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Arbitrary Death: An Empirical Study of Mitigation

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ARBITRARY DEATH: AN EMPIRICAL STUDY OF MITIGATION

EMILY HUGHES[*]

ABSTRACT

The Supreme Court has long viewed mitigation evidence as key to saving the death penalty from constitutional challenge. Mitigation evidence about a capital defendant's life history, combined with other procedural protections, is thought to alleviate arbitrariness in juries' decisions of whether a defendant deserves to die. This Article presents original empirical research studying that hypothesis. Interviews with thirty mitigation specialists who have represented over 700 capital clients in twenty-five death penalty states reveal that despite the Supreme Court's hope, mitigation evidence has not alleviated arbitrariness in death penalty decisions. Instead, new arbitrariness enters the system through the process of gathering mitigation evidence and presenting it to juries. This Article therefore concludes that mitigation must be reformed if it is to succeed in eliminating arbitrariness in capital punishment decisions. Without such reform, the death penalty will remain unconstitutionally arbitrary despite mitigation.

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* Professor of Law and Bouma Fellow in Law, University of Iowa College of Law. I would like to thank the thirty mitigation specialists who gave so generously of their time and expertise in allowing me to interview them for this research. Thanks also to Susan Appleton, Cheryl Block, Adrienne Davis, Margareth Etienne, Katherine Goldwasser, Rebecca Hollander-Blumoff, Amy Hughes, Peter Joy, Andrea Lyon, Todd Pettys, Mary Prosser, Song Richardson, Laura Rosenbury, and the faculties of Washington University School of Law and the University of Iowa College of Law for invaluable comments at different stages of the project. I also thank research assistants Susan Elgin, Glenn Hui, Elizabeth Klein, Joshua Pierson, Bradon Smith, Tiffany Spoor, and Amber Woodward for tremendous work; participants at the International Legal Ethics Forum at Stanford Law School for their insight; the editorial staff of the Washington University Law Review, and especially William Osberghaus, for their diligent work improving the article in all respects; Andrew Martin and the Center for Empirical Research in the Law at Washington University for extremely generous support; and the Center for the Study of Ethics and Human Values at Washington University for an early grant launching this project. My heartfelt thanks as well to the Israel Treiman Fellowship and especially to my former dean, Kent Syverud, for his gracious and steadfast support of the research in this Article. And finally, my sincere thanks to the late Professor David C. Baldus, who reviewed an earlier draft with meticulous and gracious care. I am deeply grateful to him.

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INTRODUCTION

A capital jury's opportunity to consider mitigating evidence is one of the critical procedures the Supreme Court has endorsed to alleviate arbitrariness in the jury's decision of whether a defendant deserves to die.[1]

1. *See* Gregg v. Georgia, 428 U.S. 153, 193, 206–07 (1976) (identifying mitigation as one of the key components of the new death penalty statutes that the Court found constitutional); Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 835–36 (2008) (noting irony in the fact that *Gregg* explicitly identified "mitigation" as a key component of the "new and improved death penalty statutes that the Court found constitutional," even though no mitigation evidence had been presented in *Gregg*); Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1092–93 & n.9 (2003) (explaining that the principle that "a statute also must permit the

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This Article presents original empirical research suggesting that the system of gathering such evidence about a defendant's life history and presenting it to juries is deeply flawed. Interviews with thirty mitigation specialists who have represented over 700 capital defendants in twenty-five death penalty states reveal that mitigation operates in an arbitrary manner.[2] Mitigation has thus introduced new forms of arbitrariness into the death penalty instead of alleviating it altogether.

After *Furman v. Georgia*[3] invalidated existing death penalty statutes because unguided discretion had led to the arbitrary imposition of death sentences,[4] roughly two-thirds of the states redrafted their capital sentencing statutes to limit jury discretion and thereby avoid arbitrary results.[5] Without endorsing a specific sentencing scheme, when reviewing

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sentencer to consider mitigating circumstances as part of an individualized sentencing determination" "was at the core of the Court's rulings"); *see also* Lockett v. Ohio, 438 U.S. 586 (1978) (discussing mitigation); Roberts v. Louisiana, 428 U.S. 325, 333 (1976) (same); Woodson v. North Carolina, 428 U.S. 280 (1976) (same). As for the Court's concern with discrimination, in *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court observed that even though statistical evidence "indicates a discrepancy that appears to correlate with race," *id.* at 312, the Court was willing to tolerate some racism within the capital sentencing process because "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system." *Id.* The Court further noted that "[t]he discrepancy indicated by the Baldus study is 'a far cry from the major systemic defects identified in *Furman*.'" *Id.* at 313 (quoting Pulley v. Harris, 465 U.S. 37, 54 (1984)); *see also* Emily Hughes, *Mitigating Death*, 18 CORNELL J.L. & PUB. POL'Y 337, 347 (2009) ("In light of *Furman*, states were forced to examine their death penalty procedures before returning to the business of capital prosecution.").

2. Consistent with other scholars, *see, e.g.*, Haney, *supra* note 1, this Article uses the words "mitigation," "mitigation evidence," and "mitigating evidence" interchangeably. In addition, as explained in the methodology discussion in Part II.A, at the time the interviews were conducted thirty-five states had state death penalty systems.

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

4. *See Furman*, 408 U.S. at 294–95 (Brennan, J., concurring) (observing that the "procedures in death cases, rather than resulting in the selection of 'extreme' cases for this punishment, actually sanction an arbitrary selection"); *id.* at 309–10 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *id.* at 427 n.11 (Powell, J., dissenting) (describing Justice Douglas's concurrence as concluding that "capital punishment is unacceptable precisely because the procedure governing its imposition is arbitrary and discriminatory"); *see also* Dale E. Ho, *Silent at Sentencing: Waiver Doctrine and a Capital Defendant's Right to Present Mitigating Evidence After* Schriro v. Landrigan, 62 FLA. L. REV. 721, 736 (2010) (noting that *Furman* "imposed a *de facto* nationwide moratorium on the death penalty in 1972 because of the seemingly random imposition of capital punishment").

5. Pulley v. Harris, 465 U.S. 37, 44 (1984); *Gregg*, 428 U.S. at 195 (highlighting importance of "a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance"); *see also* WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 198 (2006) ("The two primary post-*Furman* reforms involved providing a penalty trial at which the prosecution and the defense could introduce evidence of aggravating and mitigating circumstances relating to the defendant's offense and personal characteristics and establishing guidelines that would instruct the jury to make its penalty determination by weighing the relevant aggravating and mitigating circumstances.").

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the states' newly crafted statutes the Supreme Court noted that its concerns about arbitrariness were "best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information."[6]

States interpreted this language to mean that capital sentencing decisions were unconstitutionally arbitrary if they were not guided by statutes that allowed for individualized consideration of the defendant's crime (aggravating evidence), as well as individualized consideration of the particular circumstances of the defendant's life (mitigating evidence).[7] States therefore redrafted their death penalty statutes to include consideration of both aggravating and mitigating evidence.[8] As the Court reviewed these newly revised statutes throughout the mid to late 1970s, the Court largely concluded that because states had added consideration of aggravating and mitigating evidence, capital sentencing decisions were no longer arbitrary.[9] Nonetheless, Justice Brennan vehemently disagreed in a strongly worded dissent in *Pulley v. Harris*, criticizing the Court for "deluding" itself by thinking that the death penalty was no longer arbitrarily imposed.[10]

The interviews with contemporary mitigation specialists that form the empirical basis of this Article underscore the continuing relevance of Justice Brennan's concern. The interviews reveal ways in which the imposition of the death penalty still rests on unconstitutionally arbitrary underpinnings.

These findings present a contemporary perspective that builds on my own prior research as well as that of other scholars.[11] The Capital Jury

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6. *Gregg*, 428 U.S. at 195.

7. Stevenson, *supra* note 1, at 1092–93 ("What was clear, in the aftermath of [post-*Furman*] decisions, was that death penalty statutes were not per se unconstitutional; that any such statute must guard against arbitrariness by establishing standards to guide the sentencer's discretion; and that such a statute also must permit the sentencer to consider mitigating circumstances as part of an individualized sentencing determination." (footnotes omitted)).

8. WHITE, *supra* note 5, at 198.

9. *Pulley*, 465 U.S. at 60 (Brennan, J., dissenting) ("Thus began a series of decisions . . . in which, with some exceptions, it has been assumed that the death penalty is being imposed by the various States in a rational and nondiscriminatory way.").

10. *Id.* ("[T]he Court is simply deluding itself, and also the American public, when it insists that those defendants who have already been executed or are today condemned to death have been selected on a basis that is neither arbitrary nor capricious, under any meaningful definition of those terms.").

11. For example, in previous research I discussed the specialized use of social workers as mitigation specialists on capital defense teams. By examining critical issues that arise during the pre-trial investigation that mitigation specialists conduct, I explored the inherent complexity that the Court's mitigation jurisprudence has brought to the death penalty arena. Hughes, *supra* note 1, at 341; *see also* John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation:*

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Project is a national consortium of researchers studying how jurors in capital cases make the decision of whether to sentence a capital defendant to life or death.[12] Capital Jury Project researchers have interviewed more than 1,200 jurors who actually made the life or death sentencing decisions for more than 350 capital trials in more than fourteen different states.[13] "Despite the reforms inspired by *Furman* and approved in *Gregg*," the Capital Jury Project's research "demonstrates that jurors are not deciding who deserves the death penalty in the way the [United States] Supreme Court has held the constitution requires."[14]

In the same way that the Capital Jury Project has focused on jurors, so other scholars have focused on attorneys. Six years ago, Welsh S. White published a study based on interviews with thirty capital defense attorneys.[15] White found that post-*Furman* reforms have heightened the importance of attorneys' skills on the jury's capital sentencing decision: the worse the attorney's skills, the more certain a defendant will be sentenced to death.[16] White further explained that because thorough investigation often differentiates the most effective capital defense attorneys from other lawyers,[17] a capital defendant assigned a poorly skilled attorney who failed to conduct a thorough mitigation investigation is more likely to receive a death sentence.[18] White concluded, "[T]here is thus no reason to believe that the post-*Furman* reforms have diminished or will diminish the extent to which the death penalty will be arbitrarily applied."[19] Even though White identified a critical link between a defense

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The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation, 36 HOFSTRA L. REV. 1035, 1065 (2008) (drawing on empirical data on mitigation to explore the nature of mitigation and how it relates to capital punishment and stating, *inter alia*, that "mitigating evidence is at the core of how our legal system structures the death penalty decision, and a juror who gives it voice is not only operating within the law, but with the law's blessing").

12. Extensive information about the Capital Jury Project, including a more complete description of it and a list of publications generated by the researchers working with it, can be found at http://www.albany.edu/scj/13192.php (last visited Jan. 14, 2012).

13. William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51 (2003) (describing number of interviews conducted as of the writing of that article, although the research has been ongoing and many more interviews have been conducted since this article was published).

14. *Id.* at 51 (describing the principle findings of the Capital Jury Project research and also contextualizing that research by describing the classic 1966 study by Harry Kalven and Hans Zeisel, *The American Jury*, in which Kalven and Zeisel found substantial evidence of arbitrariness in the sentencing of capital juries).

15. WHITE, *supra* note 5, at 10.

16. *Id.* at 198–202.

17. *See* Sean D. O'Brien, *Capital Defense Lawyers: The Good, The Bad, and the Ugly*, 105 MICH. L. REV. 1067, 1068 (2007).

18. WHITE, *supra* note 5, at 198–200.

19. *Id.* at 199.

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attorney's ability to use mitigating evidence at trial and the exhaustive mitigation investigation that must precede the trial, he did not focus on the process of conducting the mitigation investigation itself.[20]

This Article moves beyond jurors and attorneys to look at mitigation specialists. Mitigation specialists uncover extensive information about the life of the capital defendant from the defendant's family, teachers, friends, and almost anyone who has ever been part of the defendant's life. They do this work to construct a psychosocial history, or life history, of the capital defendant. This life history helps defense counsel explain to jurors why punishment less than death is appropriate for the particular capital defendant.[21] In addition to their critical importance during the sentencing phase, mitigation specialists ensure that attorneys methodically and thoughtfully integrate mitigating evidence into the overall preparation of the case, which includes pre-trial negotiations, jury selection, and the guilt/innocence phase.[22] Indeed, a thorough mitigation investigation is crucial to all stages of a capital case and is not relegated exclusively to the sentencing phase or even to the trial. The investigation of mitigating evidence can sometimes lead to pre-trial plea negotiations in which the defendant agrees to plead guilty and receive a sentence of life without parole.[23] Similarly, a prosecutor may decide to try the defendant for a first-degree murder rather than for a capital crime because of something the defense learned during the mitigation investigation.[24]

Despite the critical role that mitigation specialists serve, scholars have not studied their significance within the death penalty system.[25] This Article fills that gap. Through in-depth interviews with capital mitigation specialists nationwide, this Article explores what mitigation specialists encounter as they investigate a capital client's life history. For example, sometimes mitigation specialists have adequate funding to conduct

20. O'Brien, *supra* note 17, at 1069 (noting that "[i]t would have been helpful to hear how the dedicated lawyers portrayed in his book obtained the time and resources needed to assemble a competent defense team and thoroughly investigate the client's life history").

21. *See* Hughes, *supra* note 1, at 344–45.

22. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 959 (2003) [hereinafter *Guidelines*] ("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 . . . 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.").

23. *See Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 679 (2008) [hereinafter *Supplementary Guidelines*].

24. *See Guidelines*, *supra* note 22.

25. O'Brien, *supra* note 17, at 1069 (noting that even White provided "few details about the investigative process behind the successful defenses discussed in his book").

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detailed investigations of a capital client's life history, while other times mitigation specialists cannot conduct any investigation whatsoever because the judge will not approve their appointment on the case. By analyzing mitigation specialists' experiences, my research develops a critical corollary to White's thesis regarding the arbitrariness of the death penalty. My research suggests that because of the extreme disparity in the way mitigation investigations actually work, post-*Furman* reforms have not eliminated arbitrariness in capital sentencing decisions.[26]

Part I provides an overview of Supreme Court and select state precedent relevant to the intersection of arbitrariness and mitigation. Part II presents empirical evidence from an original qualitative study of thirty capital mitigation specialists. Following a brief description of the project design and methodology, this Part describes what mitigation specialists encounter when investigating and developing the life history of capital defendants. The interview data from this research reveal that even though mitigation specialists strive to conduct thorough investigations, they are often thwarted in their ability to do so. Part III analyzes how the experiences of mitigation specialists contribute to the arbitrariness with which the death penalty is administered and proposes reform. It concludes that reform is necessary to enable all capital defendants, in all death penalty jurisdictions, to receive constitutionally sound mitigation investigation and advocacy. Unless such mitigation reform is achieved, sentencers will risk imposing the death penalty arbitrarily and therefore unconstitutionally.

I. THE HISTORICAL CONTEXT OF CAPITAL MITIGATION

In order to situate this Article's findings within the historical context of capital mitigation, this Part begins with a brief analysis of some of the Court's fundamental capital cases. This analysis is divided into two time frames: (1) the Court's early post-*Furman* cases addressing mitigation, which span the late 1970s; and (2) the "second wave" of the Court's mitigation cases, beginning in 2000 and extending through the last day of the Court's 2009–2010 term. Following this analysis, the second section of this Part analyzes state court opinions to explore how two state jurisdictions—Arizona and Illinois—implemented the Court's mitigation precedent.[27]

26. *See* discussion of cases *infra* Part I.

