

THE PAST, PRESENT, AND FUTURE
OF THE MITIGATION PROFESSION:
FULFILLING THE CONSTITUTIONAL REQUIREMENT OF
INDIVIDUALIZED SENTENCING IN CAPITAL CASES

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I. INTRODUCTION

This Article will discuss the changing world of mitigation specialists from their origins in the era of the post-*Furman*¹ death penalty to the present, when they are not only acknowledged by the *ABA Death Penalty Representation Guidelines* as essential members of the core team² required for effective representation in capital punishment cases, but as valuable assets in individualized sentencing in noncapital cases.³ The Article will begin with the simultaneous discovery of the value of multidisciplinary teams as multiple jurisdictions responded to the challenge of the newly enacted death penalty statutes approved by the Supreme Court of

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1. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (finding death penalty statutes, as applied, violated the Eighth Amendment); *id.* at 274, 286 (Douglas, J., concurring) (noting that “it is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment”); *id.* at 314-15 (White, J., concurring) (discussing a jury’s unfettered discretion to decline to apply the death penalty). The post-*Furman* era encompasses all the capital cases litigated under the statutes enacted after the decision—some in its immediate aftermath and others as late as the 1990s.

2. See Am. Bar Ass’n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. 2003), 31 HOFSTRA L. REV. 913, 952, 999-1000 (2003) [hereinafter *ABA Revised Guidelines*] (Guidelines 4.1.A.1 and 10.4.C.2.A identify mitigation specialists as members of the minimal core team); see also *infra* Part IV.

3. See, e.g., Dana Cook et al., *Miller, Montgomery, and Mitigation: Incorporating Life History Investigations and Reentry Planning into Effective Representation for “Juvenile Lifers,”* THE CHAMPION, Apr. 2017, at 44.

the United States in 1976 in *Gregg v. Georgia*,⁴ *Proffitt v. Florida*,⁵ and *Jurek v. Texas*.⁶

Even before the term “mitigation specialist” had been coined, individuals dedicated to the development of effective penalty-phase evidence appeared across the country—in some cases as pro bono volunteers in underfunded jurisdictions, and elsewhere relying on counsels’ successful applications for funds for the ancillary services that some states recognized as reasonably necessary in death penalty cases.⁷ The contribution of these newly minted capital team members was then chronicled in numerous articles in defense bar publications during the 1980s, including one in 1987 whose authors included two staff members of a state public defender office’s Mitigation Specialists Department.⁸ When the American Bar Association (“ABA”) published its original *Guidelines* for the Appointment and Performance of Counsel in Death Penalty Cases (“*ABA Guidelines*”) in 1989,⁹ there was just one modest reference to mitigation specialists,¹⁰ but the reference is positive proof of the national recognition they had earned in the 1980s.

The emergence of specialized capital defense units, beginning at the trial level with the New York State Capital Defender Office in 1995¹¹ and in post-conviction with the capital habeas units established in federal public defender offices around the same time,¹² led to a vast increase in the number of mitigation specialists working as in-house indigent defense staff. The revision of the *ABA Guidelines* in 2003, codifying standards that had become well accepted by that time, recognized mitigation

4. 428 U.S. 153, 206-07 (1976) (finding newly enacted guided discretion statute in Georgia constitutional).

5. 428 U.S. 242, 253 (1976) (finding newly enacted guided discretion statute in Florida constitutional).

6. 428 U.S. 262, 276 (1976) (finding newly enacted guided discretion statute in Texas constitutional).

7. See *infra* Part II.

8. James Hudson et al., *Using the Mitigation Specialist and the Team Approach*, THE CHAMPION, June 1987, at 33, 33-36.

9. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989) (AM. BAR ASS’N, amended 2003), <http://www.ambar.org/1989guidelines> [hereinafter “ABA ORIGINAL GUIDELINES”].

10. *Id.* at Guideline 11.4.1(D)(3)(C).

11. See BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 113-15 (2017); see also Russell Stetler & Aurélie Tabuteau, *The ABA Guidelines: A Historical Perspective*, 43 HOFSTRA L. REV. 731, 744-45 (2015).

12. See *infra* notes 213-14 and accompanying text. See generally *infra* Part III.

specialists as core team members.¹³ The *Supplementary Guidelines for the Mitigation Function* (“*Supplementary Guidelines*”) in 2008 provided a detailed elaboration of defense team duties in this critical area.¹⁴

The Article will discuss how these developments have contributed to the sharp reduction in both death sentences and executions in the new millennium,¹⁵ as well as the increased recognition of mitigation in the noncapital world following *United States v. Booker*¹⁶ and in juvenile life-without-parole cases following *Graham v. Florida*,¹⁷ *Miller v. Alabama*,¹⁸ and *Montgomery v. Louisiana*.¹⁹

The Article will conclude with some thoughts about future challenges.²⁰ The widespread proliferation of salaried positions for mitigation specialists within institutional offices in both trial and post-conviction contexts represents a well-earned recognition of their importance. However, a model based entirely on government funding is risky pragmatically, as demonstrated two decades ago by the defunding of the federally funded death penalty resource centers²¹ and more recently by the passage of the California death

13. See *supra* note 2; see also *infra* Part IV.

14. *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 682-83, 688-92 (2008) [hereinafter “*Supplementary Guidelines*”].

15. See *infra* Part V.

16. 543 U.S. 220, 264-65 (2005) (finding federal sentencing guidelines advisory rather than mandatory); see also Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 57-63, 65-66 (2013); Hugh M. Mundy, *It’s Not Just for Death Cases Anymore: How Capital Mitigation Investigation Can Enhance Experiential Learning and Improve Advocacy in Law School Non-Capital Criminal Defense Clinics*, 50 CAL. W. L. REV. 31, 49-53 (2013); Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After United States v. Booker: Why and How the Guidelines Do Not Comply with §3553(A)*, THE CHAMPION, Sept./Oct. 2006, at 32, 35; James E. Boren & Alyson Lang, *Using Lessons from the Capital Arena for Sentencing Advocacy in All Cases*, THE CHAMPION (forthcoming) (on file with author); James Tibensky, *Interviewing for Noncapital Mitigation*, THE CHAMPION, June 2014, at 30, 30-31.

17. 560 U.S. 48, 82 (2010) (barring life without parole sentences for non-homicide offenses committed prior to age eighteen).

18. 567 U.S. 460, 489 (2012) (barring mandatory life without parole sentences for homicide offenses committed prior to age eighteen).

19. 136 S. Ct. 718, 736 (2016) (holding that *Miller* applies retroactively).

20. See *infra* Parts VI.C–VII.

21. See Corinna Barrett Lain, *Following Finality: Why Capital Punishment Is Collapsing Under Its Own Weight*, in FINAL JUDGMENTS: THE DEATH PENALTY IN AMERICAN LAW AND CULTURE 35 (Austin Sarat ed., 2017). Lain quotes an open letter to Congress, stating: “We should not be spending federal money to subsidize think tanks run by people whose sole purpose is to concoct theories to frustrate the implementation of the death penalty.” *Id.* (footnote omitted). See also *infra* notes 95-97 and accompanying text. For a discussion of drastic cuts to the budget of the Georgia Capital Defender Office, see *infra* note 177.

penalty ballot measure (Proposition 66) in November 2016, radically altering the structure of a well-regarded state post-conviction office.²² It is critical to maintain a robust and diverse pool of private mitigation specialists, adequately funded in court-appointed cases, so that the successes so far in producing more reliable and humane outcomes throughout our criminal justice systems will carry us into the future as our maturing society's standards of decency continue to evolve.

II. MITIGATION: ITS ORIGINS AND EVOLUTION [THE 1970S AND 1980S]

When new capital statutes were enacted after *Furman*,²³ five cases testing their constitutionality reached the Supreme Court by the summer of 1976. The Court approved three statutes from Georgia, Florida, and Texas that permitted jurors to withhold the death penalty based on the unique characteristics of the offense and the offender;²⁴ while declaring unconstitutional two from North Carolina and Louisiana that proposed to eliminate jury discretion by making the death penalty mandatory for a narrow categories of offenses, such as the murder of police officers or children.²⁵ As Professor Craig Haney has noted, there was irony in the High Court's approval of the Georgia statute that incorporated aggravating and mitigating factors from the Model Penal Code: no mitigation whatsoever was presented at Troy Gregg's trial.²⁶ Most death penalty jurisdictions soon embraced the same basic framework of statutory factors.²⁷

22. In the fine print of the complex 2016 ballot measure promising to "mend" (not "end") California's dysfunctional death penalty system, Proposition 66 dissolved the board of directors of the Habeas Corpus Resource Center and instead vested authority for selecting its executive director with the California Supreme Court and limited the salaries of its staff attorneys. CAL. GOV'T CODE §§ 68664(b), (d) (West 2017).

23. Thirty-five states enacted new capital punishment statutes in the wake of *Furman*. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 179-81 (1976); see also EVAN MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 303-04 (2013) (discussing state legislative reactions to *Furman*).

24. *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *Proffitt v. Florida*, 428 U.S. 242, 253, 259-60 (1976); *Gregg*, 428 U.S. at 206-07.

25. See *Woodson v. North Carolina*, 428 U.S. 280, 286-87, 305 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 328-30 & n.3, 336 (1976).

26. Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 835, 845 (2008).

27. See MANDERY, *supra* note 23, at 305-06. In 2009, the American Law Institute decided to delete the death penalty provisions from the Model Penal Code because they simply did not work. See Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEXAS L. REV. 353, 359-60 (2010); Stetler

Not surprisingly, some of the most prominent figures in the early development of mitigation evidence post-*Furman* were anti-death penalty activists in southern states that were eager to resume executions.²⁸ Ten of the first thirty-two post-*Furman* executions, from 1977 through the end of 1984, were in Florida,²⁹ where the late Scharlette Holdman immediately emerged as a forceful figure recruiting lawyers for prisoners under execution warrants and attempting to investigate persuasive evidence in the context of clemency and end-stage petitions for post-conviction relief.³⁰ A story in *People* magazine in 1983 said that: “Holdman jump[ed] into the void” “[w]henver the [Florida] Supreme Court upheld a death sentence . . . begging and cajoling lawyers” to take the case.³¹ Holdman’s job did not end with lining up a lawyer. According to the magazine, she had recently advised an attorney that she knew he was not supposed to be arguing the facts at this stage: “[b]ut put them in anyway. The details are what pique the justices’ interest. That’s what makes them perk up.”³² She operated the Florida Clearinghouse on Criminal Justice on a “shoestring budget” reported to be between \$25,000 and \$50,000 per year.³³ As a single mother of two children, she drew a salary of \$9,600 per year.³⁴ Before heading the Clearinghouse, she had worked as the American Civil Liberties Union’s state director in Honolulu, New Orleans, and Miami.³⁵ An obituary in 2017 noted

& Tabuteau, *supra* note 11, at 734 n.23.

28. See TODD C. PEPPERS WITH MARGARET A. ANDERSON, *A COURAGEOUS FOOL: MARIE DEANS AND HER STRUGGLE AGAINST THE DEATH PENALTY* (2017); see also John D. Bessler, *Tinkering Around the Edges: The Supreme Court’s Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1921 n.64, 1931 & n.144 (2012).

29. *Searchable Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/views-executions> (last visited Aug. 23, 2018).

30. See PEPPERS & ANDERSON, *supra* note 28; Peter Carlson, *Florida’s Death Row Defender Stands Between 89 Condemned Men and the Electric Chair*, PEOPLE (July 11, 1983, 12:00 PM), <http://people.com/archive/floridas-death-row-defender-stands-between-89-condemned-men-and-the-electric-chair> (describing Holdman as “a sloppily dressed, chain-smoking workaholic with frizzy dirty-blond hair, boundless energy and a self-imposed mission to end capital punishment in Florida”). One of Holdman’s early colleagues, public defender Susan Cary, has never left Florida and remains dedicated to that mission.

31. Carlson, *supra* note 30.

32. *Id.*

33. *Id.* (estimating budget at \$50,000); Emily Langer, *Scharlette Holdman, Activist Known as “Angel of Death Row,” Dies at 70*, WASH. POST (July 25, 2017), https://www.washingtonpost.com/local/obituaries/scharlette-holdman-activist-known-as-angel-of-death-row-dies-at-70/2017/07/24/6638b100-7079-11e7-8f39-eeb7d3a2d304_story.html?utm_term=.1698a019bbf1 (estimating budget to be less than \$25,000).

34. Carlson, *supra* note 30.

35. *Id.*

Holdman's pivotal role in using her training in anthropology "to develop a deep understanding of her clients and their backgrounds."³⁶ Holdman is widely recognized as "creating the model for the life-history investigations that the ABA now considers standard in death penalty defense work."³⁷

Another activist who pioneered mitigation investigation was the late Marie Deans.³⁸ She was in South Carolina when she "started doing mitigation work, namely, collecting information on an inmate's background as evidence that the death penalty was not merited and that the failure of the trial attorneys to present such evidence constituted ineffective assistance of counsel."³⁹ In 1983, she moved to Virginia to head the Virginia Coalition on Jails and Prisons.⁴⁰ Virginia had carried out its first post-*Furman* execution in 1982 and would carry out its second in 1984.⁴¹ Although recruited to Virginia to work on prison conditions, Deans quickly turned her focus to the death penalty and the prisoners on Virginia's death row. Like Holdman, she recognized humanity where others saw only monsters:

Marie's integrity was founded in an abiding belief in the basic humanity of the men on death row, men who society had condemned as monsters. "From Marie, I learned to see the guys on death row as human beings," explained former death penalty attorney Steve Northrup. "No matter what they had done, she was able to see them as human beings. When you came under her influence, you would see the men in the same way."⁴²

In her long career, Deans worked effectively as a mitigation specialist in pretrial, as well as post-conviction, cases. Over a twenty-year period, she worked on approximately 220 trials, of which only three resulted in death sentences.⁴³

Some trial lawyers immediately embraced a multidisciplinary approach and the need for capital defense teams. In Atlanta, attorney Millard Farmer had formed the "Team Defense Project"

36. Maurice Chammah, *We Saw Monsters. She Saw Humans. Scharlette Holdman, Pioneering Foe of the Death Penalty, Dies at 70*, MARSHALL PROJECT (July 13, 2017), <https://themarshallproject.org/2017/07/13/we-saw-monsters-she-saw-humans#.JhnjcMsRk>.

37. Langer, *supra* note 33 (quoting Robert Dunham, executive director of the Death Penalty Information Center, concerning Holdman's role in creating the model for mitigation investigation).

38. See PEPPERS & ANDERSON, *supra* note 28.

39. *Id.* at 62.

40. *See id.* at 40.

41. *Searchable Execution Database*, *supra* note 29.

42. PEPPERS & ANDERSON, *supra* note 28, at 42 (footnote omitted).

43. *Id.* at 108.

by the time the Georgia statute was deemed constitutional in 1976.⁴⁴ Other practitioners throughout the South also began aggressively developing capital defense strategies, including how to investigate and present effective mitigating evidence. Dennis N. Balske, an attorney then practicing with the Southern Poverty Law Center in Alabama, stressed the need for teams in a 1979 law review article:

No attorney should ever solo a capital case. There are simply too many things going on for one attorney to manage. Moreover, it is difficult to maintain one's sanity under such intense pressure without the support of another attorney. Thus, as an absolute minimum, every capital case should have two defense attorneys.⁴⁵

Balske's article also emphasized the importance of investigation,⁴⁶ consistent theories in both phases,⁴⁷ and preparation of penalty phase strategy and evidence far in advance of trial, so that "rather than scurrying around to discover information to save your client, your job will consist of administering the most persuasive presentation possible from the wealth of information already accumulated, in such a way as to complement, through consistency, your trial presentation."⁴⁸ Balske also appreciated the power of transformative stories of

44. See, e.g., Jill Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1123 (2003) ("Millard Farmer, an attorney who assisted with the Team Defense Project in Georgia in 1976, was one of the first to articulate the team concept in capital defense work. The project employed an interdisciplinary approach and strategies that reached beyond the courtroom in representing its clients." (footnotes omitted)); Michael G. Millman, *Interview: Millard Farmer*, FORUM, Nov.-Dec. 1984, at 31, 31-32; *Team Defense in Capital Cases*, FORUM, May-June 1978, at 24, 24.

45. Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331, 331, 336 (1979). By 1982, Balske's admonition never to "solo" a capital case was successfully litigated by a court-appointed lawyer in California. See *Keenan v. Superior Court of S.F.*, 640 P.2d 108, 109-10, 113-14 (Cal. 1982) (granting mandamus to compel appointment of second counsel because of complex factual and legal issues in capital case); see also ABA ORIGINAL GUIDELINES, *supra* note 9, at Guideline 2.1 (requiring two qualified attorneys at trial, on appeal, and in post-conviction).

46. See Balske, *supra* note 45, at 352 (stressing the importance of information gathering in jury selection); see also ABA ORIGINAL GUIDELINES, *supra* note 9, at Guideline 11.4.1(A) (requiring that "independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial . . . should begin immediately upon counsel's entry into the case and should be pursued expeditiously").

47. Balske, *supra* note 45, at 353; see also ABA ORIGINAL GUIDELINES, *supra* note 9, at Guideline 11.7.1(A)-(B) (requiring counsel to formulate a defense theory "that will be effective through both phases," and seek to minimize inconsistencies).

48. Balske, *supra* note 45, at 353-54; see also ABA ORIGINAL GUIDELINES, *supra* note 9, at Guideline 11.8.3(A) (requiring sentencing preparation to commence "immediately upon counsel's entry into the case").

redemption, so he did not view mitigation as limited to the client's pre-offense background: "Importantly, the life story must be complete. That is, it must include information up to the day of the sentencing hearing itself."⁴⁹

Fortunately, the Supreme Court's own Eighth Amendment jurisprudence was also defining mitigation in the broadest possible terms, extending way beyond the statutory strictures. Professor Anthony G. Amsterdam, who had argued *Furman* on behalf of the NAACP Legal Defense Fund, returned to the Supreme Court in 1978 to challenge an Ohio statute that had prevented the sentencer from considering all the relevant mitigation in the case of Sandra Lockett.⁵⁰ Writing for the Court's majority, Chief Justice Warren Burger clarified the lessons of *Woodson*⁵¹ and *Gregg*, explaining:

[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.⁵²

49. Balske, *supra* note 45, at 357-58; *see also* ABA ORIGINAL GUIDELINES, *supra* note 9, at Guideline 11.8.6(A)-(B) (noting that counsel should consider presenting evidence of the "rehabilitative potential of the client," in addition to information from his medical, educational, military, employment, family, and social history); *see also* Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986) (evidence of positive jail adjustment relevant as mitigation, even though it "would not relate specifically to petitioner's culpability for the crime he committed").

50. *See* Lockett v. Ohio, 438 U.S. 586, 588-89 (1978); *see also* MANDERY, *supra* note 23, at 303 (describing the Legal Defense Fund's fight as one "against the insidious notion that the death penalty could be applied rationally"). For Amsterdam's role in multiple cases in the 1970s, *see* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 444-50, 452-54, 456 (1994) (describing how Amsterdam led the NAACP Legal Defense Fund's death penalty litigation in the 1970s).

51. *Woodson v. North Carolina*, 428 U.S. 305 (1976). *Woodson* was also argued by Professor Amsterdam. *See* GREENBERG, *supra* note 50, at 600.

52. *Lockett*, 438 U.S. at 605. Multiple statutory schemes now contain a "catch-all" mitigating factor. *See, e.g.*, 18 U.S.C. § 3592(a)(8) (2012) ("Other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence."); ALA. CODE § 13A-5-52 (1975) ("[A]ny aspect of a defendant's character or record and any of the circumstances of the offense" and "any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death."); ARIZ. REV. STAT. ANN. § 13-701.E.6 (2017) ("Any other factor that is relevant to the defendant's character or background or to the nature or circumstances of the crime and that the court finds to be mitigating."); CAL. PENAL CODE § 190.3(k) (West 2014) ("Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."); COLO. REV. STAT. § 18-1.3-1201(4)(l) (West 2017) ("Any other evidence which in the court's opinion bears on the question of mitigation."); FLA. STAT. ANN. § 921.141(6)(h) (West 2015) ("The

The Court declined to create an exemption from execution for juveniles in the case of sixteen-year-old Monte Eddings in 1982,⁵³ but eloquently evoked the mitigating importance of childhood, thereby reinforcing the need for thorough investigation of every capital client's developmental years:

The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment” expected of adults.

Even the normal 16-year-old customarily lacks the maturity of an adult. In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juvenile with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background. In addition, there was testimony that Eddings' mental and emotional development were at a level several years below his chronological age. All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of

existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.”); IND. CODE § 35-50-2-9(c)(8) (2017) (“Any other circumstance appropriate for consideration.”); LA. CODE CRIM. PROC. ANN. art. 905.5(h) (2003) (“Any other relevant mitigating circumstance.”); MONT. CODE ANN. § 46-18-304(2) (2007) (“The court may consider any other fact that exists in mitigation of the penalty.”); NEV. REV. STAT. ANN. § 200.035.7 (West 2017) (“Any other mitigating circumstance.”); N.H. REV. STAT. ANN. § 630:5.VI(i) (2018) (“Other factors in the defendant's background or character mitigate against imposition of the death sentence.”); N.C. GEN. STAT. ANN. § 15A-2000(f)(9) (2017) (“Any other circumstance arising from the evidence which the jury deems to have mitigating value.”); OHIO REV. CODE ANN. § 2929.04(B)(7) (West 2016) (“Any other factors that are relevant to the issue of whether the offender should be sentenced to death.”); OKLA. UNIF. JURY INSTRUCTIONS – CRIM. § 4-79 (West 2007) (“In addition, you may decide that other mitigating circumstances exist, and if so, you should consider these circumstances as well.”); 42 PA. CONS. STAT. § 9711(e)(8) (2012) (“Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.”); TENN. CODE ANN. § 39-13-204(j)(9) (2017) (“Any other mitigating factor that is raised by the evidence produced by either the prosecution or defense, at either the guilt or sentencing hearing.”); UTAH CODE ANN. § 76-3-207(4)(g) (West 2018) (“[A]ny other fact in mitigation of the penalty.”); WYO. STAT. ANN. § 6-2-102(j)(viii) (2007) (“Any other fact or circumstance of the defendant's character or prior record or matter surrounding his offense which serves to mitigate his culpability.”).

53. *Eddings v. Oklahoma*, 455 U.S. 104, 105, 113-14 (1982) (holding that a sentencer may not, as a matter of law, refuse to consider any relevant mitigating evidence).

great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.⁵⁴

The Court also declined to limit mitigating evidence to the pre-offense time frame, but instead showed how it can embrace redemption and post-offense “good adjustment” in jail.⁵⁵ In *Skipper v. South Carolina*,⁵⁶ the Court held that the defense should have been permitted to introduce such evidence at trial even though it “would not relate specifically to petitioner’s culpability for the crime he committed” because “there is no question but that such inferences would be ‘mitigating’ in the sense that they might serve ‘as a basis for a sentence less than death.’”⁵⁷ The *Skipper* Court thus seemed to define mitigation as anything which might lead a reasonable juror to conclude that life is the appropriate punishment.⁵⁸

As Professors Carol S. Steiker and Jordan M. Steiker have noted:

The irony, of course, was that the Court seemed to be protecting as a matter of constitutional law the very discretion *Furman* had identified as constitutionally problematic. But according to the Court, the discretion to *withhold* the death penalty based on mitigating factors is categorically different from the discretion to *impose* the death penalty based on amorphous perceptions of the aggravating aspects of the offense. So was born the central tension in American death penalty law: its simultaneous command that states cabin discretion of who shall die while facilitating discretion of who shall live.⁵⁹

Meanwhile, the details of teamwork had been evolving in capital defense practice. Post-*Lockett*, trial lawyers quickly appreciated the value of having someone give undivided attention to the client and the development of mitigating evidence. One lawyer in California hired a former *New York Times* reporter to

54. *Id.* at 115-16 (footnotes omitted) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

55. *Skipper v. South Carolina*, 476 U.S. 1, 6, 8 (1986).

56. *Id.* at 1.

57. *Id.* at 4-5 (quoting *Lockett*, 438 U.S. at 604).

58. *See id.* The low relevance threshold of *Eddings* and *Skipper* was reinforced in *McKoy v. North Carolina*, 494 U.S. 433, 440-41 (1990), where a state court dissent was quoted with approval: “Relevant mitigating evidence is evidence which *tends* logically to prove or disprove some fact or circumstance which a fact-finder *could* reasonably deem to have mitigating value.” *Id.* at 440 (emphasis added) (quoting *State v. McKoy*, 372 S.E.2d 12, 45 (N.C. 1988)).

59. CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 165 (2016) (footnote omitted).

investigate the life history of his client.⁶⁰ The reporter, the late Lacey Fosburgh, was teaching at the Journalism School at the University of California, Berkeley, and she had previously written *Closing Time: The True Story of the “Goodbar” Murder*, a best seller about a case that she had covered for the newspaper.⁶¹ Fosburgh’s account of her experience assisting in the successful representation of a capital client was published in 1982:

[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.⁶²

In 1983, Professor Gary Goodpaster published an article entitled *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases* that was widely read and frequently cited.⁶³ He discussed trial counsel’s “duty to investigate the client’s life history, and emotional and psychological make-up” in death penalty cases.⁶⁴ He continued:

60. See Lacey Fosburgh, *The Nelson Case: A Model for a New Approach to Capital Trials*, FORUM, Sept.-Oct. 1982, at 31.

61. LACEY FOSBURGH, *CLOSING TIME: THE TRUE STORY OF THE “GOODBAR” MURDER* (1977).

62. Fosburgh, *supra* note 60, at 31-32 (emphasis added).

63. See generally Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983). The article was cited four times in *Strickland v. Washington*, 466 U.S. 668, 689-90 (1984) (cited once in Justice Sandra Day O’Connor’s opinion for the majority of the Court); *id.* at 716 n.13, n.15, 718 (cited three times in Justice Thurgood Marshall’s dissent). Justice Marshall referred to the article as “a sensible effort to formulate guidelines for the conduct of defense counsel in capital sentencing proceedings.” *Id.* at 716 n.15.

64. Goodpaster, *supra* note 63, at 323-24.

There must be inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings. The affirmative case for sparing the defendant's life will be composed in part of information uncovered in the course of this investigation. The importance of this investigation, and the thoroughness and care with which it is conducted, cannot be overemphasized.⁶⁵

By the mid-1980s, there was increasing recognition of the need for multidisciplinary teams, including nonlawyers, who would give fulltime attention to social history investigation.⁶⁶ Not surprisingly, the first defense bar organization to attempt to set out standards in capital defense was the nation's leading association of counsel for the indigent, the National Legal Aid and Defender Association ("NLADA").⁶⁷ After circulating preliminary drafts over a period of years, NLADA first published its *Standards for the Appointment of Defense Counsel in Death Penalty Cases* in 1985.⁶⁸ Standard 11.4.1(D)(3)(C), Investigation, noted the potential use of mitigation specialists—a historic first acknowledgment of mitigation specialists as capital defense team members.⁶⁹ The introduction to the 1985 Standards stressed that the word "should" had been used as a mandatory term: "what counsel 'should' do is intended as a standard to be met now, not an ideal to be attained at a later time."⁷⁰

65. *Id.* at 324 (footnote omitted). The Supreme Court had noted the year before that in death penalty cases "[e]vidence of a difficult family history and of emotional disturbance [was already] typically introduced by defendants in mitigation." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

66. See, e.g., Cessie Alfonso & Katharine Baur, *Enhancing Capital Defense: The Role of the Forensic Clinical Social Worker*, *THE CHAMPION*, June 1986, at 26, 26-27; David C. Stebbins & Scott P. Kenney, *Zen and the Art of Mitigation Presentation, or, the Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial*, *THE CHAMPION*, Aug. 1986, at 14, 16-17.

67. Stetler & Tabuteau, *supra* note 11, at 741.

68. *Id.* See generally *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*, NAT'L LEGAL AID & DEFENDER ASS'N, <http://www.nlada.org/defender-standards/death-penalty/black-letter> (last visited Aug. 23, 2018) [hereinafter *1985 NLADA Appointment Standards*]. While the text was not amended, NLADA changed the name of the document from "appointment" to "performance" standards in 1987-88. See *STANDARDS FOR THE PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1987)* (NAT'L LEGAL AID & DEFENDER ASS'N, amended 1988), https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/NLADA_DP_Apptmt_Std_1987.authcheckdam.pdf [hereinafter *1987-88 NLADA PERFORMANCE STANDARDS*].

69. See *1985 NLADA Appointment Standards*, *supra* note 68, at Standard 11.4.1(D)(3)(C); *1987-88 NLADA PERFORMANCE STANDARDS*, *supra* note 68, at Standard 11.4.1(D)(3)(C).

70. *1987-88 NLADA PERFORMANCE STANDARDS*, *supra* note 68. Both the Original *ABA Guidelines* and the 2003 revision adhere to the same view of counsel's duties. As summarized in the *Guidelines*, these duties are not aspirational, but reflect what counsel ought to do now based on prevailing norms. See *ABA Revised Guidelines*, *supra* note 2, at 919 n.1 ("As in the first edition,

In 1986, New Jersey social workers Cessie Alfonso and Katharine Baur wrote about their experience in capital defense teams over the preceding five years, “bridg[ing] the gap” between attorneys and clients’ families, fostering closer cooperation between clients and attorneys, and using psychosocial expertise to help shape the mitigation narrative.⁷¹ The California defense bar prominently featured a former probation officer who had become a capital penalty phase investigator on the cover of its magazine *Forum*.⁷² The interview described how the mitigation investigator is “[d]ifferent from an investigator in that the whole emphasis on what I do has to do with the social and psychological factors in a person’s life—their biographical history. . . .”⁷³ The same magazine featured an interview with New Jersey social worker Alfonso as its cover story in 1988.⁷⁴

Ohio attorneys David C. Stebbins and Scott P. Kenney reiterated the importance of capital defense counsel being team players, and bluntly acknowledged that lawyers just do not have the “psycho-social” expertise that mitigation work requires.⁷⁵ They stressed the importance of parallel tracks of investigation: “Upon appointment to a capital case, two concurrent investigations should be begun by separate and distinct investigatory personnel. The criminal investigation is self-explanatory. A social investigation or social history is a creature of capital litigation, however, and is a key to a successful mitigation.”⁷⁶ Stebbins and Kenney also noted how social history is the key to reliable mental health assessments in capital cases: “Without a complete social history, any psychological examination is incomplete and the resulting opinions, conclusions, or diagnoses are subject to severe scrutiny.”⁷⁷ Another article in the national defense bar magazine in

‘should’ is a mandatory term.”).

71. Alfonso & Baur, *supra* note 66, at 26-29.

72. Anne E. Fragasso, *Interview: Casey Cohen*, FORUM, Jan.-Feb. 1987, at 22, 22.

73. *Id.* at 26.

74. Leslie H. Abramson, *Interview: Cessie Alfonso*, FORUM, Mar.-Apr. 1988, at 24, 24.

75. Stebbins & Kenney, *supra* note 66, at 16, 18 (noting that “[t]he capital defense attorney must recognize that the profession demands a higher standard of practice in capital cases”).

76. *Id.* at 16-17.

77. *Id.* at 17. This point was subsequently stressed in numerous articles on the standard of care in capital mental health assessments, noting that an independently corroborated social history is the foundation of reliable assessments. 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, 966-71 (2008); Douglas S. Liebert & David V. Foster, *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 15 AM. J. FORENSIC PSYCHIATRY 43, 46-47 (1994); see also Russell Stetler, *Mental Health Evidence and the Capital*

1987 concluded: “The mitigation specialist is a professional who, as attorneys across the nation are recognizing, should be included and will be primary to the defense team.”⁷⁸ These authors also stressed the importance of engaging the services of a mitigation specialist at the outset of the case: “Since the penalty phase is *always* a possibility and the entire case strategy needs to be planned and prepared around mitigation, the mitigation specialist should be obtained as soon as the attorney is retained or assigned.”⁷⁹ What was just as significant as the substance of the article was the affiliation of its three authors: one headed the Mitigation Specialists Department of the Ohio Public Defenders, another had worked there, and the third was the head of the Social Services Department of the Cuyahoga County Public Defenders Office, as well as an independent licensed social worker.⁸⁰

In February 1988, the NLADA referred its death penalty standards to the ABA’s Standing Committee on Legal Aid and Indigent Defendants (“SCLAID”), which had provided initial support to NLADA in the development of these standards.⁸¹ SCLAID reviewed the standards and “circulated them to appropriate ABA sections and committees” for further vetting.⁸² “SCLAID incorporated the only substantive concerns expressed (by the Criminal Justice Section) and changed the nomenclature” from Standards to Guidelines.⁸³ The ABA House of Delegates formally adopted the first edition of the *ABA Death Penalty Guidelines* at its midyear meeting in 1989.⁸⁴ Thus, the *ABA Guidelines* from the beginning reflected the national consensus among capital defense practitioners based on their work in the trenches throughout the 1980s.⁸⁵ The first edition of the *ABA Guidelines* had only one modest reference to mitigation specialists

Defense Function: Prevailing Norms, 82 UMKC L. REV. 407, 410, 417-18 (2014) (noting how the importance of independent corroboration had also been acknowledged in the mental health field as early as the 1980s because patients are often poor historians); George W. Woods et al., *Neurobehavioral Assessment in Forensic Practice*, 35 INT’L J.L. & PSYCHIATRY 432, 433 (2012).

