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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO **Plaintiff,** **V.** **BRYAN C. KOHBERGER,** **Defendant.**	**CASE NUMBER CR01-24-31665** **REPLY TO STATE'S RESPONSE TO DEFENDANT'S MOTION TO PRECLUDE THE DEATH PENALTY AND ADOPT OTHER NECESSARY PROCEDURES** **RE: DISCLOSURE VIOLATIONS**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby replies to the State's Response to his Motion to Preclude the Death Penalty and Adopt Other Necessary Procedures RE: Disclosure Violations.

The volume of discovery in this case is exceptional. One of the last highly publicized death penalty case in Idaho involved three victims killed in separate incidents and a months-long investigation spanning multiple states. The discovery in that case totaled less than five terabytes. *See* Declaration of Mary Goody at 7, *State v. Lori Vallow Daybell* (filed March 14, 2023) (attached as Exhibit 1) (stating that discovery in the case exceeds four terabytes in a declaration filed two weeks prior to trial). The discovery provided in this case, more than 68 terabytes, dwarfs that number. It is not only an extreme outlier in Idaho, but in the entire country—courts often refer to cases involving less than 5 terabytes of data as containing a very significant volume of discovery. *See, e.g., United States v. Salyer,* No. CR. S-10-0061-LKK, 2011 WL 1466887, at *1 (E.D. Cal. Apr. 18, 2011) ("It is probably no exaggeration to state that 1–2 terabytes of information are involved… Of course, when one considers the terabytes of information in this case are comprised of thousands and thousands of individual records, the mass of documentation acquired in the investigation and turned over in discovery is extreme."); *United States v. Puckett*, No. 3:15-CR-42, 2015 WL 1815728, at *2 (E.D. Tenn. Apr. 22, 2015) ("[D]iscovery in this case is voluminous, involving half a terabyte of information"); *United States v. Valdez-Morales*, No. 3:15-CR-56, 2016 WL 919029, at *9 (E.D. Tenn. Mar. 4, 2016) ("Mr. Roskind stated that the four terabytes of discovery, the equivalent of about ten million files or documents, was the largest amount of discovery of any criminal case in which he had been involved."); *United States v. Hofstetter*, No. 3:15-CR-27-TAV-CCS, 2018 WL 813254, at *14 (E.D. Tenn. Feb. 9, 2018) ("discovery in this case is massively voluminous, consisting of well over a terabyte of data, approximately fifty compact discs containing audio and video recordings, and numerous imaged computer hard drives"); *United States v. Conley*, No. 2:22CR147, 2023 WL 5807835, at *2 (E.D. Va. Sept. 7, 2023) (granting continuance in criminal case where the discovery totaled five terabytes, even where prosecution had "diligently assisted defense counsel in navigating the voluminous discovery materials").

To put this into perspective, it would take *hundreds* of reviewers *several years* to review the discovery in this case:

> One terabyte is generally estimated to contain 75 million pages, [and therefore] a one-terabyte case could amount to 18,750,000 documents, assuming an average of four pages per document. Further assuming that a lawyer or paralegal can review 50 documents per hour (a very fast review rate), it would take 375,000 hours to complete the review. In other words, it would take more than 185 reviewers working 2,000 hours each per year to complete the review within a year [for a one terabyte data case]."

Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 J. of Crim. L. and Criminology 237 (2019) at 249 n.70 (citations omitted). For video files, 1 TB is estimated to hold around 1,000 hours or about 40 days of video files. *Id.* Extrapolating to this case, even assuming for the sake of simplicity that all 68 terabytes consisted of video files, which take up significantly more space than documents and audio files, it would require 2,560 days or more than seven years to review all of the footage.

Contrary to the State's assertion, the prosecution and defense are not "on the same playing field." State's Response at 4. The prosecution has had the assistance of hundreds of investigators, law enforcement officers, prosecutors, and administrative staff from several different state and federal agencies working on this case and collecting, reviewing, and analyzing evidence. In addition to sheer manpower, the prosecution is using expensive, technologically powerful case management software that the defense does not have access to. According to its website, their case management system "Prosecutor by Karpel" allows for prosecutors to tag individuals in the case and pull up all documents related to them—both within a case and across cases; has a global search function to search all discovery and case documents at one time and even generate reports from such searches; and allows external individuals and agencies read-only access to the case and the ability to upload documents directly into the case system. *See* Prosecutor by Karpel, *PbK: Case Management Software with Efficiency Enhancing Features*, *Person Centric* ("Comprehensive search and organization of data by person… Every time you update information on this person,

the system automatically aligns the previous information")[1]; *id.* at *Information Management Features Enable Your Prosecutors to Do More in Less Time* ("Sifting through search results and going through mountains of paperwork just to find one piece of information saps valuable time that could be spent on more important tasks. PROSECUTORbyKarpel provides a wealth of features designed to not only find what you are looking for fast, but also to easily generate a report and share it with relevant parties.")[2]; *id.* ("PROSECUTORbyKarpel has a powerful relational database that features broad search capabilities, so you can find your case information quickly and easily."); *id.* at *PbK Intergrates with the Court, Law Enforcement, Software, and More, External Agency Portal* ("PROSECUTORbyKarpel's External Agency Portal allows your justice partners "view only" privileges to basic case information and the ability to attach and submit supplemental media/documents to the Prosecutor's Office electronically.").[3]

The system also has the capacity to integrate with advanced evidence-management software including Axon Justice's Evidence.com, which has artificial intelligence capabilities including automatic transcriptions of audio and video files.[4] *See, e.g.*, "Axon Evidence User and Administrator Reference Guide," Axon Auto-Transcribe a p.174 ("No more having to watch every

[1] Available at https://www.prosecutorbykarpel.com/efficiency (last visited March 22, 2025), saved at https://web.archive.org/web/20250322141834/https://www.prosecutorbykarpel.com/efficiency/.

[2] Available at https://www.prosecutorbykarpel.com/information-management/ (last visited March 22, 2025), saved at https://web.archive.org/web/20250322142619/https://www.prosecutorbykarpel.com/information-management/.

[3] Available at https://www.prosecutorbykarpel.com/integrations/#services (last visited March 22, 2025), saved at https://web.archive.org/web/20250322143312/https://www.prosecutorbykarpel.com/integrations/#services.

[4] The defense does not know the extent to which prosecutors and LEOs at different agencies working on this case have access to such software, but they are widely available to the government and to law enforcement agencies. For example, the Latah County Sheriff's Office recently contracted with a similar technologically advanced evidence management software called "POLARIS by Utility." *See* https://www.utility.com/news/2024/04/19/latah-county-sheriffs-office-to-purchase-a-new-state-of-the-art-digital-evidence-system/.

moment of digital evidence. Instead, users can simply scan the auto-transcript to quickly survey what happened and jump to the significant section by clicking on the spoken words.").[5]

Despite access to sophisticated technology, the prosecution has not organized the discovery in a way that facilitates review. PDF files are provided without names that correspond to their contents. Individual PDF files contain several documents grouped together into one file. For example, a single pdf file might contain 17 different documents and be labelled "Kohberger Unredacted 550-750." Thus, the defense must manually scroll through each PDF file to discern the number and type of documents it contains. Because the State protects each pdf with a password, it is extremely cumbersome to then separate the combined PDF into individual documents, which would allow the defense to rename and organize the documents individually. The State has refused to either provide the password or cease password-protecting the pdfs despite several requests.

While redacted documents are sent through the case management system's integrated email system, the State provides hard drives containing audio and video files (without transcriptions) and unredacted reports that the defense must pick up in person. They must then be manually loaded into a shared storage file for defense team access. The subfolders of video and audio files must be recreated in the defense system one by one and the files then uploaded into each. Because transcripts were not routinely provided, even once these video or audio files are uploaded into the defense system, they are not searchable.

