

## USING THE SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES TO CHANGE THE PICTURE IN POST-CONVICTION

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### I. INTRODUCTION: WHAT IS A PICTURE WORTH? LIFE OR DEATH

All murder cases are difficult to defend. But a murder case that has already resulted in (1) a conviction of capital murder, (2) a jury's sentence of death, (3) a state supreme court's conclusion that the jurors got it right, and (4) the United States Supreme Court's refusal to intercede—then what does a defense team do? The prosecution's version of events has been endorsed by the jurors, multiple courts, the news media, and the public. The tabloid press has often given the condemned defendant a catchy dehumanizing nickname: "The Night Stalker," "The Morbid Minister," or simply "Monster."<sup>1</sup> The client's identity has been reduced to nothing more than a sound bite or headline which even (*especially*) your friends and relatives recite: "Oh, isn't this the cold-

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1. "On November 7, 1989, defendant Richard Ramirez was sentenced to death for the so-called Night Stalker murders" in Los Angeles. *People v. Ramirez*, 139 P.3d 64, 71-72 (Cal. 2006). Popular culture adds to tabloid nomenclature. The metal band Macabre recorded its song *Morbid Minister* about Gary M. Heidnik on the album *MURDER METAL* (Season of Mist Records 2003). Charlize Theron played the title role in *MONSTER*, a film about Aileen Wuornos (Columbia Pictures 2003). Heidnik was executed in Pennsylvania on July 6, 1999, after waiving his appeals. *CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A.* 19 (2007), available at [http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA\\_Winter\\_2007.pdf](http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2007.pdf). Wuornos was executed in Florida on October 9, 2002. *Id.* at 24.

blooded S.O.B. who . . . .” Fill in the blank. Technical arguments about refined points of law alone will not erase this picture.<sup>2</sup> What can?

A different picture: Friends, family members, clerks, the press, and especially post-conviction judges and their law clerks must have a new and different-from-direct-appeal “thought bubble” about the client, and/or the crime, and/or the trial and sentencing, for legal claims to gain much traction during post-conviction proceedings. A criminal defense lawyer’s stock-in-trade is the presentation of a story, a narrative, a picture that is different from, truer to, and more congruent with the known facts, and thus more compelling, than the prosecution’s.<sup>3</sup> This is just as true in post-conviction proceedings as it is at trial, indeed it is probably truer—the closer a capital case gets to the end of litigation, the more “lives hang in the balance of a tale.”<sup>4</sup>

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2. Speaking to the Conference of Chief Justices in Washington, former New York Governor Mario M. Cuomo commented:

[T]he startling growth in violence and crime, made so terribly vivid by the electronic media and movies, frightens us and outrages us. So much so that we have little tolerance for labored explanations from the judge as to why apparently “technical” errors or insufficiencies should allow someone we are all sure is guilty, to go free.

Mario M. Cuomo, *Our Lady of the Law Calls*, N.Y. L.J., June 3, 1999, at 2 (excerpted from Mario Cuomo, *We Must Lead the Charge*, Remarks of Mario Cuomo at the Conference of Chief Justices (May 14, 1999), in *CT. REV.*, Fall 1999, at 14, 17).

3. See Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 *CLINICAL L. REV.* 9, 17 (1994) (Opposing counsel in a criminal case “diverge in their analysis of the legal issue that the Court must decide, in their interpretation of the relevant precedents, and in their ordering of the relevant values. But they diverge still more in the basic stories they configure, the worlds of narrative action they create.”). Professor Amsterdam mentors on:

So I ask you (the oldster said), are these not stories? Are they not powerful narratives that have a narrative beginning and a narrative middle and that dictate different narrative endings, different judgments of the Court? Do they not point to those different judgments, to some extent, *narratively*—quite apart from the *legal* arguments in which they are embedded?

*Id.* at 19; see also ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 110-13, 139-41 (2000); Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 *CLINICAL L. REV.* 1, 4-9 (2005).

Our fundamental premise that a capital post-conviction defense team must, through storytelling, “change the picture,” is stolen not only from Professor Amsterdam’s extraordinary contributions to our understanding of the use and power of narrative but also from presentations and lectures of countless other colleagues over the years. Professor John Blume may well have been the first person we heard say “change the picture,” although we are confident he stole it as well. Regardless of who first intoned the phrase, the most effective capital post-conviction and trial defense lawyers (and prosecutors) have always been storytellers.

4. Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 *STAN. L. REV.* 39, 43 (1994).

## II. MITIGATION CHANGES THE TALE

One of the most important tasks for the capital post-conviction defense team is to learn all there is to know about their client's singular frailties and strengths, but also about his or her utter normalcy, and then starkly to convey to decision-makers the unique constellation of conditions and events that unjustly dispatched him or her to death row.<sup>5</sup> Three cases from the Supreme Court illustrate this "there-but-by-the-grace-of-God-go-I" litigation.

### A. *Terry Williams*

Terry Williams killed a drunk man by beating him in the chest and back with a garden tool. He took three dollars from the victim's wallet and left him gasping for breath. He also savagely assaulted two elderly victims after this murder, leaving one in a vegetative state; set his jail cell on fire while awaiting trial for the murder; and stabbed a man during a robbery.<sup>6</sup> At his sentencing proceeding, Williams's defense counsel presented the testimony of Williams's mother and two neighbors, one of whom had never been interviewed by trial counsel but was noticed in, and summoned from, the audience "and asked to testify on the spot."<sup>7</sup> These witnesses described Williams as a "nice boy."<sup>8</sup> He was sentenced to death, that sentence was affirmed on direct appeal, and then the picture of his case changed.

Post-conviction counsel provided a truer picture of Terry Williams. First, through a proper investigation they obtained the written report of social workers who had removed Terry from his home when he was a toddler. This written report was presented in state post-conviction proceedings and ultimately was relied upon by the United States Supreme Court when it ordered that Terry Williams be awarded habeas corpus relief based upon trial counsel's ineffectiveness at sentencing. The report is quoted at footnote nineteen of the Supreme Court opinion:

The home was a complete wreck. . . . There were several places on the floor where someone had had a bowel

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5. Hereafter, we will use the male pronoun when referring generally to individual clients, since fewer than two percent of death-sentenced prisoners are female. (Of 3350 death-sentenced prisoners as of January 1, 2007, 3291—98.24%—were male.) CRIMINAL JUSTICE PROJECT, *supra* note 1, at 1.

6. *Williams v. Taylor*, 529 U.S. 362, 367-68 (2000); *see also id.* at 418 (Rehnquist, C.J., concurring in part and dissenting in part).

7. *Id.* at 369 (majority opinion).

8. *Id.*

movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. . . . The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. . . . The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey.<sup>9</sup>

This report was reflective of “extensive records graphically describing Williams’s nightmarish childhood.”<sup>10</sup> Post-conviction counsel showed that “Williams’ parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, and that he had been committed to the custody of the social services bureau for two years during his parents’ incarceration (including one stint in an abusive foster home).”<sup>11</sup> Post-conviction counsel also showed that Williams was “‘borderline mentally retarded’ and did not advance beyond sixth grade in school.”<sup>12</sup> In addition, post-conviction counsel produced “prison records recording Williams’ commendations for helping to crack a prison drug ring and for returning a guard’s missing wallet,”<sup>13</sup> and secured the testimony of prison officials who described Williams as among the inmates “least likely to act in a violent, dangerous or provocative way.”<sup>14</sup>

The United States Supreme Court concluded that this new picture, particularly “the graphic description of Williams’ childhood, filled with abuse and privation, or the reality that he was ‘borderline mentally

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9. *Id.* at 395 n.19. As an aside, we note that this caseworker report provides a vivid description that could not have been obtained just by interviewing Terry Williams or his family. Even the most adept mitigation interviewer could never have elicited this imagery because the parents had been too intoxicated, and the children were too young and under the influence of whiskey, to have remembered the episode or described it objectively. Moreover, the condition of the household, with dirty dishes and trash in the kitchen, and urine and feces on the floor, may not have been an unusual occurrence. A family member or neighbor sober enough to have recalled some of the incident (children naked below the waist, parents arrested, children put in the hospital) might have had no specific memory of the physical squalor if it was indeed the norm.

