1359, 1360 (8th Cir. 1990), in which, despite a court finding of ineffective trial counsel, those findings were vacated on appeal because of procedural defaults by appellate or post-conviction counsel. *See generally* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

16. Elizabeth Amon, *A Matter of Life and Death*, AM. LAW., Sept. 27, 2005, at 127. United States District Judge Martin Feldman of Louisiana declared, "It's a damn serious issue . . . . I am a supporter of the death penalty, but I'm a very strong believer in as just and fair and good representation as humanly possible of those who face the ultimate punishment." Susan Levine, *Luring Pro Bono Lawyers for Death Row's Forgotten*, WASH. POST, Nov. 30, 2004, at A7.

17. Levine, *supra* note 16, at A1.

do? Frequently, attorneys want the Project to recommend a good mitigation specialist to join the defense team in specific cases.[18]

The Project's experience with such inquiries is similar to that of most capital litigation offices. Because qualified mitigation specialists are essential to the preparation of any capital case, they are in great demand. The unfortunate reality is that, just as with competent capital defense attorneys, demand for qualified mitigation specialists exceeds the supply. Too often, defense teams attempt to make do with the services of investigators or co-counsel, or unskilled people who have attended a few training seminars and hold themselves out as mitigation specialists. Similar circumstances regarding capital defense counsel have contributed to substandard legal representation in capital cases.[19] Because the ABA Guidelines have provided valuable guidance on the qualifications and performance of counsel,[20] we perceived a clear need for similar standards describing the skills and functions of mitigation specialists. Such standards could guide the function of capital defense teams at all stages, educate judges and indigent defense agencies on necessary funding, resources and training, and serve as a template for post-conviction teams to recognize and challenge substandard work.

III. METHODOLOGY

The effort to articulate prevailing standards of performance for the mitigation function of capital defense teams began in October 2004, at the National Association of Criminal Defense Lawyers' annual capital training conference, Making the Case for Life, in Washington, D.C. We met with experienced capital defense attorneys, mitigation specialists, and mental health experts and sought their advice on designing and

18. *See* Robin M. Maher, *The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 763, 770 (2008).

19. Sean D. O'Brien, *Capital Defense Lawyers: The Good, the Bad, and the Ugly*, 105 MICH. L. REV. 1067, 1067-68 (2007) (reviewing WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES (2006)); *see also* Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, 45 CRIM. L. REP. 3239, 3239-40 (1989); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 9, 13 (1990).

20. *See* Rompilla v. Beard, 545 U.S. 374, 387 (2005); Florida v. Nixon, 543 U.S. 175, 191 (2004); Wiggins v. Smith, 539 U.S. 510, 524 (2003). The ABA Death Penalty Representation Project tracks the numerous state and federal courts that have looked to the ABA Guidelines for direction on issues surrounding the performance of counsel. For citations and summaries of those decisions, see ABA, List of State and Federal Cases Citing to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, http://www.abanet.org/deathpenalty/resources/docs/List_DeathPenaltyCases_Citing.doc (last visited Mar. 15, 2008).

implementing our investigation into standards of performance for mitigation specialists. After that meeting, we gathered contact information for capital litigators and mitigation specialists in every capital jurisdiction in the United States.

Our investigation of standards governing the work of mitigation specialists looked to multiple sources. PILC staff interviewed capital defense attorneys and mitigation specialists across the United States.[21] We spoke with at least one mitigation specialist and one capital defense attorney in all forty jurisdictions in the United States which then authorized the death penalty,[22] including the federal government and the United States Military. In jurisdictions that rely on a combination of government-funded public defender offices and private counsel to represent prisoners in capital cases, we interviewed members of the institutional defender office as well as mitigation specialists and capital defense lawyers in the private sector. We also spoke with representatives of non-profit entities throughout the United States that specialize in providing capital defense and mitigation specialist services. Not including the lawyers and mitigation specialists involved in drafting the Supplementary Guidelines, we interviewed ninety-seven respondents (twenty-seven mitigation specialists and seventy capital defense attorneys).

We asked experienced capital litigators and mitigation specialists specific questions about mitigation work. We learned how each jurisdiction provides mitigation specialist services. We asked whether there are mitigation specialist positions in public defender offices, or whether capital defense teams employ non-profit entities or private contractors who specialize in mitigation work. We also attempted to identify how the mitigation function is financed in each jurisdiction, and whether such fees and expenses are authorized by statute or court rules. We found that every jurisdiction in the United States that authorizes the death penalty has a mechanism to provide mitigation specialist services.[23]

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21. The interviews were conducted by PILC staff attorney Jennifer Merrigan and April McLaughlin and Ara Bailey, recent graduates of UMKC School of Law. Additional support was provided by research assistants from the UMKC School of Law, including David Brown, Jennifer Childress, and Alex Hutchings.

22. Two states, New York and New Jersey, have since abandoned or repealed the death penalty. *See* Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3; Tom Precious, *State Death Penalty Law Dies in Assembly Committee Vote*, BUFFALO NEWS, Apr. 13, 2005, at A12.

23. Interviews with defense counsel and mitigation specialists established that states use a variety of mechanisms to provide mitigation specialist services. State-funded public defenders in

We obtained training schedules, agendas, and materials from jurisdictions where such programs are offered. We attempted to identify, jurisdiction by jurisdiction, people who are actively engaged in mitigation specialist work. Finally, we asked each respondent for his or her concerns about the mitigation work being conducted in the jurisdiction.

In addition to conducting comprehensive interviews with practitioners, we collected written materials that are probative of prevailing standards. We asked capital defender offices that employ mitigation specialists to provide published job descriptions which specify the qualifications or skill sets that are desirable or necessary for this work. This provided strong evidence that mitigation work is performed by individuals from a wide variety of backgrounds, including highly trained and experienced anthropologists, attorneys, educators, journalists, social workers, sociologists, and others with education and training in human development and behavior. We therefore chose to focus on the performance and functions of the mitigation specialist rather than prescribe a specific set of credentials.

In many jurisdictions, mitigation specialists are funded by the court on a case-by-case basis, which requires the filing of a motion supported by affidavits of mitigation specialists. We therefore gathered and reviewed examples of motions and supporting affidavits from several jurisdictions. These helped determine the necessary abilities of mitigation specialists, the role that they play on capital defense teams, and a description of the work that they do. Between February 2005 and April 2007, we sent a representative to attend nearly every national and

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Arizona, Arkansas, Delaware, Georgia, Kansas, Kentucky, Louisiana, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Virginia, and Wyoming reported having mitigation specialists on staff as full-time employees. Defender offices in Colorado, Connecticut, Maryland, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, Oregon, South Dakota, Texas, and Wyoming reported that mitigation specialists are retained using funds in the public defender's budget. States that allow the court to authorize funds to employ mitigation specialists on motion of defense counsel include Alabama, Arizona, Arkansas, California, Illinois, Indiana, Kansas, Nevada, New Hampshire, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, and the United States Military. *See, e.g.*, 10 U.S.C.S. § 846 (2001); 725 ILL. COMP. STAT. ANN. 124/10 (West 2002); OHIO REV. CODE ANN. § 2929.024 (West 2008); S.D. CODIFIED LAWS § 19-15-9 (2007); TENN. CODE ANN. § 40-14-207(b) (2006); VA. CODE ANN. § 19.2-264.3:1(A) (2004); ALA. R. CRIM. P. 6.4 (2008); ARIZ. R. CRIM. P. 15.9 (1998); 1993 Ark. Legis. Serv. 1193 (West); CAL. PENAL CODE § 987.9 (West 2007); IND. R. CRIM. P. 24(C)(2) (2007); KAN. CRIM. PROC. CODE ANN. § 22-4508 (West 2006); NEV. SUP. CT. R. 250(3)(c) (2007); N.H. SUP. CT. R. 47(3) (2008); S.C. APP. CT. R. 602(g)(2) (2007); TEX. CODE CRIM. PROC. art. 11.071(3) (Vernon 2005); UTAH R. CRIM. P. 15(a) (2008); WASH. R. CRIM. P. 3.1(f)(1)-(3) (2002); WYO. R. CRIM. P. 44(e)(B).

local mitigation specialist training program in the United States. We collected the written materials from these seminars, which informed us about what skills and knowledge are important to mitigation work. In addition, we researched articles addressing various aspects of mitigation work, including pertinent standard and authoritative publications in the field of mental health. From these, we obtained an understanding of the close relationship between competent mitigation investigation and reliable mental health assessments.[24]

We also researched judicial opinions discussing counsel's obligation with respect to mitigation in capital cases. We paid particular attention to cases in which lawyers had been found ineffective in various jurisdictions for failure to uncover evidence that would have reduced the defendant's blameworthiness in either the guilt-innocence or penalty stage of a capital case. This research demonstrated how mitigation specialists can help counsel comply with their constitutional duty of effective representation, which is critical to the ability of prosecutors, juries, and judges to make fully informed and reliable life-or-death decisions.[25]

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24. *See* Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 974-77 (2008).

25. Death sentences from nearly every capital jurisdiction have been set aside due to counsel's failure to investigate adequately the client's background, character, or mental health. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 525 (2003) (Maryland) (counsel failed to present life history evidence, including sexual victimization); Williams v. Taylor, 529 U.S. 362, 396 (2000) (Virginia) (finding that "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); Outten v. Kearney, 464 F.3d 401, 418-19 (3d Cir. 2006) (Delaware) (counsel was ineffective for failing to investigate the violence committed by petitioner's alcoholic father and the defendant's own substance abuse); Douglas v. Woodford, 316 F.3d 1079, 1087-88 (9th Cir. 2003) (California) (counsel was ineffective for failing to investigate and present evidence of petitioner's mental disabilities and evidence that he was abandoned as a child); Brownlee v. Haley, 306 F.3d 1043, 1070 (11th Cir. 2002) (Alabama) (counsel's untimely investigation caused defense psychologist to be ill-prepared and unable to address petitioner's psychiatric disorders that would have showed impaired capacity at the time of the crime); Lockett v. Anderson, 230 F.3d 695, 713-14 (5th Cir. 2000) (Mississippi) (counsel failed to investigate defendant's mental disabilities, including temporal lobe lesions, epilepsy, and schizophrenia that would have mitigated even the particularly aggravated crime); Collier v. Turpin, 177 F.3d 1184, 1202 (11th Cir. 1999) (Georgia) (counsel was ineffective for failing to delve deeply into petitioner's past as a good family man, upstanding citizen, his impoverished background, and relationship between his diabetes and his impulsive behavior); Smith v. Stewart, 189 F.3d 1004, 1008 (9th Cir. 1999) (Arizona) (counsel was ineffective for failing to investigate defendant's mental condition); Hall v. Washington, 106 F.3d 742, 752 (7th Cir. 1997) (Illinois) (counsel was ineffective for failing to investigate defendant's good moral character and adaptability to prison); Antwine v. Delo, 54 F.3d 1357, 1368 (8th Cir. 1995) (Missouri) (trial counsel failed to investigate Antwine's mental health); Loyd v. Whitley, 977 F.2d 149, 160 (5th Cir. 1992) (Louisiana) (trial counsel failed to investigate defendant's preexisting mental defects); Mak v. Blodgett, 970 F.2d 614, 617 (9th Cir. 1992) (Washington) (counsel failed to

As we collected and reviewed these materials, we commenced and maintained an ongoing dialogue with the capital defense community at national training events across the United States, beginning in February 2005. As a basis for discussion, we began with a draft of guidelines created by isolating the provisions of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* that specifically discuss the mitigation function, and circulating them as part of the program materials. This process began in New Orleans, Louisiana, in February 2005, at *Life in the Balance*, an annual capital litigation training event sponsored by the National Legal Aid and Defender Association. We explained the project and solicited feedback from attorneys and mitigation specialists about the content of the guidelines. We asked capital defense attorneys and mitigation specialists at each of these events for suggestions as to how the Supplementary

present testimony of defendant's family "to show Mak's human qualities" and failed to present expert testimony of "the effects of cultural conflict on young Chinese immigrants"); Brewer v. Aiken, 935 F.2d 850, 857-58 (7th Cir. 1991) (Indiana) (counsel was ineffective for failing to investigate and uncover defendant's history of shock therapy, brain damage, mental retardation, and a disadvantaged family life); Harlow v. Murphy, No. 05-CV-039-B, slip op. 41, 44 (D. Wyo. Feb. 15, 2008) (counsel failed to present evidence of defendant's adaptation to prison and to explain that a prison fight was not because defendant was "a dangerous person, but . . . was in a dangerous place"); Sanford v. State, 25 S.W.3d 414, 421 (Ark. 2000) (trial counsel was ineffective for failing to investigate petitioner's school records, medical records, jail records, and family history showing a long-standing history of mental retardation); Green v. State, 32 Fla. L. Weekly 619 (Fla. 2007) (counsel was ineffective for failing to investigate petitioner's prior juvenile robbery conviction, which would have produced facts disqualifying the incident as an aggravating factor to justify imposition of death); Mills v. Commonwealth, 170 S.W.3d 310, 341 (Ky. 2005) (counsel failed to investigate and present evidence that the defendant was depressed, had a low IQ, and had attempted suicide in the past); Doleman v. State, 921 P.2d 278, 281 (Nev. 1996) (counsel failed to introduce testimony of defendant's childhood and institutional history that "could have effectively humanized Doleman in the eyes of the jury"); State v. Chew, 844 A.2d 487, 506 (N.J. 2004) (counsel failed to discover and provide defense experts to testify about defendant's history of child sex abuse); State v. Williams, 794 N.E.2d 27, 53 (Ohio 2003) (counsels' fear of defendant does not detract from responsibility to develop a mitigation case); Marquez-Burrola v. State, 2007 OK CR 14, ¶ 49, 157 P.3d 749, 764-65 (counsel failed to substantiate mitigation testimony of defendant's family with corroborating evidence from a broad set of sources); Commonwealth v. Gorby, 900 A.2d 346, 362 (Pa. 2006) (counsel failed to investigate witnesses and documents substantiating defendant's childhood maltreatment and related indicators of brain injury); Nance v. Ozmint, 626 S.E.2d 878, 883 (S.C. 2006) (counsel "failed to reveal that Petitioner was beaten throughout his childhood; . . . he grew up in a family of extreme poverty and physical deprivation" and did not elaborate about the fact that petitioner had "a family history of schizophrenia"); Goad v. State, 938 S.W.2d 363, 370-71 (Tenn. 1996) (counsel failed to present testimony that defendant's demeanor had changed since returning from Vietnam and that he suffered Post-Traumatic Stress Disorder ("PTSD")); *Ex parte* Gonzales, 204 S.W.3d 391, 399-400 (Tex. Crim. App. 2006) (counsel failed to present evidence that defendant suffered from PTSD because his father subjected him to oral and anal intercourse on a weekly basis since defendant was seven years old and inflicted severe physical punishment upon him).

Guidelines could be clarified, amended, or expanded upon to more accurately describe the mitigation function of capital defense teams. At every conference, we invited continuous feedback. This process was repeated at eleven different national capital defense seminars through August 2007.[26]

During and following each program, we received substantive comments on the proposed Supplementary Guidelines, edited them according to input from experts in the field, and re-circulated them for comments and suggestions. That process came to a close with a final draft produced subsequent to the March 2007, *Habeas Assistance and Training* conference in Washington, D.C., and circulated at the 28th Annual *Capital Punishment Training Conference* sponsored by the NAACP Legal Defense Fund at the Airlie House Conference Center in Warrenton, Virginia, in July 2007. The Supplementary Guidelines are the final product of this process and reflect the national consensus on standards of performance for the mitigation function in capital cases. Because there is no disagreement among experienced mitigation specialists and capital defense attorneys on the substance of these standards and the necessity that they be observed in every capital case, we are confident that the Supplementary Guidelines identify and articulate the existing national standard for the performance of capital defense teams with respect to the mitigation function. The Death Penalty Representation Project of the ABA has welcomed these guidelines as a valuable supplement to the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.[27]

IV. SCOPE AND GOALS

During our investigation of the prevailing standards which guide the mitigation function in capital cases, highly experienced capital litigators and mitigation specialists identified potential pitfalls to be avoided. First and foremost, any effort to articulate standards regarding

26. The Supplementary Guidelines were circulated for comments and suggestions at the Annual National Seminar on the Development and Integration of Mitigation Evidence sponsored by the Habeas Assistance and Training Counsel Project (Salt Lake City, UT, April 2005; Washington, D.C., March 2006 and 2007); the Annual National Habeas Corpus Seminar, sponsored by the Administrative Office of the U.S. Courts (Pittsburgh, PA, August 2005 and 2006, and Nashville, TN, August 2007); Making the Case for Life, sponsored by the National Association of Criminal Defense Lawyers (Oklahoma City, OK, October 2005, and Las Vegas, NV, 2006); the Annual Meeting of the National Association of Sentencing Advocates and Mitigation Specialists (Baltimore, MD, June 2006); and the Annual Capital Punishment Training Conference sponsored by the NAACP Legal Defense Fund (Warrenton, VA, July 2006 and 2007).

27. *See* Maher, *supra* note 18, at 763.

the mitigation function of capital defense teams must preserve the clients' right "to the guiding hand of counsel at every step in the proceedings against [them]."[28] Second, it is important to dispel any notion that mitigation is separate from issues relating to the guilt or innocence of the accused. They are intricately linked.[29] Third, neither investigators nor forensic mental health experts can perform the vital function of the mitigation specialist; they are not fungible.[30] Finally, any attempt to identify prevailing standards must not institutionalize substandard, ineffective, or counter-productive methods.

A. The Guiding Hand of Counsel

Although the mitigation function of the capital defense team is inherently "multi-faceted and multi-disciplinary," the Supplementary Guidelines provide that "ultimate responsibility for the investigation of such issues rests irrevocably with counsel."[31] Counsel guides and supervises, rather than delegates, the performance of the mitigation function.[32] Therefore, to protect "the constitutionally protected independence of counsel" and maintain "the wide latitude counsel must have in making tactical decisions,"[33] the Supplementary Guidelines repeatedly emphasize counsel's primary responsibility and central role in the representation of the client.[34]

To preserve the "guiding hand of counsel at every step" of a capital case, the Supplementary Guidelines articulate counsel's specific obligations that ensure competent performance of the mitigation function by every member of the team. Counsel must "obtain services of persons independent of the government" and "whose qualifications fit the individual needs of the client and the case."[35] To satisfy this obligation, counsel must diligently vet the qualifications and closely supervise every member of the defense team:

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28. Powell v. Alabama, 287 U.S. 45, 69 (1932).

