**THE MYSTERY OF MITIGATION:**
WHAT JURORS NEED TO MAKE A REASONED MORAL RESPONSE IN CAPITAL SENTENCING

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I. INTRODUCTION

Mitigation – the empathy-evoking evidence that attempts to humanize the accused killer in death penalty cases – remains a mystery some three decades after the United States Supreme Court mandated individualized sentencing in capital cases.¹ Few have seen its power, its transformative capacity to enable jurors to feel human kinship with someone whom they have just convicted of an often monstrous crime. It would be rare for an individual juror to sit on more than one case in which mitigating evidence was presented in the penalty phase of a capital trial. Indeed, in twenty years of federal death penalty prosecutions, very few judges have presided over more than one penalty proceeding.² Some of the most experienced public defenders specializing in capital cases have presented mitigating evidence only a handful of times over their long careers. Even mitigation specialists – the capital defense team members who give undivided attention to the client’s life-history investigation – have few opportunities to observe penalty proceedings, to watch the entire courtroom drama unfold.

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¹ See Gregg v. Georgia, 428 U.S. 153 (1976) (finding constitutional Georgia’s reenacted death penalty statute in part because it allowed for mercy based on individualized consideration).

Yet we know that mitigation works. Life verdicts in cases involving horrendous loss of life demonstrate that death sentences are never automatic or inevitable. High-profile examples include the cases of Lee Boyd Malvo, the so-called “Beltway Sniper;” Zacarias Moussaoui, the alleged twentieth hijacker of 9/11; and Terry Nichols, tried twice (in federal and then state court) for the Oklahoma City bombing. More mundane examples occur week after week in courtrooms across the country, as jurors choose life sentences for serial killers, cop killers, child killers, and others guilty of the most reviled and abhorrent crimes. While concerns about wrongful convictions have dramatically altered the public policy debate on capital punishment, mitigation evidence has continued to bring life sentences even in the face of overwhelming evidence of guilt. Mitigation is intangible and highly variable in the weight assigned to it by different individuals. Nonetheless, both courts and capital defense practitioners have over several decades articulated standards for mitigation investigation. This article will explore how those performance standards have developed.

II. WHAT IS MITIGATION?

Capital punishment has been an option in thirty-eight states as well as in federal and military prosecutions in the post-<i>Furman</i> era, and there

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4 See Jerry Markon & Timothy Dwyer, Jurors Reject Death Sentence for Moussaoui, WASH. POST, May 4, 2006, at A01.


6 See, e.g., Alex Kotlowitz, In the Face of Death, N.Y. TIMES MAGAZINE, July 6, 2003 at section 6 (discussing the impact of mitigating evidence in the case of Jeremy Gross, convicted of a convenience-store robbery murder that was recorded in its entirety on videotape, and depicting mercy-dispensing jurors as “The New Abolitionists”).

7 Ritter, supra n. 2. In <i>Furman v. Georgia</i>, 408 U.S. 238 (1972), the Supreme Court found that all the capital statutes then in place violated the Eighth and Fourteenth Amendments by allowing unfettered discretion in selecting which defendants would be subject to capital punishment. This Article discusses the modern era that began with statutes enacted to correct the constitutional infirmities identified in <i>Furman</i>.
have been multiple statutory definitions of mitigation. Some capital statutes fail to define mitigating factors at all. More typically, there are lists of statutory mitigating factors, such as age at the time of the crime and the absence of a significant history of prior criminal convictions. Many statutory factors focus on the circumstances of the crime (victim participation or consent; relatively minor participation; duress or domination) or the defendant’s mental state at the time of the crime (extreme mental or emotional disturbance; impaired capacity to appreciate right from wrong or conform one’s conduct), while making clear that the mitigating mental conditions do not rise to the level of affirmative defenses. Some statutes include a broad catchall as well, often with no

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10 See, e.g., ALA. CODE § 13A-52 (1975) (noting that “[i]n addition to the mitigating circumstances specified in Section 13A-5-51, mitigating circumstances shall include any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.”); CAL. PENAL CODE § 190.3(k) (including as mitigating “[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal
guidance beyond the magic word itself, mitigation. Sadly, the statutory frameworks have tended only to confuse lawyers and judges, and to obscure the fundamental point that mitigation has no boundaries under the Eighth Amendment requirement of individualized selection for society's punishment of last resort.11 The breadth of mitigating evidence has been

11 Over the past three decades, the U.S. Supreme Court has distinguished between the eligibility phase of capital cases (i.e., which classes of murder are “eligible” for the death penalty), where the post-Furman jury's discretion must be channeled and limited to “ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition,” and the selection phase (i.e., which defendants will be
clear since the U.S. Supreme Court in 1976 rejected the mandatory sentencing statutes enacted in Louisiana and North Carolina, and established that individualized sentencing is a constitutional requirement when the punishment is death.\textsuperscript{12} The Court began defining what constitutes mitigation, and it did so in the broadest conceivable terms – speaking of the “diverse frailties of humankind” as the source of mercy and empathy:

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 death penalty.\textsuperscript{13}

Decades earlier, the writer Arthur Koestler spoke of the “shuddering recognition of a kinship” which evokes the response “here but for the grace of God, drop I’ in the face of a condemned prisoner at the gallows.\textsuperscript{14} The diverse frailties bestow the kinship of humanity. We all have them, to varying degrees, but, for most of us, the protective supports of family and society along with our individual strengths offset those frailties. For many capital clients, the frailties are overwhelming, and the supports are absent. Eighth Amendment jurisprudence confers compensatory protection to allow life-and-death decision makers to extend compassion on an individual basis.\textsuperscript{15}

In 1978, Sandra Lockett challenged the constitutionality of the Ohio sentenced to death), where the Supreme Court requires “a broad inquiry into all relevant mitigating evidence to allow an individualized determination.” Buchanan v. Angelone, 522 U.S. 269, 275-6 (1998).