27. As Part II.B explains, *infra*, because the caselaw interpreting the Supreme Court's mitigation cases developed in two very different ways in Arizona and Illinois, those two states are especially

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A. Supreme Court Cases: Mitigation as a Means to Temper Arbitrariness

Furman v. Georgia is a well known per curiam decision overturning three defendants' death sentences.[28] Although each justice wrote separately, the Court's subsequent jurisprudence later interpreted the opinions of Justices Stewart and White as representing the Court's holding.[29] Their opinions "focused on the infrequency and seeming randomness with which, under the discretionary state systems, the death penalty was imposed."[30] To this end, Justice Stewart noted the state death penalty systems at issue in *Furman* were unconstitutional because they permitted the death penalty to be "wantonly and . . . freakishly imposed."[31] Similarly, Justice White bemoaned death penalty systems which provided "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[32] In concluding that the death penalty statutes at issue violated the Eighth Amendment, Justice White's final observation was that "[l]egislative 'policy' is . . . necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly

useful focal points to understand the divergent ways state courts interpret the Court's mitigation cases. In addition, Arizona and Illinois have attributes that distinguish those states from other death penalty jurisdictions. Arizona's large volume of pending capital cases dwarfs the number of pending capital cases in other death penalty jurisdictions. *See* Arizona Supreme Court Capital Case Oversight Committee Minutes 2 (Mar. 5, 2009), *available at* http://www.azcourts.gov/Portals/74/CCTF/Minutes/min09-03.pdf (documenting that during the first seven months of fiscal year 2009, Maricopa County alone had approximately 130 pending capital cases). In contrast to the high volume of capital prosecutions in Arizona, Illinois had a moratorium on executions from 2000 until 2011, when it officially abolished the death penalty. *See* Ariane De Vogue & Barbara Pinto, *Illinois Abolishes Death Penalty; 16th State to End Executions*, ABCNEWS.COM (Mar. 9, 2011), http://abcnews.go.com/Politics/illinois-16th-state-abolish-death-penalty/story?id=13095912. During its eleven-year moratorium, Illinois prosecutors continued to charge and litigate capital cases, although defendants sent to death row following their convictions for capital murder could not be executed. *See Counties Use Illinois Capital Litigation Fund to Cover High Costs of the Death Penalty*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/node/2155 (last visited Jan. 14, 2012).

28. 408 U.S. 238 (1972) (per curiam). For further discussion regarding the Court's Eighth Amendment jurisprudence invalidating state systems in which death was arbitrarily imposed and the relationship between the Sixth Amendment requirement that capital defense counsel reasonably investigate mitigation, see Paul Litton, *The "Abuse Excuse" in Capital Sentencing: Is it Relevant to Responsibility, Punishment, or Neither?*, 42 AM. CRIM. L. REV. 1027 (2005).

29. *See* Litton, *supra* note 28, at 1040–41, 1041 n.40 (citing Justice Scalia's concurring opinion in *Walton v. Arizona*, 497 U.S. 639, 658 (1990), wherein Justice Scalia observes the impact of Justice Stewart's and Justice White's opinions in *Furman* on subsequent jurisprudence).

30. *Id.* at 1041 (quoting Walton v. Arizona, 497 U.S. 639, 658 (1990) (Scalia, J., concurring in part and concurring in the judgment)).

31. *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

32. *Id.* at 313 (White, J., concurring).

conferred upon them."[33] The cases discussed below highlight how mitigation evolved as one of the procedural tools the Court approved to help alleviate arbitrariness in the jury's decision of whether to sentence a defendant to death.

*1. Early Post-*Furman *Cases*

One of the first cases to reach the Court after *Furman* was *Gregg v. Georgia*,[34] which allowed the Court to examine Georgia's newly revised death penalty procedures. In upholding the constitutionality of Georgia's capital statute and affirming Gregg's death sentence, *Gregg* was one of the first cases to signal the importance of mitigation in the post-*Furman* era. The Court did so by noting that capital sentencing standards which include the concept of mitigation—as Georgia's sentencing scheme did in *Gregg*—"provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary."[35]

On the same day the Court decided *Gregg v. Georgia*, it also decided *Woodson v. North Carolina*.[36] In contrast to Georgia's inclusion of mitigation (as well as other procedures) as a way to make the imposition of death less arbitrary, North Carolina employed a different strategy: it made death the mandatory sentence for all persons convicted of first-degree murder.[37] In deciding that North Carolina's mandatory system constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments,[38] the Court explained: "[I]n 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

33. *Id.* at 314.

34. 428 U.S. 153 (1976).

35. *Id.* at 194–95; *see also* MODEL PENAL CODE § 201.6 cmt. 3, at 71 (The drafters of the Model Penal Code concluded "that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case.").

36. 428 U.S. 280 (1976). The Court also decided *Roberts v. Louisiana*, 428 U.S. 325 (1976), on the same day as *Woodson* and *Gregg*. *Roberts* contains largely the same language as *Woodson* to describe mitigating evidence: "The constitutional vice of mandatory death sentence statutes—lack of focus on the circumstances of the particular offense and the character and propensities of the offender—is not resolved by Louisiana's limitation of first-degree murder to various categories of killings." *Roberts*, 428 U.S. at 333 (finding that Louisiana's mandatory death sentence statute violated the Eighth and Fourteenth Amendments).

37. *Woodson*, 428 U.S. at 286–87.

38. *Id.* at 287, 305.

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part of the process of inflicting the penalty of death."[39] In other words, the Court struck down North Carolina's system as unconstitutional because it did not allow for individualized consideration of the circumstances of the offense or individualized consideration of the character and record of the individual offender—the mitigating evidence.

Two years later in *Lockett v. Ohio*,[40] the Court sounded a similar theme when it invalidated Ohio's death penalty statute because it narrowly limited the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors.[41] The Court concluded that the Eighth and Fourteenth Amendments "require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[42] In reaching this result, the Court stressed the importance of allowing jurors to consider mitigating evidence as a critical component of a constitutional death penalty scheme.[43]

Read together, *Gregg*, *Woodson*, and *Lockett* highlight the Court's early endorsement of mitigation as a component necessary to ensure "consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part"[44] of death penalty procedures. At the same time, the Court's endorsement of statutes that allowed jurors to consider mitigating evidence was not the same as requiring attorneys to present it.[45] For example, as Professor Craig Haney has observed, even though Georgia's newly enacted death penalty statute provided for the consideration of mitigating evidence—and even though the Court pointed to the statute's

39. *Id.* at 304.

40. 438 U.S. 586 (1978).

41. *Id.* at 589, 604–05.

42. *Id.* at 604 (footnote omitted). The Court stated that this applied to "all but the rarest kind of capital case." *Id*. With respect to this clause, the Court explained in a footnote that it expressed "no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder." *Id.* at 604 n.11.

43. *Id.* at 601 ("[T]o comply with *Furman*, sentencing procedures should not create 'a substantial risk that the [death penalty will] be inflicted in an arbitrary and capricious manner.'" (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976))); *see also* Woodson v. North Carolina, 428 U.S. 280, 286–87 (1976).

44. *Woodson*, 428 U.S. at 304. In *Lockett*, the Court found it "necessary to consider only her contention that her death sentence is invalid because the statute under which it was imposed did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." *Lockett*, 438 U.S. at 597.

45. Haney, *supra* note 1, at 851.

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inclusion of mitigation as a component of what rendered Georgia's newly drafted statute constitutional—Gregg's lawyers presented no mitigating evidence on Gregg's behalf.[46]

This absence of mitigating evidence was in fact not an anomaly within the Court's early capital cases. No mitigating evidence was presented at the trial underlying *Gregg*, and no mitigating evidence was presented in *McCleskey v. Kemp*,[47] a case in which the Court denied McCleskey relief by finding that he had failed to provide sufficient statistical evidence of racial bias in his case.[48] Likewise, in *Furman* itself, the defense presented no mitigating evidence. In all three of these fundamental capital cases, "there was literally *no* mitigation whatsoever presented to the jurors who sentenced the defendants to death."[49]

That the Court was not concerned with the failures of these lawyers to present mitigating evidence stands in stark contrast to how the Court's mitigation cases would later evolve.[50] It was not until twenty-four years after *Gregg* that the Court "finally reversed a capital case explicitly because trial counsel had failed to investigate and present available background or social history mitigation."[51] This 2000 case was *Williams v. Taylor*.[52] *Williams* marks the beginning of the second wave of Supreme Court cases clarifying the importance of capital mitigation.[53]

2. The Second Wave

After the Court's early post-*Furman* cases declared the importance of capital mitigation as a means to temper the arbitrariness *Furman* had denounced, a chasm existed between that recognition and what many attorneys actually investigated and presented in court.[54] In *Williams*, *Wiggins*, and *Rompilla*, the Court took decisive steps toward closing this

46. *See* Haney, *supra* note 1, at 835–36 (noting that no mitigation evidence had been presented in *Gregg*, *McCleskey*, and *Furman*).

47. 481 U.S. 279 (1987).

48. *Id.* at 313 (holding that "the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process"); *see also supra* note 1 (discussing *McCleskey*).

49. Haney, *supra* note 1, at 835.

50. *See* discussion *infra* Part I.A.2.

51. Haney, *supra* note 1, at 851.

52. 529 U.S. 362 (2000).

53. The cases in this second wave are discussed *infra* Part I.A.2.

54. *See* discussion *supra* Part I.A.1 (observing that the attorneys in *Gregg*, *McCleskey*, and *Furman* presented no mitigation on their client's behalf).

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chasm by showing that it would reverse a death sentence if defense counsel failed to conduct a thorough mitigation investigation.[55]

a. 2000–2009: Williams, Wiggins, *and* Rompilla

Williams v. Taylor[56] involved the death of a man authorities mistakenly believed had committed suicide until Williams confessed to the crime by sending the police a note from jail (where he was housed for a different crime).[57] Although Williams had sent the note anonymously, the police quickly determined that Williams had written it and charged him with capital murder.[58] In defending Williams at his capital trial, Williams' counsel failed to conduct a thorough mitigation investigation because they "incorrectly thought that state law barred access to [mitigation] records,"[59] and because they relied on the fact that Williams had turned himself over to authorities as a reason not to impose death.[60] In finding Williams' trial counsel ineffective,[61] the Court observed that defense counsel "did not begin to prepare for [the mitigation] phase of the [capital sentencing] proceeding until a week before the trial."[62] The Court ultimately concluded that the deficiencies in defense counsel's investigation "clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background."[63]

The Court made similar conclusions in *Wiggins v. Smith*.[64] There, it reversed Wiggins' death sentence by finding that it was impossible for

55. *See* Wood v. Allen, 130 S. Ct. 841, 853 (2010) (Stevens, J., dissenting) ("The lawyers' duty to conduct a thorough investigation of possible mitigating evidence is well established by our cases" (citing Porter v. McCollum, 130 S. Ct. 447, 452–53 (2009) (per curiam); Rompilla v. Beard, 545 U.S. 374, 387 (2005); Wiggins v. Smith, 539 U.S. 510, 522–23 (2003); Williams v. Taylor, 529 U.S. 362, 396 (2000); Strickland v. Washington, 466 U.S. 668, 688 (1984))).

56. 529 U.S. 362 (2000).

57. *Id.* at 367–68.

58. *Id.* Williams' note contained a reference to the unit of the local jail in which he was housed (the "I" unit). *Id.* at 367. When the police determined that Williams had written the note, they interrogated him about the murder and other acts he had confessed to in his note, and Williams provided further statements supporting his confession. *Id.* at 367–68; *see also* Hughes, *supra* note 1, at 352–53, 353 n.81 (discussing *Williams*).

59. *Williams*, 529 U.S. at 395.

60. *Id.* at 367–69.

61. *Id.* at 399. In order to establish ineffective assistance of counsel, an accused must show (1) that counsel's performance was so deficient that counsel was not functioning as the kind of counsel guaranteed by the Sixth Amendment of the United States Constitution, and (2) prejudice, by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687, 694–95 (1984).

62. *Williams*, 529 U.S. at 395; *see also* Hughes, *supra* note 1, at 352–53 (discussing *Williams*).

63. *Williams*, 529 U.S. at 396; *see also* Hughes, *supra* note 1, at 353 (discussing *Williams*).

64. 539 U.S. 510 (2003).

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Wiggins' attorneys to say that they had made a strategic decision to stop investigating mitigating evidence when they had not done enough minimal investigation to make tactical decisions about what to leave out and what to pursue in their mitigation investigation.[65] Included in the Court's analysis was its observation that "standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report."[66] Even though defense counsel could have easily secured funding to retain a mitigation specialist[67] to help prepare such a report, they chose not to do so, and the Court included this failure within its ineffectiveness analysis.[68]

In contrast to *Williams* and *Wiggins*, the final case in the trilogy emphasizing thorough mitigation investigation did not involve "defense counsel simply ignor[ing] their obligation to find mitigating evidence."[69] In *Rompilla v. Beard*,[70] defense counsel had made "a number of efforts"[71] to find mitigating evidence. These efforts included "interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase."[72] Despite counsel's efforts and despite the Court's concession that "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up,"[73] the Court found that Rompilla's counsel had failed to conduct a thorough mitigation investigation.[74] In so holding, the Court focused on defense counsel's failure to examine a court file containing information relating to a prior conviction that the prosecution intended to introduce as an aggravating factor at the sentencing phase.[75] The Court then explained that had counsel pursued that investigative lead, it would have found further mitigating evidence, and it would have also been able to anticipate how to defend against the aggravating information contained in the file.[76]

The reversals of capital convictions in these cases based on failure to thoroughly investigate mitigating evidence illustrate a significant change

65. *Id.* at 526.
66. *Id.* at 524.
67. The profession of a "mitigation specialist" is discussed *infra* Part II.B.1.
68. *Wiggins*, 539 U.S. at 524; *see also* Hughes, *supra* note 1, at 354–55 (discussing *Wiggins*).
69. Rompilla v. Beard, 545 U.S. 374, 381 (2005).
70. *Id.*
71. *Id.* at 381.
72. *Id.*
73. *Id.* at 383.
74. *Id.*
75. *Id.*
76. *Id.* at 383–86.

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from the days of *Gregg*, when the Court said nothing regarding defense counsel's failure to present mitigating evidence.[77] Indeed, the *Williams-Wiggins-Rompilla* trilogy has formed the cornerstone of the Court's emphasis that conducting a cursory investigation of mitigating evidence is not enough: the investigation must be "thorough."[78]

While the mandate to conduct thorough capital mitigation investigation was clear through *Williams*, *Wiggins*, and *Rompilla*, until its 2009–2010 term, the Court did not provide further guidance about what constitutes thorough mitigation investigation. It was therefore surprising when the Court produced a record seven opinions in mitigation cases in its 2009–2010 term, six of which allowed the Court to discuss the contours of the Court's mitigation investigation precedent.[79] In no other term had the Court come close to writing opinions in so many cases discussing capital mitigation investigation.[80] The section that follows highlights the import and interaction of these recent cases.

b. 2009–2010: The Supreme Court's 2009–2010 Term

Six of the cases the Court decided during its 2009–2010 term presented opportunities to discuss what constitutes thorough mitigation investigation. These six cases also provided opportunities for the Court to provide guidance as to how lower courts should determine whether a

77. *See* discussion *supra* Part I.A.1 (discussing *Gregg*, *McCleskey*, and *Furman*).

78. *See* Wood v. Allen, 130 S. Ct. 841, 853 (2010) (Stevens, J., dissenting); *supra* note 55.

79. The seventh case, not discussed here, is *Smith v. Spisak*, 130 S. Ct. 676 (2010). In *Spisak*, the Court examined two issues: the constitutionality of jury instructions that required the jury to consider in mitigation only those factors that it unanimously found to be mitigating, and whether the defense attorney's inadequate closing argument deprived the defendant of effective assistance of counsel. Regarding the jury instruction issue, the Court analyzed the totality of the jury instructions and decided that the state court's finding that the instructions were sufficient was neither contrary to nor constituted an unreasonable application of clearly established federal law. *Id.* at 684. Regarding the ineffective assistance in closing argument issue, the Court found that any assumed deficiencies in the closing argument did not raise a reasonable probability that but for counsel's deficient performance the result would have been different, so the state court's decision to reject Spisak's ineffective assistance of counsel claim was not an unreasonable application of clearly established law. *Id.* at 687–88.

