

AFFIDAVIT OF RUSSELL STETLER

I, RUSSELL STETLER, declare as follows:

Summary of Opinions

1. I am the National Mitigation Coordinator for the federal death penalty projects. I have been asked by counsel for Major Nidal Malik Hasan in a pending capital prosecution, to address three related questions: What is the scope of mitigation investigation in death penalty cases generally, as required by the prevailing professional norms and ethical obligations of counsel in capital cases? When should counsel seek to retain the services of qualified mitigation specialist? Among the qualified mitigation specialists who are available for retention in capital cases, are there individuals who are also attorneys?

2. These questions are addressed in detail in this declaration, but the critical points can be summed up succinctly. Death-penalty mitigation investigations generally involve a multigenerational inquiry into the biological, psychological, and social influences on the development and adult functioning of the accused. These investigations typically involve hundreds of hours of work by a skilled mitigation specialist, and it is therefore critical to begin the investigation as early as possible. The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. 2003) note the need to assemble the capital defense team (including a mitigation specialist) “[a]s soon as possible after designation” of lead counsel. (Guideline 10.4.) Mitigation specialists come from a variety of backgrounds – including anthropology, education, journalism, law, psychology, and social work – but their work is defined by their unique role as agents of capital defense counsel. Several outstanding mitigation specialists with national reputations in the field are also licensed

to practice law, but when they are retained as mitigation specialists in an individual case they play that role and only that role in the case.

Background and Qualifications

3. I am the National Mitigation Coordinator for the Federal Death Penalty Resource Counsel and Habeas Assistance and Training Counsel Projects. This national position was created in 2005 in response to the increased demand for effective mitigation preparation in death penalty cases following the February 2003 revision of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the U.S. Supreme Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003). In this capacity, I consult with lawyers, investigators, mitigation specialists, and experts in connection with death penalty cases that are pending in the federal courts at trial or on habeas corpus.

4. From 1995 to 2005, I served as the Director of Investigation and Mitigation at the New York Capital Defender Office, which was established under New York State's death penalty statute with a mandate to ensure that indigent defendants in capital cases received effective assistance of counsel. The Capital Defender Office was charged with creating an effective system of capital defense throughout New York State by providing direct representation and offering assistance to private counsel assigned by the courts to represent indigent capital defendants. I supervised a statewide staff of investigators and mitigation specialists, and I consulted with investigators, mitigation specialists, lawyers, and experts who were retained or employed by the Capital Defender Office or the private bar in connection with death penalty cases.

5. From 1990 to 1995, I served as Chief Investigator at the California Appellate Project, a nonprofit law office in San Francisco which coordinated appellate and post-conviction representation of all the prisoners under sentence of death in California. In that capacity, I also supervised an in-house staff and consulted with investigators, mitigation specialists, lawyers, and experts outside the office who were retained to assist counsel representing death-sentenced prisoners.

6. I have investigated all aspects of death-penalty cases since 1980, first working in a private office in California and later in institutional offices. Since 1980, I have regularly attended seminars and conferences relating to the defense of capital cases at trial and on appeal. Most of these conferences were organized and attended by attorneys specializing in capital work.

7. Since 1990, I have lectured extensively on capital case investigation, particularly the investigation of mitigation evidence. I have lectured on these subjects not only in New York and California, but in many other death-penalty jurisdictions, including Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Wyoming. I have also lectured on numerous occasions under the auspices of the Administrative Offices of the United States Courts (in connection with federal death-penalty cases and habeas corpus litigation) and at the Fourth Capital Litigation Workshop of the U.S. Army Trial Defense Service. Over the past two decades, I have lectured at over three hundred continuing legal education programs around the country.

8. I have lectured on mitigation investigation at multiple national training conferences

sponsored by the following organizations: the NAACP Legal Defense Fund (annual Airlie conferences), the National Legal Aid and Defender Association ("Life in the Balance"), and the National Association of Criminal Defense Lawyers ("Making the Case for Life"). At various times in the past decade and a half, I have served on the planning committees for these national conferences, as well as the annual Capital Case Defense Seminar sponsored by California Attorneys for Criminal Justice (CACJ) and the California Public Defenders Association (CPDA). I was co-chair of the planning committee for this seminar in 2009 and will again serve as co-chair in 2011. I also teach regularly at the death penalty colleges sponsored by the Santa Clara University School of Law in California and the DePaul University College of Law in Illinois.