29. *See* discussion *infra* at notes 40-53 and accompanying text.

30. *See* discussion *infra* at notes 54-61 and accompanying text.

31. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Introduction.

32. Russell Stetler, *Mitigation Investigation: A Duty That Demands Expert Help but Can't Be Delegated*, CHAMPION, Mar. 2007, at 61, 62.

33. Strickland v. Washington, 466 U.S. 668, 689 (1984).

34. "The duty to investigate, develop and pursue avenues relevant to mitigation of the offense or penalty, and to effectively communicate the fruits of those efforts to the decision-makers, rests upon defense counsel." SUPPLEMENTARY GUIDELINES, *supra* note 1, at Introduction.

35. *Id.* at Guideline 4.1(A).

> Counsel has a duty to hire, assign or have appointed competent team members; to investigate the background, training and skills of team members to determine that they are competent; and to supervise and direct the work of all team members. Counsel must take whatever steps are necessary to conduct such investigation of the background, training and skills of the team members to determine that they are competent and to ensure on an ongoing basis that their work is of high professional quality.[36]

It is particularly important that counsel educate members of the defense team about the legal principles that will affect their work on the client's behalf. Therefore, the Supplementary Guidelines make clear that "[i]t is counsel's duty to provide each member of the defense team with the necessary legal knowledge for each individual case . . . ."[37] At a minimum, this includes providing defense team members with an "understanding of the capital charges and available defenses; applicable capital statutes and major state and federal constitutional principles; applicable discovery rules at the various stages of capital litigation; applicable evidentiary rules, procedural bars and 'door-opening' doctrines; and rules affecting confidentiality, disclosure, privileges and protections."[38] Counsel has other specific obligations to train, supervise, and regularly communicate with members of the defense team, to make strategic decisions based on the collective work and expertise of the entire team, and to otherwise closely monitor the work of the defense team.[39]

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36. *Id.* at Guideline 4.1(B).

37. *Id.* at Guideline 4.1(D).

38. *Id.* The issue of privilege also has implications for the structure of the defense team, which must function in a manner that preserves the attorney-client and work-product privileges so that counsel or defense team members will never refrain from conducting an investigation out of fear of generating discoverable material that is adverse to the client. *See id.* at 4.1.C, and discussion *infra* note 56 and accompanying text. The privilege is essential to counsel's ability to comply with the constitutional duty to conduct a thorough investigation into the client's life history before making strategic decisions. *See, e.g.*, Kenley v. Armontrout, 937 F.2d 1298, 1309 (8th Cir. 1991) ("Reasonable counsel might have been somewhat selective in his evidence presentation, but would not have cast aside all the mitigating evidence in this case."); *see also* Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775, 789-92 (2008).

39. *See* SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 6.1 ("Counsel should ensure that the workload of defense team members in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these supplementary Guidelines and the ABA Guidelines as a whole."); *id.* at Guideline 10.4(A) ("It is the duty of counsel to lead the team in conducting an exhaustive investigation into the life history of the client."); *id.* at Guideline 10.4(B) ("Counsel . . . conducts ongoing reviews of the evidence, assessments of potential witnesses, and . . . decides how mitigation evidence will be presented.").

B. Integrating the Defense Theory

A second potential danger identified by seasoned practitioners is that articulating standards specifically directed to the mitigation function could create the false impression that mitigation is separate from issues related to the guilt or innocence of the accused—that the mitigation effort only comes into play at the penalty stage of trial. Experienced capital litigators and mitigation specialists understand that the client's humanity is intricately interwoven with every aspect of a capital case, from the initial charging decision through the last step of the collateral review and clemency process. Indeed, it is not hard to find examples of cases in which exploration of the client's mental retardation or autism or other characteristics helped establish innocence of a capital crime.[40] Further, the late University of Pittsburgh Professor Welsh S. White noted, "Paradoxically, a capital defendant's strong claim of innocence . . . sometimes creates a trap for unwary defense counsel that, if not avoided, will increase the likelihood of the defendant's execution."[41] Professor White explains that persisting in claiming innocence in the face of a guilty verdict is likely to be "counterproductive" because the jury may interpret such arguments as "the defendant's failure to accept responsibility for his actions [as] a consideration that argues in favor of imposing the death penalty."[42]

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40. Professor White's book includes detailed discussions of Earl Washington and Anthony Porter, developmentally disabled men who were convicted of capital crimes based on false confessions, and later exonerated by DNA evidence. *See generally* WHITE, *supra* note 19, at 42, 50. The need to humanize a capital defendant well before the penalty phase of trial is apparent in Professor White's recounting of the ordeal of Ernest Willis, who was wrongly convicted of arson-murder and sentenced to death after the prosecutor successfully portrayed him as a monster. *Id.* at 57, 65. Often, evidence developed primarily for the purpose of mitigation becomes probative of factual issues relevant to guilt or innocence. *See, e.g.*, State v. Boyd, 143 S.W.3d 36, 46-47 (Mo. Ct. App. 2004) (granting a new trial because the trial court excluded evidence of James Boyd's developmental disability, Asperger Syndrome, which was tendered in support of his defense that Boyd made a convenient scapegoat for the perpetrators who avoided prison by testifying against him).

41. WHITE, *supra* note 19, at 101.

42. *Id.* Professor White's observation is borne out by empirical research. Professor Scott Sundby's study of capital jurors revealed that "juries in denial defense cases imposed death sentences twice as often as they imposed life sentences, while juries in admission defense cases chose a life verdict over a death sentence by a three-to-two ratio." Scott E. Sundby, *The Capital Jury and Absolution: the Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1575 (1998). Conversely, research shows that a juror's perception that the defendant has accepted responsibility for his crime and is truly remorseful is highly mitigating. *See* Steven P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559 tbl.4, 1560-61 (1998); *see also* John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What*

Therefore, "[c]apital defendants who are guilty are thus more likely to avoid the death sentence through a plea bargain; on the other hand, those who are innocent are more likely to be subjected to the vagaries—and potential mistakes—of a trial by jury."[43]

Where inexperienced defense attorneys overestimate the client's chances for acquittal, and narrow the focus of investigation to guilt-or-innocence issues, competent capital litigators always prepare for the penalty trial.[44] Professor White's research established that "[r]egardless of the strength of the capital defendant's claim of innocence, [experienced] attorneys conduct a full investigation for mitigating evidence."[45] Indeed, given the ever-increasing restrictions on capital appeals, an effective penalty phase defense may be necessary to the defendant's ability to prove his innocence at some future proceeding.

Experienced practitioners and mitigation specialists understand that the mitigation case is intricately woven into every step of the case, including the prosecutor's decisions as to the degree of the charge or whether to seek the death penalty, and the defense team's approach to settlement negotiations, jury selection, and first-stage trial issues. It is universally understood by experienced capital trial lawyers and mitigation specialists that waiting to unveil the mitigation case at the penalty phase of a capital trial is simply too late. Professor Craig Haney explained that by the penalty phase of trial, the jurors' perceptions of the defendant are unlikely to change:

> The poor timing of the defense case in mitigation, the fact that it would require most jurors to perform the difficult work of essentially changing their minds about the defendant, and the heavy crime-focus of the penalty instructions that follow may help to explain why the Capital Jury Project found that the penalty trial was the least well-remembered stage of the entire process for capital jurors.[46]

Professor Haney's observations are borne out by research into the decision-making process of jurors who have served on capital cases. Professor William Bowers reported that interviews by the Capital Jury Project with nearly a thousand capital jurors in eleven states disclose that almost half believed they knew what the punishment should be before

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Jurors Tell Us About Mitigation, 36 HOFSTRA L. REV. 1035, 1049-50 (2008) (noting that remorse is a factor that can lead jurors to choose life over death).

43. WHITE, *supra* note 19, at 169.

44. *Id.* at 79.

45. *Id.* at 102.

46. Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1457 (1997).

the sentencing phase began.[47] The research reveals that "premature decision-making is pervasive" among capital juries; most jurors reported discussing what punishment should be imposed during the guilt-or-innocence phase of trial.[48] Usually jurors who prematurely make up their minds on punishment have decided to vote for the death penalty, and report being "absolutely convinced" of their decision at the conclusion of the guilt-or-innocence phase of the trial.[49]

It is for good reason, then, that neither the ABA Guidelines nor these Supplementary Guidelines contemplate a separate "mitigation team" that waits in the wings to spring into action at the penalty stage of a capital case. "Because the mitigation function is of utmost importance in the defense of capital cases," the Supplementary Guidelines reflect the consensus view that "all members of the defense team perform in accordance with prevailing national norms when representing a client who may be facing execution."[50] The Supplementary Guidelines build on the requirement of the ABA Guidelines that counsel harmonize the defense presentation of both guilt-innocence and punishment issues[51] by recognizing counsel's duty to address the mitigation function from the very beginning and throughout the representation:

> [T]he responsibility for the development and presentation of mitigation evidence must be incorporated into the defense case *at all stages of the proceedings from the moment the client is taken into custody*, and extending to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing

47. William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1488 & tbl.1 (1998).

48. William J. Bowers, Benjamin D. Fleury-Steiner & Michael E. Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 427 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 2003).

49. William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L. REV. 1043, 1089-90 & tbl.6 (1995). Another researcher examining juror behavior in Pennsylvania found that of the jurors who chose death early, seventy-five percent never wavered from that initial choice. Wanda D. Foglia, *They Know Not What They Do: Unguided and Misguided Discretion in Pennsylvania Capital Cases*, 20 JUST. Q. 187, 198 (2003).

50. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Introduction.

51. *See* ABA GUIDELINES, *supra* note 3, at Guideline 10.10.1 ("As the investigations mandated by Guideline 10.7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies."). *See also supra* notes 37-39 and accompanying text.

> investigation, pretrial proceedings, trial, appeal, post-conviction review, clemency proceedings and any connected litigation.[52]

Therefore, building on the ABA Guidelines,[53] the Supplementary Guidelines describe in further detail counsel's unconditional duty to vigorously pursue and present mitigating evidence.

C. Accept No Substitutes

Practitioners stressed the need to educate judges and fiscal authorities about the unique role of mitigation specialists within capital defense teams. As former Presiding Judge of the Alabama Court of Criminal Appeals William M. Bowen, Jr. observed, typical criminal case investigators are ill-suited for mitigation work because they simply lack the necessary skills and abilities.[54] Nor are mental health experts able to perform the mitigation specialist function. It would be very expensive to pay a forensic psychologist or psychiatrist the number of hours necessary to perform the work required of the mitigation specialist.[55] Further, because discovery rules limit the attorney-client and work-product privileges in the case of testifying experts, counsel should think seriously about the implications of inviting forensic experts into the kind

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52. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Introduction (emphasis added). This directive is repeated at Supplementary Guideline 1.1(B).

53. The ABA Guidelines provide:

> 1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.
>
> 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

ABA GUIDELINES, *supra* note 3, at Guideline 10.7(A).

54. William M. Bowen, Jr., *A Former Alabama Appellate Judge's Perspective on the Mitigation Function in Capital Cases*, 36 HOFSTRA L. REV. 805, 817 (2008).

55. The Honorable Emmet Ripley Cox, Chair of the Defender Services Committee of the Judicial Conference of the U.S. Courts, appointed the Honorable James R. Spencer to chair a Subcommittee on Federal Death Penalty Cases ("Spencer Committee"). The Spencer Committee found inherent economies in the use of mitigation specialists:

> The work performed by mitigation specialists is work which otherwise would have to be done by a lawyer, rather than an investigator or a paralegal. Because the hourly rates approved for mitigation specialists are substantially lower than those authorized for attorneys, the appointment of a mitigation specialist or penalty phase investigator generally produces a substantial reduction in the overall costs of representation.

COMM. ON DEFENDER SERVS., JUDICIAL CONFERENCE OF THE U.S., FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION (1998), http://www.uscourts.gov/dpenalty/4REPORT.htm [hereinafter SPENCER REPORT].

of defense team investigative and strategic discussions that require the mitigation specialist's involvement.[56]

Issues of cost and privilege aside, there is a very practical reason that investigators and forensic mental health experts cannot do double duty as the mitigation specialist. Even the most skilled capital defense attorneys need the assistance of a mitigation specialist; capital defense is simply too large a task:

> An uncommonly gifted individual with expertise ranging from DNA to the DSM cannot diligently pursue the two investigative tracks that are part of every capital case: the reinvestigation of the factual allegations which constitute the capital charges, and the biographical inquiry aimed at discovering mitigating evidence that may inspire mercy or compassion in the hearts of jurors. Putting aside whether there are any such renaissance investigators, we can see at the outset that two very different skill sets are involved in the different tracks.[57]

The truth of this observation is borne out by a recent judgment, which found that where funding restrictions required the defense team to rely on the same individual as investigator and mitigation specialist, the individual was "pressed into service in two roles, resulting in her inability to do either of them sufficiently."[58]

There are innumerable and excellent reasons that the ABA Guidelines require "*no fewer than* two attorneys . . . an investigator, *and*

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56. Bowen, *supra* note 54, at 815. Many jurisdictions have rules similar to FED. R. CIV. P. 26(a)(2)(B), which mandates disclosure not only of "a complete statement of all opinions" but also of "the data or other information considered by the witness in forming the opinions . . . ." *Id.* This could oblige counsel to disclose all interviews, memoranda, and communications with counsel or the client to which an expert testifying in the penalty phase is exposed. Karn v. Rand, 168 F.R.D. 633, 639 (N.D. Ind. 1996). "[C]onsidered" is satisfied where experts have "reviewed" documents "in connection with forming their opinions." *Id.* at 635. The 1993 Advisory Committee Note to Rule 26(a)(2)(B) observes that: "[g]iven this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions . . . are protected from disclosure when such persons are testifying or being deposed." FED. R. CIV. P. 26(a)(2)(B) advisory comm. note. Therefore, the Commentary to ABA Guideline 10.4 provides that "counsel should structure the team in such a way as to distinguish between experts who will play a 'consulting' role, serving as part of the defense team covered by the attorney-client privilege and work product doctrine, and experts who will be called to testify, thereby waiving such protections." ABA GUIDELINES, *supra* note 3, at Guideline 10.4, commentary. The same caveat applies to mitigation experts. The Supplementary Guidelines therefore make it clear that mitigation specialists are members of the defense team, and "are agents of defense counsel" who "are bound by rules of professional responsibility that govern the conduct of counsel respecting privilege, diligence, and loyalty to the client." SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 4.1(C).

57. Stetler, *supra* note 32, at 62.

58. Harlow v. Murphy, No. 05-CV-039-B, slip op. at 30-31 (D. Wyo. Feb. 15, 2008).

a mitigation specialist" on every capital defense team.[59] In addition to the grave and complex subject matter, the sheer volume of the work is compounded by the fact that the prosecution is nearly always represented by well-funded and skilled specialists. The defense team must not only prepare an affirmative case for life, but must also investigate and prepare to meet the prosecution's case for death.[60] A committee of federal judges reported that prosecution resources are a significant factor driving the need for fully-staffed defense teams:

> Judges generally reported that prosecution resources in death penalty cases seemed unlimited. Typically, at least two and often three lawyers appeared for the prosecution in federal death penalty cases, who were assisted in court by one or more "case agents" assigned by a law enforcement agency. Investigative work and the preparation of prosecution exhibits for trial, including charts, video and audiotapes, is generally performed by law enforcement personnel. Law enforcement agencies also performed scientific examinations and provided expert witnesses at no direct cost to the prosecution. In some cases, which arose from joint state and federal investigations, state law enforcement agencies contributed resources to the prosecution effort.[61]

The guidance provided by these Supplementary Guidelines can only help judges and fiscal authorities understand the need for qualified mitigation specialists.

D. Standards for High Quality Representation

Practitioners repeatedly cautioned that the Supplementary Guidelines must avoid institutionalizing substandard work. As Professor Liebman's study amply demonstrates, there are clearly lawyers whose failure to perform competently undermines confidence in the outcome of

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59. ABA GUIDELINES, *supra* note 3, at Guideline 4.1 (emphasis added). *See also id.* at Guideline 10.4 (requiring counsel to make "appropriate contractual arrangements with non-attorney team members in such a way that the team includes: *at least* one mitigation specialist and one fact investigator; [and] *at least* one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments") (emphasis added).

60. "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and *evidence to rebut any aggravating evidence that may be introduced by the prosecutor*.'" Wiggins v. Smith, 539 U.S. 523, 524 (2002) (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 11.4.1(C) (1989) [hereinafter 1989 GUIDELINES]) (emphasis added). The 1989 version of the Guidelines can be found at the ABA Death Penalty Representation Project web site, http://www.abanet.org/deathpenalty/resources/docs/1989Guidelines.pdf (last visited June 1, 2008).

61. SPENCER REPORT, *supra* note 55.

capital trials.[62] However, we also learned that every capital jurisdiction in the United States has a mechanism for funding mitigation specialist services, and our research and interviews with capital defense attorneys revealed unanimous agreement with the requirement of the ABA Guidelines that the defense team include both an investigator and a mitigation specialist.[63] While case studies of incompetent performance by counsel can provide insight into the need for compliance with prevailing standards, occasional or even frequent incompetence does not define a standard of performance.[64]

Just as our notion of competent performance is not adjusted downward to accommodate a lawyer sleeping through his client's capital trial,[65] attorneys who fail to engage a qualified mitigation specialist are

62. *See supra* notes 11-12 and accompanying text. *See also* Bright, *supra* note 15, at 1840.

