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Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right

Daniel L. Payne*

I. Introduction

The United States Supreme Court repeatedly has held that a defendant is entitled to present any evidence in mitigation of his offense during the sentencing phase of a capital case.[1] The Court most recently held that capital defense counsel who do not conduct reasonable investigations into their defendants' backgrounds to uncover mitigating evidence violate their defendants' right to effective assistance of counsel.[2] The Virginia General Assembly recognized a

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1. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 396 (2000) (holding that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision because "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); Buchanan v. Angelone, 522 U.S. 269, 276 (1998) (holding that, during the penalty phase, "the sentencer may not be precluded from considering . . . any constitutionally relevant mitigating evidence"); McCleskey v. Kemp, 481 U.S. 279, 305–06 (1987) (holding that a constitutional death penalty scheme "cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty"); Strickland v. Washington, 466 U.S. 668, 691 (1984) (holding that "counsel has a duty to make reasonable investigations [into potential defenses] or to make a reasonable decision that makes particular investigations unnecessary"); Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (holding that a sentencer may "refuse to consider, *as a matter of law*, any relevant mitigating evidence"); Green v. Georgia, 442 U.S. 95, 97 (1979) (holding that Georgia's hearsay rule cannot be invoked to exclude "testimony [that] was highly relevant to a critical issue in the punishment phase of the trial"); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (arguing "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"); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (holding "that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death" (citations omitted)).

2. Wiggins v. Smith, 123 S. Ct. 2527, 2536–37 (2003) (holding that defense counsel, who

capital defendant's right to present this evidence by statutorily providing for a mental health expert to assist in preparing and presenting mitigation evidence at sentencing.[3] However, this expert is limited to a psychiatrist, a clinical psychologist, or someone with a Ph.D. in clinical psychology who has successfully completed forensic evaluation training.[4] These types of experts are generally only qualified to perform evaluations rather than to perform investigations into a capital defendant's background.[5] In order to present the capital defendant's most effective case in mitigation, counsel must ensure that a thorough investigation is conducted into every aspect of the defendant's life, often including prenatal and genealogical studies.[6] Because no other member of the defense team has either the proper training or the experience to develop properly and investigate thoroughly all potential mitigating circumstances, an expert specially trained

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did not seek the preparation of a social history report of their defendant when it was the standard practice of the state to do so and there were funds available to hire a forensic social worker, fell short of the standards for capital defense work in Maryland).

3. VA. CODE ANN. § 19.2-264.3:1(A) (Michie Supp. 2003) The statute provides in pertinent part:

> [T]he court shall appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition, including . . . whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense.

Id.

4. *Id.* Section § 19.2-264.3:1(A) states:

> [T]he mental health expert appointed pursuant to this section shall be (i) a psychiatrist, a clinical psychologist, or an individual with a doctorate degree in clinical psychology who has successfully completed forensic evaluation training as approved by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services and (ii) qualified by specialized training and experience to perform forensic evaluations.

Id.

5. *See* Major David D. Velloney, *Balancing the Scales of Justice: Expanding Access to Mitigation Specialists in Military Death Penalty Cases*, 170 MIL. L. REV. 1, 33 (2001) ("Neither mental health professionals nor criminal investigators . . . possess specialized training in death penalty mitigation investigations.").

6. *See Strickland*, 466 U.S. at 691 (holding that "counsel has a duty to make reasonable investigations [into potential defenses] or to make a reasonable decision that makes particular investigations unnecessary"); Dwight H. Sullivan, Jerry L. Brittain, Michael N. Knowlan & Cheryl Pettry, *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 GEO. MASON U. CIV. RTS. L.J. 199, 209 (2002) (arguing that a "mitigation investigation of the accused should begin 'literally from embryo,' " and that "[s]ome investigations will stretch back even further to perform a 'multigenerational inquiry aimed at identifying any genetic predispositions and environmental influences which molded [the accused's] life' " (quoting Michael Mello, *On Metaphors, Mirrors, and Murders: Theodore Bundy and the Rule of Law*, 18 N.Y.U. REV. L. & SOC. CHANGE, 887, 895 (1990–91) and Russell Stetler, Michael N. Burt & Jennifer Johnson, *Mitigation Introduction: Mitigation Evidence Twenty Years After* Lockett, 1998 CALIFORNIA DEATH PENALTY DEFENSE MANUAL 3 (1998))).

in collecting and organizing a person's complete social history must be added to a capital defense team to complete this investigation.[7] Therefore, a mitigation specialist must be appointed to every defendant in a capital case.

