

## CULTURAL COMPETENCY IN CAPITAL MITIGATION

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### I. INTRODUCTION

“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man,”<sup>1</sup> and contemporary constitutional standards recognize “[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual.”<sup>2</sup> Hence, “consideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death.”<sup>3</sup> The obvious link between culture and the mitigation function of capital defense teams is summed up by anthropologist Clifford Geertz: “there is no such thing as a human nature independent of culture.”<sup>4</sup> Because “[c]ulture is an all-pervasive medium,”<sup>5</sup> cultural competency is essential to the ability of capital defense teams to discover and reveal the humanity of the accused.

Given the integral connection between culture and humanity, cultural anthropology has much in common with mitigation investigation in capital cases. A capital defense team strives to explain a client’s life through the comprehensive process of compiling a social history, thereby revealing the client’s humanity and providing important context

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1. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

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

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

4. Clifford Geertz, *The Impact of the Concept of Culture on the Concept of Man*, in *THE INTERPRETATION OF CULTURES* 33, 49 (1973).

5. BENJAMIN JAMES SADOCK & VIRGINIA ALCOTT SADOCK, KAPLAN & SADOCK’S *SYNOPSIS OF PSYCHIATRY* 169 (9th ed. 2003).

for the client's conduct at the time of the crime.<sup>6</sup> The cultural anthropologist applies similar perspectives and methods. Like capital defense, "ethnography is establishing rapport, selecting informants, transcribing texts, taking genealogies, mapping fields, keeping a diary, and so on."<sup>7</sup> It calls for cultural self-awareness, knowledge of and immersion in the relevant culture, and non-judgmental receptivity to new information. The same method succeeds in capital mitigation investigation because the defense team must account for culture in investigating, documenting, and presenting the client's social history. This includes a client's interpretation of experiences, his notions of responsibility and duty, expectations of the future, relationships with other cultures, values and beliefs about family life, role-related behavior, decision-making patterns, and understanding and expression of mental illness and impairments. The similarity between ethnography and mitigation has understandably led to a call for drawing out what anthropologists can learn from well-established capital mitigation techniques.<sup>8</sup>

This Article examines the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* ("Supplementary Guidelines"),<sup>9</sup> focusing on the necessity for cultural competency in capital defense. Our purpose is to explain the skills that make up cultural competency, how those skills relate to the mitigation specialist's role, and, by extension, how they relate to the defense team in a capital case. Following this Introduction, Part II discusses the concept of culture and explains "cultural competency" in the context of professions that involve human services, including the law. Part III explains the well-established and significant role of culture and cultural competency in the standards of performance of capital defense teams. Part IV examines specific aspects of culturally competent investigation important to the mitigation function of capital defense teams. Throughout, we consider the role of cultural competency in the overall defense of a capital case, which extends beyond preparation and

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6. *Wiggins v. Smith*, 539 U.S. 510, 523-27, 535 (2003) (affirming that defense counsel's failure to prepare a social history of a client in a capital case "[d]oes not meet the minimum standards of the profession") (quoting *Wiggins v. State*, 724 A.2d 1, 16 (Md. 1999)).

7. *Thick Description: Toward an Interpretive Theory of Culture* in *supra* note 4, at 6.

8. Jesse Christopher Cheng, *Life, Frontloaded: Advocacy, Anticipation, and Death Penalty Mitigation* (Sept. 1, 2007) (unpublished Ph.D. dissertation, University of California, Irvine) (on file with authors).

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

presentation of mitigating evidence at sentencing to all facets of capital representation, from building a relationship with the client to reaching a plea, from the guilt-innocence trial to, if necessary, seeking clemency.

## II. CULTURE AND CULTURAL COMPETENCY

The Supplementary Guidelines describe the mitigation specialist's role in terms of "cultural competency," the touchstone term for an ethnocultural approach common to anthropology and other professional standards that has long been required in investigation, client communication, and overall strategic planning in capital cases:

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 . . . 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.<sup>10</sup>

This requirement echoes other professional standards articulating a practice norm of cultural competency, promulgated by organizations in the fields of social work, education, medicine and health services, mental health, and law. A discussion of the evolving concept of culture and the role that it has played in the human services professions is necessary to fully appreciate the depth and breadth of what it means to be "culturally competent."

### A. Culture and Individuality

E. B. Tylor expressed the classical view of "culture" as follows: "Culture or Civilization, taken in its wide ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society."<sup>11</sup> More succinctly, Clifford Geertz defined culture as the patterns by which individuals "make[] sense of the events through

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10. *Id.* at Guideline 5.1(C) (emphasis added).

11. EDWARD B. TYLOR, PRIMITIVE CULTURE: RESEARCHES INTO THE DEVELOPMENT OF MYTHOLOGY, PHILOSOPHY, RELIGION, LANGUAGE, ART, AND CUSTOM 1 (John Murray 1913) (1871).

which [they] live[.]”<sup>12</sup> Geertz’s perspective on culture represents a shift from an outside-in, institution-based perspective to an inside-out, individualized view, a “redefinition of culture”<sup>13</sup> that made a lasting impression in anthropology.<sup>14</sup> From the individualized perspective, enculturation—the manner in which culture shapes individual conduct—is more than the imposition of external dictates or compulsions.<sup>15</sup> From this view, now pervasive in anthropology and other academic disciplines, culture is an ever-developing dialogue—a dialectic<sup>16</sup>—between the individual and his or her surroundings. No longer reified as something that exists on foreign shores or in native rituals,<sup>17</sup> no longer a mere synonym for “human refinement and domestication,”<sup>18</sup> culture exists in the different patterns by which we parent, build families, perform work, define education, seek community, find hope, and overcome or fall prey to adversity.

Culture is not limited to or defined completely by race or ethnicity, nor by nationality or region, nor by class or religion, nor even by the neighborhood in which one lives or the organizations or other groups to which one belongs.<sup>19</sup> Culture is not something that a minority group has, but whichever demographic characterizes itself as dominant lacks.<sup>20</sup> Cultural imperatives and dictates exist for everyone in varying degrees.<sup>21</sup>

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12. *Person, Time, and Conduct in Bali*, in *THE INTERPRETATION OF CULTURES*, *supra* note 4, at 363.

13. *Preface*, in *THE INTERPRETATION OF CULTURES*, *supra* note 4, at vii.

14. See ROBERT C. HUNT, *BEYOND RELATIVISM: RETHINKING COMPARABILITY IN CULTURAL ANTHROPOLOGY* 1-4 (2007) (comparing and contrasting classical and contemporary perspectives in cultural anthropology).

15. William I. Torry, *Culture and Individual Responsibility: Touchstones of the Culture Defense*, 59 *HUM. ORG.* 58, 59-68 (2000); see ROY WAGNER, *THE INVENTION OF CULTURE* 80 (1975) (describing culture as an “invention” of self).

16. See generally ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 217-45 (2000) (discussing contemporary anthropological perspectives on the definition of “culture”).

17. See generally CLAUDE LEVI-STRAUSS, *TRISTES TROPICQUES* (1955).

18. WAGNER, *supra* note 15, at 21.

19. As Paul Rabinow summed up, “[c]ulture is interpretation.” PAUL RABINOW, *REFLECTIONS ON FIELDWORK IN MOROCCO* 150 (1977).

20. See Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 *HASTINGS RACE & POVERTY L.J.* 131, 134-35 (2006) (“Culture is consequently something we all have, not simply a marker of people whom we define as ‘other.’”); see also Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 *CAL. L. REV.* 1053, 1097-1103 (1994) (describing the “cultural defense” and criticizing its use when it “essentializes culture by defining it as the exclusive province of particular groups” such that “some groups have culture, others do not”).

21. Cultural dictates are “imperatives for action selectively applicable within a social group” that “come with significant costs and rewards incorporated into structures of group influence.” Torry, *supra* note 15, at 64; see also ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 11

While a society's institutions and rules retain continued significance in anthropological study and ethnography, the contemporary focus incorporates the subject's own insights about his social experience, taking account of how an individual interprets and determines the consequences of his social and cultural conditions, interprets his relations with society's institutions and rules, and interprets his life.<sup>22</sup> Culture is defined more by individual perception than by viewer projection.<sup>23</sup>

This inside-out view of culture is essential to understanding cultural competency in a capital defense context for two reasons. First, to enable capital decision-makers to respond to the client's intrinsic humanity, the defense team must investigate and present the anecdotal details of the client's life, which portray "the individual's existence as a member of the human community."<sup>24</sup> Second, but equally important, viewing culture from the individual's perspective avoids the misinterpretation of culture as stereotype. Cultural competency eschews reliance on stereotype. The ever-present danger of stereotype lies not only in overlooking elements of culture that seem ordinary, but even more dangerously in equating cultural dictates with cultural compulsion—in assuming that cultural dictates apply with equal force to all who share a cultural background.<sup>25</sup> Culture painted with a broad brush such as to distinguish "us" from "them" plays on and entrenches stereotype, and fails to address fully the complex effects of cultural dictates on individuals.<sup>26</sup>

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(2004) (noting that fundamentals of a culture, such as its traditions, may not be agreed upon uniformly by those identifying with the group).

22. See generally HUNT, *supra* note 14 (explaining various perspectives in contemporary cultural anthropology).

23. See, e.g., ANNELISE RILES, *THE NETWORK INSIDE OUT* 19-20 (2000) (describing this as turning the traditional mode of anthropology "inside out"); see generally Cheng, *supra* note 8, at 128.

24. *Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J., concurring).

25. Torry, *supra* note 15, at 64 (Discussing how "1) all dictates do not compel every member of a group; 2) dictates are not equally obligatory; and 3) group members are variably susceptible to a given dictate's demands. Susceptibility is conditional upon the strength of self-group identification (social identification)."). "It is not enough," Torry continues, "that one internalize a dictate: to prove compulsion, the [dictate] must sufficiently compel an act." *Id.* at 67.

26. See AMSTERDAM & BRUNER, *supra* note 16, at 247; Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1583 (2004) (highlighting concern about juries imputing stereotypes to individual capital defendants). Volpp notes the problematic presumption that "culture for communities of color is a fixed, monolithic essence that directs the actions of community members." Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J. L. & HUMANITIES 89, 94 (2000). She notes that the presumption that minorities follow cultural dictates also ignores "the complex ways in which power actually functions in particular communities." *Id.* at 113. And on a

Maintaining an us/them dichotomy has added potential for negative effects in the uniquely dehumanizing context of capital sentencing. Craig Haney argues that the mechanism of the modern era of capital trials succeeds by alienating the defendant from the jury.<sup>27</sup> It is only through this process of dehumanization, he suggests, that jurors can perform their task without feeling that they have compromised their own humanity.<sup>28</sup> Accordingly, presenting cultural mitigation in an us/them manner is a poor strategy in a capital sentencing proceeding, in which alienation or dehumanization works toward a death sentence. Cultural information, properly used to explain the defendant to the jury, on the other hand, presents a “reality of . . . personhood.”<sup>29</sup>

The case of James Harlow provides a compelling recent example. There, the United States District Court for the District of Wyoming vacated a death sentence, finding counsel ineffective in part for failing to investigate mitigating evidence concerning Harlow’s “adaptation to prison culture.”<sup>30</sup> At Harlow’s sentencing trial, the prosecution had presented uncontested evidence of a fight between Harlow and another inmate named Schaeffer in support of its claim that Harlow had “continuing violent tendencies.”<sup>31</sup> Years later, videotaped testimony by prison officers and prisoners, including Schaeffer, showed the federal habeas court that Harlow was a “peaceable inmate,” who had built “loving relationships with other inmates and their families.”<sup>32</sup> The

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broader level it ignores disparities in public needs, such as school funding. *Id.* at 96-99; *see also* Torry, *supra* note 15, at 64.

27. Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1454 (1997); *see also* AMSTERDAM & BRUNER, *supra* note 16, at 16 (suggesting that the practice of condemning the “other” is innate to American culture).

28. *See* Haney, *supra* note 27, at 1447-48, 1474; *see also* Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 26-27, 67 (2000) (concluding that while empirical studies reveal that jurors experience a variety of emotional responses to the sentencing decision in capital cases, “[e]mpathy is indeed a comparatively scarce commodity”).

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

People like Hannibal Lecter [sic] and Mickey and Mallory [Knox] do not exist. To the extent to which there are persons who manifest even the *slightest* resemblance to these terrifying figures—and even then only because of what they have done, not who they are—they exist in numbers so utterly insignificant as to be literally irrelevant to any meaningful discussion of the death penalty.

*Id.* at 559; *see also* Haney, *supra* note 26, at 1582-87 (explaining the need for counsel to present defendant life history information as part of a broader social framework so that jurors can relate to the defendant).

