DECLARATION OF RUSSELL STETLER

I, RUSSELL STETLER, declare as follows:

Summary of Opinions

1. I provide this declaration for the Public Defender Association of Pennsylvania to address three interrelated questions concerning mitigation investigation and mental health assessments in cases where the Commonwealth may seek the death penalty:

    1. whether every death-eligible case needs a mitigation specialist to assist in investigating mitigation evidence;

    2. when this investigation should begin at the earliest possible time (i.e., as soon as counsel is appointed in a potential death penalty case); and

    3. how the mitigation investigation and the mitigation specialist are related to reliable mental health assessments in death penalty cases.

I will use the terms "mitigation investigation" and "social history investigation" interchangeably in this declaration because the investigation of mitigation is a multigenerational biographical investigation of the client's life in the ecological context of the biological, psychological, and social environment that shaped his development and adult functioning. I will use the male pronoun because about 98 percent of the death row population are men.[1] This declaration will discuss in detail the broader context relevant to these questions, including the breadth and scope of mitigation, why it is important, the prevailing professional norms of 2022, and why thorough mitigation investigation is a fundamental element of effective representation under the Sixth Amendment. However, the specific answers to all three questions can be summarized succinctly.

[1] *See* DEBORAH FINS, DEATH ROW USA 1 (Winter 2022) (97.95 percent of the death row population were male as of Jan. 1, 2022), available at: DRUSA SPRING 2010 Tabled version (00021413-2).DOC (naacpldf.org) (last visited May 8, 2022). Pennsylvania's percentage is even higher, with 128 men out of 129 death-sentenced prisoners. *Id.* at 56.

2. The essential role of mitigation specialists in death penalty cases has long been recognized,[2] and they are described as core members of the defense team in the American Bar Association's 2003 revision of its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA LAW REVIEW 913, 952, 999-1000 (2003) (Guidelines 4.1.A.1 and 10.4.C.2.A, defining the capital defense team). Guideline 9.1.C (Funding and Compensation) notes that nonattorney members of the 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 by those who assist counsel with the litigation of death penalty cases. 31 HOFSTRA L. REV. at 981. Subsection 9.1.C.3 specifies that compensation should be "at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available." *Id.* at 982.

3. The need to retain a mitigation specialist as early as possible and to begin the mitigation investigation as soon as counsel has been appointed to the case is based on two well-established realities. First, mitigation investigation is a slow and arduous process,[3] involving two

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[2] *See,* for example, James Hudson et al., *Using the Mitigation Specialist and the Team Approach,* THE CHAMPION, June 1987, at 33, 33-36. The authors included two staff members of the Ohio State Public Defender's Mitigation Specialist Department. They concluded, "The mitigation specialist is a professional who, as attorneys across the nation are recognizing, should be included and will be primary to the defense team." *Id*. at 36. The original edition of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989) referred to mitigation specialists at Guideline 11.4.1(D)(3)(C), the investigation section corresponding to earlier standards adopted by the National Legal Aid and Defender Association in 1985, the country's largest organization of public defenders. A 1998 study of the federal death penalty by a committee of federal judges described the work of mitigation specialists, in the commentary to its recommendations, as "part of the existing 'standard of care' in a federal death penalty case." SUBCOMM. ON FED. DEATH PENALTY CASES, JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION, PT. I. (May 1998).

[3] Thirty years ago, in the infancy of the modern death penalty era, it was widely recognized that this investigation required hundreds of hours. *See* Lee Norton, *Capital Cases: Mitigation Investigation,* THE CHAMPION, May 1992, at 43-45 (estimating that hundreds of hours are typically required in a mitigation investigation, stressing the cyclical nature of mitigation investigation such that investigation not complete until information becomes redundant). *Accord* Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must*

parallel tracks of investigation that are both time-intensive.[4] Gathering and analyzing life-history records of the capital client and his family both require the skill sets of a mitigation specialist as well as ample time to obtain all the relevant documentation from institutions that are often understaffed and overworked.[5] Mitigation interviews are also slow and complex, requiring trust and rapport to overcome barriers to the disclosure of often painful and shame-inducing information. The two tracks interact: records identify more witnesses and topics to explore with witnesses, and the witnesses identify additional documentation to be obtained. Second, the information uncovered in the early phase of the investigation may establish that the client is not eligible for capital prosecution (for example, because of intellectual disability),[6] or may persuade the prosecution not to pursue the death penalty in the individual case; or may be instrumental in persuading both the prosecutor and the client that a negotiated disposition is appropriate.[7] It should also be noted that the two phases of a bifurcated death penalty trial require a harmonious, consistent theory, and from the outset of the case all the members of the defense team should be working together to develop this overall strategy. *See* ABA Guideline 10.10.1 ("Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.") 31HOFSTRA L. REV. at 1047.

Be Included on the Capital Defense Team, 31 HOFSTRA L. REV. 1143, 1154 (2003); DAVID DEMATTEO ET AL., FORENSIC MENTAL HEALTH ASSESSMENTS IN DEATH PENALTY CASES 244 (2011). But *see also* Robert J. Smith, *Forgetting Furman*, 100 IOWA L. REV. 1149, 1173 n.130 (2015) (revising the estimate upward).

[4] *See* Russell Stetler, *Mitigation Evidence in Death Penalty Cases,* THE CHAMPION, Jan.-Feb. 1999, at 35, 39 (stressing need for "meticulous attention to detail, painstaking efforts to decode and decipher old records, patience and sensitivity in eliciting disclosures from both witnesses and the client").

[5] Multigenerational record-gathering means tracking down original hard-copy records, not just the electronic records of more recent vintage. Paper records are rarely stored on site because of cost. The mitigation investigation often requires in-person visits to the schools, hospitals, and other institutions that documented the developmental years of the capital client and assisting busy staff in retrieving off-site material.

[6] *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (finding that the Eighth and Fourteenth Amendments prohibit execution of individuals with an intellectual disability, previously known as mental retardation), and its progeny

[7] *See* Russell Stetler, *Commentary on Counsel's Duty to Seek a Negotiated Disposition (ABA Guideline*

4. In defining the capital defense team, the ABA Guidelines (rev. 2003) specify that at least one member of the core team should be qualified by training and experience to screen for mental and psychological disorders and impairments. Guidelines 4.1.A.1 and 10.4.C.2.A, *supra* ¶ 2. This team member is almost always the mitigation specialist.[8] In addition, the multigenerational mitigation investigation is itself the foundation of a reliable capital mental health assessment. Finally, this investigation enables defense counsel to choose mental health experts wisely and to frame the referral questions that the experts should address. All of these points reinforce the importance of engaging the services of a mitigation specialist and commencing the mitigation investigation at the earliest opportunity, as discussed *supra* ¶¶ 2-3.

Background and Qualifications

5. I served as the first National Mitigation Coordinator for the federal death penalty projects from 2005 until my retirement from full-time work in the spring of 2020.[9] The National Mitigation Coordinator position was created in 2005 in response to the increased demand for effective mitigation preparation in death penalty cases following the U.S. Supreme Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), and the 2003 revision of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, *supra* ¶ 2. In the federal position, I consulted with lawyers, investigators, mitigation specialists, and experts in

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10.9.1), 31 HOFSTRA L. REV. 1157.

[8] The rare exception might occur when a mitigation specialist is selected because of unusual ethnocultural issues, as arise, for example, when the client is a foreign national, does not speak English, and has cultural practices whose understanding requires special expertise. If the mitigation specialist with those qualifications does not also have training and experience in mental health issues, the team will need someone else with those skills because of the pervasiveness of such issues in the capital client population.

[9] *See* JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES, JUDICIAL CONFERENCE OF THE UNITED STATES, UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES, 111-112, Sept. 2010 (Commentary describes authorization of the position "to

connection with death penalty cases that were pending in the federal courts at trial or on habeas corpus (under 28 U.S.C. §§ 2254 and 2255). Since retiring from full-time work, I continue to consult and train on mitigation issues in death penalty cases throughout the United States.