Without the sophisticated technology that the prosecution has access to, the defense cannot conduct global searches of the documents turned over, nor "tag" individuals or topics in order to catalogue or group relevant documents together. It is necessary to individually open up a PDF in

[5] Available at https://public.evidence.com/help/pdfs/latest/EVIDENCE.com+Administrator+Reference+Guide.pdf , saved at https://web.archive.org/web/20250310170651/https://public.evidence.com/help/pdfs/latest/EVIDENCE.com+Administrator+Reference+Guide.pdf.

order to use text search, and therefore the defense team cannot search the discovery unless it knows that something already exists and approximately where to find it.

The State's assertion that it has provided an index of the discovery is misleading. The "index" is really an accounting of hard drives and groups of files and the dates they were turned over; it does not address the overarching problems regarding lack of organization, labels, and clarity about what is actually being discovered. For example, within the discovery response the State likens to an index, there is a chart that identifies almost the full range of videos provided in this case—nearly 1,000—in which the only descriptions are "audio/video files." *See* State's Response and Supplemental Responses to Defendant's Discovery Requests for Discovery (Sept 4, 2024) at 25. The same exists for large numbers of documents; for example, nearly 16,000 pages of Bates Stamped documents" is described as "documents and reports," and a "Hard Drive" given on a specific date contains "FBI One Drive – Production [number redacted]." *Id.* at 3. There are also several places in which the State asserts it has provided something related to a specific topic and then provides examples, specifically stating that the relevant documents and video/audio files "include but are not limited to" those listed, making it impossible to know whether other relevant documents exist with the 68 terabytes of discovery. While there are some entries that provide more detail and can accurately be likened to an "index," such as a list of reports by name beginning on page 7, this accounts for an extremely small fraction of the discovery provided in the case.

Nor has the State facilitated defense review of the discovery in any other manner, such as by providing a list of "hot documents" or by outlining the evidence they intend to use in a presentation to the defense. These types of efforts are common in large cases, even when those cases contain multitudes less discovery than here. *See, e.g., United States v. Bussey*, No. 5:21-CR-9, 2024 WL 4879865, at *3 (S.D. Ga. Nov. 25, 2024) (in case involving 15 terabytes of data, the government took several steps to facilitate review including (1) providing an inventory of discovery; (2) organizing the discovery by seizing and producing agency, by category or type of

evidence, by individuals, and by H-2A petitions, (3) offering assistance to defense counsel in reviewing discovery, explaining what was produced, and explaining how the productions were organized; and (4) meeting with defense counsel to present a PowerPoint outlining the evidence against the client); *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009) (the government provided a searchable electronic file, produced an index of "hot documents" indicating the documents that were important to its case as well as to documents that included potentially exculpatory evidence, and created a number of other databases to assist the defense's review of the evidence); *United States v. Perraud*, No. 09-60129-CR, 2010 WL 228013, at *11 (S.D. Fla. Jan. 14, 2010) ("the Government has separately directed Defendants to the materials it deems to be most relevant to this case, and it has given Defendants an index to the remaining searchable database to enable Defendants to focus their review efforts on those documents most likely to be relevant to Defendants' defense. Moreover, the United States has provided Defendants with the same search capabilities upon which the Government must rely in reviewing the materials in the database."); cf. *Salyer*, 2011 WL 1466887, at *5 ("When the amount of information in a criminal case reaches the hundreds of gigabytes/terabyte stage, the government should consider whether everyone is better served if this information is placed in a common data base.") (citations omitted); *id*. at 6 ("It is also clear that the defense team does not have access to the number of support staff available to the government. Even with a searchable data base, either from multiple sources or a common data base, culling the pertinent information with a degree of accuracy will take time.");

The volume and format of discovery—which has been a constant issue in this case—is the backdrop to the present circumstances requiring relief. The State wants to paint away the problem by reducing it entirely to the size of the case. *See* State's Response at 10 ("in essence the Defendant is arguing that in cases that involve a large amount of discovery such as this one, the death penalty cannot be pursued because there is so much information for defense counsel to review prior to trial"). But the death penalty must be precluded because whether by design or inattention, the

defense continues to be inundated with late discovery and late expert disclosures mere months prior to trial, creating an untenable situation. This Court set a discovery deadline in September 2024 and an expert disclosure deadline of January 2025. Pursuant to that scheduling order, the defense would have had 10 months to engage with the discovery and determine priorities in preparation for trial, and more than six months to be aided in that review by completed expert disclosures largely laying out the State's case. But the State has not abided by these deadlines; for example, the State just turned over discovery that the defense specifically asked for more than one year ago. Among the documents are things dated November 2023—things that existed long before the State's discovery deadline and could have been turned over more than a year ago. And the late expert disclosures continue to roll in, even after the Motions in Limine deadline.

As one court explained, each disclosure creates a cascading set of responsibilities for defense counsel; in addition to reviewing its contents, defense counsel must also file any relevant pretrial motions, the court must hold hearing on those motions and issue an order, and then the defense must integrate the information and "prepare for trial in light of those rulings." *United States v. Covington,* No. 3:15-CR-23, 2015 WL 3883522, at *2 (E.D. Tenn. June 24, 2015) (granting continuance in criminal case involving four terabytes of data, described by the government as "an immense universe of discovery"). Thus, each and every late disclosure requires attention to be turned to the new disclosure, and to the attendant follow-up investigation, rebuttal, and/or litigation, and away from preparing for trial in a streamlined manner. There is truth to the assertion that "the facts before the Court in Kohberger's case are nothing like the facts before the Court in the Vallow case." State's Response at 10. They are significantly worse because of the State's discovery abuses.

As the State correctly points out, the judge precluded the death penalty in the Vallow Daybell case after the State turned over 100 hours of jail calls one (1) day after the discovery deadline and two weeks before trial. Though it would technically be possible to listen to all 100

hours of recordings in two weeks, the Court recognized that the size and complexity of the case mattered. The Court concluded that the "problem here is a timing problem" and that "prejudice has occurred because of the proximity to trial, the volume of discovery, and the inability of the defense to adequately review that discovery before trial begins." State's Response at 8-9 (quoting video proceedings of hearing). The mitigation specialists' declaration, *see* State's Response at 8, explains the prejudice of late disclosures in a case already involving four terabytes of discovery:

> Sifting through such a huge number of investigative documents, audio and video files, and metadata and other scientific evidence, and determining how each piece of information applies to either the fact or mitigation (or both) sides of the defense case is a very time-consuming job. There is absolutely no time to begin investigating new information after determining how it relates to the mitigation case.

Declaration of Mary Goody, Exhibit A, at 7. The Court determined that precluding the death penalty was less severe than excluding some of the State's witnesses or evidence, and that precluding the death penalty under the circumstances was consistent with the heightened scrutiny and due process guaranteed to defendants in capital cases. *See id.* at 9-10.

Here, the discovery problems have existed throughout this case, requiring near-constant litigation and significant time. The volume of discovery is an extreme outlier even in other cases involving massive amounts of data. The State has not complied with this Court's deadlines and thus has derailed counsel's review of the State's case and evidence in the months before trial. Like in the Vallow Daybell case—but in a much more extreme fashion—"prejudice has occurred because of the proximity to trial, the volume of the discovery, and the inability of the defense to adequately review that discovery before trial begins." *Id*. at 9.

