

## A FORMER ALABAMA APPELLATE JUDGE'S PERSPECTIVE ON THE MITIGATION FUNCTION IN CAPITAL CASES

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I have reviewed the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (“Supplementary Guidelines”)<sup>1</sup> from the perspective of a former presiding judge of the Alabama Court of Criminal Appeals who has retired from the bench and has since participated in the defense of indigent prisoners in capital cases. The Supplementary Guidelines are consistent with the well-established and quite obvious judicial philosophy that “[h]ighly relevant—if not essential—to [the judge’s] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.”<sup>2</sup> I have always firmly believed that judges and juries should have as much information as possible before determining whether a defendant should live or die:

The knowledge of the life of a man, his background and his family, is the only proper basis for the determination as to his treatment. There is no substitute for information. The sentencing judge in the federal court

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

2. *Williams v. New York*, 337 U.S. 241, 247 (1949), *superseded by statute*, Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

has the tools with which to acquire that information. Failure to make full use of those tools cannot be justified.<sup>3</sup>

Over the course of my legal career as a prosecutor, judge, and defense attorney, I have come to appreciate the constitutional necessity “that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence.”<sup>4</sup> I am convinced that a mitigation specialist is an absolutely critical member of the capital defense team, and that the mitigation function should be conducted in accordance with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*<sup>5</sup> and the Supplementary Guidelines.<sup>6</sup> This Article will share some of my observations based upon my experiences both from and in front of the bench, which have led me to this conclusion.

At the time I was elected to the Alabama Court of Criminal Appeals in 1976, I was the youngest appellate judge in the nation with a lot to learn. This was not long after the landmark decision in *Furman v. Georgia*.<sup>7</sup> The Court soon began once again deciding capital cases.<sup>8</sup> At the time, I was very much in favor of the death penalty. I had been a prosecutor with the Alabama Attorney General’s office, and, although a practicing Catholic, it seemed that capital punishment was a necessary evil.

In those early years following *Furman*, many of the Alabama trials that resulted in the death penalty were very short. Sometimes a death penalty trial only lasted a day. Mitigating evidence was scant and, outside of the statutory list of mitigating factors,<sup>9</sup> very little of what I have come to know as mitigating evidence was presented to the trial judge and jury. I now realize that there is an entire world outside the

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3. *Id.* at 249 n.14 (quoting Lewis B. Schwellenbach, *Information vs. Intuition in the Imposition of Sentence*, 27 J. AM. JUDICATURE SOC’Y 52, 52 (1943)).

4. *Gregg v. Georgia*, 428 U.S. 153, 189 n.38 (1976).

5. 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>.

6. SUPPLEMENTARY GUIDELINES, *supra* note 1.

7. 408 U.S. 238, 239-40 (1972).

8. Prior to *Furman*, the last person executed in Alabama was William F. Bowen, Jr. (no relation to the author). The next person to be executed in Alabama was John L. Evans, III, in 1983. For a list of Alabama executions, see Ala. Dep’t of Corr., *Inmates Executed in Alabama*, <http://www.doc.state.al.us/execution.asp> (last visited Mar. 24, 2008).

9. ALA. CODE § 13A-5-51 to -52 (2006).

statute and that the statutory list of mitigating circumstances does not even begin to scrape the surface.

The reality is that the death penalty is so political in Alabama that as a practical matter, if you are against the death penalty, you cannot get elected as a judge or any other public official. Once elected, your rulings must reflect your bias for death.<sup>10</sup> If your rulings show that you reverse too many high profile death penalty cases, you will surely be beaten in your bid for re-election. There are very few judges who can withstand that type of pressure.<sup>11</sup> The prosecution enjoys such an advantage in this respect that it is not unusual for an Alabama trial court merely to adopt in total the state's proposed findings of fact and conclusions of law in capital post-conviction cases, misspellings and all. From the appellate level it did not seem so horrendous,<sup>12</sup> but once I entered the pits of trial practice I realized how abhorrent it truly was and is. If a judge is going to impose a sentence of death, the judge should have to write his or her own order.

The very strong political pressure to impose and affirm death sentences in Alabama imposes an extra-heavy duty on the defense team to conduct a thorough investigation so that the judge and jury can

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10. I had one colleague confide in me, "What can I do?" Even though he knew a state witness was probably lying, he told me, "I just can't come out and say that." See generally Steven B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995) (examining the death penalty's prominence in judicial elections).