6. I currently serve on the board of directors of the Atlantic Center for Capital Representation, a nonprofit organization that provides advice and assistance to capital defense teams in Pennsylvania, and on the editorial board of the *Amicus Journal,* published by a British nonprofit that provides interns and other *pro bono* assistance on death row cases in the United States. I am also on the larger editorial advisory board of *The Champion*, published by the National Association of Criminal Defense Lawyers in Washington, D.C.

7. From 1995 to 2005, I served as the Director of Investigation and Mitigation at the New York Capital Defender Office, which was established under New York State's death penalty statute with a mandate to ensure that indigent defendants in capital cases received effective assistance of counsel. The Capital Defender Office was charged with creating an effective system of capital defense throughout New York State by providing direct representation and offering assistance to private counsel assigned by the courts to represent indigent capital defendants. I supervised a statewide staff of investigators and mitigation specialists, and I consulted with lawyers, investigators, mitigation specialists, and experts who were retained or employed by the Capital Defender Office or the private bar in connection with death penalty cases.

8. From 1990 to 1995, I served as Chief Investigator at the California Appellate Project, a nonprofit law office in San Francisco that coordinated appellate and post-conviction

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assist in expanding the availability and quality of mitigation work in death penalty cases in the federal courts" and the role of the National Mitigation Coordinator in case consultations and training).

representation of all the prisoners under sentence of death in California. In that capacity, I also supervised an in-house staff and consulted with staff attorneys and court-appointed counsel, as well as investigators, mitigation specialists, and experts outside the office who were retained to assist counsel representing death-sentenced prisoners.

9. I have investigated all aspects of death-penalty cases since 1980, first working in a private office in California and later in institutional offices. Since 1980, I have regularly attended seminars and conferences relating to the defense of capital cases at trial, on appeal, and in post-conviction proceedings. Most of these conferences were organized and attended by attorneys specializing in capital work. I investigated mitigation evidence in over two dozen death penalty cases in California in the 1980s.

10. Since 1990, I have lectured extensively on capital case investigation, particularly the investigation of mitigation evidence. I have lectured on these subjects not only in New York and California, but in almost all the other death-penalty jurisdictions in the United States, including Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming, as well as in Puerto Rico, a jurisdiction where only federal death penalty cases are prosecuted.[10] I have also lectured on numerous occasions under the auspices of the Administrative Office of the United States Courts (in connection with federal death-penalty cases and habeas corpus litigation) and at the Fourth Capital Litigation Workshop of the U.S. Army Trial Defense Service. Over the past three

[10]At the time I lectured on these subjects in Colorado, Connecticut, Delaware, Illinois, Maryland, New Jersey, New Mexico, New York, and Washington, capital punishment was permissible in those jurisdictions.

decades, I have lectured at over three hundred fifty continuing legal education programs around the country (including over thirty CLEs in Pennsylvania), as well as dozens of additional programs at law schools and related professional conferences in the United States, Europe, and Asia.

11. Since the 1990s, I have lectured on mitigation investigation in death penalty cases at multiple national training conferences sponsored by the following organizations: the NAACP Legal Defense Fund (annual capital punishment conference), the National Legal Aid and Defender Association ("Life in the Balance"), and the National Association of Criminal Defense Lawyers ("Making the Case for Life"). At various times over the past three decades, I have served on the planning committees for these national conferences, as well as the annual Capital Case Defense Seminar sponsored by California Attorneys for Criminal Justice (CACJ) and the California Public Defenders Association (CPDA), which is attended by over twelve hundred practitioners annually. I was a co-chair of the planning committee for this seminar in 2009 and from 2011 to 2015, and I delivered the virtual keynote address of this seminar, attended by about fifteen hundred practitioners, in 2021. I have also taught at the death penalty colleges at the Santa Clara University School of Law in California and the DePaul University College of Law in Illinois. I have taught at over a dozen capital defense seminars throughout the country under the auspices of the National Institute of Trial Advocacy and over a dozen "bring-your-own-case" capital brainstorming seminars under the auspices of the National Consortium for Capital Defense Training and its regional counterparts, in addition to every annual capital "bring-your-own-case" program held in Pennsylvania since 2012. I also designed and organized the Capital Mitigation Skills Workshop, which has been held eleven times since 2012 under the auspices of the federal Habeas Assistance and Training Counsel Project.

12. Since 1993, I have contributed extensively to the California Death Penalty Defense Manual published by the California defense bar (CACJ and CPDA). This multi-volume reference has a volume devoted to the investigation and presentation of mitigation evidence which I helped to shape in the 1990s. In 1999, I published articles on *Mitigation Evidence in Death Penalty Cases* and *Mental Disabilities and Mitigation* in *The Champion*, the monthly magazine of the National Association of Criminal Defense Lawyers, as well as an article entitled *Why Capital Cases Require Mitigation Specialists* in *Indigent Defense*, published by the National Legal Aid and Defender Association. These and other articles of mine were cited in the Commentary to the ABA Death Penalty Guidelines (rev. 2003, *supra* ¶ 2). I am the author or co-author of a dozen law review articles,[11] several book chapters,[12] and a practice guide on mental health issues in capital cases.[13]

13. My published work on mitigation has been cited by post-conviction courts in

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[11] *Commentary on Counsel's Duty to Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1)*, 31 HOFSTRA LAW REVIEW 1157 (2003); *Dying Twice: Incarceration on Death Row,* 31 Capital U. L. Rev. 853 (2003), with Norman L. Greene, William D. Buckley, Craig Haney, Joseph Ingle, & Michael B. Mushlin; *Using the Supplementary Guidelines on the Mitigation Function to Change the Picture in Post-Conviction*, 36 HOFSTRA L. REV. 1067 (2008) with Mark E. Olive; *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing,* 11 U. PA. J. L. & SOC. CHANGE, (2008); *The Unknown Story of a Motherless Child*, 77 UMKC L. REV. 947 (2009); *The ABA Guidelines and the Norms of Capital Defense Representation* 41 HOFSTRA L. REV. 635 (2013) with W. Bradley Wendel; *Mental Health Evidence and the Capital Defense Function: Prevailing Norms*, 82 UMKC LAW REVIEW 407 (2014); *The ABA Guidelines: A Historical Perspective*, 43 HOFSTRA LAW REVIEW 731 (2015) with Aurélie Tabuteau; *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases,* 46 HOFSTRA L. REV. 1161 (2018); Lockett v. Ohio *and the Rise of Mitigation Specialists*, 10 CONLAWNOW 51 (2018); *Death Penalty Keynote: Why Mitigation Matters, Now and for the Future,* 61 SANTA CLARA L. REV. 699 (2021); and *Mitigation Works: Empirical Evidence of Highly Aggravated Cases Where Juries Rejected the Death Penalty,* 51 HOFSTRA LAW REVIEW (forthcoming), with Maria McLaughlin & Dana Cook, *available at:* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4084060 (last visited May 5, 2022).

[12] *Dead Men Talking: Mental Illness and Capital Punishment*, *in* FORENSIC MENTAL HEALTH: WORKING WITH OFFENDERS WITH MENTAL ILLNESS (Gerald Landsberg, D.S.W., & Amy Smiley, Ph.D., eds., 2001) with Leah George; *Punishment*, *in* PRINCIPLES AND PRACTICE OF FORENSIC PSYCHIATRY, 2d ed. (Richard Rosner, M.D., ed., 2003) with Robert Lloyd Goldstein; *Mitigation Works*, *in* TELL THE CLIENT'S STORY: MITIGATION IN CRIMINAL AND DEATH PENALTY CASES (Edward Monahan & James Clark, eds., 2017) with John Blume; *The History of Mitigation in Death Penalty Cases in* SOCIAL WORK, CRIMINAL JUSTICE, AND THE DEATH PENALTY (Lauren A. Ricciardelli, ed., 2020).

