THE INDISPENSABLE ROLE OF THE MITIGATION SPECIALIST IN A CAPITAL CASE: A VIEW FROM THE FEDERAL BENCH

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I. INTRODUCTION

In noncapital cases, the jury determines guilt or innocence, and if the defendant is found guilty, the judge has the task of deciding the appropriate sentence. A judge does not, however, decide the penalty in a vacuum. In the federal system, a detailed Pre-Sentence Investigation report ("PSI") is prepared in virtually all cases, including misdemeanors.[1] The report is typically twenty or more pages long, single-spaced, and contains a comprehensive account of the defendant's life history. Along with details of the offense and the defendant's prior criminal record, it includes personal and family data, which discuss parents, siblings, their occupations and health, and their interactions with the defendant.[2] The PSI recites the circumstances of the defendant's upbringing, family support or lack thereof, and updated information from family members interviewed. It incorporates the defendant's own marital and parental history and interviews with his or her spouse or former spouse and children. The report includes a section on the defendant's physical condition, which recites everything from childhood

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* The author, as a lawyer, handled the penalty phase of a number of capital cases in the 1980s and early 1990s on a pro bono basis. She had never heard of a mitigation specialist. She did her own investigation and she attributes what success she had largely to extraordinary luck, time-consuming doggedness, and a sunny, non-threatening demeanor. For witnesses, she generally had only family members and a psychologist.

1. FED. R. CRIM. P. 32(c)(1). Similar provisions exist in state law for state offenders. *See* FLA. STAT. ANN. § 921.231 (West 2001); IND. CODE ANN. § 35-38-1-8 (West 2004); N.Y. CRIM. PROC. LAW § 390.20 (McKinney 2005).

2. *See, e.g.*, FED. R. CRIM. P. 32(d)(1)(B); *see also* Daniel Macallair, *The History of the Presentence Investigation Report*, http://www.cjcj.org/pubs/psi/psireport.html (last visited Apr. 18, 2008).

and adult illnesses and accidents to even current tattoos.[3] It contains a section on mental and emotional health, setting forth any commitments, psychological treatments, or difficulties the defendant has had and a separate section on substance abuse, including what drugs the defendant has sampled or is addicted to, and what treatment programs, if any, he or she attended. After that, a section on education and vocational skills details school and college attendance, where and for how long, how successful, and occupational training, if any.[4] The employment record follows, with job descriptions, how long each job lasted, the pay, and the reason for leaving the employment. This is followed by a financial condition section, which sets forth the defendant's assets and liabilities, including a credit report.[5]

Finally, the report includes several pages of sentencing options, setting out the statutory ranges of imprisonment, supervised release, and fines, the availability of probation, the appropriateness of restitution, and the sentencing guideline ranges and possible reasons for departure upward or downward from those ranges. The report even includes a confidential and detailed sentencing recommendation from the probation officer.[6]

The probation officers who prepare these reports are highly educated and trained. A minimum of a bachelor's degree is required with one year of experience in such fields as investigation, counseling and guidance of offenders in community corrections, or the equivalent in a related field such as social work or psychology.[7] The officers frequently have master's degrees in one of the related fields or a law degree.[8] For example, in the Eastern District of Louisiana, the Chief Probation Officer has a law degree and worked for a child protection agency prior to becoming a federal probation officer and PSI writer. The Deputy Chief has a Master of Social Work degree and worked in a District

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3. *See* Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1613, 1625-26 (1980).

4. *See, e.g.*, Michigan Courts, Presentence Investigation Manual, http://www.courts.michigan.gov/scao/resources/publications/manuals/prbofc/prb_sec4.pdf (last visited Apr. 18, 2008) [hereinafter Michigan Courts Manual].

5. FED. R. CRIM. P. 32(d)(2)(A)(ii); *see, e.g.*, Michigan Courts Manual, *supra* note 4.

6. FED. R. CRIM. P. 32(d)(1)(C)-(E), (2)(C)-(F); Macallair, *supra* note 2.

7. Andrew D. Alpert, *Probation Officers and Correctional Treatment Specialists*, OCCUPATIONAL OUTLOOK Q. 29, 31 (2001), *available at* http://www.bls.gov/opub/ooq/2001/fall/art05.pdf.