30. Harlow v. Murphy, 2:05-cv-00039-CAB slip op. at 33 (D. Wy. Feb. 15, 2008).

31. *Id.* at 41.

32. *Id.*

evidence concerning Harlow's life in prison and adaptation to prison culture explained that the assault the prosecution relied on was, in the context of the prison community, a reasonable response to Schaeffer's "thinly veiled threat to kill [Harlow]."<sup>33</sup> The district court reasoned that if trial counsel had fully investigated Harlow's circumstances in prison, counsel could have demonstrated that Harlow was "not a dangerous person, but in a dangerous place."<sup>34</sup>

The recent case of Isidro Marquez-Burrola, who was sentenced to death in 2003 for killing his wife of seventeen years,<sup>35</sup> is another excellent example of the contrast between cultural competency and cultural incompetency on the part of the capital defense team. The culturally incompetent trial team built his defense on the negative, one-dimensional stereotype of a jealous Mexican male moved to violence by his wife's unfaithfulness.<sup>36</sup> The dehumanizing reliance on stereotype produced a death sentence. The culturally competent post-conviction team, on the other hand, presented a detailed mitigation case which included a Mennonite farmer who "spoke of a close friendship with Appellant that transcended their different ethnic and cultural backgrounds."<sup>37</sup> The court noted that evidence that Marquez-Burrola donated blood to another Mennonite man "said as much about the Mennonites' esteem for Appellant as it did about Appellant's willingness to help others."<sup>38</sup> This culturally sensitive portrayal of Marquez-Burrola and his witnesses gave the court a culturally meaningful context through which to view Marquez-Burrola's intrinsic goodness, which moved the court to commute his death sentence.<sup>39</sup>

In sum, culture is not something that can be defined at first glance, any more than other essential features of a person can be determined superficially (for example, mental retardation, mental illness, social functioning, education, or employment). But articulations of culture can become better informed through persistent and diligently attentive immersion in cultural contexts, as described in the Supplementary Guidelines.

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33. *Id.* at 42; *see also id.* at 43-44.

34. *Id.* at 44.

35. Marquez-Burrola v. State, 2007 OK CR 14, ¶ 1, 157 P.3d 749, 753.

36. *Id.* at ¶ 57, 157 P.3d at 767.

37. *Id.* at ¶ 52 n.19, 157 P.3d at 765 n.19. For a more extensive discussion of the case, see Gregory J. Kuykendall, Alicia Amezcua-Rodriguez & Mark Warren, *Mitigation Abroad: Preparing A Successful Case for Life for the Foreign National Client*, 36 HOFSTRA L. REV. 989, 1013-17 (2008).

38. Marquez-Burrola, 2007 OK CR 14 at ¶ 52 n.19, 157 P.3d at 765 n.19.

39. *Id.* at ¶ 60, 157 P.3d at 768.

### B. Cultural Competency

Cultural differences affect and alter the relationship between a service professional and her client. They may obstruct the effectiveness of the professional's work, and consequently hinder protection of the client's health, well-being, or legal rights.<sup>40</sup> Increased awareness of culture's impact on human services has given rise to the concept of "cultural competency,"<sup>41</sup> which practitioners must possess.<sup>42</sup> Cultural

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40. In medicine, the United States Department of Health and Human Services, Office of Minority Health stresses that "because health care is a cultural construct, arising from beliefs about the nature of disease and the human body, cultural issues are actually central in the delivery of health services treatment and preventive interventions." Dep't of Health and Human Servs., Office of Minority Health, Cultural Competency, <http://www.omhrc.gov/templates/browse.aspx?lvl=2&lvlID=11> (last visited Apr. 12, 2008); U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF MINORITY HEALTH, NATIONAL STANDARDS FOR CULTURALLY AND LINGUISTICALLY APPROPRIATE SERVICES IN HEALTH CARE, FINAL REPORT 72 (2001), available at <http://www.omhrc.gov/assets/pdf/checked/finalreport.pdf> [hereinafter CLAS] (Standard 6 holds that language barriers specifically may have devastating effects on the quality of health care a client receives); see also Georgetown Univ. Ctr. for Child & Human Dev., Nat'l Ctr. for Cultural Competency, Cultural & Linguistic Competence Policy Assessment ("CLCPA"), <http://www.clcpa.info> (last visited Apr. 12, 2008) (the CLCPA's purpose is "to assist community health centers to advance and sustain cultural and linguistic competence"). For example, culture may affect the illnesses to which patients succumb: certain culturally engrained patterns of response generate pressures that result in unique mental illnesses, culture bound syndromes or folk maladies that an American medical manual may not consider illness. See, e.g., ARTHUR KLEINMAN, SOCIAL ORIGINS OF DISTRESS AND DISEASE: DEPRESSION, NEURASTHENIA, AND PAIN IN MODERN CHINA 144-45 (1986). Symptoms may be easily misjudged, discarded as mere stress, or overlooked entirely. See KAPLAN & SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 494-95 (Benjamin J. Sadock & Virginia A. Sadock eds., 7th ed. 2000). And a client's receptiveness to treatment may depend on differing interpretations of disability—what one culture sees as a disability, another may see as a blessing or reward (for example, the cause of a disability may be seen as spiritual rather than physical and the disability therefore a blessing); and some recognized diseases without manifest symptoms (for example, high cholesterol or HIV) may not be believed. See CLAS, *supra* at 54.

In general, cultural dissonances will arise in social work, legal, medical, and psychiatric domains due to divergent cultural views of the family (regarding, for example, which persons beyond the nuclear family are appropriate decision-makers), differing views of the appropriate degrees of intimacy expressed in personal versus professional roles, cultural misinterpretations of body language, and historical distrust. See, e.g., John P. Wilson, *Preface* to CROSS-CULTURAL ASSESSMENT OF PSYCHOLOGICAL TRAUMA AND PTSD, at xi (John P. Wilson & Catherine So-kum Tang eds., 2007) (emphasizing that cultural assessment of trauma in children and adolescents requires taking "special nuances . . . into consideration such as differences in emotional expression, reporting practices, parent reporting, self-descriptive interpretations of symptoms and behaviors, . . . personality, gender differences, families and acculturation, risk and resilience factors").

41. Similar concepts include "cultural literacy" and "ethnic competency." Christine Zuni Cruz, *Toward a Pedagogy and Ethic of Law/Lawyering for Indigenous Peoples*, 82 N.D. L. REV. 863, 889 (2006) (rejecting the term "cultural competency" in favor of "cultural literacy," due to the implications of the word "competency" in the former); Joseph S. Gallegos, *The Ethnic Competence Model for Social Work Education*, in COLOR IN A WHITE SOCIETY 1-4 (Barbara W. White ed., 1984)

competency is at root a collection of knowledge, abilities, and skills, which, as now set forth in professional standards, is a normative professional requisite. A pioneer publication on cultural competency provided the following definition, since adopted by national social work, health service, and mental health associations:

Cultural competenc[y] is a set of congruent behaviors, attitudes, and policies that come together in a system, agency or among professionals and enable the system, agency, or those professionals to work effectively in cross-cultural situations. The word “culture” is used because it implies the integrated pattern of human behavior that includes thoughts, communications, actions, customs, beliefs, values, and institutions of a racial, ethnic, religious, or social group. The word

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(defining and using the term “ethnic competence” in relation to social workers in “cross-cultural settings”).

42. The CLAS Standards, *supra* note 40, are a prominent example. Noting the increasing population diversity in the United States and the different ways in which health care institutions addressed cultural and linguistic diversity, the Office of Minority Health passed the fourteen CLAS standards to provide guidance for health care organizations and individual clinicians. See JULIA PUEBLA FORTIER & DAWN BISHOP, SETTING THE AGENDA FOR RESEARCH ON CULTURAL COMPETENCE IN HEALTH CARE 3-4 (Cindy Brach ed., 2004). The CLAS standards were “[b]ased on an analytical review of key laws, regulations, contracts, and standards currently in use by Federal and State agencies and other national organizations” and developed with input from a nationwide public comment process and the guidance of two national project advisory committees. CLAS, *supra* note 40, at 1, 15. The standards have subsequently become the model for other government and private sector health care efforts. FORTIER & BISHOP, *supra*, at 3; see, e.g., The Commonwealth Fund, Innovations, <http://www.cmwf.org> (last visited Apr. 12, 2008). Cultural competency is now stressed as standard in all fields of medicine (for example, nursing). Irena Papadopoulos & Shelley Lees, *Developing Culturally Competent Researchers*, 37 J. ADVANCED NURSING 258, 259, 263 (2002); see also Joyce Newman Giger & Ruth Elaine Davidhizar, TRANSCULTURAL NURSING: ASSESSMENT AND INTERVENTION (Michael S. Ledbetter ed., 3d ed. 1999) (emphasizing the need for the nursing profession to adapt their knowledge and skills to patient culture).

The field of psychiatry has responded similarly. Following the promulgation of the Federal Government Community Mental Health Act of 1963, “differential utilization patterns of disadvantaged minorities . . . became apparent, along with evidence of misdiagnosis of major psychiatric disorders and poorer than expected response to mainstream treatments by socioeconomically deprived, culturally diverse populations who gained access to rapidly growing community-based systems of mental health care.” Manuel Trujillo, *Cultural Psychiatry*, in COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 40, at 492. The American Psychiatric Association answered by recognizing the impact of culture on psychiatric disorders. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) xxxiv (4th ed. rev. 2000) (“Diagnostic assessment can be especially challenging when a clinician from one ethnic or cultural group uses the DSM-IV Classification to evaluate an individual from a different ethnic or cultural group.”); see also Trujillo, *supra* note 40, at 495-96. See generally *id.* at 493-96 for a broad discussion on the impact of culture on psychiatry.

competence is used because it implies having the capacity to function effectively.<sup>43</sup>

As an initial step toward cultural competency, individuals must “value diversity.”<sup>44</sup> This often begins with a self-assessment of one’s own cultural background.<sup>45</sup> Professionals must further understand a client’s cultural history and integrate cultural dynamics and concepts into their practice. Understanding develops through ongoing cultural immersion. Noting that cultural competency is “a lifelong process for social workers who will always encounter diverse clients and new situations in their practice,”<sup>46</sup> the National Association of Social Workers Standards for Cultural Competence in Social Work Practice (“NASW Standards”) require that “[s]ocial workers shall have and continue to develop specialized knowledge and understanding about the

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43. 1 TERRY L. CROSS ET AL., TOWARDS A CULTURALLY COMPETENT SYSTEM OF CARE: A MONOGRAPH ON EFFECTIVE SERVICES FOR MINORITY CHILDREN WHO ARE SEVERELY EMOTIONALLY DISTURBED iii-v, 13 (1989) (reprinted 1992). This piece was one of a series of Monographs sponsored by the DOHHS/OMH. See 2 MAREASA R. ISAACS & MARVA P. BENJAMIN, TOWARDS A CULTURALLY COMPETENT SYSTEM OF CARE: PROGRAMS WHICH UTILIZE CULTURALLY COMPETENT PRINCIPLES 15-16 (1991). Another influential definition of cultural competency is “the integration and transformation of knowledge, information and data about individuals and groups of people into specific clinical standards, skills, service approaches, techniques and marketing programs that match the individual’s culture and increase the quality and appropriateness of health care and outcomes.” KING DAVIS, EXPLORING THE INTERSECTION BETWEEN CULTURAL COMPETENCY AND MANAGED BEHAVIORAL HEALTH CARE POLICY: IMPLICATIONS FOR STATE AND COUNTY MENTAL HEALTH AGENCIES 4 (1997).

44. See NAT’L ASS’N OF SOCIAL WORKERS, NASW STANDARDS FOR CULTURAL COMPETENCE IN SOCIAL WORK PRACTICE, CULTURAL COMPETENCE, available at [http://www.socialworkers.org/sections/credentials/cultural\\_comp.asp](http://www.socialworkers.org/sections/credentials/cultural_comp.asp) (last visited Apr. 14, 2008) [hereinafter NASW STANDARDS]. Cross et al. outline a six-step process in which cultural awareness and cultural sensitivity are necessary prerequisites to cultural competency. Cultural competency evolves from a state of cultural destructiveness followed by states of cultural incapacity, cultural blindness (a liberal state of mind, yet lacking cultural awareness), cultural pre-competency (the first stage involving cultural sensitivity), cultural competency, and, optimally, cultural proficiency (“characterized by holding culture in high esteem”). CROSS ET AL., *supra* note 43, at 13-18.