[13] A PRACTITIONER'S GUIDE TO REPRESENTING CAPITAL CLIENTS WITH MENTAL DISORDERS AND

overturning death sentences because of trial lawyers' failure to provide effective representation, as demonstrated by their failure to conduct thorough mitigation investigations. *See State v. Revis*, 49-CC-2005-000142.60, Circuit Criminal Court, Marion County Alabama (Presiding Judge John H. Bentley) (Feb. 13, 2015) slip. op. at 27, and *Stokes v. Stirling,* 10 F.4th 236, 252 (4th Cir. 2021).

14. Courts have qualified me as an expert witness in multiple state and federal jurisdictions, and I have provided opinion evidence on standard of care issues in capital cases (especially in the investigation and presentation of mitigation evidence by testimony or affidavit over two hundred fifty times in numerous jurisdictions, including Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming. I have provided over twenty affidavits or declarations in Pennsylvania cases (both pretrial and post-conviction). I have testified as an expert witness over thirty times, in both habeas and pretrial capital proceedings, including six times in Pennsylvania. The United States District Court for the Middle District of Louisiana in *Wessinger v. Cain*, Case No. 3:04-637-JJB-SCR (July 27, 2013),[14] and the United States District Court for the District of Wyoming in *Eaton v. Wilson*, Case No. 09-CV-261-J (November 20, 2014), issued orders in which the courts qualified me as an expert in the investigation and presentation of mitigating evidence, competent to testify about the quality of

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IMPAIRMENTS (2008), with Dick Burr, Matthew Cross, David Freedman, Anne James, & Kathy Wayland.

[14] *Rev'd Wessinger v. Vannoy,* 864 F.3d 387, 392-93 (5th Cir. 2017) (finding state *post-conviction* counsel's failure to investigate was caused by state post-conviction court's decisions to deny a hearing, discovery, and funds, not counsel's inexperience or error), *cert. denied,* 583 U.S. ___, 138 S. Ct. 952 (2018).

the petitioner's trial counsel's performance, and found counsel deficient in each case. My testimony was also cited in a state post-conviction grant of relief for failure to investigate and present mitigation evidence in *Gutierrez v. State*, Case No. CR94-1795B, Second Judicial District Court, Washoe County, Nevada (Judge Jerome M. Polaha) (Aug. 21, 2017), slip op. at 30-32.[15] The Ninth Circuit Court of Appeals also cited my testimony in granting sentencing relief for ineffective assistance of counsel in *Sanders v. Davis*, No. 17-15411 (Jan. 13, 2022), slip op. at 24-25, a case from Bakersfield (Kern County), California.

15. Over the years, I have been directly involved in hundreds of capital cases in California and New York, including *scores* of trials and post-conviction hearings. I have also been consulted in various capacities on capital cases in numerous other jurisdictions around the country (including Pennsylvania), and on many federal and military death penalty cases.

The Breadth and Scope of Mitigation Evidence

16. The Supreme Court of the United States has provided a broad definition of mitigation and the types of investigation required by counsel to develop a capital defendant's social history. The Supreme Court has rooted mitigation in the context of Eighth Amendment jurisprudence, not solely statutory constructions. I will summarize here some of the cases that have most clearly defined the breadth and scope of mitigation evidence. This unbroken line of cases is summarized chronologically and points to the ways in which "death is different" in both the required investigative work and the presentation of evidence at every stage of the case.

17. In striking down North Carolina's attempt to eliminate juror discretion by making the death penalty mandatory for certain crimes, the Court required individualized sentencing to

[15] A*ff'd State v. Gutierrez,* Supreme Court of Nevada, Case No. 74236 (unpublished opinion, Dec. 6. 2020).

allow jurors to consider mitigation. Its language embraced a broad definition of what mitigation means:

> 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.

Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976).

18. Two years later, the Court overturned the death sentence of Sandra Lockett because the Ohio statute prevented the sentencing judge from considering 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*, 438 U.S. 586, 604 (1978), 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."

19. In 1982, the Court reaffirmed the *Lockett* rule in the case of sixteen-year-old Monte Eddings, who had pled *nolo contendere* to the death of a highway patrol officer. The sentencer again felt precluded by the law from considering Eddings's background. The Court's opinion also emphasized *why* youth is a mitigating factor:

> The trial judge recognized that youth must be considered a relevant mitigating factor. 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. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of 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 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.

Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982). The *Eddings* Court also noted that there are "virtually no limits" on relevant mitigating evidence. *Id*. at 114.

20. Mitigating evidence cannot even be limited to the pre-offense time frame. It can embrace redemption and post-offense "good adjustment" in jail. In *Skipper v. South Carolina*, 476 U.S. 1 (1986), the Court held that the defense should have been permitted to introduce such evidence at trial 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." *Id.* at 4-5. The *Skipper* Court succinctly defined mitigation as "anything which might lead a reasonable juror to conclude that life is the appropriate punishment." *Id*. at 6.

21. In 1989, the Court reaffirmed "the principle that punishment should be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989). The Court also stressed the importance of this evidence for the jury's weighty decision:

> 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."

Id. at 328, quoting *California v. Brown*, 479 U.S. 538, 545 (1987).

22. In *McKoy v. North Carolina*, 494 U.S. 433 (1990), the Court quoted with approval a state court dissent that defined the low relevancy standard for mitigation as follows:

"Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstances which a fact-finder could reasonably deem to have mitigating value." *Id*. at 440 (quoting *State v. McKoy*, 372 S.E.2d 12, 45 [N.C. 1988]). If the evidence *tends* to prove something that a fact-finder *could* consider mitigating, it is relevant to the life and death decision.

23. In *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005) the Court converted two common areas of mitigation (intellectual disability and youth) into categorical bars exempting from execution persons with intellectual disability and those who were under the age of eighteen at the time of the capital crime. The Court recognized that persons with intellectual disability (then known as "mental retardation") have disabilities in reasoning, judgment, and impulse control. Juveniles have an underdeveloped sense of responsibility, a vulnerability to negative influences, and a lack of true depravity. Part of the Court's justification for these categorical exemptions was the lesser culpability of these individuals compared to adult offenders with higher cognitive functioning, and the Court further acknowledged that individuals in both categories were at a heightened risk of wrongful execution because of an increased likelihood of confessing falsely, as well as impairments in communication with counsel, testifying in their own defense, and expressing remorse. Many observers quickly noted, however, that these same characteristics apply to individuals with greater intellectual capacity who are over the age of eighteen, especially those who suffer from other disabling conditions such as schizophrenia, autism spectrum disorders, and fetal alcohol spectrum disorders. Likewise, the capacity to change and the vulnerability to negative influences characterize many capital clients past the age of eighteen.

24. In *Tennard v. Dretke*, 543 U.S. 274 (2004) the Court reiterated that there

is a "low threshold for relevance" in the mitigation context and "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Id*. at 285. The Court also reminded the Texas courts that mitigation requires no "nexus" to the crime, noting that some circumstances, such as impaired intellectual functioning, are "inherently mitigating." *Id*. at 287.

25. In *Ayers v. Belmontes*, 549 U.S. 7 (2006) Justice Kennedy contrasted "the finite aggravators against the *potentially infinite mitigators*." *Id*. at 21 (emphasis added).

26. Finally, in *Kennedy v. Louisiana*, 554 U.S. 407 (2008) the Court offered a pithy summary of eligibility and selection once again: capital punishment must "be limited to those offenders who 'commit a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Id.* at 420.

27. Mitigation specialists have the necessary training and experience to discover this evidence efficiently; they have skills in gathering and deciphering life-history records and interviewing that lawyers were not taught in law school.[16] A 1998 study by a committee of federal judges described mitigation specialists as "individuals trained and experienced in the development and presentation of evidence for the penalty phase of a capital case."[17] While the public defenders and court-appointed lawyers in death penalty cases in Pennsylvania may have some prior capital defense experience, most mitigation specialists do nothing but capital defense work.