\textsuperscript{13} Woodson, 428 U.S. at 304.

\textsuperscript{14} Witherspoon v. Illinois, 391 U.S. 510, 520 n. 17 (1968) (quoting Arthur Koestler, Reflections on Hanging, 167 (1956)).

capital statute, claiming it did not allow the sentencing judge to consider as mitigating factors her character, prior record, age, lack of specific intent to cause death, and relatively minor role in the crime. In *Lockett v. Ohio*, the Court concluded that the Eighth and Fourteenth Amendments require that the sentencer “not be precluded from considering, as a mitigating factor, 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.”

When a trial court in Oklahoma refused to consider as a matter of law a teenager’s emotional disturbance and turbulent family history because these factors “did not tend to provide a legal excuse” from criminal responsibility, the Court made clear that mitigation in penalty is something different:

> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. 17

The opinion is eloquent in distinguishing responsibility from punishment considerations:

> But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. . . . Even the normal 16-year-old customarily lacks the maturity of an adult. In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juvenile with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background. In addition, there was testimony that Eddings’ mental and emotional development were at a level several years below his

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chronological age. All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.18

Mitigating evidence cannot be limited to the pre-offense time frame. It can embrace redemption and post-offense “good adjustment” in jail. In Skipper v. South Carolina, the Court held that the defense should have been permitted to introduce such evidence even though it “would not relate specifically to petitioner’s culpability for the crime he committed” because “there is no question but that such inferences would be ‘mitigating’ in the sense that they might serve as a basis for a sentence less than death.”19 The Skipper Court succinctly defined mitigation as “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.”20

Justice O’Connor went on in Penry v. Lynaugh,21 to reaffirm “the principle that punishment should be directly related to the personal culpability of the criminal defendant”22 in capital cases. She stated, “rather than creating a risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a ‘reasoned moral response to the defendant’s background, character, and crime.’”23

Professor Joan W. Howarth has developed this analysis of the reasoned moral response in her study of the role of gender in capital juries.24 She has stressed the need for personalized responsibility and individualized, contextualized decision-making in sentencing.

18 Id. at 115-16.
19 476 U.S. 1, 4-5 (1986).
20 Id. at 6 (quoting Eddings, 455 U.S. at 110).
22 Id. at 319.
determinations. Professor Howarth has contrasted the jury’s fact-finding role in guilt trials, based on the traditional ethic of justice, with its moral role in penalty trials, based on an ethic of caring, compassion, and mercy. She finds a hidden battleground of gender in capital juries—pitting rational versus irrational, active versus passive, thought versus feeling, objective versus subjective, abstract versus contextualized, distance versus connection, rules versus context, anger versus pity. Perhaps the most fundamental point is that there is simply no objective test, no rule to measure mitigation, no scale to quantify empathy-evoking evidence.

The vitality of the all-encompassing view of mitigation articulated in Lockett, Eddings, and Penry was reaffirmed by the U.S. Supreme Court in Williams v. Taylor,25 where trial counsel were found ineffective for failing to prepare for the penalty proceeding until a week before trial and failing to conduct a thorough investigation of the defendant’s background. Justice Stevens described at some length the mitigation which would have been found:

They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams’ nightmarish childhood . . . . Had they done so, the jury would have learned that Williams’ parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents’ incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents’ custody.

Counsel failed to introduce available evidence that Williams was “borderline mentally retarded” and did not advance beyond sixth grade in school. They failed to seek prison records recording Williams’ commendations for helping to crack a prison drug ring and for returning a guard’s missing wallet, or the testimony of prison officials who described Williams as among the inmates “least likely to act in a violent, dangerous or provocative way.” Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison

ministry program, that Williams “seemed to thrive in a more regimented and structured environment,” and that Williams was proud of the carpentry degree he earned while in prison.\footnote{Id. at 395-396.}

In two more recent cases, the Court has pointedly reminded the Fifth Circuit and the Texas state courts that mitigation requires no nexus to the crime, and jurors must be permitted to give it meaningful effect in their life-and-death deliberations. In \emph{Tennard v. Dretke},\footnote{542 U.S. 274 (2004).} the Court quoted \emph{Eddings} to make the point that “virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances,”\footnote{Id. at 285 (quoting \emph{Eddings}, 455 U.S. 104, 114 (1982)).} while noting that some conditions (such as borderline intellectual functioning) are “inherently mitigating”\footnote{Id. at 287.} and the threshold for relevance is low.\footnote{Id. at 285: see also \emph{Ayers v. Belmontes}, 549 U.S. 7, 26 (2006) (Justice Kennedy referencing “potentially infinite mitigators”).} In \emph{Abdul-Kabir v. Quarterman},\footnote{550 U.S. \textemdash, 127 S.Ct. 1654 (2007)} the Court offered this pithy distillation: “Our cases following \emph{Lockett} have made clear that when the jury is not permitted to give meaningful effect or a ‘reasoned moral response’ to a defendant’s mitigating evidence – because it is forbidden from doing so by statute or a judicial interpretation of a statute – the sentencing process is fatally flawed.”\footnote{Id. at 1675.}