78. Hudson et al., *supra* note 8, at 36.

79. *Id.* at 34 (emphasis in original).

80. *Id.* at 33.

81. Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 675 (2013) (quoting Affidavit of Russell Stetler at 14, *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2012) (No. 12-99001)).

82. *Id.* at 675.

83. *Id.*

84. Stetler & Tabuteau, *supra* note 11, at 742 (citing ABA ORIGINAL GUIDELINES, *supra* note 9, at Introduction).

85. *See* Stetler & Tabuteau, *supra* note 11, at 742.

at Guideline 11.4.1(D)(3)(C),⁸⁶ the Investigation section corresponding to the predecessor editions of the NLADA standards. Nonetheless, it is significant that Guideline 11.4.1(D)(3)(C) referred to mitigation specialists at all—proof positive of their national recognition back in the 1980s.⁸⁷ Moreover, the *ABA Guidelines* were not meant to be aspirational, but instead to “enumerate the minimal resources and practices necessary to provide effective assistance of counsel.”⁸⁸

In the days before e-mail, blogs, and social media, news about practice tips, effective strategies, and the importance of mitigation specialists spread through the spoken and written word at conferences, in defense bar magazines, law review articles, and in capital defense manuals.⁸⁹ In 1992, the federally funded Capital Case Resource Center of Tennessee published a lengthy Mitigation Workbook by Jeff Blum providing extensive guidance in multiple areas of mitigation investigation, including neurological impairment, psychological impairment, dysfunctional family, substance abuse, social/cultural factors, “positive prisoner” evidence, offense factors, “good person” evidence, and victim related factors.⁹⁰ Not only was this workbook circulated at national

86. ABA ORIGINAL GUIDELINES, *supra* note 9, at Guideline 11.4.1(D)(3)(C).

87. *See id.*

88. Stetler & Tabuteau, *supra* note 11, at 742 (quoting ABA ORIGINAL GUIDELINES, *supra* note 9, at Introduction).

89. Interestingly, these are the very sources Justice Stevens noted that courts should look to in establishing the objective indicia of the prevailing professional norms for evaluating ineffective assistance of counsel claims under the performance prong of *Strickland v. Washington*, 466 U.S. 668, 688, 690, 692 (1984) (requiring both deficient performance and prejudice). *See Padilla v. Kentucky*, 559 U.S. 356, 366-68 (2010). The High Court subsequently adopted this analysis in the capital case of *Hinton v. Alabama*, 134 S. Ct. 1081, 1083, 1088 (2014) (*per curiam*) (quoting the first two sentences of Justice Stevens’s analysis of prevailing norms verbatim).

The importance of collecting and preserving these historical materials documenting the collective wisdom of the capital defense community year by year has been widely recognized, and there are several efforts to make the relevant documentation available online. *See* Emily Olson-Gault, *Reclaiming Van Hook: Using the ABA’s Guidelines and Resources to Establish Prevailing Professional Norms*, 46 HOFSTRA L. REV. 1279, 1294-98 for a discussion of the valuable resource created by the ABA Death Penalty Representation Project (describing a password-protected online tool providing access to Standards, Caselaw Summaries, and Interactive Guidelines). The Habeas Assistance and Training Counsel Project is adding comparable resources to its website, www.capdefnet.org. Other regional offices, such as the California Appellate Project and the Habeas Corpus Resource Center in California, have created similar online, password-protected resources. For a discussion of the hard copy National Death Penalty Archive at the State University of New York at Albany, see *infra* note 250.

90. *See generally* JEFF BLUM, MITIGATION WORKBOOK (1992).

resource center training programs, but it was soon incorporated in the trial manuals of other states, such as California.⁹¹

III. “PART OF THE EXISTING STANDARD OF CARE” [THE 1990S]

In 1992, the National Alliance of Sentencing Advocates was founded.⁹² It was eventually renamed the National Alliance of Sentencing Advocates and Mitigation Specialists (“NASAMS”) and became a practice section of the National Legal Aid and Defender Association in 2005.⁹³ Merging the two organizations was a natural progression, since mitigation was a core component of NLADA’s annual death penalty training conferences from the outset.⁹⁴

In the late 1980s and early 1990s, communication between capital defense practitioners in different states was increased and facilitated by the establishment of federally funded Post-Conviction Defender Organizations (“PCDOs”) in some twenty states.⁹⁵ These organizations, known as “resource centers,” had their own national training programs that stressed the importance of mitigation investigation, and a number of the practitioners who had pioneered the use of nonlawyer mitigation specialists (including, for example, Scharlette Holdman) worked in the resource centers and offered training to teams from diverse jurisdictions.⁹⁶ In 1996, Congress eliminated all funding for the

91. CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE & CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, CALIFORNIA DEATH PENALTY DEFENSE MANUAL, v. II, MITIGATION WORKBOOK (1993).

92. See *Who We Are*, NAT’L ALLIANCE OF SENT’G ADVOC. & MITIGATION SPECIALISTS, <http://www.nlada.org/NASAMS> (last visited Aug. 23, 2018).

93. See *id.*

94. See *infra* note 100 and accompanying text.

95. See Roscoe C. Howard, Jr., *The Defunding of the Post-Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 904 & n.248 (1996). According to Howard, the federal grants were contingent on each PCDO receiving state funds to support their work in state court. *Id.* at 904. Their primary function was to recruit and train private attorneys to represent death row inmates, to serve as consultants to these attorneys, and to provide expertise in death row litigation. *Id.* The jurisdictions with PCDOs were Alabama, Arizona, Arkansas, California, Florida, Georgia, Illinois, Kentucky, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia. *Id.* at 904 n.248; see also *The Crisis in Capital Representation*, 51 REC. ASS’N B. CITY N.Y. 169, 187-91 (1996) (discussing history, success, and defunding of the PCDOs).

96. Howard, *supra* note 95, at 904 (noting that PCDO training was “pivotal to effective and cost-efficient representation of death row inmates”). The Death Penalty Resource Center Training Seminar in 1994, for example, was in Charleston, South Carolina in late May, and Holdman was on the faculty. Charleston Res. Ctr., Agenda for Training Seminar at the Charleston Sheraton (May 26-28, 1994) (on file with author).

twenty capital post-conviction defender organizations.⁹⁷ However, many were resurrected as nonprofit organizations, funded through charitable donations, foundations, and fees earned from court-appointed cases.⁹⁸ In addition, as the widespread use of e-mail emerged, listservs soon became an instantaneous means of communicating among capital defenders nationwide.⁹⁹ The National Legal Aid and Defender Association reached many practitioners through an annual death penalty training program, “Life in the Balance,” half of which was dedicated to mitigation and the remainder to litigation.¹⁰⁰

97. Howard, *supra* note 95, at 914-15. *Compare* Judiciary Appropriations Act of 1995, Pub. L. No. 103-317, 108 Stat. 1724, 1750-51 (1994) (allocating up to \$19.8 million for Death Penalty Resource Centers), *with* Judiciary Appropriations Act of 1996, Pub. L. No. 104-34, 110 Stat. 1321-34 (1996) (“[N]one of the funds provided in this Act shall be available for Death Penalty Resource Centers or Post-Conviction Defender Organizations after April 1, 1996.”).

98. For example, the Equal Justice Initiative of Alabama is “a private, 501(c)(3) nonprofit organization that provides legal representation to people who have been illegally convicted, unfairly sentenced, or abused in state jails and prisons.” *About EJI, THE EQUAL JUST. INITIATIVE*, <https://eji.org/about-eji> (last visited Aug. 23, 2018). EJI also challenges “the death penalty and excessive punishment” and “provide[s] re-entry assistance to formerly incarcerated people.” *Id.* It began as a resource center in 1989. *See id.* The Georgia Resource Center (officially known as the Georgia Appellate Practice & Educational Resource Center), founded in 1988, has continued as a nonprofit ever since. *About Us, THE GA. RESOURCE CTR.*, <http://www.garesource.org/about> (last visited Aug. 23, 2018). It describes itself as “housed in the basement of an Atlanta pizza restaurant,” providing representation in “the only state in the country which does not provide a right to counsel for death-sentenced inmates in post-conviction proceedings.” *Id.* North Carolina’s “Center for Death Penalty Litigation started in 1989 as the North Carolina Resource Center,” but changed its name when it became an independent nonprofit in 1995. *About, CTR. DEATH PENALTY LITIG.*, <http://cdpl.org/about> (last visited Aug. 23, 2018). The Texas Defender Service is “a non-profit organization established in 1995 by experienced death penalty attorneys.” *Who We Are, TEX. DEFENDER SERVS.*, <http://texasdefender.org/about> (last visited Aug. 23, 2018). Its stated mission is to “establish a fair and just criminal justice system in Texas” and to “improve the quality of representation afforded to those facing a death sentence . . .” *Id.* The Virginia Capital Representation Resource Center is a not-for-profit law firm assisted by the Virginia Law Foundation. *VCRRRC Mission Statement, VA. CAP. REPRESENTATION RESOURCE CTR.*, <http://www.vccrc.org> (last visited Aug. 23, 2018). It provides both direct representation and assistance to private attorneys representing death-sentenced inmates. *Id.*

99. The first capital defense listservs were discussed at the NAACP Legal Defense & Education Fund’s Eighteenth Annual Capital Punishment Training Conference at the Airlie Conference Center in Warrenton, Virginia, Aug. 2, 1997, at a panel entitled “How available technologies can quickly and cheaply access needed information, link colleagues closer together, and save lives.” NAACP Legal Def. and Educ. Fund, 18th Annual Capital Punishment Training Conference Program at Airlie Conference Center, Warrenton, Va. (July 31- Aug. 3, 1997) (agenda on file with author). Two years earlier, some attendees at this conference had begun to list e-mail addresses, but they were a small minority.

100. *See* NLADA MITIGATION DIRECTORY, A NATIONAL COMPILATION OF MITIGATION SPECIALISTS (2002). Preface:

NLADA’s annual Life in the Balance Training Conference includes two days of plenary sessions and workshops focusing on the unique role that mitigation specialists play in capital defense teams. The two-day Mitigation Track is designed for investigators, social

The defunding of the federal resource centers also provided a ready pool of experienced capital defense practitioners when the death penalty was reinstated in New York in 1995.¹⁰¹ The legislation that brought back the death penalty also created a Capital Defender Office (“CDO”) with a mandate to ensure that capitolly charged defendants received effective representation.¹⁰² The CDO was the first publicly funded, statewide indigent defense organization dedicated uniquely to the representation of capitolly charged clients.¹⁰³ The CDO hired staff who had capital experience in numerous other jurisdictions, including Alabama, California, Florida, Georgia, New Jersey, North Carolina, South Carolina, and Texas.¹⁰⁴ The CDO hired roughly as many investigators and mitigation specialists as trial lawyers—a decision that reflected “a simple attempt to implement the techniques developed by experienced capital defense practitioners all over the country that were the subject of regular presentations at training programs.”¹⁰⁵ The CDO staffed each of its cases with at least two lawyers, an investigator, and a mitigation specialist.¹⁰⁶ The CDO’s success was remarkable: as Professor Garrett has noted, there were nearly 900 cases in which prosecutors considered seeking the death penalty, but they were dissuaded from doing so in all but fifty-eight cases.¹⁰⁷ Only seven defendants were sentenced to death before the state’s high court deemed the statute unconstitutional.¹⁰⁸

workers, mental health workers and others who specialize in, or are interested in specializing in, capital mitigation investigation. Up to five simultaneous workshops are conducted in each time slot, covering such topics as team defense, mitigation-related case law, conducting thorough social history investigations, client interviewing skills, neuropsychological and other testing, case organization and report writing, the effects of substance abuse, psychological trauma, brain damage and other medical or psychological mitigating phenomena, and a variety of other substantive and skills topics.

Id. at 6.

101. See GARRETT, *supra* note 11, at 113-14; Stetler & Tabuteau, *supra* note 11, at 744.

102. Stetler & Tabuteau, *supra* note 11, at 744.

103. *Id.*

104. *Id.*

105. *Id.* at 744-45.

106. *Id.* at 744.

107. GARRETT, *supra* note 11, at 114. For precise details, see *infra* text accompanying notes 268-76.

108. *People v. LaValle*, 817 N.E.2d 341, 344, 367 (N.Y. 2004); see GARRETT, *supra* note 11, at 114; Stetler & Tabuteau, *supra* note 11, at 744 nn. 81, 83. Professor Garrett suggests that “one might argue that New York was never a hard-core death penalty state.” GARRETT, *supra* note 11, at 115. However, in the pre-*Furman* era, New York carried out 695 executions between 1890 and 1963—more than any other jurisdiction in the country. See WILLIAM J. BOWERS WITH GLENN L. PIERCE & JOHN F. MCDEVITT, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*,

The federal death penalty was reinstated in 1988,¹⁰⁹ and it was greatly expanded under the Federal Death Penalty Act (“FDPA”) of 1994.¹¹⁰ Many of the mitigation pioneers (including Carmeta Albarus, Cessie Alfonso, Scharlette Holdman, Jill Miller, Lee Norton, Hans Selvog, and Jan Vogelsang) became involved in the early capital cases prosecuted in federal court.¹¹¹ Funding under

at 458 (1984).

109. The death penalty was enacted as part of the Anti-Drug Abuse Act of 1988 (effective Nov. 18, 1988). See Pub. L. No. 100-690, 102 Stat. 4181, 4387-88 (codified at 21 U.S.C. § 848(e)(1)(A)–(B) (1988)).

110. The Federal Death Penalty Act of 1994 was enacted as Title VI of the Violent Crime Control and Law Enforcement Act of 1994 and became effective Sept. 13, 1994. See Pub. L. No. 103-322, 108 Stat. 1796, 1959-68 (codified at 18 U.S.C. §§ 3591-3598 (1994)).