Why Mitigation is Important and Why All Death-Eligible Cases Need Mitigation Specialists

[16] *See* David C. Stebbins & Scott P. Kenney, *Zen and the Art of Mitigation Presentation, or, the Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial,* THE CHAMPION, Aug. 1986, at 14, 16, 18.

28. Death sentences have always been rare in the modern era, and today they are vanishingly rare.[18] A study in 2016 by the *Reading Eagle* found that "[f]ewer than 2 percent of Pennsylvania's roughly 25,000 homicides the past decade have resulted in a death sentence."[19] Significantly, when examining the role of mitigation in cases that proceed to trial, we might easily forget that mitigation first and foremost may keep the majority of eligible cases from reaching the trial stage: mitigation plays an important role in convincing prosecutors not to seek death; to agree to a less-than-death plea; to pre-trial hearings which bar the death penalty or explain the offense such that the Court strikes the death penalty as an option; in guilt phase jury determinations of diminished culpability or lesser offenses which make a penalty phase moot. Thus, the impact of mitigation evidence and the mitigation investigation is not just in the cases that go to trial and proceed to a penalty phase. Both the evidence and the mitigation investigation may be critical in persuading the Commonwealth to reconsider its decision to pursue the death penalty or to accept a negotiated disposition. The mitigation investigation also identifies family members and other friends and loved ones of the defendant who care whether he lives or die. These people are often important influences in helping defendants make the difficult decision to accept a plea to a sentence of life without possibility of release. They are the people who will continue to visit the individual when he is incarcerated, take his telephone calls, and deposit

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17 *See* SUBCOMM. ON FED. DEATH PENALTY CASES, FEDERAL DEATH PENALTY CASES, *supra* note 1.

18 *See* Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases.,* 46 HOFSTRA L. REV. 1161 (2018). Appendix 1 summarizes how most death eligible cases throughout the modern era have avoided death sentences and executions. *Id*. at 1213-1228. *Accord* Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation,* 41 HOFSTRA L. REV. 635, 684-695 (2013) (Section VIII. The Majority of Capital Cases Avoid the Death Penalty).

19 Nicole C. Brambila, *Executing Justice: The Discretionary Nature of the Death Penalty in Pennsylvania,* READING EAGLE (June 20, 2016, 12:01 AM), *available at:* Executing Justice: The discretionary nature of the death penalty in Pennsylvania – Reading Eagle (updated Aug. 19, 2021) (last visited May 7, 2022).

money into his commissary account.[20]

29. Of course, the direct impact of mitigation evidence on cases that have proceeded to a penalty phase should not be underestimated as a core reason for the importance of mitigation. Death-qualified juries rejected the death penalty in some of the highest profile cases, such as the domestic terrorism prosecution of Terry Nichols for the Oklahoma City bombing (tried federally in Denver on change of venue and again in state court in Oklahoma City, with life sentences in both cases) and the prosecution of Zacarias Moussaoui, the alleged "twentieth hijacker" of September 11, 2001, tried in the Eastern District of Virginia.

30. In 2018, I published a list of nearly two hundred highly aggravated cases in three different categories (child victim, law enforcement victim, and multiple victim) in which juries rejected the death penalty.[21] This is an incomplete list of state and federal cases that I happened to know about, but it served to illustrate that even in highly aggravated cases, mitigation can make a difference in the jury outcome. I continue to collect additional cases, and my dataset now has over 550 cases in the same categories.[22]

31. Over the years, I have been involved in hundreds of capital cases, including dozens of trials and post-conviction hearings, throughout the country. I have provided evidence as an expert on the standard of care in investigating capital cases and mitigation by live testimony or affidavit in over two hundred fifty cases around the country. *See supra* ¶ 14. My

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[20] *See* Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench,* 36 HOFSTRA L. REV. 819, 829 (2008): "If the case for mitigation is strong enough, it may persuade the prosecution to forgo capital punishment and settle for life imprisonment on a guilty plea. If such an offer is made, the rapport and trust that the mitigation specialist has developed with the defendant may be the decisive factor in persuading the defendant to accept such a plea."

[21] *See* Stetler, *The Past, Present, and Future of the Mitigation Profession*, *supra* n.5, Appendices 2 to 4, at 1229-1256.

[22] *See* Russell Stetler et al., *Mitigation Works: Empirical Evidence of Highly Aggravated Cases Where the Death Penalty Was Rejected at Sentencing,* 51 HOFSTRA L. REV. ___ (*forthcoming), available at:*

personal experience of the effectiveness of mitigation evidence accords with the empirical research of social scientists who have studied the decision-making processes of actual jurors in death-penalty cases. *See*, for example, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538 (1998) and *The Emotional Economy of Capital Sentencing,* 75 N.Y.U. L. REV. 26 (2000) (concluding that mitigation does matter, especially mental impairment and mental illness). *See also* John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, at 1038 (2008) ("The [Capital Jury Project] studies reveal that many different types of mitigation resonate with jurors. Low intelligence, mental illness, child abuse, extreme poverty, remorse, lack of a significant prior record, and lesser culpability are just some of the categories of mitigation that, in a particular case, can lead jurors to choose life over death."); *id*. at 1051 ("[E]vidence that the defendant was under the influence of extreme emotional disturbance or mentally ill at the time of the crime is also mitigating to almost half of all jurors. Almost a third of jurors found exposure to serious child abuse mitigating, and a like number found childhood poverty mitigating.")**.**

32. As noted in *Penry v. Lynaugh, supra* ¶ 21, mitigation evidence matters not only to the capital defendant, whose life hangs in the balance, but also to the jurors who must make the "reasoned *moral* decision" as to whether he lives or dies.

Prevailing Norms in the Development of Mitigating Evidence in 2022

33. Investigation of a client's background, character, life experiences (including

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http://ssrn.com/abstract=4084060.

trauma),[23] and mental health is axiomatic in the defense of a capital case and has been for as long as I have done this work. In every seminar in which I have participated since 1980, instructors have emphasized the importance of conducting a "mitigation investigation"[24] in preparation for the penalty phase of a capital trial and developing a unified strategy for the guilt-innocence and sentencing phases. Investigation was already firmly established as an integral part of the criminal defense function generally. When the American Bar Association published the second edition of its STANDARDS FOR CRIMINAL JUSTICE (2d ed.1980), Standard 4.4-1 of the Defense Function described the duty to investigate as follows: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case *and the penalty in the event of conviction*." *Id*. at 4:53 (emphasis added). The Commentary to this Standard noted concisely, "Facts form the basis of effective representation." *Id*. at 4:54. In discussing mitigation, the Commentary continued, "Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself." *Id*. at 4:55.[25] These ABA Standards were cited by Justice Stevens in reference to counsel's obligation to conduct a thorough investigation of a capital defendant's background. *Williams v. Taylor*, 529 U.S. 362, 396 (2000). These standards

[23] *See,* for example, Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigation and Presentation,* 36 HOFSTRA L. REV. 923 (2008).

[24] As noted *supra* ¶ 2, in this declaration, I use the term "mitigation investigation" interchangeably with "social history investigation." It is evident that the mitigation investigation is primarily a biographical investigation of the client's life. The term "social history" is often employed to emphasize that this life is contextualized in the social environment of the client's world (sometimes referred to as an ecological view of human development).