80. In the 2005 term, the Court decided one case that upheld the imposition of death if mitigating and aggravating factors weigh equally. Kansas v. Marsh, 548 U.S. 163 (2006). In its 2006 term, the Court issued four opinions discussing mitigation, but only one of these opinions—*Schriro v. Landrigan*, 550 U.S. 465 (2007)—related to mitigation investigation. *Landrigan* involved a capital defendant who did not want his attorneys to present certain mitigating evidence at the sentencing phase of his trial and thus could not establish prejudice in their failure to conduct a thorough mitigation investigation. In its 2007 term, the Court decided no cases involving mitigation investigations. And in its 2008 term, the Court decided one mitigation case wherein it established that a state court could hold a rehearing to establish mental retardation without violating the Double Jeopardy clause. Bobby v. Bies, 556 U.S. 825 (2009).

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mitigation investigation was adequate and whether, if it were inadequate, it so prejudiced the defendant that it warrants reversal of the defendant's death sentence. Three of these opinions—*Wood v. Allen*,[81] *Bobby v. Van Hook*,[82] and *Wong v. Belmontes*[83]—discussed how mitigation investigations were adequate or did not prejudice the defendant even if they were inadequate. The other three cases—*Sears v. Upton*,[84] *Porter v. McCollum*,[85] and *Jefferson v. Upton*[86]—discussed case law and statutory provisions relevant to the potential inadequacy and prejudice of the mitigation investigations. This section analyzes how these recent cases reveal the Court's struggle to clarify its capital mitigation jurisprudence.

i. Constitutionally Adequate Investigations

Wood v. Allen, *Bobby v. Van Hook*, and *Wong v. Belmontes* all involve mitigation investigations in which the attorneys did not pursue or did not uncover some aspect of mitigation that was later discovered in post-conviction litigation. Despite these shortcomings, the Court nonetheless found that trial counsel's mitigation investigations were constitutionally adequate.

In *Wood v. Allen*, Holly Wood broke into his ex-girlfriend's home and killed her by shooting her as she lay in bed.[87] Three attorneys were appointed to represent Wood—two had "significant trial experience" and one "had been admitted to the bar for five months at the time he was appointed."[88] The attorneys with significant trial experience then put the inexperienced attorney in charge of the penalty phase of the trial.[89] After Wood was convicted and sentenced to death, the primary issue in the federal habeas proceedings was whether Wood's counsel had made a strategic choice not to present evidence of Wood's "mental retardation" to the jury.[90] The federal district court rejected the state court's factual determinations and found that counsel's decision had not been strategic

81. 130 S. Ct. 841 (2010).
82. 130 S. Ct. 13 (2009) (per curiam).
83. 130 S. Ct. 383 (2009) (per curiam).
84. 130 S. Ct. 3259 (2010) (per curiam).
85. 130 S. Ct. 447 (2009) (per curiam).
86. 130 S. Ct. 2217 (2010) (per curiam).
87. *Id.* at 845.
88. *Id.*
89. *Id.* at 846.
90. *Id.*; *see* Wood v. Allen, 465 F. Supp. 2d 1211, 1239 (M.D. Ala. 2006), *aff'd in part, rev'd in part*, 542 F.3d 1281 (11th Cir. 2008).

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and had thus constituted ineffective assistance of counsel.[91] After the Eleventh Circuit reversed,[92] the Supreme Court affirmed by stating that under federal habeas law, the state court's finding that counsel's decision had been strategic was "not an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings."[93] In so holding, the Court discussed the factual discrepancies in the evidence presented,[94] emphasizing that even though it might have been "debatable" whether counsel's decision was strategic, it was not "unreasonable" to conclude that it was.[95]

Similar to *Wood*, *Van Hook* also examined a limited capital mitigation investigation and determined that it was not unreasonable for the lower court to determine that counsel's decision to forego certain mitigation evidence was reasonable.[96] The murder in *Van Hook* came about after Robert Van Hook had gone to a bar that "catered to homosexual men, hoping to find someone to rob."[97] Van Hook approached the victim, drank with him for a few hours, then went to the victim's apartment, lured him into a vulnerable position, and killed him.[98] At the sentencing hearing, the defense called eight witnesses and Van Hook gave an unsworn statement.[99] In determining that the limited mitigation investigation was adequate, the Court contrasted counsel's actions to those in *Wiggins* and *Rompilla*. It found that "[t]his is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face,"[100] and that it was not a case in which such evidence "would have been apparent from documents any reasonable

91. *Wood*, 130 S. Ct. at 846. The facts the federal district court cited in support of this finding included that the inexperienced lawyer had written to an attorney at the Southern Poverty Law Center that he was "stressed out over this case and [did not] have anyone with whom to discuss the case, including the other two attorneys," and that he had told the judge that "he would request further psychological evaluation before the judge's sentencing hearing, even though the evaluation would come too late to be considered by the jury." *Id.*

92. *Id.* at 847.

93. *Id.* at 849. The Court did not reach the question of whether counsel's decision to forego additional mitigation investigation was "reasonable"—only that it was not unreasonable for the state court to conclude that it was. *Id.*

94. *Id.* at 849–50.

95. *Id.* at 850.

96. 130 S. Ct. 13, 19 (2009) (per curiam).

97. *Id.* at 15.

98. *Id.* (noting that Van Hook first strangled the victim until he was unconscious, killed him with a kitchen knife and mutilated his body, then attempted to cover his tracks by stuffing the knife and other items into the victim's body and smearing fingerprints he had left behind).

99. *Id.*

100. *Id.* at 19.

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attorney would have obtained."[101] Part of the Court's reasoning that counsel had complied with "prevailing professional norms"[102] in existence at the time of the trial included a critique of the Sixth Circuit's reliance on ethical guidelines for capital defense attorneys that had been published by the American Bar Association[103] eighteen years after Van Hook's trial.[104] The Court also stressed, "'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition."[105]

In contrast to *Wood* and *Van Hook*'s focus on whether the mitigation investigation was adequate, *Wong v. Belmontes*[106] presented a different inquiry: the federal courts agreed that the mitigation investigation was itself inadequate but disagreed whether that deficient mitigation investigation had constitutionally prejudiced Belmontes.[107]

Belmontes involved a murder committed in the course of a burglary. After killing the victim by "striking her in the head 15 to 20 times with a steel dumbbell bar," Fernando Belmontes and his accomplices "stole [the victim's] stereo, sold it for $100, and used the money to buy beer and drugs for the night."[108] Belmontes asserted that his attorney was constitutionally ineffective in limiting the evidence presented in

101. *Id.*

102. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984) (discussing concept of "prevailing professional norms").

103. *Van Hook*, 130 S. Ct. at 17. The Court also disagreed with Van Hook's insistence that "his counsel were ineffective even under the professional standards prevailing at the time." *Id.* at 18. The ABA *Guidelines* are discussed in more detail *infra* Part II.B.2.

104. *Van Hook*, 130 S. Ct. at 16–17 (criticizing the Court of Appeals' reliance on Sixth Circuit precedent for treating the *Guidelines* "not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel 'must fully comply'") (quoting Dickinson v. Bagley, 453 F.3d 690, 693 (6th Cir. 2006)).

105. *Id.* at 17 (citing *Strickland*, 466 U.S. at 688). Through *Van Hook*'s critique, the Court revealed its push-and-pull relationship with the ethical guidelines published by the American Bar Association. On the one hand, *Van Hook* illustrates that these guidelines may be "evidence of" what reasonably diligent attorneys would do. *Id.* On the other hand, the Court's critique signals that the Court is at times hesitant to use the guidelines—even as guides—to determine prevailing professional norms. *Id.* at 17 n.1 ("The narrow grounds for our opinion should not be regarded as accepting the legitimacy of a less categorical use of the Guidelines to evaluate post-2003 representation. For that to be proper, the Guidelines must reflect '[p]revailing norms of practice'. . . and must not be so detailed that they would 'interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions' . . . . We express no views on whether the 2003 Guidelines meet these criteria." (internal citations omitted)).

106. 130 S. Ct. 383 (2009) (per curiam).

107. *Id.* at 384. To establish prejudice, the Court explained that "Belmontes must show a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence (including the additional testimony [Belmontes' attorney] could have presented) against the entire body of aggravating evidence," which would have also included evidence of an additional murder. *Id.* at 386.

108. *Id.* at 384.

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mitigation.[109] In response, his attorney explained that he had strategically narrowed his mitigation case because he did not want to open the door to allow the state to introduce evidence of a prior murder in which there was substantial evidence that Belmontes had been involved.[110] The Ninth Circuit found that Belmontes was prejudiced by counsel's deficient performance, but the Supreme Court disagreed and reversed.[111] In holding that Belmontes had not established prejudice,[112] the Court stressed the necessity "to consider *all* the relevant evidence that the jury would have had before it if [Belmontes' attorney] had pursued the different path."[113] The relevant evidence included not just the mitigation evidence that his attorney could have presented, but also evidence of the additional murder "that almost certainly would have come in with it."[114]

Collectively, *Wood*, *Van Hook*, and *Belmontes* illustrate the Court's attempt to provide guidance to lower courts about what constitutes constitutionally adequate mitigation investigation. The next three cases—*Sears v. Upton*,[115] *Porter v. McCollum*,[116] and *Jefferson v. Upton*[117]—illustrate the contours of constitutionally inadequate investigations.

ii. Constitutionally Inadequate Investigations

Sears v. Upton involved an armed robbery and kidnapping that resulted in death.[118] During the penalty phase of the trial, Sears' counsel presented

109. *Id.*

110. *Id.* at 386 (explaining that Belmontes' attorney put on "nine witnesses he thought could advance a case for mitigation, without opening the door to the prior murder evidence").

111. *Id.* at 388, 391.

112. *Id.* at 386, 391.

113. *Id.* at 386.

114. *Id.* The Court also observed that "[s]ome of the error below may be traced to confusion about the appropriate standard and burden of proof." *Id.* at 390. It explained that contrary to what the Ninth Circuit had appeared to do, "*Strickland* does not require the State to 'rule out' a sentence of life in prison to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." *Id.* at 390–91.

115. 130 S. Ct. 3259 (2010) (per curiam).

116. 130 S. Ct. 447 (2009) (per curiam). In *Porter*, because the Florida Supreme Court did not decide whether Porter's counsel was deficient, the United States Supreme Court reviewed this claim *de novo* and found that it was. *Id.* at 452–53. The Court then examined whether "[t]he Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough—or even cursory—investigation" was unreasonable, and the Court found that it was. *Id.* at 453–56.

117. 130 S. Ct. 2217 (2010) (per curiam).

118. 130 S. Ct. 3259 (2010) (per curiam). *Sears* is similar to *Belmontes* insofar as the inquiry turned not on whether the mitigation investigation was deficient, but on whether the deficient investigation had prejudiced the capital defendant. Also similar to *Belmontes*, the Supreme Court remanded after clarifying the correct prejudice inquiry to employ. In *Sears*, however, the Court's clarification opened the avenue for potential relief for Sears, whereas the Court's clarification in *Belmontes* foreclosed relief. *See id.* at 3261.

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mitigating evidence "describing his childhood as stable, loving, and essentially without incident."[119] Seven witnesses testified about Sears' middle-class background, how his actions had shocked his relatives, and how sentencing Sears to death would devastate Sears' family.[120] This mitigation theory then backfired when the prosecutor asserted in closing arguments that Sears was "privileged in every way" and had "rejected every opportunity that was afforded him."[121]

In its analysis, the Supreme Court's opinion included extensive discussion about the additional information that post-conviction counsel obtained during their mitigation investigation. This discussion showed that in contrast to the mitigation theory presented at trial—that Sears was "privileged in every way"—Sears' home life was "anything but tranquil."[122] The Court then reviewed the deficiencies in the state court's inquiry by pointing to two main errors: (1) the court had "curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory,"[123] and (2) the court had failed to apply the proper prejudice inquiry in part because it mistakenly believed prejudice could only apply in cases in which there was "little or no mitigation evidence."[124] Finding that the lower court had used the wrong prejudice analysis, the Supreme Court vacated the judgment and remanded.[125]

To explain where the lower court had erred in its prejudice inquiry, *Sears* discussed the Court's recent decision in *Porter v. McCollum*.[126] *Porter* involved the shooting deaths of George Porter's ex-girlfriend and her boyfriend.[127] Porter was sentenced to death after his defense attorney told the jury that Porter was not "mentally healthy" but did not put on evidence related to his mental health.[128] During a two-day evidentiary hearing held during post-conviction proceedings, Porter presented

119. *Id.*
120. *Id.* at 3261–62.
121. *Id.* at 3262.
122. *Id.*
123. *Id.* at 3265.
124. *Id.* at 3266.
125. *Id.* at 3267.
126. *Id.* at 3266 (discussing *Porter*).
127. Porter v. McCollum, 130 S. Ct. 447, 448 (2009) (per curiam). Porter had represented himself for most of the pre-trial proceedings and during the beginning of his trial, then pleaded guilty near the end of the State's case and changed his mind about continuing to represent himself. *Id.* His standby counsel took over for the penalty phase, blaming Porter's actions on his drunkenness and putting on "only one witness, Porter's ex-wife, and read[ing] from an excerpt from a deposition." *Id.* at 449.
128. *Id.* (noting that Porter was sentenced to death for the murder of his ex-girlfriend but not for the murder of her boyfriend).

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extensive mitigating evidence, including evidence related to his heroic military service and serious mental health difficulties, "all of which was apparently unknown to his penalty-phase counsel."[129] Such evidence included "[h]is commanding officer's moving description of . . . two battles" in which Porter was wounded and later decorated for his service.[130] The Court found that the state court had unreasonably applied *Strickland*'s prejudice prong[131] when it analyzed and rejected Porter's claim,[132] noting, "[T]he Florida Supreme Court, following the state postconviction court, unreasonably discounted the evidence of Porter's childhood abuse and military service."[133]

Through its analysis in both *Sears* and *Porter*, the Court highlighted that it has "never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant."[134]

Jefferson v. Upton[135] also examined deficiencies in the prejudice analysis, this time focusing on deficiencies in the Eleventh Circuit's analysis of the state court's findings regarding the adequacy of the mitigation investigation.[136] Lawrence Jefferson was sentenced to death "for killing his co-worker while the two men were fishing."[137] In vacating the Eleventh Circuit's judgment and remanding, the Supreme Court included extensive details about the mitigation investigation that trial counsel had done, as well as details about what it had not done.[138] The complex details revolved around the fact that Jefferson had suffered a serious head injury when he was a child and that trial counsel had failed to investigate this injury.[139] When the state court decided to deny post-conviction relief, the state court held an ex parte meeting with the prosecutor in which it asked the prosecutor to draft the court's findings of

129. *Id.*
130. *Id.* at 448.
131. *See supra* note 61 (discussing *Strickland*'s prejudice prong).
132. *Porter*, 130 S. Ct. at 454–55.
133. *Id.* at 455.
134. Sears v. Upton, 130 S. Ct. 3259, 3266 (2010) (per curiam). In dissent, Justice Scalia (joined by Justice Thomas) found no error of law with the state court's prejudice inquiry and predicted that on remand the state court will "do what it has already done: find no reasonable likelihood that the mitigation evidence the Court details in its opinion would have persuaded a jury to change its mind about the death sentence for this brutal rape-murder." *Id.* at 3267 (Scalia, J., dissenting).
135. 130 S. Ct. 2217 (2010) (per curiam).
136. *Id.* at 2218.
137. *Id.*
138. *Id.* at 2218–23.
139. *Id.* at 2218.