11. I agree with Justice Stevens's conclusion that Alabama's standardless judicial override of jury life sentences violates the Eighth Amendment, puts the defendant's life in jeopardy twice, and injects improper considerations into the capital sentencing decision:

Community participation is as critical in life-or-death sentencing decisions as in those decisions explicitly governed by the constitutional guarantee of a jury trial. The "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty. Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.

Harris v. Alabama, 513 U.S. 504, 519-20 (1995) (Stevens, J., dissenting) (footnote omitted) (internal citation omitted).

12. Weeks v. State, 568 So. 2d 864, 865 (Ala. Crim. App. 1989).

In this case, Weeks has not raised an objection to the circuit court's verbatim adoption of the State's proposed findings of fact and conclusions of law. However, we issue a caution that courts should be reluctant to adopt verbatim the findings of fact and conclusions of law prepared by the prevailing party. Despite the fact that such a practice is subject to criticism, the general rule is that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous."

*Id.* at 865 (citation omitted).

recognize that the capital defendant is a human being and not just a monster.<sup>13</sup> It does not matter what the statute says about the prosecutor's burden to establish aggravating factors beyond a reasonable doubt.<sup>14</sup> Under Alabama's sentencing scheme, if the jury has found the defendant guilty, they have also found at least one aggravating factor. Therefore, even if the jury recommends life imprisonment, the judge can override that and impose a sentence of death.<sup>15</sup> To defend their clients effectively, defense attorneys must behave as though they have the burden of proof and develop an affirmative case for life. As Professor Gary Goodpaster wrote a quarter century ago: "The defense role at the penalty phase . . . parallels somewhat the plaintiff's role in a civil case: the defense advocate must establish a prima facie case for life."<sup>16</sup>

Because capital prosecutions typically involve horrible crimes that will deeply offend the sensibilities of judges and juries, defense counsel must provide compelling reasons not to execute the defendant. Although that is sometimes difficult, I am convinced that everyone's life contains a reason or a number of reasons why the death penalty should not be imposed. Given the political climate in Alabama, if we only know the defendant from the context of the crime, and do not know him or her as a person, it is almost inevitable that the sentence will be death either through the jury or judicial override, and that the sentence will be affirmed on appeal in the state courts. Mitigation evidence is the defense team's most powerful tool to fight this uphill political battle.

I am not saying that defending death penalty cases in Alabama is hopeless by any means. To the contrary, my experience on the court convinced me that when the background and character of the defendant have been thoroughly investigated and presented, there is a greater chance a death sentence will not be imposed or, if imposed, will be reversed on appeal. I read every page of every record on appeal in every capital case I reviewed as an appellate judge searching for plain error as

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13. Bryan Stevenson has stated it in his usual eloquence:

I believe each person in our society is more than the worst thing they've ever done . . . I believe if you tell a lie, you're not just a liar. If you take something that doesn't belong to you, you're not just a thief. And I believe even if you kill someone, you are not just a killer. There is a basic human dignity that deserves to be protected.

Paul M. Barrett, *Bryan Stevenson's Death-Defying Acts*, LAW SCH., Autumn 2007, at 32, 34, available at [http://www.law.nyu.edu/pubs/magazine/autumn2007/documents/Stevenson\\_000.pdf](http://www.law.nyu.edu/pubs/magazine/autumn2007/documents/Stevenson_000.pdf).

14. ALA. CODE § 13A-5-45(e) (2006).

15. § 13A-5-47(e); see also Scott E. Erlich, Comment, *The Jury Override: A Blend of Politics and Death*, 45 AM. U. L. REV. 1403, 1427 (1996).

16. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 337 (1983).

required.<sup>17</sup> I was convinced in every death penalty case I affirmed that, based on the record before me, the sentence was just.