8. Interview with Charlotte Cocchiara, Deputy Chief Prob. Officer, U.S. Prob. Office, E.D. La. (Nov. 25, 2007).

Attorney's Office prior to coming to U.S. Probation, also working in the Pre-Sentence Report division.[9]

The report and recommendation are given, of course, to a likewise highly trained federal judge who has had a previous career at least as a lawyer, and often with other prior professional experience. Once the judge receives the report, he or she may request additional information or elaboration. At the time of sentencing, the judge also has the discretion to take evidence and hear testimony, including objections to the report by the government or the defendant, before finally imposing sentence.[10]

If this elaborate process and detailed accounting of a defendant's life story is considered appropriate, and presumptively necessary, to inform a judge when the maximum penalty may be only a year in prison, then surely an equally, if not more, exhaustive and professional accounting is required when a jury of untrained laymen and women are called upon to decide if a defendant should be put to death.

Nevertheless, in a recent survey of capital defense attorneys and mitigation specialists, concern was expressed over, among other issues, inadequate court funding and judicial ignorance or outright hostility to the mitigation needs in death penalty cases.[11] Considering that the term "mitigation specialist" is a relatively recent coinage,[12] some of this lack of judicial awareness and resulting caution is understandable. The primary purpose of this Article is to hopefully dispel judicial misgivings about the crucial importance of mitigation development in the trial of a capital case.[13] The *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*[14] is a significant contribution to that cause.

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9. *Id.*

10. FED. R. CRIM. P. 32(i)(2); U.S. SENTENCING GUIDELINES MANUAL app. B (2006).

11. Interview with Russell Stetler, Nat'l Mitigation Coordinator, Office of the Fed. Pub. Defender, Oakland, Cal. (Nov. 28, 2007).

12. A search for "mitigation specialist" in Black's Law Dictionary, 8th edition, through Westlaw, disclosed "0 Documents."

13. While beyond the scope of this Article, inclusion of a mitigation specialist on post-conviction in a capital case is likewise important. A common issue on post-conviction is ineffective assistance of counsel for failure to develop mitigation. A mitigation specialist on post-conviction can investigate and gather the evidence that was available but failed to be developed at the trial stage.

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

II. DEATH IS DIFFERENT

The United States Supreme Court has repeatedly stated that "death is different" from any other penalty, with consequential need for greater reliability:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[15]

The Court's concern in *Woodson v. North Carolina* was to assure that the jury in a capital case would consider the character and history of the individual offender and "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[16] In later cases, the Court elaborated that "[t]he defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors . . . a jury may consider in fixing appropriate punishment."[17] Indeed, the Court has stated repeatedly that the Constitution requires, in all but the rarest of capital cases, that the sentencer be allowed to consider "*as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death."[18]

It is ironic that the decision to impose this most severe and irrevocable of all penalties is not generally entrusted to the hands of a trained judge, with the resources of a skilled probation department to gather all the information he or she might need. Rather, it is assigned to a lay jury of men and women, largely if not entirely unskilled in the law, who must rely completely on what is presented in open court without the opportunity to ask questions or request any additional information. The responsibility of gathering and presenting that mitigating evidence is placed upon the defendant, and its success depends on the resources and skills of the defense lawyer and his or her team.

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15. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

16. *Id.* at 304.

17. Simmons v. South Carolina, 512 U.S. 154, 163 (1994); *see also* Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (evidence that the defendant "had been a well-behaved and well-adjusted prisoner" in the months of pretrial detention); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("[E]vidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.").

18. *Skipper*, 476 U.S. at 4 (quoting *Eddings*, 455 U.S. at 110 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (Burger, C.J., plurality opinion))).

In the case of indigent capital defendants, which is the vast majority of all capital cases,[19] what resources the defense has depends to a large degree on the trial judge. The judge will decide, well in advance of the actual trial, what financial assistance, investigators, or experts the defense will be allowed in order to gather and compile their "Pre-Sentence Report" to present to the jury.[20] By controlling the purse strings, the trial judge effectively controls the quantity and quality of information that will flow to the jury if a penalty phase is necessary.

III. *ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES* ("ABA GUIDELINES")

Fortunately for trial judges and defense counsel, the American Bar Association has been a leader for nearly thirty years in promulgating appropriate standards for assuring adequate representation for defendants in capital cases. The ABA Guidelines, originally enacted in 1989, were expanded and made more explicit in 2003.[21] The *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* clarify the standards even further. The ABA Standards and Guidelines have been repeatedly cited by the United States Supreme Court as reflecting the prevailing norms of what is reasonable practice in capital cases.[22] With respect to mitigating evidence, the Supreme Court has specifically noted that: "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'"[23] The 1989 ABA Guidelines mentioned

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19. The Honorable William W. Wilkins, The Legal, Political, and Social Implications of the Death Penalty, Address at the Allen Chair Symposium: The Role of the Death Penalty in America: Reflections, Perceptions, and Reform (Sept. 14 & Oct. 11, 2006) *in* 41 U. RICH. L. REV. 793, 805 (2007).