10. *Id.* at 395.

11. *Id.*

12. *Id.* at 396.

13. *Id.*

14. *Id.*

retarded,' might well have influenced the jury's appraisal of his moral culpability."<sup>15</sup>

*B. Kevin Wiggins*

A seventy-seven-year-old woman was found drowned in the bathtub of her ransacked apartment. Kevin Wiggins was arrested about a week later in the victim's car. He had pawned a ring belonging to the victim, and, along with his girlfriend, had been using the victim's credit card for shopping.<sup>16</sup> He was convicted of first-degree murder, robbery, and theft. At capital sentencing before a jury, Wiggins's defense counsel offered no evidence of Wiggins's life, background, social history, or mental make-up. Wiggins was sentenced to death. That sentence was affirmed, and post-conviction counsel's investigation began to change the picture of Kevin Wiggins's life.

Post-conviction counsel presented a picture of Kevin Wiggins's "excruciating life history."<sup>17</sup> The evidence included an elaborate history of severe sexual and physical abuse that he suffered at the hands of his mother and while in the "care" of a series of foster homes. Kevin's mother was a mean, sadistic alcoholic. She left Kevin and his siblings home alone for days with nothing to eat, "forcing them to beg for food and to eat paint chips and garbage."<sup>18</sup> Kevin's mother beat the children for breaking into the kitchen, which she kept locked. She had sex with various men while the children were in her bed.<sup>19</sup>

Kevin had to be hospitalized when his mother forced his hand against a hot stove burner. He was placed in foster homes at age six. Two consecutive foster mothers abused him physically, and, in the second home, he was repeatedly raped by the foster father. As a teenager, Kevin ran away from his foster home and lived on the streets. He returned intermittently to foster placements, and in one he was gang-raped on more than one occasion. When Kevin entered the Job Corps, a supervisor sexually abused him.<sup>20</sup>

As they had in *Williams*, the Supreme Court in *Wiggins* determined that this new mitigating picture of Kevin Wiggins was so "powerful,"<sup>21</sup> that he was entitled to habeas corpus relief due to trial counsel's

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15. *Id.* at 398.

16. *Wiggins v. State*, 724 A.2d 1, 4 (Md. 1999).

17. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

18. *Id.* at 517.

19. *Id.* at 516-17.

20. *Id.* at 517.

21. *Id.* at 534.

ineffectiveness at sentencing in violation of the Sixth Amendment. “Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care.”<sup>22</sup> The Court found that the “nature and extent of the abuse” Wiggins suffered was “considerable,” and had the jurors known about it there was a reasonable probability that they would have not returned a death sentence.<sup>23</sup>

### C. *Ronald Rompilla*

A bar owner was found dead, left in a pool of his own blood, and set afire. The victim had been stabbed multiple times, including sixteen wounds to his neck and head. He “had been beaten with a blunt object, and his face had been gashed, possibly with shards from broken liquor and beer bottles found at the scene.”<sup>24</sup> He had been murdered as he was closing the bar.<sup>25</sup> Ronald Rompilla, who had been at the bar the night of the crime, was convicted of the murder.

At sentencing, the Commonwealth showed that Rompilla’s crime was committed during the course of another felony, that it involved torture, and that Rompilla had a significant history of felony convictions involving the use or threat of violence.<sup>26</sup> Defense counsel responded with relatively brief testimony from family members who argued that Rompilla was innocent and a good man. His fourteen-year-old son testified that he loved his father and would visit him in prison. The jury sentenced Rompilla to death.

The post-conviction defense team presented a different picture, beginning with the story of Ronald Rompilla’s father locking him and his brother in a small wire-mesh dog pen filled with excrement. The picture was filled out by both parents being alcoholic, Ronald Rompilla’s mother drinking while she was pregnant with him, Ronald Rompilla’s father beating his mother (who stabbed the father on at least one occasion), and beating Ronald with hands, fists, leather straps, belts and sticks. “All of the children lived in terror.”<sup>27</sup> Ronald Rompilla was isolated as a child and not allowed to visit other children or speak to

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22. *Id.* at 535.

23. *Id.* at 535-36.

24. *Rompilla v. Beard*, 545 U.S. 374, 397 (2005) (Kennedy, J., dissenting).

25. *Id.*

26. *Id.* at 378 (majority opinion).

27. *Id.* at 391-92 (quoting *Rompilla v. Horn*, 355 F.3d 233, 279 (3d Cir. 2004) (Sloviter, J., dissenting)).

anyone on the telephone. The family had no indoor plumbing, the children slept in an attic with no heat, and they were sent to school filthy and in rags.<sup>28</sup>

Post-conviction counsel also presented evidence from mental health experts that Ronald Rompilla “suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions . . . likely caused by fetal alcohol syndrome’ . . . . School records showed Rompilla’s IQ in the mentally retarded range.”<sup>29</sup>

The Supreme Court found this picture of Ronald Rompilla to “bear[] no relation to the few naked pleas for mercy actually put before the jury” and that “[i]t goes without saying that the undiscovered ‘mitigating evidence, taken as a whole, ‘might well have influenced the jury’s appraisal’ of [Rompilla’s] culpability,’ and the likelihood of a different result if the evidence had gone in is ‘sufficient to undermine confidence in the outcome’ actually reached at sentencing.”<sup>30</sup> Thus, as in *Williams* and *Wiggins*, the new post-conviction picture produced a grant of habeas corpus relief for Ronald Rompilla because trial counsel’s performance violated the right to effective assistance of counsel.<sup>31</sup>

### III. THE MANDATE OF THE ABA GUIDELINES: CREATE THE WINNING, OR CHANGE THE LOSING, PICTURE

A defendant in a capital case has “a right—indeed, a constitutionally protected right—to provide the jury with the mitigating evidence . . . [which] might well . . . influence[] the jury’s appraisal of his moral culpability.”<sup>32</sup> The injustice in *Williams*’s, *Wiggins*’s, and *Rompilla*’s cases was that their penalty-phase jurors had no opportunity

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28. *Id.* at 392.

29. *Id.* at 392-93.

30. *Id.* at 393 (citations omitted).

31. All three individuals subsequently received sentences of less than death. Terry Williams received a life sentence by negotiated disposition in Danville, Virginia in 2000. See Frank Green, *Death Penalty Cases Scrutinized: More Hearings Are Being Ordered in Virginia*, RICHMOND TIMES-DISPATCH, Apr. 9, 2001, at A1, available at <http://truthinjustice.org/va-dpreview.htm>. On October 15, 2004, the State of Maryland agreed to a disposition sending Kevin Wiggins to a state facility for mental health treatment and rehabilitation services, but making him eligible for parole immediately based on time already served. See Jenner & Block, *12 Year Battle for Kevin Wiggins Comes to an End* (Oct. 15, 2004), [http://www.jenner.com/news/news\\_item.asp?id=12759624](http://www.jenner.com/news/news_item.asp?id=12759624). On August 13, 2007, the Lehigh County (Pennsylvania) District Attorney’s Office stipulated to a life sentence for Ronald Rompilla. See Associated Press, *Death Row Inmate Get New Life Term*, USA TODAY, [http://www.usatoday.com/news/topstories/2007-08-13-477084247\\_x.htm](http://www.usatoday.com/news/topstories/2007-08-13-477084247_x.htm) (last visited Apr. 8, 2008).

32. *Williams v. Taylor*, 529 U.S. 362, 393, 398 (2000).

to consider all available mitigating evidence at sentencing. However, while identifying an injustice in a capital case is necessary to obtain relief in post-conviction proceedings, it is not sufficient. The new mitigation picture produced by post-conviction counsel provides the incentive, but not always the means, for relief.<sup>33</sup>

The means for relief in these three cases was the Sixth Amendment's guarantee of the effective assistance of counsel at trial and sentencing. *Strickland v. Washington*<sup>34</sup> established a two-prong test for resolving ineffective assistance of counsel claims: (1) did defense counsel perform unreasonably and, as a result, (2) was confidence in the outcome of the criminal proceeding undermined?<sup>35</sup> But what is reasonable attorney conduct?