The Due Process Clause requires a "balance of forces" between the accused and his accuser. *See Wardius v. Oregon*, 412 U.S. 470, 474 (1973). The Eighth Amendment requires a heightened standard to be applied to capital cases—and therefore lesser prejudice is required to preclude the death penalty in an effort to "balance the forces" of due process. *See, e.g., United*

States v. Lopez-Matias, 522 F.3d 150, 154 n.9 (1st Cir. 2008) ("[In a capital case] when the stakes are so high, a smaller quantum of prejudice may justify a sanction. And, as discussed above, striking the Notice is not quite as serious as dismissing the indictment altogether, and so perhaps still less prejudice is required."). If this proceeds as a non-capital case, heightened due process is not required, nor will heightened scrutiny be applied on appeal if a conviction results, and thus all parties are more likely to obtain a final outcome at trial. Thus, the prejudice to the prosecution in precluding death is relatively small—they can still seek a death-in-prison sentence. On the other hand, the prejudice to Mr. Kohberger in proceeding to a capital trial under such circumstances is unconstitutionally grave. While the prosecution seemingly suggests, (without having the fortitude to make the outright request) a continuance as a remedy, State's Response at 9-10, that is not a fair nor a sufficient remedy. Mr. Kohberger is being held without bond; it is patently unfair to restrict his freedom for months or years to come in order to fix a problem that has been and continues to be within the government's control.

Moreover, the Sixth Amendment right to a speedy trial belongs not only to a criminal defendant, but to the public. There is a "societal interest in providing a speedy trial which exists separate from…the interests of the accused." *Barker v. Wingo*, 407 U.S. 514, 519 (1972). This Court has been clear that trial will proceed on schedule and the State has long been aware of this date. Precluding the death penalty is the only way a 2025 trial can be accomplished in accordance with the state and federal constitutions.

DATED this ___24____ day of March, 2025.

BY: _____
ANNE C. TAYLOR
ANNE TAYLOR LAW, PLLC

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the ___24___ day of March, 2025 addressed to:

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov
Elisa Massoth – via Email: legalassistant@kmrs.net
Jay Logsdon – via Email: Jay.Logsdon@spd.idaho.gov
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DECLARATION OF MARY C. GOODY

STATE OF WASHINGTON)
) ss.
County of CLARK)

COMES NOW, Mary C. Goody, after being duly sworn, does hereby state as follows:

I. CREDENTIALS

1. I am a mitigation specialist in private practice located at 26605 NE 96TH Court, Battle Ground, Washington, 98604. I have been in private practice since October of 1991. My resume is attached to this Affidavit as (Attachment 1). I have worked as a mitigation specialist on death penalty cases since July of 1985.

2. I am the retained mitigation specialist in *State of Idaho v. Lori Vallow Daybell*.

3. Since 1985 I have worked on over 120 capital murder cases on which I have conducted preliminary and extensive social history investigations, prepared social history and chronological reports, assisting attorneys in the preparation of a penalty phase case at a trial; or at hearing in a post-conviction proceeding. I have worked on capital cases at the state level in Oregon, Colorado, Missouri, Kansas, Washington, Idaho, Wyoming, California, Utah, and Arizona. I have worked on 16 Federal death penalty trial level cases in the states of New Mexico, Rhode Island, Michigan, Kansas, Utah, Iowa, North Dakota, Arizona, and Missouri.

4. I have participated in continuing education since I began working as a mitigation specialist. I have attended local and national death penalty seminars beginning in 1985 in Oregon. A very strong emphasis has always been placed on fully investigating every aspect of the client's life. The overriding theme of these trainings is that a mitigation specialist must exhaustively investigate the case with special emphasis placed on the effects that family history, trauma, mental health, and multiple other factors

DEFENDANT'S
EXHIBIT NO. 1
IDENTIFICATION / EVIDENCE
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together play a role in understanding the actions of the client. Counsel, fact investigators, and other members of the team should work together with the mitigation specialist to immerse themselves in the client's life history, in order that a documented story can be presented to the trier of fact in an effort to avoid a death sentence.

5. My specialized training includes seminars put on by the Oregon Criminal Defense Lawyers Association, California Attorneys for Criminal Justice, National Legal Aid and Defender Association, Habeas Corpus Resource Center, Federal Resource Counsel Strategy Sessions, ARC, and others on a yearly basis. A focus of the training is to emphasize that attorneys representing death eligible defendants must form teams of qualified persons to work on their cases, and that the highest quality background investigations must be performed by mitigation specialists to ensure that a lifesaving defense be developed for the client.

6. The description of the role of a mitigation specialist that I give below represents the prevailing professional norms for practice of mitigation specialists working in the United States at the state and federal level at the present time.

7. The role of a mitigation specialist in a capital case is to assist the attorneys representing a death eligible client in investigating and preparing a social history that fully focuses his or her efforts towards understanding the broader environment that has affected the client during his life, and through this understanding, build the life history of the client. The purpose of the investigation is to gather personal and background information about the client that will not only humanize the client, but also fully rebut the aggravation evidence the State intends to offer in support of their request for a death sentence. The mitigation specialist and other members of the team must create a mitigation theme based upon the client's life history. The theme explains the conduct of the defendant over a lifetime. The core team, through the combined efforts of at least two counsels, the mitigation specialist, fact investigators, and other experts as needed, should utilize that theme throughout the entirety of the case, from motion hearings, to negotiations, to trial preparation, voir dire, the merits, and penalty phase portions of the case. The mitigation theme is, therefore, the foundation for other work in the case that may lead to a sentence other than death.

8. A mitigation investigation produces a wealth of information about the client that acts as a window into the life of a defendant on the day he/she committed the murder. The investigation begins with little, or nothing known about the individual except what is contained in the discovery and the knowledge that a crime has been committed. The core team is formed as soon as possible after the appointment of counsel and begins meeting with the client, explaining the life history investigation process, answering questions, and earnestly working to establish a trusting relationship with him/her. The client must understand why the core team needs to understand the environment in which the client has lived his/her life so all the aspects that formed that person's life trajectory can be explained to a jury in the various trial phases through witnesses, and exhibits. The mitigation specialist will begin a series of meetings with the client for extended periods of time throughout the life of the case to learn about the progression of his/her life, and how he/she has perceived those life events. Extensive notes must be made of these conversations, to preserve as many names as possible of people touching the life of the defendant, and places where background documents can be obtained. The mitigation specialist will begin to gather documents spanning the life of the defendant. As information is gathered and people are interviewed, the mitigation specialist returns to discuss the new information with the client, making sure he/she has ample time to reflect and respond.

9. It is important to fully interview the defendant's family, discussing the events of how each of them has fared throughout their lives. Inquiry must be made from the defendant and his/her family members about the places where the client lived, his medical, mental health, marital, religious, military, and educational history. Family members must be asked about their own education, medical, mental health, and other histories. Other topics to be discussed include traumatic events, addiction history, previous arrests, incarcerations, or juvenile incarcerations or treatment, to name a few areas of questioning. It is important to discuss with the client his/her experiences in all these facilities and situations and continually ask for names of others whom we might interview about the client. Lists of materials and witnesses are compiled and these persons are located and interviewed. Often these contacts are continuing throughout the preparation of the case because more leads to documents and witnesses come from interviews and reviewing

collected documents. Meticulous requests are made for all records associated with the client or his family such as birth certificates, birth records, school, medical, counseling, military, social security, and incarceration. It is always necessary to investigate the environments or neighborhoods that the client was raised in as individuals other than family members are often more aware of the psychosocial stressors affecting the well-being of the defendant or the neighborhood.

10. As documents and information are collected, they must be scrutinized for important facts. School and juvenile institutional records often contain the names of foster parents, or guardians not readily remembered by the client. Educational records contain information regarding early intelligence test scores and absences from school. Drafts should be started of various kinds of compilations of information such as a chronology of significant events, lists of documents requested, list of addresses where the client has lived, lists of witnesses to be interviewed and how they fit into the scheme of the client's life, lists of documents that have been destroyed. Careful documentation of efforts to collect information can lead to motions to ask that death not be considered as a penalty as too many vital pieces of background information are destroyed. The core team must meet often to discuss the progress of the investigation, and the important aspects that are emerging. The team then consults with various experts to determine what kind of evaluations will best assist them in explaining the client to a sentencing body. Often the results of the life history investigation, combined with the evaluations of the experts produces an opportunity for counsel to negotiate with the prosecution.