20. Jeremy P. White, *Establishing a Capital Defense Unit in Virginia: A Proposal to Increase the Quality of Representation for Indigent Capital Defendants*, 13 CAP. DEF. J. 323, 337-38 (2001).

21. *See id.* at 347-48; *Introduction* to ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), *in* 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES]. The ABA GUIDELINES are also available online at http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf.

22. Rompilla v. Beard, 545 U.S. 374, 387 (2005); Wiggins v. Smith, 539 U.S. 510, 524 (2003); Strickland v. Washington, 466 U.S. 668, 688 (1984).

23. *Wiggins*, 539 U.S. at 524 (emphasis added in *Wiggins*) (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 11.4.1(C) (1989) [hereinafter 1989 GUIDELINES]). Numerous federal and state courts have likewise favorably cited the ABA Guidelines. *See* Cases that Cite to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, ABA Death Penalty

mitigation specialists in the commentary section,[24] but the 2003 ABA Guidelines explicitly state that the capital defense team should consist of at least two attorneys, an investigator, and "a mitigation specialist."[25]

In describing the scope of relevant mitigation evidence the 2008 Supplementary Guidelines explain:

> Mitigation evidence includes, but is not limited to, compassionate factors stemming from the diverse frailties of humankind, the ability to make a positive adjustment to incarceration, the realities of incarceration and the actual meaning of a life sentence, capacity for redemption, remorse, execution impact, vulnerabilities related to mental health, explanations of patterns of behavior, negation of aggravating evidence regardless of its designation as an aggravating factor, positive acts or qualities, responsible conduct in other areas of life (e.g. employment, education, military service, as a family member), any evidence bearing on the degree of moral culpability, and any other reason for a sentence less than death.[26]
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> . . . [Relevant] 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.[27]

With respect to the mitigation specialist, that person:

> 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

Representation Project, http://www.abanet.org/deathpenalty/resources/docs/List_of_Cases_that_cite_to_GL_MAR_2008.doc (last visited Apr. 18, 2008).

24. 1989 GUIDELINES, *supra* note 23, at Guideline 8.1, commentary.

25. ABA GUIDELINES, *supra* note 21, at Guideline 4.1(A)(1).

26. SUPPLEMENTARY GUIDELINES, *supra* note 14, at Guideline 1.1(A); *see also id.* at Guideline 10.11(F).

27. *Id.* at Guideline 5.1(B); *see also id.* at Guideline 10.11(B).

> 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.[28]

"Mitigation specialists must possess the knowledge and skills to obtain all relevant records pertaining to the client and others. They must understand the various methods and mechanisms for requesting records and obtaining the necessary waivers and releases, and the commitment to pursue all means of obtaining records."[29] In 1998, the Judicial Conference of the United States likewise recognized the significance of mitigation specialists in federal capital cases, even encouraging Federal Defender Offices to have such specialists on staff as permanent salaried employees.[30] The accompanying commentary described mitigation specialists as "part of the existing 'standard of care' in a federal death penalty case."[31]

IV. THE NEED FOR A MITIGATION SPECIALIST

Investigating and developing mitigating evidence is time-consuming and requires unique professional skills. A mitigation specialist, as described above, has those skills. In addition, an adequately funded mitigation specialist will likely reduce the costs of the overall representation, enhance its effectiveness, and increase the possibility of avoiding trial altogether through plea bargaining.

For these same reasons, the mitigation specialist needs to be appointed early in the representation, preferably within weeks if not days of enrollment or appointment of counsel.

A. Developing Mitigation Evidence is Time-Consuming

Investigating, gathering, and organizing the life history of a defendant take a considerable amount of time. Enlisting the trust of the

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28. *Id.* at Guideline 5.1(C); *see also id.* at Guideline 10.11(B), (E).

29. *Id.* at Guideline 5.1(F).

30. SUBCOMM. ON FED. DEATH PENALTY CASES, JUDICIAL CONFERENCE OF THE U.S., FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION sec. II.7 (1998), *available at* http:/www.uscourts.gov/dpenalty/1COVER.htm [hereinafter DEATH PENALTY CASES].