45. NASW STANDARDS, *supra* note 44. The NASW’s cultural competence standards, for example, demand that social workers perform a self-assessment to “develop an understanding of their own personal and cultural values and beliefs as a first step in appreciating the importance of multicultural identities in the lives of people.” *Id.* at Standard 2. See also Melanie Tervalon & Jann Murray-Garcia, *Cultural Humility Versus Cultural Competency: A Critical Distinction in Defining Physician Training Outcomes in Multicultural Education*, 9 J. HEALTH CARE FOR THE POOR & UNDERSERVED 117, 119-20 (1998) (arguing that oft-used cultural competency training techniques might be improved by the application of “self-reflection” processes to such programs).

46. NASW STANDARDS, *supra* note 44, at Standard 4 (“Supervisors and workers should have the expectation that cultural competence is an ongoing learning process . . .”). Accord, Ellen Wu & Martin Martinez, *Taking Cultural Competency From Theory to Action*, THE COMMONWEALTH FUND, Oct. 2006, at 8, available at [http://www.commonwealthfund.org/usr\\_doc/Wu\\_takingcultcomptheoryaction\\_964.pdf?section=4039](http://www.commonwealthfund.org/usr_doc/Wu_takingcultcomptheoryaction_964.pdf?section=4039) (asserting that “staff training [in cultural competency] is necessary on an ongoing basis”).

history, traditions, values, family systems, and artistic expressions of major client groups served.”<sup>47</sup> The Commentary to the NASW Standards gives some idea of culture’s specificity as well as its range:

Social workers need to possess *specific knowledge* about the *particular* providers and client groups they work with, including the range of historical experiences, resettlement patterns, individual and group oppression, adjustment styles, socioeconomic backgrounds, life processes, learning styles, cognitive skills, worldviews and specific cultural customs and practices, their definition of and beliefs about the causation of wellness and illness, or normality and abnormality, and how care and services should be delivered. They also must seek *specialized knowledge* about U.S. social, cultural, and political systems, how they operate, and how they serve or fail to serve specific client groups. This includes knowledge of institutional, class, culture, and language barriers that prevent diverse client group members from using services.<sup>48</sup>

Professional practice standards of cultural competency implement the techniques of ethnographic anthropology. Self-awareness, cultural immersion, consistent open-mindedness, and ongoing receptiveness—abilities important to effective ethnography<sup>49</sup>—promote a type of detailed description that is essential to provide effective care and to “avoid unidimensional cultural or ethnic stereotypes.”<sup>50</sup> Standards of performance for disciplines such as medicine and social work show that the view of culture as often rooted in ethnicity and nationality but

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47. NASW STANDARDS, *supra* note 44, at Standard 3. See CLAS, *supra* note 40, at Standard 3, at 59 (“Health care organizations should ensure that staff at all levels and across all disciplines receive ongoing education and training in culturally and linguistically appropriate service delivery.”); see also ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 40, at Standard 2.4, commentary (“It is important to note that developing and maintaining cultural competence is an ongoing process.”).

48. NASW STANDARDS, *supra* note 44, at Standard 3, interpretation (emphasis added).

Cultural competence requires explicit knowledge of traditional theories and principles concerning such areas as human behavior, life cycle development, problem-solving skills, prevention, and rehabilitation. . . . Furthermore, culturally competent social workers need to know the limitations and strengths of current theories, processes and practice models, and which have specific applicability and relevance to the service needs of culturally diverse client groups.

*Id.* Likewise, the American Medical Student Association recommends, in addition to individual and group self-assessments, going to a community, walking through a community, meeting with community leaders, visiting local stores, churches, and eating at a neighborhood restaurant. Am. Med. Student Ass’n, Cultural Competency in Medicine, <http://www.amsa.org/programs/gpit/cultural.cfm> (last visited Apr. 12, 2008).

49. See Cheng, *supra* note 8, at 163.

50. Anne E. Becker & Arthur Kleinman, *Anthropology and Psychiatry*, in COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 40, at 465.

defined overall by much more—including all social groups and subgroups with which an individual associates—is now well-established in the professional world.<sup>51</sup> It is from this foundation that the Supplementary Guidelines' demand for cultural competency of mitigation specialists is drawn.

### III. CULTURAL COMPETENCY IN THE SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF CAPITAL DEFENSE TEAMS

More than ten years ago, an anthropologist pointed out that his discipline's "most prevalent role" in criminal defense proceedings may be during the bifurcated sentencing trial required by the Eighth Amendment in capital cases, in which "[p]ersonal developmental factors and cultural influences in the defendant's family and community background may extenuate the gravity of the criminal acts and lessen the punishment to be applied."<sup>52</sup> In truth, the impact of cultural diversity is pronounced throughout the law.<sup>53</sup> Culture influences a client's

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51. See NASW STANDARDS, *supra* note 44, at Introduction (recognizing that "[i]n the United States, cultural diversity in social work has primarily been associated with race and ethnicity, but diversity is taking on a broader meaning to include the sociocultural experiences of people of different genders, social classes, religious and spiritual beliefs, sexual orientations, ages, and physical and mental abilities"). The NASW consequently calls for sensitivity with respect to "racial identity formation" but also with respect to

the interrelationship among class, race, ethnicity, and gender; working with low-income families; working with older adults; the importance of religion and spirituality in the lives of clients; the development of gender identity and sexual orientation; immigration, acculturation, and assimilation stresses; biculturalism; working with people with disabilities; empowerment skills [and] community building.

*Id.* The National Institute of Mental Health's Culture and Diagnosis Group likewise identifies culture as "meanings, values and behavioral norms that are learned and transmitted in the dominant society and within its social groups." Trujillo, *supra* note 42, at 493.

52. Michael Winkelman, *Cultural Factors in Criminal Defense Proceedings*, 55 HUM. ORG. 154, 154 (1996). See James K. Boehnlein et al., *Cultural Considerations in the Criminal Law: The Sentencing Process*, 33 J. AM. ACAD. PSYCHIATRY L. 335, 336, 339 (2005) (discussing the impact of culture on psychiatric evidence in capital sentencing trials). See generally Isabel Wright, *Anthropology and Capital Case Litigation*, in DOUBLE VISION: ANTHROPOLOGISTS AT LAW 29-35 (Randy Frances Kandel ed., 1992) (examining the role an anthropologist plays in researching and testifying of mitigating circumstances in death penalty cases).

53. On the need for cultural competency in legal representation generally, see Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 38-48 (2001); see also Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1007-31 (2007) (noting that challenges of lawyering across language difference require greater attention to reconceptualize the attorney-client relationship); Lauren Gilbert, *Facing Justice: Ethical Choices in Representing Immigrant Clients*, 20 GEO. J. LEGAL ETHICS 219, 231-43 (2007) (discussing the impact of culture on building trust in the attorney-client relationship and the resulting ethical choices attorneys may face in representing immigrant clients); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-*

interaction with law enforcement during and after arrest, weighs on the reliability and voluntariness of a client's statement,<sup>54</sup> affects a client's expressions of remorse, his conduct during incarceration or probation, his receptiveness to a plea opportunity, his understanding of judicial proceedings (including the roles of the judge, the prosecutor, and the defense attorney), his demeanor in court, his relationship to the defense team, his trust of authority figures, and his mental health evaluations.<sup>55</sup> Culture also affects legal determinations of competency, of justifications or excuses for criminal offenses, and of the validity of confessions, waivers, and pleas.<sup>56</sup> Certainly not least, culture informs in myriad ways

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*Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997) (exploring race-neutral interviewing and counseling skills and the resulting marginalization of clients of color); Liwen Mah, *The Legal Profession Faces New Faces: How Lawyers' Professional Norms Should Change to Serve a Changing American Population*, 93 CAL. L. REV. 1721, 1733-64 (2005) (challenging the legal profession to reform the nature of the professional role and to reset lawyers' expectations about minority clients); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 388-403 (2002) (examining the effects of cultural differences on traditional interviewing and counseling models). Recognizing culture's impact in law has led to a vocal movement to add cultural education courses to law school curricula. See, e.g., Paul J. Magnarella, *Justice in a Culturally Pluralistic Society: The Cultural Defense on Trial*, J. ETHNIC STUD., Fall 1991, at 65, 76-77. See generally Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993) (describing methods for integrating "personal identification issues" in legal education); Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 379-83 (2005). Cf. EDUCATIONAL POLICY AND ACCREDITATION STANDARDS (Council on Soc. Work Educ. 2001) (rev. Oct. 2004), available at <http://www.cswe.org/NR/rdonlyres/111833A0-C4F5-475C-8FEB-EA740ff4d9f1/0/EPAS.pdf> (recognizing the impact of culture upon the practice of social work and a commitment to integrate cultural awareness into social work education).

54. See generally Floralynn Einesman, *Cultural Issues in Motions to Suppress Statements*, in CULTURAL ISSUES IN CRIMINAL DEFENSE 347, 388-404 (Linda Friedman Ramirez ed., 2d ed. 2007) (examining the role culture plays in the interaction of suspects with law enforcement officers in the context of *Miranda* rights).

55. See generally Sarah Buel & Margaret Drew, *Do Ask and Do Tell: Rethinking the Lawyer's Duty to Warn in Domestic Violence Cases*, 75 U. CIN. L. REV. 447, 477-79 (2006) (discussing how people of color experience the legal system differently from whites and the impact of race on attorney-client relations). For a discussion of issues arising in indigent criminal representation involving cultural competency, see ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID, Standard 2.4 (2006). For a discussion of the importance of cultural competency to the probation officer's role, see Robert A. Shearer & Patricia Ann King, *Multicultural Competencies in Probation – Issues and Challenges*, FEDERAL PROBATION, Vol. 68, No. 1 (June 2004), [http://www.uscourts.gov/fedprob/June\\_2004/competencies.html](http://www.uscourts.gov/fedprob/June_2004/competencies.html) (last visited Apr. 27, 2008). Discussion of the impact of culture in the legal system often focuses on clients who are children. See, e.g., Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466, 472-73 (2007).

56. See ABA COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 40, at Standard 2.4, commentary. Culture may also serve as a basis for downward departures in sentencing in non-capital cases under the Federal Sentencing Guidelines. See, e.g., *United States v. Decora*, 177 F.3d

the social history investigation and presentation of defense evidence in capital proceedings—including a client's relationship with codefendants or victims and barriers to disclosure such as shame, face, family expectations, suffering, hopelessness, and despair. Ethnographic practice in all aspects of a capital case is a standard to which aware and diligent defense counsel have long subscribed.

*A. Precedent Standards and Guidelines: The ABA Standards for Criminal Justice, Defense Function*

Prevailing standards have always required the capital defense team to integrate the results of a thorough and reliable mitigation investigation into every stage of the legal proceedings, beginning with attorney-client relationships and including pretrial negotiations and determinations of eligibility for the death penalty, authorization proceedings in federal capital cases, settlement negotiations, pretrial motions, jury selection, and guilt-innocence proceedings.<sup>57</sup> As any professional—whether in anthropology, medicine, mental health, education, social work, or law—counsel representing a capital client must adhere to professional norms, accepted levels of representation, and ethical practice.<sup>58</sup> In the context of mitigation, culturally competent investigation is more than an admirable and desirable skill. It is a standard of performance.

The American Bar Association Standards for Criminal Justice, which date from 1971,<sup>59</sup> define the duties to investigate,<sup>60</sup> establish a

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676, 678-79 (8th Cir. 1999) (reservation life contributed to downward departure); *United States v. Vue*, 865 F. Supp. 1353, 1359-60 (D. Neb. 1994) (background as Hmong war refugee and difficulties of assimilation in United States justified downward departure); *United States v. Somerstein*, 20 F. Supp. 2d 454, 462-64 (E.D.N.Y. 1998) (background as Holocaust survivor justified downward departure); *United States v. Delgado*, 994 F. Supp. 143, 144-46 (E.D.N.Y. 1998) (background as Colombian widow supporting two children justified downward departure on drug possession conviction). *But cf.* *United States v. Weise*, 128 F.3d 672, 674 (8th Cir. 1997) (reservation life insufficient to justify downward departure). *See also* Placido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357 (1994) (arguing that federal judges should continue to consider race as a mitigating factor despite language to the contrary in the Guidelines).

57. *See* SUPPLEMENTARY GUIDELINES, *supra* note 9, at Introduction.

58. *See supra* notes 40-42 and accompanying text; *Strickland v. Washington*, 466 U.S. 668 (1984).

59. *See* John H. Blume & Stacey D. Neumann, "It's Like Déjà Vu All Over Again:" *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 35 AM. J. CRIM. L. (forthcoming 2007), available at <http://ssrn.com/abstract=1024307>, at 29.

60. ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1986), Standard 4-4.1; *see also* Standard 4-8.1(b).

relationship with the client,<sup>61</sup> and communicate with the client about the control and direction of the case.<sup>62</sup> These requirements encompass principles of cultural competency. By illustration, consider *Mak v. Blodgett*,<sup>63</sup> which overturned a 1983 death sentence in part because counsel failed to investigate and present evidence at sentencing of “cultural dislocations” and “serious assimilation problems” experienced generally by Chinese immigrants moving from Hong Kong to North America and specifically by Mak and his family.<sup>64</sup> Culture was central to the Ninth Circuit’s finding of objectively unreasonable performance under *Strickland v. Washington*<sup>65</sup> in part because “Mak’s defense counsel never placed Mak in the community.”<sup>66</sup> *Mak* underscores the importance of information about a client’s environment as “humanizing evidence” in capital sentencing.<sup>67</sup>

In *Blanco v. Singletary*, first tried in 1982, the Eleventh Circuit found counsel ineffective for failing to investigate and present mitigating evidence of the defendant’s upbringing in Cuba.<sup>68</sup> The court criticized counsel’s poor judgment and cultural insensitivity in “referr[ing] to Blanco’s status as a Mariel refugee both during voir dire and during closing argument[] [but] fail[ing] to introduce any evidence to differentiate Blanco from the stereotype of Mariel refugees as criminals.”<sup>69</sup> The *Blanco* case often stands for the proposition that “a complete lack of investigation into a defendant’s background [is] unreasonable.”<sup>70</sup> But *Blanco* also exemplifies the failure of capital

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61. *Id.* at Standard 4-3.1.

62. *Id.* at Standard 4-5.2, 4-6.2. The defense function standards did not specifically mention representation in capital cases. Nevertheless, they were logically extended by courts to capital sentencing proceedings; indeed, *Strickland* itself concerned the performance of capital counsel at sentencing. *See Strickland*, 466 U.S. at 672-75, 698.

63. 970 F.2d 614 (9th Cir. 1992).

64. *Id.* at 617 & n.5. In the Fall of 1983, Kwan Fai Mak and two co-defendants were tried separately for the aggravated assault and capital murder of thirteen people at an after-hours gambling club in Seattle’s Chinatown. The club was named the Wah Mee Club; the incident is known as the “Wah Mee Massacre.” *Mak v. Blodgett*, 754 F. Supp. 1490, 1491 (W. D. Wash. 1991), *aff’d*, 970 F.2d at 616 (9th Cir. 1992).

65. *Mak*, 970 F.2d at 619; *Strickland*, 466 U.S. at 668, 690.

66. *Mak*, 970 F.2d at 619. Mak’s trial counsel, relatively new attorneys on their first capital case, sought only to downplay Mak’s role by introducing evidence of third-party guilt, challenging the reliability of the State’s eyewitness testimony and informing the jury that a co-defendant who fired most of the fatal shots received a life sentence. *Id.* at 617; *Mak*, 754 F. Supp. at 1491, 1496.

67. *Mak*, 970 F.2d at 619. After extended legal proceedings, the case came to an agreed-upon non-capital disposition. *See* Lynn Thompson, *Life Without Parole in Massacre: Mak Sentenced Again for 13 Wah Mee Deaths in 1983*, SEATTLE TIMES, May 21, 2002, at B1.

68. *Blanco v. Singletary*, 943 F.2d 1477, 1480-81, 1500-01 (11th Cir. 1991).

69. *Id.* at 1502-03.

70. *Bolender v. Singletary*, 16 F.3d 1547, 1558 (11th Cir. 1994).

counsel to connect a client's impoverished upbringing with his impaired mental health and social, practical, and communicative adaptive abilities. Counsel failed to recognize and investigate the impact of cultural, environmental, nutritional, and intellectual deprivation on the client's ability to develop linguistic and conceptual facility.<sup>71</sup> *Blanco*, like *Mak*, illustrates that cultural sensitivity has been associated with standards of performance in capital defense practice for a long time, predating *Strickland* itself.<sup>72</sup> While *Blanco* and *Mak* involved immigrants, recognition of the important influence of culture applies equally to clients born and raised in the United States.<sup>73</sup>

*B. Precedent Standards and Guidelines: The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*

Since *Woodson v. North Carolina* made individualized sentencing a constitutional requirement under the Eighth Amendment,<sup>74</sup> effective representation has required a thorough life-history investigation. Individualized sentencing increases the need to investigate a client's background, and requires increased understanding of and empathy for the client in order to establish rapport and develop a reliable social history. Spurred by the Eighth Amendment mandate of individualized sentencing, the ABA promulgated performance standards (in 1989 and again in 2003) specifically for death penalty defense that "embod[ie]d the current consensus about what is required to provide effective defense representation in capital cases."<sup>75</sup> The *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*

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71. See, e.g., J. DE AJURIAGUERRA & D. MARCELLI, *MANUAL OF CHILD PSYCHOPATHOLOGY* 350 (Masson ed., 2d ed. 1987); *Blanco*, 943 F.2d at 1501, 1505. Cf. *infra* notes 160-61.

72. For another example, see *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999) (the defendant in *Caro* was tried in 1981).

73. See *supra* text accompanying notes 17-23.

74. *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976).

75. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 1.1, History of Guideline (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES], and online at <http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf>. The ABA GUIDELINES, updated, but substantively the same, "simply explain in greater detail than the 1989 Guidelines the obligations of counsel . . . [but] do not depart in principle or concept from *Strickland*." *Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003); see *Rompilla v. Beard*, 545 U.S. 374, 387 & n.6 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003). Compare, e.g., ABA GUIDELINES, *supra*, at Guideline 10.7 (describing the duty of counsel to investigate issues of guilt and penalty) with ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 11.4.1(A) (1989) (detailing the duty of counsel to "conduct independent investigations relating to the guilt/innocence phase and to the penalty phase").

(“ABA Guidelines”) build on the principles enunciated in the Defense Function Standards, providing more direct guidance for the highly technical and complex representation that capital cases require.<sup>76</sup>

The ABA Guidelines emphasize that the capital defense investigation must explore the client’s medical history; family and social history, including traumatic events; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention; educational history; employment history; and prior institutional correctional experience.<sup>77</sup> Counsel must trace the same areas in determining what evidence to present at sentencing.<sup>78</sup> These requirements apply alike to post-conviction litigation<sup>79</sup> and pre-trial efforts to resolve the case by plea.<sup>80</sup> Throughout, the ABA Guidelines emphasize the critical importance of “[e]xplaining the client’s functioning and behavior, in light of socio-economic, environmental,

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76. ABA GUIDELINES, *supra* note 75, at Guideline 1.1, History of Guideline; *id.* at Guideline 1.1, commentary.

77. *Id.* at Guideline 10.7. In full, Guideline 10.7 demands that counsel must investigate a capital client’s:

- (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);
- (2) Family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);
- (3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;
- (4) Military service (including length and type of service, conduct, special training, combat exposure, health and mental health services);
- (5) Employment and training history (including skills and performance, and barriers to employability);
- (6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services).

*Id.* at Guideline 10.7, commentary.

78. *Id.* at Guideline 10.11.

79. Post-conviction counsel must “continue an aggressive investigation of all aspects of the case” and “must conduct a thorough, independent investigation in accordance with Guideline 10.7[(E)(4)].” *Id.* at Guideline 10.1, 5.1, and commentary; *see also id.* (“Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial . . .”).

80. *See id.* at Guideline 10.9.2, commentary (“The relationship that the defense team has established with the client and his or her family will often determine whether the client will accept counsel’s advice regarding the advisability of a plea.”).

political, cultural, racial, ethnic, and religious factors” as well as “cognitive, mental, and emotional” ones.<sup>81</sup>

The ABA Guidelines Commentary specifically recognizes cultural influence, advising that “[t]he circumstances of a particular case will often require specialized research and expert consultation.”<sup>82</sup> “[I]f a client grew up in a migrant farm worker community,” the ABA Guidelines Commentary advises, “counsel should investigate what pesticides the client may have been exposed to and their possible effect on a child’s developing brain,”<sup>83</sup> or “[i]f a client is a relatively recent immigrant, counsel must learn about the client’s culture, about the circumstances of his upbringing in his country of origin, and about the difficulties the client’s immigrant community faces in this country.”<sup>84</sup> In *Wiggins v. Smith*, the United States Supreme Court endorsed the ABA Guidelines as “well-defined norms.”<sup>85</sup> Although *Wiggins* was not an immigrant or a member of an ethnic minority, in paraphrasing the ABA Guidelines the Court referenced the importance of culture to the life history, faulting trial counsel for failing to investigate and present evidence of *Wiggins*’s “medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and *cultural* influences.”<sup>86</sup>

While the ABA Guidelines and *Wiggins* place culture among the factors in a capital defendant’s background that demand counsel’s attention, multi-generational cultural issues are not isolated. They influence all aspects of a client’s life, including how a client’s medical or mental illness is interpreted and treated, and the client’s relationships with family and between family and community due to poverty, poor schooling, interactions with law enforcement, prior traumatic events, racism, and bias. Even physical ailments such as stress, malnutrition,

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81. Jill Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1140 (2003).

82. ABA GUIDELINES, *supra* note 75, at Guideline 10.7, commentary.

83. *Id.* (citing *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002)). In *Caro*, the client’s upbringing in a rural farm culture prompted investigation into compelling evidence of brain damage through repeated exposure to intoxicants and pesticides. *Caro*, 280 F.3d at 1253-55.

84. ABA GUIDELINES, *supra* note 75, at Guideline 10.7, commentary (citing *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992)); *see also* *Siripongs v. Calderon*, 35 F.3d 1308, 1316 (9th Cir. 1994) (“[E]vidence of Siripongs’ Thai culture, including Thai concepts of remorse and shame, might well have bridged a cultural gap between the jury and the accused.”). *But see* *Siripongs v. Calderon*, 133 F.3d 732, 733-34, 737 (9th Cir. 1998) (denying relief on related ineffective assistance of counsel claim).

85. *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003); *see* *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

86. *Wiggins*, 539 U.S. at 524 (second emphasis added).

alcoholism, and lead poisoning must be assessed in light of the defendant's culture.<sup>87</sup> "The cultural dimensions of mitigating and extenuating circumstances may conceivably involve any aspect of the defendant's cultural background which is relevant to establish the defendant's situation."<sup>88</sup> This undergirds the Sixth Circuit's determination in *Coleman v. Mitchell* that trial counsel performed deficiently by failing to investigate the background and psychiatric problems of a defendant raised in a brothel where he was exposed to group sex, bestiality, pedophilia, and voodoo practice.<sup>89</sup> Mitigation investigation is a complex, fact-intensive enterprise in which culture underlies or overlays all aspects of a client's background and conduct.

As the United States Supreme Court, from *Strickland* to *Wiggins* and afterward, has identified the ABA Guidelines as articulating prevailing norms for capital practice, the use of mitigation specialists in capital cases (which began in the 1970s) has been a "well-established . . . accepted 'standard of care.'"<sup>90</sup> A team approach to capital defense, the ABA Guidelines note, is critical because it "enhances the quality of representation by expanding the knowledge base available to prepare and present the case . . . [and] improves the relationship with the client and his family by providing more avenues of communication."<sup>91</sup> The mitigation specialist is an "indispensable member" of the core team,<sup>92</sup> bringing "invaluable" attributes.<sup>93</sup> These attributes mirror the skills identified in professional cultural competency standards:

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87. See, e.g., *Caro*, 280 F.3d at 1250, 1255. See *infra* Part IV.

88. Winkelman, *supra* note 52, at 158. Winkelman explains:

[C]ertain aspects would be more central such as: values and their implication for behavior; socialization for aggression and violence; determination of what constitutes provocation; family systems and their roles, functions, activities, expectation, and relationship to mental health; kinship, authority, and social relations and their obligations; religious and political beliefs and their behavioral and cognitive implications; and coping mechanisms for dealing with stress and maintaining mental stability.

*Id.*

89. 268 F.3d 417, 450-52 (6th Cir. 2001).

90. Miller, *supra* note 81, at 1120, 1128; see ABA GUIDELINES, *supra* note 75, at Guideline 4.1, commentary. See generally Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must Be Included on the Capital Defense Team*, 31 HOFSTRA L. REV. 1143, 1145, 1150-51 (2003) (noting that a mitigation specialist is crucial for the reason that many attorneys do not have a specialist's advanced level of expertise in developing and utilizing mitigating evidence).

91. ABA GUIDELINES, *supra* note 75, at Guideline 10.4, commentary (internal citations omitted).

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

93. *Id.* at Guideline 10.7, commentary.