[25] *See also* Joseph B. Cheshire V, *Ethics and the Criminal Lawyer: The Perils of Obstruction of Justice*, CHAMPION (Jan./Feb. 1989) at 12 ("Defense counsel have a right and a duty to approach and interview every witness that might have any information regarding the particular issue involved in their client's case.").

covered criminal defense generally. Discussions of *capital* defense provided more specific detail about counsel's duties in investigating mitigating evidence. Some of the seminal works in this field are still instructive today and are often cited by expert practitioners to emphasize just how long these principles have been in place. As early as 1979, Dennis Balske (an effective capital litigator then practicing in the South) emphasized, "Importantly, the life story must be complete." Dennis N. Balske, *New Strategies for the Defense of Capital Cases,* 13 AKRON L. REV. 331, 358 (1979). In 1983, Professor Gary Goodpaster discussed trial counsel's "duty to investigate the client's life history, and emotional and psychological make-up" in capital cases. He wrote, "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 care with which it is conducted, cannot be overemphasized." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 323-324 (1983). Writing again in 1984, Mr. Balske advised capital defense counsel that they "must conduct the most extensive background investigation imaginable. You should look at every aspect of your client's life from birth to present. Talk to everyone that you can find who has ever had any contact with the defendant." Dennis Balske, *The Penalty Phase Trial: A Practical Guide*, THE CHAMPION, Mar. 1984, at 40, 42. *See also* David C. Stebbins and Scott P. Kenney*, Zen and the Art of Mitigation Presentation, or, the Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial*, THE CHAMPION, Aug. 1986. at 14, 18 ("capital defense attorneys must recognize that the profession demands a higher standard of practice in capital cases"); and Robert R. Bryan, *Death Penalty Trials: Lawyers Need Help*, THE CHAMPION, Aug. 1988, at 32 ("There is a

requirement in every case for a comprehensive investigation not only of the facts but also the entire life history of the client.").

34. At the beginning of the 1980s, a capital defense lawyer in California hired a former *New York Times* reporter to investigate the life history of his client. The reporter, the late Lacey Fosburgh, had written a best-selling book about a murder case she covered for the newspaper, *Closing Time: The True Story of the "Goodbar" Murder* (1977). After her successful work in developing the capital client's mitigation evidence, Ms. Fosburgh wrote about the critical role she had played:

> 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.
>
> 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.[26]

Capital defense lawyers across the country soon recognized the value of nonlawyers with expertise in the development of sentencing evidence – ultimately referred to as "mitigation

[26]Lacey Fosburgh, *The Nelson Case: A Model for a New Approach to Capital Trials*, in CALIFORNIA STATE PUBLIC DEFENDER, CALIFORNIA DEATH PENALTY MANUAL, 1982 supplement, N6-N10, N7 (July 1982) (emphasis added). This article also appeared in the magazine of the California defense bar, FORUM, Sept.-Oct. 1982. *See also* Report by the Team Defense Project, *Team Defense in Capital Cases*, FORUM, May-June 1978, and Michael G. Millman, *Interview: Millard Farmer*, FORUM, Nov.-Dec. 1984, at 31-33.

specialists." The California defense bar prominently featured one such nonlawyer on the cover of its monthly magazine FORUM in 1987.[27] The national defense bar magazine, *The Champion*, discussed the use of social workers in developing mitigating evidence in 1986.[28]

35. The 1989 edition of the ABA Guidelines reflected a national consensus among capital defense practitioners based on their practices in the 1980s. These Guidelines were the result of years of work by the National Legal Aid and Defender Association (NLADA) to develop standards to reflect the prevailing norms in indigent capital defense. NLADA published its Standards for the Appointment of Defense Counsel in Death Penalty Cases (available at www.americanbar.org/content/dam/aba/migrated/DeathPenalty/RepresentationProject/PublicDocuments/NLADA_Counsel_Standards_1985.authcheckdam.pdf) in 1985. With initial support from the ABA's Standing Committee on Legal Aid and Indigent Defendants (SCLAID), NLADA developed its expanded Standards for the Appointment *and Performance* of Defense Counsel in Death Penalty Cases (emphasis added) over the course of several years. In February 1988, NLADA referred the Standards to SCLAID, which reviewed them and circulated them to appropriate ABA sections and committees. SCLAID incorporated the only substantive concerns expressed (by the Criminal Justice Section) and changed the nomenclature to "Guidelines" as more appropriate than "Standards." Each black-letter guideline is explained by a commentary, with references to supporting authorities. *See* Introduction to ABA Guidelines, 1989 ed.

36. Courts have found the various editions of the ABA Criminal Justice Standards and Death Penalty Guidelines useful in assessing the reasonableness of counsel performance. As Justice Stevens noted in writing for the Court's majority in *Padilla v. Kentucky*, 559 U.S. 356,

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[27]Anne E. Fragasso, *Interview: Casey Cohen*, FORUM, Jan.-Feb. 1987, at 22, 26.
[28]Cessie Alfonso & Katharine Baur, *Enhancing Capital Defense: The Role of the*

366 (2010): "We long have recognized that 'prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . .'" Justice Stevens cited *Strickland*, 466 U.S. 668, 688 (1984), *Bobby v. Van Hook*, 558 U.S. 4 (2009) (*per curiam*); *Florida v. Nixon*, 543 U.S. 175, 191, and n.6 (2004); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); and *Williams v. Taylor*, 529 U.S. 362, 396 (2000). Justice Stevens concluded: "Although they are 'only guides,' *Strickland*, 466 U.S., at 688, and not 'inexorable commands,' *Bobby*, 558 U.S. at 8, these standards may be valuable measures of the prevailing norms of effective representation . . ." Justice Stevens also cited law review articles and the publications of criminal defense and public defender organizations (the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association) as guides to prevailing professional norms. *Id.* at 367.

37. SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, published in 36 HOFSTRA L. REV. 677 (2008), discuss in detail the skills that mitigation specialists provide to the defense team – skills that most lawyers simply do not possess. Supplementary Guideline 5.1.B, for example, specifies the need for someone with

> the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client's life history. Life history 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.

Id. at 682 (emphasis added).

Forensic Social Worker, THE CHAMPION.June 1986, at 26, 26-29.

38. Supplementary Guideline 5.1.C continues:

> 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 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. They must have the ability to advise counsel on appropriate mental health and other expert assistance.

Id. A core team member, usually the mitigation specialist, must also have the specialized training, as described in Supplementary Guideline 5.1.E, to identify, document and interpret

> 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.

Id. at 683.

When the Mitigation Investigation Should Begin

39. Social history investigation is an arduous process because of the interaction between field interviews and documentary evidence. The collection of multigenerational records for the client and his family and analysis of this documentation involve a slow and time-intensive process. The reward is that the records provide the firm dates and places that establish a skeletal architecture that witnesses can then flesh out. They may enable witnesses to discuss subjects that they have initially avoided or simply forgotten. 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. They may also contain names of additional witnesses with personal

knowledge of the client or client's family who can help fill out the social history picture. I can also attest from decades of experience that tracking down records is not simply a clerical task of mailing out requests. Many government record repositories routinely take months to comply with appropriately authorized requests. It often requires visiting the institutions in person and sometimes even assisting in searching for and retrieving archived records in storage facilities that are remote, poorly organized, and so filthy that no clerk is eager to go there and search for anything. Some newer records have been stored digitally, but few institutions have had the budget and motivation to transform hard-copy archival records into scanned pdfs. Even records that were once available on the web mysteriously disappear as links are no longer maintained.[29] Gathering records remains a formidable, labor-intensive task, requiring great diligence to ensure compliance.

40. The Commentary to 2003 ABA Guideline 10.7 (Investigation) notes,

> Records should be requested concerning *not only the client, but also his parents, grandparents, siblings, cousins, and children*. . . . The collection of corroborating information from multiple sources – a time-consuming task – is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence. Counsel should use all appropriate avenues including *signed releases, subpoenas, court orders*, and requests or litigation pursuant to applicable open records statutes . . .