This article will explain why a capital defender must seek the appointment of a mitigation specialist and it will argue why Virginia courts should grant an appointment as a matter of right in all capital cases. Part II of this article will further explain the mitigation specialist's role on a capital defense team, how this role differs from that performed by a mental health expert appointed pursuant to Virginia Code section 19.2-264.3:1 ("3:1 expert"), and why this role can neither be adequately nor sufficiently performed by any other potential member of the capital defense team. Part III of this article will detail the proper procedure for requesting a mitigation specialist. Finally, Part IV of this article will demonstrate why the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution require that a mitigation specialist be automatically granted upon the request of a capital defendant.

II. *Unique Nature of a Mitigation Specialist*

A. *What is a Mitigation Specialist?*

A mitigation specialist is a member of the defense team whose responsibility it is to coordinate a comprehensive biosocial and psychosocial investigation of a capital defendant's life history, identify potential mental health issues requiring evaluation by 3:1 experts, and assist defense counsel in locating such experts and in the general development of the mitigation strategy.[8] While there is no formal licensing authority for mitigation specialists, these individuals typically have a Ph.D. or a masters degree in social work as well as extensive training and experience in capital defense cases.[9] During a mitigation investigation, the mitigation specialist focuses on discovering any evidence that will be useful to convince a capital jury that the defendant should be given a sentence less than death.[10] Because a proper mitigation investigation is extremely time

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7. *See* Velloney, *supra* note 5, at 33 and accompanying text; *see also* E-mail from Cheryl A. Pettry, Mitigation Specialist, to Daniel Payne (Oct. 19, 2003, 20:50 EST) (on file with author) [hereinafter E-mail from Pettry] (noting that the primary role of the mitigation specialist "is to dig deep into all historical information and background records that could reveal potentially mitigating circumstances").

8. *See* Velloney, *supra* note 5, at 33 (providing an overview of the various functions of mitigation specialists).

9. *Id.* at 32; *see also* Sullivan et al., *supra* note 6, at 208. There are also no known formal educational programs to train mitigation specialists. However, the Virginia Commonwealth University School of Social Work has been approached by various agencies encouraging the development of such a program at this school. Interview with Roger D. Groot, Co-Chair, Capital Defense Workshop, in Lexington, Va. (Sept. 25, 2003) [hereinafter Interview with Groot].

10. *See* Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation*

consuming and requires both attention to detail and the ability to interpret the facts of a defendant's social history, the investigation cannot be sufficiently accomplished by any other member of the defense team.[11] Thus, a mitigation specialist trained and experienced in social work must be appointed to each capital case.

A proper investigation must begin with repeated visits and multiple interviews with those that know and have been in contact with the accused the most— his family.[12] The family will likely have firsthand knowledge of many of the events in the defendant's life and can detail many of the most traumatic experiences of the defendant's childhood.[13] Unfortunately, this group often can be the least likely to give a complete and accurate description of a defendant's life because they do not want to believe that their own shortcomings in raising and relating to the defendant were in any way responsible for his criminal activity.[14] Multiple visitations are often required to convince these people that the mitigation evidence that they can offer will not shift the blame to them, but rather offer an explanation of the circumstances that led to the crime that may be useful in saving the defendant's life.[15] In addition to interviewing a defendant's family, a mitigation specialist will investigate the defendant's life through interviews with

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Experts in Death Penalty Litigation, 24 AM. J. CRIM. L. 359, 365 (1997). A mitigation investigation should seek:

> evidence that (1) portrays any positive qualities the defendant possesses, (2) makes the defendant's violent acts 'humanly understandable in light of his past history and the unique circumstances affecting his formative development,' (3) tends to show that his life in prison would likely be productive, or at least not be threatening to others, (4) rebuts the prosecutor's evidence of aggravating circumstances, and (5)provides evidence of extenuating circumstances surrounding the capital crime itself.