In *Williams*, *Wiggins*, and *Rompilla* the Supreme Court looked to "the standards for capital defense work articulated by the American Bar Association" for evaluating reasonable performance.<sup>36</sup> In *Wiggins*, the Court described the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* ("ABA Guidelines") as "well-defined norms" for the performance of the capital

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33. The art of changing the picture in post-conviction litigation lies in identifying instances of injustice and unfairness that are so fundamental that the need for judicial redress looms large, and judges (or their clerks) will look for a means of righting the wrong. The injustice may concern race, or judicial bias, or prosecutorial cheating, or a client's previously undiscovered brain tumor, but the reviewing court will often avoid addressing these topics directly while finding some other, apparently technical, basis for providing relief. The exposed injustice may also provide the prosecution with incentive to accept a negotiated disposition and close the case without further attention. See, e.g., Editorial, *Miller-El Case Finally Ends, Writing Important Chapter; Though Tortured, Miller-El Case Served Purpose*, DALLAS MORNING NEWS, Mar. 21, 2008, available at [http://www.dallasnews.com/sharedcontent/dws/dn/opinion/editorials/stories/DN-millere1\\_21edi.AR.T.State.Edition1.4683db0.html](http://www.dallasnews.com/sharedcontent/dws/dn/opinion/editorials/stories/DN-millere1_21edi.AR.T.State.Edition1.4683db0.html).

34. 466 U.S. 668, 687 (1984).

35. *Williams*, 529 U.S. at 390. Confidence in the outcome of a criminal proceeding is undermined if there is a reasonable probability that the result in the proceeding would have been different absent the unreasonable attorney conduct. *Strickland*, 466 U.S. at 694.

36. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) ("[S]tandards to which we long have referred as 'guides to determining what is reasonable.'") (quoting *Strickland*, 466 U.S. at 688 and citing *Williams*, 529 U.S. at 396); *Rompilla v. Beard*, 545 U.S. 374, 387 (2004).

defense team.<sup>37</sup> The ABA Guidelines<sup>38</sup> catalogue capital counsel's long-recognized "obligations" and the parameters of attorney "diligence."<sup>39</sup>

Importantly for present purposes, the ABA Guidelines' strictures apply equally to trial and to post-conviction counsel—each defense team must conduct "an aggressive investigation of all aspects of the case"<sup>40</sup> and "collateral counsel cannot rely on the previously [trial counsel] compiled record but must conduct a thorough, independent investigation."<sup>41</sup> Post-conviction counsel has an entirely new set of facts to look into which trial counsel likely had no reason or ability to investigate.<sup>42</sup>

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37. *Wiggins*, 539 U.S. at 524 ("Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.")

38. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES]. The ABA GUIDELINES are also available online at <http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf>.

39. *Williams*, 529 U.S. at 396; *Wiggins*, 539 U.S. at 522. The Supreme Court has consistently used the ABA's standards and guidelines in capital cases to assess the performance of trial counsel who prepared their cases before the relevant ABA publications had been issued. In *Strickland*, the Court cited standards published by the ABA in 1980 when assessing trial counsel's performance in 1976-77. 466 U.S. at 688. In *Wiggins*, the Court cited the 1989 ABA Guidelines when assessing trial counsel's performance in 1988-89. 539 U.S. at 524. In *Rompilla*, the Court used multiple ABA publications from 1982, 1989, 1993, and 2003, to assess deficiencies in a 1988 trial. 545 U.S. at 387 & nn.6-7. Finally, in *Florida v. Nixon*, the Court used the 2003 ABA Guidelines to assess performance in 1984-85. 543 U.S. 175, 191 & n.6 (2004).

40. ABA GUIDELINES, *supra* note 38, at Guideline 10.15.1(E)(4).

41. *Id.* at Guideline 10.15.1, commentary. See also Eric M. Freedman, *The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-Conviction Proceedings*, 5 J. APP. PRAC. & PROCESS 325 (2003).

42. Post-conviction counsel must independently investigate the crime and the investigation of the crime by law enforcement authorities, a demanding task that includes interviewing all witnesses and possible witnesses, submitting forensic evidence for independent testing and expert analysis, and determining the best possible defense to the charge. See Russell Stetler, *Capital Cases: Post-Conviction Investigation in Death Penalty Cases*, CHAMPION, Aug. 1999, at 41-43. To some degree this investigation into the crime will have already been attempted by trial counsel, and the post-conviction investigation either will or will not demonstrate that trial counsel's performance was deficient and prejudicial under the Sixth Amendment and *Strickland* or that the prosecution suppressed material exculpatory evidence, see *Brady v. Maryland*, 373 U.S. 83, 87 (1963), or, worse, presented false evidence at trial.

Other investigation, investigation that perhaps trial counsel had no reason to undertake, must be undertaken for the first time ever by post-conviction counsel. Any and all of the actors at trial—the prosecutor, judge, jurors, bailiffs, audience members, witnesses, etc.—can violate a client's federal constitutional rights. Post-conviction counsel, charged with presenting all available violations of the constitution in a post-conviction petition, must investigate each of these actors and raise all appropriate claims for relief.

New and startling pictures of a case emerge when these actors are included in the available storylines. The case of the home-invasion, rape, and witness elimination ("what if they ain't dead" said the defendant before he shot the victims "a couple of more times apiece") becomes

Thus the ABA Guidelines serve two functions in post-conviction proceedings: they require that post-conviction counsel investigate and/or reinvestigate the entire case, thereby providing the potential for changing the picture; and they provide the legal framework for assessing trial counsel's performance. New pictures and new legal arguments arise using the ABA Guidelines, and all members of the post-conviction team must commit to one goal:

[W]inning collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and legal arguments—those which resulted in a conviction and imposition of the ultimate punishment, both affirmed on appeal—are unlikely to motivate a collateral court to make the effort required to stop the momentum the case has already gained in rolling through the legal system.<sup>43</sup>

#### IV. THE MITIGATION SPECIALIST'S CENTRALITY TO THE DEFENSE FUNCTION

Lawyers cannot do it alone. The Supreme Court in *Wiggins* emphasized the importance of the nonlawyer who had gathered the critical social history that changed the picture of Mr. Wiggins during post-conviction proceedings.<sup>44</sup> Indeed, the ABA Guidelines, last revised in 2003, require a multi-disciplinary defense team, consisting of no fewer than two qualified attorneys, an investigator, and a *mitigation specialist*,<sup>45</sup> with “at least one [team] member qualified by training and

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the case in which a juror was not forthcoming during jury selection about her relationship with the state's primary investigator because she wanted to be on the jury, see *Williams*, 529 U.S. at 440; the case of the defendant's lover who was gagged with his socks, rapped on the head, and then stabbed in the back becomes the case of the lawyer who fell asleep in court, see *Burdine v. Johnson*, 262 F.3d 336, 338, 367-68 (5th Cir. 2001); and the case of the defendant who shot two helpless, bound and gagged, hotel employees in the back as they lay face down during a robbery becomes the case in which the prosecutor took tips from a jury selection manual that included racial stereotypes, see *Miller-El v. Dretke*, 545 U.S. 231, 235-36, 264-66, 274 (2005). Our criminal justice system can ill-afford having sneaky jurors, sleeping lawyers, and racial animus at play in the trials of persons charged with terrible crimes, and a complete post-conviction investigation uproots and exposes such injustices.

43. ABA GUIDELINES, *supra* note 38, at Guideline 10.15.1, commentary. While the ABA Guidelines require a diligent (re)investigation of the entire case during post-conviction proceedings, see *supra* note 38 and accompanying text, we address only a portion of that responsibility—the duty to discover, document, and present the most compelling case for life based upon the mitigating aspects of the client's life before, during, and after the events which brought him to trial.

44. 539 U.S. at 516.

