# Capital Cases

BY RUSSELL STETLER

## Mitigation Investigation: A Duty That Demands Expert Help But Can't Be Delegated

For over 30 years, the U.S. Supreme Court has made individualized sentencing a core constitutional requirement in capital cases. In *Woodson v. North Carolina*,[1] the Court captured the breadth of potential mitigating evidence by referring simply to the "diverse frailties of humankind."[2] A decade later in *Skipper v. South Carolina*, the Court made clear that there are no temporal limits to the pre-offense time frame: redemption and "good adjustment" in jail should be considered even though they "would not relate specifically to petitioner's culpability for the crime he committed."[3]

The 21st century Court has reiterated both points. In *Tennard v. Dretke*,[4] the Court emphasized that no nexus is required between mitigation and the capital offense, and that there are virtually no limits on what the defense can introduce (noting the low threshold for relevance and defining mitigation as what *might* serve as a basis for a sentence less than death). In *Ayers v. Belmontes*,[5] Justice Kennedy wrote of the "potentially infinite mitigators" that may be proffered as a reason to reject the punishment of last resort.[6]

### Traditional Excuses No Longer Accepted

The Court has acknowledged the national standards set by the capital defense community as reflected in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("the Guidelines"), and has rejected traditional excuses for failing to investigate mitigation. The result is an unambiguous mandate for mitigation investigation and a firm basis for counsel to seek the funding and time necessary to fulfill this mandate utilizing the services of a defense team with all the requisite skills and experience.

The single most important case was *Wiggins v. Smith*,[7] in which the Court rejected trial counsel's "strategic" decision to focus on residual doubt after consulting a psychologist, collecting a few records from the department of social services, and obtaining a presentence report. The Court found that the decision "not to expand their investigation" beyond the PSI and DSS records fell short of professional standards, specifically citing the ABA Guidelines. As originally published in 1989, the Guidelines call for "efforts to discover all reasonably available mitigating evidence." The *Wiggins* Court referred to the Guidelines as "well-defined norms" in 2003. "Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only a rudimentary knowledge of his history from a narrow set of sources."[8]

In that same year, the ABA published its revised edition of the Guidelines.[9] The Sixth Circuit quickly recognized the revised edition as simply "explaining in greater detail" the 1989 Guidelines on which the *Wiggins* Court relied.[10]

These national standards of practice have now guided numerous courts in rejecting proffered excuses for failing to investigate mitigation. The Supreme Court rejected uninformed strategy both in *Wiggins* and in an earlier case, *Williams v. Taylor*.[11] Strategic decisions must be informed by investigation, not based on hunches and assumptions. In *Williams*, the Court found that "the 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."[12] That case also rejected the claim that investigation was a "two-edged sword" which would uncover bad facts as well as good in the course of Williams's life. Indeed, in a dissent Justice Rehnquist described the capital murder as "just one act in a crime spree that lasted most of Williams's life." He noted Williams's juvenile record from age 11 — the savage beating of an elderly woman, car theft, fire setting, and stabbing during a robbery.

Attempts to blame the client for inadequate life-history investigation were rejected by the Sixth Circuit in *Hamblin* and the Supreme Court in *Rompilla v. Beard*.[13] In *Hamblin*, the Sixth Circuit noted that both the ABA and judicial standards do not permits courts to excuse failure to investigate or prepare because the defendant so requested, quoting the clear language of the Guidelines verbatim: "The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing on penalty is not to be collected or presented."[14]

In *Rompilla*, the client's cooperation with the mitigation investigation was "minimal" at best and obstructive at worst: he sometimes sent counsel off on wild goose chases pursuing false leads. Rompilla was reportedly "bored" by discussion of mitigation and "uninterested in helping." In this case, counsel was faulted for failing to obtain a court file on a prior conviction that the prosecution planned

to use in aggravation. That public record would have disclosed a completely different picture from what was offered by the client and his family — including a nightmarish childhood, familial mental illness, and potential mental retardation.