111. Carmeta Albarus recalls that her first big federal death penalty case was the New Jersey prosecution of Bilal Pretlow in 1991. See Joseph F. Sullivan, *21-Year-Old Stands Trial Under Drug Kingpin Law*, N.Y. TIMES (Dec. 10, 1991), <http://www.nytimes.com/1991/12/10/nyregion/21-year-old-stands-trial-under-drug-kingpin-law.html?pagewanted=print>; E-mail from Carmeta Albarus to Russell Stetler (Nov. 3, 2017, 12:20 PM) (on file with author). Cessie Alfonso began working on federal death penalty cases in 1989. E-mail from Cessie Alfonso to Russell Stetler (Nov. 4, 2017, 4:12 PM) (on file with author); see also E-mail from Jill Miller to Russell Stetler (Nov. 5, 2017, 7:47 AM) (on file with author) (“I believe the first capital case was in Chicago, Ill. Charged under the drug kingpin law (1988) in 1989. I was hired in 1990. It was charged as U.S. v. Davis though my client’s name was Darnell Turner. He was charged under the wrong name. . . . I had a case in Alaska in 1992 under what we called the ‘zombie’ prosecutions in which fed. prosecutors tried to claim they could seek death in non-drug kingpin cases. It didn’t fly. Two more drug cases in Louisiana and Michigan before the expanded crime bill in 1994.”). Lee Norton worked on an early case in which James Roane was sentenced to death in 1993. See *3 Sentenced to Death Under U.S. Drug Law*, N.Y. TIMES (Feb. 19, 1993), <http://www.nytimes.com/1993/02/19/us/3-sentenced-to-death-under-us-drug-law.html>; E-mail from Lee Norton to Russell Stetler (Nov. 3, 2017, 2:56 PM) (on file with author). Hans Selvog worked on two cases in the Eastern District of Virginia in 1992 (Richard Tipton & Marvin Damon); another in the Eastern District of Virginia (Jean Claude Oscar); and two in the District of Columbia (Wayne Perry & Donzell McCauley) in 1994. E-mail from Hans Selvog to Russell Stetler (Nov. 6, 2017, 11:53 AM) (on file with author) (Selvog is the mitigation specialist mentioned in the U.S. Supreme Court’s grant of relief in *Wiggins v. Smith*, discussed *infra*, text accompanying notes 132-34.) Jan Vogelsang worked on the case of Anthony Battle, which spanned from Dec. 1994 through 1998. E-mail from Jan Vogelsang to Russell Stetler (Nov. 4, 2017, 7:42 PM) (on file with author); see also *United States v. Battle*, 235 F. Supp. 2d 1301, 1304, 1326, 1337 (N.D. Ga. 2001); Langer, *supra* note 33 (noting Holdman’s work on federal death penalty cases of “Theodore J. Kaczynski, known as the Unabomber . . . ; Eric Rudolph, who confessed to perpetrating bombings at the 1996 Atlanta Olympics and at abortion clinics; Jared L. Loughner, who pleaded guilty in the 2011 shooting that wounded then-Rep. Gabrielle Giffords (D-Ariz.); and Dzhokhar Tsarnaev, who was convicted in the 2013 Boston Marathon bombing”). Holdman’s extraordinary impact on the defense team in the Rudolph case was vividly described by one of the lawyers, a former judge from the Alabama Court of Criminal Appeals. William M. Bowen, Jr., *A Former Alabama Appellate Judge’s Perspective on the Mitigation Function in Capital Cases*, 36 HOFSTRA L. REV. 805, 813 (2008) (“The first time I met Scharlette Holdman was at a meeting of the defense team Because this was my first capital case, I had never worked with a mitigation specialist before, so I did not know what to expect. When she started talking, I thought to myself, ‘Thank God, we have some direction.’ After that meeting, I talked to Scharlette almost every day.”).

the Criminal Justice Act¹¹² was generally more reliable (both for counsel and for ancillary services) than in many state jurisdictions, and the complexity of the cases resulted in longer intervals between arrest and trial.¹¹³ The cases frequently involved criminal conspiracies, often drug-related, operating across multiple states over a period of years. Mitigation budgets were substantial.¹¹⁴

In 1998, a committee of federal judges chaired by the Hon. James R. Spencer of the Eastern District of Virginia examined the cost of the federal death penalty.¹¹⁵ The Spencer Report noted that “[t]he work performed by mitigation specialists is work which otherwise would have to be done by a lawyer, rather than an investigator or paralegal.”¹¹⁶ The report also noted that mitigation specialists “have extensive training and experience in the defense of capital cases. They are generally hired to coordinate an investigation of the defendant’s life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review.”¹¹⁷ In the Commentary to its Recommendation 7 (Experts), the Report described mitigation specialists as “individuals trained and experienced in the development and presentation of evidence for the penalty phase of a capital case.”¹¹⁸ The Commentary continued, “[t]heir work is part of the existing ‘standard of care’ in a federal death penalty case,” but noted that mitigation specialists are in “short supply” and often not available locally.¹¹⁹ Judge

112. 18 U.S.C. § 3006A (2012).

113. *See id.* § 3006A(a), (d)(1), (f).

114. *See* DAVID DEMATTEO ET AL., FORENSIC MENTAL HEALTH ASSESSMENTS IN DEATH PENALTY CASES 244 (2011) (“Typically, mitigation specialists invest hundreds of hours in a detailed mitigation investigation.”); *see also* Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must Be Included on the Capital Defense Team*, 31 HOFSTRA L. REV. 1143, 1154 (2003) (reiterating that “it takes hundreds of hours to conduct a thorough social history investigation”); Lee Norton, *Capital Cases: Mitigation Investigation*, THE CHAMPION, May 1992, at 43-45 (estimating that hundreds of hours were typically required in a mitigation investigation).

115. SUBCOMM. ON FED. DEATH PENALTY CASES, JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION PT. I. (May 1998), http://www.uscourts.gov/sites/default/files/original_spencer_report.pdf [hereinafter “SPENCER REPORT”].

116. *Id.* at Part I.B.7 (Importance of Experts and Their Cost); *see also* Jonathan P. 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, 364 (1997) (“[L]aw school prepares one to be an advocate, not an investigator . . .”).

117. SPENCER REPORT, *supra* note 115, Part I.B.7.

118. *Id.* at commentary to Part II.7.

119. *Id.*

Spencer's report recommended that federal defender organizations consider "creating salaried positions" for mitigation specialists.¹²⁰ In 2002, NLADA published a directory that confirmed the "short supply" to which the Spencer Report alluded: the directory listed only 136 private mitigation specialists in the whole country.¹²¹

IV. MITIGATION SPECIALISTS IN THE NEW MILLENNIUM

In 2000, the Supreme Court of the United States for the first time reversed a death sentence for a trial counsel's failure to conduct a thorough mitigation investigation.¹²² Writing for the Court's majority, Justice John Paul Stevens cited the ABA's Standards for Criminal Justice: The Defense Function, concerning the need to investigate sentencing issues thoroughly.¹²³ Standard 4-4.1 of the Defense Function described the duty to investigate as follows: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case *and the penalty in the event of conviction.*"¹²⁴ In discussing mitigation, the Commentary continued: "Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself."¹²⁵

In February 2003, mitigation specialists were recognized as part of the core capital defense team when the ABA released the second edition of its death penalty *Guidelines*, following years of

120. *Id.* at Part II.7.a. The Commentary suggested that "[t]he feasibility of having these salaried employees work not only on cases to which their federal defender organization is appointed, but on others within their region, should be explored as well." *Id.* at commentary to Part II.7.

121. NLADA MITIGATION DIRECTORY, *supra* note 100. This was the third edition of a directory originally published in 1990, when numbers were even lower.

122. *Williams v. Taylor*, 529 U.S. 362, 367, 395-96 (2000) (ineffective assistance where capital trial counsel in Virginia in 1986 did not fulfill their obligation to conduct a thorough investigation of the defendant's background).

123. *Id.* at 396 (citing STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION, Standard No. 4-4.1 (AM. BAR ASS'N, 2d ed. 1980)).

124. STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION, Standard No. 4-4.1, *supra* note 123 (emphasis added).

125. *Id.* commentary to Standard 4-4.1 at 4-53.

study and review.¹²⁶ The Commentary elaborated on why mitigation specialists were needed:

A mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may have never disclosed. They 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. Moreover, they may be critical to assuring that the client obtains therapeutic services that render him cognitively and emotionally competent to make sound decisions concerning his case.

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict. 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

126. See *ABA Revised Guidelines*, *supra* note 2, at 952, 999-1000 (reiterating minimal components of a defense team); see also Robin M. Maher, *The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 763, 766 (2008) ("The revised edition of the ABA Guidelines greatly expanded and updated an earlier set that had been published in 1989. In addition to taking into account intervening legal and case law developments, the ABA Advisory Committee also identified areas of legal practice that had proved particularly problematic and sought to provide specific guidance to remedy some of the most serious mistakes made by counsel and other actors in the criminal justice system. One of these errors was the frequent failure of defense counsel to investigate and present mitigation evidence during the penalty phase of a capital trial. This was true despite the fact that the importance of mitigation evidence was not a new concept." (footnotes omitted)). Maher noted that the ABA Advisory Committee that coordinated the revision included "experienced capital defenders, volunteer death penalty lawyers, law school professors, representatives from national defender organizations and members of many ABA Sections, including the Criminal Justice Section." *Id.* at n.13; see *ABA Revised Guidelines*, *supra* note 2, at 914-15 (listing in full the experts involved in the revision).

team and experts to develop a comprehensive and cohesive case in mitigation.

The mitigation specialist often plays an important role as well in maintaining close contact with the client and his family while the case is pending. The rapport developed in the process can be the key to persuading a client to accept a plea to a sentence less than death.¹²⁷

The Commentary to Guideline 10.7, Investigation, also includes a lengthy discussion of counsel's duty to investigate and present mitigating evidence, and the many sources of the documentary evidence and collateral witnesses that a mitigation specialist will explore in a social history investigation.¹²⁸ The Commentary contains some eighty footnotes citing law review articles; most of the authors ultimately had academic affiliations, but the vast majority also had experience as capital practitioners.¹²⁹ Over two dozen other notes cited publications of the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association, and another dozen cited the trial manuals of Alabama, California, Florida, Kentucky, and Texas.¹³⁰ In short, the revision largely reflected the experience of the capital defense community subsequent to the original edition of the *Guidelines* in 1989 and overwhelmingly reaffirmed the practical and legal lessons that had been set out in the original edition. The ABA's reiteration of these norms in 2003 "did not magically emerge from the word processors of agenda-driven activists or the imagination of elitist academics."¹³¹

Later in the spring of 2003, the Supreme Court issued its historic decision in *Wiggins v. Smith*.¹³² While the High Court did not use the term "mitigation specialist," it acknowledged the importance of the nonlawyer who had conducted the thorough post-conviction investigation of readily available mitigation

127. *ABA Revised Guidelines*, *supra* note 2, at 959-60 (footnotes omitted).

128. *Id.* at 1021-26.

129. Stetler & Tabuteau, *supra* note 11, at 745 & nn.84-110 (identifying the various authors and the specific revised *Guidelines* to which their articles were relevant).

130. *Id.* at 745-46.

131. *Id.* at 748. Publication of the 2003 revision of the *Guidelines* also reminded the outliers of the need to bring their local lawyers up to the prevailing norms of the capital defense community. See, e.g., Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 OKLA. CITY U. L. REV. 23, 95 (2005) (citing *Rompilla v. Beard*, 545 U.S. 374, 387 (2005)).

132. 539 U.S. 510, 514, 524 (2003) (finding counsel ineffective in a 1989 Maryland trial because they "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources").

evidence that had been neglected at trial.¹³³ Citing the *ABA Death Penalty Guidelines* published in 1989 (the year of Kevin Wiggins's trial), Justice Sandra Day O'Connor, writing for the Court's majority, offered a lengthy description of what a thorough mitigation should entail:

The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." 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. . . . [A]mong the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences. . . . ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. . . . Investigation is essential to fulfillment of these functions").¹³⁴

Shortly after the *Wiggins* decision, a multi-year effort began to produce more detailed guidelines for the mitigation function.¹³⁵ The experienced practitioners involved in this project agreed that it was preferable to articulate performance standards rather than to certify individuals as "qualified" mitigation specialists.¹³⁶ The drafters of the *ABA Guidelines* revision in 2003 had made a similar choice: they eliminated the specific experiential qualifications in the original edition in 1989 in favor of a demonstrated commitment to high-quality representation, appropriate training, and specific knowledge and skills.¹³⁷ As the

133. *Id.* at 516 (licensed clinical social worker Hans Selvog provided "the elaborate social history report" in post-conviction proceedings).

134. *Id.* at 524-25 (citations omitted).

135. For history, see Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 693 n.2 (2008) (acknowledging the "substantial contributions from many experienced capital defense attorneys, mitigation specialists, and mental health professionals" in the work that resulted in the publication of these *Supplementary Guidelines*, "including Chris Adams, Jean Barrett, John Blume, Mickell Branham, Richard Burr, the late Marie LeBoeuf Campbell, Melanie Carr, Ingrid Christensen, Eric M. Freedman, Judy Gallant, Tanya Greene, Lisa Greenman, Scharlette Holdman, John Holdridge, Lori James-Townes, Pamela Blume Leonard, Andrea Lyon, Robin Maher, Jennifer Merrigan, Jill Miller, Lee Norton, Mark Olive, Danalynn Recer, Lisa Rickert, David Ruhnke, Russell Stetler, Ronald Tabak, Naomi Terr, Kathy Wayland, Juliet Yackel, and Denise Young").

136. *Id.* at 697.

137. Compare *ABA Revised Guidelines*, *supra* note 2, at 961-62 (noting that Guideline 5.1 of

mitigation guidelines took form over the course of three-to-four years, drafts were circulated at multiple national training programs and modified as a result of the feedback received.¹³⁸ Experienced practitioners in all forty jurisdictions that then had death penalty statutes (thirty-eight states plus the federal and military systems) were contacted for input.¹³⁹ In the spring of 2008, the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* were published in a symposium edition of this *Law Review* featuring over four hundred pages of mitigation-related articles by academics, attorneys, ethics experts, mitigation specialists, judges, and mental health experts.¹⁴⁰ Robin M. Maher, then director of the ABA Death Penalty Representation Project, succinctly summarized the importance of the *Supplementary Guidelines*:

The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases . . . are a natural and complementary extension of the ABA Guidelines. They spell out important features of the existing standards of practice that enable mitigation specialists and defense attorneys to work together to uncover and develop evidence that humanizes the client. Most

the 2003 revised *Guidelines*, entitled “Qualifications of Defense Counsel,” was “substantially reorganized for this edition . . . [to] focu[s] on counsel’s ability to provide high quality legal representation”), with ABA ORIGINAL GUIDELINES, *supra* note 9, at Guideline 5.1 (requiring “at least five years litigation experience in the field of criminal defense . . . no fewer than nine jury trials of serious and complex cases,” etc.). The 2003 Commentary noted that “quantitative measures of experience are not a sufficient basis to determine an attorney’s qualifications,” and “[a]n attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency and commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster.” *ABA Revised Guidelines*, *supra* note 2, at 964 (citing Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1871 n.209 (1994) (“Standards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications.”)).

138. See O’Brien, *supra* note 135, at 697-98, 701-02.

139. *Id.* at 698.

140. Published in 36 HOFSTRA L. REV. 663 (2008). The articles in that issue of the *Hofstra Law Review* covered ethical duties, the perspectives of a retired judge of the Alabama Court of Criminal Appeals and the then-Chief Judge of the Eastern District of Louisiana, evolving standards, cultural competency, the importance of trauma investigation, reliable mental health assessments, foreign national cases, defense-initiated victim outreach, research by the Capital Jury Project, and post-conviction litigation of mitigation-based claims. The authors included many of the practitioners involved in developing the *Supplementary Guidelines* (see *supra* note 135 for a list of those practitioners), as well as the Hon. Helen G. Berrigan, William M. Bowen, Jr., Richard G. Dudley, M.D., Lawrence J. Fox, Craig Haney, Sheri Lynn Johnson, Gregory J. Kuykendall, Alicia Amezcua Rodriguez, Christopher Seeds, Scott Sundby, and Mark Warren.

importantly, the Supplementary Guidelines will help defense counsel understand how to supervise the development of mitigation evidence and direct a key member of the defense team. This guidance is urgently needed. In my role as Director of the ABA Death Penalty Representation Project, I often receive inquiries from judges and lawyers about what training and experience a mitigation specialist should have before being appointed and what his or her responsibilities in a capital case should be. I also receive calls from mitigation specialists themselves, frustrated because defense counsel does not understand their role and what they need by way of support and direction. The Supplementary Guidelines will provide answers to many of those questions, continuing what the ABA Guidelines began when they first described the unique role and responsibilities of mitigation specialists.¹⁴¹

V. DEATH SENTENCES ARE BECOMING VANISHINGLY RARE¹⁴²

On hearing an account of the sort of horrible crime that grabs headlines on Fox News, many ordinary people—the sort of people who serve on juries¹⁴³—will likely react viscerally, thinking there is nothing anyone could tell them about the perpetrator that would convince them that he does not deserve execution. Yet from the inception of the modern era of capital punishment to the present day, the statistics tell a different story. In earlier cases in which practitioners had learned the lessons described above, the outcome was in a surprising number of instances a sentence less than death.¹⁴⁴ In more recent times, death sentences have become almost vanishingly rare notwithstanding intense social and political pressures in the opposite direction.

141. Maher, *supra* note 126, at 770-71 (footnotes omitted).

142. Appendices 1 to 4 to this Article, *infra*, summarize data from multiple jurisdictions and scores of highly aggravated cases (child victims, killing of police officers, and multiple victim cases) to make the point that the overwhelming majority of post-*Furman* death-eligible cases have *always* avoided death sentences, regardless of the brutality of the crime. In short, mitigation has always mattered. In this Part, however, the emphasis is slightly different. This Part focuses entirely on the trend toward dramatically diminished death sentencing in the twenty-first century, particularly in those states that have established dedicated, specialized capital defense units with in-house mitigation staff. Instead of being rare, as they have always been, annual death sentences are now nearing zero in the states with enhanced mitigation capacity. The Appendices provide important context. They do not purport to be exhaustive surveys, but simply illustrations of the overall rarity of death sentences in the modern era and some readily available examples of highly aggravated cases known to the author where jurors rejected the death penalty.