III. COUNSEL’S DUTY TO INVESTIGATE MITIGATION

Most importantly, the Court acknowledges the national standards set by capital defense practitioners as reflected in the \emph{ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases} (rev. 2003)\footnote{American Bar Association, \emph{Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases}, 31 \textsc{Hofstra L. Rev.} 913 (Summer 2003), available at \url{http://www.abanet.org/deathpenalty} [hereinafter 2003 GUIDELINES].} and rejects traditional excuses for failing to investigate
mitigation. The result is an unambiguous mandate for mitigation investigation and a firm basis for counsel to seek the funding and time necessary to fulfill this responsibility utilizing the services of a defense team with all the requisite skills and expertise.

In the seminal case *Wiggins v. Smith*, the Court rejected trial counsel’s “strategic” decision to focus on residual doubt. Counsel had consulted a psychologist and collected records from the department of social services (“DSS”) and a presentence investigation (“PSI”). Nonetheless, the Court faulted their decision “not to expand their investigation” beyond the PSI and DSS records. The Court specifically cited the ABA Guidelines in determining the professional standards for assessing counsel’s performance. As originally published in 1989, the Guidelines call for “efforts to discover all reasonably available mitigating evidence.” According to the *Wiggins* Court, the 1989 Guidelines constituted “well-defined norms” as of 2003: “Despite these well-defined norms, however, counsel abandoned their investigation of petitioner’s background after having acquired only a rudimentary knowledge of his background from a narrow set of sources.”

In February 2003, the ABA published its revised edition of the Guidelines. The Sixth Circuit quickly recognized the revised edition as simply explaining “in greater detail” the 2003 Guidelines on which the *Wiggins* Court relied.

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34 The ABA web site keeps an updated list of cases citing to the 2003 GUIDELINES at http://www.abanet.org/deathpenalty/resources/. In addition to three cases in the U.S. Supreme Court, there have been dozens of cases in the federal courts and in the highest state courts citing the 2003 GUIDELINES.


36 Id. at 523-24.

37 Id.


39 *Wiggins*, 539 U.S. at 524.

40 2003 GUIDELINES, supra, n. 32.

41 *Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003) (noting “New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence. The 2003 GUIDELINES do not depart in principle or concept from *Strickland*, *Wiggins* or our court’s previous cases
These national standards of practice have now guided numerous courts in rejecting proffered excuses for failing to investigate mitigation. Strategic decisions must be informed by investigation, not based on hunches and assumptions. The Supreme Court rejected uninformed strategy both in *Wiggins* and earlier in *Williams*. In *Williams*, the Court found that “the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams’s favor was not justified by a tactical decision to focus on Williams’s voluntary confession.” That case also rejected the claim that investigation was a two-edged sword which would uncover bad facts as well as good in the course of Williams’s life. Indeed, Chief Justice Rehnquist in dissent described the capital murder as “just one act in a crime spree that lasted most of Williams’s life,” which included a savage beating of an elderly woman, car theft, fire setting, and a stabbing during a robbery.

Attempts to blame the client for inadequate life-history investigation were rejected by the Sixth Circuit in *Hamblin* and the Supreme Court in *Rompilla v. Beard*. In *Hamblin*, the Sixth Circuit noted that neither the ABA nor judicial standards permit courts to excuse failure to investigate or prepare because the defendant so requested. The *Hamblin* court quoted the clear language of Guideline 10.7 verbatim: “The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing on penalty is not to be collected or presented.”

In *Rompilla*, the client’s cooperation with the mitigation investigation was “minimal” at best and obstructive at worst: he sometimes sent counsel off on wild goose chases pursuing false leads. *Rompilla* was

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42 *Williams*, 529 U.S. 362.
43 *Id.* at 396.
44 *Id.* (acknowledging “not all of the additional evidence was favorable.”)
45 *Id.* at 418 (Rehnquist, C.J., dissenting) (citing *Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998) (agreeing with the lower court that additional mitigation evidence would not have overcome the evidence already presented to the jury that Williams posed a significant danger to society)).
46 *Rompilla*, 545 U.S. 374 (2005)
47 *Hamblin*, 354 F.3d at 492.
48 *Id.* (quoting ABA GUIDELINES).
49 *Rompilla*, 545 U.S. at 381
reportedly “bored” by discussion of mitigation and “uninterested in helping.” In this case, counsel was faulted for failing to obtain a court file on a prior conviction that the prosecution planned to use as evidence of aggravation. That public record would have disclosed a completely different picture from what was offered by the client and his family — including a nightmarish childhood, familial mental illness, and potential mental retardation.

In both *Wiggins* and *Rompilla*, consulting mental health experts was rejected as a substitute for conducting a thorough mitigation investigation. In *Wiggins*, counsel had consulted a forensic psychologist. In *Rompilla*, they consulted a “cadre of three [top] mental health” experts. In addition, counsel had conducted some investigation in both cases: in *Rompilla*, they had interviewed a former wife, two brothers, a sister-in-law, and a son. Such minimal investigation fell below the national standard.