63. ABA GUIDELINES, *supra* note 3, at Guideline 4.1(A); *see also supra* note 23.

64. Recently, the Fourth Circuit Court of Appeals ruled that counsel was relieved of his obligation to seek funding because the request would have been denied anyway under Virginia law, which requires the showing of a "particularized need" for expert assistance. Yarbrough v. Johnson, 520 F.3d 329, 334-35 (4th Cir. 2008). The district court had questioned the Virginia standard because it "appears to skate dangerously close to conflicting with the federal constitutional requirement that indigent defendants be provided with the 'basic tools for an adequate defense.'" Yarbrough v. Johnson, 490 F. Supp. 2d 694, 719 (D. Va. 2007). Indeed, the Supreme Court explicitly rejected the "particularized need" standard, noting that indigent defendants are entitled to transcripts of prior testimony "without requiring a showing of need tailored to the facts of the particular case." Britt v. North Carolina, 404 U.S. 226, 228 (1971); *see also* Ake v. Oklahoma, 470 U.S. 68, 80 (1985) (The Due Process Clause requires states to provide indigent defendants with expert assistance that is "relevant to his criminal culpability and to the punishment he might suffer.") Counsel plays a critical role in the protection of this right, without which "the risk of an inaccurate resolution of . . . issues is extremely high." *Id.* at 82. By articulating counsel's duty to request all appropriate and relevant expert assistance, ABA Guideline 10.8 recognizes that even if the trial court denies funding, counsel's diligent assertion of the client's right may benefit him in future proceedings. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 442-43 (2000), where the Court found that Williams's unsuccessful requests for investigative funds during state post-conviction proceedings constituted "due diligence" within the meaning of 28 U.S.C. § 2254(e)(2) (2000), so that when Williams later acquired the means to investigate, he was not precluded from raising claims based on the fruits of that investigation. Nor does a state's chronic underfunding of resources for indigent defendants justify incompetent performance by defense counsel. As Justice Holmes declared, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." Tex. & Pac. Ry. Co. v. Behmeyer, 189 U.S. 468, 470 (1903). Judge Learned Hand likewise observed that while common practice may define reasonable standards of care, it is never the final measure, for "a whole calling may have unduly lagged in the adoption of new and available devices." The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932). Therefore, "[c]ourts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." *Id.* This is the more just rule in light of the constitutional imperative of fully informed decision-making where human life hangs in the balance.

65. Burdine v. Johnson, 262 F.3d 336, 340 (5th Cir. 2001) (en banc).

not performing consistently with the prevailing standard of care.[66] Therefore, these Supplementary Guidelines were drafted with the primary goal of articulating the practices of capital defense teams that have been proven over time to acquire and present the evidence, facts and circumstances of the client's life history that move capital decision-makers away from death.

In addition to the obvious objective of guiding the performance of capital defense teams in the field, the Supplementary Guidelines identify specific skills, qualities and practices which must be addressed in the training and recruiting of capital defense teams. The ABA Guidelines require training for lawyers and identify specific areas of skill and knowledge which must be addressed.[67] The Supplementary Guidelines incorporate that directive in the requirement to attend annual training with "an organization with substantial experience and expertise in the defense of persons facing execution and committed to the national standard of practice embodied in these Supplementary Guidelines and the ABA Guidelines as a whole."[68] By directing that training include "[a]ll capital defense team members,"[69] the Supplementary Guidelines reflect the fact that the most relevant and effective training programs are directed to the entire defense team, not solely to counsel or to mitigation specialists or investigators. Some of the most effective training consists of fellowships or internships in offices that specialize in the representation of persons facing the death penalty, and small regional seminars at which participants bring materials relating to their own cases as the context for their training. All training models involve as faculty seasoned capital defense attorneys, mitigation specialists, and experts in mental health, human behavior, and human services relevant to the development of mitigation. The skills, abilities and duties described in the Supplementary Guidelines mirror those that are being taught nationally by capital defense experts.

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66. Rompilla v. Beard, 545 U.S. 374, 391 (2005) (trial counsel's unskilled interviews of Ronald Rompilla's parents and siblings failed to uncover a wealth of mitigation evidence that existed just beneath the surface); Wiggins v. Smith, 523 U.S. 539, 525 (2002).

67. ABA GUIDELINES, *supra* note 3, at Guideline 8.1(A)-(B).

68. SUPPLEMENTARY GUIDELINES, *supra* note 1, at 8.1(A).

69. *Id.* Examples of organizations that sponsor national and regional capital defense training programs include the Federal Death Penalty Resource Counsel ("FDPRC") and Capital Resource Counsel Projects ("CRC"), the National Legal Aid and Defender Association ("NLADA"), the National Association of Criminal Defense Lawyers ("NACDL"), and the Habeas Corpus Resource Center ("HCRC"). A schedule of upcoming training events sponsored by these and other organizations can be found at the Capital Defense Network web site, http://capdefnet.org. (follow "Habeas Assistance and Training" hyperlink; then follow "WebSite Contents" hyperlink; then follow "Upcoming Seminars" hyperlink) (last visited Mar. 9, 2008).

V. EVOLVING CONCEPTS OF MITIGATION

One of the biggest challenges in devising standards for the "mitigation function" of the capital defense team was to arrive at an understanding of what mitigation is. As Professor Haney noted, "despite its absolute centrality to any attempt at fairly implementing the modern death penalty, 'mitigation' is probably the least understood concept in current capital sentencing formulas."[70] The Supreme Court's Eighth Amendment cases make it clear that the concept of mitigation is as broad as it can possibly be. In *Lockett v. Ohio*,[71] the Supreme Court ruled that modern standards of human decency embodied in the Eighth Amendment require a sentencer to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[72] Justice Kennedy recently referred to the scope of mitigation evidence as "potentially infinite,"[73] and then-Justice Rehnquist observed, albeit derisively, that under *Lockett*, "anything under the sun" can be tendered by the defense in mitigation of punishment.[74] To understand how these concepts are applied in the work of modern capital defense teams, it is helpful to trace the evolution of mercy in capital sentencing in America.

A. Mercy

The modern concept of mitigation in capital cases has its roots in the pre-Civil War South:

> The inadequacy of distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense led the States to grant juries sentencing discretion in capital cases. Tennessee in 1838, followed by Alabama in 1841, and Louisiana in 1846, were the first States to abandon mandatory death sentences in favor of discretionary death penalty statutes. This flexibility remedied the harshness of mandatory statutes by permitting the jury to respond to mitigating factors by withholding the death penalty. . . . By 1963, all of these remaining jurisdictions had replaced

70. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 554 n.15 (1995).

71. 438 U.S. 586 (1978).

72. *Id.* at 604.

73. Ayers v. Belmontes, 127 S. Ct. 469, 478 (2006).

74. *Lockett*, 438 U.S. at 631 (Rehnquist, J., concurring in part and dissenting in part).

> their automatic death penalty statutes with discretionary jury sentencing.[75]

Although jurors were given little or no guidance on how to exercise this discretion, it is clear that jurors could respond to evidence and circumstances beyond the bare elements of the capital offense in choosing to spare the life of a defendant. Justice Frankfurter observed that this development was prompted by "[d]issatisfaction over the harshness and antiquity" of mandatory death penalty statutes.[76] The Court subsequently observed, "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."[77] The discretion of juries to reject capital sentences was viewed as "a link between contemporary community values and the penal system . . . ."[78] Chief Justice Burger described the "enlightened introduction of flexibility into the sentencing process" as "a humanizing development," and "the most sensitive feature of the sentencing system."[79]

Although the Court's pre-*Furman* decisions had stopped short of constitutionalizing the requirement of individualized consideration in capital sentencing, it was well-accepted that "where sentencing discretion is granted, it generally has been agreed that the [sentencer's] 'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence.'"[80]

B. Evolving Concepts of Mitigation

Against this backdrop, the Supreme Court sowed the seeds for the modern capital defense team more than thirty years ago when it decided that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular

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75. Woodson v. North Carolina, 428 U.S. 280, 291-92 (1976) (footnote omitted). See also Winston v. United States, 172 U.S. 303 (1899), in which the Court noted that the "hardship of punishing with death every crime coming within the definition of murder at common law, and the reluctance of jurors to concur in a capital conviction, have induced American legislatures, in modern times, to allow some cases of murder to be punished by imprisonment, instead of by death." *Id.* at 310.

76. Andres v. United States, 333 U.S. 740, 747-48 n.11 (1948).

77. Williams v. New York, 337 U.S. 241, 247 (1949).

78. Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968).

79. Furman v. Georgia, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting).

80. Lockett v. Ohio, 438 U.S. 586, 602-03 (1977) (quoting Williams v. New York, 337 U.S. 241, 247 (1949)) (alterations in original).

offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[81] This constitutional obligation flows from the fact that the life or death decision is "qualitatively different" from decisions involved in any other kind of case,[82] leading Chief Justice Burger to conclude "that an individualized decision is essential in capital cases."[83]

In defining the scope of mitigating evidence necessary to individualized sentencing, the Court has spoken "in the most expansive terms."[84] The Court recently emphasized that the concept of mitigation extends far beyond factors related to the defendant's culpability in the underlying offense, striking down any requirement to establish a causal nexus between a mitigating factor and the crime.[85] Such a requirement "will screen out any positive aspect of a defendant's character, because good character traits are neither 'handicap[s]' nor typically traits to which criminal activity is 'attributable.'"[86] The Court further noted "that impaired intellectual functioning is inherently mitigating,"[87] regardless of whether it contributed to the commission of the crime.

The Court's decisions also emphasize that painful aspects of a defendant's life history are a very important source of mitigating evidence. In *Williams v. Taylor*,[88] the Court concluded that the "graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability."[89] The Court

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81. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

82. *Id.* The Court's conclusion that a capital case decision-maker must be allowed to consider any aspect of the defendant's background and character,

> . . . rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 305.

83. *Lockett*, 438 U.S. at 605.

84. Tennard v. Dretke, 542 U.S. 274, 284 (2004) (citing McKoy v. North Carolina, 494 U.S. 433, 440-41 (1990)).

85. *Tennard*, 542 U.S. at 284.

86. *Id.* at 285.

87. *Id.* at 287.

88. 529 U.S. 362 (2000).

89. *Id.* at 398. The justices were clearly moved by evidence of Williams's impoverished and tragic childhood, and included a passage from juvenile records describing those conditions in some detail:

> The home was a complete wreck. . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the

observed that, "Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."[90] In a similar case, the Court described such mitigating evidence as "powerful," finding that Kevin Wiggins also had "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability."[91]

The Court deemed the unrestricted scope of mitigating evidence necessary to "be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence."[92] Further, "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."[93] The nature, quality, and gravity of the death penalty make the defense of capital cases fundamentally unlike any other type of legal endeavor. In ordinary criminal cases, the law defines crimes and defenses in objective elements which can be perceived in concrete terms. The life and death decision, in contrast, is driven by abstract but powerful concepts, such as retribution, remorse, redemption, and human dignity.[94] The Court's Eighth Amendment capital jurisprudence is built around the concept of human dignity[95] and "the evolving standards of decency that mark the progress of a maturing

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> bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. . . . The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. . . . The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey.

Id. at 395 n.19. Justice O'Connor also took note of "the existence of 'friends, neighbors and family of [Williams] who would have testified that he had redeeming qualities.'" *Id.* at 416 (O'Connor, J., concurring in part and dissenting in part).

90. *Id.* at 398.

91. Wiggins v. Smith, 539 U.S. 510, 534, 535 (2003).

92. Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 305 (1976)) (alteration in original). Justice O'Connor, the author of *Woodson*, emphasized that "'the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime.'" *Penry*, 492 U.S. at 319 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

93. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

94. The Court has observed that in reaching the life-or-death decision, "[t]he emphasis shifts from narrowing the class of eligible defendants by objective factors to individualized consideration of a particular defendant." Sawyer v. Whitley, 505 U.S. 333, 343 (1992).

95. "The basic concept underlying the [Eighth Amendment] is nothing less than the dignity of man." Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).

society."[96] In the wake of *Furman v. Georgia*,[97] the humanity of the accused became the focal point of capital litigation.

The Court's Eighth Amendment cases thus make it very clear that the concept of mitigation is as broad as it can possibly be because any definition must accommodate the humanity and uniqueness of each individual defendant. Certainly any definition of mitigating evidence included in the Supplementary Guidelines must not limit in any way the scope of evidence to be searched out, developed, and presented in support of a life sentence. However, language such as "potentially infinite," while conducive to evolving standards and creativity in the conceptualization of mitigation, is not particularly descriptive or helpful in guiding the investigation and development of mitigation in a specific case. Therefore, the Supplementary Guidelines include a definition of mitigation evidence that guides and explains mitigation without limiting or restricting it:

> All capital defense teams must be comprised of individuals who, through their experience, training and function, strive to fulfill the constitutional mandate that the sentencer consider all evidence in support of a sentence other than death. Mitigation evidence includes, but is not limited to, compassionate factors stemming from the diverse frailties of humankind, the ability to make a positive adjustment to incarceration, the realities of incarceration and the actual meaning of a life sentence, capacity for redemption, remorse, execution impact, vulnerabilities related to mental health, explanations of patterns of behavior, negation of aggravating evidence regardless of its designation as an aggravating factor, positive acts or qualities, responsible conduct in other areas of life (e.g., employment, education, military service, as a family member), any evidence bearing on the degree of moral culpability, and any other reason for a sentence less than death.[98]

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96. *Woodson*, 428 U.S. at 301 (quoting *Trop*, 356 U.S. at 101).

97. 408 U.S. 238 (1972).

98. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 1.1(A). Note that the Supplementary Guidelines do not link the definition of mitigation to sentencing schemes that attempt to identify specific statutory mitigating circumstances. In its first post-*Furman* decision upholding the constitutionality of a death penalty statute, the Court noted the mitigating factors to be considered by a capital sentencer enumerated in the Model Penal Code:

> (a) The defendant has no significant history of prior criminal activity.
>
> (b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> (d) The murder was committed under circumstances which the defendant believed to

Given the central role and broad spectrum of mitigating evidence, this definition guides capital defense teams in the search for and development of such evidence.

In attempting to enumerate types of mitigating evidence for consideration, the Supplementary Guidelines make it clear that mitigation "is not limited to" the enumerated factors, and defense teams are reminded that mitigating evidence includes "any evidence bearing on the degree of moral culpability, and any other reason for a sentence less than death."[99] The Supplementary Guidelines preserve important aspects of the present concept of mitigation, including "vulnerabilities related to mental health, explanations of patterns of behavior, negation of aggravating evidence . . . and any evidence bearing on the degree of moral culpability."[100] In naming specific categories of mitigating evidence, however, the Supplementary Guidelines avoid restricting the scope of mitigation, in compliance with *Tennard v. Dretke*.[101]

Just as the concept of mitigation is not restricted to the circumstances of the crime, it is also not restricted in time and place. While it was easy for early twentieth century Justices to conceptualize the relevance of the defendant's "past life and habits of a particular offender,"[102] modern death penalty litigation demands that the defense team explore strategies that will project the client's growth and development into the future in positive and mitigating ways. Therefore, the Supplementary Guidelines include in the definition of mitigating evidence factors which require the exploration of developments

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provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.

Gregg v. Georgia, 428 U.S. 153, 193-94 n.44 (1976) (quoting MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962)). These factors have been incorporated into many capital sentencing statutes. Except for youth and the lack of a prior criminal record, the proposed statutory mitigating circumstances are defined in relation to guilt-or-innocence phase evidence bearing on the defendant's mental or emotional state at the time of the offense. More often than not, the most compelling mitigation is non-statutory mitigating evidence that reveals the intrinsic humanity of the accused. As Judge Bowen observed, "There is an entire world [of mitigation] outside the statute." Bowen, *supra* note 54, at 806-07.

99. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 1.1(A).

100. *Id.*

101. 542 U.S. 274, 285 (2004).

102. Williams v. New York, 337 U.S. 241, 247 (1949).

subsequent to the offense, such as the client's "capacity for redemption" and expressions of remorse.[103]

Demonstrating the client's remorse and capacity for change is important to the defense team's obligation to explore evidence that will assist in "negation of aggravating evidence regardless of its designation as an aggravating factor,"[104] which often includes allegations that the defendant will pose a danger if not executed. A majority of states allow the prosecution to argue the defendant's future dangerousness as an aggravating circumstance explicitly defined by statute,[105] or as a non-statutory aggravating factor.[106] Further, empirical research reflects that jury decision-making is heavily influenced by their perceptions of the defendant as posing a future danger, regardless of whether future danger is designated as an aggravating factor.[107] It is, therefore, critically

103. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 1.1(A).

104. *Id.*

105. *See, e.g.*, Jurek v. Texas, 428 U.S. 262, 269 (1978) (upholding the Texas capital sentencing scheme in which a sentence of death is based in part upon a jury's determination that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society") (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1) (Vernon 1975); Ford v. State, 919 S.W.2d 107, 111-12 (Tex. Crim. App. 1996) (applying the statute quoted in *Jurek*); *see also* IDAHO CODE ANN. § 19-2515(9)(I) (2004); OKLA. STAT. ANN. tit. 21, § 701.12(7) (West 2003); OR. REV. STAT. ANN. § 163.150(1)(b)(B) (West 2007); VA. CODE ANN. § 19.2-264.4(C) (2004); WYO. STAT. ANN. § 6-2-102(h)(xi) (2007).

106. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 2-303(h)(2)(vii) (2002) (authorizing future dangerousness as a non-statutory aggravating factor in Maryland capital murder trials); *see also* United States v. Allen, 274 F.3d 741, 788 (8th Cir. 2001) ("given the broad language of the [Federal Death Penalty Act ("FDPA")] as to the allowance of nonstatutory aggravating factors, there is no reason under the FDPA why future dangerousness cannot be presented to the jury"); Ruiz v. Norris, 868 F. Supp. 1471, 1520 (E.D. Ark. 1994); Holladay v. State, 549 So. 2d 122, 132 (Ala. Crim. App. 1988); People v. Ervin, 990 P.2d 506, 534 (Cal. 2000) (expert opinion on future danger is inadmissible, but argument based on the "defendant's future dangerousness is permissible when based on evidence of the defendant's conduct rather than expert opinion"); Starling v. State, 903 A.2d 758, 764 (Del. 2006); Sterling v. State, 477 S.E.2d 807, 810 (Ga. 1996); People v. Mertz, 842 N.E.2d 618, 648 (Ill. 2005); Hodge v. Commonwealth, 17 S.W.3d 824, 853 (Ky. 1999); State v. Cooks, 720 So. 2d 637, 650 (La. 1998); Bell v. State, 725 So. 2d 836, 862-63 (Miss. 1998); State v. Chambers, 891 S.W.2d 93, 107 (Mo. 1994); State v. Smith, 705 P.2d 1087, 1104 (Mont. 1985); Redmen v. State, 828 P.2d 395, 400 (Nev. 1992); State v. Jacobs, 10 P.3d 127, 150 (N.M. 2000); State v. Smith, 607 S.E.2d 607, 621 (N.C. 2005); State v. White, 709 N.E.2d 140, 156 (Ohio 1999); Commonwealth v. Chandler, 721 A.2d 1040, 1046 (Pa. 1998); State v. Hughes, 521 S.E.2d 500, 503-04 (S.C. 1999); Rhines v. Weber, 608 N.W.2d 303, 311 (S.D. 2000); State v. Young, 853 P.2d 327, 353 (Utah 1993); State v. Finch, 975 P.2d 967, 1008 (Wash. 1999).