143. See *ABA Revised Guidelines*, *supra* note 2, at 1052 (describing how “death qualification” process skews juries in favor of both conviction and death sentences); Adam Liptak, *Court Ruling Expected to Spur Convictions in Capital Cases*, N.Y. TIMES, June 9, 2007, at A1.

144. See *infra* apps. 1-4.

This Article focuses on death sentences imposed rather than executions because executions are affected by quite different variables, including execution methods (availability of drugs, so-called “botched” executions using experimental drug combinations administered by nonmedical personnel, etc.),¹⁴⁵ “volunteers” who seek their own execution by waiving appeals or post-conviction litigation,¹⁴⁶ politics in the executive branch (where the governors of Colorado, Oregon, Pennsylvania, and Washington have vowed not to carry out executions as long as they are in office),¹⁴⁷ and

145. See AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY 4, 21, 123 (2014) (listing various technologies used, and noting the availability of lethal injection and the painful effects of administration by inexperienced personnel). The Death Penalty Information Center offers an overview of lethal injection issues, with links to articles, media reports, official actions, and court cases. *Lethal Injection*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/lethal-injection> (last visited Aug. 23, 2018).

146. See John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 962 tbl. 2 (2004) (reviewing 106 “volunteer” executions and finding that 87.74% had struggled with mental illness and/or substance abuse). About ten percent of executions involve prisoners who have waived further litigation (146 out of 1471 as of May 10, 2018). *Searchable Execution Database*, *supra* note 29.

147. Gov. John Kitzhaber of Oregon declared a moratorium on executions on Nov. 22, 2011. Helen Jung, *Gov. John Kitzhaber: Oregon Death Penalty Fails ‘Basic Standards of Justice’*, OREGONIAN (Nov. 23, 2011, 7:13 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/11/gov_john_kitzhaber_oregon_deat.html. Kitzhaber’s successor, Gov. Kate Brown, declared that she would maintain the moratorium on February 20, 2015. *Oregon’s New Governor Plans to Continue Death Penalty Moratorium*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/node/6060> (last visited Aug. 23, 2018) (citing Jonathan J. Cooper, *New Oregon Governor Will Continue Death Penalty Moratorium*, HERALDNET (Feb. 20, 2015, 2:38 PM), <http://www.heraldnet.com/news/new-oregon-governor-will-continue-death-penalty-moratorium>). In a special election to determine who would serve the remainder of Kitzhaber’s term, Brown was elected in November 2016. Chris Lehman, *Oregon Elects Kate Brown as Governor*, OPB (Nov. 9, 2016, 12:20 AM), <http://www.opb.org/news/series/election-2016/oregon-governor-kate-brown-bud-pierce-results>. Washington’s Gov. Jay Inslee declared a moratorium in that state on February 11, 2014. Ian Lovett, *Executions Are Suspended by Governor in Washington*, N.Y. TIMES (Feb. 11, 2014), <https://www.nytimes.com/2014/02/12/us/washington-governor-jay-inslee-suspends-death-penalty.html>. Inslee was also re-elected in November 2016. Jim Brunner, *Gov. Jay Inslee Defeats Republican Challenger Bill Bryant*, SEATTLE TIMES (Nov. 7, 2016, 12:00 AM), <https://www.seattletimes.com/seattle-news/politics/washington-governor-jay-inslee-bill-bryant>. Gov. John Hickenlooper signed an Executive Order granting Nathan J. Dunlap a temporary reprieve from his death sentence in Colorado on May 22, 2013. Press Release, Gov. John Hickenlooper, Gov. Hickenlooper Grants Temp. Reprieve of Death Sentence (May 22, 2013), <https://colorado.gov/governor/news/gov-hickenlooper-grants-temporary-reprieve-death-sentence>. Hickenlooper has since “made it his policy that no one in Colorado will be executed as long as he is in office.” Maria L. La Ganga, *Death Penalty is Sought Against James Holmes, But Governor Stands in the Way*, L.A. TIMES (July 22, 2015, 4:00 AM), <http://www.latimes.com/nation/la-na-death-penalty-governors-20150722-story.html>. Hickenlooper was re-elected in November 2014. Lauren French, *Hickenlooper Reelected in Colorado*, POLITICO (Nov. 5, 2014, 11:32 AM), <https://www.politico.com/story/2014/11/john-hickenlooper-2014-elections-112585>. Gov. Tom Wolf declared a moratorium on the death penalty in Pennsylvania on February 13, 2015. Wallace McKelvey, *Gov. Tom Wolfe Declares Moratorium on Death Penalty in Pa.*, PENNLIVE (Feb. 13,

labyrinthine obstacles to the review of new mitigation evidence in post-conviction proceedings, especially in federal court.¹⁴⁸

The modern decline in death sentences returned by juries is all the more remarkable because to convince jurors of the inherent worth of the life of a capital defendant requires the defense team to break through several culturally produced predispositions influencing the way capital jurors approach a case.¹⁴⁹

Professor Franklin Zimring has noted how the death penalty was reinvented (or rebranded) in the 1990s as a “service to victims,” providing “closure” for the surviving families.¹⁵⁰ He traced the number of news stories that link the term “closure” to the subject of executions in a broad sample of print media in the United States from 1986 to 2001.¹⁵¹ Professor Zimring found that the term “closure” did not appear in death penalty stories prior to 1989:

Its first and only mention in 1989 was followed by a year in which two stories use the term. By 1993, ten stories a year combine the topic “death penalty” and the word “closure,” and thereafter the combination of “capital punishment” and “closure” grows almost geometrically to more than 500 stories in 2001.¹⁵²

Professor Zimring noted that the empirical support for the proposition that executions bring psychological benefits to grieving survivors is “quite thin.”¹⁵³ However, even if it did bring

2015, 10:34 PM), http://www.pennlive.com/politics/index.ssf/2015/02/gov_tom_wolf_declares_moratori.html.

148. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 758-59, 762-67, 773 (1991) (Blackmun, J., dissenting) (referring to habeas corpus proceedings, with all their procedural requirements, as a “Byzantine morass”); Eric M. Freedman, *Federal Habeas Corpus in Capital Cases*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 577, 589 (James R. Acker et al. eds, 3d ed. 2014) (criticizing “the elaboration of a legalistic maze of restrictions on the availability of the habeas corpus remedy”); see also Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 741, 750, 767-69 (2002); Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 968-69 (2012).

149. See, e.g., Haney, *supra* note 26, at 839-41 (describing the importance of mitigation counter-narrative).

150. See FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 59-61 (2003).

151. *Id.* at 60, fig. 3.1.

152. *Id.* at 60.

153. *Id.* at 59; see also JODY LYNEÉ MADEIRA, *KILLING MCVEIGH: THE DEATH PENALTY AND THE MYTH OF CLOSURE* at xxv, 275 (2012) (empirical study of the survivors of Oklahoma City bombing victims). It should also be noted that if there is some psychological benefit from executions, it is dispensed disproportionately to the families of white victims, since 78% of the executions in the modern era have involved white victims (1151 out of 1471). See *Searchable*

such benefits, they would accrue to a minuscule fraction of the more than ten thousand families victimized annually by homicide, since death sentences have never exceeded a number in the three hundreds and executions peaked at ninety-eight in 1999.¹⁵⁴

Even in the days when the rebranded death penalty was in its ascendancy, with ever increasing numbers of annual death sentences in the 1990s, most death-eligible cases still avoided death sentences.¹⁵⁵ The peak in annual death sentences nationwide came in the mid-1990s, with 311 death sentences in 1994, 310 in 1995, and 315 in 1996.¹⁵⁶ The annual totals then began to decline; and since 2011, the number has been in double, rather than triple digits: 2011, 85; 2012, 82; 2013, 83; 2014, 73; 2015, 49; 2016, 31; 2017, 39.¹⁵⁷

The increase in the number of dedicated, specialized capital defense offices at trial and in post-conviction units with in-house mitigation specialists has made death sentences and executions rarer than at any previous time in the post-*Furman* era.¹⁵⁸

The specialized trial level offices in the twenty-first century generally follow the model launched in New York by the CDO with stunning results: only seven death sentences in nearly 900 death eligible cases.¹⁵⁹ Indeed, commentators had predicted that provision of resources on the front end would both reduce the number of death sentences imposed and increase the reliability of trial outcomes:

The single most meaningful reform of the capital punishment system, short of its abolition, would be the provision of effective trial counsel, through a system that provided adequate compensation, expert resources, and the training and support needed to practice in this esoteric field. If that happened . . . there would be far fewer convictions and death sentences, but those few would be much more likely to stick. That is an outcome that would be in the best interests of all concerned. When the government attempts to evade costs at the

Execution Database, *supra* note 29.

154. *Executions by Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions-year> (last visited Aug. 23, 2018).

155. See App. 1, *infra* Part II.

156. TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, NCJ 248448, CAPITAL PUNISHMENT, 2013 – STATISTICAL TABLES 19 tbl. 16 (2014), <https://www.bjs.gov/content/pub/pdf/cp13st.pdf>; *Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-sentences-united-states-1977-present> (last visited Aug. 23, 2018).

157. *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 156.

158. See *infra* note 161 and accompanying text.

159. See *supra* text accompanying notes 101-08; *infra* text accompanying notes 267-76.

front end, they emerge at the back end—not just in the monetary drain of lengthy appeals, but in such injustices as the irreplaceable years that [DNA-exoneree] Earl Washington spent wrongfully imprisoned.¹⁶⁰

Five states illustrate the recent dramatic drop in death sentencing where there has been statewide focus on the use of mitigation specialists either through specialized capital defense offices or training stressing the need for court-appointed attorneys to comply with the *ABA Guidelines* in this area.¹⁶¹

160. Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089, 1106-07 (2001) (footnotes omitted).

161. Professor Brandon L. Garrett reached similar conclusions, based on “read[ing] a collection of the death penalty trials” and research by law student Ankur Desai, which found that “having statewide defense resources and assistance is strongly associated with the decline” in death sentencing. GARRETT, *supra* note 11, at 112, 116-17. Desai found this

robust effect even when controlling for the numbers of homicides in different states, and by using a series of statistical models and regressions, such as controlling for “fixed effects” or other factors which might cause a given state to persist in the same death-sentencing patterns over time. Even when the analysis was simplified, simply determining whether a state had a statewide capital defense office or something less than that showed a strong statistical association between the states that had such offices and those that experienced the greatest death penalty decline.

Id. at 112. Garrett concluded: “In short, it does not take a ‘dream team’ to turn the tide. It just takes a team, working out of a state-supported office, which saves money by using nonlawyers like social workers and mitigation investigators.” *Id.* at 113. The Commentary to the revised *ABA Guidelines* notes that “[n]ational professional groups” have “for decades advocated” organizing “defender services . . . on a statewide basis.” *ABA Revised Guidelines*, *supra* note 2, at 941 & n.75 (citing NAT’L LEGAL AID & DEFENDER ASS’N, NAT’L STUDY COMM’N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES FINAL REPORT 2.4 (1976); Nat’l Conf. of Comm’rs on Unif. State Laws, *Prefatory Note* to UNIFORM LAW COMMISSIONERS’ MODEL PUBLIC DEFENDER ACT 3-4 (1970); PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 151 (1967)); *see also* *ABA Revised Guidelines*, *supra* note 2, at 939 (Guideline 2.1: Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases). The focus on five states in this Part is not meant to ignore the impact of high-quality representation and effective mitigation development in other jurisdictions. In 2017, no death sentences were imposed in Colorado, Indiana, Kansas, Kentucky, Louisiana, New Hampshire, Oregon, South Dakota, Tennessee, Utah, Washington, Wyoming, and the U.S. military courts. *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 156. Seven other states had only one death sentence each (Arkansas, Idaho, Mississippi, Missouri, Nebraska, Ohio, and the federal system). *Death Sentences in 2017*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/2017-sentencing> (last visited Aug. 23, 2018). Indeed, Missouri imposed its first new death sentence since 2013, and that was the result of a judge overriding a jury’s eleven to one recommendation of a life sentence. MISSOURIANS FOR ALTERNATIVES TO THE DEATH PENALTY, MISSOURI’S DEATH PENALTY IN 2017: THE YEAR IN REVIEW 3 (2017) (“On October 6, St. Charles County Judge Kelly Wayne Parker imposed a death sentence on Marvin Rice despite the fact that the jury deadlocked, with 11 out of 12 jurors voting for life without the possibility of parole.”).

A. North Carolina

According to statistics maintained by the North Carolina Office of Indigent Defense Services (NCIDS), from 2007 to 2015, nearly 60 [percent] of capital prosecutions ended with non-capital convictions for second-degree murder or less, and only 2.2 percent of all capital cases in the state resulted in death sentences. . . . With representation by the regional capital defenders, there have been only 5 death sentences in the state over the past five years, down from 140 death sentences imposed 20 years ago in the five years spanning 1992-1996.¹⁶²

“In 2015, North Carolina had no death sentences and only four capital trials. In 2016, North Carolina had just one death sentence.”¹⁶³ In 2017, North Carolina sentenced no one to death.¹⁶⁴

B. South Carolina

A study by Professor John H. Blume and South Carolina attorney Lindsey S. Vann reported that South Carolina had been about average in its death-sentencing rate historically in the modern era, but there had been only two death sentences in the preceding five years.¹⁶⁵ The authors attributed the recent decrease in death sentences, “at least in part, to the creation of the Capital Trial Division of the South Carolina Commission on Indigent Defense” in 2008.¹⁶⁶ They note that early involvement by “the [Capital Trial] Division or other lawyers trained by the Division . . . allow[s] the [defense] . . . to conduct factual and mitigation investigation early on for use in [plea] negotiations,”

162. *North Carolina Decline in Death Verdicts Highlights Penalty's Cost, Ineffectiveness*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/node/6881?utm_source=WeeklyUpdate (last visited Aug. 23, 2018) (citing Max Seng, “It’s Not a Game”: District Attorney, Capital Defender Dive into Importance of Negotiations, *Death Penalty Ineffectiveness*, HICKORY REC. (Sept. 24, 2017), http://www.hickoryrecord.com/news/it-s-not-a-game-district-attorney-capital-defender-dive/article_62b2c61e-a9fb-509e-a063-94d373b0616e.html). In 1993 alone, there were thirty-two death sentences imposed; there were none in 2017. See *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 156.

163. GARRETT, *supra* note 11, at 84.

164. See *Death Sentences in 2017*, *supra* note 161.

165. John H. Blume & Lindsey S. Vann, *Forty Years of Death: The Past, Present, and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years)*, 11 DUKE J. CONST. L. & PUB. POL’Y 183, 215-16 (2016).

166. *Id.*; see also JUSTICE 360 ANNUAL REPORT 6 (2016), <https://justice360sc.org/wp-content/uploads/2017/01/2016-Annual-Report.pdf> (indicating no death sentences in 2011, 2012, or 2013; two in 2014, and none in 2015 or 2016).

and many cases have therefore avoided trial.¹⁶⁷ In 2017, South Carolina sentenced no one to death.¹⁶⁸

C. Virginia

Professor Brandon L. Garrett, writing about the state of Virginia in 2015, found that there “are now only two or fewer trials per year” in which the sentencer could “consider . . . the death penalty,” and that there had been no death sentences at all since 2011.¹⁶⁹ He compared every capital trial since 2005 (twenty-one trials) with twenty trials from 1996 to 2004, when Regional Capital Defender offices were created.¹⁷⁰ According to Garrett, although there had been no changes in the law that would make death sentences harder to obtain:

[F]rom 1996 to 2004 . . . [t]he crucial sentencing phase, at which the judge or jury decided whether to impose the death penalty, was typically cursory, averaging less than *two days* long.