Id. (quoting Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 335 (1983)).

11. *See* Velloney, *supra* note 5, at 33 and accompanying text.

12. *See* Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 341 (1993) (arguing that a mitigation investigation must begin by obtaining information from the defendant and his immediate family who were with the defendant from the time of his birth).

13. *See* Jeffrey J. Pokorak, *Dead Man Talking: Competing Narratives and Effective Representation in Capital Cases*, 30 ST. MARY'S L.J. 421, 439-40 (1999) (detailing the testimony of a capital defendant's sisters describing their father's brutal physical and sexual abuse toward each member of his family, as well as the father's gruesome death at the hands of the defendant's older brother, which was witnessed by the defendant).

14. *See* Elizabeth Beck et al., *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 413 (2003) (noting that the shame a capital defendant's family can feel within the community can be "intensified by the nature of mitigation which, though essential to the defense, may be interpreted as suggesting the defendant's family is culpable").

15. *See* Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES, July 6, 2003, § 6 (Magazine), at 32 (quoting a capital defender who said that "[i]t took nearly a dozen visits with [the defendant's] mother before she agreed to lay out her dismal life in court").

other individuals, such as friends, neighbors, teachers, clergy, coaches, employers, co-workers, physicians, and therapists, who may be able to supplement the family's account of a defendant's life.[16]

A mitigation specialist must also scrutinize any institutional records filed regarding the defendant, including, but not limited to, school records, medical records, government agency records, employment records, military records, and prison records.[17] For example, records indicating that the defendant was well-adjusted and non-violent in prison can help the defense rebut the aggravating factor of future dangerousness that the Commonwealth may attempt to prove in order to secure a death sentence.[18] Additionally, school records can reference the defendant's foster care history as well as the family's problems that led to the need for foster care.[19] These records not only help a defense attorney paint an accurate picture of the defendant's life for the jury, but they can also provide the investigator with clues as to where to look and what questions to ask in her quest to discover every relevant mitigating circumstance of a defendant's life.[20]

A mitigation specialist must investigate all factors that may have contributed to making the defendant the type of person that he was on the day he committed the capital murder.[21] In order to complete adequately this task, the mitigation

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16. *See* Tomes, *supra* note 10, at 365 (arguing that the defense team "must interview all members of the extended family as well as neighbors, friends and associates" (quoting Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV. 488, 495 (1995)); White, *supra* note 12, at 341 (promoting the idea that a mitigation investigation must begin by obtaining information from the defendant and his immediate family who were with the defendant from the time of his birth and "then from the spreading circles of people and institutions that the defendant had contact with during the course of his life" (citing Telephone Interview with Richard Burr, Director of the Capital Punishment Section of the NAACP Legal Defense and Educational Fund (Feb. 25, 1992)).

17. Tomes, *supra* note 10, at 368–69.

18. *See* VA. CODE ANN. § 19.2-264.4(C) (Michie Supp. 2003) (stating in pertinent part that the death penalty "shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant . . . that he would commit criminal acts of violence that would constitute a continuing serious threat to society"); Skipper v. South Carolina, 476 U.S. 1, 4 (holding that the exclusion of evidence regarding a capital defendant's "good behavior during the over seven months he spent in jail awaiting trial deprived [him] of his right to place before the sentencer relevant evidence in mitigation of punishment").

19. *See* Tomes, *supra* note 10, at 368 (referring to a mitigation specialist who "found references in the defendant's school records to a foster care agency that took care of one of the defendant's siblings. Those records contained considerable information detailing the family's problems, including his mother's drug addiction").

20. *See id.* at 368–69 (providing examples of the types of evidence a mitigation specialist can uncover by an in depth inquiry into a defendant's various institutional records).

21. *See id.* at 365 (stating that a mitigation investigation should seek "evidence that . . . makes the defendant's violent acts 'humanly understandable in light of his past history and the unique circumstances affecting his formative development,' " (quoting Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 335 (1983))).

specialist will often include an investigation into the maternity and birth records of the defendant and a genealogical investigation into his family's history.[22] An investigation into the prenatal care of the defendant may lead to evidence of fetal alcohol syndrome or other problems in the development of the defendant's brain.[23] Furthermore, a multi-generational investigation of a defendant's family can identify genetic predispositions and environmental influences which may have molded the defendant's life.[24] For example, an investigation that reveals a family history of mental illness can prompt a defense attorney to seek a psychiatrist's evaluation and diagnosis of a disease such as schizophrenia in a defendant who had never before sought or received psychiatric treatment.