107. As noted by Professor Stephen Garvey,

> [A] majority of jurors would be at least slightly more likely to impose death if the defendant had a history of violent crime, with over a quarter being much more likely. When the question of the defendant's future dangerousness was put more directly—the "defendant might be a danger to society in the future"—57.9% reported that they would be more likely to vote for death. Moreover, 78.7% believed the defendant actually presented

important that the mitigation case reveal the client's remorse and capacity for redemption;[108] indeed, the Court has held that a jury cannot be precluded from considering an offender's positive adaptation to prison as a reason to spare his life.[109]

While the Court has made clear that mitigating evidence cannot be restricted to characteristics or disabilities that are causally connected to the crime,[110] the capital crime is always part of the context in which mitigating evidence will be presented. The defendant's unique human qualities are more difficult to perceive in the atmosphere that surrounds capital litigation. Professor Haney observes that to facilitate the imposition of the death penalty, the prosecution will attempt to sever the defendant from his intrinsic humanity:

> [I]t becomes justifiable "to kill those who are monsters or inhuman because of their abominable acts or traits, or those who are 'mere animals' (coons, pigs, rats, lice, etc.) . . ." because they have been excluded "from the universe of morally protected entities." But locating the causes of capital crime exclusively within the offender—whose evil must be distorted, exaggerated, and mythologized—not only makes it easier to kill them but also to distance ourselves from any sense of responsibility for the roots of the problem itself. If violent crime is the product of monstrous offenders, then our only responsibility is to find and eliminate them.[111]

Professor Haney suggests that "sensationalized, demonic images" such as Hannibal Lecter, or Mickey and Mallory Knox, "have become so much a part of the public's 'knowledge' about crime and punishment that, despite their fictional, socially constructed quality, they wield

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> such a risk. These results comport with prior studies that emphasize the pervasive role future dangerousness plays in and on the minds of capital sentencing jurors."

Garvey, *supra* note 42, at 1559-60 (footnotes omitted).

108. Post-verdict interviews of capital jurors reflect jurors who perceive the defendant as "remorseless" are likely to impose a sentence of death. *Id.* at 1560-61. At least one researcher has found that "a jury that believes the defendant is truly remorseful is very likely to settle on a life sentence." Sundby, *supra* note 42, at 1568. Professor Sundby's research may also suggest that jurors who believe the defendant is remorseful are less likely to believe that he will be a danger in the future. *Id.* at 1571.

109. Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986).

110. Tennard v. Dretke, 542 U.S. 274, 285 (2004).

111. Haney, *supra* note 70, at 558 (footnotes omitted). The ordeal of former Texas death row inmate Ernest Willis provides a stark example. At his trial for arson-murder, the district attorney portrayed Willis as "a cold blooded monster, devoid of empathy or feelings of any kind." WHITE, *supra* note 19, at 57. After spending seventeen years on death row, Willis was exonerated by scientific evidence. *Id.* at 65. The same prosecutor who called him a monster dismissed all charges against Willis explaining, "[h]e simply did not do the crime. . . . I'm sorry this man was on death row for so long and there were so many lost years." *Id.*

significant power in actual legal decisions."[112] Into his third decade of studying capital murder and examining persons accused of violent crimes, Professor Haney does not believe that such fictional characters exist in real life; nevertheless, "these are the images that American citizens bring into many courtrooms and voting booths across the country."[113]

The tendency to dehumanize capital defendants unleashes aspects of capital sentencing that the Court found constitutionally repugnant:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[114]

Therefore, humanizing the defendant is a crucial component of the capital defense team's constitutionally mandated duty of effective representation. These Supplementary Guidelines reflect that this duty permeates every aspect of every capital case.

VI. THE LIFE HISTORY INVESTIGATION

The first post-*Furman* capital defense teams quickly discovered that the client's life history is always a rich source of humanizing, mitigating evidence revealing those "diverse frailties of humankind" which the Court had found so crucial to reliable capital sentencing.[115] Twenty-five years ago, Gary Goodpaster interviewed capital defense attorneys, reviewed death penalty defense materials and training programs, and described the standards of performance which were followed by capital defense teams in the 1970s and early 1980s.[116] Specifically, he looked to the successful defense of two highly aggravated capital murder cases to demonstrate examples of effective performance. His article begins with Millard Farmer's and James Kinard's 1976 discussion of the defense of

112. Haney, *supra* note 70, at 559.

113. *Id.*

114. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

115. *Id.* at 304.

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

Bernardino Sierra after his eight-hour crime spree, which resulted in the deaths of three people. The defense presented evidence of Sierra's tragic life history:

> When he was a little boy, his stepfather would come home drunk at night and beat him with a wire whip, catching him while he was asleep. His stepfather would lock him out of the house at night sometimes, and he would crawl under it to make his miserable bed and try to sleep. Often he was hungry and had no food. He ate out of garbage cans. He brought the best food he found there home for his mother and little sister.[117]

The jury voted to spare Sierra's life in spite of his terrible crimes.[118] Similarly, after the Georgia Supreme Court granted Randall Lamb a new sentencing trial,[119] Lamb's "new defense attorneys conducted a comprehensive investigation of Lamb's life history and placed all the information uncovered, including evidence of poor upbringing, extensive drug abuse, and a genuine religious conversion subsequent to the crime, before the jury in the new penalty trial. The jury returned a life sentence."[120] The nature and quality of the powerful mitigating evidence which moved juries to impose life sentences was remarkably similar to the mitigation that decades later moved the Supreme Court to grant new capital sentencing trials in *Wiggins*, *Williams*, and *Rompilla*.[121]

A. Humanizing the Client

Echoing the familiar theme that the defense of death penalty cases is different from all other litigation, Goodpaster observed that "the defense advocate must establish a prima facie case for life."[122] To meet "[t]he heavy burden of persuading the sentencer that the defendant should live,"[123] according to Goodpaster, "counsel must portray the defendant as a human being with positive qualities."[124] Evidence of the

117. *Id.* at 300-01.
118. *Id.* at 301.
119. Lamb v. State, 243 S.E.2d 59, 62 (1978).
120. Goodpaster, *supra* note 116, at 303 n.21.
121. *See supra* notes 9-10, 81-83, and *infra* notes 170-95 and accompanying text.
122. Goodpaster, *supra* note 116, at 337.
123. *Id.* at 335.
124. *Id.* Goodpaster elaborated:

> The prosecution will have selectively presented the judge or jury with evidence of defendant's criminal side, portraying him as evil and inhuman, perhaps monstrous. Defense counsel must make use of the fact that few people are thoroughly and one-

defendant's redeeming traits must be accompanied by evidence that his crimes are "humanly understandable in light of his past history and the unique circumstances affecting his formative development, that he is not solely responsible for what he is."[125] The defense team must also investigate and prepare evidence to mitigate or rebut evidence that the prosecution will use to justify the death penalty.[126] Professor Goodpaster's article is but one example of publications by scholars and capital litigators describing standards of performance of early capital defense teams.[127] With only minor variations in emphasis, these works reflect a consensus on the key principles articulated in the *National Legal Aid and Defender Association Standards for the Appointment of Counsel in Death Penalty Cases* published in 1987,[128] and in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* adopted in 1989.[129]

The focal point of counsel's investigation in the post-*Furman* era of capital litigation is the client's life history. "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."[130] Therefore, the Constitution requires a thorough investigation of the client's background and character,[131] which in turn defines the unique nature and exhaustive scope of defense counsel's obligation:

> sidedly evil. Every individual possesses some good qualities and has performed some kind deeds.

Id. (footnote omitted).

125. *Id.* The professor acknowledged that the defendant's childhood maltreatment does not excuse his crime. However, it makes his crime more understandable, and "may spark in the sentencer the perspective or compassion conducive to mercy." *Id.* at 335-36.

126. *Id.* at 337.

127. *See also* Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 377 (1993); Dennis N. Balske, *The Penalty-Phase Trial: A Practical Guide*, CHAMPION, Mar. 1984, at 42; Kevin McNally, *Death is Different: Your Approach to a Capital Case Must Be Different, Too*, CHAMPION, Mar. 1984, at 8.

128. *See* NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES (1987), *available at* http://www.nlada.org/Defender/Defender_Standards/Standards_For_Death_Penalty.

129. The 1989 GUIDELINES have been superseded by a February, 2003, revision. *See generally* ABA GUIDELINES, *supra* note 3. The revisions "adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence. The 2003 ABA Guidelines do not depart in principle or concept from *Strickland, Wiggins* or our court's previous cases concerning counsel's obligation to investigate mitigation circumstances." Hamblin v. Mitchell, 354 F.3d 482, 487 (6th Cir. 2003).

130. Jurek v. Texas, 428 U.S. 262, 276 (1976).

131. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 396 (2000) (finding that "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background" (citing ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1, cmt. 4-55 (2d ed. 1980)). Capital defense attorney

> Counsel will have to uncover witnesses from a possibly distant past, not only relatives, but childhood friends, teachers, ministers, neighbors, all of whom may be scattered like a diaspora of leaves along the tracks of defendant's travels. . . . Not only does it call for imagination and resourcefulness on the part of defense counsel, it also requires that the defendant reveal himself completely to counsel and take an active role in saving his own life. The quality of the client's cooperation may depend significantly on counsel's skill and sensitivity in developing a human and emotional relationship with him.[132]

The commentary to ABA Guideline 10.7 makes it clear that counsel's duty to investigate includes "extensive and generally unparalleled investigation into personal and family history."[133]

B. Parallel Tracks: Paper and People

The exhaustive life history investigation encompasses multiple sources; a competent capital defense team will triangulate data to assure maximum thoroughness, accuracy, and reliability:

> Triangulation of data refers to obtaining data from more than one source and, preferably from more than one type of source. For example, a head injury should be documented by several witnesses and by medical records. This insures the reliability of information, as well as providing more details for each incident.[134]

This careful investigative approach is an integral aspect of the standards articulated in the Supplementary Guidelines:

> The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other factors,

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Dennis Balske wrote that defense counsel "must conduct the most extensive background investigation imaginable." Balske, *supra* note 127, at 42.

132. Goodpaster, *supra* note 116, at 321-22.

133. ABA GUIDELINES, *supra* note 3, at Guideline 10.7(A), commentary (quoting Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, CHAMPION, Jan.-Feb. 1999, at 35). Additionally, "[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." ABA GUIDELINES, *supra* note 3, at Guideline 10.7. The critical need to conduct a thorough, multidisciplinary investigation of the client's life history is the dominant theme in capital defense articles and training materials. *See, e.g.*, Cessie Alfonso & Katharine Baur, *Enhancing Capital Defense: The Role of the Forensic Social Worker*, CHAMPION, June 1986, at 26; Balske, *supra* note 127, at 42; James Hudson, Jane Core & Susan Schorr, *Using the Mitigation Specialist and the Team Approach,* CHAMPION, June 1987, at 33; Kevin McNally, *supra* note 127, at 12-13; Russell Stetler & Kathy Wayland, *Dimensions of Mitigation*, CHAMPION, June 2004, at 31.

134. Lee Norton, *Capital Cases: Mitigation Investigations*, CHAMPION, May 1992, at 45.

> which may provide a basis for a sentence less than death. The investigation into a client's life history must survey a broad set of sources and includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.[135]

The client's life history will reveal many events that are independently mitigating, but will also provide valuable data for experts and jurors who strive to understand the defendant and his vulnerabilities. Traumatic or stressful conditions and events in his early life can help them better understand him because "[e]ach stress leaves behind a trace of its influence and continues to manifest itself throughout life in proportion to the intensity of its effect and the susceptibility of the human being involved."[136] Therefore, the client's trauma history must be determined to the fullest extent possible. Stresses and strains "should be determined to the fullest extent possible," keeping in mind that "[t]he significant point may not be a stress itself but a person's reaction to it."[137]

The broad set of sources which must be explored in every case includes lay witnesses, appropriate experts, and physical evidence such as documents, photographs, and objects that reveal or verify something about the client's history. It has long been recognized that a competent mitigation investigation has to include the family history going back at least three generations, and must document genetic history, patterns, and effects of familial medical conditions.[138] Competent life history investigations require "interviewing the client and virtually everyone

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135. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 10.11(B).

136. BENJAMIN JAMES SADOCK & VIRGINIA ALCOTT SADOCK, KAPLAN & SADOCK'S SYNOPSIS OF PSYCHIATRY 6 (9th ed. 2003). *See also* Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 925 (2008).

137. SADOCK & SADOCK, *supra* note 136, at 6-7.

138. Norton, *supra* note 134, at 48. *See also* Dudley & Leonard, *supra* note 24, at 966-67; Daniel J. Wattendorf & Donald W. Hadley, *Family History: The Three-Generation Pedigree*, 72 AM. FAM. PHYSICIAN 441, 447 (2005).

who has ever known the client, and finding every piece of paper regarding the client ever generated."[139]

While thorough and complete medical and mental health assessments are an important part of the investigation, they must be accompanied by a thorough life history investigation:

> Without a thorough social history investigation, it is impossible to ascertain the existence of previous head injuries, childhood poverty and deprivation, and a host of other life experiences that may provide a compelling reason for the jury to vote for a life sentence. Moreover, without a social history, counsel cannot determine which experts to retain, in order to gauge the nature and extent of a client's possible mental disorders and impairments. Mental health experts, in turn, require social history information to conduct a thorough and reliable evaluation. The investigation should include a thorough collection of objective, reliable documentation about the client and his family, typically including medical, educational, employment, social service, and court records. Such contemporaneous records are intrinsically credible and may document events which the client and other family members were too young to remember, too impaired to understand and record in memory, or too traumatized, ashamed, or biased to articulate.[140]

Mental health experts also recognize that "[f]amily members, friends, and spouses can provide critical data such as past psychiatric history, responses to medication, and precipitating stresses that patients may not be able to describe themselves."[141]

1. Lay witnesses

Finding and interviewing people who have known the defendant throughout his life are of paramount importance to the mitigation function. As the late mitigation specialist Marie Campbell explained, the life history investigation "for a capital defendant involves thoroughness, precision and attention to all aspects of all persons' lives who touch

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139. Norton, *supra* note 134, at 43. Dr. Norton further advises, "Both tasks require special knowledge and expertise which the attorney may not (and probably does not) possess. Therefore, one of the first steps in the preparation of any capital case is securing the assistance of an individual with the skills that make him or her competent to conduct the life history investigation." *Id. See supra* Part IV.

140. Affidavit of Russell Stetler, at 8 [hereinafter Stetler Affidavit] (on file with the Hofstra Law Review). Declarations and affidavits of mitigation specialists are generally filed *ex parte*. The affidavits cited herein were either unsealed or redacted to prevent the disclosure of confidential information.

141. SADOCK & SADOCK, *supra* note 136, at 5.

upon the client's life, since the evidence presented in court must be an accurate representation of the client and the factors that affect his judgment and behavior as well as those factors that militate against a death sentence."[142] Given the vast number of people whose lives intersect with a client's in a meaningful way, no list can be complete. Attempts to describe the categories of people to be interviewed are helpful in the sense that they provide direction for the investigation, but they are by no means exhaustive. Therefore, the Supplementary Guidelines reflect the prevailing recognition that the defense team must locate and interview:

> Lay witnesses or witnesses who are familiar with the defendant or his family, including but not limited to:
> a) The client's family, extending at least three generations back, and those familiar with the client;
> b) The client's friends, teachers, classmates, co-workers, employers, and those who served in the military with the client, as well as others who are familiar with the client's early and current development and functioning, medical history, environmental history, mental health history, educational history, employment and training history, military experience and religious, racial, and cultural experiences and influences upon the client or the client's family;
> c) Social service and treatment providers to the client and the client's family members, including doctors, nurses, other medical staff, social workers, and housing or welfare officials;
> d) Witnesses familiar with the client's prior juvenile and criminal justice and correctional experiences;
> e) Former and current neighbors of the client and the client's family, community members, and others familiar with the neighborhoods in which the client lived, including the type of housing, the economic status of the community, the availability of employment and the prevalence of violence;
> f) Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;
> g) Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.[143]

142. Affidavit of Marie L. Campbell, at 9 [hereinafter Campbell Affidavit] (on file with the Hofstra Law Review). Sadly, Ms. Campbell passed away on September 17, 2006. Marie was nationally known for her extensive knowledge and deep compassion.

143. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 10.11(E)(2). Mitigation Specialist Pam Leonard provided a similarly comprehensive list of prospective witnesses who must be interviewed. *See* Affidavit of Pamela Blume Leonard, at 6 [hereinafter Leonard Affidavit] (on

All lists of potential mitigation witnesses are similarly comprehensive. To investigate the client's whole life, it is necessary to interview everyone "who has ever had any contact with the defendant."[144]

2. Documents

Every mitigation specialist and capital defense lawyer contributing to the Supplementary Guidelines stressed the importance of collecting every document generated about the client and members of the client's family. "The building blocks of a competent social history investigation are the collection of life history records and interviews of all significant persons in the defendant's life."[145] As one respected mitigation specialist explained:

> A central feature of a competent social history is an exhaustive review of records and documents that trace the client's life and shed light on his level of functioning across time. Historical information can reveal patterns of impairments and other factors that contributed to the circumstances of the offense. Necessary social history records include those regarding the client, his immediate family and relevant extended family members.[146]

The Supplementary Guidelines therefore recognize that the defense team must conduct an exhaustive search for documents relating to the client and his family:

> It is the duty of team members to gather documentation to support the testimony of expert and lay witnesses, including, but not limited to, school, medical, employment, military, and social service records, in order to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state, intellectual capacity, and life history that may explain or diminish the client's culpability for his conduct, demonstrate the absence of aggressive patterns in the client's behavior, show the client's capacity for empathy, depict the client's remorse, illustrate the client's desire to function in the world, give a favorable opinion as to the client's capacity for rehabilitation or adaptation to prison, explain possible

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file with the Hofstra Law Review). *See also* ABA GUIDELINES, *supra* note 3, at Guideline 10.7, commentary; Campbell Affidavit, *supra* note 142, at 5-6 (providing comprehensive descriptions of witness who must be located and interviewed).