11. The mitigation investigation is critical to the information offered about the defendant at trial. The jury must have a complete understanding of how the defendant has been a product of his/her environment, his/her mental health functioning, and his/her familial nurturing, or the lack thereof. This information explains the client. The team must personally interview the witnesses exploring and documenting the stories the witnesses tell. Often the client does not fully remember critical events from his/her past, or because of a mental health illness will minimize the importance of formative experiences. The mitigation specialist must then further delve into these facts and locate witnesses who can corroborate these important events.

12. The mitigation investigation must cover all aspects of the defendant's life and is not complete without a continuous flow of background information from before the birth of the defendant to the present time of his/her life. The investigation seeks to look back into the life history for at least three generations. The goal of the investigation is to help the jury understand the defendant as well as if they had read a biography of his/her life. To make an informed choice about what existing background factors are most suited to a particular defense, all investigative leads must be vigorously pursued. It is not uncommon that family members or other close associates of the defendant are unable or unwilling to recall re-traumatizing, painful memories and the mitigation specialist must be sensitive to these impairments and proceed to follow investigative leads with care and concern for those being interviewed. The mitigation specialist needs the time to make a thoughtful and relentless search for witnesses who remember the client and his/her family - the time to establish a rapport with those witnesses to uncover the crucial life history information so vital to a penalty phase presentation.

13. The United States Supreme Court has repeatedly stated that "Death is different" from any other penalty, and thus the information needed by a sentencing body to make the sentencing decision must be verified and reliable. (*Woodson v. North Carolina,* 428 U.S. 280, 305 (1976.)) The Court as long ago as 1978, stated that the sentencer should be allowed to consider "as a mitigating factor, any aspect of a defendant's character or record...that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio,* 438 U.S. 586,604 (1978.) *Lockett* was one of the first cases to emphasize that there can be many different facets to the mitigation investigation and ultimate presentation.

14. In 2003, the American Bar Association adopted the Revised ABA standards pertaining to capital defense work and incorporated the previously adopted 1989 Guidelines and provided that a sentencing phase "*should comprise efforts to discover all reasonably available mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.*" Guideline # 11.4.1 (C.) ABA Guidelines for the Appointment and Performance of Counsel in Death penalty Cases © (1989). These Guidelines were developed to provide guidance to those people representing death eligible clients and to establish prevailing professional norms for

practice. In the Introduction to the 1989 Guidelines, it expressly states that, *"...they enumerate the* ***minimal resources and practices*** *necessary to provide effective assistance of counsel."* The Guidelines further state in the Commentary that. "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". Commentary, pg. 4-55. In 2008, the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases were published (36 Hofstra L.Rev.677) to clarify the role of the mitigation specialist as an integral member of the team. Lawyers are generally "...unprepared and ill equipped to discover mitigating evidence without expert assistance. The special skills and abilities necessary to obtain sensitive and sometimes embarrassing evidence about a client's life experiences from family members and other sources are often beyond the abilities of even the most skilled courtroom lawyer." (SEE ABA Guidelines, note 1 at Guideline 4.1.) ("The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, Hofstra Law Review, Vol. 36, Issue 3, Article 5." - attached as Attachment 2.)

15. In addition to the Guidelines, in my work I refer to significant legal decisions that specifically address the importance of a comprehensive mitigation history, such as Woodson v. South Carolina, 428 U.S. 280, 304 (1976), Lockett v. Ohio, 438 U.S. 586 and other more recent cases, such as Williams v. Taylor 529 U.S. 362 (2000), Wiggins v. Smith, 539 U.S. 510 (2003) and Rompilla v. Beard 545 U.S. 374 (2004.) These decisions provide guidance to attorneys and those involved in mitigation investigations, as they emphasize the need for the development and presentation of a detailed picture of the defendant's life history background; his character; his mental health history, presenting cause and effect of his life history upon his mental health; and life experiences which impacted him. In Wiggins, applying the Guidelines, the Supreme Court tells us that trial counsel must "undertake to discover all reasonably available mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Wiggins v. Smith, 539 U.S. 510, 524 (2003) (underline in original).

16. The Wiggins case is especially meaningful as it discusses the difficulties posed when only half-heartedly investigating a mitigation case. "In assessing the reasonableness of an attorney's investigation, however, a court must

consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins v. Smith, 539 U.S.510, 525 (2003).

17. I have conducted a mitigation investigation of the background of Lori Norene Vallow Daybell, to the extent possible, given the time constraints, in accordance with my duties as a mitigation specialist in this case. I have determined that a significant amount of important information both in the form of documents and witnesses exist. In addition to the available information are leads of unknown origin that would undoubtedly come up as the team pursues the information we have uncovered or learned of through the discovery already provided to us in this case.

18. The discovery in this case (at my last information) exceeds four terabytes. This is an incredible amount of information, some of which has only recently been given to the Daybell defense team just prior to the discovery cutoff, and afterwards. The State, along with their cadre of law enforcement officials, has had this information possibly for three years prior to the defense team beginning their work in the late spring of 2022. Sifting through such a huge number of investigative documents, audio and video files, and metadata and other scientific evidence, and determining how each piece of information applies to either the fact or mitigation (or both) sides of the defense case is a very time-consuming job. There is absolutely no time to begin investigating new information after determining how it relates to the mitigation case. I must admit that, because of the client's insistence on maintaining her speedy trial rights, I have not been able to completely review the discovery we already have. The recent disclosures make reviewing the complete discovery information frankly, impossible. The recent addition of numerous witnesses, listed without identifying information, or a summary of what their testimony would be at this late date constitutes a gross miscarriage of justice as even the State must admit that the defense cannot begin to investigate this new information on the eve of trial.

19. Adding new witnesses such as the State has proposed further hampers defense investigators who have attempted to contact numerous witnesses endorsed by the State but have been unable to interview these witnesses because they have avoided returning phone calls, texts messages and ignored business cards left at their known addresses. Many of these individuals have

been participants in multimedia presentations or interviews. Witnesses who have been interviewed by the defense, who have also been the subject of prime-time media presentations report that while they were interviewed for substantial periods of time, the amount of material presented in the episode they were featured in, did not accurately portray all the information provided to network, or news organizations. Information given to news organizations, but never aired would very likely contain information critical to developing a mitigation case, especially for a person such as Ms. Daybell, who suffers from a mental illness. The State has never provided the defense with all the statements made by their witnesses about their contacts with the news media.

20. It is a fact that the State of Idaho is seeking the death penalty against Ms. Daybell who suffers from a mental illness with multiple diagnoses, and conditions which were identified by the Idaho State Hospital North but not ruled out. These details are well known to the parties and the Court. Based upon her fragile mental health, time constraints in the case, and the complexities in dealing with the voluminous existing amount of discovery, should this additional discovery be allowed, I would be further precluded from conducting my customary and reasonable mitigation investigation in Lori Vallow Daybell's case. Allowing in any of the State's new discovery after the discovery cutoff date prevents me from conducting the type of mitigation investigation which adheres to the prevailing professional norms of practice in death penalty cases.

Mary C. Goody

Mary C. Goody

Date: 3/14/23

Resume

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PROFESSIONAL EXPERIENCE

MITIGATION SPECIALIST, October 1990 to present. Consultant specializing in development and preparation of mitigation investigations, expert witness coordination, and trial assistance for defendants facing the death penalty. Experience in state and federal trials and post conviction cases. Emphasis on investigation and development of mental health issues for presentation at trial, competency and post conviction proceedings. Caseload has included cases in Washington, Oregon, Idaho, Utah, Wyoming, Arizona, California, Illinois, Missouri and Colorado.