B. A Proper Mitigation Investigation Cannot Be Sufficiently Completed by Any Other Member of the Defense Team

A proper mitigation investigation involves a complex process of researching records, interviewing family members and associates of capital defendants, following leads, multiple follow-up interviews, as well as the organization and compilation of potentially large quantities of evidence into a comprehensible summarized chronology that illustrates the cumulative effect of the influences on a capital defendant's life.[25] Because only an individual with education and experience in social work is qualified to make a thorough and complete investigation into a defendant's biosocial and psychosocial history, a mitigation specialist is the only individual who can sufficiently complete this type of investigation in a capital case.[26] Furthermore, the need for a detailed investigation into a defendant's records and repeated interviews with those who have contact with the defendant effectively precludes any other member of the defense team from being able to complete the mitigation investigation.[27] Therefore, a mitigation

22. *Id.* at 368.

23. *See id.* (noting that "prolonged pre-term labor [ ] can result in bleeding in the germinal matrix of the fetus's brain that can cause adverse effects running from mild developmental delay to profound mental retardation").

24. Sullivan et al., *supra* note 6, at 209–10 (discussing the role that mitigation evidence plays in military capital litigation and the mitigation specialist's contributions to the defense team).

25. *See* Velloney, *supra* note 5, at 33 (noting that an effective mitigation specialist will gather substantial amounts of multigenerational evidence in order to create a summarized chronology of the patterns of influences on a capital defendant's life and to illustrate the cumulative effects of these influences on his life).

26. *Id.* ("Neither mental health professionals nor criminal investigators . . . possess specialized training in death penalty mitigation investigations."); *see also* E-mail from Pettry, *supra* note 7 (noting that while mental health experts are trained in the conducting of and use of a social history, they "do not approach [the taking of] social history [ ] with the extensive depth and meticulous background research" that is required).

27. *See* Tomes, *supra* note 10, at 371–72 ("The magnitude of the effort to gather all [the mitigation] information makes it difficult for defense counsel— even the two-lawyer team many

investigation cannot be sufficiently completed by anyone other than a mitigation specialist.

A capital defender will be unable to complete a mitigation investigation on his own. Lawyers are widely considered to be intimidating and capital defendants often will not initially trust their court-appointed counsel.[28] Even if a capital defendant's family members want the defendant to receive a sentence less than death, they may be unable or unwilling to give information that may help the defendant receive such a sentence.[29] Not only would a family's desire to stay out of trouble in its own right prevent its members from revealing any such information, the family often does not realize that such information is even considered mitigating evidence that is useful to the defendant.[30] Capital defense attorneys have neither the experience nor the training necessary to recognize every potential mitigating factor when examining a defendant's records or interviewing a witness.[31] As one commentator noted, "[L]aw school prepares one to be an advocate, not an investigator . . . ."[32] A mitigation specialist, with her background in social work, would have far more experience recognizing signs of a physically abusive relationship in a defendant's medical or foster care records.[33] Furthermore, an experienced social worker is trained in techniques to

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experts advocate as necessary for death penalty cases— to prepare for both the guilt and the penalty phases without expert assistance." (citing Kreitzberg, *supra* note 16, at 490)).

28. White, *supra* note 12, at 338 (noting that capital defendants have often had bad prior experiences with appointed attorneys, leading them to view their appointed capital defender as part of "the system" rather than an advocate who will represent their best interest).

29. *See* Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 367 n.155 (1995). Vick notes:

> The defendant or his family may distrust the attorney or may not want private facts they view as shameful or embarrassing aired publicly in a crowded courtroom. The defendant and his family may lack awareness that certain facts about the defendant's upbringing might be considered mitigating, making the attorney's investigation more difficult.

Id.