45. ABA GUIDELINES, *supra* note 38, at Guideline 4.1(A)(1) (The Defense Team and Supporting Services) (emphasis added); see also *id.* at Guideline 10.4(C)(2)(a) (detailing the

experience to screen . . . for the presence of mental or psychological disorders or impairments.”<sup>46</sup> The mitigation specialist is an indispensable member of the defense team at every stage of a capital case.<sup>47</sup>

The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client’s life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive case in mitigation.<sup>48</sup>

The *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (“Supplementary Guidelines”), published in this symposium Issue of the *Hofstra Law Review*, help to explain the critical role of the mitigation specialist throughout the case, and how the role changes according to the case’s procedural posture.<sup>49</sup>

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requirement for the defense team to contain “at least one mitigation specialist and one fact investigator”).

46. *Id.* at Guideline 4.1(A)(2); *see also* Guideline 10.4(C)(2)(b).

47. *See id.* at Guideline 4.1, commentary.

48. *Id.*

49. Mitigation, as in “the defense evidence introduced (or that should have been introduced) at a capital sentencing proceeding,” is not what a mitigation specialist is for (ironically). Mitigation, as in “how does this case end with a life sentence or less,” is what a mitigation specialist is for. There are many ways to show that a sentence less than death is appropriate. For example, we have seen countless cases in which a motion to suppress a confession has been heard and denied although the mitigation specialists had not completed their work and had not participated in the suppression strategy and hearing. To be constitutional, “waivers” by a defendant (for example, a waiver of the right to counsel and a subsequent confession) must have resulted from a brain acting knowingly, voluntarily, and intelligently. It makes no sense to present the “mitigation” at sentencing that the client’s brain does not work right and yet not present it at the suppression hearing as evidence that his confession is unreliable or was involuntarily given. If the confession is suppressed, the possibility that a negotiated settlement of the case, a guilty plea in return for a sentence less than death, increases; if the confession is not suppressed in light of such evidence, nevertheless the prosecution, the judge, the public, and other decision-makers will begin to see a different and helpful picture, a different narrative, of the case. Clearly the function of a mitigation specialist is not cabined within the confines of the sentencing proceeding.

Furthermore, ABA Guideline 10.10.1 requires counsel to “seek a theory that will be effective in connection with both guilt and penalty, and [counsel] should seek to minimize any inconsistencies.” *Id.* at Guideline 10.10.1. “It is critical that, well before trial, counsel formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages. Counsel should then advance that theory during all phases of the trial, including jury selection, witness preparation, pretrial motions, opening statement, presentation of evidence, and closing argument.” *Id.* at Guideline 10.10.1, commentary. Under Supplementary Guideline 10.11, “[i]t is the duty of the defense team [i.e., the mitigation specialist] to aid counsel in coordinating and

As with the ABA Guidelines themselves, the Supplementary Guidelines are not aspirational and “were developed . . . to reflect prevailing professional norms.”<sup>50</sup>

*A. Qualifications of the Mitigation Specialist*

The structural soundness of the defense team at trial or in post-conviction proceedings is not achieved by counting heads, for example, by having “two lawyers, an investigator, and a mitigation specialist.”<sup>51</sup> And structural soundness is not guaranteed by the level of experience of team members. Structural soundness is a function of the skills of each of the individual team members.<sup>52</sup> Thus, the Supplementary Guidelines do not measure the competence of mitigation specialists by whether they have particular college degrees or other backgrounds. What are important are the skills necessary for mitigation investigation. Supplementary Guideline 5.1 provides a detailed discussion of these skills, a discussion that serves two purposes: it provides guidance to post-conviction counsel in selecting an appropriate mitigation specialist for the needs of the case and client; and it provides an objective basis for assessing whether the trial team was structurally sound. A skilled mitigation specialist collects all background information about a client, processes that information, and then becomes a primary decider/adviser for the defense team regarding what sorts of experts and other team

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integrating the case for life with the guilt or innocence phase strategy.” SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Guideline 10.11, in 36 HOFSTRA L. REV. 677 (2008) [hereinafter SUPPLEMENTARY GUIDELINES]. By starting the “mitigation” at the front end rather than springing it at the back end of the case, the defense team often can improve the chances of obtaining a sentence less than death.

50. SUPPLEMENTARY GUIDELINES, *supra* note 49, Introduction.

51. *See supra* note 44 and accompanying text (describing the requirements for a multi-disciplinary defense team).

52. *See* ABA GUIDELINES, *supra* note 38, at Guideline 5.1 (Qualifications of Defense Counsel), especially 5.1(B)(2) sections (a) through (h), as well as the eleven areas of specialized training identified in ABA Guideline 8.1(B). The Commentary to ABA Guideline 5.1 states pointedly that:

[T]he abilities that death penalty defense counsel must possess in order to provide high quality legal representation differ from those required in any other area of law. Accordingly, quantitative measures of experience are not a sufficient basis to determine an attorney’s qualification for the task. An attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster.

*Id.* at Guideline 5.1, commentary. This Commentary also notes the valuable contributions of lawyers committed to high-quality representation who took on post-conviction cases without specific prior experience in criminal defense. *Id.*

members are further required to present a compelling picture of the client's life. The first step, gathering all the client's background information, is especially daunting. Supplementary Guideline 5.1(B) describes (without limitation) the range of subject areas subsumed under life history: medical history; toxic exposures; substance abuse and mental health history; exposure to maltreatment, neglect, and trauma; education, employment, training, and military history; multigenerational family history, including genetic disorders and vulnerabilities as well as multigenerational behavior patterns; correctional experience; influence of religion, gender, sexual orientation, ethnicity, race, culture and community; and socioeconomic, historical, and political factors. This information is gathered by skilled interviewing (addressed in Supplementary Guideline 5.1(C)) and skilled record gathering and record analysis (addressed in Supplementary Guideline 5.1(F)). Post-conviction counsel must ensure that their team has the capacity to explore all of these domains. And, looking back at trial performance, post-conviction counsel should see whether any of these areas were unexplored and, if so, whether that failure reflected structural deficits in the trial team.<sup>53</sup>

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53. Life-history records are especially important in post-conviction proceedings, but they are an indispensable part of mitigation investigation at every stage. Supplementary Guideline 5.1(F) emphasizes the importance of records, echoing the extensive discussion in the Commentary to ABA Guideline 10.7. SUPPLEMENTARY GUIDELINES, *supra* note 49, at Guideline 5.1(F). The Commentary to the ABA Guidelines states:

Records should be requested concerning not only the client, but also his parents, grandparents, siblings, cousins, and children. A multi-generational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. . . . Counsel should use all appropriate avenues including signed releases, subpoenas, court orders, and requests or litigation pursuant to applicable open records statutes . . . .

ABA GUIDELINES, *supra* note 38, at Guideline 10.7, commentary. Post-conviction counsel should carefully review the thoroughness of pretrial record gathering. Records that were gathered pretrial should be reviewed because they probably contained leads that should have been developed or pursued. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (investigation unreasonable because the known evidence uncovered in social services records would have led a reasonably competent attorney to investigate further).

In post-conviction litigation, documentary evidence obtained via such an investigation is particularly compelling. It is neutral, objective, and contemporaneous, and hence possibly more persuasive than new revelations from a witness or an expert opinion formed only after the capital conviction and sentence. Records can reveal not only what the client's family is reluctant to disclose (as in *Rompilla*, discussed *supra* notes 24-29 and accompanying text), but what they are incapable of disclosing (as in *Williams*, also discussed *supra* note 9 and accompanying text). The Supreme Court faulted trial counsel in *Williams* for failing to "conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because

Processing and analyzing information, and then performing directed investigation and reinvestigation based upon that analysis, are critical. A mitigation specialist must have this “investigate, assess, and reinvestigate” skill set. A mitigation specialist must have expertise in mental and developmental disorders and impairments<sup>54</sup> and must be attuned to factors in a client’s background which, when found, will begin to direct additional investigation. For example, does the post-conviction (and did the trial) specialist know: how to document a woman’s drinking of alcohol while pregnant, and how to begin to assess fetal alcohol spectrum disorders for a client; how to investigate for lead paint in the housing project or hundred-year-old house where the client grew up, and how to assess the neurological consequences; that mood disorders run in families just as surely as do medical disorders, and how to document and assess mood disorders; how to elicit information about all mental disorders—not just descriptions of acute and floridly psychotic moments, but the subtler prodromal signs; how to ask family members and intimate partners broadly about irritability, weight fluctuation, sleep patterns, fatigue, concentration problems, and other potential symptoms of mood disorders; the negative symptoms of schizophrenia—passivity, poor eye contact, neglected hygiene, reduction in body language—and how to document them; how to assess the client’s religious beliefs in an appropriate cultural context; how to discern manifestations of magical thinking and superstition?

