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A NEW PROFESSION FOR AN OLD NEED: WHY A MITIGATION SPECIALIST MUST BE INCLUDED ON THE CAPITAL DEFENSE TEAM

*Pamela Blume Leonard**

In April 1999, “The Atlantic Online” highlighted the term “mitigation specialist” in Word Watch:¹

mitigation specialist *noun*, a member of a criminal-defense team who gathers detailed background material about the defendant in order to persuade a jury not to impose the death penalty: “Increasingly, lawyers defending death-penalty cases rely heavily on *mitigation specialists*” (*U.S. News & World Report*).

BACKGROUND: Though both the term and the job are probably no older than the current decade, printed evidence of both has steadily accrued, making the term a likely candidate for entry in future dictionaries. A *mitigation specialist* has been described as a kind of social historian who delves into the defendant’s past to unearth circumstances—childhood abuse, for example—that might be used to paint a sympathetic picture and sway a jury toward leniency. A recent case in which a *mitigation specialist* was at work, seemingly with some success, is the trial of Terry Nichols in connection with the 1995 Oklahoma City bombing.

INTRODUCTION

In 1976, the United States Supreme Court approved the death penalty statutes of several states, ending a four-year hiatus from

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1. Anne H. Soukhanov, *Word Watch*, THE ATLANTIC ONLINE, (Apr. 1999), at <http://www.theatlantic.com/issues/99apr/9904wdwtch.htm> (compiling a selection of terms that have newly been coined, that have recently acquired new currency, or that have taken on new meanings).

executions in this country.² These statutes sought to avoid the arbitrary and capricious use of the death penalty prohibited by *Furman v. Georgia*³ through the implementation of a bifurcated trial.⁴ In a separate sentencing trial that follows conviction, the state must prove at least one statutory aggravating circumstance beyond a reasonable doubt and the defendant is allowed to present mitigating circumstances, which are those factors that might lead jurors to choose a life sentence rather than imposing death.⁵ Over the last thirty years, the scope and admissibility of various types of mitigating evidence have been litigated at all levels of our courts. The resulting body of law calls for a comprehensive sentencing phase that requires a jury, in the course of making a reasoned moral judgment⁶ regarding punishment for a capital crime, to listen to and consider⁷ all evidence presented by the defendant regarding his character,⁸ upbringing⁹ and frailties,¹⁰ as well as the proportionality of the sentence to the offense.¹¹ In this setting, the mitigation specialist, charged with identifying and developing mitigation issues, emerged as a critical member of the capital defense team.¹²

2. See generally *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

3. 408 U.S. 238 (1972).

4. See Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV. 485, 488 (1995).

5. See *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986).

6. See *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring) (“The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed.”).

7. See *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Morgan v. Illinois*, 504 U.S. 719, 736-39 (1992).

8. See *Simmons*, 512 U.S. at 163 (“The defendant’s character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment.”) (citing *Lockett v. Ohio*, 438 U.S. 586; *Eddings v. Oklahoma*, 455 U.S. at 110; *Barclay v. Florida*, 463 U.S. 939, 948-51 (1983) (plurality opinion)).

9. See *Eddings*, 455 U.S. at 104.

10. See *Caldwell v. Mississippi*, 472 U.S. 320, 330-31 (1985) (“This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed ‘[those] compassionate or mitigating factors stemming from the diverse frailties of humankind.’ [*Woodson v. North Carolina*, 428 U.S. 280, 304 (1980)]. When we held that a defendant has a constitutional right to the consideration of such factors, we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses.”).

11. See generally *Coker v. Georgia*, 433 U.S. 584 (1977).

12. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 4.1, commentary (rev. ed. 2003) [hereinafter GUIDELINES] (noting that the inclusion of mitigation specialists is now part of the standard of care in capital defense cases). Scharlette Holdman, Ph.D., is the Executive Director of the Center for Capital Assistance in San Francisco, California. She was an early leader in the training and development of mitigation specialists and in teaching attorneys how to make use of mitigation evidence.

The fundamental task of the mitigation specialist is to conduct a comprehensive social history of the defendant and identify all relevant mitigation issues.¹³ The 2003 revised edition of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases recognizes the mitigation specialist as an “indispensable member of the defense team throughout all capital proceedings.”¹⁴

What are the particular responsibilities and contributions of a mitigation specialist and what makes them so essential to the capital defense team as to warrant this long overdue recognition by the ABA Guidelines?