30. Tomes, *supra* note 10, at 370.

31. *See* United States v. Thomas, 33 M.J. 644, 647 (N.M.C.M.R. 1991) (stating that "a psychosocial investigation is not within the ken of a competent attorney"); Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 605–06 (1995) (arguing that "the task of compiling background and social history information is so foreign to criminal defense work generally, yet so monumentally important to the question of whether or not a capital defendant lives or dies, that a separate standard of ineffective assistance should be applied in death penalty cases").

32. Tomes, *supra* note 10, at 364.

33. *See* Velloney, *supra* note 5, at 32 (noting that mitigation specialists are relied upon to "dig up documentation of childhood traumas" (quoting Jonah Blank & Karen Roebuck, *Guilty— But Just How Guilty?*, U.S. NEWS & WORLD REP., Jan. 12, 1998, *available at* 1998 WL 8126270)).

make a defendant's family members comfortable with divulging unpleasant family secrets and to explain why it is important that they do so.[34]

A court that does not appoint a mitigation specialist, but rather places the responsibility of the mitigation investigation upon the shoulders of the capital defender, places a great financial burden upon the Commonwealth. A thorough mitigation investigation can require dozens or even hundreds of hours of research and analysis.[35] An attorney appointed to defend a capital case in Virginia is generally compensated on an hourly basis by the Commonwealth.[36] At the time of publication of this article, the hourly rate for capital defenders varied from $125 to $150 per hour, based on the trial judge's discretion.[37] A mitigation specialist appointed to a capital case in Virginia, on the other hand, is often compensated on an average of $85 per hour.[38] Therefore, a court that appoints a mitigation specialist will save the Commonwealth a substantial amount of money based on hourly fees alone. The investment in a mitigation specialist also adds to judicial efficiency because it allows for an attorney to prepare adequately for both the guilt and sentencing phases of a capital case.[39]

Virginia private investigators appointed by the court are not qualified for the type of investigation that is necessary for collecting all available mitigation evidence.[40] While the majority of these investigators have prior experience in law

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34. *See* Lisa Orloff, *Social Worker as Mitigation Specialist: The Role of the Social Worker in Death Penalty Cases*, May 1996, *at* http://www.naswnyc.org/p2.html (last visited Oct. 1, 2003) ("Gathering a social history from a family most often involves convincing them to reveal painful secrets: mental illness, addiction, physical abuse within a family. This can be ameliorated by social workers, as we are trained and educated to do not only thorough diagnostic interviews but sensitive collateral interviews.").

35. *See* Marie Deans, *Mitigation: A Last Chance at Life*, Presentation at the Virginia Capital Case Clearinghouse Continuing Legal Education: Defending a Capital Case in Virginia X: Defending a Life: Integrating the Theme for Life Throughout the Capital Case [hereinafter Deans, *Last Chance*], at 5–6 (Apr. 3, 1998) (on file with author) (noting that a mitigation specialist spends many hours on interviews alone and that one case required the presenter to spend ten days investigating the defendant's life in the southside of Chicago).

36. Interview with Groot, *supra* note 9.

37. *See* Alan Cooper, *Lawyers' Hourly Fees at Issue: Guidelines Interpretation Worries Some Defenders*, RICH. TIMES-DISPATCH, July 12, 2001, at B-3, *available at* 2001 WL 5328322.

38. E-mail from Marie Deans, Executive Director & Mitigation Specialist, Virginia Mitigation Project, to Daniel Payne (Oct. 1, 2003, 11:07 EST) (on file with author) [hereinafter E-mail from Deans].

39. *See* Vick, *supra* note 29, at 397–98 (noting that a "crisis in capital representation is caused by funding systems that discourage experienced and competent criminal attorneys from taking appointments in death penalty cases and prevent even the most talented attorneys from preparing an adequate defense, particularly for the penalty phase").

40. *Cf.* Reed A. Castle, *A Study of the Private Investigator*, Study Conducted for the Commonwealth of Virginia Department of Criminal Justice Services, *at* http://www.dcjs.org/private Security/pssab/jta/pi.pdf (last visited Sept. 18, 2003) (developing a survey delineating the roles of a private investigator, identifying appropriate demographic questions to describe the population of

enforcement, over one-fourth have no education beyond high school and less than half have a bachelor's degree or higher.[41] Most investigators have no experience or training in identifying biosocial and psychosocial problems in a defendant's background.[42] Furthermore, these investigators have no knowledge of the kind of evidence that would be useful to an attorney who is preparing a mitigation defense.[43] Therefore, a mitigation investigation attempted by a private investigator would not be adequate.