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fact.[140] The state court then adopted the opinion the prosecutor had drafted—including all factual findings relevant to the adequacy of the mitigation investigation conducted at trial—without modification.[141] The Court remanded so that the Eleventh Circuit could determine "whether the state court's factual findings warrant a presumption of correctness, and to conduct any further proceedings as may be appropriate in light of their resolution of that issue."[142]

In summary, the Court's 2009–2010 term illustrates the Court's determination to clarify the contours of thorough mitigation investigation. The range of lower court disagreement about what constitutes thorough mitigation investigation is reflected in the variety of divergent lower court opinions as each case wound its way to the Supreme Court. The fact that the Court chose to issue six decisions in a single term—all with an eye toward aiding the lower courts in their determinations of what constitutes constitutionally sufficient mitigation investigation—is evidence of the confusion that exists among the lower courts and the Supreme Court's attempt to provide guidance.

The next section examines the divergent opinions among the state courts in more detail by analyzing recent opinions in two states. A close reading of these opinions provides further evidence of how state courts interpret the Supreme Court's mitigation precedent in conflicting ways.

B. State Court Case Studies

The preceding analysis of Supreme Court cases shows decisiveness in the Court's holding that the Sixth Amendment right to counsel includes a

140. *Id.* at 2219.

141. *Id.*

142. *Id.* at 2223. While *Jefferson* discusses counsel's actions and inactions during the mitigation investigation, the decision ultimately turns on a close reading of 28 U.S.C. § 2254(d). *Id.* at 2220–24 (enumerating subsections (d)(1) through (8)). Section 2254(d) provides eight instances in which federal courts do not have to presume that a factual issue determined by a state court is correct. *Id.* In its decision, the Court critiqued the Eleventh Circuit for limiting its analysis under section 2254(d) to subpart (8) alone, pointing out that "there are seven other[] [subparts], none of which the Court of Appeals considered when addressing Jefferson's claim." *Id.* at 2222 (internal citation omitted). The Court then explained that the Eleventh Circuit erred by "not consider[ing] the state court's process [i.e., its adoption of the prosecutor's drafted opinion without any modifications] when it applied the statutory presumption of correctness." *Id.* In dissent, Justice Scalia took issue with the Court's conclusion that the Eleventh Circuit misapplied §§ 2254(d)(1)–(8) by treating § 2254(d)(8) "'as the *exclusive* statutory exception' to the presumption of correctness, and by failing to address whether § 2254(d)(2), (6), or (7) might also bar application of that presumption." *Id.* at 2224. Justice Scalia asserted that "[t]he Court's opinion . . . is the first anyone (including Jefferson) has ever heard of this argument." *Id.*

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duty to conduct thorough mitigation investigation,[143] and that mitigation is a critical component of curtailing the arbitrariness of death penalty systems the Court deemed unconstitutional in *Furman*.[144] At the same time, the Court has not definitively held that capital defense attorneys need expert help to conduct a thorough mitigation investigation that comports with the Sixth Amendment. Although the Supreme Court's mitigation cases have come close to recognizing such a right,[145] the Court has left it to the states—and more specifically, to the state court judges and capital defense attorneys working within the states—to decide what constitutes, and how to accomplish, thorough mitigation investigations.[146]

While it may be no surprise that the state courts undertake this task differently, the degree of variance across state jurisdictions is pronounced. Using state court opinions and news reports as sources of information, this section examines the variance in how two different jurisdictions—Illinois and Arizona—interpreted the Court's mitigation precedent to decide what constitutes constitutionally adequate mitigation investigations. The contrast between these jurisdictions suggests evidence of continued arbitrariness of how mitigation operates within the states' death penalty systems.

1. Illinois

While recognizing that thorough mitigation investigation is a necessity, some state trial courts have held that capital defense attorneys can simply do the investigation themselves. Illinois is one such example.[147] In the

143. Wood v. Allen, 130 S. Ct. 841, 853 (2010) (Stevens, J., dissenting); *supra* note 55.

144. *See* discussion *supra* Part I.A.

145. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 521 (2003) (observing that the ABA *Guidelines for the Appointment of Defense Counsel in Capital Cases* have established "well-defined norms" in capital cases); *Guidelines*, *supra* note 22, at 952 (detailing the necessity of hiring a capital mitigation specialist).

146. *See* Van Hook, 130 S. Ct. 13, 17 n.1 (2009) (per curiam).

147. In light of the fact that Illinois officially abolished its state death penalty on July 1, 2011, the selection of Illinois as one of the two state case studies in Section B has heightened significance. When signing the bill to abolish the death penalty in Illinois, Governor Pat Quinn stated that the system of imposing the death penalty in Illinois was "inherently flawed" and that evidence presented to him "by former prosecutors and judges with decades of experience in the criminal justice system has convinced [him] that it is impossible to devise a system that is consistent, that is free of discrimination on the basis of race, geography or economic circumstance, and that always gets it right." Press Release, Governor Pat Quinn, Statement from Governor Pat Quinn on Senate Bill 3539 (Mar. 9, 2011), *available at* http://www.illinois.gov/pressreleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265.

Such observations are particularly relevant to the analysis in Section B, which explores the fact that various Illinois trial courts refused to appoint mitigation specialists to capital cases in Illinois

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words of one Illinois trial court as recently as 2009, "[O]ur [state] supreme court has held that 'a mitigation specialist is not crucial to the defendant's ability to marshal evidence in mitigation.' . . . Moreover, 'a trial court is not constitutionally required to appoint a mitigation specialist, or even an investigator, because defense counsel is capable of obtaining and presenting such information.'"[148]

This statement was part of an unpublished state court opinion, *People v. Taylor*,[149] which denied the defendant's motion to prohibit the state of Illinois from seeking the death penalty because defense counsel did not have enough money to pay for various aspects of the defense. The case in which this unpublished opinion was issued was one of some sixty death penalty cases with similar budgetary deficits in Illinois during the summer of 2009. Among the defense attorneys making similar lack-of-funding motions was Assistant Public Defender Jim Mullenix, who made headlines when he asserted he did not have enough money "to mount an effective defense" in representing capital defendant D'Andre Howard.[150]

Because capital defense attorneys had no funding to cover "DNA testing, expert witnesses, mitigation specialists and other expenses associated with death penalty cases,"[151] defense attorneys asked state trial courts to remove the death penalty from pending capital cases, thereby allowing the capital defendants to be tried only for a "regular" murder carrying a maximum penalty of life without the possibility of parole.[152] Stating that they would be ineffective if they proceeded to trial without funding to cover such critical expenses,[153] defense counsel also asked for permission to withdraw unless they received the necessary funding or unless their client's case was reduced to a non-capital murder.[154]

Although denying the necessity of adequate funding to appoint a mitigation specialist, the state court in *Taylor* simultaneously recognized Supreme Court precedent requiring thorough investigation of mitigating evidence. While noting that "[t]he *Wiggins* court found that the mitigating

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because they believed that capital defense attorneys could conduct the mitigation investigation themselves, even though they were not trained to do so and did not have sufficient funding to do so. *See* discussion *infra* Part I.B.1

148. People v. Taylor, 07 CR 18462, slip op. at 4 (Ill. Cir. Ct. July 29, 2009) (quoting People v. Burt, 658 N.E.2d 375, 389 (1995)).

149. *Id.*

150. Barbara Vitello, *Defense Wants Death Penalty Option Dropped in Triple-Murder Case*, CHI. DAILY HERALD, June 30, 2009, at 9 (discussing case of D'Andre Howard).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

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evidence trial counsel failed to discover and present was 'powerful' and that counsel's investigation did not meet the minimum performance standards of *Strickland*,"[155] the state court went on to distinguish its holding from *Wiggins*. It acknowledged that the public defenders representing Taylor were "arguing that no funds ha[d] been made available to retain a mitigation specialist,"[156] then contrasted that with the situation in *Wiggins*: Wiggins' attorneys had been allocated adequate funding to hire a mitigation specialist but had chosen not to do so.[157] Despite the absence of mitigation specialists in both *Wiggins* and *Taylor*, the *Taylor* court parsed *Wiggins*' holding to find that mitigation specialists are not a critical component of the capital defense team:

> [T]he [*Wiggins*] Court does not suggest that trial counsel should have retained a mitigation specialist. The Court's holding was based on the narrow principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." . . . The Court does not opine that trial counsel in *Wiggins* could not have accomplished a complete investigation notwithstanding the absence of a mitigation specialist—simply that counsel failed to conduct a thorough investigation.[158]

By underscoring the fact that *Wiggins* did not hold that trial counsel should have retained a mitigation specialist, *Taylor* interpreted *Wiggins* to allow for the proposition that capital defense counsel can simply conduct thorough capital mitigation themselves.[159] The *Taylor* court then bolstered this finding with Illinois precedent, finding that the "[Illinois] supreme court has held that 'a mitigation specialist is not crucial to the defendant's ability to marshal evidence in mitigation.'"[160] It went on to assert that "'a trial court is not constitutionally required to appoint a mitigation specialist, or even an investigator, because defense counsel is capable of obtaining and presenting such information.'"[161]

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155. People v. Taylor, 07 CR 18462, slip op. at 7 (Ill. Cir. Ct. July 29, 2009).

156. *Id.*

157. *Id.* (observing that although "the Public Defender's Office [in *Wiggins*] had made funds available for the retention of a forensic social worker, counsel chose not to commission such a report").

158. *Id.* (quoting Wiggins v. Smith, 539 U.S. 510, 533 (2003)).

159. *Id.*, slip op. at 4–7.

160. *Id.*, slip op. at 4 (quoting People v. Burt, 658 N.E.2d 375, 389 (1995)).

161. *Id.* at 4–5 (wherein "the defendant's 'constitutional rights were not violated by the denial of a mitigation expert' because he 'was given adequate assistance to prepare and present his mitigation evidence,' [which included] 'the assistance of counsel, an investigator, and a psychologist for the

In short, by denying defense counsel's motion,[162] the *Taylor* court relied on what it perceived to be an opening (or silence) in Supreme Court precedent that allowed for capital attorneys to conduct the mitigation investigation themselves. The *Taylor* court then bolstered this finding with its own state court precedent specifically stating that a capital defendant's constitutional rights are not necessarily violated by the denial of a mitigation expert.

2. Arizona

In contrast to capital defendants' experience in Illinois state courts before the death penalty was recently abolished in Illinois,[163] Arizona state courts have interpreted the Supreme Court's mitigation precedent to necessitate exactly the opposite result. The case of *State v. Sharp*[164] is one such example.

Kyle Sharp was charged with capital murder in Arizona in 1995.[165] He was tried in 1996 and sentenced to death.[166] The two attorneys appointed to represent Sharp did not seek the appointment of a mitigation specialist and did not conduct a mitigation investigation themselves.[167] An attorney named Margaret Macartney was appointed as co-counsel on Sharp's case.[168] Neither she nor Sharp's lead attorney had any experience trying homicide or capital cases.[169] Despite her unfamiliarity with capital cases,

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purposes of securing, presenting and analyzing mitigation evidence.'" (quoting People v. Burt, 658 N.E.2d 375, 389 (1995))); People v. Lear, 572 N.E.2d 876, 880 (1991) (wherein the court could not find "that the trial court erred in denying the defendant's request for a mitigation expert" "[u]nder the facts and circumstances of the case," which included the court instructing defense counsel to inform the court if it was "unable to obtain certain information" relevant to mitigation prior to the sentencing hearing, and defense counsel did not so inform the court); People v. Munson, 794 N.E.2d 155, 170 (2002) (stating that a "mitigation specialist is not crucial to a defendant's ability to marshal evidence in mitigation" and that "a trial court is not constitutionally required to appoint a mitigation specialist, as defense counsel is capable of obtaining and presenting such evidence").

162. *Id.* at 10. After the *Taylor* court denied the public defender's motion to withdraw as defense counsel, the public defender managed to divert money from other areas to cover the capital costs until the summer of 2010, when the public defender again informed the trial courts that it did not have enough money to defend its capital clients. *See* Vitello, *supra* note 150. Only $150 remained in the Illinois Capital Litigation Fund to cover the costs of capital litigation for the capital cases that were pending at that time. *Id*.

163. *See* discussion *supra* note 147.

164. State v. Sharp, Case No. CR95000271 (Ariz. Super. Ct. July 29, 2010).

165. *Id.*, slip op. at 20–21.

166. *Id.*, slip op. at 8, 30.

167. *Id.*

168. *Id.*, slip op. at 20.

169. *Id.*, slip op. at 8 (noting that during post-conviction proceedings lead counsel testified that he "had handled four homicide trials—it is unclear whether he counted the Sharp case as one of the four—but none before the Sharp case," and that co-counsel "had never represented anyone charged

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Macartney testified during post-conviction proceedings that she had urged lead counsel to seek the appointment of a mitigation specialist, and that lead counsel responded, "[W]e don't have them in Cochise County."[170] She further testified that after lead counsel told her this, she "made calls . . . to learn more about a mitigation specialist . . . but [lead counsel] never authorized hiring one."[171] Although inexperienced in trying capital cases, Macartney believed it was important to investigate Sharp's background and informed lead counsel that "a trip to Indiana was necessary to investigate Sharp's background."[172] Despite her insistence, lead counsel "would not authorize the trip, being (in Ms. Macartney's estimation) more concerned with pleasing the Board of Supervisors by not exceeding his budget."[173]

Based on this and other evidence, the state court's findings of fact included that lead counsel "never sought nor obtained funds to conduct a mitigation investigation or to hire a mitigation specialist."[174] The court further found that lead counsel "had not conducted, nor had he hired anyone else to conduct, a mitigation investigation that would have revealed the full extent of [the defendant's childhood] history."[175]

In vacating Sharp's death sentence,[176] the Arizona state court made several conclusions of law that differ from the Illinois state court's interpretation of the same issue. While the state courts in Illinois and Arizona both agreed that "[a] reasonably thorough mitigation investigation [is] required for defense counsel in a capital case to satisfy prevailing professional norms for representation of capital clients,"[177] they disagreed on whether thorough mitigation investigation necessitates hiring a mitigation specialist. In contrast to the Illinois state court that found it constitutional to force defense counsel to continue to represent a capital defendant without funding to hire a mitigation specialist,[178] the Arizona state court found that "[f]or defense counsel in a capital case in the State of

with homicide, either in pretrial proceedings or at trial" before being assigned to Sharp's case).

170. *Id.*, slip op. at 22.

171. *Id.*, slip op. at 22–23.

172. *Id.*, slip op. at 22.

173. *Id.* (further observing that "[w]ithout making any estimate of the probable cost of a trip to Indiana, [lead counsel] told Ms. Macartney: 'We can't afford that [the proposed Indiana trip]. This is Cochise County.'").

174. *Id.*, slip op. at 23.

175. *Id.*, slip op. at 29.

176. *Id.*, slip op. at 50. In addition to vacating Sharp's death sentence, the court also set the case "for further appropriate proceedings to determine whether a sentence of death shall again be imposed." *Id.*

177. *Id.*, slip op. at 44; *see also supra* note 161.

178. *See* discussion *supra* Part I.B.1.

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Arizona, including Cochise County, to satisfy prevailing professional norms, counsel was obligated to obtain the services of a mitigation specialist . . . ."[179] It based this conclusion on Supreme Court precedent, Arizona precedent, and on evidence presented during post-conviction proceedings.