**IV. WHAT IS A MITIGATION SPECIALIST?**

More than a quarter century ago, a California defense lawyer hired a former *New York Times* reporter to investigate the life history of his client. The former journalist, the late Lacey Fosburgh, later wrote about the unusual role she had played in the capital defense team:

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

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50 *Id.*

51 *Id.* at 385.

52 *Id.* at 390.

53 *Wiggins*, 539 U.S. at 523.

54 *Rompilla*, 545 U.S. at 382.

55 *Id.* at 381; *see also Wiggins*, 539 U.S. at 523 (noting that, in addition to arranging for psychological testing for Wiggins, counsel’s investigation included their client’s presentence investigation report and his Baltimore City Department of Social Services files).

defendant’s personality in a sympathetic way.

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. (Emphasis added.)

The importance of mitigation investigation was widely acknowledged in the world of post-*Furman* capital defense, even if it took some time for the term “mitigation specialist” to enter the lexicon. Professor Gary Goodpaster noted in 1983 how mitigation investigation required different skills from those honed in law school and noncapital criminal defense practice:

Trial counsel has a duty to investigate the client’s life history, and emotional and psychological make-up, as well as the substantive case and defenses. There must be inquiry into the client’s childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology and present feelings. The affirmative case for sparing the defendant’s life will be composed in part of information uncovered in the course of this investigation. The importance of this investigation, and the thoroughness and care with which it is conducted, cannot be overemphasized.

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When the American Bar Association first published its *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* in 1989, the duty to investigate “all reasonably available mitigating evidence” was stressed, even when clients initially voiced opposition to presenting mitigation. By 1998, the term of art was well accepted. It was also widely understood that lawyers lacked the necessary skills to investigate mitigation. A subcommittee of the Committee on Defender Services of the Judicial Conference of the United States offered this summary:

Mitigation specialists typically have graduate degrees, such as a Ph.D. or masters degree in social work, and have extensive training and experience in the defense of capital cases. They 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 materials for them to review. Although most often they assist counsel in assembling and interpreting the information needed in the penalty phase of a capital case, in some cases mitigation specialists are also called to testify about their findings.

Without exception, the lawyers interviewed by the Subcommittee stressed the importance of a mitigation specialist to high quality investigation and preparation of the penalty phase. Judges generally agreed with the importance of a thorough penalty phase investigation, even when they were unconvinced about the persuasiveness of particular mitigating evidence offered on behalf of an individual defendant. 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

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59 1989 ABA GUIDELINES, supra, n. 38.

60 1989 ABA GUIDELINES 11.4.1.C.
representation. (Citation omitted.)\footnote{Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, \textit{Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation} (May 1998), available at www.uscourts.gov/dpenalty/COVER.htm; see also Russell Stetler, \textit{Mitigation Evidence in Death Penalty Cases}, \textit{THE CHAMPION} (January/February 1999); and Russell Stetler, \textit{Why Capital Cases Require Mitigation Specialists}, \textit{INDIGENT DEFENSE} 1-2, 11 (July/August 1999).}

Coincidentally, in 2003, the same year in which the Supreme Court acknowledged the work of the nonlawyer who uncovered compelling mitigation in the post-conviction investigation of the life of Kevin Wiggins,\footnote{\textit{Wiggins}, 539 U.S. 510.} the ABA updated its \textit{Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases} to define the \textit{minimal} capital defense team as no fewer than two qualified attorneys, an investigator, and a mitigation specialist.\footnote{2003 GUIDELINES 4.1.A.2 and 10.4.}

As I have noted elsewhere, the logic behind capital defense teamwork derives from the adage “two heads are better than one.”\footnote{See Russell Stetler, \textit{Mitigation Investigation: A Duty That Demands Expert Help But Can’t Be Delegated}, \textit{THE CHAMPION} (March 2007)(outlining the diverse set of skills needed to engage in fact investigation).} A true renaissance lawyer representing a client facing the death penalty will be brilliant on her feet in the courtroom, creative in crafting original motions, scholarly in her knowledge of Eighth Amendment jurisprudence, and empathic in her capacity to build a relationship of trust with a paranoid schizophrenic client who grew up in a foreign land. The Guidelines call for a second lawyer not because the true renaissance lawyer is perceived to be deficient in any area, but because no single lawyer can possibly find the time to do everything that is needed to provide high quality representation in a capital case. Of course, it is common for lawyers with complementary skills to be paired on capital cases. But regardless of the skills of any individual lawyer, a second lawyer strengthens the representation.

In the area of fact development as well, two heads are better than one.\footnote{\textit{Id.}} An uncommonly gifted individual with expertise ranging from DNA to the DSM should not attempt to handle simultaneously the two investigative tracks that are part of every capital case: the reinvestigation of the factual allegations which constitute the capital charges, and the

\footnote{\textit{Id.}}
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 the two different tracks require two very different skill sets.

A capital defense investigator’s task is to deconstruct the prosecution theory of the case and turn a solved crime into an unsolved mystery, challenging all factual predicates. Typically, the investigator reviews discovery meticulously and is a skilled reader of police reports, autopsy protocols, and a wide range of forensic analyses. She must be thoroughly familiar with the law and science relating to physical evidence, including the protocols for collection, preservation, laboratory analysis, and interpretation of scientific evidence. In the twenty-first century, a capital defense investigator also needs to understand the implications of the exonerations which have shaken the criminal justice system since the advent of DNA evidence in the late 1980s.