I. ROLE

It is the role of the mitigation specialist to investigate and analyze the defendant’s background so that defense counsel is made aware of all potentially mitigating factors.¹⁵ As in all forensic investigations, the process is not complete until all material leads are exhausted and “the information uncovered becomes redundant and provides no new insight.”¹⁶

A. Training and Responsibilities

All mitigation specialists have training and experience in the development and presentation of mitigating evidence in all stages of capital proceedings.¹⁷ Some mitigation specialists have training in social science and learn to apply it in forensic settings, perhaps providing testimony of their findings.¹⁸ Other mitigation specialists confine themselves to conducting the social history investigation and then assist in identifying necessary experts and in determining how to effectively present their findings.¹⁹

B. Frequently Occurring Mitigating Factors

There is no comprehensive list of mitigating factors because mitigation encompasses any factor that significantly affected the

13. See GUIDELINES, *supra* note 12, at Guideline 4.1, commentary.

14. *Id.*

15. *See id.*

16. Lee Norton, *Capital Cases: Mitigation Investigations*, THE CHAMPION, May 1992, at 45.

17. See GUIDELINES, *supra* note 12, at Guideline 4.1, commentary.

18. *See id.* at 145-46.

19. *See id.* at 146.

defendant's character and his conduct related to the offense. Many of the following circumstances, however, frequently occur in the backgrounds, offenses and incarceration of capital defendants and should be considered in all cases:

- psychiatric illness;
- medical conditions with psychiatric consequences;
- mental retardation;
- neurological deficits;
- childhood maltreatment;
- family dynamics resulting in neglect or physical/emotional abuse;
- extreme poverty;
- community effects;
- dislocation and immigration;
- youth at the time of offense;
- duress;
- degree of participation by the defendant;
- circumstances of prior offenses;
- remorse;
- good character;
- good conduct while incarcerated;
- effects and conditions of incarceration;
- future dangerousness.²⁰

The building blocks of the investigation are the collection of life history records and interviews of all significant persons in the defendant's life.²¹ The developmental history of the client, including conditions affecting him in utero to the present must be tracked and documented.²² When there are signs of mental impairments, the social history should reach back at least three generations to establish patterns and effects of medical conditions, mental illness, substance abuse, poverty, environmental toxins and other factors that may have negatively influenced the health of the defendant and his family.²³

All significant documentation related to the client and his family must be gathered, organized and analyzed.²⁴ There can be no

20. See GUIDELINES, *supra* note 12, at Guideline 10.11(F).

21. See generally Russell Stetler, *Why Capital Cases Require Mitigation Specialists*, at <http://www.nlada.org/DMS/Dccuments/998934720.005>. Methods used by mitigation specialists in their investigations must produce data that can be relied upon in medical and psychological evaluations as well as in court. See *id.*

22. See GUIDELINES, *supra* note 12, at Guideline 10.7, commentary.

23. See Stetler, *supra* note 21.

24. See GUIDELINES, *supra* note 12, at Guideline 10.7, commentary.

comprehensive list and the following is no more than a preliminary guide:

- school records, including special education evaluations and reports, psychological testing, health and disciplinary records;
- medical records, including birth, childhood illnesses and check-ups, immunizations, mental health, all accidents and injuries, psychiatric, substance abuse;
- psychological records, including mental health evaluations, substance abuse;
- social services records, including welfare, foster care, adoption
- criminal records, juvenile and adult;
- employment records;
- military records;
- immigration records.²⁵

1. Psychiatric Illnesses

The mental illnesses of many criminal defendants, including capital defendants, are often overlooked by officials in the criminal justice system, including defense counsel, due to the growing tendency to criminalize persons with mental illness.²⁶ Many mental illnesses have a gradual onset, making it even more important to acquire an accurate social history.²⁷ The mitigation specialist is trained to identify signs of mental impairments in the defendant's thinking and behavior, including modes of speech and mobility,²⁸ that come to light during interviews with the defendant or in life history records and interviews.²⁹

2. Mental Retardation

In light of the constitutional bar against executing mentally retarded persons,³⁰ one of the major responsibilities of the mitigation specialist is to determine if signs of mental retardation are present. However, people

25. *See id.*

26. *See* John H. Blume & Pamela Blume Leonard, *Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, THE CHAMPION, Nov. 2000, available at <http://dpa.state.ky.us/library/advocate/jan02/mentalh.html>.