In addition, the mitigation specialist must be skilled at using the tools of the trade like genograms and detailed life history chronologies.<sup>55</sup> A genogram presents the client’s family history in a color-coded and integrated “family tree,” with, for example, all of the family members who suffered from mental illness highlighted in one color, all the family members who suffered from substance abuse in another color, and all the family members who committed or attempted suicide in another color, etc. A technicolor genogram makes a powerful courtroom exhibit, but it is also a very useful visual work product to help the team keep track of family members and intimate relationships. Chronologies distilling the accumulated social data also show important connections: the year the client missed school coincides with a mother’s treatment for major

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of any strategic calculation but because they incorrectly thought that state law barred access to such records.” *Williams v. Taylor*, 529 U.S. 362, 395 (2000). Some of the juvenile records were so vivid that the Supreme Court quoted them directly in footnote nineteen of the Supreme Court’s opinion. *See supra* note 9 and accompanying text.

54. SUPPLEMENTARY GUIDELINES, *supra* note 49, at Guideline 5.1(E).

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

depression or a father's departure from the home. These standard digests of information and visualizations prompt additional investigation and enable colleagues and consultants to provide efficient assistance when outside help is called upon to brainstorm particularly difficult or sensitive mitigation issues.

Finally, the mitigation specialist must have “the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how those conditions may have affected the [client's] development and behavior, and to identify the most appropriate experts to examine the [client] or testify on his behalf.”<sup>56</sup> The mitigation specialist must be, or must become, familiar with all sorts of experts—“medical doctors, psychologists, toxicologists, pharmacologists, social workers and persons with specialized knowledge of medical conditions, mental illnesses and impairments; substance abuse, physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning”; “[a]nthropologists, sociologists and persons with expertise in a particular race, culture, ethnicity, religion”; “[p]ersons with specialized knowledge of specific communities or expertise in the effect of environments and neighborhoods upon their inhabitants”; and “[p]ersons with specialized knowledge of institutional life, either generally or within a specific institution.”<sup>57</sup>

### *B. Counsel's Rights and Duties in Selecting and Funding Mitigation Specialists*

#### 1. Whom to Select

Both the ABA and Supplementary Guidelines fully and repeatedly recognize counsel's responsibility for conducting a thorough life-history investigation regardless of any statement by the client opposing such investigation.<sup>58</sup> Only counsel is accountable for fulfilling the promise of the Sixth Amendment. In recognition of this accountability, Supplementary Guideline 4.1(A) imposes on counsel the duty to obtain the mitigation services and the right “to select one or more such persons whose qualifications fit the individual needs of the client and the case.”<sup>59</sup>

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56. ABA GUIDELINES, *supra* note 38, at Guideline 4.1, commentary.

57. SUPPLEMENTARY GUIDELINES, *supra* note 49, at Guideline 10.11(E)(1)(a)-(d).

58. *See* ABA GUIDELINES, *supra* note 38, at Guidelines 10.4(B), 10.7; SUPPLEMENTARY GUIDELINES, *supra* note 49, at Introduction.

59. SUPPLEMENTARY GUIDELINES, *supra* note 49, at Guideline 4.1(A); *see also id.* at Guideline 4.1(B) (“Counsel must take whatever steps are necessary to conduct such investigation of

These persons must be “independent of the government,”<sup>60</sup> and it would be inconsistent with these principles either to impose a particular individual on counsel (regardless of qualifications or past experience) or to expect counsel to select only from a pre-approved roster of potential mitigation specialists. Mitigation specialists (and clients) are not fungible: the individual needs of the client and the case must shape the selection process in order best to ensure that a compelling mitigation picture of the case will emerge.

While the Supplementary Guidelines provide useful standards for assessing the general skill sets that the mitigation specialist will need, as well as the importance of a commitment to high-quality representation,<sup>61</sup> counsel must consider case-specific concerns as well. With more than three thousand prisoners currently under sentence of death across the United States,<sup>62</sup> there is an enormous need for qualified, skilled, mitigation specialists. Counsel must identify mitigation specialists who can build trust and rapport with individuals from diverse racial groups. The broad demographic death row categories alone reflect great diversity: 1517 white (45%); 1397 black (42%); 359 Latino/a (11%); 37 Native American (1%); 39 Asian (1%); and 1 unknown.<sup>63</sup> More than a hundred individuals on death row are foreign nationals from thirty-three different countries.<sup>64</sup> The need for ethnoculturally and linguistically competent mitigation specialists is patent, and counsel must select specialists with the unique skills to establish trusting relationships and to organize the biographical investigation necessary. Ninety-eight percent of death-sentenced prisoners are male,<sup>65</sup> but the needs of the female fraction will require special skills.

All of our badges of social identity become potential barriers to disclosure of sensitive life-history information when clients and defense teams do not share them. In addition to race, nationality, language, and gender, potential barriers include age, class, education, politics, religion, sexual orientation, and social values. “Overcoming these barriers will

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the background, training and skills of the team members to determine that they are competent and to ensure on an ongoing basis that their work is of high professional quality.”).

60. *See id.* at Guideline 4.1(A).

61. *See id.* at Guideline 5.1 (Qualifications of the Defense Team).

62. CRIMINAL JUSTICE PROJECT, *supra* note 1, at 1 (3350 prisoners on death row as of January 1, 2007).

63. *Id.*

64. *See* Death Penalty Information Center, Foreign Nationals and the Death Penalty in the US (Feb. 29, 2008), <http://www.deathpenaltyinfo.org/article.php?did=198> (information provided by Mark Warren of Human Rights Research).

65. CRIMINAL JUSTICE PROJECT, *supra* note 1, at 1 (3291 males as of January 1, 2007).

often mean involving someone in the defense team”—most often a mitigation specialist—“with whom the client will feel more at ease”<sup>66</sup> and through whom the entire defense team will gain a richer understanding, appreciation, and picture of the client’s circumstances.<sup>67</sup>

## 2. Need for Funds

The mitigation specialist, in turn, can provide crucial assistance to post-conviction counsel in helping to explain to the funding source the scope and expense of the necessary life-history investigation.<sup>68</sup> In many state jurisdictions, and in motions for post-conviction relief in federal death penalty cases under 28 U.S.C. § 2255, post-conviction funding applications are made in the very courts where the cases were originally tried. The trial court judges may have presided over long trials; none of them believe at the outset of post-conviction proceedings that the Constitution was violated before their very eyes. They have formed their own views of the evidence supporting convictions and death sentences. In many cases, they appointed trial counsel and provided funding for experts and ancillary services at trial. They may know trial counsel at least by reputation, and they may feel that they have “already” generously funded a mitigation investigation. They may have a picture of the case as over and done with, and post-conviction proceedings as a necessary evil.

Both the ABA Guidelines and the Supplementary Guidelines are important authorities for the need for thorough investigation as a component of high-quality representation at every stage where counsel may be appointed, including “post-conviction review, competency-to-be-executed proceedings, clemency proceedings and any connected

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66. Russell Stetler, *Capital Cases: Mitigation Evidence in Death Penalty Cases*, CHAMPION, Jan.-Feb. 1999, at 35, 36.

67. Counsel must also be certain that the mitigation specialist has the time to perform as required by the Supplementary and ABA Guidelines. Post-conviction deadlines are critical, and it is mandatory that the mitigation specialist be able to commit to spending the necessary time within the time constraints imposed. Supplementary Guideline 10.3 obliges all members of the defense team, including the mitigation specialist, to “limit their caseloads to the level needed to provide each client with high quality legal representation,” SUPPLEMENTARY GUIDELINES, *supra* note 49, at Guideline 10.3, but counsel should determine in advance that the mitigation specialist can dedicate adequate blocks of time to give undivided attention to the post-conviction client. Workload issues are so important that both the ABA Guidelines and the Supplementary Guidelines discuss them twice, at Guideline 6.1 and 10.3 (from supervisory and individual perspectives, respectively). Counsel should also monitor the progress of the life-history investigation regularly to be sure it is proceeding efficiently and expeditiously.