DEFENSE INITIATED VICTIM OUTREACH services. June 2007 to present. Washington and Lee University; Federal Resource Counsel Project.

LEGAL/TRIAL ASSISTANT, Stoel, Rives, Boley, Jones and Grey, Portland, Oregon. Defense firm, employment litigation. July 1991 to June 1992.

MITIGATION COORDINATION, DEATH PENALTY UNIT, Office of the State Public Defender, Columbia, Missouri. January 1987-October 1990. Responsible for tracking cases statewide at trial level, and post conviction death penalty cases. Assisted in the coordination of issues, counsel, and cases; served as mitigation specialist, trial assistant, and assistant to the Statewide Director of the Capital Litigation Division.

LEGAL ASSISTANT, Jackson County Public Defender, Inc., Medford, Oregon. November 1985 to November 1986. Staff legal assistant in seven attorney office holding contract for indigent defense services in Jackson County, Oregon. Prepared mitigation in county's first death penalty case since hiatus.

LEGAL ASSISTANT, Pleasant Valley Research, Merlin, Oregon. January 1981 to September 1985. Freelance legal assistant. Prepared complex findings of fact in land use matters for Josephine County Board of County Commissioners. Provided planning services to the City of Cave Junction.

Attachment 1

LEGAL ASSISTANT, Law Office of Ernest E. Cutting. 1979-1980. Staff legal assistant.

EDUCATION

Defense Initiated Victim Outreach Training, Washington and Lee School of Law, June 2007

Stephens College, Columbia, Missouri, B.A. Philosophy and Law, 1995 (Graduation Speaker - Class Representative)

University of Minnesota, Minneapolis, Minnesota, Legal Assistant Training Program, 1980.

Numerous professional seminars including Life in the Balance, California Attorneys for Criminal Justice - national training seminars for death penalty related casework. I attend yearly training in Oregon and California.

PROFESSIONAL AFFILIATIONS

State of Oregon, Mitigation Specialist/Private Investigator License #34002
State of Washington, Licensed Private Investigator #3044
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Oregon Criminal Defense Lawyers Association
California Attorneys for Criminal Justice

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The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases

Robin M. Maher

Attachment 2

THE ABA AND THE SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES

*Robin M. Maher**

On February 10, 2003, the American Bar Association House of Delegates overwhelmingly approved the revised *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* ("ABA Guidelines").[1] In doing so, the ABA renewed the serious concerns it has voiced for decades about the fairness and reliability of the death penalty. All jurisdictions were urged to adopt the ABA Guidelines to ensure that capital trial and death row defendants had access to qualified, competent counsel and the expert assistance and funding that make capital legal representation meaningful.[2]

For the nation's largest organization of lawyers, the quality and availability of counsel for those facing execution is of paramount concern. Although the ABA does not take a position on the death penalty itself, it has long recognized that "[a] system that would take life must first give justice."[3] The efforts of the ABA—through policy statements,[4] amicus briefs,[5] task forces,[6] and projects such as the Death

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* Robin M. Maher, Esq. is the Director of the ABA Death Penalty Representation Project in Washington, D.C. The opinions expressed in this Article are strictly her own and not those of the American Bar Association.

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

2. *Id.* at Guideline 1.1(A).

3. *Violent Crime Control Act of 1991: Hearing on S. 618 and S. 635 Before the S. Comm. on the Judiciary*, 102d Cong. 334 (1992) (statement of John C. Curtin Jr., President, American Bar Association).

4. *See, e.g.*, ABA, REPORT SUBMITTED WITH RECOMMENDATION ON DEATH PENALTY MORATORIUM (1997), *available at* http://www.abanet.org/irr/rec107.html (calling "upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures," including *inter alia* "[i]mplementing ABA 'Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases' . . . and Association policies

intended to encourage competency of counsel in capital cases," "to . . . ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and . . . minimize the risk that innocent persons may be executed"); ABA, REPORT SUBMITTED WITH RECOMMENDATION ON ACCESS TO COUNSEL IN THE MILITARY FOR POST-CONVICTION HABEAS CORPUS DEATH PENALTY CASES (1996), *available at* http://www.abanet.org/legalservices/downloads/sclaid/101b.pdf (urging "that military capital prisoners be provided with the same opportunity for the assistance of counsel in seeking federal post-conviction habeas corpus relief as is now provided by federal law for persons sentenced to death in the civilian courts"); ABA, REPORT SUBMITTED WITH RECOMMENDATION ON COMPETENT COUNSEL IN DEATH PENALTY CASES (1990), *available at* http://www.abanet.org/irr/feb90.html ("[S]tate and federal governments should be obligated to provide competent and adequately compensated counsel for capital defendants/appellants/petitioners, as well as to provide sufficient resources for investigation, expert witnesses, and other services, at all stages of capital punishment litigation. The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases should govern the appointment and compensation of counsel."); ABA, REPORT SUBMITTED WITH RECOMMENDATION ON GUIDELINES FOR COUNSEL IN DEATH CASES (1989) (adopting the ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (1998) [hereinafter 1989 GUIDELINES] and urging the adoption of the of the Guidelines by any entity providing counsel in capital cases); ABA, REPORT SUBMITTED WITH RECOMMENDATION ON REPRESENTATION PLAN FOR HABEAS CORPUS IN DEATH PENALTY CASES (1987), *available at* http://www.abanet.org/legalservices/downloads/sclaid/125.pdf ("[T]he American Bar Association urges each federal district and circuit court to adopt and each federal circuit judicial council to approve a plan for providing representation in federal habeas corpus death penalty proceedings which includes," among other things: (1) "appointment and compensation of counsel, and of expert legal consultants if requested by counsel, in every federal habeas corpus death penalty case whether or not the petition was prepared, or counsel previously appeared, pro bono;" (2) "the appointment for federal habeas corpus proceedings of eligible attorneys who provided representation in the state post-conviction proceedings for the same case, unless the petitioner objects for cogent reasons, there is evidence of a conflict, or other good cause appears for appointing new counsel;" (3) "the appointment of two attorneys in every federal habeas corpus death penalty case as counsel of record;" (4) "pre-assignment screening of attorneys considered for appointment to such cases to assure that only trained and experienced attorneys are appointed;" and (5) "support for creation of state and regional centers to provide expert advice and assistance to appointed counsel in federal habeas corpus death penalty litigation." The ABA also urged the federal courts "to ensure the maximum extent of coordination and consistency concerning the standards and procedures governing appointment of counsel in state and federal post-conviction proceedings involving death penalty cases."); ABA, REPORT SUBMITTED WITH RECOMMENDATION ON APPOINTMENT OF TWO ATTORNEYS IN DEATH PENALTY CASES (1985), *available at* http://www.abanet.org/legalservices/downloads/sclaid/109.pdf (recommending that "two attorneys shall be appointed as trial counsel to represent the defendant" in a death penalty case); ABA, REPORT SUBMITTED WITH RECOMMENDATION ON RIGHT TO COUNSEL IN POST-CONVICTION DEATH CASES (1979), *available at* http://www.abanet.org/legalservices/downloads/sclaid/102b.pdf ("[T]he American Bar Association recommends that the United States Supreme Court adopt a rule providing for appointment of counsel to prepare petitions for discretionary review of state court convictions, including appropriate postconviction or clemency petitions if necessary, in death penalty cases where the defendant cannot afford to hire counsel," "offer to assist . . . in identifying qualified attorneys who are willing to accept appointment," and "recommend to Congress that the Criminal Justice Act . . . be amended to provide for the payment of adequate compensation to counsel . . . in state death penalty cases.").