144. Balske, *supra* note 127, at 42; *see also* Norton, *supra* note 134, at 43.

145. Leonard Affidavit, *supra* note 143, at 4.

146. Campbell Affidavit, *supra* note 137, at 3.

> treatment programs, rebut or explain evidence presented by the prosecutor, or otherwise support a sentence less than death.[147]

As with the Supplementary Guidelines generally, this section should be read *in pari materia* with the ABA Guidelines which require the exhaustive investigation of documents pertaining to the client and his family.[148]

An exhaustive documentary history can reveal important clues establishing or leading to the discovery of persuasive mitigating evidence, including the developmental history of the client, conditions affecting him *in utero*, medical conditions, mental retardation, mental illness, substance abuse, poverty, environmental toxins, and other factors that may have impaired the health and development of the client and his family.[149]

Many capital defense lawyers and mitigation specialists reported the experience of being told that records were lost or destroyed when that was not in fact the case. Records should be obtained in person whenever possible:

> This reduces the chances of a records custodian making a cursory search and reporting that the records do not exist. With old or difficult to find records, it is important to find the individual who has worked longest in the records department because there are usually archives of which the younger employees may not be aware. In some instances, conversations with records clerks cause them to recall the client which enables them to provide additional information about the client or the client's family, case or community.[150]

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147. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 10.11(F).

148. *See* ABA GUIDELINES, *supra* note 3, at Guideline 10.7, commentary. The commentary includes a non-exhaustive list of documents which include "school records[,] social service and welfare records[,] juvenile dependency or family court records[,] medical records[,] military records[,] employment records[,] criminal and correctional records[,] family birth, marriage, and death records[,] alcohol and drug abuse assessment or treatment records[, and] INS records." *Id.* The mitigation specialist affidavits that were reviewed also included comprehensive, non-exhaustive sources of documents. *See* Stetler Affidavit, *supra* note 140, at 11-12; Campbell Affidavit, *supra* note 142, at 3-5; Leonard Affidavit, *supra* note 143, at 4-6. By describing specific sources of documents, and mentioning others in terms of their relevance to the defense case, the Supplementary Guidelines do not diminish the obligation imposed under the current standard of practice, which require "finding every piece of paper regarding the client ever generated." Norton, *supra* note 134, at 47.

149. Leonard Affidavit, *supra* note 138, at 4. *See also* Dudley & Leonard, *supra* note 24, at 966.

150. Norton, *supra* note 134, at 45. In *Parkus v. Delo*, 33 F.3d 933 (8th Cir. 1994), for example, trial counsel was informed that his client's records of psychiatric hospital records had been destroyed, but "[t]hrough more vigorous pursuit of the records, habeas counsel learned that they had

As with every other aspect of the mitigation function, the guiding hand of counsel is critically important in the review and follow-up of the documentary record. "Each record obtained will refer to other records and reports which must be obtained, and individuals who must be located and interviewed, thus expanding the investigation."[151]

3. Experts

Expert witnesses are an important component of the mitigation case if they are supported by persuasive lay testimony and documentary evidence, and their findings are in harmony with the theory of the defense supported by the other witnesses and evidence.[152] The Supplementary Guidelines reflect the fact that a critical function of the defense team is to help counsel identify:

> Expert witnesses, or witnesses with specialized training or experience in a particular subject matter. Such experts include, but are not limited to:
> a) Medical doctors, psychologists, toxicologists, pharmacologists, social workers and persons with specialized knowledge of medical conditions, mental illnesses and impairments; substance abuse, physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning.
> b) Anthropologists, sociologists and persons with expertise in a particular race, culture, ethnicity, [or] religion.
> c) Persons with specialized knowledge of specific communities or expertise in the effect of environments and neighborhoods upon their inhabitants.
> d) Persons with specialized knowledge of institutional life, either generally or within a specific institution.[153]

As with documents and witnesses, this list is a broad description of types of experts, and does not attempt to identify subspecialties that might be appropriate for every case.[154] The Spencer Committee on

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not been destroyed and that the existing records contained diagnoses of Parkus' mental condition ranging from mild mental retardation to childhood schizophrenia." *Id.* at 936. Because those records documented "[c]onclusions of mental retardation . . . at ages 8, 10 (2 reports), 11, 13, 15, and 17," they resulted in commutation of Parkus' sentence to life. *In re* Parkus, 219 S.W.3d 250, 255-56 (Mo. 2007)

151. Norton, *supra* note 134, at 45.

152. *See supra* notes 116-134.

153. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 10.11(E).

154. Attempts to list such subspecialties became cumbersome and raised the concern that a list that appeared to be exhaustive would prevent consideration of an expert whose field was not specifically listed. Therefore, experts are listed by the broadest category applicable to that area of expertise. "Medical doctor" includes psychiatrists and neurologists. "Psychologist" includes

federal death penalty cases observed that mitigation specialists "are generally hired to coordinate an investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review."[155]

Expert assessments and opinions must always be accompanied by lay witness testimony, physical and documentary evidence for the very pragmatic concern that juries "tend to view experts as hired guns, and are more likely to be persuaded by lay witnesses."[156] Juror research has shown that jurors reacted very favorably to lay experts, people who had insightful personal knowledge of the defendant, or the defendant's experiences.[157] Therefore, "family testimony may be invaluable if part of the defendant's case in mitigation revolves around such things as child abuse."[158]

On the other hand, jurors who respond positively to expert testimony are more likely to vote for life.[159] The importance of finding an expert whose abilities and experience fit the client's particular circumstances is demonstrated in the case of Lee Boyd Malvo, the teenager accused of multiple murders in the "Beltway Sniper" case.[160] In addition to lay witnesses who testified that Malvo's mother beat him regularly with sticks and belts, and abandoned him for months at a time,[161] the defense team wisely balanced this evidence with testimony

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neuropsychologists and other subspecialties. Indeed, because of the frequency of head trauma among the population of capital defendants, neuropsychological screening is considered standard where there is a history of head trauma, toxic exposure, maltreatment, or neglect. *See* Dorothy Otnow Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 838-40 (1986).

155. SPENCER REPORT, *supra* note 55, at 11.

156. Scott E. Sundby, *The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1115 (1997). In post-trial interviews of capital jurors, two thirds of the witnesses who were perceived to "back-fire" on the defense were expert witnesses. *Id.* at 1144. *See also*, Garvey, *supra* note 42, at 1543-44 (jurors "generally place more trust in the testimony of lay witnesses than they do in that of experts.").

157. Melissa E. Whitman, *Communicating with Capital Juries: How Life Versus Death Decisions Are Made, What Persuades, and How to Most Effectively Communicate the Need for a Verdict of Life*, 11 CAP. DEF. J. 263, 278 (1999).

158. *Id.* at 280.

159. *Id.* at 277.

160. *See* WHITE, *supra* note 19, at 111.

161. *Id.* (quoting Tom Jackman, *Malvo Said Confession to Police Was a Lie, Psychologist Tells Court*, WASH. POST, Dec. 9, 2003, at A1).

of caretakers who described him "as a gentle, vulnerable youth who was desperate for a father or for a parent of any kind."[162]

The defense also called a psychologist who testified that Muhammad had brainwashed Malvo to participate in his sniper plan, and Neil Boothby, "a recipient of a humanitarian award from the Red Cross for his work with child soldiers from third world countries."[163] Although not a forensic expert, Boothby was qualified to "explain[] how adults train children to be soldiers and why children are especially susceptible to this kind of training."[164] Because the experts were carefully chosen to fit Malvo's unique circumstances, the harmonious blend of lay testimony, "lay experts," and forensic experts moved the jury to spare Malvo's life.[165]

The clear lesson from the jury research and from the experience of seasoned capital litigators is that all categories of investigation—lay witnesses, experts, and corroborating documentary history—play a critical role in the defense of capital cases:

> [T]he most successful defense cases used a combination of different types of testimony to create a coherent, harmonious theme that spanned both the guilt and penalty phases of the trial. Using lay experts whenever possible; "family and friend" witnesses for emotional input and to flesh out the case in mitigation; and professional experts to complement, but not overshadow, the testimony of the two other groups, provides the greatest chance of securing the client a sentence of life.[166]

A successful capital defense investigation, therefore, is one that leaves no stone unturned in examining a wide range of evidence from a broad set of sources to discover and communicate the humanizing events and conditions that exist in the life of every capital client.

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162. *Id.*

163. *Id.* at 115 & n.42.

164. *Id.*

165. *Id.* at 117.

166. Whitman, *supra* note 157, at 280. Professor Sundby explained:

> If the expert performs as a soloist, presenting theories unsupported by facts established by more credible witnesses who are free of the suspicions attached to experts, the testimony is likely to be discounted at best or have a negative spillover effect at worst. If, on the other hand, the expert takes the role of accompanist and helps harmoniously explain, integrate, and provide context to evidence presented by others, the jury is far more likely to find the expert's testimony useful and reliable.

Sundby, *supra* note 156, at 1144.

VII. THE SKILLS SETS OF THE MITIGATION SPECIALIST

It did not take long for capital litigators to find that traditional investigative techniques do not adapt well to the demands of post-*Furman* capital investigations. The traditional lawyer-investigator defense team had a significant gap in skills, abilities, and understanding that could not be filled by typical investigators or mental health experts. A capital defense lawyer in 1980 realized that he or she needed someone to focus on mitigation. The lawyer found a former journalist, Lacey Fosburgh, who had the skill and patience to establish a rapport with the client and witnesses, and helped uncover a successful mitigation case. Fosburgh wrote about the experience, describing the unique, specialized needs of capital defenders:

> [A] significant legal blind spot existed between the roles played by the private investigator and the psychiatrist, the two standard information-getters in the trial process. Neither one was suited to the task at hand here—namely discovering and then communicating the complex human reality of the defendant's personality in a sympathetic way.
>
> But if getting this human and sometimes intangible information is important enough to warrant a specialist, the question is: what specialist? This is the dilemma [counsel] faced. [A]nd he ended up deciding that the intelligent application of a journalist's skills in an interdisciplinary process might solve his problem.[167]

In response to this need, capital litigators cultivated skilled journalists, anthropologists, educators, social workers, and others to thoroughly explore the client's life history for people and events that reveal his intrinsic humanity.[168] Thus, the mitigation specialist became an integral part of the "guiding hand of counsel" that the Supreme Court declared necessary "at every step" in a capital proceeding.[169]

A. Overcoming Barriers

To appreciate the skills and abilities necessary to the mitigation function, one must understand that the most compelling mitigating evidence available to a capital defendant is typically hidden from sight,

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167. Lacey Fosburgh, *The Nelson Case: A Model for a New Approach to Capital Trials*, CAL. DEATH PENALTY MANUAL, N6-N10, at N7 (Cal. State Pub. Def. Supp. July, 1982).

168. Mitigation specialists may be described as "human service experts working on capital defense teams represent[ing] the disciplines of social work, psychology, and counseling," and who "demonstrate both sound clinical skills for interviewing and assessment and a thorough working knowledge of the court system." Hudson et al., *supra* note 133, at 33.

169. Powell v. Alabama, 287 U.S. 45, 69 (1932).

surrounded by formidable emotional and psychological barriers to disclosure. *Rompilla v. Beard*[170] is a case in point. The defense team had a hole in it: although the court appointed two "committed" public defenders who had an investigator on staff,[171] and the lawyers engaged three mental health experts, there was no mitigation specialist. Defense counsel attempted to do the mitigation investigation personally, but failed miserably; the three mental health experts likewise failed to examine a court file for a prior conviction, and this failure in turn resulted in a sentence of death imposed by a jury[172] that knew nothing of Ronald Rompilla's tragic life history and substantial mental disabilities. The anatomy of that failure, and the post-conviction team's eventual success, is a good demonstration that the mitigation specialist is essential to the ability to achieve just results.

Defense counsel's interviews of Rompilla and his family were unskilled and counterproductive; Rompilla's involvement in the mitigation case was "minimal."[173] When counsel attempted to discuss mitigation strategy, "Rompilla told them he was 'bored being here listening' and returned to his cell."[174] On other visits, Rompilla's answers were misleading: for example, he described his childhood as "normal . . . save for quitting school in the ninth grade."[175] The Court

170. 545 U.S. 374 (2005).

171. *Id.* at 396, 398 (Kennedy, J., dissenting).

172. *Id.* at 383.

173. *Id.* at 381.

174. *Id.* (quoting Appellate Record at 668, Rompilla v. Beard, 545 U.S. 374 (2005) (No. 04-5462) [hereinafter Beard Appellate Record]).

175. *Id.* (citing Beard Appellate Record, *supra* note 174, at 677). To a person untrained in sound clinical interview techniques, trial counsel's unproductive interviews with Rompilla may appear reasonable. The Court of Appeals quoted from trial counsel's testimony describing pretrial interviews with Rompilla:

> "Is there anything that happened? What was it like growing up? Is there anything you can tell us that could help us?" And he said, "No, there was nothing wrong." He was very, very, smooth about it. It wasn't that he was reluctant to talk about anything. He said, "Your conversations about the possibility of the death penalty bore me."
>
> . . .
>
> There was no indicator from anything he told us that would send us searching for . . . any kind of records. He said everything was fine. He had a normal childhood. There was nothing there. . . .
>
> . . . I remember [co-counsel] specifically going one by one and talking to him. "Is there anything you can tell me? Tell me about yourself. Tell me about your background." She was, you know, meticulous to cover points.

Rompilla v. Horn, 355 F.3d 233, 241 (3d Cir. 2004) (quoting Appellate Record at 1303, Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004) (No. 00-9005) [hereinafter Horn Appellate Record]) (all but final alteration in original). Further, trial counsel testified in Rompilla's post-conviction hearing "that nothing in their discussions with Rompilla ever suggested that he was mentally retarded," and their subjective lay impression was "that Rompilla did not have difficulty in understanding what was said

noted, "There were times when Rompilla was even actively obstructive by sending counsel off on false leads."[176]

Counsel's interviews of Rompilla's family were likewise unproductive. Multiple interviews with five family members produced little information about Rompilla's life history.[177] Trial counsel testified that "the overwhelming response from the family was that they didn't really feel as though they knew him all that well since he had spent the majority of his adult years and some of his childhood years in custody."[178] Although "[s]ubstantial evidence linked Rompilla to the crime,"[179] Rompilla's family focused on his claim of innocence; "they weren't looking for reasons for why he might have done this."[180] The lower court had observed that neither Rompilla nor his family "even hinted at the problems on which Rompilla's ineffective assistance claim [was] based."[181]

Counsel also asked three mental health experts "to look into Rompilla's mental state as of the time of the offense and his competency to stand trial," but those evaluations "revealed 'nothing useful' to Rompilla's case."[182] One psychiatrist testified that Rompilla "denied any abuse as a child, by either parent," and that Rompilla reported "a good relationship with his father" and a "fairly normal childhood," and reached conclusions in accordance with that history.[183] Because of "the lawyers' unreasonable reliance on family members and medical experts

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to him or in expressing his feelings." *Id.* (citing Horn Appellate Record, *supra*, at 1181, 1393). Although some lower court judges found trial counsel's unskilled investigation reasonable, it unquestionably produced only misleading information and false impressions.

176. *Beard*, 545 U.S. at 381 (citing Beard Appellate Record, *supra* note 174, at 663-64).

177. Counsel interviewed Rompilla's "former wife, two brothers, a sister-in-law, and his son." *Id.*

178. *Id.* at 382 (quoting Beard Appellate Record, *supra* note 174, at 495). Rompilla's trial counsel "also testified that members of Rompilla's family provided no hint that Rompilla had mental problems, had suffered child abuse, or was an alcoholic." *Horn,* 355 F.3d at 241.

179. *Beard*, 545 U.S. at 397 (Kennedy, J., dissenting). Justice O'Connor observed that defense counsel should have known that focusing the mitigation theme on residual doubt about Rompilla's guilt "would be ineffective and counterproductive" in light of the prosecutor's reliance on Rompilla's prior crimes. *Id.* at 394-95 (O'Connor, J., concurring). "The similarities between the two crimes, combined with the timing and the already strong circumstantial evidence, raised a strong likelihood that the jury would reject Rompilla's residual doubt argument." *Id*.

180. *Id.* at 382 (quoting Beard Appellate Record, *supra* note 174, at 494).

181. *Horn*, 355 F.3d at 241.

182. *Beard*, 545 U.S. at 382 (quoting Beard Appellate Record, *supra* note 174, at 473-74, 476, 1358). Trial counsel testified that he "sent Rompilla to 'the best forensic psychiatrist around here, to [another] tremendous psychiatrist and a fabulous forensic psychologist.'" *Horn*, 355 F.3d at 242 (quoting Horn Appellate Record, *supra* note 175, at 1307-08).

183. *Horn*, 355 F.3d at 243 (quoting Horn Appellate Record, *supra* note 175, at 1517).

to tell them what records might be useful,"[184] they did not obtain school, medical, or prison records. The mitigation case produced without the assistance of a mitigation specialist was summed up by the Court in a short paragraph:

> Rompilla's evidence in mitigation consisted of relatively brief testimony: five of his family members argued in effect for residual doubt, and beseeched the jury for mercy, saying that they believed Rompilla was innocent and a good man. Rompilla's 14-year-old son testified that he loved his father and would visit him in prison. The jury acknowledged this evidence to the point of finding, as two factors in mitigation, that Rompilla's son had testified on his behalf and that rehabilitation was possible. But the jurors assigned the greater weight to the aggravating factors, and sentenced Rompilla to death.[185]

Working with a mitigation specialist and performing consistently with the ABA Guidelines, Rompilla's post-conviction counsel produced compelling mitigating evidence that the original trial team failed to uncover: school, medical, and prison records produced evidence of Rompilla's "childhood, alcoholism, mental retardation, or possible organic brain damage."[186] Further, trial counsel had failed to interview "two of Rompilla's siblings who lived nearby and would have advised counsel of evidence that Rompilla was raised by alcoholic parents in a cold, violent, frightening and abusive home."[187]

In finding trial counsel's investigation constitutionally deficient, the Court summarized some of the evidence that Ronald Rompilla's jury did not hear:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small

184. *Beard*, 545 U.S. at 379-80.

185. *Id.* at 378. *See also Horn*, 355 F.3d at 237-38. (referencing passages from trial counsel's penalty phase presentation on Rompilla's behalf.)

186. *Horn*, 355 F.3d at 273-74 (Sloviter, J., dissenting).

187. *Id.*

> wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.[188]

After obtaining a thorough history based on comprehensive interviews and documentation of Rompilla's life history, the post-conviction team engaged mental health experts to re-evaluate Rompilla. Based on more complete information, the experts found "that Rompilla's low IQ and achievement test results documented in his school records, his medical history, and his abusive background were all 'red flags' indicating that further objective evaluation was necessary."[189] Rompilla's prison records "disclose[d] test results that the defense's mental health experts would have viewed as pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling."[190] All three of the experts engaged by Rompilla's trial counsel testified that these records would have prompted them to conduct additional testing.[191] Such testing, when performed, revealed that Rompilla suffered "from organic brain damage, an extreme mental disturbance" which resulted in significant impairment in his reasoning, mood, judgment and impulse control.[192] The mental health experts "believe[d] [that] Rompilla's problems relate back to his childhood, and were likely caused by fetal alcohol syndrome."[193] The Court concluded that the new evidence "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury," and that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability."[194] On remand, the prosecutor stipulated to a life sentence for Rompilla.[195]

This detailed discussion of Rompilla is a graphic illustration of the "significant blind spot" between lawyers, investigators, and experts

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188. *Beard*, 545 U.S. 391-92 (quoting *Horn*, 355 F.3d at 279 (Sloviter, J., dissenting)).