It always troubled me when, as an appellate judge, I had virtually no information about the defendant. Sometimes I had a vague feeling that there must be more to this story of human tragedy, but without defense counsel having provided a better picture, I was literally helpless. I vividly recall the way I felt on the night of Alabama's first post-*Furman* execution. John Evans was executed on April 22, 1983.<sup>18</sup> Evans stood up before the jury and told them if they did not sentence him to death, he was going to get out and kill them all. He won habeas corpus relief in the Court of Appeals for the Fifth Circuit, which was reversed by the Supreme Court.<sup>19</sup> At some point in the appeal process, Evans dropped his appeals and asked to be executed.<sup>20</sup> I remember the night they executed him. I stayed up until midnight, the time set for execution in Alabama, half expecting heavy black clouds of judgment to roll across the state. Nothing had been filed in the Court of Criminal Appeals on his behalf, so there was nothing for me as a judge to act on. Although at the time I was in favor of the death penalty, I remember having a gut feeling that there was something not right about this; that the state should have no right to kill someone; that killing an individual to prove that murder was wrong simply did not work. It is frustrating as a judge to have a feeling that there is more to a case, but being helpless to act because as an appellate judge you are bound by the record on appeal.

It is our obligation as defense counsel at the trial level to avoid the death penalty by giving the judge a good mitigation case that includes valid reasons why the defendant should not be put to death. In fact, every lawyer in Alabama must understand that the politics of capital punishment are such that in most cases the only way to avoid the death penalty is by thoroughly investigating the client's life story, and presenting the judge and the jury with an affirmative case for a life

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17. ALA. R. APP. P. 45A:

Scope of review in death cases. In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant.

18. See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 413 (1997); see also Ala. Dep't of Corr., *Inmates Executed in Alabama*, <http://www.doc.state.al.us/execution.asp> (last visited Mar. 24, 2008).

19. *Hopper v. Evans*, 456 U.S. 605, 609-10 (1982).

20. See Anthony G. Amsterdam, *The Supreme Court and Capital Punishment*, HUM. RTS., Winter 1987, at 14, 59 n.46; *Final Judgment; Alabama Executes a Murderer*, TIME, May 2, 1983, at 24.

sentence. We have to give the trial jury a reason not to impose the death penalty and the trial judge a reason not to override the jury's decision of life.

Politics aside, trial and appellate judges are human just like the rest of us. If mitigation evidence in the record raises real questions about whether the defendant truly deserves the death penalty, it becomes a lot easier to find error. Indeed, I can recall cases in my career on the bench in which the evidence of insanity was so overwhelming that the Court of Criminal Appeals took the highly unusual step of reversing the verdict of the jury based on overwhelming evidence of legal insanity at the time of the crime.<sup>21</sup> If, for whatever reason, I was convinced that this man or woman did not deserve the death penalty, then the prejudice from trial error became more obvious.<sup>22</sup> It is critically important at all levels in capital litigation to present all the information to the judge that the attorney can uncover to portray the defendant as a human being.

One case that illustrates this point is that of Judith Ann Neelley,<sup>23</sup> who was convicted of the murder of a young girl who was tortured, shot, and thrown off a cliff.<sup>24</sup> The defense presented substantial mitigation at trial, including evidence that Neelley was the victim of brutal domestic violence by her husband, who the defense alleged was primarily responsible for the crime. I remember her attorney breaking down into tears at the oral argument on appeal. Although I (the court) affirmed her conviction and sentence of death,<sup>25</sup> I struggled with the decision and spent extra effort to make sure that I was right. The post-conviction attorneys continued to pursue mitigating evidence, building on what was presented at trial. They developed persuasive evidence that she had experienced horrible things that were similar to the acts that had been committed against the victim of her crimes. In addition, they were able to portray her as a person who found redemption on death row.<sup>26</sup> The defense team helped her to communicate the depth of her remorse, and

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21. See, e.g., *Dixon v. State*, 668 So. 2d 65, 72-73 (Ala. Crim. App. 1994).

22. This is merely a variant of the rule of *Chapman v. California*, 386 U.S. 18, 22 (1967), that "[i]n fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one."

23. *Neelley v. State*, 494 So. 2d 669 (Ala. Crim. App. 1985), *aff'd*, *Ex parte Neelley*, 494 So. 2d 697, 705 (Ala. 1986).

24. *Id.* at 670-71.

25. *Id.* at 682.