31. *Id.* at sec. II.7, commentary.

defendant and family members alone may take repeated visits. The defendant and family members have the firsthand information needed for an effective defense, but are often not forthcoming because the information is highly personal. Childhood trauma and abuse are common in the background of capital defendants,[32] yet family members, parents in particular, are understandably reluctant to disclose maltreatment or failure. The shock of the defendant being charged with a horrendous crime may also drive the family away; indeed, the horrendous crime may be the end of a long line of disappointments the family has had with the defendant and he may well be alienated from key family members. The defense must be sensitive to these concerns and be able to explain to family members that the investigation is not about blame or castigation, but about seeking an explanation for the defendant's conduct and a basis for mercy from the jury. Breaching that resistance and developing trust takes time and patience.

Apart from the defendant and family members, others need to be interviewed and evaluated for possible mitigation: friends, neighbors, teachers, guidance counselors, coaches, clergy, employers, co-workers, treating physicians, and psychiatrists. If the defendant has been in prison or juvenile facilities, then institutional employees, such as security staff, classification officers, caseworkers, and even prison clerical staff, may have known him and should be contacted.

In addition to personal interviews, institutional records must be gathered. These include school records, such as academic, disciplinary, and evaluative reports; medical records of accidents and illnesses; mental health evaluations; social services data, including welfare, adoption, or foster care records; juvenile delinquency and adult criminal records; employment history, military records, and any other institutional accounts.

A key component of a mitigation defense is screening for any mental health conditions. A potentially significant factor in any case, including a capital case, is the mental capacity of the defendant.[33] Psychiatric illnesses, psychological disorders, physical disabilities with

32. *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 157 (1994) ("[E]vidence [was introduced] tending to show that petitioner's violent behavior reflected serious mental disorders that stemmed from years of neglect and extreme sexual and physical abuse petitioner endured as an adolescent."); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("[E]vidence [was introduced] of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance . . . .").

33. *See, e.g.*, Drope v. Missouri, 420 U.S. 162, 171 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.").

psychiatric effects, mental retardation, and neurological or cognitive deficits are all relevant to fundamental issues in a criminal case. Even prenatal information is important, such as whether the defendant's mother abused alcohol or drugs while pregnant, causing the defendant to suffer from fetal alcohol syndrome. Multi-generational records may also disclose genetically influenced disorders, such as bipolar disorder and possibly schizophrenia.

As developing mitigation evidence is time-consuming, early appointment of the mitigation specialist is essential. It takes months to conduct the interviews and amass the information needed and cull it to a presentable form. Also, as noted, screening for mental health issues is a primary task of the mitigation specialist. A mental illness or disability, if present, raises issues that are important to resolve early in the case, such as the defendant's competency to waive fundamental rights and his capacity to stand trial and to assist counsel in the context of a capital case. It can also implicate an insanity defense or, if the defendant is mentally retarded, preclude the death penalty as a punishment.[34] Even if insufficient as an absolute defense on the merits or on the penalty, a mental condition may persuade the prosecution to forgo the death penalty altogether.

The guilt phase and mitigation phase of the trial also need to be coordinated and integrated into a cohesive whole.[35] Since the penalty phase may immediately follow an unsuccessful guilt phase, both need to be fully prepared and interlocked with each other. The mitigation specialist is in an ideal position to assure that the two phases do not conflict but are compatible with each other.

B. Developing Mitigation Evidence Requires Special Professional Skills

A mitigation specialist must have the skills and experience needed to investigate, analyze, and evaluate the life history of the defendant. These specialists are generally trained in the social sciences, with college degrees in social work or psychology, similar to the probation officers that provide background data to judges in noncapital sentencing.[36] They are adept at gathering institutional records,

34. *See* Atkins v. Virginia, 536 U.S. 304, 317, 320-21 (2002) (holding that state executions of mentally retarded offenders are unconstitutionally excessive).

35. SUPPLEMENTARY GUIDELINES, *supra* note 14, at Guideline 10.11(A).

36. *See* Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 364, 367-68 (1997).

interviewing lay and professional people, and compiling case histories. Significantly, they are trained in uncovering family trauma and screening for often subtle mental and psychological disorders.[37] They are likewise experienced in interpersonal communication so they know how to develop trust and rapport with even the most difficult or distrustful of individuals. A criminal investigator is unlikely to have these skills. A typical criminal investigator is likely to have a law enforcement background, but without training in social sciences. Such investigators are invaluable in preparing for the guilt phase of a capital case—the what, when, and how the alleged crime occurred ("just the facts, ma'am") but are not skilled in assessing "why" it happened, which is the primary piece of the mitigation defense.