In terms of Supreme Court precedent, the Arizona court observed that "*Van Hook* and *Porter*, and the long line of cases upon which they both rely, make it abundantly clear that *someone* on the defense team must do a proper mitigation investigation."[180] The court also acknowledged that it was "not aware of a United States Supreme Court decision that specifically states that a mitigation specialist must be on board to conduct that investigation."[181] Whereas the Illinois court interpreted such silence in Supreme Court precedent as an opening to allow defense counsel to conduct the mitigation investigation themselves, the Arizona court found two passages in the Court's cases to be "suggestive" of needing a mitigation specialist.[182] The first was that one of the actions taken in *Van Hook* that "the Supreme Court considered to be evidence of the adequacy of [defense counsel's] mitigation preparation in the mid-1980s was an effort to hire a mitigation specialist five weeks before trial began."[183] The second was that "one of the numerous deficiencies displayed by [*Wiggins*'] trial defense counsel . . . was their failure to employ a forensic social worker to prepare a social history of the defendant, even though funds were available to do so."[184]

After noting these two "suggestive" passages, the *Sharp* court observed there was "no need for this court to rely on mere suggestions that a mitigation investigation performed by a qualified specialist was required . . . ."[185] It went on to discuss an Arizona Supreme Court case, *State v. Bocharski*.[186] The *Sharp* court noted that the "authorities cited in [*Bocharski*] demonstrate that the Arizona Supreme Court believed that an adequately-funded mitigation investigation was a constitutionally-required and essential defense tool."[187] Based on this observation, the *Sharp* court

179. State v. Sharp, Case No. CR95000271, slip op. at 44–45 (Ariz. Super. Ct. July 29, 2010).
180. *Id.*, slip op. at 14.
181. *Id.*
182. *Id.*
183. *Id.* (footnote omitted) (citing Bobby v. Van Hook, 130 S. Ct. 13, 18 (2009) (per curiam)).
184. *Id.* (noting that "[t]he term 'forensic social worker' as used in *Wiggins* appears to describe a person who does much, if not all, of the work that a 'mitigation specialist' would be expected to do" (quoting Wiggins v. Smith, 539 U.S. 510, 524 (2003))).
185. *Id.*
186. *Id.*, slip op. at 14–15 (discussing State v. Bocharski, 22 P.3d 43 (Ariz. 2001)).
187. *Id.*, slip op. at 15 (footnote omitted).

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concluded that "[i]f, in the mid-1990s, it was a constitutionally-required and essential defense tool in Yavapai County (where Bocharski was tried, convicted, and sentenced), then it was also a constitutionally-required and essential defense tool in Cochise County (where Sharp was tried, convicted, and sentenced)."[188]

By finding that a mitigation specialist was constitutionally "required" in order for defense counsel to conduct a thorough mitigation investigation, the Arizona state court reached a decidedly different result than the Illinois state court. These two case studies provide a window through which to see how state courts have interpreted the Supreme Court's precedent, as well as their own state precedent, in divergent ways.

The research presented in Part II broadens the lens of study from the two case studies analyzed above to a nationwide focus. Collectively, the thirty mitigation specialists interviewed in Part II have helped to represent over 700 capital clients in twenty-five states with state death penalty systems. Their experiences provide a lens through which to further analyze the impact of mitigation within the nation's death penalty systems.

II. EXPERIENCES OF CAPITAL MITIGATION SPECIALISTS

This Part presents findings from interviews with thirty capital mitigation specialists. Following a brief description of the project design and methodology, it describes the mitigation specialists' experiences investigating and developing the social history of capital defendants. The interview data from this qualitative study reveal that even though mitigation specialists strive to conduct thorough investigations in order to help capital defense attorneys provide effective assistance of counsel, they are often thwarted in their ability to do so.

A. Empirical Study Design

The data for this study is derived from in-depth, semi-structured interviews with thirty mitigation specialists who have worked on capital defense teams across the United States.[189] The thirty mitigation specialists

188. *Id.* In addition to relying on Supreme Court precedent and Arizona state precedent, the *Sharp* court also found that the prosecution had presented no credible evidence that a mitigation specialist was not required. *Id.*

189. As Professor Margareth Etienne has explained, "Interviews play a critical role in data collection in grounded theory studies. It is recommended that grounded theorists interview twenty to thirty respondents in order to develop a reliable model or theory with adequate categorization of findings and adequately categorize these findings." Margareth Etienne, *The Ethics of Cause*

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include fifteen people who are employed full-time by state or federal public defender offices, as well as fifteen people who work as private mitigation specialists.[190]

The thirty mitigation specialists interviewed for this study have worked on capital defense teams representing over 700 capital clients in twenty-five different states.[191] Prior to each interview, the mitigation specialists were told that neither their names nor the states in which they live or in which they have worked as capital mitigation specialists would be revealed in this study.

Each mitigation specialist was asked to complete a short questionnaire prior to the interview. The interviews, lasting an average of approximately seventy-five minutes each, explored each participant's experience working as a mitigation specialist. Participants were given the option of having the interview audiotaped, and all but three of the participants agreed to be audiotaped. Each audiotaped interview was transcribed. While the interviews covered various topics, each respondent was interviewed in some depth about difficulties they have experienced working as a capital mitigation specialist, as well as their suggestions for improvements.

The mitigation specialists interviewed for this study were identified in "snowball" fashion,[192] starting initially with a list of mitigation specialists working privately or in public defender offices in three different states. When I interviewed mitigation specialists who were employed by public

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Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1207 n.33 (2005) (citing JOHN W. CRESWELL, QUALITATIVE INQUIRY AND RESEARCH DESIGN: CHOOSING AMONG FIVE TRADITIONS 56 (1998)).

190. For the purposes of this Article, the term "private mitigation specialist" describes those people who are not salaried employees of state or federal public defender public offices. Private mitigation specialists may contract with public defender offices on a case-by-case basis, but they are not regularly employed by a public defender office. Private mitigation specialists may also contract with private criminal defense attorneys on a case-by-case basis.

191. At the time these interviews were conducted, thirty-five states had state death penalty systems. The difference between the number of mitigation specialists interviewed and the number of states in which they have worked reflects several factors. These include the fact that private mitigation specialists often work on capital defense teams in jurisdictions outside their state of residence, that private mitigation specialists often work in numerous jurisdictions, and that there is some movement between the private and public spheres during the course of a person's career.

192. Professor Etienne, who also identified her participants in similar "snowball" fashion, has explained that "[u]sing a 'snowball' or 'chain' is one of several accepted methods of obtaining a reliable subject sample in qualitative research." Etienne, *supra* note 189, at 1202 n.24. She further explained that such methodology "involves selecting an initial group of participants who help identify additional participants," and that "[s]nowballing allows the researcher to 'identif[y] cases of interest from people who know people who know what cases are information-rich.'" *Id.* (quoting MATTHEW B. MILES & MICHAEL A. HUBERMAN, QUALITATIVE DATA ANALYSIS: A SOURCEBOOK OF NEW METHODS 28 (2d ed. 1994)).

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defender offices, I obtained permission from their supervisor to contact the mitigation specialist prior to conducting the interview.

I contacted each mitigation specialist from an initial list by phone or by email seeking an interview. All but two of the people I initially contacted agreed to be interviewed. After every interview, I asked each mitigation specialist for the names of other mitigation specialists—not necessarily residing in their same state or working in their same office—who might be willing to be interviewed. I then contacted these mitigation specialists by mentioning the name of the mitigation specialist who had referred me if that mitigation specialist had given me permission to do so. I continued to obtain new names of potential interviewees in this snowball fashion until I had interviewed the thirty mitigation specialists who form the basis of the data in this Article. I conducted eleven of the interviews by phone and nineteen of the interviews in person.

The sample of mitigation specialists interviewed in this study is not designed to be statistically representative of all mitigation specialists working in the United States. Similar to other qualitative studies, my goal was to obtain a better understanding of the experiences of capital mitigation specialists, rather than to identify a statistically representative randomized sample.[193]

Each of the interviews included extensive discussion about the capital mitigation specialist's experiences. Interviewees discussed with great detail and candor their observations of how capital mitigation is working well on the ground, as well as substantive hurdles they have encountered or observed in their work. I combed the transcripts and my handwritten notes to identify and categorize their observations and experiences. The observations and experiences that mitigation specialists described are grouped into two categories: (1) the hope of mitigation and (2) the fiction of mitigation. Each category is discussed below.

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193. Professor Etienne explains a similar methodology and lists other qualitative studies that have appeared in legal journals, such as "Albert W. Alshuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1181 (1975) (explaining that the usefulness of qualitative studies lies not in obtaining a scientific measure of a problem but in helping to 'guide analysis and to permit an evaluation of the inherency of the problems')" and "Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 278–79 (2001) (reporting that his qualitative study, consisting of interviews of thirty-nine attorneys, was conducted with the goal of in-depth exploration of case selection, management, and settlement strategies rather than arrival at a quantitative measure of specific variables)." Etienne, *supra* note 189, at 1206 n.32.

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B. The Hope of Mitigation

During the interviews, the mitigation specialists discussed a range of experiences. Across their varied accounts, two areas emerged as especially relevant for considering the Court's hope that mitigation would decrease the arbitrariness of the death penalty. These two areas are: (1) the development of capital mitigation specialists as a profession and (2) the role of the ABA *Guidelines* in establishing prevailing professional norms for thorough mitigation investigation. While overlap exists between the two areas, to the extent possible, each area is discussed individually.

1. The Professionalization of Capital Mitigation

When the Court dismantled existing death penalty statutes through *Furman* and highlighted the importance of mitigation in *Gregg*, *Woodson*, and *Lockett*,[194] the field of capital mitigation began to evolve. Indeed, the concept of a "mitigation specialist" is a relatively new term with which few of the interviewees were familiar before they stumbled into discovering the job. One interviewee described learning about capital mitigation as follows:

> We got our first case, a death case, and my partner at the time (one of the brightest guys I ever knew) and I said this seems so weighted for the prosecution. When does the defendant get a break? He started researching, and I started researching, and of course what do we find? *Lockett v. Ohio*. We started talking to people about [the fact that] there's got to be a way to get the lawyers to realize that they need to do more than say, "He's a good boy." That same year, I just started calling people and luckily found the National Association of Sentencing Advocates. I joined immediately and started going to their seminars. I started doing legal research and had a lawyer friend help me, and read everything I could, all the big ones from the old days . . . . I paid for myself a trip to . . . a seminar—well, nobody ever paid for me to go to one for fifteen years. I did it all myself. . . . But we did the mitigation insofar as we understood it at that time. And then I kept doing it on my own and telling the funding agency here you've got to do it, you've got to do it, and they looked at me like I'd lost my mind . . . . And I took the

194. *See* discussion *supra* Part I.A.1.

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> name mitigation specialist because "investigator" was getting me nowhere.[195]

The description of stumbling upon the field of mitigation and teaching oneself what it involved resonated across many of the interviews.[196] Perhaps it is not surprising that people who were among the first in the country to work as capital mitigation specialists discovered mitigation by chance and had to teach themselves what it was.[197] More surprising is the fact that mitigation remains a relatively unknown field and that people who recently became capital mitigation specialists also describe discovering the profession by chance. For example, an interviewee who has been working as a capital mitigation specialist for less than six years described how she discovered the job opening:

> I was on this, believe it or not, I was on this email list . . . and I saw this [mitigation specialist] job advertised, never heard of it, never even thought of it, never even been introduced [to it] in schools of social work as a place to do some work. So I applied and I got it.[198]

Another interviewee described the experience of moving to a new state several years ago and discovering the field of mitigation through a chance conversation at a party:

> [A]t that point I did not have a job, and we were just at a party, and there was a judge who . . . asked me about my background. He said they really need people to do mitigation. . . . So I put in the [application], and before it was even approved I had a case. One thing was—I speak Spanish, and surprisingly I was the only one for a number of years. So I've worked with a number of Mexican nationals.[199]

While none of the interviewees entered their post-college careers with the intent to do mitigation, once they discovered the field, some specifically sought further post-graduate education because the mitigation specialist jobs for which they wanted to apply required a master's degree. In the words of an interviewee who was working in a public defender's office

195. Interview with Mitigation Specialist 24, at 1.

196. *See, e.g.*, Interview with Mitigation Specialist 25, at 1 ("There was an ad in the paper [for a mitigation specialist.] I answered it, and I was hired.").

197. Interview with Mitigation Specialist 8.

198. Interview with Mitigation Specialist 50, at 2.

199. Interview with Mitigation Specialist 18, at 1.

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and was encouraged to obtain a master's degree in order to be competitive for the position:

> I had to wait for a little while. [My supervisor] encouraged me to get my master's because they wouldn't put me in [the mitigation specialist] position without my master's. But they didn't specify what the degree had to be in. So I talked to people; they all said social work. . . . But others said no, it wasn't just about the degree; [you] have to be able to talk to people. Long story short, that's how I decided to get [my] degree.[200]

In addition to master's degrees, some of the mitigation specialists interviewed had other post-graduate education, such as a Ph.D. and/or a J.D. Indeed, although the sample of mitigation specialists interviewed in this study is not designed to be statistically representative of all mitigation specialists working in the United States,[201] every one of the thirty mitigation specialists interviewed had a four-year college degree; seventeen also had a master's degree; two had a Ph.D; and two had a J.D.

Further evidence of the professionalization of mitigation specialists includes the development of a professional group renamed to include mitigation specialists. This group, called the National Alliance of Sentencing Advocates & Mitigation Specialists (NASAMS), originally began in 1992 under the name the National Association of Sentencing Advocates (NASA).[202] Formed in response to a concept paper that "recognize[d] the existence of [sentencing advocacy as] a growing profession and called for the creation of a professional association to support its development," as NASA it was housed under the auspices of The Sentencing Project.[203] In 2005, it joined the National Legal Aid & Defender Association as a section in its Defender Division and changed its name to the National Alliance of Sentencing Advocates & Mitigation Specialists.[204] As NASAMS's website explains:

> NASAMS members now also include mitigation specialists, who work to save the lives of defendants facing sentence of death. . . . By helping juries that pronounce sentence in death penalty cases to

200. Interview with Mitigation Specialist 49, at 2.

201. *See* discussion of empirical design *supra* Part II.A; *see also supra* note 193.

202. *History of Defense-Based Sentencing Advocacy and NASAMS*, NAT'L LEGAL AID & DEFENDER ASS'N, http://www.nlada.org/Defender/Defender_NASAMS/about_nasams/about_history (last visited Jan. 14, 2012).

203. *Id.*

204. *Id.*

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> understand their clients' life stories, they argue, often successfully, for lifelong prison terms in secure settings instead of the death penalty.[205]

While not all people who work as mitigation specialists belong to NASAMS, its decision to rename the organization in order to include mitigation specialists gives some an indication of the growing importance of mitigation specialists within the field of sentencing advocacy.

In addition, an American Bar Association subcommittee published a report after three years of "attempt[ing] to identify how the mitigation function is financed in each jurisdiction" in the United States.[206] The subcommittee found that "every jurisdiction in the United States that authorizes the death penalty has a mechanism to provide mitigation specialist services."[207] The fact that every jurisdiction has a mechanism for providing mitigation specialist services shows the degree to which states recognize the importance of mitigation specialists and the profession of capital mitigation specialist. At the same time, as the example from Illinois described above illustrates, even when a state has a mechanism for providing for mitigation specialist services—as did Illinois[208]—a critical gap may exist between courts' willingness to provide such services and the provision that allows the courts to do it.[209] The gap between the mechanism for providing for mitigation specialist services and courts' willingness to provide such services is explored in more detail later in this Article. No matter what the degree of individual state judge commitment to the funding and actual appointment of mitigation specialists, however, the fact remains that the profession has penetrated state criminal justice systems to the point of erecting mechanisms in every state to provide for mitigation specialist services.