9. Since 1993, I have contributed extensively to the California Death Penalty Defense Manual published by the California defense bar (CACJ and CPDA). This four-volume reference has a volume devoted to the investigation and presentation of mitigation evidence which I helped to shape in the 1990s. In 1999, I published articles on *Mitigation Evidence in Death Penalty Cases* and *Mental Disabilities and Mitigation* in THE CHAMPION, the monthly magazine of the National Association of Criminal Defense Lawyers, as well as an article entitled *Why Capital Cases Require Mitigation Specialists* in INDIGENT DEFENSE, published by the National Legal Aid and Defender Association. These and other articles of mine have been cited in the Commentary to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, rev. 2003 (31 HOFSTRA L. REV. 913 (Summer 2003), available at www.abanet.org/deathpenalty). At the request of HOFSTRA LAW REVIEW, I wrote an article for their symposium issue on the revised ABA Guidelines, entitled *Commentary on Counsel's Duty to Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1)*. (31 HOFSTRA LAW

REVIEW 1157 (Summer 2003)). At the request of HOFSTRA LAW REVIEW, I also wrote an article for their symposium issue on the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (36 HOFSTRA L. REV. 1067 (Spring 2008)).

10. I am the coauthor of chapters on psychiatric issues in death penalty cases in two books: *Dead Men Talking: Mental Illness and Capital Punishment*, in FORENSIC MENTAL HEALTH: WORKING WITH OFFENDERS WITH MENTAL ILLNESS (Gerald Landsberg, D.S.W., and Amy Smiley, Ph.D., eds.; Kingston, New Jersey: Civic Research Institute, Inc., 2001) and PUNISHMENT, in PRINCIPLES AND PRACTICE OF FORENSIC PSYCHIATRY, 2nd ed. (Richard Rosner, M.D., ed.; London: Arnold Medical Publishing, 2003; U.S. distribution by Oxford University Press). I am also a coauthor of A PRACTITIONER'S GUIDE TO REPRESENTING CAPITAL CLIENTS WITH MENTAL DISORDERS AND IMPAIRMENTS (Bishop Auckland, U.K.: International Justice Project, 2008).

11. Over the years, I have been directly involved in hundreds of capital cases in California and New York, including dozens of trials and postconviction hearings. I have also been consulted in various capacities on capital cases in numerous other jurisdictions around the country. As an expert witness, I have provided evidence on the standard of care in investigating capital cases and mitigation by live testimony or affidavit in numerous jurisdictions, including Alabama, Arizona, Arkansas, California, Georgia, Mississippi, Missouri, New York, Oklahoma, Pennsylvania, Tennessee, Texas, and Wyoming.

Standard of Care in Capital Cases

12. Investigation of a client's background, character, life experiences, and mental health is axiomatic in the defense of a capital case, and has been for as long as I have done this work. In every seminar I have participated in since 1980, instructors have emphasized the importance of conducting a "mitigation investigation" in preparation for the penalty phase of a capital trial and developing a unified strategy for the guilt-innocence and sentencing phases.

13. As early as 1983, Professor Gary Goodpaster discussed trial counsel's "duty to investigate the client's life history, and emotional and psychological make-up" in capital cases. He wrote, "There must be inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology and present feelings. The affirmative case for sparing the defendant's life will be composed in part of information uncovered in the course of this investigation. The importance of this investigation, and the care with which it is conducted, cannot be overemphasized." (Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 323-324 (1983).)

14. Since the early 1980s, it has also been standard practice for competent defense counsel to determine whether their capital client suffers from organic brain injury, psychiatric disorders, or trauma outside the realm of ordinary human experience. Whenever brain-behavior relationships are at issue, a thorough investigation of the etiology of brain damage is needed to determine the interplay of genetics, intra-uterine exposure to trauma and toxins, environmental exposures, head injuries, etc. In a capital case, such investigation is particularly important

because of the additional mitigating factors which may be disclosed beyond the fact of psychiatric disorder or organicity.