26. See *Alabama Leader Spares Condemned Woman*, N.Y. TIMES, Jan. 16, 1999, at A18.

eventually persuaded Governor Fob James to commute her sentence to life.<sup>27</sup>

Another case that sticks in my mind is that of Walter McMillian.<sup>28</sup> I sat on the court that affirmed his death sentence on appeal. At the time, I felt absolutely certain that he was guilty of the crime. Later, however, thanks to the investigation conducted by Bryan Stevenson of the Equal Justice Initiative, evidence was presented proving that McMillian was completely innocent and could not have committed the crime.<sup>29</sup> His conviction for the murder of a young woman had been predicated mainly on witnesses' fabricated statements obtained through coercive police interrogations. Although the jury recommended a life sentence, trial judge Robert E. Lee Key, Jr., overrode the jury's decision and imposed the death penalty.<sup>30</sup> McMillian's trial lawyers did little if any investigation into the facts of the case, so all I had before me was the government's evidence and the government's theory of the case. Stevenson's investigation established, however, that not only had the prosecution presented false evidence to convict him, but that it was nearly impossible for McMillian to have committed the crime.<sup>31</sup> I am now as certain of his innocence as I had been earlier of his guilt. There have been several cases like McMillian's in Alabama, where witnesses lied, evidence was manufactured, or where DNA proved the defendant innocent in spite of eyewitness testimony.<sup>32</sup> To realize that even one innocent person has been put on death row is shocking. How could that happen in America? I do not rest easy knowing that in every case in which I, as an appellate judge, affirmed a sentence of death, I had the same level of certainty about guilt as I had when I affirmed McMillian's conviction and sentence.<sup>33</sup>

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27. See *id.*; *Outgoing Gov. James of Alabama Commutes Woman's Death Sentence*, L.A. TIMES, Jan. 17, 1999, at A12.

28. *McMillian v. State*, 594 So. 2d 1253, 1285 (Ala. Crim. App. 1991).

29. See Barrett, *supra* note 13, at 38-39.

30. *McMillian*, 594 So. 2d at 1273; see also Barrett, *supra* note 13, at 38.

31. See Barrett, *supra* note 13, at 38-39.

32. For details of prisoners exonerated from Alabama's death row, in addition to *McMillian*, see *Cochran v. Herring*, 43 F.3d 1404, 1405 (11th Cir. 1995) (James "Bo" Cochran); *Ex parte Drinkard*, 777 So. 2d 295, 296 (Ala. 2000) (Gary Drinkard); *Quick v. State*, 825 So. 2d 246, 262 (Ala. Crim. App. 2001) (Wesley Quick); *Padgett v. State*, 668 So. 2d 78, 83 (Ala. Crim. App. 1995) (Randall Padgett).

33. I am reminded of Bryan Stevenson's comment after winning the freedom of his innocent client, former Alabama death row inmate Walter McMillian: "It was too easy for the state to convict someone for that crime and then have him sentenced to death. And it was too hard in light of the evidence of his innocence to show this court that he should never have been here in the first place." *Man Freed After Spending Six Years on Alabama's Death Row*, DALLAS MORNING NEWS, Mar. 3, 1993, at 6A.

During my eighteen years as a Court of Criminal Appeals judge, my views on the death penalty evolved. One thing that never changed, however, is my appreciation for the fact that defense counsel must present all available mitigating evidence in order to enable appellate courts to make reliable decisions in capital cases.<sup>34</sup> By failing to thoroughly investigate, develop, and present mitigating evidence, counsel “creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.”<sup>35</sup> It is therefore “essential . . . that the [court] have before it all possible relevant information about the individual defendant whose fate it must determine.”<sup>36</sup> In all of these cases, we are dealing with an individual who has a mother, a father, and a story to tell that reveals his or her basic humanity, and who must have a chance for redemption. The only way we can show that is through mitigation. It is a disservice to the entire system—judges, jurors, the public, and victims of crime—to impose and carry out death sentences without a thorough investigation, as described in the Supplementary Guidelines.<sup>37</sup>

I left the Court of Appeals in 1995 and returned to the practice of law. My first experience with the death penalty as a defense attorney was the case of Eric Rudolph, who was accused of a series of bombings in Georgia and Alabama that included nightclubs, abortion clinics, and the 1996 Olympic bombing in Atlanta.<sup>38</sup> Off-duty police officer Robert Sanderson was killed in the bombing of a Birmingham family planning clinic, and forty-four-year-old Alice Hawthorne died in the blast at the Atlanta Olympics. More than 120 others were injured in the bombings.<sup>39</sup> I had been in my office in downtown Birmingham when the bomb that killed Officer Sanderson exploded. From there I could see the cloud of smoke caused by the explosion.