68. See *supra* text accompanying notes 52-53. Supplementary Guideline 4.1(A) recognizes that applications for funding mitigation services “should be conducted *ex parte*, *in camera*, and under seal.” SUPPLEMENTARY GUIDELINES, *supra* note 49, at Guideline 4.1(A).

litigation.”<sup>69</sup> The mitigation specialist can help counsel to change the judge’s picture about what is necessary for a competent mitigation investigation to be conducted under the unique circumstances of the case, and can thereafter help demonstrate what trial counsel may have failed to uncover or present.

In addition, Supplementary Guideline 9.1 (“Funding and Compensation”) explicitly reaffirms ABA Guideline 9.1(C): “Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed to assist counsel with the litigation of death penalty cases.”<sup>70</sup> The impropriety of flat fees, compensation caps, and lump-sum contracts is also reaffirmed in the context of non-attorney members of the capital defense team.

### C. *Legal Guidance for Post-Conviction Mitigation Specialists*

Most mitigation specialists who are available for post-conviction cases also work at the trial level.<sup>71</sup> Supplementary Guideline 4.1(D) requires post-conviction counsel to provide their mitigation specialists complete information about the range of legal issues available in post-conviction proceedings; the rules of evidence; the critical differences between pretrial and post-conviction practice, including applicable discovery rules and the fact that judges, rather than jurors, will be reviewing all the evidence that is submitted; and the available methods of expanding the evidence that is in the record.<sup>72</sup>

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69. SUPPLEMENTARY GUIDELINES, *supra* note 49, at Guideline 1.1(B).

70. *Id.* at Guideline 9.1; ABA GUIDELINES, *supra* note 38, at Guideline 9.1(C).

71. One chief exception is staff mitigation specialists at institutional state post-conviction offices and the Capital Habeas Units at several Federal Defender offices.

72. SUPPLEMENTARY GUIDELINES, *supra* note 49, at Guideline 4.1(D). While testifying witnesses may present the most powerful mitigating evidence at trial before a jury, post-conviction cases may be won with voluminous documentary evidence, i.e., records kept by governmental agencies documenting the client’s life yet not found or presented by trial counsel. Affidavits and declarations, largely inadmissible at trial, are often presented in support of post-conviction petitions. The mitigation specialist must be skilled at obtaining such “testimony.” Experts, by affidavit or live, may be more persuasive before judges than before jurors. The entire presentation-of-evidence strategy in capital post-conviction proceedings may be counterintuitive to persons skilled solely in trial advocacy, and counsel is obliged to educate.

Supplementary Guideline 8.1(A) (Training) also recognizes the need for all capital defense team members, including mitigation specialists, to attend annual training focused on defense of death penalty cases. *Id.* at Guideline 8.1(A). Such training should provide mitigation specialists with an understanding of the legal framework applicable to their work. *See id.* Supplementary Guideline 8.1(B) calls for funding for all team members, including mitigation specialists, “to receive effective training and continuing professional education in their respective fields of expertise.” *Id.* at Guideline 8.1(B).

*D. Mitigation Specialists and the Pictures of Mental Disease or Defect*

Although issues of confidentiality and privacy preclude a psychiatric census of death-sentenced prisoners, a recent study of the total United States inmate population documents the extremely high prevalence of mental disorders in inmates. The Bureau of Justice Statistics (“BJS”) issued a special report in September 2006, based on data from personal interviews with jail inmates in 2002 and state and federal inmates in 2004. The BJS survey identified inmates who had either a “recent history or symptoms,” of a mental disorder within the twelve months prior to the interview.<sup>73</sup> “History” meant a clinical diagnosis and treatment; “symptoms” required their disclosure during a structured interview with trained screeners based on criteria from the *Diagnostic and Statistical Manual of Mental Disorders*.<sup>74</sup> The results were that more than half of all prison and jail inmates had a mental health problem.<sup>75</sup> Since this survey included all inmates—jail and prison, local, state, and federal, violent and nonviolent inmates—it follows that the prevalence of mental disorders in the violent offender population is likely to be even higher.

Unless post-conviction counsel has unusual expertise in mental health issues, and the time to put into the task, it is most often the mitigation specialist who takes the laboring oar on mental health issues.<sup>76</sup> Such issues are singularly important in capital post-conviction proceedings.<sup>77</sup> A more thorough life-history investigation does not simply change the picture of a condemned inmate in the eyes of decision-makers; it may prompt questions about whether the client’s mental disorders or impairments affected his competency to plead guilty in a prior offense that was introduced as aggravating evidence at the

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73. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST., MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006).

74. *Id.*; see generally AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) (the primary text used in diagnosing and treating mental health disorders).

75. JAMES & GLAZE, *supra* note 73, at 1. The study found 56% of state prisoners, 45% of federal prisoners, and 64% of jail inmates had a mental health problem. *Id.*

76. See ABA GUIDELINES, *supra* note 38, at Guideline 4.1. Mitigation specialists “have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant’s development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf.” *Id.* at Guideline 4.1, commentary.

77. A more thorough life-history investigation in post-conviction may raise questions about potential mental-state defenses that were not pursued at trial. Pursuant to Supplementary Guideline 4.1(D), post-conviction counsel must educate the mitigation specialist about the applicable law at the time of trial. SUPPLEMENTARY GUIDELINES, *supra* note 49, at Guideline 4.1(D).

capital trial. Competency is always a temporally fixed determination, so there may also be questions about the client's competency through various pretrial stages of the capital case.<sup>78</sup> Was he competent to waive *Miranda* rights? Were there other waivers prior to trial, and was he competent to understand the complex implications of each? Was he competent to provide trial counsel rational assistance for both phases of the capital trial? Competency is also contextual: what capacities did he need for the unique demands of assisting capital defense counsel? Was he under medication pretrial or during trial, or should he have been? Is he competent to provide rational assistance to post-conviction counsel?<sup>79</sup>

Has the post-conviction client's mental health deteriorated during his incarceration to the point where there are now issues relating to competency to be executed?<sup>80</sup> Because conditions of confinement on death row often exacerbate preexisting mental disorders or give rise to new ones<sup>81</sup> it is important to have at least one team member who is sensitive to symptomatology and able to screen for disorders and impairments.<sup>82</sup> The post-conviction mitigation specialist will often have an important role in preventing appeal waivers,<sup>83</sup> not only through close

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78. ABA GUIDELINES, *supra* note 38, at Guideline 4.1, commentary.

79. *See* *Odle v. Woodford*, 238 F.3d 1084 (9th Cir. 2001) (due process denial when state trial court failed to hold competency hearing in 1983). Although *Odle* had appeared "calm in the courtroom" during trial, post-conviction investigation disclosed three involuntary psychiatric commitments following a post-head-trauma lobectomy, county jail records documenting a psychotic episode and suicide attempt pretrial, and trial counsel's coaching *Odle* "to stare at a particular object or objects in the courtroom, such as a coffee cup or sign" to block out the proceedings when they began to agitate him. The Ninth Circuit found that this strategy "illustrates the danger of relying on calm behavior in the courtroom as a guide to mental competence." *Id.* at 1088-89.

80. *See* ABA GUIDELINES, *supra* note 38, at Guideline 10.15.1(E)(2); *see also* *Panetti v. Quarterman*, 127 S. Ct. 2842, 2852 (2007) ("All prisoners are at risk of deteriorations in their mental state."); *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that it violates the Eighth Amendment to execute a person who is not competent to be executed).

81. *See* TERRY A. KUPERS, *PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT* 9-64 (1999); HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* 53-69 (2003), available at <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf>. Both studies describe the effects of incarceration on the mentally ill and others with predispositions and vulnerabilities.