In both *Wiggins* and *Rompilla*, consulting mental health experts was rejected as a substitute for conducting the mitigation investigation. In *Wiggins*, counsel had consulted a forensic psychologist. In *Rompilla*, they had consulted a cadre of three top mental health experts. Likewise, counsel had conducted some investigation in both cases. In *Rompilla*, they had interviewed a former wife, two brothers, a sister-in-law, and a son. Such minimal investigation fell below the national standard.

The ABA Web site[15] keeps an updated list of cases citing to the Guidelines since *Wiggins*. In addition to three cases in the U.S. Supreme Court, there have been dozens of cases in the federal courts and in the highest state courts citing the Guidelines.

## Quality Representation Requires Teamwork

The core practical wisdom of the Guidelines, embodying the consensus of capital defense practitioners over the past 30 years, is that quality representation requires teamwork. Guideline 4.1 defines the team as no fewer than two qualified attorneys, an investigator, *and* a mitigation specialist — with at least one member of the team qualified by training and experience to screen for the presence of mental or psychological disorders or impairments.

To some extent, the logic behind capital defense teamwork derives from the adage "two heads are better than one." The following hypothetical will serve as an explanation. Imagine that a true renaissance lawyer is representing a client facing the death penalty. The lawyer is brilliant on her feet in the courtroom, creative in crafting original motions, scholarly in her knowledge of Eighth Amendment jurisprudence, and empathic in her capacity to build a relationship of trust with a paranoid schizophrenic client who grew up in a foreign land. The Guidelines call for a second lawyer, not because the true renaissance lawyer is perceived to be deficient in any area, but because no single lawyer can possibly find the time to do everything that is needed to provide high quality representation in a capital case. Of course, it is common for lawyers with complementary skills to be paired on capital cases. But regardless of the skills of any individual lawyer, a second lawyer strengthens the representation.

In the area of fact development as well, two heads are better than one. An uncommonly gifted individual with expertise ranging from DNA to the DSM can't diligently pursue the two investigative tracks that are part of every capital case: the reinvestigation of the factual allegations which constitute the capital charges, and the biographical inquiry aimed at discovering mitigating evidence that may inspire mercy or compassion in the hearts of jurors. Putting aside whether there are any such renaissance investigators, we can see at the outset that two very different skill sets are involved in the different tracks.

A capital defense investigator's task is to deconstruct the prosecution theory of the case and turn a solved crime into an unsolved mystery. The investigator should challenge all the factual predicates. Typically, the investigator reviews discovery meticulously and is a skilled reader of police reports, autopsy protocols, and a wide range of forensic analyses. She must be thoroughly familiar with the law and science relating to physical evidence, including the protocols for collection, preservation, laboratory analysis, and interpretation of scientific evidence. In the 21st century, a capital defense investigator also needs to understand the implications of the exonerations which have shaken the criminal justice system since the advent of DNA evidence in the late 1980s. The investigator needs to be well-informed about the sources of wrongful convictions such as eyewitness errors, false confessions, perjurious testimony of jailhouse informants, and unreliable scientific testimony (both junk science and forensic fraud).

Thus, skilled investigation of the facts of a capital crime involves more than asking a percipient witness where she was, what she saw, and for how long. Equally important, the investigator needs to find out how the witness came to identify a particular suspect, and how that identification was influenced by police procedures before and after the witness attended a lineup. The investigator needs all the old skills as well: expertise at interviewing, and an ability to knock on a stranger's door and engage the stranger in conversation, without any authority to coerce cooperation. Finally, the modern investigator needs state-of-the-art databases for locating witnesses, familiarity with legal tools like open records acts, and a methodology for comprehensive background investigation of all witnesses, especially experts.