In the more recent trials, the average was twice that—*four days*. The defense called the bulk of the witnesses during the sentencing proceedings and cases handled by the Virginia RCD offices were still more complex. The defense’s use of experts regarding mitigating evidence such as the defendant’s mental health has markedly advanced.¹⁷¹

In 2017, Virginia again sentenced no one to death.¹⁷²

167. Blume & Vann, *supra* note 165, at 217; *see also* Russell Stetler, *Commentary on Counsel’s Duty to Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1)*, 31 HOFSTRA L. REV. 1157, 1158, 1160-61 (2003); Kevin McNally, *Death Is Different: Your Approach to a Capital Case Must Be Different, Too*, THE CHAMPION, Mar. 1984, at 8, 15 (noting that capital cases are different “because avoiding execution is, in many cases, the best and only realistic result possible,” so instead of being “offered” a plea deal, “pleas in capital cases must be pursued and won”), *cited in* ABA Revised Guidelines, *supra* note 2, at 1040 n.242 (Commentary to Guideline 10.9.1).

168. *See* *Death Sentences in 2017*, *supra* note 161.

169. Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO. L.J. 661, 664 (2016).

170. *Id.* at 664-66.

171. *Id.* at 667; *see* GARRETT, *supra* note 11, at 79-80 & fig. 4.1. When interviewed about his book, Professor Garrett noted that “a defense lawyering effect” had “played an important role in this death penalty decline” in Virginia and elsewhere: “The states that created offices for defense lawyers experienced significantly more pronounced declines in their death sentences.” Maurice Chammah, *What’s Behind the Decline in the Death Penalty? A New Book Explores the Slow Demise of the Ultimate Punishment*, MARSHALL PROJECT (Oct. 2, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/10/02/what-s-behind-the-decline-in-the-death-penalty>. He also stressed the value of mitigation investigators in providing jurors with a reason not to sentence a murderer to death. *Id.*

172. *See* *Death Sentences in 2017*, *supra* note 161. This recent history in Virginia is

D. Georgia

Georgia imposed double-digit death sentences in some years in the 1980s and 1990s, prior to the creation of a statewide CDO in 2005.¹⁷³ According to its website, “[t]he Georgia Capital Defender is a division of the Georgia Public Defender Council and is charged with providing defense to all indigent defendants facing the death penalty.”¹⁷⁴ Its six regional offices “handle capital cases for their geographic region and capital conflict representation for nearby regions.”¹⁷⁵ Each office is staffed with one or more teams “specially trained for the complexities of capital litigation,” and including “two death penalty qualified lawyers, a trained mitigation specialist, and a fact investigator.”¹⁷⁶ The office suffered severe budget cuts two years after it opened, prompting its initial director to step down.¹⁷⁷ Nonetheless, the office has continued to function statewide, and only four death sentences have been imposed in Georgia since 2010.¹⁷⁸ “Georgia had no

particularly remarkable because of the previous highly anomalous pattern of capital outcomes in the state. A national study by Professor James S. Liebman, Jeffrey Fagan, Valerie West, and Jonathan Lloyd, for the period 1973-1995, identified Virginia’s high execution rate as “nearly *double* that of the next nearest state and *five times* the national average, and its low rate of capital reversals [as] . . . nearly *half* that of the next nearest state and less than *one-fourth* the national average.” Liebman et al., *Capital Attrition: Error Rates of Capital Cases*, 78 TEX. L. REV. 1839, 1857 fig. 2, 1858 (2000) (emphasis added). Thus, if a prisoner were sentenced to death during the study period, the likelihood of his execution in Virginia was dramatically higher than anywhere else. See *id.*; see also Freedman, *supra* note 160, at 1097 n.63.

173. See GARRETT, *supra* note 11, at 129 (noting that Georgia “creat[ed] a statewide public defender system in 2003” and a Capital Defender Office in 2005). Georgia imposed eleven death sentences in 1986, fifteen in 1987, thirteen in 1997, and eleven in 1998. *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 156.

174. See *Office of the Capital Defender*, GA. PUB. DEFENDER COUNCIL, <http://www.gapubdef.org/index.php/divisions/office-of-the-capital-defender> (last visited Aug. 23, 2018).

175. *Id.*

176. *Id.*

177. GARRETT, *supra* note 11, at 129 (noting budget cuts in whole indigent defense system in 2008); *Georgia’s Death Penalty System in Crisis Over Funding*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/2175> (last visited Aug. 23, 2018) (“Just two years after the creation of the Georgia Office of the Capital Defender, which successfully defended 30 death penalty cases in 2006 without a single client being sentenced to death, state budget cuts have left the attorneys with less than half the resources needed to carry out their current case load. . . . Christopher Adams recently stepped down as director of the Office of the Capital Defender because he said Georgia made it nearly impossible for the office to function.”). The Capital Defender Office “asked for \$10.5 million and received \$4.5 million, down from \$7 million in 2005.” GARRETT, *supra* note 11, at 129.

178. Two death sentences were imposed in 2012, and one each in 2011 and 2014. *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 156. There were no death sentences in 2010, 2013, 2015, 2016, and 2017. *Id.*

death sentences in 2015 or 2016.”¹⁷⁹ In 2017, Georgia again sentenced no one to death.¹⁸⁰

E. Pennsylvania

The increased use of mitigation specialists throughout Pennsylvania (as emphasized at annual “bring-your-own-case” training programs) has contributed to a dramatic decrease in statewide death sentences, mirroring trends in the states with specialized offices.¹⁸¹ According to Marc Bookman, co-director of the nonprofit Atlantic Center for Capital Representation (and a former Philadelphia public defender in the capital homicide unit):

Death sentences have dropped precipitously since the 1990s, when the state averaged well more than 10 per year. Over the past five years, that average has dropped to three – meaning that fewer than half of one percent of murders now end in the ultimate punishment. In 2016 there was a single death sentence in the state.¹⁸²

Bookman has noted elsewhere that “Philadelphia, a city that not long ago ranked third in the country for inmates on death row, has produced only four death sentences in the last 10 years.”¹⁸³ On November 7, 2017, Philadelphia voters elected a district attorney, civil rights attorney Larry Krasner, who vowed never to seek the death penalty.¹⁸⁴ In 2017, there were two death sentences in Pennsylvania, in Lancaster and Pike counties.¹⁸⁵

179. GARRETT, *supra* note 11, at 81, 213.

180. *See Death Sentences in 2017*, *supra* note 161.

181. The annual “bring-your-own-case” training programs have been held since 2010 at a conference center just outside Philadelphia. Details of each training are on file with the author, who has served on the faculty at each program.

182. Marc Bookman, *Commentary: Next DA Must End Capital Punishment in Philly*, PHILA. INQUIRER (Feb. 23, 2017, 3:01 AM), http://www.philly.com/philly/opinion/20170223_Commentary__Next_DA_must_end_capital_punishment_in_Philly.html. Pennsylvania imposed twenty-one death sentences in 1994 and twenty in 1995. *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 156.

183. Marc Bookman, *The Last Death-Penalty Case in Philadelphia Before a New DA*, PHILA. INQUIRER (Sept. 27, 2017, 3:01 AM), <http://www.philly.com/philly/opinion/the-last-death-penalty-case-in-philadelphia-before-a-new-da-opinion-20170929.html>.

184. Chris Brennan & Aubrey Whelan, *Larry Krasner Wins Race for Philly DA*, PHILA. INQUIRER (Nov. 7, 2017, 10:37 PM), <http://www.philly.com/philly/columnists/clout/larry-krasner-wins-race-for-philly-da-20171107.html>.

185. *Death Sentences in 2017*, *supra* note 161.

VI. FEWER CAPITAL CASES,
MORE JOBS, CONTINUING CHALLENGES

A. Decline in Number of Capital Prosecutions
Nationwide in New Millennium

More robust capital defense, including mitigation staffing, has contributed to the declining number of capital prosecutions in the new millennium, but multiple additional influences have been at work. These factors include:

- *Declining murder rates.* Figure 1 shows the trend from 1970 to 2016.¹⁸⁶

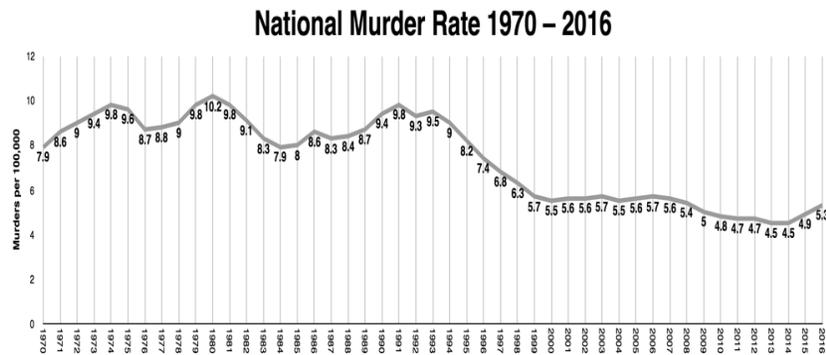


Figure 1: National murder rates, 1970-2016. Source: Death Penalty Information Center.¹⁸⁷

- *The availability of life without parole* as the statutory alternative to capital punishment in every death penalty jurisdiction.¹⁸⁸
- *Wrongful convictions and exonerations.* According to the Innocence Project, there have been over 350 DNA exonerations.¹⁸⁹ According to the Death

186. See *infra* fig. 1.

187. *Murder Rates Nationally and by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/murder-rates-nationally-and-state> (last visited Aug. 23, 2018).

188. See GARRETT, *supra* note 11, at 167-71 (describing life without parole option as an explanation for the decline in the death penalty). Every state except Alaska has adopted life without parole as a sentencing option. See *Year That States Adopted Life Without Parole (LWOP) Sentencing*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/year-states-adopted-life-without-parole-lwop-sentencing> (last visited Aug. 23, 2018). Life without parole is also available in the District of Columbia and under federal and military sentencing schemes. *Id.*

189. INNOCENCE PROJECT, <https://www.innocenceproject.org> (last visited Aug. 23, 2018). In addition, wrongful convictions disproportionately affect African Americans. See SAMUEL R. GROSS ET AL., NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED

Penalty Information Center, there have been 161 death row exonerations from 1973 through December 21, 2017.¹⁹⁰

- *Long delays* between sentence and execution. Figure 2 shows how this interval has increased from 1984 to 2012.¹⁹¹



Figure 2: Time between sentencing and execution. Source: Death Penalty Information Center.¹⁹²

- *Cost.* Numerous studies show that the cost of the death penalty (both in terms of litigation from arrest through post-conviction and incarceration, now that the interval between sentence and execution, if it occurs at all, is on average a decade and a half) far exceeds the cost of life imprisonment.¹⁹³

STATES at ii, 1 (Samuel R. Gross ed., 2017) (explaining that African Americans constitute “13% of the American population” but “47% of the 1,900 exonerations listed in the National Registry of Exonerations (as of October 2016), and the great majority of more than 1,800 additional innocent defendants who were framed and convicted of crimes in 15 large-scale police scandals and later cleared in ‘group exonerations’”). The report focuses on cases of murder, sexual assault, and drug crimes. *See generally id.*

190. *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Aug. 23, 2018). Inclusion on the DPIC innocence list requires acquittal of all charges placing the prisoners on death row, dismissal of such charges by prosecutors or courts, or granting of pardons based on evidence of innocence. *Id.*

191. *See infra* fig. 2.

192. *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/time-death-row> (last visited Aug. 23, 2018). In his widely publicized dissent in *Glossip v. Gross*, inviting briefing on the constitutionality of the death penalty, Justice Stephen Breyer referred to “unconscionably long delays that undermine the death penalty’s penological purpose.” *Glossip v. Gross*, 135 S. Ct. 2726, 2755-56 (2015) (Breyer, J., dissenting).

193. A compilation of state and federal studies (as well as news reports on this issue over the past two decades) can be found at *Costs of the Death Penalty*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/costs-death-penalty> (last visited Aug. 23, 2018). For a concise summary, see GARRETT, *supra* note 11, at 155-59. As Professor Eric M. Freedman has noted, in promulgating the revised *Guidelines* in 2003, the ABA specifically recognized that cost might prompt some states

- *Public opinion* (and related juror attitudes). Figure 3 shows what Gallup polls have found about Americans' support for the death penalty over an eighty-year period.¹⁹⁴

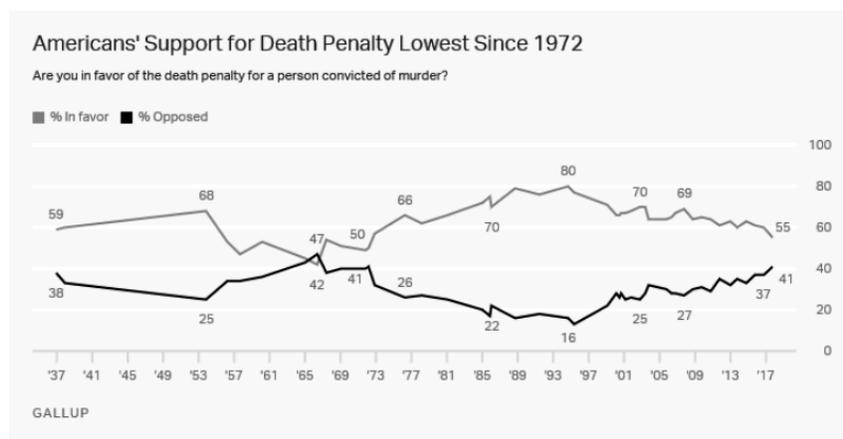


Figure 3: Support for the death penalty in the United States is at a 45-year low. Source: Death Penalty Information Center, Gallup.¹⁹⁵

- *Geography*. Recent studies have shown that two percent of more than 3000 counties in the United States are responsible for the majority of executions and death sentences.¹⁹⁶ Figure 4 shows the diminishing number of jurisdictions imposing new death sentences over the past five years.¹⁹⁷ Figure 5

to forego the death penalty. See Eric M. Freedman, *Add Resources and Supply Them Systemically: Governments' Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1097-99, 1102 n.14 (2003).

194. See *infra* fig. 3.

195. Gallup Poll: Support for Death Penalty in U.S. Falls to a 45-Year Low, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/Gallup-Support_for_Death_Penalty_Falls_in_2017 (last visited Aug. 23, 2018) (citing Jeffrey M. Jones, *U.S. Death Penalty Support Lowest Since 1972*, Gallup (Oct. 26, 2017), <http://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx>).

196. See RICHARD C. DIETER, *THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL* 6 (2013), <https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf>; see also Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 233 (2012) (“Twenty-nine counties – fewer than 1% of counties in the country – rendered death sentences at a rate of one or more new sentences per year.” (footnote omitted)).

197. See *infra* fig. 4.

shows the counties that imposed new death sentences in 2017.¹⁹⁸

- *Changing prosecutorial regimes.* In the November 2016 election that brought Donald Trump to the White House, voters also elected new prosecutors with less enthusiasm for the death penalty than their predecessors. In Colorado, newly elected Denver district attorney Beth McCann pledged that her administration will never seek the death penalty.¹⁹⁹ In Alabama, home state of Attorney General Jefferson Sessions and where voters were almost two to one in favor of Donald Trump, two prosecutors “personally opposed” to the death penalty were elected in populous Jefferson County, which has the most prisoners on the state’s death row.²⁰⁰ In Florida, Hillsborough County voters replaced an incumbent who had obtained five death sentences since 2010 with a new State Attorney who said the use of the death penalty should be “fair[] and consistent[] and rare[].”²⁰¹ In Houston, long the buckle of the Texas death belt, voters elected Kim Ogg as Harris County prosecutor; Ogg had pledged “very few death penalty prosecutions” because the death penalty had created a “terrible image for our city.”²⁰² She subsequently offered a plea deal to Duane Buck, whose case had been overturned by the United States Supreme Court because an expert had testified that being black made Buck more dangerous.²⁰³ And as noted

198. See *infra* fig. 5.

199. Kyle Clark, *New DA McCann Says Denver is Done with the Death Penalty*, 9NEWS (Jan. 10, 2017, 10:05 PM), <http://www.9news.com/news/local/next/new-da-mccann-says-denver-is-done-with-the-death-penalty/384633301>.

200. See Kent Faulk, *New Jefferson County Prosecutors ‘Personally Opposed’ to the Death Penalty*, AL.COM (Nov. 15, 2016, 7:46 AM), http://www.al.com/news/birmingham/index.ssf/2016/11/new_jefferson_county_prosecutors_”personally_opposed”_to_Death_penalty.

201. Dan Sullivan, *Andrew Warren Threads the Needle in Death Penalty Debate*, TAMPA BAY TIMES (Oct. 2, 2017), <http://www.tampabay.com/news/courts/andrew-warren-threads-the-needle-in-death-penalty-debate/2339202>.

202. *Death Sentences Decline, Even Within Texas’s ‘Execution Belt’*, NEWSWEEK (Nov. 4, 2016, 6:14 PM), <http://www.newsweek.com/death-sentences-decline-texas-execution-belt-517675>.