189. *Horn*, 355 F.3d at 279 (Sloviter, J., dissenting) (citing Horn Appellate Record, *supra* note 175, at 1614, 1686, 1692-93, 1739, 1743, 1745-46).

190. *Beard*, 545 U.S. at 390-91 (citing Beard Appellate Record, *supra* note 174, at 32-35).

191. *Horn*, 355 F.3d at 242.

192. *Id.* at 279-80 (Sloviter, J., dissenting).

193. *Id.* at 280 (citing Horn Appellate Record, *supra* note 175, at 1616, 1687-88, 1735-36).

194. *Beard*, 545 U.S. at 393 (quoting Wiggins v. Smith, 539 U.S. 510, 538 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 398 (2000)).

195. *Allentown Man to Spend Life in Prison for 1998 Murder*, PITTSBURGH POST-GAZETTE, Aug. 14, 2007, at B-5.

described by Lacey Fosburgh twenty-five years earlier.[196] It is also a classic demonstration of the barriers to disclosure that have led competent practitioners to follow the approach to the mitigation function described in the Supplementary Guidelines. Even though Rompilla's trial counsel felt they had "established a good relationship" with Rompilla and conducted detailed interviews with five members of his family,[197] all six subjects failed to disclose significant mitigating history and evidence. Further, although trial counsel considered the three mental health experts he engaged to be "the best… tremendous . . . and . . . fabulous,"[198] their conclusions were indisputably deficient, demonstrating the "long recognized . . . critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel."[199]

Even if Justice Kennedy is correct that Rompilla's public defenders were "committed criminal defense attorneys,"[200] the fact remains that they failed to appreciate and overcome the substantial barriers to disclosure of the sensitive information that was crucial to Ronald Rompilla's mitigation case. Such barriers exist in virtually every case:

> [M]ost people consider mental handicaps shameful and may be reluctant to reveal any signs of mental trouble. Like the client, they may think they are being helpful by minimizing, normalizing or rationalizing signs of mental illness in the defendant and his family. In some instances, they may not be candid because they want to cover up their own misdeeds, e.g., acts of physical or sexual abuse. These factors help us to understand and explain why many severely mentally handicapped defendants remain completely unidentified as such in the criminal justice system. Recognize that the tendency of a client's family and friends to minimize, normalize or deny mental illness is a barrier to achieving a reliable social history.[201]

196. *See supra* text accompanying note 167.

197. *Horn*, 355 F.3d at 251.

198. *Id.* at 242.

199. Blake v. Kemp, 758 F.2d 523, 531 (11th Cir. 1985) (quoting United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974)).

200. Rompilla v. Beard, 545 U.S. 374, 396 (2005) (Kennedy, J., dissenting).

201. John H. Blume & Pamela Blume Leonard, *Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, CHAMPION, Nov. 2000, at 63, 64-65. Barriers to disclosure, which are well-recognized in the mental health field, include "the victim's feelings of guilt, shame, ignorance, and tolerance, . . . some physicians' reluctance to recognize and report sexual abuse, . . . families' fears of dissolution if the sexual abuse is discovered." SADOCK & SADOCK, *supra* note 136, at 885. Further, "sexual abusers often threaten to hurt, kill, or abandon the children if the events are disclosed." *Id.*

A competent mitigation investigation will invade dark, shameful family secrets; it "exposes raw nerves, re-traumatizes, scratches at the scars nearest the client's heart."[202]

Because of the powerful stigma attached to mental illness or developmental disabilities, afflicted individuals and their families will take extreme measures to hide those disabilities.[203] One study of individuals institutionalized for mental retardation revealed that they commonly attempted to hide the reason for institutionalization with false tales of illness, "nerves," or even incarceration.[204] Often capital clients suffer severe impairments that interfere with effective communication, or that render them highly distrustful, intellectually and cognitively impaired, and unable to accurately perceive reality.[205] Impaired clients may be depressed and suicidal, or "they may be in complete denial in the face of overwhelming evidence."[206]

The Commentary to the ABA Guidelines cautions that "[t]here will also often be significant cultural and/or language barriers between the client and his lawyers."[207] More often than not, lawyers and clients come from different racial, cultural and socio-economic backgrounds, and these differences "create barriers to disclosure of sensitive life-history information."[208] Additional communication barriers between clients and counsel "typically include nationality, ethnicity, language, class, education, age, religion, politics, social values, gender, and sexual orientation. Overcoming these barriers will often mean involving someone in the defense team with whom the client will feel more at ease."[209]

These are a few of the forces that impede discovery of important mitigating evidence. Barriers to disclosure are as varied and complex as the clients themselves. The same kinds of barriers stand between counsel and potential mitigation witnesses:

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202. Stetler, *supra* note 133, at 36.

203. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 430-31 (1985).

204. *Id.* at 430 n.83 (quoting ROBERT EDGERTON, THE CLOAK OF COMPETENCE: STIGMA IN THE LIVES OF THE MENTALLY RETARDED 148 (1967)). Edgerton noted one case in which a person institutionalized for mental retardation explained his absence from the community by saying that he had been in jail. EDGERTON, *supra*.

205. ABA GUIDELINES, *supra* note 3, at Guideline 10.5, commentary.

206. *Id.*

207. *Id.*

208. Stetler, *supra* note 133, at 36 (endnotes omitted). *See also* Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation,* 36 HOFSTRA L. REV. 883, 885 (2008).

209. Stetler, *supra* note 133, at 36.

> Many of the client's relatives and cohorts are similarly impaired. Active alcoholism and substance abuse are common, as are mental retardation and mental illness. Much more time is required to work with impaired witnesses, and often information is obtained only through numerous contacts over a long period of time.[210]

Obviously, multiple layers of such barriers lay between Rompilla's mitigation evidence and his defense team. When the post-conviction team finally overcame the barriers, Rompilla's family was able to disclose the maltreatment he endured as a child, including the parental violence, and his mother's heavy drinking "while pregnant with Rompilla."[211] At the post-conviction hearing, Rompilla's siblings testified that "Rompilla was told he was stupid and would not amount to anything," and that Rompilla's nightmarish childhood left him a "'very nervous child,' who kept everything inside."[212] It is no wonder that trial counsel's unskilled efforts failed to overcome the powerful barriers that stood between them, their client, and his compelling mitigation case.

Rompilla amply demonstrates why the ability to identify and overcome barriers to disclosure of potentially life-saving information is at the heart of the mitigation function. Embodied in the Supplementary Guidelines are the tried and true methods used by capital defense teams throughout the post-*Furman* era to overcome the ubiquitous barriers to disclosure of the type of evidence the Court has declared critical to "a reasoned *moral* response to the defendant's background, character, and crime."[213]

B. Building Rapport

The core of the mitigation function is set out in Supplementary Guidelines 5.1 and 10.11, which describe the abilities and the function of mitigation specialists. These two sections are closely related and should be read together. Supplementary Guideline 5.1 describes in detail

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210. Norton, *supra* note 134, at 44. This is yet another reason that this investigation be conducted by individuals "qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." ABA GUIDELINES, *supra* note 3, at Guideline 10.4(C)(2)(b); *see also* SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 5.1(E) (discussing the need for a qualified person to screen for mental or behavioral impairments, maltreatment, environmental issues, and substance abuse).

211. Rompilla v. Horn, 355 F.3d 233, 279 (3d Cir. 2004) (Sloviter, J., dissenting).

212. *Id.* (citing Horn Appellate Record, *supra* note 175, at 1401-13, 1424, 1451, 1480-84, 1487-88).

213. Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original)).

the necessary skills and abilities of the mitigation specialist;[214] Supplementary Guideline 10.11 describes the performance of those skills on behalf of the client.[215]

In drafting Supplementary Guideline 5.1, we considered the issue of what professions or academic degree programs are best suited for mitigation work. However, like the ABA Guidelines, the Supplementary Guidelines focus more on performance than pedigree. Just as an attorney whose "performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster,"[216] neither should a mitigation specialist, regardless of licensing or academic credentials. Steven Bright observed, "[s]tandards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications."[217] For similar reasons, the Supplementary Guidelines focus on mitigation specialists' abilities and performance rather than credentials.

Another reason to reject standards based upon academic degrees is that highly respected and successful mitigation specialists come from a wide variety of backgrounds. Many mitigation specialists are attorneys; some of these attorneys have advanced academic degrees in behavioral sciences, such as psychology or social work. Excellent mitigation work is also being done by people with degrees in education, anthropology and journalism. As noted above, former journalists were among the first mitigation specialists.[218] Because of the wide range of mitigation specialists' backgrounds, the Supplementary Guidelines do not specify credentials that would disqualify capable people.

Experienced capital defense team members stressed that personal characteristics of the mitigation specialist are as important as other qualifications. Traits that practitioners identified as desirable included "a commitment to social justice and community service," the "ability to listen without judging," patience, compassion, sensitivity, and "tolerance of human frailty." Such qualities are valued by capital defense teams because "[t]he quality of the client's cooperation may depend

214. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 5.1(C).

215. *Id.* at Guideline 10.11.

216. ABA GUIDELINES, *supra* note 3, at Guideline 5.1, commentary.

217. Bright, *supra* note 15, at 1871 n. 209.

218. *See* discussion *supra* notes 167-68 and accompanying text. *See also* Holdman & Seeds, *supra* note 208, at 887-893 (providing a history of and discussing the mitigation specialist).

significantly on counsel's skill and sensitivity in developing a human and emotional relationship with him."[219] Professor Goodpaster suggested that counsel assume "the role of nonjudgmental confessor" to succeed with often-difficult capital clients.[220] These qualities and values are reflected in the Supplementary Guidelines' recognition that mitigation specialists "must be able to establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of sensitive information and to assist the client with the emotional impact of such disclosures."[221]

The concept of "rapport" embodied in the Supplementary Guidelines is derived from standards followed in the mental health profession.[222] Rapport with clients and witnesses is crucial to the representation of clients facing the death penalty for the same reasons that it is essential to effective doctor-patient relationships. It describes a dynamic relationship between the interviewer and the subject, in which "patients feel accepted with both their assets and liabilities."[223] Thus, as used in the Supplementary Guidelines, rapport is "a relationship between the [client or witness] and [the defense team] that reflects warmth, genuine concern, and mutual trust."[224]

Rapport building should begin with the very first contact with the client. Like psychiatric patients, capital clients "are often anxious on first

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219. Goodpaster, *supra* note 116, at 322.

220. *Id.* The Reverend Dr. Martin Luther King perhaps best captured this quality when he spoke repeatedly of the role of *agape* in his message of nonviolence:

> When we speak of loving those who oppose us . . . we speak of a love which is expressed in the Greek word *agape*. *Agape* means nothing sentimental or basically affectionate; it means understanding, redeeming good will for all men, an overflowing love which seeks nothing in return. . . . [W]e rise to the position of loving the person who does the evil deed while hating the deed he does.

A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 8-9 (James Melvin Washington ed., 1991).

221. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 5.1(C). Capital defense teams are sensitive to the need to prepare the client to hear "testimony [that] may deal with unpleasant or disturbing childhood experiences, drug and alcohol problems, psychological problems, and possibly information not previously known to the client." Hudson et al., *supra* note 133, at 35. It is necessary to tell the client what will be presented in order to prevent the likely embarrassment and agitation that would occur upon hearing such testimony for the first time in court. *Id.*

222. The commentary to the ABA Guidelines observes that "the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that '[i]t must be assumed that the client is emotionally and intellectually impaired.'" ABA GUIDELINES, *supra* note 3, at Guideline 10.5, commentary (quoting Rick Kammen & Lee Norton, *Plea Agreements: Working with Capital Defendants*, ADVOCATE (Ky.), Mar. 2000, at 31.

223. SADOCK & SADOCK, *supra* note 136, at 1.

224. *Id.* at 2.

encounters . . . and feel both vulnerable and intimidated."[225] However, counsel "who can establish rapport quickly, put the [client] at ease, and show respect is well on the way to conducting a productive exchange of information."[226] Effective interviewers respond empathically to "facilitate the development of rapport."[227] The same is true of capital defense teams: "counsel must consciously work to establish the special rapport with the client that will be necessary for a productive professional relationship over an extended period of stress."[228]

Interpersonal communication skills are critical to establishing rapport. Reading questions from a script, failing to make eye contact, and taking notes may impair interpersonal communication, making the client "uncomfortable and defensive."[229] Because a client "who has just been arrested and charged with capital murder is likely to be in a state of extreme anxiety,"[230] the client must be approached in a spirit of empathy and understanding, even if his demeanor is suspicious, hostile, and uncooperative. "Emotion breeds counter[-]emotion"[231] and the defense team must avoid the human tendency to be angry or judgmental with the client. If those feelings are hostile, the relationship will deteriorate rapidly.

Building and maintaining rapport require the defense team to rise above negative emotions and try to understand the fears and conflict that shape the client's behavior. Responding with patience and compassion will enable the defense team to involve the client in sound strategies for responding to the capital charges.[232]

Patience and compassion are particularly important as the investigation progresses "into sensitive and intimate areas which are frightening and humiliating to the client," including physical and sexual

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225. *Id.* at 7.

226. *Id*

227. *Id.* at 6.

228. ABA GUIDELINES, *supra* note 3, at Guideline 1.1, commentary.

229. SADOCK & SADOCK, *supra* note 136, at 2.

230. ABA GUIDELINES, *supra* note 3, at Guideline 10.5, commentary.

231. SADOCK & SADOCK, *supra* note 136, at 4.

232. See SADOCK & SADOCK, *supra* note 136, at 4-15, for a discussion of constructive, therapeutic responses to difficult psychiatric patients. A checklist used in the mental health field to rate skills at establishing and maintaining rapport includes elements that are equally useful in evaluating the success of client and witness interviews by members of the capital defense team. Strengths and weaknesses of the interview are assessed by evaluating whether, among other criteria, the interviewer "put the patient at ease, . . . addressed the [patient's] distress, . . . helped [the patient] warm up . . . [and] overcome suspiciousness, . . . understood [the patient's suffering], . . . expressed empathy for [the patient's] suffering, . . . [and] tuned in on [the patient's] affect." EKKEHARD OTHMER & SEIGLINDE OTHMER, THE CLINICAL INTERVIEW USING DSM-IV 41-43 (1994). These criteria are also probative of the success of a mitigation specialist's client or witness interview.

maltreatment and emotional or physical neglect.[233] In addition to facilitating investigation and overcoming barriers to disclosure, "rapport can be the key to persuading a client to accept a plea that avoids the death penalty."[234] Therefore, the Supplementary Guidelines discussing rapport-building skills and abilities are directed not only to the mitigation specialist,[235] but to counsel and the entire defense team as well.[236] Counsel must maintain close contact with the client and establish a relationship of trust.[237]

Every member of the team, not just the mitigation specialist,[238] has a role to play in building a strong working relationship with the client:

> Clients develop trust when the defense team demonstrates serious efforts to defend them rigorously by following up on all leads provided, even if the leads seem remote. When the client sees that her/his input is considered important and that the facts of the case are being fully investigated, the client develops confidence in the defense team and becomes more forthcoming with information.[239]

Ongoing communication among the client and all members of the defense team is necessary to maintain such a relationship, which enables the defense team to discover and understand the client's humanity, and convey it to decision-makers in a manner that allows them to respond with mercy and compassion.

Building rapport necessary to obtain the client's trust, and work effectively as a team to guide the client through the difficult, complex, and emotional capital litigation process, requires substantial time and effort:

> An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial, appeal, post-conviction review, or clemency. Even if counsel manages to ask the right questions, a client will not—with good reason—trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls.

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233. Norton, *supra* note 134, at 44.

234. ABA GUIDELINES, *supra* note 3, at Guideline 4.1, commentary.

235. *See* SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 5.1(C).

236. *See id.* at Guideline 10.11(C).

237. ABA GUIDELINES, *supra* note 3, at Guideline 10.5(A).

238. "Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding." SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 10.11(C).

239. Norton, *supra* note 134, at 44.

> It is also essential to develop a relationship of trust with the client's family or others on whom the client relies for support and advice.[240]

The Spencer Committee found that client communication is "vastly more time consuming and demanding in a death penalty case . . . ."[241] Because of "the enormous stress that the risk of a death sentence imposes on both the client and the lawyer . . . ."[242] the committee urged that "special care must be taken in order to avoid a rupture of the professional relationship that would force counsel to withdraw, delaying the trial."[243]

It is critically important that the mitigation function be staffed and funded at a level that will allow the team to spend the time necessary to build a working relationship with the client. The commentary to the ABA Guidelines explains the importance and benefits of this central aspect of capital representation:

> Even apart from the need to obtain vital information, the lawyer must understand the client and his life history. To communicate effectively on the client's behalf in negotiating a plea, addressing a jury, arguing to a post-conviction court, or urging clemency, counsel must be able to humanize the defendant. That cannot be done unless the lawyer knows the inmate well enough to be able to convey a sense of truly caring what happens to him.[244]

C. Interviewing

One of the most important skills of the mitigation specialist is the ability to interview effectively. The mitigation specialist's objectives are similar to those in the mental health field, in which good interview skills

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240. ABA GUIDELINES, *supra* note 3, at Guideline 10.5(A), commentary.

241. SPENCER REPORT, *supra* note 55. The committee listed some of the reasons:

> First, the nature of the penalty phase inquiry requires a relationship which encourages the client to disclose his or her most closely guarded life history with the lawyer. Experiences of mental illness, substance abuse, emotional and physical abuse, social and academic failure, and other "family secrets" must be revealed, researched and analyzed for the insight they may provide into the underlying causes of the client's alleged conduct. The establishment of trust and confidence is also vitally important if the lawyer is to convince the defendant to consider an offer to plead guilty, especially because what is offered is likely to be life imprisonment without the possibility of parole. Accepting such a "deal" requires tremendous faith in counsel.

Id.