5. *See, e.g.*, Brief of the ABA as Amicus Curiae in Support of Petitioner at 1-2, Medellin v. Texas, 2008 U.S. LEXIS 2912 (U.S. Mar. 25, 2008) (No. 06-984); Brief Amicus Curiae of the ABA in Support of Respondent at 1-3, Schriro v. Landrigan, 127 S. Ct. 1933 (2007) (No. 05-1575); Brief

Penalty Representation Project[7]—have been directed at identifying problems and working to improve the systems that provide counsel to indigent defendants. As stated in its 1990 Task Force Report:

> The American Bar Association is persuaded that the principal failings of the capital punishment review process today are the inadequacy and inadequate compensation of counsel at trial and the unavailability of counsel in state post-conviction proceedings. The absence of adequate representation not only deprives capital defendants and death-sentenced prisoners of a meaningful defense and of meaningful access to state post-conviction remedies, but also greatly aggravates and protracts the death penalty review process. Specifically, the lack and inadequacy of counsel in state capital proceedings forces state and federal post-conviction judges to: adjudicate cases on the basis of incomplete and often incomprehensible records; resolve manifold colorable claims of ineffective assistance of counsel; dispose of myriad procedural questions—including exhaustion of state remedies, procedural default, and successive petition issues—arising from the failure of counsel to notice and assert meritorious claims for relief; and

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of the ABA as Amicus Curiae in Support of Petitioner at 1, Bustillo v. Johnson, 548 U.S. 331 (2006) (No. 05-51); Brief of the ABA as Amicus Curiae in Support of Petitioner at 1-2, Medellin v. Dretke, 544 U.S. 660 (2005) (No. 04-5928); Brief Amicus Curiae of the ABA in Support of Petitioner at 1-4, Rompilla v. Beard, 545 U.S. 374 (2005) (No. 04-5462); Brief Amicus Curiae of the ABA in Support of the Respondent at 1-2, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633); Brief Amicus Curiae of the ABA in Support of the Petitioner at 1-4, Banks v. Cockrell, No. 02-8286 (U.S. July 11, 2003); Brief Amicus Curiae of the ABA in Support of Petitioner at 2-5, Wiggins v. Smith, 539 U.S. 510 (2003) (No. 02-311); Brief Amicus Curiae of the ABA in Support of Petitioner at 1, McCarver v. North Carolina, *cert. dismissed*, 533 U.S. 975 (2001) (No. 00-8727), *considered in* Atkins v. Virginia, 536 U.S. 304, 306 (2002); Motion of the ABA to File Brief as Amicus Curiae and Brief of Amicus Curiae in Support of Petitioner at 2, Gibson v. Head, *cert. denied*, 528 U.S. 946 (1999) (No. 99-77); Brief of Amicus Curiae ABA in Support of Petitioner at 2, Williams v. Taylor, 529 U.S. 362 (2000) (No. 98-8384).

6. The 1990 Report of the ABA Task Force on Death Penalty Habeas Corpus involved an intensive, national study of cases in which defendants had been sentenced to death that included an investigation of "the entire system of post-conviction review of capital convictions and sentences." Ira P. Robbins, ABA, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 13 (1990). The report concluded that "[c]ompetent and adequately compensated counsel from trial through collateral review is thus the *sine qua non* of a just, effective, and efficient death penalty system." *Id.* at 17.

7. The Death Penalty Representation Project was created in 1986. ABA, Death Penalty Representation Project, http://www.abanet.org/deathpenalty (last visited May 11, 2008). Its goals include "rais[ing] awareness about the lack of representation available to death row inmates, . . . address[ing] this urgent need by recruiting competent volunteer attorneys and . . . offer[ing] these volunteers training and assistance, . . . [and] work[ing] for systemic changes in the criminal justice system that would assure those facing death are represented at all stages of the proceedings from trial through clemency by qualified, adequately compensated counsel." *Id.*

grant constitutionally mandated relief and costly retrials in numerous cases.[8]

Since their approval in 2003, the revised ABA Guidelines have been recognized as national standards regarding the obligations of jurisdictions and defense counsel in capital cases.[9] They have provided important guidance to judges and defense counsel regarding the minimum requirements of competent and effective legal representation. Courts have increasingly turned to the ABA Guidelines when deciding whether defense counsel's performance met the requirements of the Sixth Amendment and delivered the "high quality" legal representation that each capital defendant and death-sentenced prisoner deserves.[10]

The revised edition of the ABA Guidelines greatly expanded and updated an earlier set that had been published in 1989.[11] In addition to taking into account intervening legal and case law developments,[12] the ABA Advisory Committee[13] 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. It has long been held that

8. Robbins, *supra* note 6, at 16 (footnote omitted).

9. "The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction." ABA GUIDELINES, *supra* note 1, at Guideline 1.1(A).

10. More than eighty state and federal death penalty cases, including cases decided by the United States Supreme Court, cite the ABA Guidelines as authority in cases in which the performance and obligations of defense counsel are considered. *See* ABA, Cases that Cite to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, http://www.abanet.org/deathpenalty/resources/docs/List_of_Cases_that_cite_to_GL_MAR_2008.doc (last visited May 11, 2008).

11. *See* ABA GUIDELINES, *supra* note 1, at Introduction; *see generally* 1989 GUIDELINES, *supra* note 4.

12. Among these was the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in 1996 which, *inter alia*, established strict deadlines for the filing of federal habeas petitions, limited the scope of review of state court decisions, severely restricted the ability of prisoners to file successive petitions, and generally limited the availability of federal habeas for state prisoners. *See* ABA GUIDELINES, *supra* note 1, at Guideline 1.1, commentary n.34.

13. Members of the ABA Advisory Committee 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. For a complete list of Advisory Committee Members, see *id.* at Acknowledgements.

"[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender."[14] Mitigation evidence took on a more urgent importance after the Supreme Court reinstated the death penalty in 1976. In *Gregg v. Georgia*,[15] the United States Supreme Court believed it could eliminate concern about the arbitrariness of the death penalty with a bifurcated trial procedure.[16] The Court sought to guide and narrow a jury's discretion in a discrete penalty phase and permit it to consider specific information about the appropriateness of sentencing a particular defendant to death:

> Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. . . . To the extent that this problem is inherent in jury sentencing, it may not be totally correctable. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.[17]

The Court went on to explain:

> [T]he jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime).[18]

To achieve the objective of "individualizing sentencing"[19] in capital cases, therefore, it was clear that defense counsel had to develop and present a detailed picture of the defendant's background, character, and

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14. Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937); *see also* Williams v. Oklahoma, 358 U.S. 576, 585 (1959); Williams v. New York, 337 U.S. 241, 247 (1949). Otherwise, "the system cannot function in a consistent and a rational manner." ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO: SENTENCING ALTERNATIVES AND PROCEDURES 201 (Approved Draft 1968); *see* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 144 (1967); MODEL PENAL CODE § 7.07 cmt. 1 (Tentative Draft No. 2, 1954).

15. 428 U.S. 153 (1976).

16. *Id.* at 195.

17. *Id.* at 192 (citation omitted); *see also* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 14, at 46-47; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *supra* note 14, at 145.

18. *Gregg*, 428 U.S. at 197.

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

life experiences to the jury. To present a complete portrait, however, counsel had to move well beyond the limited statutory factors that most capital sentencing statutes identified.[20] Experience taught them that the best mitigation evidence was found on front porches in conversations with family members, and in discussions with school teachers who remembered the neglected and abused children from their classes years earlier. There was no blueprint for the mitigation investigation that had to occur for a client's life to be saved. But these compelling details had the potential to transform the prosecution's "monsters" and "cold-blooded killers" into tragic figures for whom juries could find mercy.[21] Mitigation evidence took center stage in death penalty cases as potentially the *only* way defense counsel could humanize their client and save his life.