Two days after Rudolph’s arrest, a federal judge called me out of the blue and asked if I would be willing to defend Rudolph. Although I had never before defended a capital case, I agreed to join the defense team, which at that time had not been selected by the judge. That team

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34. See Goodpaster, *supra* note 16, at 318.

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

36. Jurek v. Texas, 428 U.S. 262, 276 (1976), *overruled by* Abdul-Kabir v. Quarterman, 127 S. Ct. 1654, 1671 (2007).

37. See SUPPLEMENTARY GUIDELINES, *supra* note 1, at Introduction.

38. See Jeffrey Gettleman & David M. Halbfinger, *Suspect in '96 Olympic Bombing and 3 Other Attacks Is Caught*, N.Y. TIMES, June 1, 2003, at A1.

39. See Don Plummer & Cameron McWhirter, *Rudolph Cuts Deal: Olympic Bombing Suspect to Plead Guilty*, ATLANTA J.-CONST., Apr. 9, 2005, at A1; Gettleman & Halbfinger, *supra* note 38, at A1.

eventually included attorneys Judy Clarke and Michael Burt and mitigation specialist Scharlette Holdman.<sup>40</sup> Working with Clarke and Burt was a privilege and an education in and of itself.

The first time I met Scharlette Holdman was at a meeting of the defense team, which at that time did not include Clarke and Burt. Because this was my first capital case, I had never worked with a mitigation specialist before, so I did not know what to expect. When she started talking, I knew that she knew what we were supposed to be doing. I thought to myself, "Thank God, we have some direction." After that meeting, I talked to Scharlette almost every day.

As the case went on, we learned a great deal, not just about the facts of the case, but also about the story behind the facts and why things occurred, and to a degree why Eric was the way he was. The Supplementary Guidelines are practically a blueprint for how the defense team functioned for Eric Rudolph. We had a defense team that included "no fewer than two attorneys qualified in accordance with ABA Guideline 5.1, an investigator, and a mitigation specialist."<sup>41</sup> Being new to capital defense, I could not have had better teachers than Michael Burt, Judy Clarke, and Scharlette Holdman. Based on that experience, I do not see how in the world you could have a death penalty defense team without a mitigating specialist as an integral member. The mitigation specialist is the glue that holds everything together.

The Supplementary Guidelines provide that the defense team "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."<sup>42</sup> This is easier said than done. Anyone facing the death penalty is frightened and distrustful of lawyers chosen by the court to present her defense. It is unreasonable to expect anyone in Eric's stressful circumstances to trust an attorney he had just met. Probably the most important thing that the mitigation specialist taught us was how to communicate with Eric. We had to build a bond of trust, which is not easy to do under the worst of circumstances in a jail cell. She accompanied Judy and me to visit Eric; she knew exactly what to say and how to say it, and when to confront him and when to back off. We sincerely wanted to help Eric, but the

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

41. ABA GUIDELINES, *supra* note 5, at Guideline 4.1(A)(1). Because this was my first death penalty case, I was not one of the lawyers who was "qualified under Guideline 5.1."

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

mitigation specialist helped us understand that we couldn't expect Eric to believe that unless we demonstrated our level of commitment. That insight was invaluable. I had never thought of that as mitigation, but getting your client to trust you, at least to some degree, is perhaps the most important function of the defense team.

The same is true with respect to witnesses; it was important to build rapport with Eric's family and people who knew him. The mitigation specialist would interview witnesses and family members, and before we knew it, she would be having dinner with the family and learning information that was so important because she knew how to talk to people. That is an art and a science overlooked by many attorneys because we are too busy drafting motions, preparing for trial, learning the facts, and getting our strategies down.

The Supplementary Guidelines also call for team members to "conduct in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history or who would support a sentence less than death."<sup>43</sup> In addition, they acknowledge that "[m]ultiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation."<sup>44</sup> No defense counsel should consider himself the "face of the case" and the only person to deal with the family.

In keeping with the standard, the defense team visited Eric almost daily. After our visits with Eric, we would return to the office and discuss with the rest of the defense team what we had learned so Eric would know that this was a team effort. This also helped the team follow up on Eric's questions or concerns and helped to guide the defense investigation. Our frequent visits helped us get to know who Eric Rudolph was, which was a tremendous part of the case.