242. *Id.*

243. *Id.*

244. ABA GUIDELINES, *supra* note 3, at Guideline 10.5, commentary (footnotes omitted).

are critical to treat patients.[245] Therefore, the Supplementary Guidelines provide:

> Mitigation specialists must be able to identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information. They must be skilled interviewers who can recognize and elicit information about mental health signs and symptoms, both prodromal and acute, that may manifest over the client's lifetime. . . . They must have the ability to advise counsel on appropriate mental health and other expert assistance.[246]

While the capital defense practice borrows established interview protocols from the mental health field, there is one substantial difference. Mitigation specialists conduct interviews in the field. By going to the home of a witness or family member, the mitigation specialist will observe things about the interview subject that would not be visible in the office, thus providing a deeper perspective:

> The home visitor often has greater opportunity to meet the client's friends and family; see family pictures; note relationships with cherished pets and neighbors that the client may not think to mention in the office; and experience the way the client puts together, develops, and protects living space. . . . [We] note the client's environment and the messages it conveys about the client and his or her situation.[247]

Because the mitigation specialist's interviews will invade traumatic and sensitive areas of the client's and witnesses' lives, one-on-one interviews are essential. The mitigation specialist must "attempt to speak with [clients and witnesses] privately to determine if there is anything that they . . . were reluctant to say in front of someone else."[248] Mental health experts recognize that "[m]ost patients do not speak freely unless they have privacy and are sure that their conversations cannot be overheard."[249]

The psychiatrists' assessment tool "'is the face-to-face interview of the patient: evaluations based solely on review of records and interviews

245. SADOCK & SADOCK, *supra* note 136, at 4.

246. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 5.1(C).

247. BIANCA CODY MURPHY & CAROLYN DILLON, INTERVIEWING IN ACTION: PROCESS AND PRACTICE 28 (1998).

248. SADOCK & SADOCK, *supra* note 136, at 7. Life histories of capital clients often involve physical or sexual maltreatment at the hands of caretakers, parents, or family members; "it is obvious that these topics will not be freely discussed in the presence of the guilty parent or party." Jeff Blum, *Investigation in a Capital Case: Telling the Client's Story*, CHAMPION, Aug. 1985, at 30.

249. SADOCK & SADOCK, *supra* note 136, at 8.

of persons close to the patient are inherently limited.'"[250] Mitigation specialists also conduct interviews in person, face-to-face because "as much as 65% of what is communicated is communicated nonverbally."[251] A telephone interviewer could not detect nonverbal cues that may be incongruent with the words being spoken; people "may use body language to express feelings they cannot express verbally, for example, a clenched fist or nervous tearing at a tissue by a patient with an apparently calm outward demeanor."[252] Without seeing the subject, the interviewer cannot observe "general appearance, behavior, and body language and the ways in which these factors provide diagnostic clues."[253] Hygiene, grooming, and appropriateness of clothing can provide important clues about mood or mental health.[254] "Eyes can also reflect organic problems; for example, pupil dilation may signal a tumor or drug use."[255] Finally, face-to-face interviewing facilitates rapport.[256]

The Supplementary Guidelines also recognize that "[m]ultiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation."[257] Mitigation specialist Lee Norton explains:

> It is insufficient to talk to witnesses only once because each new individual recalls different facts and anecdotes; if an aunt provides an account of a head injury which the mother forgot to mention, it is necessary to go back to the mother and ask about it. Similarly, an interview may reveal records that must be obtained which in turn raise new questions, questions which necessitate interviewing several

250. *Id.* at 6.

251. MURPHY & DILLON, *supra* note 247, at 60.

252. SADOCK & SADOCK, *supra* note 136, at 8.

253. *Id.* at 6.

254. *See, e.g.*, MURPHY & DILLON, *supra* note 247, at 60; SADOCK & SADOCK, *supra* note 136, at 238, 490-91.

255. MURPHY & DILLON, *supra* note 247, at 62.

256. *See supra* notes 225-37 and accompanying text.

257. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 10.11(C). As one author explained:

> Don't expect to find out everything in one visit or through one interview. . . . Realize that certain information such as child sexual abuse or drug problems will not be easily shared with a stranger. It may take weeks or months of intimate contact before the individual shares some deep, painful secret that may be the key to understanding his or her violent or bizarre behavior. It is your job to nurture the environment of trust that will allow this sharing to take place.

Blum, *supra* note 248, at 30.

> witnesses again. Several interviews of each witness may be necessary to obtain all the facts.[258]

By nature, mitigation interviews are in-depth and can be emotionally and physically draining; "a patient suffering from increased agitation or depression may not be able to sit for 30 to 45 minutes of discussion or questioning."[259] Therefore, deteriorating stamina, or mental stability may require curtailing interviews which must be resumed another time. Finally, multiple interviews with a subject are necessary to establish rapport, which is critical to effective life history interviews.

Effective life history interviews are flexible and fluid, but there are some common elements to any successful interview. Key principles for conducting effective mental health care interviews are equally applicable to life history interviews in capital cases:

1. "*Establish rapport as early in the interview as possible*."[260] Nancy C. Andreason and Donald W. Black suggest opening the interview by asking the client or witness, in a manner that conveys "warmth and friendliness," innocuous biographical questions about himself, his family, his well-being or routine aspects of his daily life.[261] This approach can also work for witnesses, but may not be practical for a prisoner facing the death penalty, who is likely to be agitated and have legitimate fears about his safety and well-being in prison. It is important to inquire about the prisoner's concerns because they will otherwise be a barrier to communication about other subjects.[262] As Benjamin and Virginia Sadock observed, use of check-lists and taking notes, especially in this initial stage of the interview, can be an obstacle to rapport.[263]

2. "*Follow up on vague or obscure replies with enough persistence to accurately determine the answer to the question*."[264] This is especially important to a mitigation specialist who is looking for specific anecdotal

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258. Norton, *supra* note 134, at 45. A good example of the necessity for multiple interviews with witnesses is Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004), *rev'd sub nom*. Rompilla v. Beard, 545 U.S. 374 (2005). After the post-conviction team found documentary evidence of Ronald Rompilla's wretched childhood and mental illness, they conducted additional interviews with members of Rompilla's siblings and learned that "[a]ll of the children lived in terror" of their violent father. *Id.* at 279.

259. SADOCK & SADOCK, *supra* note 136, at 6.

260. NANCY C. ANDREASEN & DONALD W. BLACK, INTRODUCTORY TEXTBOOK OF PSYCHIATRY 27 (4th ed. 2006). *See supra* notes 214-44 and accompanying text.

261. ANDREASEN & BLACK, *supra* note 260, at 27.

262. Norton, *supra* note 134, at 44.

263. SADOCK & SADOCK, *supra* note 136, at 2.

264. ANDREASEN & BLACK, *supra* note 260, at 28.

information to humanize the client; merely making "a plea for mercy in conclusory terms such as "he is a good person, friendly, nice, polite, hard-working, decent, compassionate," et cetera has not proven to be particularly helpful.[265]

Capital defense teams understand that "it is always best to have the family and friends testify *anecdotally* about incidents in the defendant's life."[266] The team must use gentle persistence to get witnesses to open up:

> One of the greatest hurdles in communicating with and gaining the trust of lay witnesses is explaining that what they may have thought was "bad" about their friend or loved one is actually helpful information. For example, descriptions of the client's inexplicable outbursts from the age of about eight when he was involved in a near-fatal car accident help the mental health experts determine the presence and etiology of brain damage. In order to gain the cooperation of lay witnesses, the defense must take the time to explain not only what information is needed but why it is important.[267]

An effective interviewer therefore will be alert to clues that there is information below the surface, and persistently but patiently pursue the specific details that could be helpful to the client.

3. "*Use a mixture of open and closed questions*."[268] An effective interviewer strikes "a fine balance between allowing the patient's story to unfold at will and obtaining the necessary data for diagnosis and treatment"; an ideal interview "begins with broad, open-ended questioning, continues by becoming specific, and closes with detailed direct questioning."[269] Experts caution that "[t]oo many closed-ended questions, especially in the early part of the interview, can restrict . . . responses."[270]

4. "*Let the patient talk freely* . . . ."[271] Allowing the client or witness to speak freely, without interruption, may reveal clinically significant clues.[272] Allowing the client to speak freely also facilitates the flow of other significant information. The effective interviewer is an "empathic listener," who "puts [the client] at ease, is sensitive to his suffering, and

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265. Marshall Dayan, *The Penalty Phase of the Capital Case: Good Character Evidence,* CHAMPION, June 1991, at 15.

266. Balske, *supra* note 127, at 44 (emphasis added).

267. Norton, *supra* note 134, at 44.

268. ANDREASEN & BLACK, *supra* note 260, at 29.

269. SADOCK & SADOCK, *supra* note 136, at 8.

270. *Id.*

271. ANDREASEN & BLACK, *supra* note 260, at 29.

272. *Id.*

expresses his [or her] compassion."[273] The interviewer's attitude is critical to full and frank disclosure; she must listen non-judgmentally, and "elicit data . . . [while] encouraging the patient to tell his or her story."[274]

D. Mental Health Screening

The ABA Guidelines require the defense team to include "at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments."[275] The Supplementary Guidelines expand on this requirement in specific ways that are critical to the effective performance of the mitigation function:

> At least one member of the team must have specialized training in identifying, documenting and interpreting symptoms of mental and behavioral impairment, including cognitive deficits, mental illness, developmental disability, neurological deficits; long-term consequences of deprivation, neglect and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior; effects of substance abuse and the presence, severity and consequences of exposure to trauma. Team members acquire knowledge, experience, and skills in these areas through education, professional training and properly supervised experience.[276]

These abilities have always been essential for the mitigation specialist. Because only defense team members have access to the client over time, it is their duty to "act as the observational caretakers for the mental status symptoms of the client."[277] Therefore, defense team members must be trained to "perceive data from multiple sources," including "history, . . . nonverbal cues, [and] listening at multiple levels."[278]

Many of the training materials that were reviewed when researching the Supplementary Guidelines focused on the recognition of subtle verbal and nonverbal signs of mental impairment. Mitigation specialists are trained to observe "general signals of mental disorder

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273. OTHMER & OTHMER, *supra* note 232, at 35.

274. SADOCK & SADOCK, *supra* note 136, at 5.

275. ABA GUIDELINES, *supra* note 3, at Guideline 4.1(A)(2).

276. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 5.1(E).

277. Deana Dorman Logan, *Learning to Observe Signs of Mental Impairment*, 19 CAL. ATTY'S FOR CRIM. JUST. F. 40, 40 (1992) (footnote omitted).

278. SADOCK & SADOCK, *supra* note 136, at 5.

rather than definitive symptoms of one particular psychiatric illness" because, "if properly noted by the legal team and passed on to the mental health expert, [they] will help guide the expert to make a more accurate evaluation."[279] These skills are an integral part of capital defense team training.

Even the most obvious symptom of impairment, reality confusion,[280] can go undetected by an interviewer who is not adequately trained and experienced to identify "symptoms of mental and behavioral impairment."[281] "[A] client's reference to [hallucinations] may be so subtle as to avoid detection."[282] In one case, for example, an attorney failed to detect hallucinations because she was unaware that the aunt with whom the client regularly conversed died when he was five years old.[283] Defense team members must be alert for "spontaneous remarks by the client [which] should also guide the legal team to pursue the possibility of phobias, and delusions ([fixed] false beliefs), [and] other general signs of mental impairment."[284] Delusions or phobias can likewise be misinterpreted. For example, "[c]lients with the false belief that their attorneys are out to get them often prompt defensive behavior in their counsel rather than recognition that persistent beliefs along this line may be a signal of psychosis or paranoia."[285]

Mitigation specialists carefully observe speech and language patterns because "oral language is a particularly sensitive manifestation of thought processes and brain dysfunction."[286] Thought disorders are sometimes manifested by "word salad" or "neologisms or non-words."[287] Other verbal signs of impairment are more subtle, and require skill, training, and experience to recognize, such as pressured, circumstantial, or tangential speech.[288] These and other manifestations of thought

279. Logan, *supra* note 277, at 40. *See generally* Dudley & Leonard, *supra* note 24 *passim* (discussing the relationship between competent mitigation work and accurate clinical findings).

280. The most classic forms of reality confusion: "[h]allucinations, a sign of both psychosis and brain damage, can involve sights, sounds, smells, physical sensations or tastes. Although these may not be a routine part of the legal team's inquiry, anytime hallucinations are mentioned or hinted at, the subject should be pursued." Logan, *supra* note 277, at 41.

281. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 5.1(E).

282. Logan, *supra* note 277, at 41.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 42.

287. *Id.* Word salad is "speech that is basically gibberish (even though at times it may sound like sentences)." *Id.*

288. *Id.* "Pressure of speech" is also described as "rapid speech," in which the client "[t]alks rapidly and is hard to interrupt," his "[s]entences [are] left unfinished because of eagerness to move on," he "[c]ontinues talking even when interrupted"; the client "[o]ften speaks loudly and

disorders, such as "blocking,"[289] can frustrate the unskilled interviewer who comes away disappointed at having failed to obtain "useful" information from the client. As in *Rompilla*, the client's history and disorder go undetected because the client's symptoms obstruct the untrained investigator.[290]

The defense team must be alert to nonverbal signs of impairment. A client who is hyper-alert to his surroundings, and who "constantly checks behind and around himself, may be exhibiting hypervigilance, a sign of post-traumatic stress disorder."[291] "Slow movements and slow speech (psychomotor retardation) as well as slow reactions can be both a general psychiatric sign, as well as a marker of brain damage."[292] The interviewer should observe the client as he walks into the interview and how he physically handles objects, such as pencil and paper, or opens food wrappers, because balance, gait, coordination, and fine motor skills can provide clues of impairment.[293] The mitigation specialist must be trained to recognize these and other signs of thought disorders in patterns of speech and behavior.

Symptoms of impairment can easily be misinterpreted in ways that frustrate the capital defense team and damage the relationship with the client. The client's inability to produce information may be the product of memory deficits, which "can be clues to a variety of mental illnesses."[294] Even a client's "lies" can signal a variety of psychiatric

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emphatically," and "[t]alks too much and interrupts others." *Id.* at 44 fig.2. Speech is "tangential" when the subject "[a]nswers questions in an oblique or irrelevant way." *Id.* at 43 fig.2. A subject suffers from "Circumstantial" speech when the subject's "[s]peech pattern is circuitous, indirect, or delayed in reaching its goal"; it "[i]ncludes many tedious details, seems 'long-winded,'" and "[r]equires that you interrupt in order to finish business." *Id.* Other speech phenomena that might be clinically significant include loss of goal, perseveration, psychomotor retardation, deficient verbal fluency, blocking, paraphasia, dysarthria, aprosody, and stilted speech. *Id.* at 43-44 fig.2. Written communications with clients may also have indicia of language problems, such as micrographia, hypergraphia, and dyslexia. *Id.* at 44 fig.2.

289. The client "[s]tops in the middle of a thought and after some silence [c]annot remember what he was talking about"; he "says his 'mind went blank.'" *Id.* at 44 fig. 2. Blocking is common among trauma victims, but can be indicative of other disorders as well. *See* Wayland, *supra* note 136, at 925.

290. Rompilla v. Beard, 545 U.S. 374 (2005).

291. Logan, *supra* note 277, at 48 (citing DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 250 (3d ed. rev., 1987)).

292. Logan, *supra* note 277, at 48 (citing Harvey S. Levin et al., *Neuropsychological and Intellectual Assessment of Adults*, in 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 500 tbl.9.5-2 (Harold I. Kaplan & Benjamin J. Sadock eds., 5th ed. 1989)).

293. Logan, *supra* note 277, at 49.

294. *Id.* at 45 (citing 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 292, at 464).

conditions,[295] such as fetal alcohol syndrome,[296] faulty memory,[297] or confabulation.[298] Incongruent emotion is another symptom which is commonly misinterpreted in capital clients:

> [O]ne of the most disturbing emotional responses (at least to the lay public) is inappropriate laughing. Counsel needs to understand that clients who laugh while discussing what happened to the victim or how they were victimized themselves by child abuse, for example, are exhibiting signs of mental impairment. A mental health expert with a thorough medical and social history, reports of careful observation, and their own clinical observations and the testing results can properly analyze this behavior.[299]

Effective advocacy and loyalty to the client require the defense team to diligently explore mitigating explanations for client behavior. The Supplementary Guidelines emphasize that the defense team must be trained to observe, without judging, the client's behavior and appearance while maintaining the rapport that is necessary to effective representation.

E. Cultural Competence

Echoing the ABA Guidelines,[300] the Supplementary Guidelines provide that the defense team "include individuals possessing the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client's life

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295. Logan, *supra* note 277, at 45 (citing COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 292, at 474).

296. Logan, *supra* note 277, at 45 (citing Streissguth, et al., *Fetal Alcohol Syndrome in Adolescents and Adults*, 265 JAMA 1991, 1965 (1991)).

297. Logan, *supra* note 277, at 45 (citing COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 292, at 474).

298. ROLLAND S. PARKER, TRAUMATIC BRAIN INJURY AND NEUROPSYCHOLOGICAL IMPAIRMENT: SENSORIMOTOR, COGNITIVE, EMOTIONAL, AND ADAPTIVE PROBLEMS OF CHILDREN AND ADULTS 204 (1990).