It was surprising, therefore, that notwithstanding its literal life and death significance, the ABA Advisory Committee found many cases where a thorough and independent investigation and presentation of mitigation evidence had not occurred.[22] Worse, appellate decisions left no doubt that the result would have been different if the jury had heard the mitigation evidence at trial.[23] Given the general unavailability of

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20. Statutory mitigating factors generally track the language proposed by the Model Penal Code. MODEL PENAL CODE § 210.6(3)-(4) (Proposed Official Draft 1962), *quoted with approval in Gregg*, 428 U.S. at 193 n.44. For examples of statutes that track the mitigating factors of the Model Penal Code, see 18 U.S.C. § 3592(a) (2000); ALA. CODE § 13A-5-51 to -52 (2006); ARIZ. REV. STAT. ANN. § 13-703(G) (2007); ARK. CODE ANN. § 5-4-605 (2006); CAL. PENAL CODE § 190.3 (West 1999); COLO. REV. STAT. ANN. § 18.1.3-1201(4) (West 2007); FLA. STAT. ANN. § 921.141(6) (West 2006); 720 ILL. COMP. STAT. ANN. § 5/9-1(c) (West Supp. 2007); IND. CODE ANN. § 35-50-2-9(c) (West 2004 & Supp. 2007); KAN. CRIM. CODE ANN. § 21-4626 (West Supp. 2007); KY. REV. STAT. ANN. § 532.025(2)(b) (LexisNexis 1999 & Supp. 2007); LA. CODE CRIM. PROC. ANN. art. 905.5 (1997); MD. CODE. ANN., CRIM. LAW § 2-303(h)(2) (LexisNexis 2002 & Supp. 2007); MISS. CODE ANN. § 99-19-101(6) (West 2006); MO. ANN. STAT. § 565.032(3) (West 1999); MONT. CODE ANN. § 46-18-304 (2007); NEB. REV. STAT. ANN. § 29-2523(2) (LexisNexis 2003); NEV. REV. STAT. ANN. § 200.035 (West 2000); N.H. REV. STAT. ANN. § 630.5(VI) (2007); N.M. STAT. ANN. § 31-20A-6 (West 2003); N.Y. CRIM PROC. LAW § 400.27(9) (McKinney 2005); N.C. GEN. STAT. § 15A-2000(f) (2007); OHIO REV. CODE ANN. § 2929.04(B) (West 2006); 42 PA. CONS. STAT. ANN. § 9711(e) (West 2007); S.C. CODE ANN. § 16-3-20(C)(b) (2003); TENN. CODE ANN. § 39-13-204(j) (2006); UTAH CODE ANN. § 76-3-207(4) (2003); VA. CODE ANN. § 19.2-264.4(B) (2004); WASH. REV. CODE ANN. § 10.95.070 (West 2002); WYO. STAT. ANN. § 6-2-102(j) (2007); OKLA. UNIFORM JURY INSTRUCTIONS: CRIMINAL OUJI-CR 4-79 (Vernon's 2d ed. 2007).

21. *See* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 300-03 (1983).

22. *See* ABA GUIDELINES, *supra* note 1, at Guideline 10.7, commentary n.205.

23. *See id.*; *see also* 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, 716-17 (2008) (quoting Williams v. Taylor, 529 U.S. 362, 395, 398 (2000)); Mark E. Olive & Russell Stetler, *Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction*, 36 HOFSTRA L. REV. 1067, 1069-

competent counsel in post-conviction proceedings,[24] the number of defendants affected by the failure to find and present mitigation evidence at trial was incalculable.

It became apparent that the reason for this failure was not that lawyers did not understand that the development of mitigation evidence was critical. It was that most of them just did not know how to do it properly. Lawyers are generally unprepared and ill-equipped to discover mitigation evidence without expert assistance. The special skills and abilities necessary to obtain the sensitive and sometimes embarrassing evidence about a client's life experiences from family members and other sources are often beyond the abilities of even the most skilled courtroom lawyer.[25] While there is no question that obtaining mitigation evidence and presenting it at trial and in post-conviction proceedings remains the ultimate responsibility of defense counsel, it is equally clear that the assistance of a mitigation specialist is necessary to achieve that objective.

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73 (2008) (discussing Rompilla v. Beard, 545 U.S. 374 (2004); Wiggins v. Smith, 539 U.S. 510 (2003); *Williams*, 529 U.S. at 362).

24. *See* Eric M. Freedman, Giarratano *Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1086-88 (2006).

25. *See* ABA GUIDELINES, *supra* note 1, at Guideline 4.1, commentary ("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."); SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Guideline 5.1(C)-(D), *in* 36 HOFSTRA L. REV. 677 (2008) [hereinafter SUPPLEMENTARY GUIDELINES]. As outlined in the Supplementary Guidelines:

> Mitigation specialists must be able to identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information. They must be skilled interviewers who can recognize and elicit information about mental health signs and symptoms, both prodromal and acute, that may manifest over the client's lifetime. They must be able to establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of sensitive information and to assist the client with the emotional impact of such disclosures. They must have the ability to advise counsel on appropriate mental health and other expert assistance. . . . The mitigation specialist must be able to furnish information in a form useful to counsel and any experts through methods including, but not limited to: genealogies, chronologies, social histories, and studies of the cultural, socioeconomic, environmental, political, historical, racial and religious influences on the client in order to aid counsel in developing an affirmative case for sparing the defendant's life.

Id.

The ABA addressed this problem in the revised ABA Guidelines with the concept of the "defense team."[26] It made clear the absolute requirement that capital defenders retain the assistance of a mitigation specialist as an essential member of any defense team.[27] The ABA Guidelines also require jurisdictions to provide the necessary funding to the defense to hire a mitigation specialist.[28] The ABA's strong endorsement of the value and importance of mitigation specialists in capital cases and post-conviction proceedings helped cement their role in capital cases.

The *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* ("Supplementary Guidelines")[29] 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.[30] Most 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

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26. ABA GUIDELINES, *supra* note 1, at Guideline 4.1. The "defense team" should comprise a minimum of two attorneys, one investigator, and one mitigation specialist. *Id.* at Guideline 4.1(A)(1).

27. *Id.* at Guideline 4.1.

28. *Id.* at Guideline 9.1.

29. SUPPLEMENTARY GUIDELINES, *supra* note 25.

30. *See id.* at Guideline 4.1(A)-(B). The Supplementary Guidelines describe the duties of the mitigation specialist,

> In performing the mitigation investigation, counsel has the duty to obtain services of persons independent of the government and the right to select one or more such persons whose qualifications fit the individual needs of the client and the case. . . . Counsel has a duty to hire, assign or have appointed competent team members; to investigate the background, training and skills of team members to determine that they are competent; and to supervise and direct the work of all team members. Counsel must take whatever steps are necessary to conduct such investigation of the background, training and skills of the team members to determine that they are competent and to ensure on an ongoing basis that their work is of high professional quality.

Id.

ABA Guidelines began when they first described the unique role and responsibilities of mitigation specialists.[31]

For volunteer attorneys recruited by this Project[32] and other counsel inexperienced in capital litigation, the depth and scope of an investigation that meets the demands of the ABA Guidelines and Supplementary Guidelines can prove daunting.[33] This task is made harder with the realization that the vast majority of the men and women who are charged with or convicted of capital crimes have backgrounds of violence, abuse, and neglect. As an essential part of any capital case investigation, families that have carefully hidden shameful secrets of incest, abuse, alcoholism, and mental illness for generations must now be persuaded to disclose these details. It is a difficult and intimidating process. These are not secrets that will be revealed to strangers on the first visit, or even perhaps the third or fourth. Yet the damaging and destructive nature of these secrets is the very evidence that might convince a jury to spare a client's life.