The Code of Virginia provides a mental health expert as a matter of right to every defendant in a capital case to aid in the preparation and presentation of mitigation evidence in section 19.2-264.3:1.[44] This 3:1 expert has different qualifications and serves a purpose different from that of a mitigation specialist.[45] A 3:1 expert must be either a psychiatrist, a clinical psychologist, or an individual with a doctoral degree in clinical psychology who has successfully completed forensic evaluation training.[46] These experts specialize in making psychological

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practitioners in this field, and developing tasks that describe work behaviors).

41. *Id.* at 9, 12.

42. *See id.* at 10 (noting that less than 25% of Virginia private investigators consider either information gathering or criminal defense as their primary area of practice). The study also noted that the training to become a Virginia private investigator requires only a total of sixty hours of training in the following areas: Orientation, Standards, Law, Investigative Techniques, Report Writing, and Communication. *Id.* at 21.

43. *See* Velloney, *supra* note 5, at 33 and accompanying text.

44. VA. CODE ANN. § 19.2-264.3:1(A) (Michie Supp. 2003). The statute provides in pertinent part:

> Upon (i) motion of the attorney for a defendant charged with or convicted of capital murder . . . the court *shall* appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition, including . . . whether there are any other *factors in mitigation* relating to the history or character of the defendant or the defendant's mental condition at the time of the offense.

Id. (emphasis added).

45. *See* Affidavits of John B. Boatwright, III, Leonard R. Piotrowski, and Joseph A. Migliozzi, Jr., lead attorneys for the Central Virginia, Northern Virginia, and Southeastern Virginia Capital Defender Units, respectively [hereinafter CDU Affidavits] (on file with author) (asserting that "[t]he work of the mitigation specialist will be *independent and different* than that performed by an expert appointed for [CDU] clients pursuant to Va. Code Ann. § 19.2-264.3:1") (emphasis added). A Southwestern Virginia CDU has been planned, but has yet to be established.

46. VA. CODE ANN. § 19.2-264.3:1(A) (Michie Supp. 2003). Section 19.2-264.3:1(A) requires:

> The mental health expert appointed pursuant to this section shall be (i) a psychiatrist, a clinical psychologist, or an individual with a doctorate degree in clinical psychology who has successfully completed forensic evaluation training as approved by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services and (ii) qualified by specialized training and experience to perform forensic evaluations.

evaluations based on information and histories given to them by their patients or other sources.[47] They are typically neither experienced in the practice of nor inclined to pursue an in-depth investigation into a patient's social history.[48] Because 3:1 experts are not qualified to conduct a thorough psychosocial and biosocial investigation of a defendant, they cannot fill the role of a mitigation specialist.

A 3:1 expert is unable to commit the amount of time necessary to conduct a sufficient mitigation investigation. A proper mitigation investigation requires "travel to every location where the accused lived to seek birth, adoption, health, education, pre-military employment, and criminal records."[49] A 3:1 expert would further be required to interview anyone with knowledge of the defendant's history while visiting these places.[50] Effective interviews of this nature must be in person and often follow-up interviews are required to get a complete account of the defendant's history.[51] This process is clearly a time-consuming task, and 3:1 experts would potentially be unwilling or unable to be absent from their professional practice to devote the necessary time to a mitigation investigation.[52] A mitigation specialist, whose sole task is to conduct an extensive biosocial and psychosocial investigation of the defendant, is capable of committing the time necessary to conduct a thorough investigation.

III. Requesting a Mitigation Specialist

A. When to Make the Request

An attorney assigned to defend a capital case in Virginia will often move for the court to appoint a 3:1 expert at the first available motions hearing.[53] This expert is appointed upon the defendant's request as a matter of right, and many capital defenders believe that this expert will be helpful in preparing a mitigation case for the penalty phase of the trial.[54] While a 3:1 expert will be an indispens

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Id.

47. Sullivan et al., *supra* note 6, at 215 (noting that mitigation specialists "present the mental health experts with data that will help them form a diagnosis, and they may collect information that will be useful in confirming a diagnosis").