299. Logan, *supra* note 277, at 47-48.

300. ABA GUIDELINES, *supra* note 3, at Guideline 10.11(F)(2) ("Counsel should consider . . . [e]xpert and lay witnesses . . . to provide . . . cultural or other insights into the client's mental and/or emotional state and life history"). *See also id.* at Guideline 4.1, commentary (noting that "it might well be appropriate for counsel to retain an expert from an out-of-state university familiar with the cultural context by which the defendant was shaped"); *id.* at Guideline 10.5, commentary ("There will also often be significant cultural and/or language barriers between the client and his lawyers. In many cases, a mitigation specialist, social worker or other mental health expert can help identify and overcome these barriers, and assist counsel in establishing a rapport with the client."); *id.* at Guideline 10.7, commentary ("counsel must learn about the client's culture").

history. . . [including] religious, gender, sexual orientation, ethnic, racial, *cultural* and community influences; socio-economic, historical, and political factors."[301] In addition, "Mitigation specialists must be able to identify, locate and interview relevant persons in a *culturally competent manner* that produces confidential, relevant and reliable information."[302] Further, he or she must "furnish information in a form useful to counsel and any experts through methods including . . . *cultural*, *socioeconomic*, *environmental*, *political*, *historical*, *racial and religious influences on the client* in order to aid counsel in developing an affirmative case for sparing the defendant's life."[303] This includes the duty to assist counsel in locating "[e]xpert witnesses, or witnesses with specialized training or experience in a particular subject matter [including,] [a]nthropologists, sociologists and persons with expertise in a particular race, culture, ethnicity, [or] religion."[304]

The heavy emphasis on culture in the defense of capital cases is the inevitable consequence of the powerful influence of culture on perception and behavior. "Culture is an all-pervasive medium for humans."[305] It affects "subjective dimensions such as values, feelings, and ideals" that guide the perceptions and decisions of clients, witnesses, lawyers, judges, and juries.[306] Therefore, the Supplementary Guidelines account for the influence of culture in every aspect of the capital defense team's work. Just as cultural differences between clients and lawyers can prevent the rapport necessary to effectively defend the client,[307] they can also interfere with the reliability of medical and mental health assessments of the client. Because culture defines the "spectrum of 'normal behaviors' as well as thresholds of tolerance for diverse 'abnormalities,'" unfamiliarity "with the nuances of an individual's cultural frame of reference may incorrectly judge as psychopathology those normal variations in behavior, belief, or experience that are particular to the individual's culture."[308] Further, culture is a significant

301. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 5.1(B) (emphasis added).
302. *Id.* at Guideline 5.1(C) (emphasis added).
303. *Id.* at Guideline 5.1(D) (emphasis added).
304. *Id.* at Guideline 10.11(E)(1).
305. SADOCK & SADOCK, *supra* note 136, at 169.
306. *Id.*
307. *See supra* notes 207-09 and accompanying text.
308. SADOCK & SADOCK, *supra* note 136, at 168-69; *see also* John H. Blume & David P. Voisin, *Capital Cases: Avoiding or Challenging a Diagnosis of Antisocial Personality Disorder*, CHAMPION, Apr. 2000, at 69. Blume and Voisin leveled criticism at a oft-misunderstood disorder:

> [An Antisocial Personality Disorder] diagnosis is not only harmful, but it is frequently wrong. Sometimes the error rests on a misunderstanding of the disorder. At times, it is erroneously diagnosed because of an over-reliance on personality tests, a failure to

factor influencing individuals' perceptions about the existence or cause of mental illness.[309] Culture can even affect how symptoms of illness and trauma are perceived or experienced in afflicted individuals.[310] Defense teams that do not share the client's culture may overlook symptoms of impairment, attributing them to language difficulties or cultural differences."[311] It is difficult to conceive of a capital case, or even an aspect of a capital case, in which cultural competence is not necessary to the performance of the defense function.[312]

F. Communication

The diligent work of the mitigation specialist is for naught if the results are not effectively communicated to counsel, who in turn makes it accessible to the life-or-death decision-maker:

> It is not enough simply to obtain the data. The data must be integrated in such a way as to explain why the offense occurred and how all the factors came together to bring your client to the point of killing someone. It is not that your client suffers from impairments, it is that the impairments were too much for him or her to overcome. More important, you must explain why other members of the same family, who presumably suffered similar hardships, did not kill anyone. This implies a thorough understanding of the client's entire family, of the individuals who intervened and assisted in the lives of siblings but not in the life of the client.[313]

As Deana Logan explained, "There is no one to one relationship between being abused as a child and becoming a killer. One does not

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> consider the defendant's culture and background, or an inaccurate or incomplete factual basis.

Id.

309. Rosemarie McCabe & Stefan Priebe, *Explanatory Models of Illness in Schizophrenia: Comparison of Four Ethnic Groups*, 185 BRIT. J. PSYCHIATRY 25, 25 (2004).

310. DELIA SALDAÑA, CULTURAL COMPETENCY: A PRACTICAL GUIDE FOR MENTAL HEALTH SERVICE PROVIDERS 10-11 (2001), *available at* http://www.hogg.utexas.edu/PDF/Saldana.pdf; *see also* SADOCK & SADOCK, *supra* note 136, at 169 ("[The] unique capacity of culture to bind the objective world of perceived reality to the subjective world of the personal and intimate lends it its powerful role as expressor, mediator, and moderator of psychological processes and, ultimately, emotional disorders.").

311. Stetler Affidavit, *supra* note 140, at 9; *see also* Logan, *supra* note 277, at 42.

312. For a detailed discussion of the critical role that culture plays in capital mitigation cases see Holdman & Seeds, *supra* note 208, at 894-905.

313. Norton, *supra* note 134, at 45. The mitigation case might include witnesses who provided essential social support for a sibling, while also demonstrating that such nurturing support was unavailable to the defendant. *See, e.g.*, Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES MAG., July 6, 2003 at 32, 38, 46.

inevitably lead to the other. Just as each abused child's life is different so is the path leading up to every homicide."[314] Counsel must therefore make a rich, detailed presentation of the defendant's life history in order to enable the jury to see intuitively the inevitable connection between the client's past and his crime, and between his past and his potential for redemption. These connections are complex and multifaceted, and the difficulty of articulating them requires the defense team to help counsel develop a compelling theme for life, and identify, select, organize, and prepare the exhibits, evidence, and witnesses on the client's behalf.

Assembling and carrying out a defense strategy requires input from all members of the multidisciplinary team. "[A]ttorneys who simply follow a checklist of requirements without grasping their purpose are likely to [be] ineffective."[315] Because "[m]ental health cases can easily disintegrate into a series of disconnected, contradictory witnesses who testify in a disjointed manner in language that makes no sense to the jury," the defense team must carefully and thoroughly prepare every aspect of the presentation on the behalf of the client.[316] The responsibility of the entire defense team is described in the Supplementary Guidelines:

> Team members must have the training and ability to use the information obtained in the mitigation investigation to illustrate and illuminate the factors that shaped and influenced the client's behavior and functioning. The mitigation specialist must be able to furnish information in a form useful to counsel and any experts through methods including, but not limited to: genealogies, chronologies, social histories, and studies of the cultural, socioeconomic, environmental, political, historical, racial and religious influences on the client in order to aid counsel in developing an affirmative case for sparing the defendant's life.[317]

Chronologies and genograms allow capital defense teams to organize the vast streams of data that are produced by the life history investigation. The chronology consists of a "narrative, historical account of the influences or events which have the most significant effect on the

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314. Deana Dorman Logan, *From Abused Child to Killer: Positing Links in the Chain*, CHAMPION, Jan.-Feb. 1992, at 32.

315. White, *supra* note 127, at 377.

316. Blume & Leonard, *supra* note 201, at 70.

317. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 5.1(D); *see also id.* at Guideline 10.11(D) (requiring mitigation team members to furnish defense counsel with documentary evidence of the investigation, using various methods, on relevant subjects and issues in the client's life).

client's life," and span "at least three generations."[318] It is continuously updated as new data are found,[319] thus allowing the defense team to identify the facts, documents, physical evidence, and witnesses that are capable of communicating important chapters of the client's life story. Genograms, "annotated family trees which depict the relationships between family members and patterns of impairments" within the client's family, also help organize and display data that will be "very useful in explaining to juries the long-term effects of various influences on the client."[320]

The Supplementary Guidelines reflect the standard practice of capital defense teams to use a wide variety of means to organize and communicate the client's life story. "Life history timeline diagrams, models of pathways into criminal behavior, and photographs are commonly used to help jurors come to know the defendant during the penalty phase."[321] As Professor White emphasized, "[t]he evidence presented should weave a fabric of the defendant's life—triumphs and successes as well as failures and obstacles. Vivid details are important. Counsel should '[g]et personal records and objects from the family such as photographs, report cards, favorite books, or even a baseball mitt.'"[322]

A capital defense attorney and mitigation specialist with many years of experience coined the "Four C's" of capital litigation to measure the defense case resulting from this collaborative effort:

> Jurors must understand your evidence before they can accept your theory. They also must believe it. If they question the credibility of your evidence, they will likely stop listening and start resisting your theory. Without doubt, for your evidence to be understood (*comprehensible*) by jurors, it must have a reliable foundation (*credible*), it must not come as a surprise (*comprehensive*) and it must not be used as an excuse only after all else has failed (*consistent*).[323]

318. Norton, *supra* note 134, at 45; *see also* Dudley & Leonard, *supra* note 24, at 966-67.

319. Norton, *supra* note 134, at 45.

320. *Id.*; *See also* Dudley & Leonard, *supra* note 24, at 977 (discussing the use of genograms, ecomaps and other visual tools); Holdman & Seeds, *supra* note 208, at 884.

321. Julie Schroeder et al., *Mitigating Circumstances in Death Penalty Decisions: Using Evidence-Based Research to Inform Social Work Practice in Capital Trials*, 51 SOC. WORK 355, 361 (2006).

322. White, *supra* note 127, at 361 (quoting Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695, 705 (1991)).

323. Blume & Leonard, *supra* note 201, at 69.

A fifth "C" to accompany this list is *context* for the episodes of the defendant's life story to be presented in mitigation.[324] Corroborating documents, evidence, and witness accounts will help the jury visualize the characters, scenes, and actions that set the client upon his tragic path:

> Except in extreme cases, it is not the physical wound that causes the lasting trauma. A child can heal easily from a scar if received in a ball game. It is often the child's perception of the meaning behind the blow that causes the major trauma of abuse.[325]

The mitigation specialist is critical to the defense team's ability to tell a persuasive story:

> Significantly, the defendant's personal history and family life, his obsessions, aspirations, hopes, and flaws, are rarely a matter of physical evidence. Instead they are both discovered and portrayed through narrative, incident, scene, memory, language, style, and even a whole array of intangibles like eye contact, body movement, patterns of speech—things that to a jury convey as much information, if not more, as any set of facts. But all of this is hard to recognize or develop, understand or systematize without someone on the defense team having it as his specific function. This person should have nothing else to do but work with the defendant, his family, friends, enemies, business associates and casual acquaintances, perhaps even duplicating some of what the private detective does, but going beyond that and looking for more. This takes a lot of time and patience.[326]

The client's life story must be analyzed and understood on a deep level to enable the defense team to convey such meaning.[327]

VIII. FUNDING

The mitigation function requires that a dedicated defense team spend considerable time and energy learning and preparing to tell the client's life story. "An effective case in mitigation—one that genuinely

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324. *See, e.g.*, Harlow v. Murphy, No. 05-CV-039-B, slip op. at 44 (D. Wyo. Feb. 15, 2008) (explaining that the successful habeas corpus presentation focused on the culture and environment of a maximum security prison and strongly supported the defense theme that "Mr. Harlow is not a dangerous person, but he was in a dangerous place"). The mitigation specialist in that case prepared a video presentation which included the petitioner's fellow prisoners and prison employers, and which the district court referred to as "powerful mitigation evidence." *Id.* at 41.

325. Logan, *supra* note 314, at 37.

326. Fosburgh, *supra* note 167, at N7.

327. Because frank and detailed communications about intimate details of the client's life is absolutely necessary to this aspect of the mitigation function, strict observation of attorney-client and work-product privilege is essential. *See supra* notes 35 and 52 and accompanying text.

humanizes a capital defendant—requires deep commitment to one's client, a moderately sophisticated grasp of human psychology, and hundreds of hours to assemble."[328] Representing a capital client is a labor-intensive, time-consuming undertaking; there are no shortcuts. A half-hearted effort will create only a "veneer of competence" likely to result in the client's execution.[329]

Counsel's leadership role includes the duty to acquire sufficient resources to conduct the exhaustive investigation that is constitutionally required in capital cases. The unfettered constitutional right to offer mitigating evidence "does nothing to fulfill its purpose unless it is understood to presuppose the defense lawyer will unearth, develop, present and insist on consideration of those 'compassionate or mitigating factors stemming from the diverse frailties of humankind.'"[330] It is therefore incumbent upon counsel to "demand on behalf of the client all resources necessary to provide high quality legal representation."[331] Further, "[b]ecause the defense should not be required to disclose privileged communications or strategy to the prosecution in order to secure these resources, it is counsel's obligation to insist upon making such requests *ex parte* and *in camera*."[332]

The ABA Guidelines require that every death penalty jurisdiction "provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings."[333] The Supplementary Guidelines specifically address the funding and compensation of defense team members. The workload of mitigation specialists and other team members must be "maintained at a level that enables them to provide each client with high quality services and assistance in accordance with these Guidelines."[334] The Supplementary Guidelines also acknowledge the need for adequate compensation to maintain well-qualified defense teams:

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328. Haney, *supra* note 46, at 1458.

329. Norton, *supra* note 134, at 45.

330. SPENCER REPORT, *supra* note 55 (quoting Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1316-17 (1997) (citation omitted)).

331. ABA GUIDELINES, *supra* note 3, at Guideline 10.4(D). "If such resources are denied, counsel should make an adequate record to preserve the issue for further review." *Id.*

332. *Id.* at Guideline 10.4, commentary (emphasis added). *See also* Fox, *supra* note 38, at 800-02.

333. ABA GUIDELINES, *supra* note 3, at Guideline 4.1(B).

334. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 6.1; *see also id.* at Guideline 10.3.

> Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed to assist counsel with the litigation of death penalty cases. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.[335]

To obtain the necessary funds, counsel must explain to the court the factors that exist in the particular case which affect the amount of work ahead. In any case, "[d]eveloping mitigation evidence through life-history investigation [will] involve[] hundreds of hours of work—with meticulous attention to detail, painstaking efforts to decode and decipher old records, patience and sensitivity in eliciting disclosures from both witnesses and the client."[336] Further, "[t]he broad range of information that may be relevant to the penalty phase requires defense counsel to cast a wide net in the investigation of any capital case."[337]

The amount of time required to investigate a particular case will vary according to a number of factors, including:

> [T]he need to develop client and lay witness trust; the need to overcome the reticence of witnesses because of the sensitive nature of the information sought; the need to triangulate data to ensure reliability; the time required to locate and retrieve records and to locate and interview witnesses; the impairments of both clients and lay witnesses; the need to investigate at least three generations within the client's family; and the need to integrate massive amounts of data into a concise and understandable form.[338]

It is important to impress upon the court the need to begin the mitigation investigation as early as possible, before the prosecution decides whether to seek the death penalty at trial. While some courts have been reluctant to fund a mitigation specialist's time and expenses prior to the prosecutor's decision to ask for the death penalty, the Spencer Committee observed that full funding early in the case is cost-effective:

> Because development of mitigating information early in the case may convince the prosecution that the death penalty should not be

335. SUPPLEMENTARY GUIDELINES, *supra* note 1, at Guideline 9.1; *accord* ABA GUIDELINES, *supra* note 3, at Guideline 9.1(C).

336. Stetler, *supra* note 133, at 39.

337. SPENCER REPORT, *supra* note 55 (citing ABA GUIDELINE, *supra* note 3, at Guideline 11.8.3).

338. Norton, *supra* note 134, at 45.

> authorized, delaying preparation for the penalty phase is likely to increase the number of cases authorized, and therefore increase total costs. In a small number of instances, judges were reluctant to approve expenditures related to the penalty phase until an authorization decision was made. However, if the result of such a decision is that cases are authorized which should not be, this approach may cost more money than it saves, for cases that are never authorized cost much less than cases that are authorized, even if a guilty plea to a sentence less than death eventually is negotiated.[339]

Because "effective advocacy by defense counsel . . . may persuade the prosecution not to seek the death penalty[;] . . . it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible—well before the prosecution has actually determined that the death penalty will be sought."[340]

It may also be necessary for counsel to make supplemental funding requests as the investigation develops additional leads that must be explored, as it is difficult to predict where the investigation will go. "Investigating the capital client's biography is a sensitive, complex, and cyclical process."[341] Seeking evidence from a broad set of sources will generate additional leads which must be followed, sometimes raising new questions for witnesses who have already been interviewed.[342]

In assessing whether the investigation is complete, it must be remembered that "[t]he nature of a criminal prosecution in which the defendant's life is at stake transforms counsel's role from start to finish. The quality of defense counsel's work must always remain in accord with the gravity of the proceeding."[343] Recently, when a capital defense team was denied travel funds necessary to conduct a thorough life history investigation, United States District Judge Clarence Brimmer chastised the funding authority, stating, "When a man's life was at stake, there was surely $20,000 to be found for such an important investigation, either in the State Public Defender's budged [*sic*] or in the Governor's contingency fund. There is evidence that in this case, however, the State Public Defender never even asked for it."[344]

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339. SPENCER REPORT, *supra* note 55.

340. ABA GUIDELINES, *supra* note 3, at Guideline 1.1, History of Guideline.

341. Stetler, *supra* note 133, at 38.

342. *See supra* note 258 and accompanying text.

343. SPENCER REPORT, *supra* note 55.

344. Harlow v. Murphy, No. 05-CV-039-B, slip op. at 57 (D. Wyo. Feb. 15, 2008). Judge Brimmer found that the failure to fund the mitigation investigation prevented defense counsel from undertaking critical investigation of the client's background and character, rendering him constitutionally ineffective. *Id.* at 57-58.

IX. CONCLUSION

The Supreme Court granted relief in *Wiggins*, *Williams*, and *Rompilla* because counsel failed to find compelling mitigating evidence, hidden beneath layers of barriers to disclosure, that was essential to a constitutionally adequate capital sentencing trial. In each case, jurors sentenced the defendants to die without the benefit of evidence about the defendant's background and character that might have persuaded them to spare his life. In each case, the Court had to choose between granting new sentencing trials for prisoners who had spent more than a decade on death row or allowing their executions in spite of the unfairness of the original sentence. The ABA Guidelines define a national standard of care in capital representation, and adherence to this high national standard benefits all the participants in our criminal justice system. As Hofstra Law Professor Eric M. Freedman observed:

> The revised [ABA] Guidelines came to the floor of the House of Delegates with the co-sponsorship of a broad spectrum of ABA entities and passed without a single dissenting vote. This was symbolic of the philosophy that has animated the project since its inception in the 1980s, and that I as the current Reporter hope will continue to guide the future evolution of the field as a whole: "All actors in the system share an interest in the effective performance of [capital defense] counsel; such performance vindicates the rights of defendants, enables judges to have confidence in their work, and assures the states that their death sentences are justly imposed."[345]

The Supplementary Guidelines were developed in the same spirit, with the hope that articulating the prevailing standard of performance of the mitigation function will enable both the lawyer and non-lawyer members of the capital defense team to uncover the portions of the defendant's life story that reveal his basic humanity for capital decision-makers to see and understand.

345. Eric M. Freedman, *Introduction*, 31 HOFSTRA L. REV. 903, 912 (2003) (quoting Comm. on Civ. Rts., Ass'n of the Bar of the City of N.Y., *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASS'N. OF THE BAR OF THE CITY OF N.Y. 848, 854 (1989)).