203. See *Buck v. Davis*, 137 S. Ct. 759, 777 (2017); Matt Ford, ‘Some Toxins Can Be Deadly Even in Small Doses’, THE ATLANTIC (Feb. 22, 2017), <https://www.theatlantic.com/politics/archive/2017/02/supreme-court-duane-buck/517542>; see also Brian Rogers, *Condemned Inmate Duane Buck Escapes Death Penalty*, HOUS. CHRON. (Oct. 3, 2017, 9:33 PM), <http://www.chron.com/news/houston-texas/article/New-charges-filed-for-death-row-inmate-Duane-Buck-12249540.php> (noting that Buck’s case was the third Harris County death penalty case

previously, in November 2017 (a year after the presidential election), voters in Philadelphia overwhelmingly elected Larry Krasner, who had promised to end capital prosecutions as district attorney.²⁰⁴

Of course, one result of the declining number of capital prosecutions is a reduction in the number of pretrial cases where mitigation specialists are needed. Ironically, they are at least partially victims of their own success.

resolved with a plea bargain under Ogg after a successful appeal). Ogg subsequently asked the Court of Criminal Appeals to sentence Bobby Moore to a life sentence after the U.S. Supreme Court found him intellectually disabled. *See Moore v. Texas* 137 S. Ct. 1039, 1046, 1053 (2017); Keri Blakinger, *Prosecutors Ask for Life Sentence for Texas Death Row Inmate Bobby Moore*, LMTONLINE (Nov. 1, 2017, 7:46 PM) <http://www.lmtonline.com/news/houston-texas/article/Prosecutors-ask-judge-to-resentence-death-row-12324475.php>.

204. Krasner was elected by a three to one margin. *See Brennan & Whelan, supra* note 184.

Years	State Jurisdictions		Federal Jurisdictions		Total	% Decrease Since 2013
	Counties	States	Federal Government	U.S. Military		
2013	56	15	1	1	58	
2014	56	20	1	0	57	1.7%
2015	35	14	1	0	36	37.9%
2016	28	13	0	0	28	51.7%
2017	29	14	1	0	30	48.3%

Figure 4: Jurisdictions imposing new death sentences, 2013-2017. Source: Death Penalty Information Center.²⁰⁵

JUST 3 COUNTIES ACCOUNTED FOR 31% OF THE 39 DEATH SENTENCES IN THE U.S. IN 2017

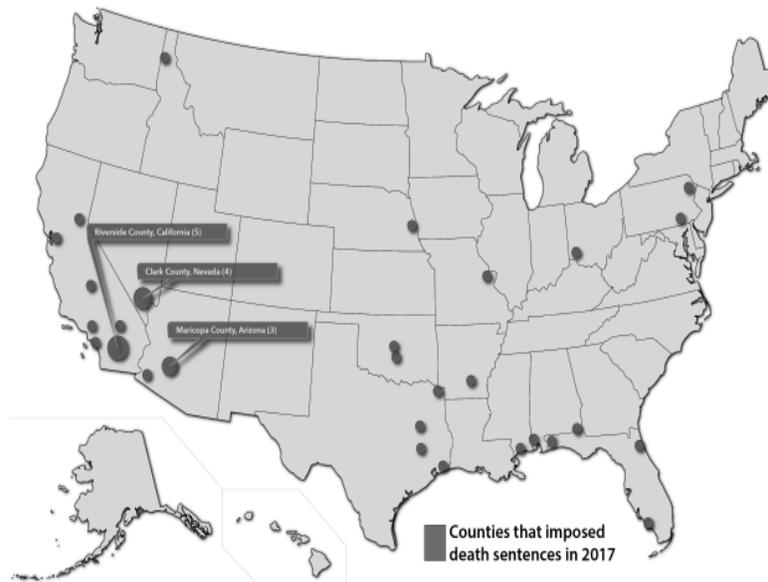


Figure 5: Counties imposing new death sentences in 2017. Source: Death Penalty Information Center.²⁰⁶

205. *The Death Penalty in 2017: Year End Report*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/yearend2017> (last visited Aug. 23, 2018).

206. *The Death Penalty in 2017: Year End Report*, *supra* note 205.

B. More Institutional Jobs

The variety of fulltime, salaried jobs for mitigation specialists is greater than ever before. There are capital defender offices and units in multiple states, including Georgia, Mississippi, Missouri, North Carolina, South Carolina, and Virginia.²⁰⁷ In Texas, multiple rural counties have funded a capital defense office based on the concept of “murder insurance.”²⁰⁸ Large counties in other states have specialized units in their public defender offices with in-house mitigation specialists, including Maricopa County in Arizona (one main office and two more for conflict cases, all with in-house mitigation staff),²⁰⁹ Dade County in Florida,²¹⁰ Clark County in Nevada,²¹¹ and Philadelphia in Pennsylvania.²¹² There are capital habeas units in federal defender organizations with in-house mitigation capacity in over twenty federal districts covering some fifteen states: Alabama (Middle), Arizona, Arkansas (Eastern), California (Central and Eastern), Delaware, Florida (Northern and Middle), Georgia (Northern), Idaho, Missouri (Western), Nevada, Ohio (Northern and Southern), Oklahoma

207. See *supra* text accompanying notes 160-80 (discussing Georgia, North Carolina, South Carolina, and Virginia). The Office of Capital Defense Counsel in Jackson, Mississippi, was established by the Capital Litigation Act of 2000. OFF. OF ST. PUB. DEFENDER, CAP. DEF. DIVISION, <http://www.ospd.ms.gov/CapDef.htm> (last visited Aug. 23, 2018). It became a division of the Mississippi State Public Defender, effective July 1, 2011. *Id.* The website identifies staff mitigation specialists. *Lela Hubbard*, OFF. OF ST. PUB. DEFENDER, CAP. DEF. DIVISION, <http://www.ospd.ms.gov/CapStaff/Lela.htm> (last visited Aug. 23, 2018); *Monica Lee*, OFF. OF ST. PUB. DEFENDER, CAP. DEF. DIVISION, <http://www.ospd.ms.gov/CapStaff/MonicaLee.htm> (last visited Aug. 23, 2018). The Capital Division of the Missouri State Public Defender was established in 1989. *Capital Litigation*, MO. ST. PUB. DEFENDER, <http://www.publicdefender.mo.gov/legal/capital.division.htm> (last visited Aug. 23, 2018). Its defense teams include in-house mitigation specialists. *Id.*

208. GARRETT, *supra* note 11, at 132-36. “A regional office . . . was funded by counties paying annual ‘premiums’ based on population and average capital murder filings.” *Id.* at 134-35. The office began in 2008 in west Texas but soon expanded to include 158 of Texas’s 240 counties. *Id.* at 135-36. Through mid-2013, only one in twenty-six cases tried by the office resulted in a death sentence. *Id.* at 136.

209. E-mail from Natman Schaye, Senior Attorney, Ariz. Capital Representation Project, to Russell Stetler (Nov. 6, 2017, 1:31 PM) (on file with author).

210. E-mail from Stephen Harper, Visiting Clinical Professor of Law, Fla. Int’l Univ. Coll. of Law, to Russell Stetler (Nov. 7, 2017, 2:40 PM) (on file with author). Harper was a public defender in Miami-Dade for twenty-nine years, including seventeen as Co-coordinator of the Capital Litigation Unit. *FIU Law Faculty Directory: Stephen K. Harper*, FIU LAW, <https://law.fiu.edu/faculty/directory/stephen-k-harper> (last visited Aug. 23, 2018).

211. *Mitigation Specialist*, CLARK CTY. NEV., <http://agency.governmentjobs.com/clarkcounty/default.cfm?action=specbulletin&ClassSpecID=66871&headerfooter=0> (last updated Aug. 11, 2007).

212. E-mail from Frederick Goodman, Attorney, the Phila. Def. Ass’n Capital Homicide Unit, to Russell Stetler (Nov. 6, 2017, 4:59 PM) (on file with author).

(Western), Pennsylvania (Eastern, Middle, and Western), Tennessee (Eastern and Middle), and Texas (Northern and Western).²¹³ There are both capital and noncapital (post-*Booker*) mitigation specialists on staff in other federal defender organizations, including California (Southern), Illinois, Indiana, and Maryland.²¹⁴ Some creative public defender offices in noncapital jurisdictions have comparable staff positions, including the Public Defender Service of the District of Columbia, the Neighborhood Defender Service of Harlem, Bronx Defenders, and the San Francisco Public Defender's Office.²¹⁵ The nonprofit

213. See AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 194 (rev. 2017) (Section 9.2.3: Capital Habeas Units ("CHUs")) (listing the CHUs budgeted for Fiscal Year 2018 and noting that a CHU has been authorized for the Southern District of Indiana, with funding beginning in Fiscal Year 2019). The CHUs thus exist in roughly twenty-five percent of the eighty-one federal defender offices. *Id.* The author has personal knowledge of these units and their staffing as an invited attendee at their annual supervisors' roundtable (last held in Washington, D.C., Sept. 12, 2017).

214. The author's personal communications with the heads of these offices has confirmed this staffing. A decade after *Booker*, the federal defender organizations developed new job descriptions in a "Mitigation Professional Series." Since 2016, the Defender Organization Classification System ("DOCS") manual has included job descriptions for both non-capital and capital mitigation specialists. See E-mail from Lisa Freeland, Chair, Death Penalty Working Grp., to Russell Stetler (May 24, 2016, 1:03 PM) (on file with author).

215. In their innovative use of nonlawyers, the Neighborhood Defender Service of Harlem (founded in 1990) and Bronx Defenders (founded in 1997) have long employed a holistic approach to defense representation—and all in the context of noncapital cases. *Our Vision and Mission*, NEIGHBORHOOD DEFENDER SERV. OF HARLEM, <http://www.ndsny.org/index/php/about-us/our-vision-and-mission> (last visited Aug. 23, 2018) ("NDS clients are represented by a team that includes criminal and civil attorneys, social workers, investigators, paralegals, law school and social work interns, and pro bono attorneys. . . . A core aspect of our holistic approach to public defense is a commitment to search for the underlying issues that bring our clients into contact with the criminal justice system, and providing comprehensive social service support to avoid or minimize future problems."); *Our Mission and Story*, THE BRONX DEFENDERS, <http://www.bronxdefenders.org/who-we-are> (last visited Aug. 23, 2018) (describing the Bronx Defenders' team as "comprised of criminal defense attorneys, family attorneys, social workers, housing attorneys, employment attorneys, immigration attorneys, benefits specialists, investigators, community organizers, team administrators, civil legal advocates, and parent advocates"). The Bronx Defenders defines its holistic approach as a combination of "aggressive legal advocacy with a broader recognition that for most poor people arrested and charged with a crime, the criminal case is not the only issue with which they struggle." *Holistic Defense, Defined*, THE BRONX DEFENDERS, <http://www.bronxdefenders.org/holistic-defense> (last visited Aug. 23, 2018).

Really top-notch defenders like the Bronx Defenders have pioneered a "holistic" model, using a team approach much like in death penalty cases. They do not just defend accused criminals but also help them with social services such as welfare and counseling. They try to help their clients get their lives on track and they negotiate the complex collateral consequences of convictions that can make it so hard to work, obtain housing, and maintain a family.

GARRETT, *supra* note 11, at 241. On the West Coast, the San Francisco Public Defender's Office similarly employs social workers as part of its own holistic approach. See S.F. PUB. DEFENDER, <http://sfpublicdefender.org/careers> (last visited Aug. 23, 2018). Although California remains a death

organizations that have arisen to litigate “Second Chances” for prisoners sentenced to Life Without Parole (“LWOP”) as juveniles also have mitigation staff, such as the Youth Sentencing and Reentry Project in Pennsylvania (which has the highest number of LWOP prisoners sentenced as juveniles—five hundred out of two thousand nationwide).²¹⁶

C. Continuing Need for Private Mitigation Specialists in Court-Appointed and Pro Bono Cases; Continuing Challenge to Ensure Adequate Time and Funding for Private, Independent Mitigation Specialists

There is no question that the overall number of mitigation specialists has increased significantly, but the absorption of large numbers of them into the institutional offices has left a scarcity of private practitioners.²¹⁷ These private mitigation specialists are still vitally needed for all the jurisdictions that lack dedicated capital defense offices at the trial level or capital post-conviction offices at the state or federal level. Private court-appointed counsel and pro bono counsel recruited to represent death-sentenced prisoners have an acute need for multidisciplinary assistance in investigating the lives of their clients. Federal death penalty prosecutions in jurisdictions that have no state capital statute (e.g., Alaska, Michigan, New York, or Puerto Rico) or where nearly all cases are handled by institutional defenders (e.g., Georgia or Virginia) invariably drain the pool of private mitigation specialists from elsewhere in the country.²¹⁸ Of over a thousand prisoners challenging the constitutionality of their death sentences in the federal courts, hundreds remain reliant on private and pro bono counsel who in turn need private mitigation specialists.²¹⁹

penalty jurisdiction, it is more than a quarter of a century since San Francisco elected a district attorney who pursued capital punishment.

216. See Cook et al., *supra* note 3, at 44-45.

217. See *supra* text accompanying note 121.

218. See *Puerto Rico and the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/881> (last visited Aug. 23, 2018); *States with and without the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Aug. 23, 2018); *supra* text accompanying note 169-71; *supra* note 173.

219. As noted *supra*, text accompanying note 213, there are capital habeas units in fourteen of the thirty-one states that retain the death penalty, plus Delaware, which has had no death penalty since its state supreme court found constitutional infirmities in its statute in *Rauf v. State*, 145 A.3d 430, 433-34 (Del. 2016). The capital habeas units do not handle every case in their states. Private court-appointed counsel handle most of the remaining cases, as well as those arising in the

One unintended consequence of the dramatic growth in in-house mitigation capacity throughout the institutional offices (both trial and post-conviction) is an appreciation of how many hours mitigation specialists typically need to spend in order to ensure that the client is effectively represented. The most recent scholarly estimate of the time required for thorough mitigation investigation is from Professor Robert J. Smith, who noted that it often takes “*thousands of hours*” to complete the extraordinarily difficult and time-consuming task.²²⁰

The struggle for adequate funding for mitigation professionals has always had two elements: an appropriate hourly rate²²¹ and the number of hours reasonably necessary to conduct the thorough mitigation investigation required for high-quality representation.²²² It is beyond the scope of this Article to discuss these issues in detail, but it is critical for counsel to advocate forcefully for fair compensation and the necessary time for thorough investigation. A particularly problematic aspect of this issue is race and gender bias. Some courts have no problem providing compensation to white male lawyers, regardless of their effectiveness, but when auditing mitigation vouchers, some courts question both the qualifications and professional judgment of mitigation specialists, the majority of whom are women,²²³ in their performance of work

seventeen states without capital habeas units. Private counsel must hire mitigation specialists who are in private practice.

220. Robert J. Smith, *Forgetting Furman*, 100 IOWA L. REV. 1149, 1173 n.130 (2015) (emphasis added).

221. Both the 2003 ABA Guideline 9.1(C) and Supplementary Guideline 9.1 state explicitly: “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 by those who assist counsel with the litigation of death penalty cases.” *ABA Revised Guidelines*, *supra* note 2, at 981; *Supplementary Guidelines*, *supra* note 14, at 686. The Commentary to the ABA Guideline notes: “For better or worse, a system for the provision of defense services in capital cases will get what it pays for.” *ABA Revised Guidelines*, *supra* note 2, at 988 (footnote omitted).

222. *See ABA Revised Guidelines*, *supra* note 2, at 1000 (Guideline 10.4(D) provides that “[c]ounsel at all stages should demand on behalf of the client all resources necessary to provide high quality legal representation.”); *supra* note 114 (explaining that substantial time is required to conduct a thorough mitigation investigation).