The investigator needs to be well informed about the sources of wrongful convictions – including eyewitness errors, false confessions, the perjurious testimony of jailhouse informants, and unreliable scientific testimony (both junk science and forensic fraud). Thus, skilled investigation of the facts of a capital crime involves more than asking a percipient witness where she was, what she saw, and for how long. Equally important, the investigator needs to find out how the witness came to identify a particular suspect, and how that identification was influenced by police procedures before and after the witness attended a lineup. The investigator needs all the old skills as well: expertise at interviewing, and an ability to knock on a stranger’s door and engage the stranger in conversation, without any authority to coerce cooperation. Finally, the twenty-first century investigator needs state-of-the-art databases for locating witnesses, familiarity with legal tools like open records acts, and a methodology for comprehensive background investigation of all witnesses, especially experts.

The mitigation specialist investigates a different factual universe and

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66 See generally Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery and Sujata Patil, Exonerations in the United States, 1989 through 2003, 95:2 J. CRIM. L. & CRIMINOLOGY 523 (2005) (examining patterns presented by 340 false convictions and what this information demonstrates about who is convicted and why and the overall risk of error); and Barry Scheck, Peter Neufeld & Jim Dwyer, Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted (2000) (presenting ten case studies of prisoners who have been wrongfully convicted to demonstrate a series of flaws within the criminal justice system and the role of DNA evidence in exonerating prisoners).
needs a wholly different set of skills. The Commentary to ABA Guideline 4.1 offered this summary:

A mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant’s development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf. Moreover, they may be critical to assuring that the client obtains therapeutic services that render him cognitively and emotionally competent to make sound decisions concerning his case.

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict. The mitigation specialist compiles a comprehensive and well documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client’s life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation. (Citations omitted.)

The Commentary also advises counsel to “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

67 31 Hofstra L. Rev. at 959.
work product doctrine, and experts who will be called to testify, thereby waiving such protections. 68

V. MENTAL IMPAIRMENTS AND MITIGATION

“Mental disorders and impairments pervade the capital client population, 69 and indeed the entire inmate population of U.S. jails and prison. In July 1999, the Justice Department released the first comprehensive study of the rapidly growing number of emotionally disturbed people in the nation’s jails and prisons, finding 283,000 inmates with mental illness (about 16 percent of the incarcerated population generally) in 1998. 70 Other studies have suggested that more than 50 percent of prison and jail inmates have had some form of psychiatric disorder during their lifetimes, 71 while nearly 15 percent have been “estimated to have severe disorders (such as schizophrenia, bipolar disorder, or major depression).” 72 Some commentators posit that “deinstitutionalization” of the indigent mentally ill, through closing of public psychiatric hospitals and the defunding of community mental health services, results in jails and prisons becoming the principal care providers to the poor who are mentally ill. 73

68 Id. at 1003.

69 Russell Stetler, Mental Disabilities and Mitigation, THE CHAMPION (April 1999); see also Butterfield, infra n. 70; and Freedman, infra n. 71.


72 Id. (citing H. R. Lamb and L. E. Weinberger, Persons with Severe Mental Illness in Jails and Prisons: A Review, 49:4 PSYCHIATRIC SERVICES 483 (1998)).

73 See E. Fuller Torrey, Out of the Shadows: Confronting America’s Mental Illness Crisis (John Wiley & Sons 1996) (showing the reduction of the hospitalized mentally ill population from 565,000 in 1955 to 70,000 in 1995); see also Terry Kupers, Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It (1999) (presenting a general discussion of how deinstitutionalization (closing of community care facilities) over a twenty-five-year period and changes in conditions of confinement exacerbated mental health problems leading to a higher prevalence of
Human Rights Watch issued a report in 2003 generally endorsing the Justice Department estimates (200,000 to 300,000 mentally ill prisoners), but estimating that 70,000 inmates were psychotic on any given day, with little or no meaningful treatment and a likelihood that they would be viewed as a disciplinary problem within the prisons. The report described the resulting deterioration: “They huddle silently in their cells, mumble incoherently, or yell incessantly. They refuse to obey orders or lash out without apparent provocation. They beat their heads against cell walls, smear themselves with feces, self-mutilate, and commit suicide.”

In September 2006, the U.S. Department of Justice’s Bureau of Justice Statistics (“BJS”) released a new report, indicating that at midyear 2005, more than half of all prison and jail inmates in the United States had a mental health problem. The dramatic difference between the 1999 and 2006 estimates derived from methodology. In 1999, BJS counted only those inmates who had been diagnosed and treated within the preceding twelve months. In 2005 they counted not only those with a documented history (i.e., clinical diagnosis or treatment), but also those whose reported symptoms in the preceding twelve months met the criteria in the Diagnostic and Statistical Manual of Mental Disorders IV-TR. The data came from personal interviews with jail inmates in 2002 and state and federal sentenced prisoners in 2004. The estimated numbers are staggering: 705,600 inmates in state prisons, 78,800 inmates in federal prisons, and 479,900 inmates in local jails.

Since these estimates included all prisoners, it can safely be assumed that the prevalence of mental disorder and impairment in the violent mental illness among the incarcerated).