Similarly, a criminal defense lawyer is unlikely to have the necessary skills to amass the mitigation evidence. Lawyers are adept at legal analysis, fitting facts to legal principles, dissecting prior jurisprudence—all essential to an effective defense but often involving abstract concepts far afield from the social sciences. Lawyers are not trained in the communication (particularly listening) skills needed, nor perhaps do they have the time or patience, to delve deeply into the life history of their client.[38] They are not knowledgeable about uncovering family abuse or assessing for mental illness, nor recognizing other nuanced factors that could be invaluable mitigation evidence. Lawyers are advocates, not investigators and certainly not social workers. On the contrary, lawyers are often perceived by clients and family members as intimidating, and if court-appointed, may not even be trusted.

Within the criminal justice system, mitigation specialists are needed for the monumental task of investigating, identifying, and developing the evidence needed for a constitutionally effective defense.

C. A Mitigation Specialist Reduces the Cost of Representation

A significant pragmatic factor is that a mitigation specialist is cost-effective. Investigating and developing a mitigation defense is constitutionally required in a capital case. The hourly rate of a mitigation specialist, such as a social worker, anthropologist, or sociologist, is

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37. *Id.* at 368-71.

38. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (finding that capital trial counsel was constitutionally ineffective for, among many other failings, not even returning a phone call from a certified public accountant who worked with the defendant in prison and volunteered to be a mitigation character witness).

substantially less than that of the lawyer.[39] The mitigation specialist can gather, analyze and summarize the voluminous material for the attorneys, so that the costlier lawyers only need to focus on that which is relevant and material. The mitigation specialist, after compiling the life history, can also help identify the appropriate experts that are needed,[40] eliminate those that are not, and help frame the precise referral question to focus the expert in a cost-effective way. When the expert is selected, the mitigation specialist will have already prepared an organized and reliable life history for the expert's review. As with lawyers, experts are costly, hence costs are reduced when the mitigation specialist provides the background material necessary. As noted below, the mitigation specialist may also enhance the possibility of avoiding trial altogether, with significant savings in cost and time for the entire court system.

D. A Mitigation Specialist Enhances the Effectiveness of the Defense and Increases the Possibility of Avoiding Trial Altogether through Plea-Bargaining

For the reasons already stated, the skilled mitigation specialist is more likely to find and develop the relevant evidence needed for an effective penalty phase defense.[41] If the case for mitigation is strong enough, it may even 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.

Of particular significance in capital cases is the constitutional prohibition against executing a person who is mentally retarded.[42] Mental retardation in its milder forms is not easy to detect, as the person is reluctant to admit any mental deficiencies and may look and appear normal in ordinary circumstances.[43] But even mild mental retardation

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39. DEATH PENALTY CASES, *supra* note 30, at sec. I.B.7. Some attorneys likewise specialize in mitigation development, at a reduced hourly rate. *Id.* at sec. I.C.4-5.

40. *See* SUPPLEMENTARY GUIDELINES, *supra* note 14, at Guideline 10.11(E)(1). In *Williams*, mitigation evidence developed on post-conviction disclosed the defendant had suffered repeated head injuries, which suggested "mental impairments organic in origin." 529 U.S. at 370. Had counsel used a mitigation specialist at trial, an expert in organic brain damage could have been sought.

41. *See supra* Parts IV.A-B.

42. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002).

43. In one case handled by the author, the psychological report clearly established mental retardation but my client resisted presenting the defense, even to save his life, because he did not want to be publicly described as retarded. He was finally persuaded to allow it, but still insisted to

distorts a person's judgment and reduces impulse control.[44] A mitigation specialist is adept at screening for mental retardation, which allows the issue to be raised pretrial. Even if the judge declines to rule on it before trial, evidence of mental retardation may persuade the prosecution to take capital punishment off the table.

V. THE MITIGATION SPECIALIST REDUCES THE LIKELIHOOD OF REVERSIBLE ERROR

Appointing a mitigation specialist is arguably the best assurance a trial judge can have that all the available mitigation evidence will be available for trial counsel to present at the penalty phase. The failure to retain such a specialist places the responsibility in the hands of counsel, who is less qualified, more costly, and has less time to gather what is needed. Failure to adequately investigate mitigation evidence has been grounds for United States Supreme Court reversals on ineffective assistance of counsel grounds.[45] Both are showcases on what can happen when the defense fails to include a mitigation specialist.