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205. *Id.*

206. 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, 698 (2008); *id.* at 693 (explaining that the *Supplementary Guidelines* "are the culmination of three years of work coordinated by the Public Interest Litigation Clinic ("PLIC") and the University of Missouri-Kansas City School of Law in cooperation with seasoned capital litigators and mitigation specialists across the United States").

207. *Id.* at 698; *see id.* at 698 n.23 (explaining that "states use a variety of mechanisms to provide mitigation specialist services" and listing states that use state-funded public defenders, states in which mitigation specialists are retained using funds in the public defender's budget, and states that allow the court to authorize funds to employ mitigation specialists on motion of defense counsel).

208. *See id.* at 698 n.23 (citing 725 ILL. COMP. STAT. ANN. 124/10 (West 2002) to support the proposition that Illinois allows the court to authorize funds to employ mitigation specialists on defense motion).

209. *See* discussion *supra* Part I.B.1.

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Other evidence of the professionalization of mitigation specialists includes the numerous capital defense training programs that have emerged to hone skills necessary for effective mitigation investigation.[210] In addition to training capital defense attorneys about the importance of mitigation and how to integrate mitigation into the entire case (and not just the sentencing phase of the trial), these programs now specifically invite the entire capital defense team—including the capital defense lawyers, mitigation specialists, and investigators—to attend the training together.[211] Other examples of training programs are the formal fellowship and internship opportunities that are emerging to provide training opportunities for people who hope to become mitigation specialists across the country.[212] While formal fellowships in mitigation investigation are still somewhat rare, many of the interviewees reported the critical role that informal mentoring opportunities played in their initial development as a mitigation specialist. One interviewee also discussed the role that she has played as a paid mentor to someone new to the field:

> It's just an example of how varied the cases can be. It was another federal case where the attorney wanted to start a brand-new mitigation specialist. He had been working with this agency forever and ever, and one of the investigators wanted to break into the mitigation field but didn't have the experience, and so one of the attorneys hired me to mentor her. She was getting paid, and I was getting paid, and we arranged weekly phone calls where I would direct her on everything, and then we arranged for every few months she would actually fly here, and we would sit down and go over all the documents, and we did really good work together. That

210. For example, the Clarence Darrow Death Penalty Defense College, co-hosted by DePaul University College of Law and the University of Michigan Law School, provides individual and group training to the defense team—including capital defense attorneys, mitigation specialists, and investigators. *Darrow Defense College*, DEPAUL U. C. L., http://www.law.depaul.edu/centers_institutes/cjcc/darrow.asp (last visited Jan. 14, 2012). Another such program is the Death Penalty Seminar at Gerry Spence's Trial Lawyers College at Thunderhead Ranch Campus in DuBois, Wyoming. *Programs*, TRIAL LAW. C., http://www.triallawyerscollege.com/Programs.aspx (last visited Jan. 14, 2012). Another example is The Bryan R. Shechmeister Death Penalty College hosted by Santa Clara University Law School. *The Bryan R. Shechmeister Death Penalty College*, SANTA CLARA L.: HOME FOR DEATH PENALTY C., http://law.scu.edu/dpc/index.cfm (last visited Jan. 14, 2012) (indicating that it invited mitigation specialists for the first time in 2010 and that it provides "special discount prices for non-lawyer team members who register").

211. *See supra* note 210.

212. One such example is the Fair Trial Initiative's Mitigation Program. "Over the last seven years, [it] has trained five mitigation specialists" who are now practicing across the United States. *Mitigation Program*, FAIR TRIAL INITIATIVE, http://www.fairtrial.org/mitigation_program.php (last visited Jan. 14, 2012).

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> was such a cool opportunity, and it's happened in other situations too. . . . I love it when they actually will hire you for mentoring of new people.[213]

No matter what the diverse path with which interviewees learned about the profession and honed their skills—from discovering the position by chance or by specifically seeking mentoring or obtaining a master's degree to practice skills necessary for the profession—the field has continued to become more and more professional, as well as professionally recognized, in the twenty-six years since *Gregg*. The next section explores another aspect of this professionalization by discussing the role that the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*Guidelines*)[214] and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (*Supplementary Guidelines*)[215] have played in the professionalization of mitigation investigations.

2. The ABA Guidelines' *Role in Developing Norms*

The *Guidelines* and *Supplementary Guidelines* have had a tremendous impact on developing norms for the profession of mitigation specialists in the short time since their publication. The objective of the 2003 edition of the ABA *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."[216] To achieve this objective, the *Guidelines* strive to provide "comprehensive, up-to-date guidance for professionals who work in [the] specialized and demanding field [of capital defense] and help[] to ensure effective assistance of counsel for all persons charged with or convicted of capital crimes."[217] While the *Guidelines* existed in another form prior to their revision in 2003,[218] the revision "expanded what had been . . . a broad outline of defense counsel's duties in all criminal cases into detailed prescriptions for legal representation of capital

213. Interview with Mitigation Specialist 37, at 4.
214. *Guidelines*, *supra* note 22.
215. *Supplementary Guidelines*, *supra* note 23.
216. *Guidelines*, *supra* note 22, at 919.
217. *Id.* at 916 (Introduction).
218. *See id.* (explaining revision process of the 2003 *Guidelines*); *see also* Bobby v. Van Hook, 130 S. Ct. 13, 16–17 (2009) (per curiam) (discussing history of ABA's 2003 *Guidelines* and the *ABA Standards for Criminal Justice* that preceded them).

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defendants."[219] In addition to explaining what capital defense attorneys must do themselves, the *Guidelines* "discuss the duty to investigate mitigating evidence in exhaustive detail, specifying what attorneys should look for, where to look, and when to begin."[220]

Although the 131-page *Guidelines* are extremely detailed, the *Supplementary Guidelines* were published in 2008 in order to explain with even more precision "the elements of the mitigation function of capital defense teams."[221] As the Introduction to the *Supplementary Guidelines* explains:

> Because the mitigation function is of utmost importance in the defense of capital cases, and because counsel must rely on the assistance of experts, investigators and mitigation specialists in developing mitigating evidence, these supplementary interdisciplinary performance standards are necessary to ensure that all members of the defense team perform in accordance with prevailing national norms when representing a client who may be facing execution.[222]

In addition to providing comprehensive and contemporary guidance for "all members of the defense team,"[223] the *Supplementary Guidelines* strive to provide "useful guidance to judges and defense counsel on selecting, funding and working with mitigation specialists."[224]

All of the interviewees were asked to comment on the ABA *Guidelines* and *Supplementary Guidelines*. Nearly every mitigation specialist interviewed expressed great familiarity with both documents and said that both documents do a good job explaining what mitigation specialists strive to accomplish through their investigations. One mitigation specialist even suggested that using the *Guidelines* and *Supplementary Guidelines* as a basis for training would improve the effectiveness of new mitigation specialists and would improve attorneys' understandings of the role of mitigation:

> [What] I'd do is training on [the] ABA *Guidelines*. What is the role, what do we do, where do we fit in, how do you fit in with the rest of the team. And again, each attorney sees mitigation specialists in a

219. *Van Hook*, 130 S. Ct. at 17 (comparing the *ABA Standards* to the revised *Guidelines*).
220. *Id.* (citing *Guidelines*, *supra* note 22).
221. *See Supplementary Guidelines*, *supra* note 23, at 678.
222. *Id.* at 677.
223. *Id.* at 677–78.
224. *Id.* at 678.

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> different role. . . . Within the ABA *Guidelines*, it's no stone uncovered. It's go out and be an investigator, find out about everybody, not just our client and their family, but [the] family's family. It's looking at the microcosm, and the macro—start globally with generations, go back, look at neighbors. It's a very complex overview of someone's life.[225]

Similarly, a private mitigation specialist described the *Supplementary Guidelines* as so important to explaining the complexity of her job that she purchases copies of the *Supplementary Guidelines* for every capital defense attorney with whom she works:

> Even the attorneys still have to be educated. Every time I join a new defense team, I buy them all the volume that has the mitigation stuff in it [the *Supplementary Guidelines*], so that they'll know (if they read it) that that's what I should be doing. [I] give [it] to the attorneys, and it just helps everybody.[226]

In addition to the interviewees' descriptions of their reliance on the *Guidelines*[227] as a baseline for their work and to teach others what their work entails, the *Guidelines* have served as a model for developing similar standards, rules, or guidelines in several states.[228]

Other evidence of the *Guidelines*' role in helping to establish prevailing professional norms is the degree to which courts have discussed the *Guidelines* when deciding issues relevant to capital defense standards and norms. The Illinois and Arizona courts described above are two such examples. In addition, the American Bar Association periodically updates a list of cases in which courts have cited the *Guidelines*.[229] That list currently contains 137 published cases in which state or federal courts, including the United States Supreme Court, have referred to the *Guidelines* in the context of their opinions.[230]

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225. Interview with Mitigation Specialist 1, at 6–7.

226. Interview with Mitigation Specialist 37, at 8.

227. When discussing their reliance on the *Guidelines* and the *Supplementary Guidelines*, mitigation specialists referred to both documents as "the *Guidelines*."

228. *See* Implementation of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (June 2010) [hereinafter Implementation of the 2003 ABA Guidelines], http://www.americanbar.org/content/dam/aba/migrated/DeathPenalty/RepresentationProject/PublicDocuments/Implementation_Fact_Sheet_06_2010_1.authcheckdam.pdf (gathering examples of how states are using the *Guidelines*).

229. *See* List of Cases Citing 2003 ABA Guidelines, http://www2.americanbar.org/DeathPenalty_migrated/RepresentationProject/PublicDocuments/2003List.doc (last visited Jan. 14, 2012).

230. *Id.*

http://openscholarship.wustl.edu/law_lawreview/vol89/iss3/3

Even though the *Guidelines* may not be "inexorable commands" with which capital defense attorneys and mitigation specialists must comply, many mitigation specialists reported during their interviews that the *Guidelines* reflect their understanding of prevailing professional norms to which they aspire and with which they strive to comply. One mitigation specialist described that in addition to the *Guidelines*, what was especially helpful to develop as a mitigation specialist was attending training seminars where people from across the country discussed how they implement the *Guidelines* in their work:

> [T]he *Guidelines* are like, you do all that work, all those cases . . . . [It was] so nice to see [at the training] how other people work, think, prepare, communicate, do everything—even some of the investigators. To me, that was just an eye opener, because we operate like this. If that's all you're exposed to, you can't grow. And you have to.[231]

This mitigation specialist learned much from people throughout the country who also rely on the *Guidelines* in their work. In contrast to this experience, another mitigation specialist explained that even though the *Guidelines* are understood as establishing prevailing professional norms for mitigation investigation nationwide,

> [t]he thing that bothers me about mitigation is I don't think there's any uniformity in the profession, it's kind of willy-nilly. Even with these mitigation *Guidelines*, it's like are people even reading them?[232]

The question of uniformity in standards of practice within the mitigation profession highlights tension between the *Guidelines*' guidance in developing norms and the reality of how mitigation specialists understand and implement these norms. The next section examines this tension in more detail as it analyzes hurdles that mitigation specialists experience throughout their work.

C. The Fiction of Mitigation

This section explores hurdles that mitigation specialists experience as they strive to emulate prevailing norms of thorough mitigation. While the

231. Interview with Mitigation Specialist 1, at 7.
232. Interview with Mitigation Specialist 25, at 13.

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hurdles they described were wide-ranging,[233] this section focuses on two of the most commonly described experiences: (1) inadequate resources to support mitigation and (2) skepticism toward mitigation.

1. Inadequate Resources to Support Mitigation

A strong and consistent theme running throughout the interviews was the degree to which resources were inadequate to support the work that mitigation specialists strove to accomplish. From inadequate funding to impossibly heavy caseloads, many mitigation specialists expressed frustration that such hurdles prevented them from accomplishing the kind of thorough mitigation investigation Supreme Court precedent requires.[234]

The most extreme resource restriction happened when courts denied defense counsel's motion to appoint and fund mitigation specialists for a capital case. In such instances, the mitigation specialists could not work on the case, and defense counsel were left to conduct the mitigation investigation themselves, even though they had no experience conducting mitigation investigations and admitted they did not know how to conduct a mitigation investigation. One interviewee described such an experience as follows:

> The attorneys called, and they interviewed me for a long time and settled on me . . . . [T]hen [I] got word that the judge [had] ruled against any mitigation. They said the money bothered the judge, and I said of course it did, and it should . . . because it should be expensive, and if they don't want to pay the money for good representation, then they should take death off the table. But that's what the attorney just said—the judge said that, oh, you two are experienced attorneys, you can do it. They have no experience in mitigation. They've got lawyer things to do, and I'm just appalled at it. [The judge] said the ABA *Guidelines* are just guidelines, so we're not required to have a mitigation specialist. That's what the judge said. [The attorneys] have no idea what they're doing [trying to investigate mitigation]; it's awful.[235]

233. Some of the other hurdles most frequently described included ethical dilemmas they had to navigate and communication issues pertaining to the capital defense team. These areas are beyond the scope of this Article and will be discussed in forthcoming work.

234. *See* discussion *supra* Part I.A.2 (discussing the second wave of Supreme Court precedent, from 2000 through the Court's 2009–2010 term).

235. Interview with Mitigation Specialist 37, at 1.

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This interviewee's experience demonstrates how even though written rules and procedures may indicate that "every jurisdiction . . . that authorizes the death penalty has a mechanism to provide mitigation specialist services,"[236] the reality in some jurisdictions—such as the one in which the interviewee was denied appointment as a mitigation specialist—is that the state procedures authorizing funding for mitigation specialists are not always followed.

While denying appointment to a case is the ultimate form of resource restriction, mitigation funding was restricted in other ways that interviewees found similarly destructive to their ability to do their job. For example, other mitigation specialists described the experience of being appointed to a case and not being allotted a sufficient budget to do what they needed to do. While acknowledging their individual obligation to submit a budget and try to stay within that budget, one mitigation specialist explained that the process was not as simple as submitting a single budget for every expense expected to be incurred during the course of the mitigation investigation. As that interviewee explained, in some jurisdictions the assumption is that the initial budget is just an estimate and that attorneys can seek further funding when necessary, but that assumption does not always work out in the mitigation specialist's interests.

> I'm [significantly] over budget. . . . I was just doing the work. So I've got a call into [the attorney] because I've got a lot more to do, and I'm already . . . over budget. . . . By and large, attorneys do not understand how long it takes and how much goes into this, so they shortcut you all the time. [The attorney] only got me approved for [a certain amount] going through trial. Generally, an attorney will approve you for a certain amount and then go back and get more.[237]

Other mitigation specialists described different funding hurdles, such as the fact that when a mitigation specialist is appointed on a military capital case, the government—rather than a non-interested party—reviews and approves all funding requests that the mitigation specialist submits.[238] In contrast to non-military capital trials, where funds are provided through *ex parte* motions to the court or through neutral entities,[239] having the government approve the mitigation specialist's expenses means that the

236. O'Brien, *supra* note 206, at 698.
237. Interview with Mitigation Specialist 25, at 5.
238. Interview with Mitigation Specialist 37, at 2.
239. *See* O'Brien, *supra* note 206, at 698 n.23 (listing mechanisms of funding for all fifty states).

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government knows every expert with whom the mitigation specialist has consulted (even if that expert is not called to testify at trial), as well as everywhere the mitigation specialist has traveled in search of mitigation evidence.