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75 Id.
78 James & Glaze, Mental Health Problems, supra, n. 76
79 Id.
80 Id.
offender population is even higher.\footnote{See Craig Haney, The Social Context of Capital Murder: Social Histories and the Logic of Mitigation, 35 \textit{Santa Clara L. Rev.} 547, 559-60 (1995) (arguing that the social history of the defendant is the primary means to correct the notion that perpetrators of capital crimes are less than human); Dorothy Otnow Lewis et al., \textit{Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States}, 143 \textit{Am. J. Psychiatry} 838, 840 (1986)(finding 9 of 15 death row inmates examined were either chronically or episodically psychotic and two others met the criteria for bipolar mood disorder).}

In the capital context, mental illness can be powerful mitigation when jurors understand empathetically the disabilities, brain damage, and tormented psyches of a convicted killer.\footnote{See Stephen P. Garvey, \textit{Aggravation and Mitigation in Capital Cases: What Do Jurors Think?} 98 \textit{Colum. L. Rev.} 1538, 1565 (1998) (finding a majority of jurors would be at least slightly less likely to vote for death if the defendant had a history of mental illness). Impaired capacity and emotional disturbance are specifically included as statutory mitigating factors in many jurisdictions. \textit{See Statutes, supra n. 9.}} However, jurors also show skepticism toward defense experts, who appear to be “hired guns” unless their opinions are supported by contemporaneous information from lay witnesses.\footnote{Scott Sundby, \textit{The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony}, 83 \textit{Va. L. Rev.} 1109, 1122 (1997) (finding two-thirds of the witnesses jurors thought “backfired” were defense experts).} There is also a risk that mental illness will inspire fear, rather than compassion, and become an excuse to kill (“surgery to excise the cancer”), instead of a basis for reduced moral blame and mercy.\footnote{Stetler, \textit{Mental Disabilities and Mitigation}, supra n. 65.}

Mental illness or impairment can also interfere with the capital defense team’s effort to establish a relationship of trust. Mentally ill clients can be self-destructive.\footnote{See Craig Haney, \textit{Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death}, 49 \textit{Stan. L. Rev.} 801, 814 (1997) (“Human beings react punitively toward persons whom they regard as defective, foreign, deviant, or fundamentally different from themselves. Sobering histories recount the ways in which ‘scientific’ attempts to prove defect or deviance have served as a prelude to mistreatment and extermination”).} Their paranoia may prevent them from accepting...
sound legal advice about the wisdom of a plea offer. They may fear the
shame and stigma of mental retardation, even when the diagnosis could
(updating a classic 1967 text, which followed the daily lives of individuals with mental retardation after being discharged from institutions and noting that the stigma of being labeled mentally retarded leads many individuals to don a “cloak of competence” to conceal their disability).

Not surprisingly, ABA Guidelines 4.1.A.2 and 10.4.C.2.b mandate that the capital defense team include “at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.” The presumption is that one of four core team members will have this qualification. Typically, the mitigation specialist has this training and experience. The Commentary to Guideline 10.5 (Relationship with the Client) addresses the importance of establishing a relationship of trust:

Many capital defendants are . . . severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, 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.” There will also often be significant cultural and/or language barriers between the client and his lawyers. In


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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. (Citation omitted.)

The social history investigation is also critical to any consultation with mental health experts. A richly documented multigenerational social history based on an exhaustive collection of records relating to the client and other family members will provide credible corroboration for key events. Skilled interviews with family members, teachers, neighbors, and co-workers will also elicit vivid descriptions of mental health signs and symptoms, both prodromal and acute, over the client’s entire lifetime. The social history is a critical component of a reliable expert assessment. It identifies corroborating contemporaneous documentary evidence and a cast of credible witnesses who can support the interpretation of any testifying expert. The witnesses identified in the life-history investigation may include historical experts — that is, professionals who encountered the client or his family in the developmental years and who provide the insights of objective third parties to the onset of intellectual impairments or family dysfunction. But the social history investigation also helps to determine what kind of expert is needed, what role she will play, and what referral

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90 Id. at 1007-1008.

91 See Douglas S. Liebert & David V. Foster, The Mental Health Evaluation in Capital Cases: Standards of Practice, 15:4 AM. J. FORENSIC PSYCHIATRY 43-64 (1994); see, also, 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. (forthcoming 2008).

92 During the operative years of the New York death penalty statute (1995 to 2004), for example, the Capital Defender Office offered the testimony of historical experts in several cases. In People v. Bell, a school psychologist who had tested a client routinely as part of mandated triennial review for Special Education explained the significance of his borderline intellectual functioning. 181 Misc.2d 186, 187-88 (N.Y. Sup. Ct. 1999). In People v. Santiago, a different school psychologist explained the impact of learning disabilities (at age 11, reading just above a second grade level; at 14, just above fourth grade; and, at 17, just above fifth grade). 183 Misc.2d 715 (N.Y. Sup. Ct. 2000). In People v. Owen, a psychiatrist had treated the client’s mother after her suicide attempt when the client was nine – 30 years before the capital trial. From the records, the psychiatrist testified to the history of mood disorders and suicidality in the maternal lineage, as well as to family dysfunction, including fights over promiscuity, gambling, and drinking. From her current perspective, the psychiatrist opined about the devastating impact on the children of the mother’s mood disorder, suicidality, and psychiatric removal from the family. 187 Misc.2d 494 (N.Y. Sup. Ct. 2001).
question(s) should be addressed.