31 HOFSTRA L. REV. at 1024-25 (emphasis added).

41. Records invariably provide valuable background information on clients and their families. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (court file – a readily available public

[29] Even the world of science and scholarship suffers pervasively from the phenomenon of "link rot." *See* Jonathan Zittrain, Kendra Albert, & Lawrence Lessig, *Perma: Scoping and Addressing the Problem of Link and Reference Rot in Legal Citations,* 127 HARV. L. REV. 176 (2014); Martin Klein et al., *Scholarly Context Not Found: One in Five Articles Suffers from Reference Rot,* PLOS One (published Dec. 26, 2014), *available at:* Scholarly Context Not Found: One in Five Articles Suffers from Reference Rot (plos.org) (last visited May 5, 2022). These articles estimate that 50 percent of links in Supreme Court opinions, 70 percent of links in academic legal journals, and 20 percent of links of all science, technology, and medicine articles suffer from link rot.

document – contained "a range of mitigation leads that no other source had opened up"). In an earlier ineffectiveness case, *Williams v. Taylor*, *supra* ¶ 33, the Supreme Court found the life-history records such powerful mitigating evidence that the High Court added a footnote to quote a caseworker report verbatim:

> 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 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.

529 U.S. at 395, n.19. This excerpt provides a lucid example of a vivid illustration of family dysfunction – and a story which even the most skilled interviewer could never have elicited simply by talking with family members. The records documented an event that Terry Williams and his siblings were too young to remember, and his parents were too intoxicated to register in memory. Records have no inherent bias, and contemporaneous records are in any event more credible than witnesses who share previously undisclosed memories.

42. Life-history records enable capital defense teams to interview all witnesses more effectively – not only the witnesses who created the records in the first place (like the teachers who produced report cards) but also family members and friends who can organize their memories more accurately if there is hard documentation of dates and places. The frailty of human memory obliges us all to rely on records, and they provide the essential skeletal framework for the social history investigation. They are helpful in preparing witnesses to testify.

43. A thorough social history cannot be completed in a matter of days, weeks, or even months, even when in-person, face-to-face meetings can be undertaken without the lingering complications of a global pandemic. In addition to the bureaucratic obstacles to the acquisition of essential documentation, it takes time to establish rapport with the client, his family, and others who may have important information to share about the client's history. It is quite typical, in the first interview with clients or their family members, to obtain incomplete, superficial, and defensive responses to questions about family dynamics, socioeconomic status, religious and cultural practices, the existence of intra-familial abuse, trauma, and mentally ill family members. These inquiries invade the darkest, and most shameful secrets of the client's family, expose raw nerves, and often re-traumatize those being interviewed. Barriers to disclosure of sensitive information may include race, nationality, ethnicity, culture, language, accent, class, education, age, religion, politics, social values, gender, and sexual orientation.

44. Only with time can an experienced mitigation specialist break down these barriers, and obtain accurate and meaningful responses to these sorts of questions. Dr. Bessel van der Kolk, a leading expert on trauma, discussed the barriers specifically arising from trauma in his book *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (*2014): the exposure creates "unspeakable knowledge," blocked by alcohol, drugs, and self-mutilation (*id.* at 12); people have "shame for what they did or didn't do in response" to what they experienced or witnessed (*id.* at 13)'; "[t]raumatized people simultaneously remember too little and too much" (*id.* at 179); "[n]obody wants to remember trauma" (*id.* at 194).

45. Mitigation investigation is particularly complex when the client does not share the attorney's cultural background.[30] Attorneys may too readily overlook symptoms of impairment, attributing them to language difficulties or cultural differences. Cultural issues may involve not only race and ethnicity, but sexual orientation; gender, transgender and non-binary gender identity; socioeconomic status; or any other characteristics that define social identity. It is critical to complete the mitigation investigation before jury selection begins because of the need to harmonize trial strategy in both phases of the capital trial. Substantial progress in this investigation is also required before counsel can thoughtfully select appropriate mental health experts and define the subjects that they will need to address. Counsel not only need to develop mitigation evidence, but also to integrate this evidence into a theory of the case based on a thorough investigation of the factual allegations charged in the indictment and any statutory or non-statutory aggravation that the prosecution elects to allege. The need for a unified theory "that will be effective in connection with both guilt and penalty" phases and which "should seek to minimize any inconsistencies" is recognized in ABA Guideline 10.10.1, 31 HOFSTRA L. REV. at 1047. Moreover, empirical research confirms the need. The extensive research of the Capital Jury Project has disclosed the widespread prevalence of premature deliberation – that is, the tendency of jurors to reach decisions about punishment *before* a sentencing proceeding even begins. *See* William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Attitudes and Premature Decision-Making*, 83 CORNELL L. REV. 1476 (1998) (interviews with 1,000 capital jurors in eleven states disclose that almost half believed they knew

[30] *See* Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883 (2008).

what the punishment should be before sentencing phase of trial began). Thus, the mitigation investigation must be completed before trial commences with jury selection.

46. Mitigation evidence is not developed to provide a defense to the crime. Instead, it provides evidence of a disability, condition, or set of life experiences that can inspire compassion, empathy, mercy and understanding. Unlike insanity and competency, both of which have strict statutory definitions and temporal limitations, mitigation does not necessarily involve a mental disease or defect or diagnosis, nor must it necessarily relate in any way to the commission of the crime. *See, e.g., Skipper v. South Carolina, supra* ¶ 20; *Tennard v. Dretke, supra* ¶ 24. In addition, mitigation may encompass the entire trajectory of the client's life. In many cases, defendants suffer mental impairments that may not legally qualify as insanity or incompetency (or exemption because of intellectual disability), but are nonetheless significantly mitigating infirmities that may weigh heavily on the side of life when jurors are determining the blameworthiness of an individual.

47. For clients who are psychiatrically disordered, mitigation evidence may explain the succession of facts and circumstances that led to the crime, and how that client's disabilities distorted his judgment and reactions. Psychiatric evidence may provide a context to explain the capital crime and past behaviors as more than simply bad choices made by the client. *See Sears v. Upton,* 561 U.S. 945, 951 (2010) (per curiam) (mitigation "evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts"). *See also* ¶¶ 52 - 61 *infra.*

What Is the Controlling Law? What Is Expected of Counsel under the Sixth Amendment?

48. Between 2000 and 2010, the U.S. Supreme Court found trial counsel ineffective

in five death-penalty cases for failing to investigate potential mitigation evidence: *Williams v. Taylor*, *supra* ¶ 33; *Wiggins v. Smith*, *supra* ¶ 36; *Rompilla v. Beard*, *supra* ¶ 41; *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam); and *Sears v. Upton*, *supra* ¶ 47. Every case but *Sears* was tried in the 1980s, and *Sears* was tried nearly three decades ago, in 1993.

49. In *Williams,* the Court reaffirmed an all-encompassing view of mitigation and found trial counsel ineffective for failing to prepare the mitigation case until a week before trial in 1986 and failing to conduct an investigation of the readily available mitigating evidence (nightmarish childhood, borderline retardation, model prisoner status, etc.). In *Wiggins*, a case tried in 1989, trial counsel were found deficient in their performance, even though they had had their client examined by one mental health expert, because they failed to conduct a complete social history investigation in accordance with the ABA Guidelines. "Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." 539 U.S. at 524. In Rompilla, tried in 1988, counsel were found deficient "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available" and despite consulting three mental health experts. 545 U.S. at 377, 379. Similarly, in *Porter*, also tried in 1988, counsel were found deficient despite a "fatalistic and uncooperative" client because "that does not obviate the need for defense counsel" to conduct mitigation investigation. 558 U.S. at 40. Quoting *Williams*, the Court in *Porter* reaffirmed this duty: "It is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" *Id*. at 39 (citation omitted). Among the mitigation that Porter's counsel failed to present was "brain damage that could manifest in impulsive, violent behavior." *Id*. at 36. In *Sears*, the Court found