> [T]he government gets to know everything you're doing. They're the ones who get to approve of all the stuff you have to do, and the travel, so they always get to know where you're going. That was just so weird and creepy.[240]

While many mitigation specialists provided various descriptions of mechanisms that restricted or administered funding in a way that hampered the mitigation specialist's ability to perform fully, some of these same mitigation specialists experienced no funding difficulties in other cases.[241] In addition, two mitigation specialists described receiving sufficient funding all of the time, as they worked full caseloads that consisted of one case at a time. One of these mitigation specialists explained:

> Just for me, they set aside [a specific amount for the case]. Just for me to work this case, and I work it full time. [O]ther mitigators maybe have ten cases that they're juggling at a time; I work one, and I work it . . . solid, and then it goes away. And the client, nine out of ten times, pleads guilty and gets life.[242]

The other mitigation specialist who carried only one case at a time as a full caseload described never having the court cut or trim the bills that were submitted, never being capped in the full amount of expenses incurred during the course of the investigation, and being paid relatively reliably by both the federal court and the local public defender office (depending on whether the case was a federal or state capital case).[243]

While these two mitigation specialists had full caseloads consisting of one case at a time, other mitigation specialists handled multiple cases simultaneously. Although not all mitigation specialists who carry one case at a time are in private practice, one mitigation specialist who carried multiple cases reflected the following:

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240. Interview with Mitigation Specialist 37, at 2.

241. *See, e.g.*, Interview with Mitigation Specialist 25, at 5–6.

242. Interview with Mitigation Specialist 5, at 2.

243. Interview with Mitigation Specialist 40, at 3 (explaining that it sometimes took "months" to get paid by the federal court but that the local public defender office, who funded the mitigation in the state capital cases, was "really good" about punctual reimbursement).

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> some people are in private practice, have grant money, can pick and choose cases, do one case at a time. [I] just came from a seminar. They brought different people in from the U.S.—attorneys to investigators to mitigation people—they all thought the norm[] was one case at a time, that's all you can do. And I thought, we have four.[244]

Another interviewee who was carrying several cases at once explained that part of the reason this was possible was because the cases were at different stages in the litigation process (such as brand new or pending trial) and it often took several years to reach trial.[245] Another reason was that sometimes one mitigation specialist might take over the case from another mitigation specialist who purported that the investigation was virtually done, when in fact, little to no work had been done on the case:

> Right now I have nine [cases], still more than I'd like. Five to six [cases] would be ideal. At one point I had [even more]. Now that was when cases were taking five to six years to go to trial, and so . . . a lot of the cases I had were conflicted off, some mitigation had been started, or the prior mitigation specialist quit. So this is where you get a different opinion of what constitutes mitigation. I [had] one [mitigation specialist] who said, "It's 95% done," and there were no records, no nothing. So that's one thing about mitigation, it's still—I think the *Guidelines* are pretty clear, but there's a considerable variation amongst people, approaches.[246]

These comments reflect the variation in caseloads that mitigation specialists carry as well as the variation in work product that mitigation specialists produce.

Although poor mitigation investigation should ideally self-correct under the supervision of the lead capital defense attorney, as the next section explains, many of the mitigation specialists witnessed ineffective assistance of counsel by the attorneys for whom they worked. This ineffectiveness sometimes took the form of skepticism toward the concept of mitigation.

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244. Interview with Mitigation Specialist 1, at 7.
245. Interview with Mitigation Specialist 18, at 1.
246. *Id.*

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2. Skepticism Toward Mitigation

Mitigation specialists relayed many positive experiences describing dedicated capital defense attorneys who worked hard to provide excellent defense at the sentencing phase of the capital trial. Such experiences provide hope that mitigation can temper the arbitrary imposition of death by providing the opportunity for jurors to evaluate the particular life circumstances of the capital defendant in order to decide what sentence to impose. At the same time that such experiences provide hope for mitigation, mitigation specialists also described experiences where attorneys did not understand what mitigation evidence involved and were not open to learning about it. They also described working with attorneys who held such skepticism about the concept of mitigation that it interfered with the attorneys' ability to mount an effective defense against the death penalty.

Other mitigation specialists described working with attorneys who did not understand how to present mitigating evidence to a jury, and this ineptness interfered with the jury's ability to understand why the mitigating evidence was relevant to the jury's decision about whether to render a death sentence.[247] In other instances, the attorneys' inability to understand mitigation took the form of not establishing a relationship with the client, which prevented the attorneys from conveying to the jury why their client's life was worth saving. As an example of this behavior, one mitigation specialist described working with an attorney for five years on a capital case. The case ultimately resulted in a death sentence, and the attorney had only visited the client once a year prior to the case going to trial:

> I had a case that the attorney . . . would see his client once a year. And it got to be a joke between myself and the client, that it's about time for his annual visit.[248]

Although this case resulted in death and the mitigation specialist documented through notes what the attorney did not do when preparing for

247. Interview with Mitigation Specialist 1, at 8 (explaining that rather than call to the stand numerous witnesses whom the mitigation expert had found so that different people who could convey stories about the client in their own words, the attorney ordered the mitigation specialist to compress the mitigation evidence into a single PowerPoint presentation that was presented through the mitigation specialist's own testimony: "So I'm there on the stand, telling his life with a PowerPoint that—the jury couldn't care less. It was just hard.").

248. Interview with Mitigation Specialist 20, at 7.

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trial, the case has not been reversed on appeal or through post-conviction relief.[249]

Even if such a case is ultimately reversed and results in a new trial, the mitigation specialists explained their frustration with the fact that capital clients must stay on death row for years before obtaining relief because they were appointed an attorney who did not understand mitigation or who was resistant to mitigation:

> [I]t's difficult, because the attorneys run the show, and I can express my concern, and I can jump up and down, and I can wave my arms, and I can holler, and at the end of the day, the attorneys run the show. And that's one of the more frustrating things about this job—and the response I generally get from supervisors and from management—well, you'll have your chance at the IAC [the ineffective assistance of counsel claim]. You'll have your chance when it comes back, and there's an IAC complaint or an IAC hearing. I don't want that to happen in the first place. In the meantime, my client's been on death row for . . . years.[250]

In this way, mitigation specialists expressed concern that a capital client would have to linger on death row for many years before an ineffective assistance of counsel claim could be heard—let alone whether that claim would ultimately result in relief. In addition to this concern, the mitigation specialist interviewed above also described the difficult position that the mitigation specialist would be in during the ineffective assistance of counsel hearing:

> I would be in a very uncomfortable position if I'm called to testify [at the IAC hearing], because there is an IAC complaint or a bar complaint, when I have to come back in [to] that office and work

249. *Id.*

250. Interview with Mitigation Specialist 35, at 2; *see also* Dan Barry, *In the Rearview Mirror, Oklahoma and a Life on Its Death Row*, N.Y. TIMES, Aug. 11, 2010, at A1. Barry describes the recent case of James Fisher, a capital defendant in Oklahoma sentenced to death who remained on death row for nineteen years before his case was reversed because of ineffective assistance of counsel. *Id.* As an example of the ineffective assistance of counsel Fisher received, Barry cites the court's own description of the trial: "When the time came at sentencing to plead for mercy . . . [the attorney] uttered just nine words. Four were judicial pleasantries; the remaining five formed a lame objection to the prosecution's closing argument." *Id.* During his retrial in 2005, Fisher again received ineffective assistance of counsel (his second attorney "all but ignored the many boxes of defense material concerning Mr. Fisher's case"). Although Fisher's second death conviction was overturned more quickly than his first, as his case was set for a third trial, the prosecution and the defense reached a resolution of the twenty-eight-year-old case which allowed Mr. Fisher to be immediately released, with the understanding that he never return to Oklahoma. *Id.*

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> with that attorney for the next day, week, year. That's not a good thing.[251]

Rather than wait until years down the road to potentially rectify difficulties the attorneys are experiencing in understanding mitigation or in remaining skeptical about mitigation, mitigation specialists strove to point attorneys and courts to the ABA *Guidelines* so that everyone could better understand mitigation in the first place.

When doing this, some mitigation specialists returned to the theme of the tension they experienced between courts relying on the *Guidelines* and courts distancing themselves from the *Guidelines*. Although the *Guidelines* are what the mitigation specialists themselves follow in order to do their jobs to the best of their abilities, they sometimes ran into courts that downplayed the relevance of the *Guidelines*. To rectify this situation, one mitigation specialist explained the hope that the

> ABA *Guidelines* could be viewed not as just guidelines, but could be used by judges as the actual performance standard for mitigation specialists. This is what we follow. Obviously, the judges are not educated. Even the attorneys still need to be educated.[252]

While the experience above illustrates an example of judges not understanding what mitigation specialists do and what mitigation investigation entails—and the wish that the *Guidelines* would be used to help educate them—another mitigation specialist described the opposite experience. That mitigation specialist was recently appointed to a capital case through the strong encouragement of the judge presiding over the case. The capital attorneys assigned to the case had been working on the case for a year without the help of a mitigation specialist because defense counsel did not "believe in" mitigation.[253] After a year of working without a mitigation specialist, defense counsel finally sought appointment of a mitigation specialist as the result of the judge "strongly encouraging" them to do so.[254] Without such strong encouragement from the trial judge to appoint a mitigation specialist, the mitigation specialist firmly believes the attorneys would not have done so.[255]

The contrast between a judge strongly encouraging attorneys to seek the appointment of a mitigation specialist and a judge denying defense

251. Interview with Mitigation Specialist 35, at 2.
252. Interview with Mitigation Specialist 37, at 8.
253. Interview with Mitigation Specialist 40, at 3–4.
254. *Id.*
255. *Id.*

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counsel's motion to appoint a mitigation specialist could not be more stark. Between these two extremes remain a variety of other hurdles that mitigation specialists experience while trying to render thorough mitigation investigation—from funding difficulties, to attorneys who do not understand mitigation, to attorneys who do not "believe" in it. While the Court has made clear that variation between jurisdictions' death penalty procedures is acceptable, the degree of variance illustrated through the experiences of mitigation specialists interviewed in this research indicates the need to examine the arbitrariness of the system as a whole. To this end, Part III explores the possibilities and limitations of mitigation helping to achieve justice in the administration of the death penalty.

III. THE ARBITRARY IMPOSITION OF DEATH

The research presented in this Article suggests that the arbitrariness the Court strove to temper after *Furman* has not been realized. Read together, Parts I and II highlight circumstances in which the reality of capital mitigation investigation often falls short of what is required under the Sixth, Eighth, and Fourteenth Amendments. The qualitative data reveal ways that arbitrariness continues to pervade the nation's death penalty systems.

Justice White's concurrence in *Furman* therefore continues to resonate. "Legislative 'policy,'" he wrote, is "necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them."[256] The cases and interviews documented in this Article illustrate that even though mitigation investigation and advocacy are required by legislation nationwide, judges, attorneys, and mitigation specialists often implement that legislation in arbitrary ways.

A. Evidence of Arbitrariness

The experiences of the mitigation specialists interviewed through this research reveal that the absence of national consistency in understanding what constitutes thorough capital mitigation can lead to wide disparity in mitigation investigations and advocacy. The research also suggests that arbitrary professional norms within mitigation investigations and advocacy may introduce arbitrariness into the administration of the death penalty. For example, the interviews in this research reveal instances in which

256. Furman v. Georgia, 408 U.S. 238, 314 (1972) (White, J., concurring) (per curiam).

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mitigation specialists, defense attorneys, and judges misunderstood what thorough mitigation investigation involved. Such misunderstandings can impact a capital defendant's ability to receive a non-arbitrary sentence of death.

From denial of appointment in a capital case because the state court believed the attorneys could do the investigation themselves,[257] to a state court who "strongly encouraged" capital defense counsel to hire a capital mitigation specialist (even though defense counsel had themselves not sought a capital mitigation specialist to help them during the year they had been working on a capital client's case because defense counsel did not "believe in" mitigation[258]), this research suggests that the expertise of the capital judge has an impact on the capital defendant's ability to receive a fair trial. Because of the wide disparity in expertise and training among judges presiding over capital trials, some capital defendants may have the assistance of a capital mitigation specialist and some may not. Such wide disparity in access to expertise from mitigation specialists is one way that arbitrariness may be introduced into the death penalty system.

Another way that arbitrariness can infiltrate the administration of the death penalty is reflected in the wide misunderstanding of what constitutes thorough mitigation investigation. The experience of the mitigation specialist who took over a case from another mitigation specialist who promised the investigation was "95% done"[259]—only to discover that virtually no investigation had been conducted whatsoever—is one example of the gaping differences in performing thorough mitigation investigation. Such differences mean that the mere act of assigning a mitigation specialist to a case does not automatically eliminate the arbitrary imposition of death. Without a common understanding of prevailing professional norms in capital mitigation investigation, a capital defendant will not receive effective assistance of counsel when the capital defense attorney erroneously relies on the work of a mitigation specialist who does not understand what constitutes thorough mitigation investigation.

This misunderstanding of the role of the mitigation specialist and of what constitutes thorough mitigation investigation is further illustrated by the cases examined through this research. Post-*Furman* Supreme Court precedent, beginning with *Gregg*, *Woodson*, and *Lockett* and extending

257. Interview with Mitigation Specialist 37, at 1; *see supra* note 235 and accompanying text.

258. Interview with Mitigation Specialist 40, at 3–4; *see supra* notes 253–54 and acompanying text.

259. Interview with Mitigation Specialist 18, at 1.

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through the six cases published during the Court's 2009–2010 term, establish the Court's mandate that thorough mitigation investigation is a critical component of a constitutional death sentence.[260] Despite the Court's emphasis on thorough mitigation investigation, however, state courts are rendering divergent interpretations of the Court's precedent, as evidenced by the juxtaposition of state court opinions from Illinois and Arizona. The Illinois trial court presiding in *People v. Taylor* examined the Court's precedent and Illinois state court opinions interpreting the Court's precedent to decide that Taylor's attorneys could conduct a thorough mitigation investigation themselves and did not need a capital mitigation specialist to help them.[261] When an Arizona post-conviction court interpreted the same Supreme Court precedent (in addition to other Court cases issued since *Taylor* was decided in the summer of 2009), the Arizona court found that the Supreme Court had suggested that a capital mitigation specialist was important.[262] After reviewing Arizona state precedent as well, the court found that an "adequately-funded mitigation investigation was a constitutionally-required and essential defense tool"[263] and that hiring a capital mitigation specialist to help conduct such a mitigation investigation was part of the prevailing professional norms in capital litigation.[264] While the divergent results in Illinois and Arizona are not per se evidence of arbitrariness within the states' death penalty systems, they suggest arbitrariness.

In addition to the Court's precedent striving to provide guidance to lower courts as they establish—however divergently—what constitutes a thorough mitigation investigation, the ABA *Guidelines* also strive to temper arbitrariness by providing guidance. They do this by setting 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."[265] The *Guidelines*' clarity and thoroughness has helped to establish what constitutes thorough mitigation investigation and capital defense advocacy.[266] At the same time, the Supreme Court's reference to the ABA

260. *See* discussion *supra* Part I.A.2 (discussing the second wave of Supreme Court precedent, from 2000 through the Court's 2009–2010 term).

261. *See* discussion *supra* Part I.B.1.

262. *See* discussion *supra* Part I.B.2.

263. State v. Sharp, Case No. CR95000271, slip op. at 15 (Ariz. Super. Ct. July 29, 2010) (footnote omitted) (discussing State v. Bocharski, 22 P.3d 43 (Ariz. 2001)).

264. *Id.*

265. *Guidelines*, *supra* note 22, at 919.

266. *See* Implementation of the 2003 ABA Guidelines, *supra* note 228.

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Guidelines as "'only guides' to what reasonableness means, not its definition,"[267] has underscored the States' freedom to "impose whatever specific rules they see fit to ensure that criminal defendants are well represented . . . [provided that] counsel make objectively reasonable choices."[268] Without consistency in enforcing the prevailing professional norms clarified through the *Guidelines*, inconsistent understandings of what constitutes thorough mitigation investigation will continue to contribute to the arbitrariness with which defendants receive the death penalty.