In *Williams v. Taylor*, trial counsel did not even begin preparing for the penalty phase until a week before trial. During the state post-conviction proceedings, it took two days of hearings to present all the mitigation evidence that the trial lawyers had failed to uncover.[46] The Supreme Court found that trial counsel were obligated to "conduct a thorough investigation of the defendant's background," citing ABA Standards.[47]

> 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 and repeatedly 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.

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me that he was not mentally retarded. *See also* ROBERT B. EDGERTON, THE CLOAK OF COMPETENCE 2 (1993); ABA GUIDELINES, *supra* note 21, at Guideline 10.5, commentary & n.183.

44. *See, e.g.*, EDGERTON, *supra* note 43, at 36.

45. Wiggins v. Smith, 539 U.S. 510, 537-38 (2003); *Williams*, 529 U.S. at 398-99. Both are significant also because they were state capital convictions on federal habeas relief. In order to reverse, the United States Supreme Court had to rule not only that trial counsel was constitutionally ineffective but that the state courts' rulings upholding the sentences were "contrary to, or involved an unreasonable application of, clearly established Federal law." *Wiggins*, 539 U.S. at 520 (internal citations omitted); *Williams*, 529 U.S. at 367 (internal citations omitted).

46. *Williams*, 529 U.S. at 370.

47. *Id.* at 396.

> 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.[48]

Significantly, the above illustrates again the sort of mitigation considered constitutionally relevant in a capital penalty phase. The Supreme Court considered even something as minor as "returning a guard's missing wallet" as noteworthy mitigation.[49]

The *Wiggins* case is a significantly greater incentive for a trial judge to not proceed with a capital case without having a mitigation specialist on board. Prior to trial, defense counsel was offered state funds to retain a "forensic social worker [mitigation specialist] to prepare a social history" but turned it down.[50] They did arrange for a psychological evaluation, found records indicating the defendant had been in foster care, and had a one-page account from a pre-sentence report that indicated the defendant had a miserable youth.[51] At the original sentencing, trial counsel did not proffer any evidence of the defendant's background or life history. In seeking state post-conviction relief, the petitioner presented testimony by a "licensed social worker" who prepared "an elaborate social history report" which relied on "state social services, medical, and school records, as well as interviews with [defendant] and numerous family members."[52] In other words, a mitigation specialist who did his job. That report disclosed, in graphic and sordid detail, the severe physical and sexual abuse the defendant suffered throughout his childhood and youth.[53]

The Supreme Court focused on whether trial counsel's investigation into the defendant's background was reasonable and

48. *Id.* at 395-96 (internal citations omitted).
49. *Id.* at 396.
50. *Wiggins*, 539 U.S. at 517.
51. *Id.* at 523.
52. *Id.* at 516.
53. *Id.* at 516-17.

concluded it was not.[54] The Court then cited the ABA Guidelines at length in concluding that counsel's performance was constitutionally inadequate:[55]

> Counsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989. As [counsel] acknowledged, standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report. Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report. Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as "guides to determining what is reasonable." The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." 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. [The ABA Guidelines noted] that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences[.] [The ABA Standards for Criminal Justice noted that] "[t]he lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. . . . Investigation is essential to fulfillment of these functions."[56]

While the majority opinion did not outright declare that an appropriately investigated social history by a mitigation specialist was constitutionally required in a capital case, the implication was certainly strong to that effect. In fact, Justice Scalia in his dissent noted that the majority "flirts" with the notion that trial counsel has an "inescapable

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54. *Id.* at 523-26.

55. *Id.* at 524-25.

56. *Id.* (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)); Williams v. Taylor, 529 U.S. 362, 396 (2000); 1989 GUIDELINES, *supra* note 23, at Guidelines 11.4.1(C), 11.8.6; ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.41 commentary (1982)).

duty to hire a social worker to construct a so-called 'social history' report."[57]

VI. CONCLUSION

Presiding over a capital case is the most difficult task that faces a trial court, perhaps surpassed only by presiding over the same case again after the decision has been reversed. Early appointment of a mitigation specialist goes a long way toward avoiding this problem and infusing true justice into the process. The 2008 *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* are an invaluable source for trial judges to guarantee that defendants in capital cases will be competently represented. Early appointment of a mitigation specialist, if not an "inescapable duty," is certainly a judicious, wise, and cost-effective way of reaching that goal.

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57. *Wiggins*, 539 U.S. at 546 (Scalia, J., dissenting). See also United States v. Kreutzer, 61 M.J. 293, 305-06 (2005) where the reviewing military court found that denial of the services of a mitigation specialist was an error of constitutional magnitude.