trial counsel ineffective in a 1993 trial even though they had presented seven witnesses in the penalty proceedings. The Court noted, "We have never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented . . ." 561 U.S. at 954. Post-conviction evidence emphasized significant frontal lobe brain damage causing deficiencies in cognitive functioning and reasoning. *Id*. at 946. Four of these five individuals have subsequently received sentences of less than death, and the fifth case is pending as of this writing. Terry Williams received a life sentence by negotiated disposition in Danville, Virginia in 2000. Frank Green, *Death Penalty Cases Scrutinized: More Hearings Are Being Ordered in Virginia*, *Richmond Times-Dispatch* (Apr. 9, 2001) at A1, truthinjustice.org/va-dpreview.htm. On October 15, 2004, the State of Maryland agreed to a disposition sending Kevin Wiggins to a state facility for mental health treatment and rehabilitation services, but making him eligible for parole immediately based on time already served. Jenner & Block, *12 Year Battle for Kevin Wiggins Comes to an End* (Oct. 15, 2004), https://jenner.com/library/news/7810. On August 13, 2007, the Lehigh County (Pennsylvania) District Attorney's Office stipulated to a life sentence for Ronald Rompilla. Associated Press, *Death Row Inmate Gets New Life Term*, *USA Today* (Aug. 13, 2007), usatoday.com/news/topstories/2007-08-13-477084247_x.htm. On July 21, 2010, the Brevard-Seminole (Florida) State Attorney's Office announced that it would allow George Porter, Jr., to be resentenced to life." Kaustuv Basu, *Aging Killer May Get Reprieve from Death Row*, *Fla. Today* (July 21, 2010). All five cases involved mental health evidence that was not discovered and presented at trial.

How a Mitigation Investigation, the Mitigation Specialist, and Social History Are Essential to Reliable Mental Health Assessments

50. Since the early 1980s, it has been standard practice for competent defense counsel

to determine whether their capital client suffers from organic brain injury, psychiatric disorders, or trauma outside the realm of ordinary human experience. Whenever brain-behavior relationships are at issue, a thorough investigation of the etiology of brain damage is needed to determine the interplay of genetics, intra-uterine exposure to trauma and toxins, environmental exposures, head injuries, etc. In a capital case, such investigation is particularly important because of the additional mitigating factors that may be discovered beyond the fact of psychiatric disorder or organicity. *See*, for example, John Hill and Mike Healy, *The Death Penalty and the Handicapped*, FORUM (May-June 1986) at 18-20 (discussing implications of childhood disorders affecting the brain and other disabilities for penalty phases in capital cases); and David C. Stebbins, *Psychologists and Mitigation: Diagnosis to Explanation*, THE CHAMPION (April 1988)at 34, 36 (discussing need for adequate time to overcome clients' distrust and the value of a neuropsychologist or neurologist in cases with head trauma). The 2003 ABA Guidelines twice discuss the need for some member of the core team (usually the mitigation specialist) "qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." Guideline 4.1.A.2, 31 HOFSTRA L. REV. at 952; Guideline 10.4.C.2.b, *id*. at 1000.

51. Without the thorough social history investigation, of the kind described above, that a skilled mitigation specialist can develop, it is impossible to ascertain the existence of previous head injuries, childhood trauma, 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 make an informed and thoughtful decision, based on the nature and extent of a client's possible mental disorders and impairments, about which types of experts to retain, what evaluation or assessment to request of an expert, or even how to most effectively work with a

client whose everyday life may be shaped by mental disorders and impairments. Mental health experts, in turn, require social history information to conduct a complete and reliable evaluation.[31]

52. Both anecdotal reports from capital defense practitioners and social science research indicate that defense experts are viewed with great skepticism and often regarded as "hired guns" unless their conclusions are supported by abundant, credible evidence from lay witnesses and historical experts (i.e., the professionals who encountered the capital client long before the alleged offense). *See*, for example, Scott Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997), finding that two-thirds of the witnesses jurors thought "backfired" were defense experts. Thus, if only for pragmatic reasons, capital defense counsel are well advised not to rely on expert testimony without the corroborative lay witnesses whose identity and potential evidence can only be discovered through life-history investigation. However, it is equally important to offer well-prepared expert testimony to explain the effects of life experiences on an individual's functioning and behavior. Lay witnesses on their own are unlikely to understand the significance of the symptoms and behaviors they describe, and only an expert is likely to be able to provide an overview of the factors that shaped the client over the course of her life and to be able to offer an empathic framework for understanding the resultant disorders and disabilities.[32] Expert

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[31] *See* Douglas Liebert & David Foster, *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 15:4 AM. J. FORENSIC PSYCHIATRY 43 (1994); 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 (2008); George W. Woods, David Freedman, & Stephen Greenspan, *Neurobehavioral assessment in forensic practice*, 35 INT'L J. OF L. & PSYCHIATRY 432 (2012); Russell Stetler, *Mental Health Evidence and the Capital Defense Function: Prevailing Norms*, 82 UMKC L. REV. 407 (2014).

[32] It has long been recognized that lay and expert testimony must be harmonized to be credible to the trier of fact. As one capital defense lawyer pointed out in 1988, "[T]estimony about the psycho-social development of the defendant explains the psychological diagnosis in

testimony is essential for placing the factual details elicited from lay witnesses into an interpretive context that explains how various life events shaped the capital client's brain and behavior. Historical experts – the professionals who encountered the client and other family members – can be critical. 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. 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 (FS IQ 76-81). *People v. George Davis Bell* (Ind. 128-97, Judge Cooperman, Queens County, N.Y., 1999). In another case, 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). *People v. José J. Santiago* (Ind. 1210/99, Judge Bristol, Monroe County, N.Y., 2000). In a third case, a psychiatrist had treated the client's mother after her suicide attempt when the client was nine – thirty 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 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

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human terms that the jury can understand." He continued, "Typical psychological testimony on sanity, competency, or diminished capacity sounds like it comes out of a textbook. Despite the best efforts of the mental health professional and the attorneys, most of this type of testimony is incomprehensible to a lay juror. There is also an unfortunate tendency to get caught up in technical terms that bore the jurors and do nothing to humanize the client. It makes little sense to spend several days putting on the testimony of relatives and friends of the defendant about the human characteristics of the defendant, and then put on a psychologist or psychiatrist who immediately turns this around by making the person sound like a casebook study out of some obscure and arcane psychology textbook." David C. Stebbins, *Psychologists and Mitigation: Diagnosis to Explanation*, CHAMPION (Apr. 1988), at 34, 38.

removal from the family. *People v. John F. Owen* (Ind. 547-99 cons. with 414-99, Judge Egan, Monroe County, N.Y., 2001). *See* Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J. L. & SOC. CHANGE 237, 258 (n.92) (2007-08).

53. The proper standard of care for a competent mental health evaluation also requires an accurate medical and social history as its foundation. Because psychiatrically disordered, traumatized, or cognitively impaired individuals are by definition likely to be poor historians, a reliable evaluation requires historical data from sources independent of the client (for clinical, not simply forensic, reasons).

54. Except when clients exhibit such florid symptomatology that immediate clinical intervention is patently warranted, capital defense counsel are well obliged to conduct a thorough social history investigation before retaining mental health experts. Only after the social history data have been meticulously digested and the multiple risk factors in the client's biography have been identified will counsel be in a position to determine what kind of culturally competent expert is appropriate to the needs of the case, what role that expert will play, and what referral questions will be asked of the expert.[33] Psychiatrists and psychologists (including neuropsychologists) have different training and expertise, and within each profession are numerous subspecialties including the disciplines that study the effects of trauma on human development, psychopharmacology and addiction medicine, child and adolescent psychology and geropsychology, as well as subspecialists who address sexual trauma, neurotoxins, and the issues of LGBTQ and various cultural groups. The potential roles of experts include consultants;

[33] *See* Dudley & Leonard, *supra* ¶ 53 at 985, for multiple "examples of legal questions commonly confronting mental health experts in capital proceedings," including how mental

fact gatherers needed to measure cognitive capacities or to elicit client disclosures (and/or to assess their credibility); and testifying witnesses, to name but a few. To make informed decisions about the kind of experts that may be needed and the referral questions they will address, counsel first needs a reliable social history investigation.