48. *Id.* at 214 (suggesting that the responsibilities involved in conducting a mitigation investigation may detract from a psychiatrist's freedom to focus attention on the task of analyzing the accused); *see also* E-mail from Pettry, *supra* note 7 (noting that while mental health experts are trained in the conducting of and use of a social history, they "do not approach [the taking of] social history [ ] with the extensive depth and meticulous background research" that is required).

49. Sullivan et al., *supra* note 6, at 213.

50. *Id.* at 214.

51. *Id.*

52. *Id.*

53. Interview with Groot, *supra* note 9.

54. *See* VA. CODE ANN. § 19.2-264.3:1 (Michie Supp. 2003) (providing that, upon a motion

able asset to the defense team during the penalty phase, moving for this expert before consulting with a mitigation specialist can hinder the defense team's objective of presenting the best mitigation case possible.[55] A request for a mitigation specialist should be among the first motions a capital defender files.[56] If the court grants funds for a mitigation specialist, a capital defender should allow the specialist to conduct a substantial portion of her investigation, discuss the results of the investigation with the specialist to determine the best strategy to present mitigation, and then consult with the specialist to determine the type of 3:1 expert to request.[57] A capital defender could, in effect, waste his client's right to a 3:1 expert by moving for the wrong type of expert.[58] Without a

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of an indigent capital defendant, the court shall appoint a qualified mental health expert to assist the defendant in preparation and presentation of, *inter alia*, any factors in mitigation).

55. *See* Russell Stetler, *Mental Disabilities and Mitigation*, THE CHAMPION 49, 50 (Apr. 1999). Stetler notes:

> Most capital defense practitioners now recognize that it is disastrous to wait until the eve of trial to consult a mental health expert, but many over-compensate for this risk by consulting experts too early. It is essential for counsel . . . to develop an independently corroborated multi-generational social history that will highlight the complexity of the client's life and identify multiple risk factors and mitigation themes.

Id. (citations omitted). Not all 3:1 experts are the same. Stetler notes that these "[m]ental health experts are neither all-purpose generalists nor interchangeable. They represent many disciplines . . . and they have specialized knowledge and experience based on their research and clinical practices." *Id.*

56. *See id.* at 52 (noting that before a mental health expert joins a capital defense team, "the team should already have assembled a rich documentary history of the client's life through painstaking mitigation investigation"). Stetler adds:

> It is critical that mitigation be woven into the defense theory and strategy beginning in the earliest stages of the guilt/innocence phase of the trial. Too often, when mitigation is only revealed to the jury at sentencing, they have already hardened their perspective toward the defendant and are therefore considerably less likely to be inclined toward any kind of humanitarian or merciful perspective.

E-mail from Pettry, *supra* note 7.

57. *See* E-mail from Deans, *supra* note 38 (asserting that attorneys should not request a 3:1 expert until a majority of the investigation has been completed and the mitigation specialist has assessed all the relevant records).

58. *See id.* (providing that in a hypothetical in which a defense counsel has a psychiatrist appointed as a 3:1 expert before the mitigation specialist completes her investigation and reveals that the defendant requires a psychologist with a specialty in development as a 3:1 expert, the previously appointed psychiatrist is at a disadvantage helping the defense and the defendant will not likely have the opportunity to have the most appropriate 3:1 expert appointed). Some mental health experts, without the guidance of a thorough investigation, will begin their evaluation of a capital defendant by subjecting him to a battery of neuropsychological and psychiatric tests. *See* Sullivan et al., *supra* note 6, at 212 (noting a forensic psychiatrist's argument that mitigation specialists are not necessary and that defense mental health experts should consider conducting CAT scans or MRIs of the

detailed life history compiled by a mitigation specialist, a 3:1 expert could potentially subject a defendant to tests that are unnecessary or even harmful to the defense.[59]