15. In three relatively recent cases, the U.S. Supreme Court has found trial counsel ineffective for failing to investigate potential mitigation evidence: *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005). In *Williams*, the Court reaffirmed an all-encompassing view of mitigation and found trial counsel ineffective for failing to prepare the mitigation case until a week before trial and failing to conduct an investigation of the readily available mitigating evidence (nightmarish childhood, borderline retardation, model prisoner status, etc.) In *Wiggins*, trial counsel were found deficient in their performance, even though they had had their client examined by one mental health expert, because they failed to conduct a complete social history investigation. In *Rompilla*, counsel were found deficient “even when a capital defendant’s family members and the defendant himself have suggested that no mitigating evidence is available” and despite consulting mental health experts.

16. In a capital case, competent defense counsel have a duty to conduct life-history investigations, but generally lack the skill to conduct the investigations themselves. Moreover, even if lawyers had the skills, it is more cost-effective to employ those with recognized expertise in developing mitigation evidence. Thus, competent capital counsel retain a “mitigation specialist” to complete a detailed, multigenerational social history to highlight the complexity of the client’s life and identify multiple risk factors and mitigation themes. More than a decade ago, the Subcommittee on Federal Death Penalty Cases, Committee on Defender Services for the Judicial Conference of the United States, for example, noted that mitigation specialists “have

extensive training and experience in the defense of capital cases. They are generally hired to coordinate an investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review." This report also bluntly commented, "The work performed by mitigation specialists is work which otherwise would have to be done by a lawyer, rather than an investigator or paralegal." (FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION, Federal Judicial Conference, May 1998, available at <http://www.uscourts.gov/dpenalty/1COVER.htm>.)

17. The Revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter, 2003 Revised ABA Guidelines, available at www.abanet.org/deathpenalty) state unequivocally that lead counsel at any stage of capital representation (trial or postconviction) should assemble a defense team as soon as possible after designation with at least one mitigation specialist and at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments (Guideline 10.4), in order to conduct a thorough and independent investigation relating to penalty (Guideline 10.7 and Guideline 10.11). The previous Guidelines, adopted in 1989, similarly required counsel to begin investigation immediately upon counsel's entry into the case and to "discover all reasonably available mitigating evidence." (1989 Guideline 11.4.1.) The 1989 Guidelines also required counsel to retain experts for investigation and "preparation of mitigation" (1989 Guideline 11.4.1.(7)) Notably, the 1989 Guidelines specifically stated that

“the investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered.”

18. Without a thorough social history investigation, it is impossible to ascertain the existence of previous head injuries, childhood trauma, and a host of other life experiences that may provide a compelling reason for the jury to vote for a life sentence. Moreover, without a social history, counsel cannot make an informed and thoughtful decision about which experts to retain, in order to gauge the nature and extent of a client’s possible mental disorders and impairments. Mental health experts, in turn, require social history information to conduct a complete and reliable evaluation. *See* Richard G. Dudley, Jr., and Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963 (2008); and Douglas Liebert and David Foster, *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 15:4 AM. J. FORENSIC PSYCHIATRY 43 (1994).

19. The social history investigation should include a thorough collection of objective, reliable documentation about the client and his family, typically including medical, educational, employment, social service, and court records. Such contemporaneous records are intrinsically credible and may document events which the client and other family members were too young to remember, too impaired to understand and record in memory, or too traumatized, ashamed, or biased to articulate. The collection of records and analysis of this documentation involve a slow and time-intensive process. Many government record repositories routinely take months to comply with appropriately authorized requests. Great diligence is required to ensure compliance.

Careful review of records often discloses the existence of collateral documentation which, in turn, needs to be pursued.

20. A social history cannot be completed in a matter of hours or days. In addition to the bureaucratic obstacles to the acquisition of essential documentation, it takes time to establish rapport with the client, his family, and others who may have important information to share about the client's history. It is quite typical, in the first interview with clients or their family members, to obtain incomplete, superficial, and defensive responses to questions about family dynamics, socio-economic status, religious and cultural practices, the existence of intra-familial abuse, and mentally ill family members. These inquiries invade the darkest, and most shameful secrets of the client's family, expose raw nerves, and often re-traumatize those being interviewed. Barriers to disclosure of sensitive information may include race, nationality, ethnicity, culture, language, accent, class, education, age, religion, politics, social values, gender, and sexual orientation.