I also witnessed first-hand what it meant to conduct "culturally competent"<sup>45</sup> interviews with witnesses and with my client. There were times when I would come away from an interview with a witness, and I would jump to conclusions that were judgmental. I remember walking away from a witness and just shaking my head and saying, "Oh, that was awful," or "What a jerk!" The mitigation specialist would say, "Well, Bill, you have to remember this person suffered this," or "This person's dealing with that," or "Poor thing." She showed me the other side of the

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43. *Id.* at Guideline 10.11(C).

44. *Id.*; see also Holdman & Seeds, *supra* note 40, at 904.

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

coin. Then I felt like a total dunce. It was incredible to work as part of a team that was so in tune with the human side of the equation. I learned to compassionately and professionally look for cultural, scientific, or medical explanations for what we had seen and heard, and we discussed how to explore those theories.

This approach to representing our client eventually helped us overcome the barriers to disclosure of mitigating evidence. Because the case ended in a negotiated plea,<sup>46</sup> much of the mitigating evidence that we developed remains privileged and confidential. By learning and understanding Eric's background and upbringing, we came to understand Eric as a man and as a person, a relationship that was essential to the ultimate resolution of the case, and that would have been essential to presentation of a defense at trial. It helped me to be personally involved with our client, to know him as best I could, rather than treating him as an object or just somebody I represented. It allowed me to work harder and longer, and actually have more passion for my case. To know that Eric Rudolph is an individual and not just the man who committed these horrible acts is to have compassion and appreciation for him as a human being. In getting to know Eric, I learned a lot from him. He is compassionate. He has a great sense of humor. Eric is not the monster many believe him to be. He is an intelligent young man who reads philosophy and history. The goal of the mitigation investigation we were conducting was to eventually get the jury to see Eric as we saw him.

The ability to understand our client affected everything we did for him. We learned that we could not separate mitigation from the determination of guilt or innocence. The more work we did, the more we were able to go into Eric's background, the more that influenced the direction of the investigation in the factual part of the case. We were able to improve Eric's chances of avoiding execution by acting in the spirit of the Supplementary Guidelines, which provide that "the development and presentation of mitigation evidence must be incorporated into the defense case at all stages of the proceedings from the moment the client is taken into custody."<sup>47</sup>

All of the work that the defense team was doing for and with Eric created an opportunity for him to settle his case without the multiple trials in multiple jurisdictions. Our relationship with Eric enabled him to be an active member of the team whose input was highly valued and

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46. Dan Eggen, *Rudolph to Plead Guilty to Bombings*, WASH. POST, Apr. 9, 2005, at A1.

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

respected. Eric was able to accept a sentence of life without parole, without compromising his core beliefs.<sup>48</sup> Through the mitigation function, Eric's defense team was able to arrive at a settlement that not only avoided the death penalty, but also provided finality to the victims and served the best interests of the public.

My experience in the Rudolph case has made me a real convert. I cannot imagine being involved in a capital case without the assistance of a mitigation specialist as a member of the team. Even in the most terrible crimes, a proper mitigation investigation could move a jury to life, just as the Supreme Court suggested in *Williams v. Taylor*,<sup>49</sup> *Wiggins v. Smith*,<sup>50</sup> and *Rompilla v. Beard*.<sup>51</sup> Since Rudolph, I have represented several defendants in capital cases. A mitigation specialist has always been on the defense team. There are very good mitigation specialists in Alabama who perform in accordance with the standards described in the Supplementary Guidelines. I have learned that in all of these cases, we are dealing with an individual who has a story to tell that reveals him or her as a human being capable of finding redemption. If we can make this monster that we call the defendant human, people will not want to execute him, even if they are in favor of the death penalty. But we have to make our client human, and the only way we can do that is through mitigation.

At first blush, the amount of time we spent with Eric may seem like an extraordinary cost. In the long run, it was the only way to build a trusting attorney-client relationship that allowed Eric to make decisions in his best interests. Further, our relationship with Eric was crucial to resolving the case in a manner that allowed the government to save the millions of dollars that would have been expended in as many as four death penalty trials. Compared to those costs, the amount of time invested in getting to know our client and earning his trust was relatively inexpensive.<sup>52</sup>

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48. Plummer & McWhirter, *supra* note 39, at A1.

49. 529 U.S. 362, 398 (2000).

50. 539 U.S. 510, 536-37 (2003).