Unfortunately for capital counsel, there is no quick fix to the complex problems associated with the mental disabilities of capital clients. The solution to the complex problems posed by mental illness in capital cases is not simply to “call a doctor.” Contacting a mental health expert is a litigation decision with many grave implications, which vary widely in different litigation environments. Most capital defense practitioners know they are entitled to competent expert assistance. Most capital defense practitioners now also recognize that it is disastrous to wait until the eve of trial to consult a mental health expert, but many overcompensate for this risk by consulting experts too early.

It is essential for counsel and the defense team not only to build a foundation of trust with the client before involving experts in the case, but also to develop an independently corroborated multigenerational social history that will highlight the complexity of the client’s life and identify multiple risk factors and mitigation themes. In the paradoxical universe of mitigation investigation, it is often unclear whether a jury will view a particular fact as aggravating or mitigating -- or even which information is reliable and credible. Involving experts before these ambiguities have been resolved can be dangerous, and the choice of expert may inadvertently and prematurely focus the mitigation case too narrowly. Also, mental health experts need the social history information to enable them to conduct a thorough evaluation, if that is their assignment. Mental health experts are neither all-purpose generalists nor interchangeable. They represent many disciplines (e.g., psychiatry, neurology, psychology, neuropsychology, pharmacology, addiction medicine), and they have specialized knowledge and experience based on their research and clinical practices. It is also crucial that the expert have familiarity with the cultural norms of the community in which the client grew up.

Before retaining any mental health expert one must address what role the expert is going to play. A mental health expert might, for example, join the capital defense team as a consultant, whose job is just to help develop themes to integrate the first and second phases of the trial (e.g., to explain the connection between the client’s behavior in the capital crime and his or her mental infirmities). A consultant might also be called upon to decode and deconstruct prior mental health evaluations of the client: to look beneath the labels at the clusters of symptoms that were detected and

93 See, e.g., Ake v. Oklahoma, 470 U.S. 68 (1985) (denying expert psychiatric assistance to indigent defendant where defendant’s sanity was a significant factor at both guilt and penalty phases of trial constituted a denial of due process).
to suggest alternative hypotheses for explaining those behaviors or traits. Another role for a mental health consultant is quasi-therapeutic intervention to assist the legal team in dealing with the client. The expert might provide insight into team interactions with the client and suggest ways to make the team work better with the client. The mental health consultant might assist the client in enduring the stress of a capital trial, even advising when medication is appropriate. The consultant might play an integral role in helping the client to maintain appropriate decorum in the courtroom or to help counsel explain the cultural and psychological underpinnings of behavior that jurors might easily misinterpret. Finally, the consultant might aid counsel in recognizing the client’s self-destructive behaviors, and addressing those risks.

Another role for a mental health expert is as a fact gatherer, an investigator with specialized expertise, someone who can elicit sensitive information that the client (or family members) will not disclose to others on the team. The expert may be a skilled listener or a highly trained interviewer who can obtain information and even evaluate the credibility and reliability of disclosures. A clinician with expertise in sexual trauma, for example, might be skilled not only in drawing out the client’s most shameful secrets, but also in identifying the indicia of reliability when disclosures come. A fact-gatherer might also use testing to assess intellectual functioning or other neuropsychological deficits, which affect behavior and potentially diminish culpability. Alternatively, the expert might serve as a skilled observer, describing psychiatric symptomatology more richly and systematically than the team’s lay observers might.

In some cases, fact gatherers may become testifying experts—the storytellers who will narrate and interpret the client’s life history for the sentencing jury. Their narration may or may not include a diagnosis of the client’s mental disorders and they may offer an explanation as to why the crime occurred.

Defining the expert’s role will help counsel to identify who the expert should be, but the unique needs of the individual case will also dictate what type of expertise is needed and what subspecialty. If the role involves fact gathering, it is particularly important also to consider how the expert will relate to and connect with the client. For example, how will the expert’s age, race, ethnicity, gender, sexual orientation, or personality affect rapport with the client? If the role involves testimony, who will the fact-finders find most credible and persuasive? In addition, how will the expert’s qualifications look to a reviewing court? Counsel must also conduct a thorough investigation of the expert’s background and prior
testimony in anticipation of cross-examination.

Mental health experts address a wide range of referral questions when consulted in capital cases. They do not simply “evaluate” the client. Counsel must clearly and explicitly explain requirements of absolute confidentiality and precisely define the referral question or questions to be addressed. Experts should understand that legal issues will likely include not only questions traditionally implicated in noncapital cases, but others unique to capital sentencing.

Most lawyers and many experts are relatively familiar with the traditional questions in forensic mental health, and they involve clearly articulated legal standards. These questions include competency to stand trial and to aid and assist counsel, responsibility (not guilty by reason of insanity, diminished capacity, extreme emotional disturbance, etc.), mental status at the time of the offense (including capacity to premeditate, deliberate, and form specific intent), capacity to make a knowing and intelligent waiver of rights (including Miranda rights, right to counsel, right to be present, right to trial and appeal, right to testify), and the voluntariness and reliability of all statements to law enforcement. These questions pertain not only to the capitaly charged offense, but also to all prior offenses, including all convictions by negotiated dispositions involving waivers. This is relatively familiar territory for most lawyers and many experts because it involves clearly articulated legal standards.