- Mitigation specialists have clinical and information-gathering skills that most lawyers lack (such as clinical skills to recognize congenital, mental or neurological conditions and to understand how these conditions affected the defendant's development and behavior);<sup>94</sup>
- Mitigation specialists have the time and ability to conduct exhaustive investigation (including the interviewing ability to elicit sensitive, embarrassing and often humiliating evidence—for example, family sexual abuse);
- Mitigation specialists have the time and ability to maintain close contact with the client and his family to develop rapport, which “can be the key to persuading a client to accept a plea to a sentence less than death”;
- Mitigation specialists are able to synthesize all information gathered, and identify mitigating themes in a client's life history that integrate the client's entire case (guilt-innocence and sentencing); and
- Mitigation specialists have the ability to transform the gathered information into a social history and communicate it to counsel and relevant experts, which the mitigation specialist can also help identify, in order to produce reliable expert evaluations.

For these reasons, the ABA Guidelines conclude, mitigation specialists have become “‘part of the existing standard of care’ in capital cases, ensuring ‘high quality investigation and preparation of the penalty phase.’”<sup>95</sup>

The mitigation specialist's abilities that the ABA Guidelines find “invaluable” and “indispensable” are attributes of cultural competency.<sup>96</sup> Mitigation investigation demands awareness and respect for cultural difference. It calls for resilient interest and ability to immerse oneself in a culture or subculture, and to learn about it in detail from an “informed

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94. Guideline 10.4(C)(2)(b) demands that some team member must be “qualified by training and experience to screen” for mental or psychological disorders or impairments. *Id.* at Guideline 10.4. This is usually the mitigation specialist, but in a case where the specialist does not have the screening ability, another team member must.

95. *Id.* at Guideline 4.1, commentary (citing Russell Stetler, *Why Capital Cases Require Mitigation Specialists*, NLADA, July-Aug. 1999, available at <http://www.nlada.org/DMS/Documents/998934720.005> (discussing the role and required skills of the mitigation specialist)); TEXAS DEFENDER SERVICE CAPITAL TRIAL PROJECT, DEATH PENALTY MITIGATION MANUAL FOR TRIAL ATTORNEYS ch. 2 (2001) (“The Mitigation Specialist and the Team Approach”).

96. ABA GUIDELINES, *supra* note 75, at Guideline 4.1, commentary; *id.* at Guideline 10.7, commentary

not-knowing” perspective.<sup>97</sup> Mitigation specialists must identify and empathize with how culture influences the client’s perspectives and actions, and have the ability to distinguish a cultural dictate from the degree to which the client internalizes it. Armed with the skills to identify, understand, and communicate, it is not a stretch at all to say that in capital defense practice, the mitigation specialist has evolved as the defense team’s resident ethnographer.

*C. The Supplementary Guidelines for the Mitigation Function of Capital Defense Teams*

The Supplementary Guidelines articulate what the ABA Guidelines demand from the mitigation investigation and presentation, specifically with regard to the mitigation specialist’s role.<sup>98</sup> And the Supplementary Guidelines follow the United States Supreme Court’s recognition in *Wiggins v. Smith* that to fulfill a defendant’s Sixth Amendment right to effective representation, counsel must, with the aid of a qualified defense team, prepare a thorough social history of the client<sup>99</sup>—mandating what one could rightly describe as a cultural anthropological study of the capital defendant’s life.

Arising from foundations of good anthropology and ethnographic practice, molded in professional standards of medicine, mental health, social work, and law, cultural competency demands self-awareness, immersion, repeated revision, open-mindedness, resistance to stereotyping, and attention to detail. The Supplementary Guidelines demand that mitigation specialists understand and empathize with a client’s cultural influences as a means to open-minded interviewing and investigating, and thorough, unedited, nonjudgmental, and organic fact-gathering. This involves sensitivity to areas of dissonance and the ability to know when further questions are necessary, as well as the ability to

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97. Esther Wattenberg & Annette Semanchin, *The Contribution of Ethnographic Interviewing to Culturally Competent Practice*, 20 ABA CHILD L. PRAC. 59, 59 (2001) (culturally competent practice allows the client and other social history lay witnesses to act as cultural guides, while the interviewer, by contrast, adopts a state of “informed not-knowing”); see DERALD WING SUE & DAVID SUE, *COUNSELING THE CULTURALLY DIFFERENT: THEORY AND PRACTICE* (3d ed. 1999). Cf. NASW STANDARDS, *supra* note 44, at Standard 3, interpretation (noting that “[s]ocial workers need the critical skill of asking the right questions, being comfortable with discussing cultural differences, and asking clients about what works for them and what is comfortable for them in these discussions”).

98. SUPPLEMENTARY GUIDELINES, *supra* note 9, at Guideline 5.1.

99. See *Wiggins v. Smith*, 539 U.S. 510, 535 (2003).

identify issues, interview openly, and establish rapport.<sup>100</sup> It demands the ability to relate in an uninhibited manner, breeding openness of communication, because “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” are essential.<sup>101</sup> As the Supplementary Guidelines state, multiple interviews with individual family members, friends, and other witnesses must be done in order to “establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation.”<sup>102</sup> Significantly, cultural competency applies not only to investigation and presentation of social history at sentencing, it applies to counsel’s overall investigation of the case and communication with and counseling of the client. The overall goals are to obtain comprehensive, detailed information about a client, synthesize it, and establish rapport.<sup>103</sup>

While the cultural competency requirement begins with mitigation specialists, it extends to the entire defense team: “Team members must have the training and ability to use the information obtained in the mitigation investigation to illustrate and illuminate the factors that shaped and influenced the client’s behavior and functioning.”<sup>104</sup> The mitigation specialist must translate the information gathered,

in a form useful to counsel and any experts through methods including, but not limited to: genealogies, chronologies, social histories, and studies of the cultural, socioeconomic, environmental, political, historical, racial and religious influences on the client in order to aid counsel in developing an affirmative case for sparing the defendant’s life.<sup>105</sup>

The mitigation specialist must further assist counsel in identifying expert witnesses, including medical doctors,<sup>106</sup> “[a]nthropologists, sociologists, and persons with expertise in a particular race, culture, ethnicity, religion. . . . [p]ersons with specialized knowledge of specific

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100. SUPPLEMENTARY GUIDELINES, *supra* note 9, at Guideline 5.1(C) (“Mitigation specialists 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.”).

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

102. *Id.*

103. *See id.*

104. *Id.*

105. *Id.*; *see also id.* at Guideline 10.11(D) (“Team members must provide counsel with documentary evidence of the investigation . . . on relevant subjects including . . . cultural, socioeconomic, environmental, racial, and religious issues in the client’s life.”).

106. *Id.* at Guideline 5.1(C) (“They must have the ability to advise counsel on appropriate mental health and other expert assistance.”).

communities or expertise in the effect of environments and neighborhoods upon their inhabitants,”<sup>107</sup> as well as lay witnesses familiar with the client and with the “cultural experiences and influences upon the client or the client’s family,”<sup>108</sup> and “[f]ormer and current neighbors of the client and the client’s family, community members, and others familiar with the neighborhoods in which the client lived, including the type of housing, the economic status of the community, the availability of employment and the prevalence of violence.”<sup>109</sup> In emphasizing team competency, Supplementary Guidelines 5.1 and 10.11 thus centralize culture and designate its breadth, extending beyond race or ethnicity to neighborhoods and specific communities.<sup>110</sup>

The Supplementary Guidelines require that the mitigation specialist have culturally relevant skills, and apply those skills in a culturally competent manner.<sup>111</sup> But each client has a unique and compound cultural background, characterized by a variety of affiliations. Further, the extent to which each client has internalized the dictates of any cultural subgroup with which he identifies will differ. In some cases, therefore, it may be impractical to find a mitigation specialist who is culturally competent in all the groups and subgroups that define a client. The cultural competency requirement, however, demands only that mitigation specialists have adequate cultural awareness, understanding, and empathy to know when and for what reasons one or more persons, lay or expert, with more culturally relevant experience are needed. If the mitigation specialist lacks requisite understanding, she must be able to identify the needed skills and identify one or more individuals with those skills, particularly where fluency in multiple cultural subgroups is necessary.<sup>112</sup>

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107. *Id.* at Guidelines 10.11(E)(1)(b), 10.11(E)(1)(c).

108. *Id.* at Guideline 10.11(E)(2)(b).

109. *Id.* at Guideline 10.11(E)(2)(e).

110. *See id.* at Guidelines 5.1, 10.11.

111. *Id.* at Guideline 5.1(D).

112. Supplementary Guideline 5.1(E) points out:

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

*Id.* at Guideline 5.1(E) (emphasis added). Note that whereas a doctor servicing a largely immigrant neighborhood, for example, may have substantial professional and economic

In all cases, to be most effective, the defense team should reflect diversity, which helps to establish rapport and brings a variety of perspectives. The more perspectives on hand, the more accurate and meaningful the mitigation investigation and presentation will be.<sup>113</sup> On a given team, the expert in a cultural group or subgroup may be someone other than the mitigation specialist. Keeping in mind that “there is no such thing as a human nature independent of culture”<sup>114</sup> is critical in a capital case, where all actors—the client, the members of the defense team, the prosecution team, the court, scores of witnesses, experts testifying and non-testifying, and each of the members of the jury—import their own cultural perspectives.

#### IV. SPECIFIC ASPECTS OF CULTURALLY COMPETENT INVESTIGATION

The preceding section describes how cultural competency is a standard of practice in capital defense that is now embodied in the Supplementary Guidelines. This section addresses, more specifically, how cultural competency and its key skills—self-awareness, understanding, immersion, open-mindedness, receptiveness, and culturally sensitive interviewing and interaction—play out for a mitigation specialist and defense team working on a capital case. While culture is concrete and knowable,<sup>115</sup> there is no comprehensive checklist for investigating and presenting cultural mitigating evidence. The cultural influences for each client are different, in degree and in kind, and thus cultural competency in a given case depends ultimately on the client and his or her circumstances.

As mitigation investigation is resource intensive (the defense team must conduct a literature search for relevant history, politics, demographics, social science; a document search for client’s and family’s life history; acquire data regarding mental health; conduct

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incentive to become culturally competent in a particular local cultural background, a capital defense attorney or mitigation specialist by contrast may only have a single client with a given cultural background. Cognizant of this “one case” issue, the Supplementary Guidelines demand cultural awareness sufficient to identify when an additional individual with specialized cultural expertise is needed, the nature of the expertise, and the appropriate individual. *Id.*; see also *id.* at Guideline 10.11(E)(1) (directing the mitigation specialist to help defense counsel locate “[e]xpert witnesses, or witnesses with specialized training or experience in a particular subject matter,” including “[a]nthropologists, sociologists and persons with expertise in a particular race, culture, ethnicity, religion”).

113. See Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, CHAMPION, Jan.-Feb. 1999, at 35 (discussing potential for cultural differences between client and defense team).

114. Geertz, *supra* note 4, at 49.

115. See HUNT, *supra* note 14, at 6-11.

interviews on commonly held notions, beliefs, myths and stereotypes; conduct interviews with people from the client's neighborhood and acquire oral histories), cultural competency prizes detail as the measure of accuracy of cultural explanation. It involves the ongoing practice of immersing oneself empathetically in a client's environment and gathering as much information as possible about the client and client's cultural circumstances. It promises an ability and skill to do more than skim the surface, an ability to identify the important particulars of an individual client's background and relentlessly pursue them.

How do the Supplementary Guidelines and the constitutional standard for ineffective assistance of counsel relate? Under *Strickland* and *Wiggins*, counsel must do more than just acquire "some" information about a client's background.<sup>116</sup> The information counsel must obtain depends on the unique circumstances of each case and each client's background. At base, counsel must know enough to make a reasonable decision whether to investigate avenues further, and counsel must know enough to interpret the information they have in a competent manner, including the state's forensic evidence, a client's medical history records, or evidence about a client's past held in a prior arrest file.<sup>117</sup> Cultural competency guides counsel (through the defense team members, who funnel their knowledge and understanding to counsel) along the path of attaining this level of informed understanding.

The cultural competency requirement may serve an additional end in post-conviction litigation. The defense team in post-conviction and habeas corpus proceedings must fill evidentiary voids left when trial teams fail to complete a comprehensive life history investigation. If the mitigation presentation failed at trial, the post-conviction defense team faces the difficult task of overcoming the perception that cultural evidence is merely cumulative or that the client now merely seeks to present the new—and more favorable—testimony of a different expert.<sup>118</sup> In a post-conviction proceeding, therefore, the cultural

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116. See *Wiggins v. Smith*, 539 U.S. 510, 527-28 (2003).