27. Sometimes early warning signs can be identified as far back as elementary school. For example, new research into paranoid schizophrenia, long thought to first appear in early adulthood, has identified subtle symptoms that were, in fact, present in children and adolescents. *See generally* Elaine F. Walker et al., *The Developmental Pathways to Schizophrenia: Potential Moderating Effects of Stress*, DEV. & PSYCHOPATHOLOGY 647 (1996).

28. *See* MURIEL DEUTSCH LEZAK, NEUROPSYCHOLOGICAL ASSESSMENT 736-738 (3rd. ed. 1995).

29. *See* GUIDELINES, *supra* note 12, at Guideline 4.1, commentary.

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

in general, including capital defendants, are reluctant to admit they have mental impairments because they know and fear the stigmatization that will follow.³¹ This is especially true of defendants who are, or may be, mentally retarded. Persons with mental retardation often look normal, having learned to mask their deficits while suffering from a disability that delays learning, diminishes memory, curtails problem solving and distorts the understanding of cause and effect.³² The result is a person who, although he may appear normal, is in fact a very vulnerable person, particularly within the confines of the criminal justice system.³³

Mental retardation usually begins before or around birth, so signs and symptoms of mental retardation will be reflected throughout life.³⁴ The mitigation specialist, who is familiar with the diagnostic criteria of mental retardation³⁵ and the normal progress of developmental milestones, will provide critical data for an accurate and reliable evaluation regarding mental retardation.³⁶

3. Childhood Maltreatment and Victimization

Trauma and maltreatment are prevalent in the backgrounds of many capital defendants.³⁷ Social science research continues to confirm the relationship between childhood victimization and violent criminal behavior.³⁸ The special skills and sensitivities of a mitigation specialist

31. See GUIDELINES, *supra* note 12, at Guideline 10.7, commentary.

32. See *id.* at Guideline 10.5, commentary.

33. See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 424 (1985); The Arc, *When People with Mental Retardation Go to Court*, available at <http://www.thearc.org/ada/court.html> (last visited June 1, 2003).

34. See Ellis & Luckasson, *supra* note 33, at 424.

35. See AMERICAN ASSOCIATION OF MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT* 23 (10th ed. 2002).

36. See John Blume, *Mental Health Issues in Criminal Cases: The Elements of a Competent and Reliable Mental Health Examination*, THE ADVOCATE, Aug. 1995 at 6 (noting a five step forensic mental health assessment process:

- 1) An accurate medical and social history must be obtained.
- 2) Historical data must be obtained not only from the patient, but from sources independent of the patient.
- 3) A thorough physical examination (including neurological examination) must be conducted.
- 4) Appropriated diagnostic studies must be undertaken in light of the history and physical examination.
- 5) The standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessing the presence or absence of organic impairment.)

37. See generally DIANA J. ENGLISH ET AL., NATIONAL INSTITUTE OF JUSTICE, CHILDHOOD VICTIMIZATION AND DELINQUENCY, ADULT CRIMINALITY, AND VIOLENT CRIMINAL BEHAVIOR: A REPLICATION AND EXTENSION, FINAL REPORT (2001).

38. See *id.*

are needed to work with the defendant and his family members to avoid further trauma and to elicit all relevant mitigating evidence from them, especially when there are embarrassing and humiliating circumstances that may have been kept secret for many years.³⁹ In such instances, trust and respect skillfully developed over time are necessary in order for stories of physical or sexual abuse to emerge.⁴⁰

4. Strengths of the Defendant

The defendant's strengths should also be identified and documented. Positive contributions he has made to his family and community, as well as attempts to overcome his own impairments, are important mitigating factors that rebut the prosecutors' characteristic attempts to "demonize" the offender.⁴¹ Awards, family photographs and prison records citing good conduct are among the life history records gathered by mitigation specialists to support testimony by mitigation witnesses.⁴²

5. Additional Mitigation Themes

Additional common mitigation themes are youth at the time of the offense, severe childhood poverty and its consequences—such as malnutrition, exposure to neurotoxins that led to neurological damage and the client's good conduct while awaiting trial or during previous incarcerations—as well as remorse for the offense and its aftermath. No investigation of any matter that significantly influenced the defendant or the commission of the offense can be foreclosed without its relevance to the defendant's character and culpability.⁴³