The crisis of counsel that exists in the death penalty system means that we must rely on the good will and assistance of members of the private bar to represent death row prisoners without counsel.[34] Many of the volunteer lawyers that I recruit have never handled a death penalty case before.[35] Developing mitigation evidence and making a case for the life of their client is one of the most important tasks defense lawyers

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31. ABA GUIDELINES, *supra* note 1, at Guideline 4.1(B), commentary.

32. For a list of volunteer firms recruited by the ABA Death Penalty Representation Project since 1998, see ABA, Volunteer Law Firms Death Penalty Representation Project, http://www.abanet.org/deathpenalty/participatingfirms/home.shtml (last visited May 11, 2008).

33. Daniel S. Brennan is a volunteer lawyer from DLA Piper who was recruited by the Project to represent a death-sentenced man without counsel in a southern jurisdiction. "We really were grasping for where to start," said Brennan about beginning the mitigation investigation without the assistance of a skilled and experienced mitigation specialist. After a mitigation specialist joined the defense team, they found evidence to support the claim that their client was mentally retarded and succeeded in obtaining an evidentiary hearing on the question of the client's eligibility for a death sentence. "We had to learn to keep an open mind," said Brennan.

> We didn't always know where to look and what we should be looking for. Our immediate reaction to some evidence was that it might not be useful; but then she'd turn it around and help us understand how it would help our case. Often it would lead to other evidence that was useful. She helped us map out a strategy and understand the case we needed to make for our client. I know we would not have been savvy enough to understand that without her assistance.

E-mail from Daniel S. Brennan, Partner, DLA Piper US LLP, to Robin M. Maher, Director, ABA Death Penalty Representation Project (Mar. 4, 2008, 18:07) (on file with author).

34. *See* Robin M. Maher, *Volunteer Lawyers and Their Extraordinary Role in the Delivery of Justice to Death Row Prisoners*, 35 U. TOL. L. REV. 519 (2004).

35. However, while many volunteer lawyers have not previously handled a death penalty case, it is nonetheless possible for these lawyers to provide adequate representation. *See id.* at 521.

must handle. But unlike the law of capital punishment, which they will eventually learn and master, developing mitigation evidence that may result in a different sentence for their client is not easy for volunteer lawyers, even when they are among the country's top litigators. For out-of-state lawyers who volunteer far from home, even the local accents are sometimes hard to understand. As a matter of survival, many families and communities have learned to conceal information about illegal activity and harmful behavior from strangers. This compelling and potentially life-saving evidence is often invisible to the untrained eye.

It is in this way that mitigation specialists—skilled in interviewing techniques, experienced in developing social histories, knowledgeable about cultural and racial differences, expert in recognizing the signs of mental disorders and impairments—do what most lawyers are simply unable to do. The evidence that a competent mitigation expert gathers will provide defense counsel with the tools that can save her client's life—counsel's ultimate responsibility. Without this evidence, it is impossible for defense counsel to represent her client effectively.[36]

The Supplementary Guidelines assist defense counsel in choosing and supervising the work of mitigation specialists throughout the course of the investigation. For inexperienced counsel, this guidance will be indispensable. Hiring a mitigation specialist who does not have appropriate training, skills, and experience is as disastrous as not hiring a mitigation specialist at all. In either case, the evidence is unavailable. The results of any mitigation investigation are only as good as the person seeking the evidence. Mitigation specialists must know where to look, who to talk to, and how to analyze the information properly. The Supplementary Guidelines provide important information to defense counsel about who they should hire and what mitigation specialists should do during the course of an investigation.[37]

Like other professionals, mitigation specialists must be given the necessary tools to perform competently. Judges who use the Supplementary Guidelines will understand why they must ensure adequate funding and avoid placing unreasonable limits on the ability of mitigation specialists to interview witnesses and travel for in-person interviews.[38] Appellate judges will better understand the mitigation

36. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510 (2003) (holding that defense counsel's failure to present existing mitigation evidence fell short of professional standards); *see also supra* note 22-23 and accompanying text.

37. SUPPLEMENTARY GUIDELINES, *supra* note 25, at Guidelines 5.1, 10.11.

38. *See* Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case*, 36 HOFSTRA L. REV. 819, 823-27 (2008).

function and what should have happened at trial.[39] The Supplementary Guidelines provide a detailed description of the scope and breadth of a mitigation investigation, a process that may span multiple jurisdictions and involve several generations of a family.[40] Mitigation investigations must begin immediately and often require months of intense effort to gather the necessary information.[41] Restrictions that limit the ability of mitigation specialists to meet the requirements of independence and thoroughness may ultimately prove fatal to the client.

Unsurprisingly, an increased understanding of the value provided by mitigation specialists has resulted in an unmet demand for the services of these skilled professionals. In many jurisdictions, there is a desperate need for trained and experienced mitigation specialists to be available to defense counsel. I often receive calls asking for referrals to mitigation specialists, and the volunteer lawyers I recruit rely on me to find the necessary experts. Too often I must tell them that there are not enough trained and experienced mitigation specialists for all those who need them.

The Supplementary Guidelines can be used to create training programs and to recruit gifted and interested individuals to enter this professional field. This development should be a priority for the criminal justice community. It is only with the assistance of skilled mitigation specialists that we can finally deliver on the promise of competent legal representation for all capital defendants.

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In a previous article for the *Hofstra Law Review*, I wrote about the importance of the "guiding hand of counsel" in death penalty cases and the urgent need for reform of the systems that provide counsel to indigent defendants.[42] The most effective way to increase accuracy and reduce the number of wrongful convictions[43] is to achieve this reform.

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39. *See* William M. Bowen, Jr., *A Former Alabama Appellate Judge's Perspective on the Mitigation Function in Capital Cases*, 36 HOFSTRA L. REV. 805 (2008) (describing a retired appellate judge's experiences with, and appreciation of, defense teams in capital cases).

40. *See* SUPPLEMENTARY GUIDELINES, *supra* note 25, at Guideline 10.11.

41. *See* O'Brien, *supra* note 23, at 747 n.257; Olive & Stetler, *supra* note 23, at 1078-80.

42. *See* Robin M. Maher, *'The Guiding Hand of Counsel' and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV 1091, 1091-95 (2003).

43. As of February 2008, 127 people in 26 states have been released from death row since 1973 with evidence of their innocence. Death Penalty Information Center, The Innocence List, http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (last visited May 11, 2008).

The unwillingness of too many death penalty jurisdictions to do so remains one of the most shameful and profound failures of our criminal justice system. As the ABA Task Force stated in 1990:

> [C]apital litigation in the United States today too often begins with poor legal representation. Thereafter, the petitioner, the state, and society pay the price as each successive stage of the case becomes more complicated, more protracted, and more costly. Poor representation after the trial is also not uncommon, and it, too, imposes costs—in terms of both efficiency and fairness—at each successive stage of the litigation. The goals of better, more efficient, and more orderly justice can be achieved when the quality of legal representation at all stages of capital cases is improved.[44]

Our experience in death penalty cases has taught us a great deal over the years. We now understand that effective legal representation requires the work and commitment of a defense team of skilled professionals, including a mitigation specialist. We know that a pool of expertise and skill is needed to competently perform the high-wire act of defending a human being on trial for his life. And we appreciate the significant difference that effective legal representation makes in determining an outcome of life or death.

The Supplementary Guidelines join the ABA Guidelines as important tools for all those who seek to ensure justice for the men and women on death row. They will enhance the work of capital defenders and mitigation specialists. They will inform jurisdictions that must make decisions about the resources and assistance that defense teams require. They will educate judges who have questions about mitigation evidence and the professionals who develop it. While we remain far from our objective of ensuring justice and fairness for all those facing possible execution, the Supplementary Guidelines further our progress toward reaching that goal.

44. Robbins, *supra* note 6, at 27.