117. See *id.* at 527-28, 533-34; see also *Rompilla v. Beard*, 545 U.S. 374, 382-89 (2005).

118. This may color a court's determination of deficient performance, see, e.g., *Syriani v. Polk*, 118 F. App'x 706, 714-17 (4th Cir. 2004); *Breard v. Netherland*, 949 F. Supp. 1255, 1268-69 (E.D. Va. 1996) (finding trial counsel not deficient for failing to call a bishop from defendant's native country, Paraguay, where counsel did call the defendant's "local religious counselor," in case where defendant held strong belief in satanic curses and the hold of such a curse on him at the time of the crime), or a court's determination of prejudice. Cf. *Stallings v. Bagley*, 2007 WL 1683832, at \*1-3 (N.D. Ohio June 8, 2007) (finding that "by permitting Stallings to develop the facts surroundings [sic] this claim yet limiting the quantum of testimony, it can strike a balance between ensuring the full development of the federal habeas record and belaboring issues already contained therein,"

competency requirement may help identify cases in which a half-hearted mitigation presentation at sentencing suffers not only from a lack of thoroughness (which may foster dismissal of post-conviction evidence as cumulative or an insignificant product of a battle of experts), but also from a lack of sufficient cultural understanding to enable the jury to truly understand the client's uniqueness and humanity.<sup>119</sup>

What is required in each case will differ. But in no case can one underestimate the value of culture as a foundation that underlies everything. Often facts that otherwise seem contradictory to counsel or to a jury will make sense when viewed through the prism of the defendant's culture—that is, by viewing events as the defendant views them and views the world.<sup>120</sup> Presented without a cultural link, the same facts will be fragmented, confusing, and far less persuasive. Culture has significant impacts upon all capital clients and is a critical context for most facts, including issues of mental health, in every individual's life.

A defense team that is not culturally competent may miss key information through ignorance; moreover, they may misinterpret information they already have. Of course, a defense team having thoroughly investigated a client's background may reasonably conclude that a jury will not find evidence persuasive and that it should not be presented; but if a defense team during the course of investigation reaches a stalemate where the team is saying the client has "no mitigation," this should be a red flag to reconsider the team's assumptions about the client and the case, as well as the team's composition.<sup>121</sup> In that circumstance, the team should consider whether a new member needs to be recruited, perhaps a new mitigation specialist, who may have a greater understanding, awareness, and empathy for the client's cultural makeup and the patterns it creates in the client's perspectives of and interactions with the world.

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where defendant "asserts that counsel failed to present testimony about the gang culture which Stallings claims was a catalyst to the robbery/murder").

119. In *Wiggins*, the majority found that counsel's " cursory investigation" into family service records did not justify a "tactical decision." *Wiggins*, 539 U.S. at 527. The dissent argued, however, that because defense counsel knew what was in the records they did not need to go further. *Id.* at 545 (Scalia, J., dissenting). The cultural competency requirement sheds light on this distinction. It focuses on the possibility that defense counsel may possess material, and yet not know how to interpret it for lack of cultural competency. If a failure to investigate stems from lack of cultural competency on the defense team (for example, a failure to perceive how a culture bears on the client's mental health, background or character, or mitigates or explains the offense), that is deficient performance. A failure to establish rapport with the client and with witnesses that results in a failure to investigate or obtain information is also deficient performance.

120. See SUPPLEMENTARY GUIDELINES, *supra* note 9, at Guideline 5.1.

121. See discussion *supra* Part III.A.

The following discussion offers several highlights of the impact of culture on capital mitigation investigation, all of which appear to have been overlooked by the trial team in *Marquez-Burrola*.<sup>122</sup> the need for multigenerational cultural investigation of the various circumstances of the client's life (including family, housing, education, religion, and issues of migration and assimilation); the inter-connectedness of cultural competency and mental health issues; and the need to develop rapport with the client and members of the client's family and community. In examining these, we stress that the following discussion is not meant to be comprehensive and does not seek to present certain cultural influences as more valid than others. Nor do we suggest that counsel should rule out influences not discussed. Culturally competent attention to these areas is needed at all points of representation, from the moment of appointment to the presentation of mitigating evidence at the sentencing trial or collateral evidentiary hearing.

*A. The Scope of Cultural Influence:  
Multigenerational Investigation of a Client's Life Circumstances*

In *A Rainbow of Gangs*, James Diego Vigil traces the lives of four Los Angeles gang members, one Chicano, one African American, one Salvadoran, and one Vietnamese, each of whom was raised in a family struggling with poverty and cultural assimilation following migration and resettlement from within the United States or from outside its borders.<sup>123</sup> Vigil explains how, for each, a combination of "multiple marginalization[s]," including economically and socially disadvantaged parents unable to provide guidance, racial prejudice, language difficulty, and threats of violence in school, made membership in street gangs a viable option.<sup>124</sup> Vigil's discussion looks to a multilayered scope of reference.<sup>125</sup> Understanding why American urban street gangs exist and why individuals join gangs, Vigil asserts, begins with comprehending the forces on certain individuals or groups "in play over a long period of time."<sup>126</sup> The same is true for understanding the life history of a capital

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122. *Marquez-Burrola v. State*, 2007 OK CR 14, ¶ 49, 157 P.3d 749, 764 (described *supra* text accompanying notes 35-39).

123. JAMES DIEGO VIGIL, *A RAINBOW OF GANGS: STREET CULTURES IN THE MEGA-CITY* 29 (2002).

124. *Id.* at 7. Vigil describes his study as an attempt to identify the causes of gangs through a comparative analysis. *Id.* at 6.

125. *Id.* at 15 (discussing need for macro, intermediate (meso), and micro-levels of reference in sociocultural assessment).

126. *Id.* at 7.

client and the impact of historical and structural conditions on a client's actions—school, family and employment history, religious beliefs, and social interactions are relevant to show a defendant's character and explain his acts.

Culturally competent mitigation work demands a thorough range of investigation that examines the groups and subgroups to which the individual client belongs, both contemporaneously to a client's life and on a historic level. Understanding patterns of migration and resettlement (from other countries or within the United States) in the lives of the capital client, his parents and grandparents, provides necessary background for investigation and interaction. In a country as diverse as the United States, occurrences of migrant resettlement are many. A recent well-known example is the plight of Chinese Vietnamese, who were forced to leave their homeland by a new government in an ethnic cleansing campaign. Fleeing on boats, they left everything behind, including family members, some of whom were lost in the sea. They resettled in pockets across the United States, where they began to rebuild their lives in sometimes hostile communities.<sup>127</sup> Migration and resettlement patterns in the United States are not necessarily brought from without. Hundreds of thousands of people in this country have dealt with migration and post-migration stress throughout various periods of history; for example, the move of many African Americans from the South to the Northeast and West in the 1940s,<sup>128</sup> and the migration of Midwestern and Southern sharecroppers to the West Coast following the Great Plow-Up of the American plains.<sup>129</sup>

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127. See, e.g., MIN ZHOU & CARL L. BANKSTON III, *GROWING UP AMERICAN: HOW VIETNAMESE CHILDREN ADAPT TO LIFE IN THE UNITED STATES* 37, 45 (1998); JAMES M. FREEMAN, *HEARTS OF SORROW: VIETNAMESE-AMERICAN LIVES* 10 (1989); WILLIAM T. LIU, *TRANSITION TO NOWHERE: VIETNAMESE REFUGEES IN AMERICA* 63, 66-67 (1979); Ngoc-Dien, *The First Months, in REFUGEE: THE VIETNAMESE EXPERIENCE* 319, 322-25 (Leslyanne Hawthorne ed., 1982). The first wave of Vietnamese refugees were well-educated, urbanized pre-war escapees with families who encountered race-based resentment upon arriving in California. See *VIGIL*, *supra* note 123, at 100. The second wave, commonly referred to as "boat people," was a poorer, less-educated group, half of which were teens or infants who came without parents. *Id.* at 102. Similar assimilation circumstances apply to refugees escaping civil war in El Salvador and resettling in the Pico-Union neighborhood of Los Angeles, and to Hmong refugees who fled Laos in the mid-1970s after assisting the United States government in Vietnam. See LEO R. CHAVEZ, *SHADOWED LIVES: UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY* 36 (1992); *VIGIL*, *supra* note 123, at 99.

128. See *VIGIL*, *supra* note 123, at 68 (citing KEITH E. COLLINS, *BLACK LOS ANGELES: THE MATURING OF THE GHETTO: 1940-1950* (1980)).

129. The Great Plow-up of the 1930s began when President Franklin Delano Roosevelt instituted a number of reforms under the banner of the New Deal. The largely beneficial reforms were accompanied by payoffs to farmers and sharecroppers not to plant. The ecological result was the Dust Bowl, in which hundreds of thousands of impoverished Americans starved to death. While

By understanding the larger historical picture, the defense team and decision-makers alike can have a context to better understand the choices available to the client and interpret the client's actions. There is a cause and effect. As Vigil explains, patterns of migration and resettlement are forces that "occur at the broader levels of society [and] lead to economic insecurity and lack of opportunity, fragmented institutions of [family and school], poverty, and psychological and emotional barriers."<sup>130</sup> Post-migration difficulties of leaving behind family and the familiar for the unknown are followed by adjustment to a new environment. Assimilation stressors, including cultural difference, social and institutional racism, and poverty, catalyze breakdown of the usual social control mechanisms of family or school or both.<sup>131</sup> As the Sixth Circuit recognized in *Blanco*, the mitigating significance of the client's journey was not limited to his swimming refugee flight from Cuba, which was mitigating in its own right.<sup>132</sup> The court also faulted counsel for failing to explain the effect that *reassimilating* to the United States would have had on Blanco's daily life and mental health.<sup>133</sup> Likewise, trial counsel in *Marquez-Burrola* can be faulted for not investigating the substantial impact that resettling in Oklahoma had on the client.<sup>134</sup>

Turning from a broad historical level to a local level, by investigating circumstances and institutions contemporaneous to the

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many settlers stayed put, others across the South and the plains loaded wagons and headed West, where corporations offered the promise of finding work. See, e.g., TIMOTHY EGAN, *THE WORST HARD TIME: THE UNTOLD STORY OF THOSE WHO SURVIVED THE GREAT AMERICAN DUST BOWL* 140-41 (2006) (describing the conditions and choices faced by Midwesterners during the Dust Storms of the 1930s). Today, in central California towns like Bakersfield or Fresno, one finds residents with Southern accents as strong, or stronger, than some in the South. These individuals form a class and a group from which many capital defendants in central California come.

130. VIGIL, *supra* note 123, at 7. Vigil refers to racism, social and cultural oppression, and migration and resettlement as "macrohistorical and macrostructural forces." *Id.* at 7-8. These contribute to "ethnohistorical nuances and contours" that must be taken into account. *Id.* at 15. Vigil makes the point that by understanding the macro forces at work in a given community and on certain individuals, constructive change can be made to more immediate factors of social control such as family and schooling in an effort to alleviate the multiple marginalizations that promote gangs. *See id.*

131. See VIGIL, *supra* note 123, at 8-12; cf. Trujillo, *supra* note 42, at 492, 496 ("Culturally uninformed clinicians often treat their immigrant patients as if their lives began when they arrived in the United States, and their clinical narratives often lack key data from the patients' preimmigration experience."). Trujillo emphasizes that "[t]he process of acculturation is once again key to understanding the psychological distress and psychopathology of immigrants." *Id.* at 496.

132. See *Blanco v. Singletary*, 943 F.2d 1477, 1500-03 (11th Cir. 1991).

133. *See id.*

134. See Kuykendall et al., *supra* note 37, at 1014-15. Assimilation stressors may exacerbate a defendant's strong emotions surrounding the violation of sexual mores. See, e.g., *Marquez-Burrola v. State*, 2007 OK CR 14, ¶ 18-25, 157 P.3d 749, 757-58.

client's life (including family, religion, education, and interaction with community), the defense team can learn much through location. The neighborhood and housing in which a client lives may say something about a broader pattern of racial segregation<sup>135</sup> or environmental racism, such as locating industry or other toxic sites close to a less advantaged community.<sup>136</sup> The neighborhood and housing in which the client lives may reflect family income. Often, clients have lived in poverty, leaving little family income for the basic needs of food, clothing, and medical care. This may, in turn, indicate susceptibility to physical illness, anxiety, or depression.<sup>137</sup>

Similarly, a localized multigenerational history of many families in the same subgroup, suffering over generations from certain environmental stressors, may reveal a vulnerability to negative patterns. For example, where a group of people has been uprooted or subjugated by a majority culture, cultural dissolution may weaken cultural identity, exacerbating social and psychological problems, including learning disabilities, neurologic or cognitive impairments, and developmental disorders. This might also be revealed in instances of child abuse and neglect, rates of incarceration, frequency of alcohol and substance abuse, teenage pregnancies, and infant mortality rates.<sup>138</sup> Multigenerational information about sources of stress—poverty, social ostracism, malnutrition, physical or mental illness—is significant not only as it bears on the client directly, but also insofar as it impairs a client's parents' ability to parent. Parents overburdened with their own struggles are less able to cope with the responsibility of raising children.<sup>139</sup>

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135. Vigil discusses the barrio pattern of resettlement, in which immigrants settle in "isolated, insulated urban villages." VIGIL, *supra* note 123, at 34. *But see id.* at 35 (discussing how since the 1970s, Mexican immigrants have filled rundown housing left by other groups, leading to more diffuse, and less territorially concentrated settlements).