C. *Identifying the Need for Expert Mental Health Evaluations*

Analysis of life history information by mitigation specialists leads to the identification of issues requiring assessments by psychologists, psychiatrists and other experts who will potentially testify regarding their findings.⁴⁴ The mitigation specialist helps defense counsel identify appropriate experts and provides reliable, well-organized life history

39. See GUIDELINES, *supra* note 12, at Guideline 10.7, commentary.

40. See *id.* at Guideline 4.1.

41. See Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 548 (1995).

42. See GUIDELINES, *supra* note 12, at Guideline 10.11(F)(5).

43. See GUIDELINES, *supra* note 12, at Guideline 10.7, commentary.

44. See *id.* at Guideline 10.11, commentary.

data to those experts.⁴⁵ This valuable tool reduces the amount of time experts would otherwise spend gathering and organizing background information that is necessary for an accurate and reliable mental health evaluation.⁴⁶ Once an expert's assessment is complete, the mitigation specialist assists counsel in determining whether the expert will testify and, if so, what documents and lay witness testimony have been identified to support his conclusions.⁴⁷

D. *Assisting in Plea Negotiations*

Capital cases often do not go to trial for several years, straining the stamina of even the most cooperative defendants and supportive families. The relationships between the mitigation specialist, the defendant and key members of his family can be instrumental in bridging the gap between their fear and distrust of the criminal justice system and the difficult realities of capital litigation.⁴⁸ This is particularly true in plea negotiations when the defendant may resist accepting the long sentence—usually life without the possibility of parole—he will serve.⁴⁹ The mitigation specialist can assist defense counsel in explaining the value of a negotiated plea and the risks of a capital trial to the defendant and his family.⁵⁰

II. NEED

In keeping with the ABA-advised standard of care,⁵¹ mitigating evidence must be developed and presented at a capital trial for at least three reasons:⁵² (1) the procedural protections of the Constitution require it;⁵³ (2) capital jurors must consider the defendant's character—his very

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

46. See Blume, *supra* note 36 (noting a five step forensic mental health assessment process).

47. See GUIDELINES, *supra* note 12, at Guideline 10.11, commentary.

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

49. See *id.*

50. See generally Elizabeth Beck et al., *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382 (2003).

51. See GUIDELINES, *supra* note 12, at Guideline 4.1, commentary.

52. See *id.* at Guideline 10.11(G)-(J); Jonathan Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 361-62 (1997).

53. See Tomes, *supra* note 52 (citing *Furman v. Virginia*, 408 U.S. 238, 239-40 (1972); *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part); *Kreitzberg, supra*, note 4 at 488; *Gregg v. Georgia*, 428 U.S. 153, 188 (1976)).

humanness—in their sentencing decision-making,⁵⁴ and (3) the defendant needs to rebut the state’s demand for death as the appropriate answer to the heinous nature of the crime.⁵⁵

The most compelling reason to include a mitigation specialist on the defense team is that a mitigation specialist possesses expertise in the monumental task of identifying, developing and presenting mitigating evidence that most attorneys do not have.⁵⁶ Failing to include a mitigation specialist on the capital defense team will increase the risk that counsel will miss vital mitigating evidence. As a result, that evidence will not be presented at trial and will at best come to light during the appeals process, casting doubt on the reliability of the outcome of the trial and leading to a finding that trial counsel was ineffective.⁵⁷

The weight and breadth of the defense preparation for a capital trial have given rise to the need for an expert to identify, develop and coordinate mitigating evidence.⁵⁸ Further, lawyers defending capital cases have found that developing and presenting mitigating evidence requires a broad, time-consuming investigation into the life history of the client and the client’s family, including medical and mental health issues as well as developmental, educational, community and cultural factors that influenced his conduct over time.⁵⁹ In the capital trial setting, a social history is an in-depth investigation and analysis of the defendant’s life and character, including the genetic and environmental factors that shaped him.⁶⁰ This type of investigation—a social history investigation—falls outside the expertise of the traditional fact investigator whose job is to assist the attorneys in determining “what” happened.⁶¹ In contrast, the mitigation specialist assists the defense team in identifying, understanding and presenting evidence that can reveal “why” the offense occurred and reasons why the death penalty is not the appropriate punishment for the defendant.⁶²

54. See generally *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Skipper v. South Carolina*, 476 U.S. 1 (1986).

55. See generally Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUMBIA L. REV. 1538 (1998); see Tomes, *supra* note 52, at 361-62.