The evidence of wide disparities illustrated by the examples in this Article suggests ways in which arbitrariness continues to infiltrate the administration of the death penalty. When courts agree on prevailing professional norms in capital mitigation investigation, courts take one-step closer to fulfilling the hope of mitigation. When courts disagree on prevailing professional norms, courts take one-step away from reducing arbitrariness in the administration of the death penalty.

B. Possibilities for Reform

Evidence of arbitrariness in the administration of the death penalty raises questions about what should be done. Is it possible to achieve justice through further reform of death penalty systems, or is it only possible to achieve justice through other means? Although this Article is not designed to set forth an agenda for law reform, the mitigation specialists' own analyses of what is working and not working within capital mitigation investigations and advocacy suggests some possibilities for reform.

1. Justice Through Mitigation

One way to move beyond the arbitrariness of the death penalty is to further study and emulate ways in which mitigation investigations and advocacy are operating as the Supreme Court intended. In such instances, mitigation works as a means to ensure "the fundamental respect for humanity underlying the Eighth Amendment" by requiring "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."[269] By studying

267. Bobby v. Van Hook, 130 S. Ct. 13, 17 (2009) (per curiam)).
268. *Id.* (quoting Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000)).
269. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

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examples where mitigation investigations and advocacy do in fact succeed in tempering arbitrariness in the administration of the death penalty, ideas for reform emerge that could be implemented nationally.

A mitigation specialist who has worked on both state and federal capital cases suggested one such idea. That mitigation specialist described the benefit of having access to the expertise of "federal resource councils"—experts in capital defense who are assigned regionally to provide additional support and guidance to people working on federal capital defense teams. According to the mitigation specialist:

> I just think [regional resource councils are] fabulous. I just love working with them. I love listening to their ideas. I'm going to a federal training in [a certain state] in a couple of weeks that is by invitation only for the worst twenty federal cases this year. We send our information in advance, and they take them very seriously, and they brainstorm the cases with us, and help us through everything that we need to think through.[270]

Based on this mitigation specialist's positive experience working with federal resource councils who teach the entire capital defense team (including defense lawyers, regular investigators, and mitigation specialists), the mitigation specialist suggested that such an idea could be implemented on a regional basis to improve mitigation investigations and advocacy nationwide:

> It seems to me that there should be a similar resource available to the state, and it wouldn't just have to be state by state, that every state has to have their own . . . . But I just think more willingness to talk, to share, to assume that this is not just a local problem would [be] benefi[cial] . . . . So I guess I would say that my dream would be that there would be . . . a resource council for each state . . . . I always think that people learn better in groups. That's what I would like to see.[271]

In the same way that many mitigation specialists suggested better training opportunities for all members of the capital defense team, so did many mitigation specialists suggest improved training for judges who preside over capital trials. In the words of a mitigation specialist who had worked

270. Interview with Mitigation Specialist 48, at 11.
271. *Id.*

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on capital defense teams appearing in front of judges who did not seem to understand what mitigation was and what capital mitigation specialists do:

> The one thing that comes to mind . . . is more training for judges. In a couple of areas: one, to help them understand what it is that a mitigation specialist does. Then help them understand why it's important that there is a mitigation specialist on the team . . . and also to help them understand how you cannot do a complete and thorough mitigation investigation in 100 hours, or 200 hours, or 300 hours—that it takes a lengthy period of time, and there are certain things that need to occur in order to get the information you need to get to develop the puzzle of this person's life. So I think those basic areas are very important for judges to understand.[272]

Other mitigation specialists also emphasized the idea of providing better training to judges while acknowledging that improved training would only indirectly help to improve the administration of the death penalty system:

> Sadly, it indirectly has an impact, but I would like the judges to have better training. They are putting judges in positions to officiate over death penalty cases that they are not qualified to be doing. They have not been on the criminal bench long enough, they don't really have a good grasp of death penalty law, it's very different. I'd like to see them get better training.[273]

In addition to the ideas that mitigation specialists suggested to improve training for judges and all members of the capital defense team, the recent Arizona Superior Court decision, *State v. Sharp*,[274] represents another action that state courts could take to temper the arbitrariness of capital mitigation investigations. State courts could recognize that mitigation investigation performed by a qualified mitigation specialist is required. In reaching this result, the *Sharp* court acknowledged that although the United States Supreme Court has not specifically stated "that a mitigation specialist must be on board to conduct that investigation,"[275] two passages from the Court's precedent, in *Van Hook* and *Wiggins*, are "suggestive" of such a result.[276] In addition, the Arizona court relied on its own state court

272. Interview with Mitigation Specialist 2, at 6.
273. Interview with Mitigation Specialist 23, at 5.
274. State v. Sharp, Case No. CR95000271 (Ariz. Super. Ct. July 29, 2010).
275. *Id.*, slip op. at 14.
276. *Id.* (citing Bobby v. Van Hook, 130 S. Ct. 13 (2009) (per curiam); Wiggins v. Smith, 539 U.S. 510 (2003)).

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precedent as further support for requiring a mitigation specialist. Other states could undertake similar analyses, and absent relevant precedent in their own state, they could cite Arizona's example as evidence of evolving professional norms emerging throughout the states.

Alternatively, the United States Supreme Court could decide that the right to effective assistance of counsel includes the right for defense counsel to obtain the expert help of a mitigation specialist. Indeed, a number of scholars have suggested such a reform.[277] Other scholars have suggested a variation of this reform by recommending that the *Strickland* standard evolve to reflect the defense attorney's performance at the penalty stage of a capital case.[278] Still another way to achieve reform is envisioned by Jordan M. Steiker, who argues for improving representation in capital cases by promoting structural reform within states.[279]

Another idea for reform is to implement the ABA *Guidelines* as rules or standards to guide defense attorneys across the country. Many of the mitigation specialists stressed the important role the *Guidelines* serve in their daily work, as well as their frustration that judges and defense counsel remain unfamiliar with the *Guidelines*. One mitigation specialist explained:

> [The *Guidelines* are] probably one of the best things we have going for us now. That's where it all starts, and that's why we try to incorporate it into our affidavit, so [the judge and defense counsel] understand what it means for us to do a client interview, a family interview, what record management means. I've turned to those many different times, even in trying to get certain records for a client or family members. I would copy and highlight whatever

277. *See, e.g.*, Lieutenant J. Michael Montgomery, *Death is Different:* Kreutzer *and the Right to a Mitigation Specialist in Military Capital Offense Cases*, ARMY LAW., Feb. 2007, at 13; Daniel L. Payne, *Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAP. DEF. J. 43 (2003).

278. Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323 (conveying an argument that preceded—and in some ways, anticipated—the Court's recent decisions in cases such as *Williams*, *Wiggins*, and *Rompilla*); *see also* Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 178 (2001) (arguing that "improvement in the standards for effective assistance of counsel for the capital penalty phase will work towards ending the freakish and arbitrary imposition of the death penalty" (internal quotation marks omitted)).

279. Jordan M. Steiker, *Improving Representation in Capital Cases: Establishing the Right Baselines in Federal Habeas to Promote Structural Reform Within States*, 34 AM. J. CRIM. L. 293 (2007). Steiker recommends "rejecting the Court's overly deferential standard of review reflected in *Strickland* . . . and . . . refusing to accept the judicial and legislative baseline of no right to effective representation in state post-conviction." *Id.* at 312.

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> passage I needed and include it with the request, so I was educating different people throughout the process.[280]

In order to more widely implement the *Guidelines*' reach, state bar associations, state defender organizations, or state supreme courts could adopt the *Guidelines* within their individual states. For example, in 2008, the Nevada Supreme Court issued new standards that "substantially conform to the 2003 ABA Guidelines."[281] Similarly, the Arizona Supreme Court amended the Arizona Rules of Criminal Procedure in 2006 to require that death counsel "be guided by and familiar with" the ABA *Guidelines*.[282] Also in 2006, the Texas Bar Association adopted a version of the *Guidelines*.[283] And the Georgia Public Defender Standards Council adopted a version of the ABA *Guidelines* in 2005.[284] If each state were to undertake similar steps to adopt the ABA *Guidelines*, the prevailing professional norms for thorough mitigation investigation would be consistent throughout the states.

Just as individual states could mirror the ABA *Guidelines* and *Supplementary Guidelines*, so could the United States Supreme Court more decisively embrace both documents as evidence of prevailing professional norms in capital defense. While *Van Hook* left open the possibility of the Court doing this in a future case, the Court also conveyed cross signals about the weight that the *Guidelines* carry.[285] If mitigation is to operate non-arbitrarily nationwide, then the Court's recognition of the *Guidelines*' role in establishing professional norms in capital litigation would help achieve more uniformity in mitigation investigation and advocacy. If implemented, such ideas for reform would improve capital representation and capital mitigation investigation within the individual states. Whether these improvements would ultimately succeed in tempering residual arbitrariness within the death penalty system would remain to be seen.

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280. Interview with Mitigation Specialist 46, at 5.

281. *See* Implementation of the 2003 ABA Guidelines, *supra* note 228, at 3 (citing In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Jan. 04, 2008)). In addition to these examples, other examples include the Alabama Circuit Court Judges Conference adopting the ABA *Guidelines* by resolution in 2005, the National Association of Criminal Defense Lawyers adopting the ABA *Guidelines* in 2003, and the Department for Public Advocacy for the Commonwealth of Kentucky adopting the ABA *Guidelines* in 2003. *Id.* at 4.

282. *Id.* at 3 (citing ARIZ. R. CRIM. PROC. 6.8 (West 1998 & Supp. 2011)).

283. *Id.*

284. *Id.*

285. *See* Bobby v. Van Hook, 130 S. Ct. 13, 17 n.1 (2009) (per curiam).

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In lieu of reforms that strive to improve existing death penalty systems by affecting the level of capital representation within those systems, an entirely different strategy is to envision justice beyond the confines of existing state systems. The final section does just this.

2. Justice Beyond Mitigation

Instead of reforms that strive to improve existing state systems, another course of action would be for individual states to look beyond using mitigation as a means to achieve justice. In the absence of clear choices for alternative systems that achieve justice in the imposition of death, states might choose to impose state moratoriums on executions. Former Governor George Ryan made Illinois one of the most famous examples of this strategy when he commissioned a study of the state's death penalty system. Governor Ryan then pardoned four individuals who had been erroneously sentenced to death and commuted the sentences of every other individual on Illinois' death row because he believed that Illinois' capital punishment system was fundamentally flawed and unfair.[286]

Another course of action would be for the Supreme Court to declare, as it did in *Furman*, that current death penalty systems do not guard against arbitrariness and are therefore unconstitutional, so states must go back to the drawing board and revise their statutes yet again if they wish to continue administering the death penalty.[287] Such action would constitute a de facto moratorium on the death penalty that would drive individual states to seriously study their state procedures in order to make changes geared toward tempering existing arbitrariness within their systems.

A still more extreme reform would be for individual states or for the Supreme Court to abolish the death penalty. In so doing, they could adopt Justice Blackmun's declaration from his famous dissent from denial of certiorari in *Callins v. Collins*,[288] that after decades of "[tinkering] with the machinery of death," he felt "morally and intellectually obligated simply to concede that the death penalty experiment has failed" and that it was "virtually self-evident to [him] now that no combination of procedural rules or substantive regulations ever can save the death penalty from its

286. Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at A1 (explaining that Governor Ryan's condemnation of Illinois' capital punishment system as fundamentally flawed and unfair was the reason for Ryan's decision to conduct the "largest such emptying of death row in history").

287. *See* discussion *supra* Part I.A.1.

288. 510 U.S. 1141, 1143–59 (Blackmun, J., dissenting from denial of certiorari).

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inherent constitutional deficiencies."[289] Indeed, three states have recently abolished the death penalty because they found it impossible to provide sufficient resources to safeguard against constitutional deficiencies in their death penalty systems.[290] And even more recently, on March 9, 2011, Illinois Governor Pat Quinn signed legislation abolishing the death penalty in Illinois.[291]

CONCLUSION

This Article has presented original empirical research suggesting that mitigation has not tempered the arbitrary imposition of the death penalty. Although the Supreme Court has assumed that a jury's consideration of mitigating evidence would help to ensure that capital defendants are not sentenced to death arbitrarily, this research suggests that such an assumption is deeply flawed. Indeed, the experiences of mitigation specialists highlight ways in which mitigation introduces new forms of arbitrariness into the system, rather than alleviating it.

The empirical research presented in this Article thus reveals that disparities in the kinds of mitigation investigations individual defendants receive are much more serious than previously thought. The Supreme Court has already highlighted deficiencies in the way that mitigation investigations and advocacy are conducted.[292] Similarly, the American Bar Association has expressed concern regarding "the overall fairness and accuracy of capital punishment systems in the [United States]."[293] Many of the mitigation specialists I interviewed voiced similar concerns, and my

289. *Id.* at 1145.

290. The three states that have abandoned capital punishments systems in the last three years are New Jersey (2007), New Mexico (2009), and New York (2007). *See Death Penalty Abolished in New Mexico—Governor Says Repeal Will Make the State Safer*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/death-penalty-abolished-new-mexico-governor-says-repeal-will-make-state-safer (last visited Jan. 14, 2012). New Mexico's move toward abolition began when New Mexico prosecutors dropped death penalty charges against three inmates who had killed a prison guard because the "defense ran out of money." Steve Mills, *Cost Is Slowly Killing Death Penalty*, CHI. TRIB., Mar. 8, 2009, at C10. Prior to prosecutors dropping the capital charges, the New Mexico Supreme Court had ruled that state prosecutors "could not seek a death sentence until the lawyers were paid." *Id.* In discussing the prosecutors' decision to forego capital charges, New Mexico Attorney General Gary King surmised at the time that "[u]nless the legislature is willing to appropriate a lot of money for the defense, then I think that the death penalty is pretty well negated in New Mexico." *Id.* True to his prediction, on March 18, 2009, the State of New Mexico officially abolished the death penalty.

291. Abolishment of the death penalty in Illinois took effect on July 1, 2011. *See* Ray Long, *State's Death Row Emptied Out as Ban Goes Into Effect Friday*, CHI. TRIB., July 1, 2011, at C11.

292. *See* discussion *supra* Part I.A.

293. *See The American Bar Association and the Death Penalty*, A.B.A., http://www2.americanbar.org/DeathPenalty_migrated/default.aspx (last visited Jan. 14, 2012).

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empirical research suggests that the problems are more systemic than previously acknowledged.

Convincing a jury to punish a defendant with a non-death sentence instead of death is not the hallmark of constitutionally effective mitigation. When capital mitigation works as the Supreme Court intended—as a way to ensure that the jury considers any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death—then capital mitigation has succeeded in tempering the arbitrary imposition of death, even if death is imposed. In the words of one mitigation specialist,

> [W]ell, we don't win very often—you redefine success . . . . When you go to court . . . or you show up to the client's visit when you say you're going to, they start to really feel believed in and understood, and they change. You see a shift in them, and you see a light go on, where they feel like someone cares, finally. And . . . they say thank you when it's all over with . . . thank you so much for working so hard and for caring so much, and for fighting for [their] life, even when I didn't want you to, thank you, [I] changed [their] life forever.[294]

Until mitigation operates nationwide as a means to temper the arbitrary imposition of death, capital defendants will continue to be sentenced to death in an arbitrary manner that does not comport with fundamental notions of human decency. States must ensure that all defendants receive constitutionally sound mitigation investigations and advocacy, or they must acknowledge the continuing arbitrariness of capital sentencing decisions. Capital defendants' access to constitutionally sound mitigation investigations must therefore be reformed if the investigations are to help to eliminate arbitrariness in capital punishment decisions. Without such reform, the death penalty will remain unconstitutionally arbitrary despite mitigation.

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294. Interview with Mitigation Specialist 34, at 4.

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