Unlike approaching these traditional questions, developing mitigating evidence is quite different. Capital counsel must educate experts so they understand that the definition of mitigating evidence relating to mental conditions stems from what mitigation is not. Mitigation is not a defense to prosecution. It is not an excuse for the crime. It is not a reason the client should “get away with it.” Instead, mitigation is a means of introducing evidence of a disability or condition which inspires compassion, but which offers neither justification nor excuse for the capital crime. Unlike the insanity and competency requirements, mitigation need not involve a mental “disease” or “defect.” Mitigation does not require a diagnosis. The expert who assists a capital defense team is not there either for the traditional forensic purpose (assessing competency and/or responsibility) or for the routine goals of a clinician (diagnosis in order to prescribe treatment). If the expert testifies, it may simply be to help jurors appreciate the world as the client experiences it.

Mitigation provides the biography of mental disability. It explains the influences that converged in the years, days, hours, minutes, and seconds leading up to the capital crime, and how information was processed
in a damaged brain. It is a basis for compassion – not an excuse.

VI. PERFORMANCE STANDARDS FOR THE MITIGATION FUNCTION

Ever since Wiggins and the 2003 revision of the ABA GUIDELINES, many courts have asked for guidance about the nature and scope of mitigation investigation, the qualifications of mitigation specialists, whether they should be certified (or licensed), and whether specific training programs in mitigation should be certified.94 A clear consensus has emerged in the capital defense community that performance standards, modeled on the ABA Guidelines, should address the courts’ questions and concerns. However, mitigation specialists do not form a separate and free-standing profession. Instead, they are an integral part of the capital defense function. Mitigation specialists come from varied backgrounds, including anthropology, journalism, law, psychology, and social work. They are not fungible. Counsel needs to be able to select the appropriate mitigation specialists based on the unique needs of case and client (including ethnocultural competency). A clear consensus emerged in the capital defense community that performance standards, modeled on the ABA Guidelines, should address the courts’ questions and concerns.95

As a result, Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases96 have been developed in a national effort coordinated by the Public Interest Litigation Clinic in Kansas City and the University of Missouri Kansas City Law School. With input from experienced litigators and mitigation specialists throughout the country, draft Supplementary Guidelines were developed and then circulated at ten

94 Personal communications between the Author and Robin M. Maher, executive director of the ABA Death Penalty Representation Project. Personal communications between the Author and case budgeting attorneys of multiple federal jurisdictions. Requests from court-appointed lawyers and mitigation specialists to Author for affidavits on scope of mitigation investigation and expertise of mitigation specialists in multiple jurisdictions, including Alabama, Arizona, Arkansas, California, Georgia, Illinois, Indiana, Kansas, Louisiana, Mississippi, Missouri, New York, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, and Washington. Communications between the Author and attendees at numerous national and regional capital training conferences.


96 The Supplementary Guidelines are scheduled for publication in a symposium Summer 2008 issue of the Hofstra Law Review (with articles by scholars and practitioners).
national capital defense training programs. The ABA’s Death Penalty Representation Project welcomed the resulting Supplementary Guidelines as a valuable elaboration of the principles embodied in the black-letter ABA Guidelines. 97

The organizational scheme of the Supplementary Guidelines follows that of the ABA black-letter Guidelines. The introductory section makes clear that ultimate responsibility for the multifaceted and multidisciplinary mitigation investigation rests with counsel. Supplementary Guideline 4.1 discusses the role of the mitigation specialist (defined as an agent of capital defense counsel), but stresses counsel’s duty to select a competent team, enforce high-quality performance, and educate the team about applicable law. Supplementary Guideline 5.1 discusses the needed skill sets, including cultural competency, knowledge of mental health signs and symptoms, and skills in interviewing and record gathering. The importance of multigenerational documentary evidence is emphasized, along with the need for multiple, in-person, face-to-face, one-on-one interviews with all relevant witnesses.

The Supplementary Guidelines will inform the practice of death penalty defense at every stage, from arrest through clemency. They are practice guides for defense teams – lawyers and nonlawyers – that assume the awesome burden of representing individuals in capital punishment cases. They will also help the judges who must make decisions not only about resources and deadlines, but also about what effective defense representation means when a life is in the balance. By unmasking the mystery of mitigation, the Supplementary Guidelines for the Mitigation Function will inform courts about the expertise required to investigate a social history, the obstacles to be overcome, and the time needed both to gather and process the factual information, and to build relationships of trust and rapport with clients and their families. The ultimate beneficiaries might be the ordinary citizens who may never even know of the existence of a mitigation specialist but who are entitled to all the relevant evidence when called upon as jurors to make a reasoned moral decision about whether a fellow human should live or die. 98


98 Professor Eric Freedman made a similar point in his introduction to the Summer 2003 issue of Hofstra Law Review in which the revised 2003 Guidelines were published. He noted the broad support within the ABA House of Delegates for the Guidelines and the philosophy that animated the whole project: “All actors in the system share an interest in the effective performance of [capital defense] counsel; such
The law never requires a nexus between mitigation and the capital offense,99 but jurors crave explanation in the face of horrific tragedy. Mitigation strives to provide that explanation, to make some sense of what has happened, and to give jurors what they deserve as they struggle with life and death decisions. In a sense, though, when mitigation can provide that explanation it has a purpose beyond the courtroom, as an archive for the future historians, social scientists, and public health researchers who will look for the causes of the homicide levels in twenty-first century America that far exceed those of our peer nations.100

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