82. *See* ABA GUIDELINES, *supra* note 38, at Guideline 10.4(C)(2)(b) ("[A]t least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments."). Screening, of course, is not diagnosing. What is required in the core team is sufficient expertise to identify the signs and symptoms of disorders and impairments, and to help select the appropriate expert consultants and to frame their referral questions. *See* SUPPLEMENTARY GUIDELINES, *supra* note 49, at Guideline 5.1(C).

83. Mental deterioration on death row poses such a substantial problem that the commentary to the ABA Guidelines includes a section entitled simply, "Keeping the Client Whole." ABA GUIDELINES, *supra* note 38, at Guideline 10.15.1, commentary. Mental deterioration "may result in suicidal tendencies and/or impairments in realistic perception and rational decisionmaking." *Id.*

contact which builds a relationship of trust with the client, but also through the life-history investigation which may identify family and other individuals who can provide support for the client.<sup>84</sup>

E. Retrospective Assessment of Mitigation Performance; No Excuses 1. Did Trial Counsel Perform According to Professional Norms?

The Supplementary Guidelines not only offer detailed guidance for the renewed life-history investigation that is essential in post-conviction cases, but also provide standards for assessing the effectiveness of pretrial mitigation preparation. They point out that mitigation specialists—indeed all nonattorney members of the defense team at trial—“have a duty to maintain complete and accurate files, including records that may assist successor counsel in documenting attempts to comply with these [Supplementary] Guidelines.”<sup>85</sup> Pretrial mitigation specialists need to assist trial counsel in making a record regarding why they were needed or why they needed more time or additional funding

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Indeed, beginning with the firing-squad execution of Gary Gilmore on January 17, 1977 (the first post-*Furman* execution), there have been 129 executions of prisoners who have waived their own appeals—roughly 12% of all executions (129 of 1099). See Death Penalty Information Center, Execution Database, <http://www.deathpenaltyinfo.org/executions.php> (scroll to the bottom of the screen; then click on “Get Info”) (last visited Apr. 8, 2008). All but three of these so-called “volunteers” have been males. Almost all (111) are white, along with six blacks, nine Latinos, two Native Americans, and one Asian. *Id.* A study analyzing 106 volunteer executions (through the end of 2003) found that nearly 88% had struggled with mental illness and/or substance abuse. John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 962 (2005). Based on published opinions, media coverage, and interviews with counsel, Blume found fourteen involved schizophrenia; others also reported delusions; twenty-three involved depression or bipolar disorder; ten involved posttraumatic stress disorder; and at least thirty had previous suicide attempts. *Id.* at 963. See generally AMNESTY INT’L, UNITED STATES OF AMERICA: PRISONER-ASSISTED HOMICIDE—MORE “VOLUNTEER” EXECUTIONS LOOM (2007), available at <http://web.amnesty.org/library/Index/ENGAMR510872007> (discussing the rise in death row inmates who choose to waive their appeals).

84. Prior to the appointment of post-conviction counsel, trial counsel has continuing duties that incorporate what are to become the duties of post-conviction counsel. Compare ABA GUIDELINES, *supra* note 38, at Guideline 10.14, with *id.* at Guideline 10.15.1. The Commentary to ABA Guideline 10.14 (Duties of Trial Counsel After Conviction) notes:

Trial counsel must also monitor the client’s personal condition as set out in Guideline 10.15.1(E)(2). If the client’s mental status deteriorates under the impact of the conviction and death sentence, the client may inappropriately decide to cease efforts to secure review, thereby creating a series of problems for the defense team that might well have been avoided.

ABA GUIDELINES, *supra* note 38, at Guideline 10.14, commentary. The trial team’s mitigation specialist should play a continuing role in monitoring the client’s personal condition and mental status until a new post-conviction team is in place.

85. SUPPLEMENTARY GUIDELINES, *supra* note 49, at Guideline 4.1(C).

based on the initial months of life-history investigation. ABA Guideline 10.4(D) requires counsel to demand “all resources necessary” for high-quality representation, adding, “If such resources are denied, counsel should make an adequate record to preserve the issue for further review.”<sup>86</sup> Mitigation specialists should assist counsel in making the best record possible and should document in their own file if counsel fails to make that record or make it adequately. If the case reaches post-conviction, mitigation specialists—and all nonattorney members of trial defense teams—should provide their files to successor counsel and cooperate fully in providing an accurate account of exactly what was—or was not—done at trial.

## 2. No Excuses: Strategy

The type of mitigation investigation that must be conducted at trial is reflected in the ABA Guidelines and is the prevailing norm. The essential role of the mitigation specialist in post-conviction teams is also the prevailing norm, as recognized in Supplementary Guideline 4.1. These norms prevail; decisions from the United States Supreme Court and other courts reject attorney conduct that is inconsistent with these norms.<sup>87</sup>

The Supreme Court in *Strickland* noted that when attorneys make strategic decisions about how to proceed in a criminal case, those strategic decisions, if reasonable, may be insulated from challenges of ineffective assistance of counsel.<sup>88</sup> However, no strategy exists in a

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86. ABA GUIDELINES, *supra* note 38, at Guideline 10.4(D). For example, in *United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2005), the Court of Appeals for the Armed Forces affirmed the decision of the intermediate appellate court and held that the “[e]rroneous denial of Kreutzer’s request for a mitigation specialist was error of constitutional magnitude,” *id.* at 305, 309-10 (under *Ake v. Oklahoma*, 470 U.S. 68 (1985) and distinguishing *Wiggins v. Smith*, 539 U.S. 510 (2003)). To their credit, trial counsel had made an excellent record, having filed a fourteen-page affidavit from their proposed mitigation specialist detailing exactly what skills she would bring to the team and outlining the scope of her investigation. *United States v. Kreutzer*, 59 M.J. 773, 799 (A. Ct. Crim. App. 2004) (Currie, J., concurring). That affidavit, from Dr. Lee Norton, “was intended to illustrate the broad, potentially significant role of a mitigation specialist in this death penalty case. It is clearly a compelling description of both the necessity for such an expert and the inability of defense counsel to successfully perform that role in this case.” *Id.* at 777 n.5 (majority opinion). Post-conviction counsel obtained the services of an experienced mitigation specialist, whose investigation provided the proof of prejudice needed to win the legal claims by changing the picture of Sgt. Kreutzer himself.

87. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 688 (1984) (noting that the ABA sets out prevailing norms which are guides to determining reasonable attorney performance); *Outten v. Kearney*, 464 F.3d 401, 419 (3d Cir. 2006) (holding that failing to present mitigating evidence is unreasonable in light of professional norms).

88. *See Strickland*, 466 U.S. at 689-90.

vacuum; a strategy is only reasonable when it is predicated upon information. For example, in *Williams*, trial counsel claimed that they had made a “strategic” decision to focus on the client’s confessions and acceptance of responsibility rather than to focus on the client’s life history.<sup>89</sup> The Supreme Court rejected that claim, noting that counsel had not begun any mitigation investigation until a week before trial.<sup>90</sup> “[T]he failure to introduce the comparatively voluminous amount of evidence that did speak in Williams’s favor was not justified by a tactical decision to focus on Williams’s voluntary confession.”<sup>91</sup>

In *Wiggins*, rather than focusing upon the client’s background and social history, trial counsel focused on the circumstantial nature of the evidence of guilt of capital murder as the centerpiece of the argument for a life sentence. Justice O’Connor noted that the trial attorneys were not in a position to make such a strategic decision:

In assessing the reasonableness of an attorney’s investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [trial counsel] limited the scope of their investigation for strategic reasons, Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.<sup>92</sup>

Justice O’Connor concluded:

Counsel’s investigation into Wiggins’ background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the

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89. *Williams v. Taylor*, 529 U.S. 362, 373 (2000).

90. *Id.* at 395 (citations omitted); *see supra* text accompanying notes 32-33.

91. *Williams*, 529 U.S. at 396; *see supra* text accompanying notes 11-16 (setting forth the voluminous mitigation evidence that was available).