51. 545 U.S. 374, 393 (2005).

52. A committee of federal judges headed by Hon. James R. Spencer studying the costs in capital cases found that "[c]onferences with the client comprised 9% of attorney hours, reflecting the time required to establish and sustain a professional relationship in a federal death penalty case." SUBCOMM. ON FED. DEATH PENALTY CASES, JUD. CONF. COMM. ON DEFENDER SERV., FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION Part I.B.4.c (1998), available at <http://www.uscourts.gov/dpenalty/4REPORT.htm>. The Spencer Committee found that "consultation with the client is vastly more time consuming and demanding in a death penalty case" because "the nature of the penalty phase inquiry requires a relationship which encourages the client to disclose his or her most closely guarded life

Working with mitigation specialists has also taught me that the licensed criminal case investigators we use cannot fulfill the mitigation function, and certainly can't do both jobs in the same case. The trained investigator, the retired FBI agent, the retired police officer, the retired parole officer cannot do mitigation work because mitigation is so much more than just finding facts. They can go up to a stranger at his house and talk to him and get his opinions and facts, but good mitigation specialists can come away and tell you so much more. They observe so much more. They take in so much more than an investigator whose approach may only be, "Just tell me the facts."

A mental health expert is also not an adequate substitute for a mitigation specialist. For one, I do not think they would drop in on families, or track down and interview witnesses. Second, the specialty is not broad enough; the psychologist's or psychiatrist's field of expertise is too narrow. You need somebody with a much broader field who gets involved deeply in the defense case. In Rudolph's case, we never had a defense team meeting without the mitigation specialist present. You could not do that with a forensic psychologist whom you intend to put on the witness stand. Discovery rules would make him a mole for the other side.<sup>53</sup>

The Supplementary Guidelines are a great tool for the defense bar to demonstrate to judges the need to fund competent mitigation work, just as the ABA Guidelines have helped defense counsel. It helps to have something formal, in writing, which is tied to the national standard so that judges understand that if the defense team is not performing on this level, we are incompetent. Without a mitigation specialist, I would feel incompetent, not because I want to be, but because I cannot do an adequate job without one. It is also important to assert the defendant's right to make an *ex parte* showing of the need for a mitigation specialist and to return to the court for additional funding for him or her whenever it becomes necessary. In my experience, even conservative judges become believers when they see the work product that the defense team produces with the assistance of the mitigation specialist.<sup>54</sup>

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history with the lawyer," and also because a high level of trust is "vitaly important if the lawyer is to convince the defendant to consider an offer to plead guilty, especially because what is offered is likely to be life imprisonment without the possibility of parole." *Id.* at Part I.B.4.a.

53. See FED. R. CRIM. P. 16(b)(1)(C) ("The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use . . . as evidence at trial . . .").

54. The ABA Guidelines state:

At every stage of the case, lead counsel is responsible, in the exercise of sound professional judgment, for determining what resources are needed and for demanding

My experience has given me only the highest personal and professional respect for those attorneys, mitigation specialists, and investigators who defend capital cases. I was privileged to work with some of the very best—Clarke, Burt, and Holdman. Yet some of the most dedicated and talented death penalty defense attorneys and advocates are found in Alabama, my home state. Through different paths we each seek to arrive at the same end of saving our clients from death. The mitigation specialist is an essential part of that journey.

More generally, the full presentation of the mitigation case serves interests that go beyond those of the defendant. Just as the ABA Guidelines themselves are premised on the belief that the ultimate beneficiary of the effective performance of capital defense counsel is the justice system itself,<sup>55</sup> so too do the Supplementary Guidelines advance the proposition that the more is known about the defendant's life the more everyone involved—including prosecutors, judges, and family members—can have confidence in the soundness with which they have discharged the heavy burdens they all bear.

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that the jurisdiction provide them. Because the defense should not be required to disclose privileged communications or strategy to the prosecution in order to secure these resources, it is counsel's obligation to insist upon making such requests *ex parte* and in camera.

ABA GUIDELINES, *supra* note 5, at Guideline 10.4, commentary (footnotes omitted); *see Ex parte Moody*, 684 So. 2d 114, 119-20 (Ala. 1996).

55. *See* Eric M. Freedman, *The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-Conviction Proceedings*, 5 J. APP. PRAC. & PROC. 325, 332 (2003).