21. Only with time can an experienced mitigation specialist break down these barriers, and obtain accurate and meaningful responses to these sorts of questions. In my professional opinion, an experienced mitigation specialist requires, at minimum, hundreds of hours to complete an adequate social history – even working under intense time pressure. (One nationally recognized authority in mitigation investigation, Lee Norton, has stressed the cyclical nature of the work and estimated that hundreds of hours will typically be required. *See* Lee Norton, *Capital Cases: Mitigation Investigation*, THE CHAMPION, 43-45 (May 1992).) Courts today routinely authorize funding for hundreds of hours of mitigation investigation in capital cases.

22. Mitigation investigation is particularly important when the client does not share the attorney's racial, ethnic, or cultural background. Cultural differences can include not only

ethnicity and language, but all of the badges of social identity that define an individual's world and belief system, including politics, religion, and sexual orientation. In those cases where the client does from a different ethnocultural background, attorneys may too readily overlook symptoms of impairment, attributing them to language difficulties or cultural differences. In my experience, the process of compiling an accurate social history is even more time-consuming and delicate when interviewing clients and family members from foreign cultures, because of inevitable cultural misunderstandings about the nature of the legal process and the purpose of the investigation. Every aspect of the investigation is more difficult abroad, from gathering records to gaining the trust and cooperation of witnesses. I am familiar with the difficulties of conducting investigations in foreign countries from my own personal experience. I have personally traveled to Canada, Germany, Honduras, Nigeria, Puerto Rico, and the Virgin Islands on investigative assignments. I have supervised staff investigators and mitigation specialists in capital cases who have had to conduct investigations in Colombia, the Dominican Republic, Jamaica, Mexico, Peru, and Thailand. These assignments are consistently viewed as the most arduous even among the most seasoned and skilled practitioners.

23. Mitigation evidence is not developed to provide a defense to the crime. Instead, it provides evidence of a disability, condition, or set of life experiences that inspire compassion, empathy, mercy and understanding. Unlike insanity and competency, both of which are strictly defined by statute, mitigation need not involve a mental disease or defect. Nevertheless, in many, many cases, defendants do suffer mental impairments that may not meet the legal definition of insanity or incompetency, but are powerfully mitigating disabilities which are given great weight when juries are charged with assessing individualized culpability.

24. For clients who are psychiatrically disordered or brain damaged, mitigation evidence may explain the succession of facts and circumstances that led to the crime, and how that client's disabilities distorted his judgment and reactions. Of all the diverse frailties of humankind, brain damage is singularly powerful in its ability to explain why individuals from the same family growing up in the same setting turn out so differently. It is an objective scientific fact. It does not reflect a choice made by the client.

25. Over the years, I have been involved in hundreds of capital cases, including dozens of trials and postconviction hearings. My personal experience of the effectiveness of mitigation evidence accords with the empirical research of social scientists who have studied the decision-making processes of actual jurors in death-penalty cases. *See*, for example, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538 (1998) and *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000) (concluding that mitigation does matter, especially mental impairment and mental illness).

Standard of Care in Capital Mental Health Evaluations

26. Both anecdotal reports from capital defense practitioners and social science research indicate that defense experts are viewed with great skepticism and often regarded as “hired guns” unless their conclusions are supported by abundant, credible evidence from lay witnesses. (*See*, for example, Scott Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997), finding that two-thirds of the witnesses jurors thought “backfired” were defense experts.) Thus, if only for pragmatic reasons, capital defense counsel are well advised not to rely on expert testimony without the corroborative

lay witnesses whose identity and potential evidence can only be learned through life-history investigation. However, it is equally important to offer well-prepared expert testimony to explain the effects of life experiences on an individual's functioning and behavior. Lay witnesses on their own are unlikely to understand the significance of the symptoms and behaviors they describe, and only an expert is likely to be able to provide an overview of the factors that shaped the client over the course of his life and to be able to offer an empathic framework for understanding the resultant disorders and disabilities. Expert testimony is essential for placing the factual details elicited from lay witnesses into an interpretive context that explains how various life events shaped the capital client's brain and behavior.

27. The proper standard of care for a competent mental health evaluation also requires an accurate medical and social history as its foundation. Because psychiatrically disordered individuals are by definition likely to be poor historians, a reliable evaluation requires historical data from sources independent of the client (for clinical, not simply forensic, reasons). Additional components of a reliable evaluation will include a thorough physical examination (including neurological examination) and appropriate diagnostic testing. The standard mental status examination cannot be relied upon in isolation for reliable clinical assessments any more than the expert can be relied upon in isolation in the courtroom context.