92. *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). Numerous additional cases to the same effect are cited in footnote 208 to Commentary to ABA Guideline 10.7. ABA GUIDELINES, *supra* note 38, at Guideline 10.7, commentary.

social services records—evidence that would have led a reasonably competent attorney to investigate further.<sup>93</sup>

She termed their incomplete investigation “the result of inattention, not reasoned strategic judgment.”<sup>94</sup>

### 3. Two-Edged Sword

In *Williams*, the Court also rejected the well-worn excuse that a thorough investigation would have been a two-edged sword—uncovering unfavorable information along with mitigating evidence. In his dissent in *Williams*, the late Chief Justice Rehnquist described the capital murder as “just one act in a crime spree that lasted most of Williams’s life,” and then catalogued all the bad acts that a thorough investigation would have uncovered.<sup>95</sup> The majority conceded “not all of the additional evidence was favorable to Williams” but concluded that “[m]itigating evidence unrelated to dangerousness may alter the jury’s selection of penalty.”<sup>96</sup>

### 4. Unhelpful Client

More recently, the Supreme Court rejected the excuse that the client (and/or his family) had not revealed at the time of trial the mitigation that was discovered through a thorough post-conviction investigation. In *Rompilla v. Beard*,<sup>97</sup> the Court accepted that the client’s cooperation had been “minimal,” that he was “uninterested in helping” prepare for the penalty phase, and that he was “bored being here listening” when his lawyers came to talk about mitigation.<sup>98</sup> At times, he was actively

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93. *Wiggins*, 539 U.S. at 534.

94. *Id.* The excuse or strategy that “mitigation does not work in my jurisdiction” is also inconsistent with the ABA and Supplementary Guidelines. See ABA GUIDELINES, *supra* note 38, at Guideline 10.7, commentary at 1021 & n.207. In *United States v. Kreutzer*, trial counsel noted the pervasive attitude at Fort Bragg toward mental health problems is “suck it up” and “no excuses.” 59 M.J. 773, 797 (A. Ct. Crim. App. 2004) (Currie, J., concurring). One military lawyer commented simply, “I honestly did not think that emotional or mental health problems would be accepted as mitigating . . .” *Id.* The Court of Appeals for the Armed Forces disagreed because a court member may have “harbored . . . reasonable doubt” (on premeditation) with full mental health evidence, thereby granting Sgt. Kreutzer a new court martial. *United States v. Kreutzer*, 61 M.J. 293, 305 (C.A.A.F. 2005).

95. *Williams*, 529 U.S. at 418 (Rehnquist, C.J., concurring in part and dissenting in part). In the months following the murder, Williams “savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner’s jaw.” *Id.*

96. *Id.* at 396, 398 (majority opinion).

97. 545 U.S. 374 (2005).

98. *Id.* at 381.

obstructive and sent them off on false leads.<sup>99</sup> Trial counsel had interviewed Rompilla's former wife, two brothers, a sister-in-law, and his son. Nonetheless, the Court held "that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available" counsel has to make "reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation."<sup>100</sup> Simply reviewing a court file from a prior offense that was to be used as aggravation at trial would have provided a completely different picture of Rompilla's childhood and mental health.<sup>101</sup>

The *Wiggins* and *Rompilla* cases also disposed of the assertion that by consulting with mental health experts trial counsel does not have to conduct the time-consuming and labor-intensive mitigation investigation.<sup>102</sup> In *Wiggins*, trial counsel had retained a psychologist who had completed IQ testing of the client.<sup>103</sup> In *Rompilla*, three eminent mental health experts had been consulted by trial counsel.<sup>104</sup> One of these experts "developed a 'very close' relationship with Rompilla's family, which was a 'constant source of information,'"<sup>105</sup> and counsel relied upon them, and upon Mr. Rompilla and his family, to discover details on Mr. Rompilla's "mental fitness or upbringing."<sup>106</sup> The experts' reports to counsel revealed "'nothing useful' to Rompilla's case, and the lawyers consequently did not go to any other historical source that might have cast light on Rompilla's mental condition."<sup>107</sup> Substantial evidence in mitigation was in fact available from other sources,<sup>108</sup> and the Court found that counsel were ineffective for not investigating those collateral sources. The excuse that "we relied on the experts" failed because at every stage of litigation involving mental health claims, a multigenerational social history must be gathered before strategy

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99. *Id.*

100. *Id.* at 377.

101. *See supra* text accompanying notes 24-30.

102. *See* Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 985-87 (2008) (discussing the role of both counsel and the mitigation specialist).

103. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

104. *See Rompilla*, 545 U.S. at 382; *see also In re Lucas*, 94 P.3d 477, 487, 504, 512 (Cal. 2004) (unanimous California Supreme Court found counsel ineffective for failing to investigate and present mitigating evidence even though they had consulted a psychiatrist, a hypnotist, and a psychopharmacologist).

105. *Rompilla*, 545 U.S. at 399 (Kennedy, J., dissenting).

106. *Id.* at 401.

107. *Id.* at 382 (majority opinion) (citation omitted).

108. *See supra* text accompanying notes 27-31.

decisions are made—it provides the cornerstone of reliable mental health evaluations.<sup>109</sup>

#### V. CONCLUSION: MITIGATION NARRATIVE

How does one change the picture? There is no formula for successful mitigation presentation. Both the ABA Guidelines and the Supplementary Guidelines provide nothing more than a minimum framework for life-history investigation and effective collaboration with mental health experts who may help to explain and create a picture of what shaped a client's brain and behavior. But the larger task of humanizing the client, of enabling judges, clemency commissioners, and state executives to feel empathy for a death row inmate, takes more than standards, checklists, and practice tips. The goal of mitigation investigation is to discover the frailties of a client's life, but also to find the voices who can tell that story empathetically. The Supplementary Guidelines remind us repeatedly that counsel "bears ultimate responsibility" for leading the team and making decisions, including decisions about how mitigation evidence will be presented.<sup>110</sup>

The dual message of the Supplementary Guidelines is that counsel bears ultimate responsibility, but the whole team shares the duty to develop an integrated theory for life, whether at trial or in post-conviction. Building the case for life is never easy. Mitigation is cyclical, rather than linear.<sup>111</sup> Records provide new information, requiring reinterviewing witnesses, who, in turn, identify other records, and the process continues until the information becomes redundant. The investigation is time-intensive, requiring multiple "in-person, face-to-face, one-on-one interviews" with the client, family members, and outsiders with insight into the client's life, his family, or other reasons why a punishment of last resort is inappropriate in this specific case.<sup>112</sup>

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109. See Douglas S. Liebert & David V. Foster, *The Mental Evaluation in Capital Cases: Standards of Practice*, 15 AM. J. OF FORENSIC PSYCHIATRY 43 (1994); Russell Stetler, *Capital Cases: Mental Disabilities and Mitigation*, CHAMPION, Apr. 1999, at 49, 50; see also Marc H. Hollender & Charles E. Wells, *Medical Assessment in Psychiatric Practice*, in 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY/IV 543, 544 (Harold I. Kaplan & Benjamin J. Sadock eds., 4th ed. 1985) (discussing the importance of gathering a medical history).

110. SUPPLEMENTARY GUIDELINES, *supra* note 49, at Guideline 10.4; see also ABA GUIDELINES, *supra* note 38, at Guideline 10.4, commentary, noting that "counsel should structure the team in such a way as to distinguish between experts who will play a 'consulting' role, serving as part of the defense team covered by the attorney-client privilege and work product doctrine, and experts who will be called to testify, thereby waiving such protections." *Id.*

111. See Lee Norton, *Mitigation Investigations*, CHAMPION, May 1992, at 43, 45.

112. SUPPLEMENTARY GUIDELINES, *supra* note 49, at Guideline 10.11(C).

There are no shortcuts. The life-history investigation cannot be done by telephone, e-mail, or outsourcing. It requires undivided attention for large blocks of time. It requires open communication within the capital defense team, and mutual respect for a multidisciplinary culturally competent team approach.

The challenge of post-conviction litigation in capital cases has always been to create the narrative that distinguishes one frail but recognizable human from the faceless masses of the condemned. The Supplementary Guidelines are a valuable elaboration of the rigorous standards developed in capital defense work for finding the factual predicates from which that story can be told. They are a practice guide for defense teams, a resource for courts and institutional defenders grappling with post-conviction budgeting issues, and they provide the norms for assessing one critical component of effective representation in capital punishment cases.