56. See GUIDELINES, *supra* note 12, at Guideline 4.1, commentary.

57. See *id.*

58. See *id.*

59. See *id.* at Guideline 10.7, commentary.

60. See *id.* at Guideline 10.11, commentary.

61. See Stetler, *supra* note 21.

62. In my work as a mitigation specialist, I have served on numerous capital defense teams and consulted on scores of cases. Several times, I have testified at hearings where defense attorneys were seeking funds to hire a mitigation specialist. Each time, the judge asked me why the attorneys

Mitigation specialists are trained to identify signs and symptoms of mental illnesses and impairments as well as medical conditions that have psychiatric consequences.⁶³ Defense counsel, who are not trained in these areas, need the assistance of mitigation specialists because capital defendants often have serious mental health issues that impacted their conduct surrounding the offense. Like mental illnesses, neurological impairments and mental retardation of defendants are often overlooked or denied by the criminal justice system.⁶⁴

In addition to identifying mental health issues, mitigation specialists assist attorneys in developing a credible and comprehensive theory of the case throughout the merit and sentencing stages of capital proceedings.⁶⁵ Mitigation, particularly when mental health issues are involved, is neither statutorily nor strategically confined to the sentencing phase of trial.⁶⁶ For example, mental health issues affect a pre-trial determination of competency; evidence supporting a plea of insanity or diminished capacity goes to the state of mind of the defendant at the time of the crime and all waivers made by the defendant.⁶⁷ Mental health issues that do not rise to the level of a defense—for example, absence of malice or no specific intent—may be presented during the merit phase of the trial.⁶⁸

Assistance in determining when and how to present mitigating evidence is crucial in death penalty cases because empirical studies show that jurors, contrary to the instructions given to them, are considering punishment from the outset of the trial process.⁶⁹ Jurors tend to view defense experts negatively if their testimony is not supported by lay witnesses and other contemporaneous information that supports the

and their fact investigator need yet another expert to work on the case. It is essential to explain how a mitigation specialist is different from a fact investigator and to emphasize the greatly decreased likelihood of an appellate court reversing or remanding the case based on ineffective assistance of counsel when a mitigation specialist is a part of the capital trial team.

63. See Blume, *supra* note 36 (noting a five step forensic mental health assessment process).

64. See Blume & Leonard, *supra* note 26. Even though properly treated mentally ill persons are no more violent than the general population, untreated or improperly medicated illnesses can contribute to tragic and avoidable violent offenses. See generally Henry J. Steadman, et al., *Violence by People Discharged from Acute Inpatient Facilities and by Others in the Same Neighborhoods*, 55 *Archives of Gen. Psych.* 393 (1998).

65. See Blume & Leonard, *supra* note 26.

66. See GUIDELINES, *supra* note 12, at Guideline 10.11, commentary.

67. See *id.*

68. See *id.*

69. See generally William J. Bowers, et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience and Premature Decision-Making*, 83 *CORNELL L. REV.* 1476 (1998).

expert's opinion.⁷⁰ Assisting attorneys in effectively interlocking documentary evidence with testimony by lay and expert witnesses is a crucial aspect of the mitigation specialist's work.⁷¹

A mitigation specialist is skilled at working with family members of capital defendants, who are often the source of critical mitigating evidence.⁷² After all, these are the people who have known the defendant over time and have seen various aspects of his character and living environments.⁷³ If the client endured childhood maltreatment or had medical or psychological problems, family members are most likely to have witnessed or been aware of it.

Family members can also help the defense team determine why the defendant's siblings, who grew up in the same family, were not involved in a capital crime. Yet, social convention, as well as fear of the criminal justice system, causes family and friends of the defendant tend to minimize, normalize or deny their own mental conditions as well as those of the defendant. Further, family members of the defendant have experienced the shock of the offense and the shame of being closely associated with an accused person whom the state seeks to execute.⁷⁴ In many cases, family members have suffered profound blows to their physical health and emotional equilibrium.⁷⁵ Enter the defense team—asking questions about personal matters rarely shared with any outsider—who want material for use in open court that will most likely be seen in the media.⁷⁶ At this crucial point, family members must be persuaded that the investigation is necessary and that their full participation is vital. Failure to handle potential mitigation witnesses skillfully can mean missing critical information, a situation that will jeopardize the reliability of the trial altogether.