28. Except when clients exhibit such florid symptomatology that immediate clinical intervention is patently warranted, capital defense counsel are well advised to conduct a thorough social history investigation before retaining mental health experts. Only after the social history data have been meticulously digested and the multiple risk factors in the client's biography have been identified will counsel be in a position to determine what kind of culturally competent

expert is appropriate to the needs of the case, what role that expert will play, and what referral questions will be asked of the expert. Psychiatrists and psychologists have different training and expertise, and within each profession are numerous subspecialties including neuropsychology, psychopharmacology, and the disciplines which study the effects of trauma on human development. The potential roles of experts include consultants; fact gatherers needed to elicit, or assess the credibility of, client disclosures; and testifying witnesses, to name but a few. To make informed decisions about the kind of experts who may be needed and the referral questions they will address, counsel first needs a reliable social history investigation.

Summary of Conclusions

29. I was asked by counsel for Major Hasan to address the prevailing professional norms regarding the investigation and preparation of mitigation evidence in capital cases today. In addition to my own training and experience in this area, I rely on the standards articulated in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003 rev.), the Commentary to those Guidelines, and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases. The Supplementary Guidelines were published in HOFSTRA LAW REVIEW 36:3 (Spring 2008) as part of a symposium issue dedicated to the mitigation function. This symposium issue also includes articles focusing on professional responsibility (Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775)¹ and cultural issues (Scharlette

¹A coauthor of THE LAW GOVERNING LAWYERS: NATIONAL RULES, STANDARDS, STATUTES AND STATE LAWYER CODES (4th ed. 2008), Mr. Fox has opined that “the core principles expressed in the ABA Guidelines, commentary, and Supplementary Guidelines are no

Holdman and Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883).

30. The importance of the mitigation specialist is addressed at length in the Commentary to ABA Guideline 4.1:

A mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may never have disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf. Moreover, they may be critical to assuring that the client obtains therapeutic services that render him cognitively and emotionally competent to make sound decisions concerning his case.

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict. The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effects on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation. (Citations omitted; 31 HOFSTRA L. REV. at 959 (2003)).

31. The Commentary to ABA Guideline 10.7 also underscores the importance of obtaining all relevant records:

Counsel should use all appropriate avenues including signed releases, subpoenas, court orders, and requests or litigation pursuant to applicable open records statutes, to obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members, including but not limited to:

more than detailed, contextualized explanations of counsel's existing obligations under the *Model Rules of Professional Conduct*." 36 HOFSTRA L. REV. 775, 776 (2008).

- a. school records
 - b. social service and welfare records
 - c. juvenile dependency or family court records
 - d. medical records
 - e. military records
 - f. employment records
 - g. criminal and correctional records
 - h. family birth, marriage, and death records
 - i. alcohol and drug abuse assessment or treatment records
 - j. INS records
- (31 HOFSTRA L. REV. at 1025, emphasis added).

32. Reliable, objective records are critical to life-history investigation because they can reveal what the client and his family are reluctant to disclose because of shame and embarrassment, and what they simply can't disclose because they were too young or too impaired to record the events in memory. They are more credible to fact-finders because they have no inherent bias. Contemporaneous records are more credible than witnesses sharing previously undisclosed memories of past events, or experts offering opinions formed only after the client faces capital charges. They also enable the defense team to interview mitigation witnesses more effectively. The authors of reports and documents are themselves potential mitigation witnesses, otherwise unknown to the client and his family. Siblings' records often reveal insights into family dynamics or help to explain the differences between their life trajectories and that of the capital client. Multigenerational records show inherited predispositions and vulnerabilities, as well as patterns of behavior that are repeated from one generation to the next. Records from multiple family members also provide a context for understanding key changes in the client's life.

33. The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 677 (Spring 2008), explain in detail the duties of

counsel to obtain the services of competent team members and to supervise and direct their work. (Supp. Guideline 4.1.A and B, 36 HOFSTRA L. REV. at 680.)