The mitigation specialist investigates a different factual universe and needs a wholly different set of skills. A quarter century ago, a California lawyer hired a former *New York Times* reporter to investigate his client's life history and help outline the empathy-evoking story which ultimately saved that client's life. The journalist, the late Lacy Fosburgh, then wrote about the unusual role she had played:

> A significant legal blind spot existed between the roles played by the private investigator and the psychiatrist, the two standard information-getters in the trial process. Neither one was suited to the task at hand here — namely discovering and then communicating the complex human reality of the defendant's personality in a sympathetic way. Significantly, the defendant's personal history and family life, his obsessions, aspirations, hopes and flaws, are rarely a matter of physical evidence. Instead they are both discovered and portrayed through narrative, incident, scene, memory, language, style, and even a whole array of intangibles like eye contact, body movement, patterns of speech — things that to a jury convey as much information, if not more, as any set of facts. But all of this is hard to recognize or develop, understand or systematize without someone on the defense team having it as his specific function. This person should have nothing else to do but work with the defendant, his family, friends, enemies, business associates and casual acquaintances, perhaps even duplicating some of what the private detective does, but going beyond that and looking for more. This takes a lot of time and patience.

Over the years, capital defense team members giving undivided attention to the client's life story have come to be called mitigation specialists. Their duties and ethical obligations are defined purely by the capital defense function. They are not part of any other freestanding profession. Mitigation specialists come from diverse backgrounds, but have common areas of competency, including the ability to identify collateral evidence of symptoms of mental disorders and deficits, exposure to trauma, brain damage, and substance abuse history. They conduct a multigenerational investigation to identify genetic predispositions, in utero exposures, and intergenerational patterns of behavior, including the his-

toric influences of cultures and subcultures. Their expertise must be multidisciplinary because they are identifying the biological, psychological, and social influences that shaped a client's identity. Their investigation is cyclical and nonlinear. There is no checklist: the end point of the investigation cannot be foreseen.

Mitigation specialists often help to identify issues requiring expert evaluation, especially in mental health areas. Their investigation allows capital defense counsel to make informed choices about the kinds of experts who are needed and what referral questions the experts should address. Their interviewing skills must include an informed ability to explore signs of mental illness and to conduct the interviews according to the professional standards of the mental health and legal professions.

Both the traditional capital defense investigator and the mitigation specialist must understand the need for a unified theory for both the guilt and punishment phases of a death penalty trial. Their spheres will certainly overlap. Each area of investigation will have an impact on the other. Each area of investigation will also most likely identify the need to expand the team to include additional experts.

There is no one-stop shopping in capital cases. Just as the team needs at least two lawyers, the team needs distinct investigators focused on the crime and the client. The crime-focused investigation may well determine the need to consult specialists in DNA, firearms identification, false confessions, or other forensic areas. The client-focused investigation may identify the need for experts in psychiatry, culture, brain development, or sexual trauma. Skilled investigators will help sharpen the focus on the kinds of expertise that may be appropriate.

In sports, it is often said that you play to the level of your team. So, too, in capital cases. The team is more than the sum of its divided parts. The assignments cannot be compartmentalized because the work must be integrated. The goal in adding a skilled player to the team is to make everyone work harder, toward a better result. The ABA Guidelines make clear that the promise of effective representation in capital cases requires a fully staffed defense team. With a life in the balance, no team should go forward until each position has been filled.

The cases and Guidelines also make clear that the ultimate responsibility always lies with counsel. The duty to investigate mitigation is shared, not simply delegated. A first-rate mitigation specialist will bring new skills, the perspective of a different discipline, and new energy to the team. But responsibility for thorough investigation and effective presentation remains with counsel. Fortunately, the Guidelines and the recent cases discussed here provide counsel with powerful support to obtain the resources needed to fulfill that duty to uphold a national standard of quality representation.

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## Notes

1. 428 U.S. 280 (1976).
2. *Id.* at 303.
3. 461 U.S. 1 (1986), at 4-5.
4. 542 U.S. 274 (2004).
5. 549 U.S. ____, 127 S. Ct. 469.
6. 127 S. Ct. at 478.
7. 539 U.S. 510 (2003).
8. *Id.* at 523.
9. 31 HOFSTRA L. REV. 913 (Summer 2003); also available at www.abanet.org/deathpenalty.
10. *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003).
11. 529 U.S. 362 (2000).
12. *Id.* at 420.
13. 545 U.S. 374 (2005).
14. Guideline 10.7.
15. www.abanet.org/deathpenalty.

## About the Author

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