136. *See, e.g.,* Caro v. Woodford, 280 F.3d 1247, 1250 (9th Cir. 2002). Other possible examples include residents of encapsulated mill towns in the Southeast, ostracized in larger nearby communities, and Okies forced to live in tent communities.

137. *See* ARTURO HERNANDEZ, PEACE IN THE STREETS: BREAKING THE CYCLE OF GANG VIOLENCE 170-71 (1998).

138. *See, e.g.,* Erik Eckholm, *A Grim Tradition, and a Long Struggle to End It*, N.Y. TIMES, Apr. 2, 2008, (reporting on efforts to reduce multigenerational heroin addiction in Rio Arriba County, New Mexico, with interviews recognizing narcotics and alcohol abuse as "a source of bonding between parents and children" and attributing it to "a shared sense of loss, starting when the United States refused to recognize many Spanish land grants in the mid-19th century and building more recently as struggling families, accustomed to farming and ranching, became dispirited as they had to sell land").

139. *See* Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923 *passim* (2008), for a detailed

Location may also be a clue to recognizing isolated or ostracized cultural communities. Some post-migration communities are isolated in worlds that follow their own cultural dictates, often producing offshoots that in turn carry cultural mandates that differ from both the majority and migratory cultural traditions.<sup>140</sup> Cultural isolation may work for or against the client. On one hand, it may provide a resource for support: a study of Vietnamese students in Versailles City in Louisiana found that Vietnamese children who did well succeeded by relying on their ethnic community system of supports, and that those who did not were “assimilated into the disadvantaged youth culture.”<sup>141</sup>

On the other hand, isolation may allow and validate traditions of physical abuse in parenting. Sometimes, closed doors protect abusive religious traditions promoted by the belief that corporal punishment is necessary to break a child’s will.<sup>142</sup> Or cultural prejudice may provoke abuse. In *Karis v. Calderon*, the District Court for the Eastern District of California and the Ninth Circuit Court of Appeals called for a new sentencing trial for a petitioner who had raped and shot his victim, because trial counsel failed to elicit evidence about the physical and psychological maltreatment the petitioner and his mother suffered at the hands of the father and stepfather.<sup>143</sup> “The testimony . . . of severe beatings and treatment,” which “could legitimately have severe effects on a young child’s development and attitude,” the Ninth Circuit concluded, was “extremely probative” and “highly relevant” mitigating

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discussion of the impact of “cumulative trauma exposures” on capital clients and proper response by mitigation specialists and defense teams; see also VIGIL, *supra* note 123, at 8-9, 22-23.

140. See ZHOU & BANKSTON, *supra* note 127, at 7. The authors explain:

[T]he outcomes of adaptation vary according to where immigrants settle, whether in affluent middle-class suburbs or in impoverished inner-city ghettos. . . .

Family socioeconomic status shapes the immediate social conditions for adaptation, because it determines the type of neighborhood in which children live, the quality of school they attend, and the group of peers with whom they associate.

*Id.*

141. *Id.* at 228-29 (“[T]he main elements of Vietnamese success in the United States can be seen to be a traditional value orientation of dedication to the expectations of others brought from the home country, parental aspirations for upward mobility, and an ethnic system of social relations to enforce the expectations and aspirations.”).

142. An example of the use of cultural child-rearing practices is found in the case of Lee Boyd Malvo and the Virginia Beltway Sniper homicides. The defense theme was built around a saying that was common among parents in the impoverished community into which Malvo was born. Defense counsel told the jury in final argument, “I leave you with a phrase. . . . that both invites you to mete punishment out but also to temper it, to draw the line short of the ultimate penalty . . . . Punish this child, save the eye.” WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES* 120 (2006). Notwithstanding Malvo’s terrible crime, the jury returned a unanimous verdict for life. *Id.*

143. *Karis v. Calderon*, 283 F.3d 1117, 1139-41 (9th Cir. 2002).

evidence.<sup>144</sup> The courts were notably swayed by Karis's eye-witnessing and experiencing of abuse; but to explain why the abuse suffered by Karis and his mother occurred, counsel had to present as a backdrop the circumstances of poverty and discrimination that Karis and his mother suffered as Okie migrants.<sup>145</sup>

Like family, schooling is a critical element in social and cultural development.<sup>146</sup> "The inequalities of race and class that plague American society are carried into the American educational system where minority group members often attend schools that provide poorer resources than those available in other schools."<sup>147</sup> When students find that race or class prejudice blocks their paths to assimilation, they may respond through avoidance. Damaging negative experiences in school due to "cultural insensitivity" or "ethnocentric curriculum[s]" may lead to a loss of hope.<sup>148</sup> As a result, "it may be the willful refusal to learn, not the failure to learn, that affects the academic outcomes."<sup>149</sup> As Vigil explains in *A Rainbow of Gangs*, it is the cumulative effect of "multiple marginali[zations]"—the failure of family and schools exacerbated by historical forces—that opens the door to alternative "models and means for new norms, values, and attitudes" found in "special group[s] within which normal developmental needs are met."<sup>150</sup> Sources of "familial compensation," such as street socialization through gangs, replace the traditional parents as family. By providing a place to "strive for higher aspirations," gangs replace the traditional roles served by family and schools through homework, chores, part-time jobs, recreational sports, and other extracurricular activities.<sup>151</sup> Viewed in this light, gang membership may simply reveal the client's struggle for love, acceptance,

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144. *Id. Accord* *People v. Johnson*, 740 N.E.2d 1075, 1076-77 (N.Y. 2000) (finding that, for children, witnessing violence is as traumatizing as suffering violent abuse, and holding that the defendant who committed violent acts against a mother in the presence of her children could be convicted of endangering the welfare of those children).

145. *See supra* note 136; *see also* DOROTHEA LANGE & PAUL SCHUSTER TAYLOR, *AN AMERICAN EXODUS: A RECORD OF HUMAN EROSION* 67-68 (1939); JAMES N. GREGORY, *AMERICAN EXODUS: THE DUST BOWL MIGRATION AND OKIE CULTURE IN CALIFORNIA* 179 (1989).

146. VIGIL, *supra* note 123, at 9.

147. ZHOU & BANKSTON, *supra* note 127, at 9.

148. VIGIL, *supra* note 123, at 9.

149. ZHOU & BANKSTON, *supra* note 127, at 10; *see* VIGIL, *supra* note 123, at 40; *see also* MARCOS PIZZARO, *CHICANAS AND CHICANOS IN SCHOOL: RACIAL PROFILING, IDENTITY BATTLES, AND EMPOWERMENT* 16 (2005) (noting part of the "typical explanation" for academic failures of Chicana/o students is their families' lack of "experience with [scholastic] success").

150. Joan W. Moore, *Foreword* to VIGIL, *supra* note 123, at xii-xiii; VIGIL, *supra* note 123, at 7, 10.

151. VIGIL, *supra* note 123, at 24-25.

and self-actualization in an environment in which other options are limited by factors outside the client's control.

A capital defense team must recognize these cultural factors to explain a client's decisions and actions to life-or-death decision makers. A defendant's decision to drop out of school may not be a sign of lack of interest or ability, but rather a response to cultural role models who stress the need to work to support the family, or to earn money so that another family member need not engage in prostitution to feed the family. A client's alcoholism may follow a common problem across generations in the defendant's community. The possibilities of such examples are endless, but the point is the same: without understanding and empathizing with these settings—and the impact of family, school, and codes of conduct—the mitigation specialist cannot understand the defendant, and neither can a prosecutor, court, or jury.<sup>152</sup> One should not underestimate the importance of this information to those decision-makers.<sup>153</sup>

*B. The Intersection of Culture  
with Mental Health and Mental Retardation*

Mental health evidence affects every aspect of capital litigation in much the same way that culturally informed mitigation investigation does—and the two overlap: the defense team must pay particular attention to cultural effects on psychological, psychiatric, and neurological factors.<sup>154</sup> Aside from culture-bound syndromes, culture generally impacts many mental disorders.<sup>155</sup> At the core of schizophrenic delusions is some reflection of reality, however distorted; as one strips

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152. As culturally competent defense teams must recognize the importance of a multigenerational investigation, it is equally important that defense teams not overlook cultural groups, subcultures or communities that relate only to the client's life, and to life apart from family or schooling, as an adult. One example of this is prison culture. See *Harlow v. Murphy*, 2:05-cv-00039-CAB (D. Wy. Feb. 15, 2008).

153. Capital Jury Project studies show that juries often resort to charts, predominantly timelines. In doing so, one thing jurors look for is any opportunity a defendant had to make different life choices. See, e.g., SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 110-11 (2005). Without explanation, dropping out of school, for example, may look like an aborted opportunity that weighs in favor of a death sentence.

154. See SUPPLEMENTARY GUIDELINES, *supra* note 9, at Guideline 5.1(E); Trujillo, *supra* note 42, at 492; see, e.g., *Caro v. Woodford*, 280 F.3d 1247, 1252-53, 1257 (9th Cir. 2002).

155. See Anne E. Becker & Arthur Kleinman, *Anthropology and Psychiatry*, in COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 40, at 468, 471-72 (noting that in the context of psychiatry the DSM-IV categories are no more "'real' than folk categories" and that medicine does not "simply describe biological realities," it "constitutes a perspective in attributing meaningfulness," a "specific means of organizing symptoms" and their significance).

away the layers of mental illness, a kernel of the delusion is related, in its distorted way, to the real.<sup>156</sup> Marquez-Burrola was suffering from hallucinations and delusions following his arrest and prior to his trial. He visited a Mexican folk healer the day before the murder.<sup>157</sup> The extent to which culture impacted and explained his mental illness, however, was not explored by trial counsel.

In addition to directly impacting the interpretation or cause of mental illness, culture may erect barriers to acknowledging mental impairment. Defense teams must pay attention to ethnic background and how it may prevent a family from acknowledging or revealing a profound disability. How a disability could exist without being recognized is an issue that must be addressed in every mental health case because only in the small minority of cases do families receive adequate mental health treatment. The desire and ability to seek and follow mental health treatment are culturally bound. Studies show under what circumstances distinct cultural groups will seek and will not seek assistance, and much of that is because the mental health system is designed for the majority rather than for effective outreach in communities.<sup>158</sup> Therefore, “[a] careful sociocultural history provides essential clinical data with which to contextualize how a patient presents with an illness.”<sup>159</sup>

The failure of family to recognize or understand a client’s behavior may have repercussions that exacerbate the illness, leading to future ostracism, maybe even punishment, and the failure to provide needed medical services. The same may play a role at school in unidentified learning disabilities; thus, doing poorly in school may be misinterpreted as lack of interest. Some families may disregard physician advice and ignore majority cultural advice, sometimes masking multiple generations of mental health problems, mental retardation, or mental illnesses. Warning signs of psychological disturbance may be viewed instead as odd behavior, and neglected or punished. This could contribute to

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156. See, e.g., Arthur Kleinman & Joan Kleinman, *Suffering and Its Professional Transformation: Toward an Ethnography of Interpersonal Experience*, 15 *CULTURE, MED. & PSYCHIATRY* 275, 275-76 (1991). For further discussion on the intersection of mental health, trauma, and cultural issues, see Wayland, *supra* note 139.

157. *Marquez-Burrola v. State*, 2007 OK CR 14, ¶ 4, 157 P.3d 749, 753.

158. See U.S. DEP’T OF HEALTH & HUMAN SERV., *MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL—EXECUTIVE SUMMARY* 86-88 (1999).

159. See Becker & Kleinman, *supra* note 155, at 469 (“[A client’s social history] identifies crucial information regarding social supports, relevant psychosocial precipitants and stressors, explanatory models of the illness, and characteristic patterns of help-seeking behavior for a particular illness.”).

isolation, difficulty forming attached relationships, poor performance in school, or a turn to alcohol or drug abuse as a form of self-medicating to reduce the pain and emotional anxiety.