34. The Supplementary Guidelines also provide clear guidance about the qualifications of mitigation specialists. Supplementary Guideline 5.1.C elaborates on the necessary interviewing skills:

Mitigation specialists must be able to identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information. They must be skilled interviewers who can recognize and elicit information about mental health signs and symptoms, both prodromal and acute, that may manifest over the client's lifetime. They must be able to establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of sensitive information and to assist the client with the emotional impact of such disclosures. They must have the ability to advise counsel on appropriate mental health and other expert assistance. (36 HOFSTRA L. REV. at 682)

Guideline 5.1.F discusses the necessary skills in record gathering:

Mitigation specialists must possess the knowledge and skills to obtain all relevant records pertaining to the client and others. They must understand the various methods and mechanisms for requesting records and obtaining the necessary waivers and releases, and the commitment to pursue all means of obtaining records. (36 HOFSTRA L. REV. at 683)

Neither skill set is of much use without adequate time to gather all the necessary records and to conduct multiple interviews with the individuals who knew the client most intimately over the course of his life.

35. Multigenerational life-history interviewing is essential, involving multiple one-on-one interviews, as succinctly summarized at Supplementary Guideline 10.11.C:

Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation. Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the

client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding. (36 HOFSTRA L. REV. at 689)

36. Supplementary Guideline 10.4.A delineates the responsibility of counsel in preparing mitigation evidence as follows:

Counsel bears ultimate responsibility for the performance of the defense team and for decisions affecting the client and the case. It is the duty of counsel to lead the team in conducting an exhaustive investigation into the life history of the client. It is therefore incumbent upon the defense to interview all relevant persons and obtain all relevant records and documents that enable the defense to develop and implement an effective defense strategy. (36 HOFSTRA L. REV. at 688)

37. These national standards of practice apply to death penalty cases under any U.S. jurisdiction. The effective representation guaranteed under the Sixth Amendment of the U.S. Constitution requires a thorough mitigation investigation in death penalty cases anywhere in the country, and the denial of the resources which are reasonably necessary for such an investigation risks denying a capital defendant effective counsel. It is my considered opinion that the services sought by counsel for Major Hasan for the purposes of investigating mitigating evidence are reasonable, necessary, and well within the prevailing professional norms in capital cases in the year 2010.

38. It is also my considered opinion that it is important to obtain the services of a mitigation specialist now. As noted in ¶¶ 2 and 21, *supra*, mitigation typically involves hundreds of hours of work over a long period of time, so it cannot be delayed until the last minute. Gathering life-history records is slow and time-consuming even for the most experienced mitigation specialists. Bureaucratic response to records requests is often difficult to accelerate, and sometimes requires repeated demands to ensure full compliance. Eliciting sensitive information from clients and their family members involves building trust and rapport over time,

especially where (as here in Major Hasan's case) there are cultural barriers dividing client and defense team. Early investigation of potential mitigating evidence may also be crucial to affecting the prosecution's decision of whether to seek the death penalty or whether to agree upon a disposition involving a sentence less than death. If mental health issues are to be explored in Major Hasan's case, it is imperative that a full life-history investigation be completed to provide a reliable foundation for any psychiatric assessment.

39. I understand that Major Hasan's counsel seeks to retain as his mitigation specialist Juliet Yackel, a highly qualified and experienced mitigation specialist who also is admitted to practice law. While Ms. Yackel's training as a lawyer is valuable to her work as a mitigation specialist in terms of her understanding of Eighth Amendment jurisprudence, admissibility and evidentiary issues, and other substantive and procedural matters, it is simply an asset, an additional skill set, since she will function uniquely as counsel agent in her capacity as a mitigation specialist. The purpose of retaining her has absolutely nothing to do with her also being a lawyer: she is needed to employ her considerable skills in the investigation of mitigating and extenuating evidence – nothing more.

40. Obtaining the timely appointment of a mitigation specialist is essential to counsel's efforts to provide Major Hasan with effective representation, and denying counsel these services risks committing an "error of constitutional magnitude"; see *United States v. Kreutzer*, 61 M.J. 293, 305, 309-310 (C.A.A.F. 2005). Providing Major Hasan with effective representation, including the tools essential to capital defense, not only enforces the promise of the Sixth Amendment, but assures the court that it may be confident in the reliability of its proceedings.

41. I have provided this affidavit on a pro bono basis.

I declare under penalty of perjury under the laws of the States of California and Texas,
and the United States of America, that the foregoing is true and correct and was executed this
1st day of March 2010 in Oakland, California.



RUSSELL STETLER