55. The importance of independently corroborated social history data has been well recognized among mental health practitioners since the 1980s. A leading psychiatric text in that period described an accurate and complete medical and social history as the "single most valuable element to help the clinician reach an accurate diagnosis." H. KAPLAN & B. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 837 (4th ed. 1985). The same text noted that the individuals being evaluated are often poor historians: "The past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family members." *Id*. at 488. Thus, "retrospective falsification, in which the patient changes the reporting of past events or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." *Id*. This problem is particularly acute in the forensic context, as two other leading authorities pointed out in 1980:

> The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 508-509 (1980). Capital defense lawyers also appreciated this need: "A psychologist armed with all of the records

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health issues relate to the crime and/or to mitigation.

of the client's history is much better equipped to present a sympathetic and truthful explanation of the client's psychological make-up and of how the crime occurred." David C. Stebbins, *Psychologists and Mitigation: Diagnosis to Explanation*, THE CHAMPION (April 1988) at 34, 37.

56. Outside the death penalty context, forensic mental health evaluations are generally focused on two traditional issues: competency and sanity.[34] In the death penalty context, some assessments focus on a dispositive issue, such as the Eighth Amendment exemption from execution for people with intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 572 U.S. 5 (2014). Even those highly focused assessments require exhaustive investigation prior to choosing the relevant culturally competent experts. Most assessments in the death penalty context have no such clarity of purpose because of the breadth of potential mitigating evidence and the constitutional requirement of individualized sentencing based on consideration of the "diverse frailties of humankind" (*see Woodson, supra* ¶ 17, at 303). In addition, the meticulously documented multigenerational social history sharply reduces many malingering concerns because it is based on hard information objectively recorded long before anyone faced capital charges. Regardless of the stage of the proceeding, from pretrial efforts to prevent the case proceeding as a death penalty prosecution to plea negotiations and trial, reliable assessments require thorough investigation for counsel to choose the right experts and frame the appropriate referral questions.

[34] The experts who view their specialty as courtroom work represent a small group of generalists whose expertise in the context of criminal proceedings is principally in competency and sanity evaluations. The directory of the American Board of Forensic Psychologists lists 343 experts, of whom not quite two thirds self-identify as doing mainly criminal work. *See* American Academy of Forensic Psychology - Specialist Directory (wildapricot.org) www.abfp.org/about (directory searchable by geography and areas of practice) (last visited May 8, 2022). The directory lists only nine members in Pennsylvania, of whom only six specialize in criminal work. Forensic mental health experts are ever conscious that they are examining someone with "external incentives" and therefore may be malingering. They typically have a limited temporal focus: Is the defendant competent to stand trial or waive rights now? What was his mental state at the time of the crime?

57. Rather than limiting their choices to the competency/sanity specialists, capital defense teams more typically select their experts from individuals who have clinical and research expertise in a much wider range of subspecialties from brain development and neurotoxins to the impact of sexual trauma and neighborhood violence on children. In turn, a comprehensive social history also anticipates suggestions of malingering since it identifies the symptoms of disorders and indicia of impairment that were present long before the individual faced capital prosecution.

58. In capital cases, it is also important to note that consultations with mental health assessments are an integral part of the mitigation investigation, not a separate enterprise to be undertaken at the end when the social history investigation is finished. Mental health experts add new information in the course of their clinical interviews and testing, as well as new insights from their review of all the previously gathered data and the specific research expertise that they bring to the case. Rather than simply providing an end to the narrative, they are frequently the inspiration for further investigation. They will not only detect red flags in the life-history records and interviews, but they will often recommend consultations with other experts, utilization of other diagnostic technologies, and exploration of entirely new lines of inquiry relevant to their assessments. They are active participants in the investigation, not simply passive commentators on what is already known. They will have questions, not just answers, and this dynamic role underscores the cyclical nature of the social history investigation itself. It does not follow a checklist from top to bottom, but constantly integrates new knowledge into an ongoing search for an understanding of the capital client's diverse frailties.

Conclusion

59. The mitigation function is a core element of effective defense representation in death penalty cases as defined by the Sixth Amendment jurisprudence of the U.S. Supreme Court, *supra* ¶¶ 48-49, and prevailing professional norms, ¶¶ 33-47. Its importance is demonstrated by the empirical evidence of life sentences from juries in hundreds of highly aggravated cases and the myriad other uses of mitigation to promote negotiated dispositions, or to persuade prosecutors that death is not appropriate in an individual case, or to uncover compelling evidence that an individual is not eligible for capital punishment because of the exemption for intellectual disability, ¶¶ 28-32. The scope of mitigation is not limited to narrow statutory factors, but is reflected in the Supreme Court's Eighth Amendment jurisprudence from the time the High Court established individualized sentencing as a constitutional necessity, ¶¶ 16-27.

60. Not surprisingly, this core function of capital defense has led to the development of a specialized group of professionals whose only task is to assist in the investigation and presentation of this evidence in death penalty cases. These professionals are firmly established as members of the core team required in every case where the death penalty may be sought. Early retention of mitigation specialist is indispensable both because the investigation involves a long, slow process, and because the evidence discovered in the early stages frequently helps to resolve cases without trial. Although counsel is ultimately responsible for the investigations that are required for effective representation under the Sixth Amendment, the mitigation investigation requires skills that are simply not taught in law school. I summarized this problem a decade and a half ago in an article whose title captures the point concisely, *Mitigation Investigation: A Duty That Demands Expert Help But Can't Be Delegated, The Champion,* Mar. 2007.

61. Like the mental health professionals that I discussed *supra* ¶ 54, mitigation specialists come from a variety of backgrounds and have developed particular areas of expertise over their careers. Lawyers need to choose mitigation specialists based on the needs of the particular case, including the issues of cultural competency that I discussed *supra* ¶ 45 (and again in ¶ 54). Within the multidisciplinary backgrounds of mitigation specialists, there are people who speak a foreign language or have worked with clients from Central America or the Caribbean, have served in the armed forces, have prior experience investigating intellectual disability or fetal alcohol spectrum disorders, or are otherwise specially qualified to represent a particular client. Mitigation specialists should be selected based on their qualifications, experience and specialized skills rather than simply geographic proximity.

61. As discussed *supra* ¶¶ 50-58, the work of the mitigation specialist is also the foundation of a reliable mental health assessment, providing the experts with the objective, multigenerational genetic and social data convergence that forms the basis of a reliable and accurate expert opinion, and will make the expert's opinion credible in the adversarial setting. In capital cases, mental health experts are called upon to opine on myriad issues outside the narrowly defined categories most common in the ordinary criminal context (competency and sanity). The social history investigation enables the capital defense team to frame its referral questions with care so that the experts are addressing clearly defined areas germane to the unified defense theory arcing over both phases of a potential capital trial.

62. In the end, the purpose of a thorough mitigation investigation is to develop evidence that will humanize the defendant, help jurors and other decision-makers to understand why he may have committed the capital offense, and to evoke compassion and empathy by identifying the client's individual frailties that at once establish human kinship and expose

vulnerabilities and disadvantage. The fruits of a thorough social history investigation not only provide capital defendants with the effective representation to which they are entitled under the Sixth Amendment, but assure jurors of the opportunity to consider all the evidence relevant to the reasoned moral judgment they are asked to render, thereby also assuring the courts of an outcome that is reliable and just.

I have provided this declaration on a *pro bono* basis.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746, and under the laws of the States of California and Pennsylvania, that the foregoing is true and correct and was executed this 18th day of May 2022 at Berkeley, California.

RUSSELL STETLER