Cultural factors are just as essential to identifying and diagnosing mental retardation.<sup>160</sup> The American Association on Intellectual and Developmental Disabilities identifies five assumptions that are essential to the application of the definition of mental retardation. Two involve culture. One is that “[v]alid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.”<sup>161</sup> Another is that “limitations in present functioning must be considered within the context of community environments typical of the individual’s age, peers, and culture.”<sup>162</sup> As with mental illness, mental retardation may be in part genetic, but it is complicated by a lack of environmental supports,<sup>163</sup> including malnutrition, which is a leading cause of mental retardation in developing nations.<sup>164</sup> Cognitive, intellectual and even physical deficits can also arise from lack of stimulation during formative years, particularly the first six months.<sup>165</sup> Poverty and lack of nutrition create vulnerability to physical and mental impairments, which also impact adaptive functioning relevant to the mental retardation assessment.<sup>166</sup>

Culture impacts all three diagnostic criteria in the clinical definitions of mental retardation discussed by the Supreme Court in *Atkins v. Virginia*, which exempted persons with mental retardation from

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160. See AM. ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORT 87 (10th ed. 2002) (“A diagnosis of mental retardation must take into account the sociocultural context of the individual.”). The former American Association on Mental Retardation is now the American Association on Intellectual and Developmental Disabilities.

161. *Id.*

162. *Id.*

163. See Wayland, *supra* note 139, at 929 (noting “evidence that refugees and people in underdeveloped and war-torn countries may be at even higher risk”) (citing Joop De Jong et al., *Lifetime Events and Posttraumatic Stress Disorder in 4 Postconflict Settings*, 286 J. AM. MED. ASS’N 555 (2001); Mina Fazel et al., *Prevalence of Serious Mental Disorder in 7000 Refugees Resettled in Western Countries: A Systematic Review*, 365 LANCET 1309 (2005)).

164. See AM. ASS’N ON MENTAL RETARDATION, *supra* note 160, at 45; MARY BEIRNE-SMITH ET AL., MENTAL RETARDATION: AN INTRODUCTION TO INTELLECTUAL DISABILITIES (7th ed. 2005). Malnutrition of the mother during pregnancy can reduce fetal brain mass. *Id.* at 215-16. Malnutrition after birth and low weight at birth may be early conditions for developmental and neurological disorders, including brain damage. UNICEF, CHILDREN OF THE AMERICAS: CHILD SURVIVAL, PROTECTION AND INTEGRATED CHILDHOOD DEVELOPMENT IN THE 1990S, 29-30 (1992). Malnutrition impacts development in formative years, from birth through the age of five. *Id.* at 29.

165. See BEIRNE-SMITH ET AL., *supra* note 164, at 162-63.

166. See AM. ASS’N ON MENTAL RETARDATION, *supra* note 160, at 45, 169-82.

execution.<sup>167</sup> With regard to intellectual functioning (“IQ”), limitations in present functioning must also be addressed within the context of the environments discussed above.<sup>168</sup> Culture is also significant to the second criterion, adaptive functioning or adaptive behavior, “the collection of conceptual, social, and practical skills that have been learned by people in order to function in everyday lives.”<sup>169</sup> Adaptive functioning limitations are a result of the combination of a person’s innate ability and family, neighborhood, and community support systems<sup>170</sup>—all of which are shaped by culture. Where cultural and/or linguistic differences are extreme, as, for example, in the case of a client from a small rural village in Central America that lacks electricity, piped water, and paved roads, commonly used standardized tests for adaptive functioning such as the Vineland<sup>171</sup> may be useless and misleading. Instead, personal observation, visits to the community, and interviews with family are critical to an accurate assessment of functioning deficits.<sup>172</sup>

With regard to the third criterion, age of onset, a common issue when it comes to determining if a capital client has mental retardation is that decision-makers (prosecutors making charging decisions, courts, or juries making legal determinations of death-eligibility or the applicability or sufficiency of certain defenses) want early documentation—when did mental retardation first manifest? The before-the-age-of-eighteen onset requirement of the *Atkins*-approved clinical definitions for mental retardation<sup>173</sup> spurs the query. How could someone

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167. *Atkins v. Virginia*, 536 U.S. 304, 308, 318-21 (2002).

168. See *supra* note 162 and accompanying text.

169. AM. ASS’N ON MENTAL RETARDATION, *supra* note 160, at 41; see AM. PSYCHIATRIC ASS’N, *supra* note 42, at 39-40; *Atkins*, 536 U.S. at 308. At least one significant limitation in a designated capacity is a requisite for a finding of mental retardation. AM. ASS’N ON MENTAL RETARDATION, *supra* note 160, at 91.

170. AM. ASS’N ON MENTAL RETARDATION, *supra* note 160, at 91; AM. PSYCHIATRIC ASS’N, *supra* note 42, at 40.

171. The Vineland Adaptive Behavior Scales “score[] communications, daily living skills, socialization, and motor skills . . . and generates an adaptive behavior composite that is correlated with the expected skills at a given age.” SADOCK & SADOCK, *supra* note 5, at 1162.

172. As the American Association on Mental Retardation explained:

The key challenges are to identify sociocultural circumstances that might differ from those of the norm group, to examine the individual’s performance in relation to others of the same age and culture, and to evaluate the expectations and opportunities of the individual’s culture that might influence an adaptive behavior score. Behavioral expectations may differ across cultural groups, along with education and training in adaptive skills. Assessments, therefore, must consider relevant ethnic and cultural factors.

AM. ASS’N ON MENTAL RETARDATION, *supra* note 160, at 87.

173. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

with mental retardation succeed in school and be promoted from grade to grade, successfully hold a job, and be married? The answer may differ based on an individual's culture and the nature of the support and structure it provides to members of its community.

### C. *Rapport: Communication and Collecting Evidence*

Even if a defense team is on the lookout for cultural impacts on a client's mental health, and cognizant of the cultural aspects of environmental supports and adaptive functioning limitations relevant to mental retardation, and of the breadth of cultural influence generally, the team will not get far if it lacks the ability to communicate effectively. This requires trust and rapport with the client, the client's relatives and friends, and members of the client's community. While cultural competency develops through awareness of one's own cultural perspective and through cross-cultural education and understanding, mitigation investigations that fully account for culture use that understanding to develop strong relationships with people who know the client and the environments in which he or she has lived.

Language is a threshold barrier, as demonstrated by the problems encountered in the *Marquez-Burrola* case. The defense team should strive to have at least one member who fluently speaks the primary language or dialect of the client, the client's family, and community (these languages may differ). A defense team lacking linguistic fluency is at a disadvantage from the outset because they must rely on a middle person, an interpreter, to communicate with the client.<sup>174</sup> Interpreters, who constitute a filter between the defense team and the client, risk miscommunicating critical legal information between attorney and client and hinder the investigative process. This is particularly true in mitigation investigation, which seeks to unearth everything in the client's past, including extremely sensitive facts and issues that may have long been kept secret by the client or members of his family.<sup>175</sup> Recruiting a family member or relative as an interpreter, therefore, does not resolve the problem and only complicates matters. As a rule, persons emotionally involved as family or friends make poor interpreters because they are likely to manipulate information to the client to avoid insult or

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174. This possibility will differ based on the language in question. Where a client's first language is Spanish, for example, failure to have a member of the defense team who is fluent is inexcusable. It may be more difficult, however, to recruit a team member who can communicate fluently with, for example, a Polynesian client. In that circumstance, the team will at least need the services of a translator or interpreter.

175. See Stetler, *supra* note 113, at 36.

embarrassment, or to avoid telling bad news.<sup>176</sup> In *Marquez-Burrola*, for example, trial counsel used the client's nephew as an interpreter and, as the appellate court noted, testimony at the post-conviction hearing suggested that, unbeknownst to trial counsel, family members may have pressured the nephew to withhold information from the client for fear of offending him.<sup>177</sup>

Linguistic fluency is but one aspect of communication. It is necessary to spend the time to develop relationships, and to understand and become sensitive to cultural differences. In *Marquez-Burrola*, post-conviction counsel obtained assistance from attorneys and mitigation specialists working in conjunction with the Mexican government, who were able to develop relationships with witnesses in Mexico and arrange and lead the investigation.<sup>178</sup> In cases of foreign nationals, when some mitigation investigation necessarily must take place abroad, these connections are critical to breaking down barriers. Some individuals will be unfamiliar with and frightened of a foreign justice system. Overcoming such barriers will be necessary to secure the trust of members of the community not only as witnesses, but as guides, where streets are unpaved and unmarked and many potential witnesses lack a phone. And culturally competent assistance will enable the defense team to receive a stamp of approval from the client's community.<sup>179</sup>

Of course, capital counsel will not always have governmental assistance, but the same rules apply. Rapport begins by developing a close relationship between the defense team and individuals within a community, before showing up with a large group of strangers to ask personal questions. It is important to reiterate that cultural competency does not require a mitigation specialist to be an expert in all layers of a client's cultural influence; but it requires that the mitigation specialist know enough to recognize when the time has come to call someone else—or many “someone elses”—and whom to call. For example, consider the representation of a client charged with capital murder for a drive-by gang-related killing in a racially and socially segregated

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176. See Naomi E. Terr, *Conducting Mitigation Investigations in Cases of Foreign National – Part One*, CAPITAL LITIGATION UPDATE, Vol. 8, No. 14 (Mar. 2006); see also Robert L. Rhodes, *Legal and Professional Issues in the Use of Interpreters: Guidelines for School Psychologists*, 29 NAT'L ASS'N OF SCHOOL PSYCHOLOGISTS COMMUNIQUE 28, 28 (2000).

177. *Marquez-Burrola v. State*, 2007 OK CR 14, ¶ 50 & n.16, 157 P.3d 749, 765 & n.16.

178. *Id.* at ¶¶ 46-55, 764-67; see Kuykendall et al., *supra* note 37, at 1014-15 (discussing the failure of *Marquez-Burrola*'s trial counsel to establish a dialogue with Mexican legal assistance or authorities).

179. See Kuykendall et al., *supra* note 37, for detailed discussion of life-history investigation of foreign nationals.

housing project where the client grew up and in which the gang congregates. If the members of the defense team lack experience in the community, a solution may be to retain a community lay expert who knows the community history and rules, police officers, and leaders, to educate the team and to serve as liaison for the team.<sup>180</sup>

To take this example a step further, suppose a client suffers from adaptive functioning deficits serious enough to warrant a diagnosis of mental retardation. To ascertain the client's adaptive functioning limitations, the defense team must become familiar with his supports. The acceptance and trust of some member of the community (perhaps the client or a member of the client's family or a member of the defense team who is also involved in the community) will be necessary: first, so that the defense team may grow to respect and understand what is happening in the community; and second, so that understanding in turn may promote community respect for the defense team. With rapport, members of the community or the client's family will feel more comfortable telling the defense team about the client's limitations and any efforts on their part to help the client function. Evidence of adaptive functioning limitations consistent with mental retardation may help establish that the client played a non-leadership role in the charged offense, or may help to produce a plea agreement to a lesser, non-capital sentence or, alternatively, may act as mitigation at sentencing. "Participant observation' means that the ethnographer participates in the life of the people in order to discover what the right questions are. . . . Only if ethnographers learn to speak with people in their own language can they understand the rational reasons people have for doing what they do."<sup>181</sup>

## V. CONCLUSION

The Supplementary Guidelines for the Mitigation Function of Capital Defense Teams exemplify a standard of cultural competency. By insisting upon the establishment of rapport with clients and witnesses, the acquisition of exhaustive life history documentation, and the performance of culturally competent interviews of the client and everyone who has ever known him, the Supplementary Guidelines

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180. See generally VIGIL, *supra* note 123, at 13-15, 20, 90-94 (describing and examining by case study the need to look at interactions between police, families, and schools to understand the community-level problems that lead to gang membership and its associated violence).

181. PAUL BOHANNAN & DIRK VAN DER ELST, ASKING AND LISTENING: ETHNOGRAPHY AS PERSONAL ADAPTATION 24 (1998).

assure the attentiveness to detail necessary for culturally competent mitigation work. These are the methods for uncovering more than what the eye can see—or more precisely, more than what the nonchalant observer or the uninformed juror initially recognizes or remembers. Everyone has experienced conflict in his or her life. But to understand a capital defendant's conflict, jurors must witness a presentation that empathetically portrays his individual humanity within the crucial context of culture. Every new fact changes perception, if ever so slightly. It is the accumulation of facts and details, painted with a fine brush, that enables capital decision makers to transcend expectations, prejudices, and stereotypes and view the defendant as a unique human being worthy of compassion.

A crucial by-product of culturally competent representation and investigation is the elimination of stereotype. Stereotyping, one of the great barriers to humanizing a defendant before a jury and to constructing a full and reliable social history, is a danger whenever evidence is presented concerning a defendant. By sharing details about the defendant's life, jurors come closer to understanding the defendant's view of the world and his actions. Close attention to cultural detail uncovers a reality that explains what a cursory, less culturally sensitive view overlooks. A defense attorney can present a client's life-history, like any series of facts, in many ways; but it takes more to explain. The Supplementary Guidelines provide the defense team a blueprint for becoming culturally competent learners and observers.