223. *See* NLADA MITIGATION DIRECTORY, *supra* note 100, in which about two-thirds of the listed specialists were women. Professor Joan W. Howarth also offered fascinating insight into the mitigation capacity of women in her study of the role of gender in capital juries. *See generally* Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Juries*, 6 WIS. L. REV. 1345 (1994). She stressed the need for personalized responsibility and individualized, contextualized decision-making in sentencing determinations. *Id.* at 1361. Professor Howarth contrasted the jury’s fact-finding role in guilt trials, based on the traditional ethic of justice, with its

that is in strict compliance with the aforementioned *Supplementary Guidelines for the Mitigation Function*.²²⁴ Figure 6 captures a systemic snapshot of the generic problem, where a public defense system was appropriately increasing its annual compensation for lawyers while infinitesimal sums were allocated for all the investigative and expert services rendered by nonlawyers.²²⁵ When the mitigation specialist is both female and a person of color, there are sometimes co-occurring biases to be overcome when the majority of the bench, both state and federal, is white and male. “A recent report on racial and gender diversity from the American Constitution Society found that white men comprise fifty-eight percent of state court judges, even though they make up less than one-third of the population.”²²⁶ A report prepared for members of Congress found that as of June 1, 2017, 49.3% of active U.S. district court judges were white men, 21.9% white women, 8.1% African American men, and 6.1% African American women.²²⁷

moral role in penalty trials, based on an ethic of caring, compassion, and mercy. *Id.* at 1355-56, 1379-81. She found a hidden battleground of gender in capital juries—pitting “rational” versus “irrational,” “active” versus “passive,” “thought” versus “feeling,” “objective” versus “subjective,” “abstract” versus “contextualized,” “distance” versus “connection,” “rule” versus “context,” “anger” versus “pity”. *Id.* at 1348, 1403-04 (footnote omitted) (citation omitted).

224. See *supra* text accompanying notes 140-41. See generally *Supplementary Guidelines*, *supra* note 14.

225. See *infra* fig. 6.

226. Michele L. Jawando & Allie Anderson, *Racial and Gender Diversity Sorely Lacking in America’s Courts*, CTR. FOR AM. PROGRESS (Sept. 15, 2016, 9:00 AM), <https://www.americanprogress.org/issues/courts/news/2016/09/15/144287/racial-and-gender-diversity-sorely-lacking-in-americas-courts>.

227. BARRY J. McMILLION, CONG. RESEARCH SERV., R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS 19-20 (2017); see also Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789–2016*, 26 BERKELEY LA RAZA L.J. 92, 110 chart 1 (2016) (reviewing judicial appointments from President John F. Kennedy through Barack Obama and finding seventy percent were white males, thirteen percent white females, seven percent African American males, and three percent African American females).

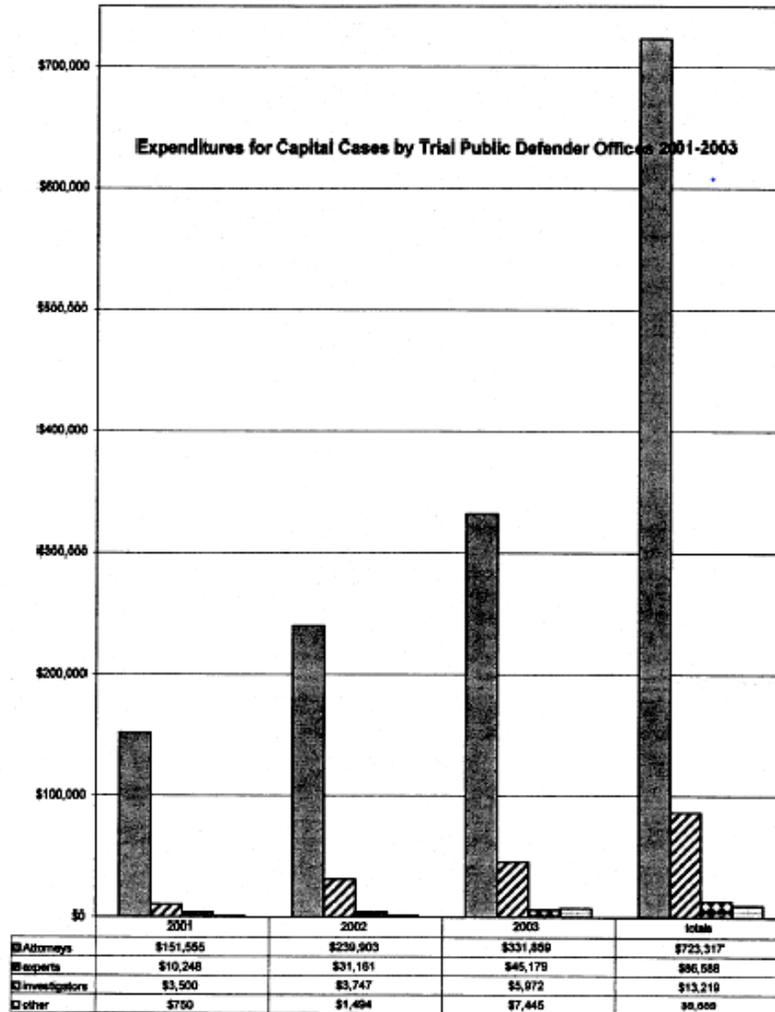


Figure 6: Capital case expenditures for attorneys, experts, investigators, and other services in Arkansas 2001-2004. Source: Arkansas Public Defender Commission.²²⁸

228. Chart provided to author by the executive director of that commission in the early 2000s and maintained on file with author.

VII. CONCLUSIONS [2018 AND BEYOND]

A. Prisoners being Executed Today Would Not Receive Death Sentences if Tried Today

One of the bitter ironies about today's executions is that few, if any, of the relatively small number of prisoners who are executed would be sentenced to death if tried today in the same jurisdiction. Georgia executed nine prisoners in 2016, but sentenced no one to death.²²⁹ Texas has executed over one hundred prisoners from Harris County, but the death penalty is rarely imposed in Houston today—and voters elected a prosecutor who has pledged to seek death rarely.²³⁰ More cases are resolved by negotiated dispositions today than ever before. A recent study²³¹ surveyed the social histories of one hundred recently executed prisoners to see “[h]ow many offenders possessed mitigating characteristics that demonstrate intellectual or psychological deficits comparable to those shared by classes of offenders categorically excluded from capital punishment” under *Atkins v. Virginia*²³² or *Roper v. Simmons*.²³³ Based on state and federal court records, the authors documented the presence of significant mitigation evidence for eighty-seven percent of the executed prisoners.²³⁴ They concluded that their findings “suggest the failure of the Supreme Court’s mitigation project to ensure the only offenders subjected to a death sentence are those with ‘a consciousness materially more depraved’ than that of the typical murderer.”²³⁵ Of course, the ability of these authors to find the mitigation evidence in state and federal court records demonstrates that it was discovered in state and federal post-conviction proceedings, even if procedural bars prevented the federal courts in particular from giving it full and fair consideration. Another way of looking at this study is that it illustrates the variety of

229. *Searchable Execution Database*, *supra* note 29; see *Death Sentences in 2016*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/2016-sentencing> (last visited Aug. 23, 2018).

230. See *Death Sentences Decline*, *supra* note 202.

231. Robert J. Smith et al., *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1224 (2014).

232. 536 U.S. 304, 321 (2002) (finding that the Eighth and Fourteenth Amendments prohibit execution of individuals with an intellectual disability, previously known as mental retardation).

233. 543 U.S. 551, 578 (2005) (finding that the Eighth and Fourteenth Amendments prohibit execution of those whose crimes were committed prior to age eighteen).

234. Smith et al., *supra* note 231, at 1228-29 & nn.34-35.

235. *Id.*

mitigating evidence that would almost certainly be found at the trial level today, whether in jurisdictions with specialized capital offices or court-appointed teams with adequate mitigation resources, thereby diminishing the likelihood of a death sentence.²³⁶

B. “Enlightened Policy” Comes Full Circle

Individualized sentencing, recognized over forty years ago in *Woodson v. North Carolina* as a constitutional requirement in capital cases and “enlightened policy” in ordinary cases,²³⁷ has returned as we reevaluate mass incarceration and recognize that each of us is more than the worst thing he has ever done. In striking down North Carolina’s mandatory capital statute (which provided automatic death sentences for some crimes), Justice Potter Stewart wrote eloquently for the Court’s majority:

This court has previously recognized that “[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.” Consideration of both the offender and the offense in order to arrive a just and appropriate sentence has been viewed as a progressive and humanizing development. . . . While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.²³⁸

236. See Petition for Writ of Certiorari, at 11-14, *Hitchcock v. Florida*, 138 S. Ct. 513 (No. 17-6180) (Sept. 25, 2017; cert. denied Dec. 4, 2017). (“Inmates whose death sentences became final before June 24, 2002 are more likely than their post-*Ring* counterparts to have been given those sentences under standards that would not produce a capital sentence – or even capital prosecution – under the conventions of decency prevailing today.”); see also *id.* at n.23 (“A significant factor in the decreasing willingness of juries to impose death sentences has been the development of a professional corps of mitigation specialists – experts focused and trained specifically to assist in the penalty phase of capital trials. This subspecialty has burgeoned as a unique field of expertise since the turn of the century.”).

237. 428 U.S. 280, 304 (1976).

238. *Id.* (citations omitted) (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)).

The “enlightened” and “progressive” policy of individual sentencing determinations disappeared for a long time in the era of mass incarceration, but it has fortunately returned, making it crucial that counsel have the support of multidisciplinary teams that can help sentencers understand what shaped the individual they are sentencing.²³⁹

C. Private, Independent Mitigation Specialists Are Still Vitrally Needed Because There Is Always a Risk of Defunding or Diminished Funding in the Institutional Offices; Most Jurisdictions Still Have No Institutional Capital Offices at Any Level of Representation; and Mitigation Needs in Noncapital Litigation Have Expanded Dramatically

This Article has shown the impact of well-staffed, adequately funded, specialized capital defense offices with in-house mitigation capacity, but there are still more jurisdictions without such offices than there are jurisdictions that have established them.²⁴⁰ The capital defense systems in most jurisdictions are more like those in Pennsylvania than those in Georgia, the Carolinas, and Virginia.²⁴¹ Yet Pennsylvania, too, has reduced death sentences to near zero because of relentless efforts by private counsel to demand equivalent staffing and resources in court-appointed cases.²⁴² Whether states choose to adopt the cost-effective models of specialized capital defense offices or continue to rely on traditional public defenders and court-appointed systems, the recognized need for mitigation specialists will continue to grow. The “average murderer” does not deserve execution,²⁴³ and every effective mitigation theory rests on the uniqueness of the particular client in the case at hand.²⁴⁴

Regardless of the system in place, it is essential to provide adequate compensation for the nonlawyer specialists whose

239. See *supra* Part IV.

240. See *supra* note 219.

241. See *supra* Part V.A–E.

242. *Supra* Part V.E.

243. See *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (“[C]apital punishment must ‘be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002))). “[T]he culpability of ‘the average murderer’ is insufficient to justify” the death penalty. *Atkins*, 536 U.S. at 319.

244. See *supra* text accompanying note 127.

contributions are now recognized as an indispensable element of effective representation in capital cases.²⁴⁵ The Constitution requires the government to bear the costs of such representation, and good sense requires that this be done efficiently, rather than inefficiently.²⁴⁶ In practical terms, this means that the continued existence of a well-funded coterie of mitigation specialists is a critical component of the system of capital representation.²⁴⁷ Public defender organizations may come and go as governmental policies change, but the constitutional obligation of jurisdictions seeking to impose the death penalty will not change.

D. Mitigation Is an Archive for Understanding Homicide, its Causes, and its Perpetrators

The individual mitigation investigations throughout the death penalty era have also served another purpose, beyond the practical applications in individual cases. These detailed investigations have created an archive for history, a robust collection of data for the social scientists who will look back on the years when America's homicide rates far exceeded those of our peer nations.²⁴⁸ The mitigation archive will help to explain the roots of violence in American society through thousands of individual stories. We know very little about over ten thousand prisoners who were executed before 1972²⁴⁹—or the myriad faceless individuals who were convicted of murder, but had the good luck to be spared execution for reasons unknown.²⁵⁰ Their lives are untold stories.

245. See *supra* Part VI.C.

246. See Freedman, *supra* note 193, at 1102-03.

247. See *supra* text accompanying note 127; *supra* Part VI.C.

248. See Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-Income OECD Countries, 2010*, 129 AM. J. MED. 266, 268-69 (2016).

249. See Chris Wilson, *Every Execution in U.S. History in a Single Chart*, TIME (Apr. 25, 2017, 8:00 AM), <http://time.com/82375/every-execution-in-u-s-history-in-a-single-chart> (showing 15,760 total executions in the U.S. since 1700). A study of executions in twentieth century New York found that the limited personal data about the prisoners came from two main sources: reports of the "Lunacy Commission" that examined prisoners prior to electrocution and clemency applications to the governor. SCOTT CHRISTIANSON, CONDEMNED: INSIDE THE SING SING DEATH HOUSE 53-54, 56-57, 80, 83-85 (2000).

250. See *Arbitrariness*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/arbitrariness> (last visited Aug. 23, 2018) (suggesting that the death penalty is often applied arbitrarily based on factors such as the location where the crime was committed, the race of the victim, the quality of legal representation, juror misperceptions, and the gender of the defendant). For a description of collections of historical materials which also fulfill this important function as resources for the social scientists of future generations, see *supra* note 89. Of particular note is the National Death

By contrast, the mitigation files of the modern era are a rich source for understanding homicide and thereby developing public policies to prevent it; for understanding the biological, psychological, and social influences that contribute to the public health risk for violence; and for seeing the humanity, the capacity for redemption and change, even of those responsible for horrific crimes.

Over the past four decades, the search for justice tempered with mercy in our criminal justice system has grown deeper in capital cases and wider in noncapital cases, led by lawyers and nonlawyers who appreciate the empathic power of the mitigation function.²⁵¹ The *ABA Guidelines* and the *Supplementary Guidelines for the Mitigation Function*²⁵² have played a critical role in this search and will continue to provide guidance and inspiration in the years ahead. Courts that are willfully blind to the power of mitigation in persuading jurors to strike a different balance would do well to review what the Fifth Circuit has said more than once in emphatically rejecting the “brutality trumps” argument in cases alleging ineffective representation:

[T]he State’s stereotypical fall-back argument—that the heinous and egregious nature of the crime would have ensured assessment of the death penalty even absent [the error]—cannot carry the day here. . . . [O]ur decades of experience with scores of . . . habeas cases from the death row of Texas teach an obvious lesson that is frequently overlooked: Almost without exception, the cases we see in which conviction of a capital crime has produced a death sentence arise from extremely egregious, heinous, and shocking facts. But, if that were all that is required to offset prejudicial legal error and convert it to

Penalty Archive at the State University of New York Albany, which collects materials and makes them available online to lawyers, academics, and journalists. *National Death Penalty Archive*, UNIV. ALBANY, <http://library.albany.edu/speccoll/findaids/eresources/static/91.html> (last visited Aug. 23, 2018).

251. See John Blume & Russell Stetler, *Mitigation Matters*, in *TELL THE CLIENT’S STORY: MITIGATION IN CRIMINAL AND DEATH PENALTY CASES* 19 (Edward C. Monahan & James J. Clark eds., 2017) (“Mitigation matters. It works. It literally saves lives every day, often in cases in which a death sentence seems a foregone conclusion. But mitigation matters—it works—only if the capital defense team is committed both to conducting a comprehensive investigation of the client’s life and to developing and integrating the results of the investigation into a compelling, credible narrative for life. This commitment to uncovering and telling the client’s true story must be complete and unwavering. When it is, life sentences follow. When it is not, undeserved death sentences are imposed.”); Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 241 (2007).

252. See *supra* notes 2, 14.

harmless error, habeas relief . . . would virtually never be available, so testing for it would amount to a hollow judicial act.²⁵³

The Appendices that follow document how rare death sentences have always been,²⁵⁴ and how juries have chosen life sentences even in highly aggravated cases in multiple categories, including child victim, police officer victim, and multiple victim cases.²⁵⁵ Part V of this Article has shown that when capital defense teams are adequately staffed and funded, death sentences are not only rare, but vanishingly so.²⁵⁶ The mitigation profession has long been critical to constitutionally effective representation, and it has received the recognition it deserves in the *ABA Guidelines* that reflect the norms in the highly specialized area of capital defense practice.

253. *Walbey v. Quarterman*, No. 08-70007, 2009 WL 113778, at *8 (5th Cir. Jan. 19, 2009) (internal quotation marks omitted) (quoting *Gardner v. Johnson*, 247 F.3d 551, 563 (5th Cir. 2001)). Both cases are cited in Mark E. Olive, *Narrative Works*, 77 UMKC L. REV. 989, 1003 & nn.48, 49 (2008).

254. *See infra* App. 1.

255. *See infra* Apps. 2-4, respectively.

256. *See supra* Part V.