III. BENEFITS

There are two primary benefits to having a mitigation specialist on a capital defense team. Most importantly, the identification, development and presentation of mitigating evidence will be greatly improved. In a report on the cost, availability and quality of defense

70. See Scott Sundby, *Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1144 (1997).

71. See GUIDELINES, *supra* note 12, at Guideline 10.11, commentary.

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

73. See *id.* at Guideline 10.11, commentary.

74. See Beck, *supra* note 50 at 399-400.

75. See GUIDELINES, *supra* note 12, at Guideline 10.11(F)(4).

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

representation in federal death penalty cases, “[w]ithout exception, lawyers . . . stressed the importance of a mitigation specialist to high quality investigation and preparation of the penalty phase.”⁷⁷ Defense attorneys rarely have the training, experience or time to gather social history records for several generations of a defendant’s family or to analyze those records. They also do not have the time to make the necessary repeat visits with crucial social history witnesses.⁷⁸

As a rule, neither the signs, symptoms and effects of mental retardation, mental illness, neurological impairments and childhood abuse nor the ramifications of community violence or non-mainstream cultural beliefs are familiar to defense attorneys. The assistance of a mitigation specialist supports an exhaustive investigation for mitigating evidence,⁷⁹ thorough organization and analysis of that evidence, development of mitigation themes, identification of experts who can diagnose and explain the consequences of mental impairments, location of critical lay witnesses, adequate preparation of witnesses who will testify, and insight into the behavior of the defendant and his family.⁸⁰ All of these contributions lead to increased effectiveness of defense counsel and, ultimately, promotes more reliable capital trial procedures.⁸¹

Second, mitigation specialists are hired or employed at a lesser rate than that of lawyers with equal capital experience.⁸² In their absence, the work of a mitigation specialist must be done by lawyers rather than paralegals or investigators. However, since it takes hundreds of hours to conduct a thorough social history investigation, hiring a mitigation specialist generally results in a “substantial reduction in the overall costs of [capital] representation.”⁸³

77. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation, Report for the Subcomm. on Federal Death Penalty Cases, Comm. on Defender Services, Judicial Conference of the United States*, at 11 (May 1998), available at <http://www.uscourts.gov/dpenalty/1COVER.htm> [hereinafter *Recommendations*] (Hon. James R. Spencer, Subcomm. Chair).

78. See GUIDELINES, *supra* note 12, at Guideline 4.1, commentary.

79. In *Wiggins v. Smith*, the United States Supreme Court conducted a *Strickland* analysis and, reversing the Maryland Court of Appeals, held that trial counsel did not provide effective assistance of counsel. 123 S.Ct. 2527, 2538 (2003). Rather, Mr. Wiggins’ attorneys settled on a trial strategy without conducting an adequate investigation into mitigating factors and their “incomplete investigation was the result of inattention, not reasoned strategic judgment.” *Id.* at 2538.

80. See *id.*

81. See GUIDELINES, *supra* note 12, at Guideline 4.1, commentary n.107.

82. See *id.*

83. See *Recommendations*, *supra* note 77.

CONCLUSION

With a defendant before them, jurors cannot act on the abstract belief that the death penalty is an appropriate punishment in some circumstances. They must judge an individual defendant in light of his frailties, his fundamental humanity, the tragedy of murder and its ramifications as well as their own convictions about responsibility, remorse, retribution and mercy.

The Constitution, as well as the various statutes outlining the criminal procedures of death penalty trials and appeals, recognizes the legal and moral necessity of presenting a full picture of the defendant and any factors that reduce his culpability in the offense to the jurors who carry the burden of determining his punishment. It is the job of the mitigation specialist to identify all mitigating evidence that will assist defense counsel in persuading jurors that imprisonment is an appropriate punishment and that taking the life of the defendant is not a mandatory outcome of the trial. The ultimate goal, of course, is to avoid the imposition of a death sentence and save the life of the defendant.