A mitigation specialist and a 3:1 expert must work together to present an effective mitigation case for a capital defendant. A mitigation specialist, when properly employed, does not replace the work done by a 3:1 expert, but rather supplements and enhances the mitigation presentation provided by the 3:1 expert.[60] The mitigation specialist collects the data the 3:1 expert needs to form an accurate diagnosis.[61] When this diagnosis is formed, the 3:1 expert will meet with the mitigation specialist and the defense counsel to determine what evidence to present during the sentencing phase and how to present it.[62] A capital defender will generally present his mitigation case using a combination of three available types of witnesses: the professional expert, the lay expert, and the defendant's friends and family.[63] The professional expert "profess[es] an expertise based upon training and study beyond the knowledge of the average juror."[64] In Virginia, the 3:1 expert who testifies during sentencing is the most common "professional expert." The lay expert "has particular knowledge of the defendant's situation through the lay expert's own experiences and [ ] has insights to

defendant's head and "electroencephalogram, neuropsychological testing, and even chromosome analysis" of the defendant (quoting James Bradley Reynolds, M.D., *The Clinical Assessment of Military Criminal Behavior*, in PRINCIPLES AND PRACTICE OF MILITARY FORENSIC PSYCHIATRY, R. Gregory Lande & David T. Armitage, eds., 57-94, at 86 (1997))).

59. Sullivan et al., *supra* note 6, at 212; *see also* John H. Blume and David P. Voisin, *Avoiding or Challenging a Diagnosis of Antisocial Personality Disorder*, THE CHAMPION 69, 69 (Apr. 2000) (noting that "[t]oo often, it is the defense mental health expert who concludes that the defendant has ADP [antisocial personality disorder]. As a result, counsel may decide to forgo presenting any expert testimony on the client's behalf in order to avoid having the jury learn from defense expert that the defendant may be a sociopath").

60. *See* The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases [hereinafter ABA Guidelines for Death Penalty Defense], Commentary to 4.1, at 33 (rev. ed. 2003). The Guidelines note that a mitigation specialist:

> 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.

Id. (citations omitted).

61. Sullivan et al., *supra* note 6, at 215.

62. *See* Deans, *Last Chance*, *supra* note 35, at 10 (noting that the mitigation specialist can assist in preparing mitigation witnesses once the defense team is satisfied with the mitigation themes).

63. *See* Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1118-19 (1997) (noting that penalty phase witnesses fall into three categories: professional experts, lay experts, and "family and friends").

64. *Id.* at 1118.

offer because of those experiences."[65] Witnesses who are family or friends of the defendant can provide testimony "ranging from raw emotional appeals for sparing the defendant's life to a detailed accounting of the defendant's childhood."[66]

While each of these witnesses can provide valuable testimony, each witness has the potential to have a negative effect on a defendant's mitigation case. Professional experts can be viewed as hired guns willing to say anything for a fee.[67] Lay experts, while often seen as unbiased by jurors, are not given significant credibility because their expertise is not derived "from professional training or study."[68] Finally, the testimony of friends and family loses credibility due to "their inherent bias in favor of the defendant."[69] In order to present the most effective case for mitigation, the 3:1 expert's testimony must be intertwined with lay expert and/or friends and family testimony.[70] Because the 3:1 expert will need to present his conclusions and diagnoses in the most convincing fashion, both lay expert and friends and family witnesses will need to testify to give factual support to the testimony of the 3:1 expert.[71] Thus, a mitigation specialist must be utilized in the defense of every capital case, because this specialist provides the unique and valuable service of locating lay witnesses and determining what mitigating information they can provide.

B. *Motion for Appointment of a Mitigation Specialist*[72]

The United States Supreme Court's decision in *Ake v. Oklahoma*[73] and the Supreme Court of Virginia's decision in *Husske v. Commonwealth*[74] have combined to set the procedure for an indigent defendant's motion to seek appointment of experts in capital cases in Virginia.[75] In *Ake*, the United States Supreme Court

65. *See id.* (including as examples of lay witnesses a prison guard who has had prior interaction with the defendant or an incest victim who has lived through similar experiences as the defendant).

66. *Id.* at 1119.

67. *Id.* at 1126.

68. *Id.* at 1118.

69. Sundby, *supra* note 63, at 1151.

70. *See id.* at 1171 (noting that capital jurors who returned a life verdict "were all strongly persuaded by the defendant's case in mitigation, a case that involved the effective integration of all three types of witness testimony").

71. *See id.* at 1186 (concluding that "if [a mental health] expert is to be used, the expert's testimony must be effectively integrated with persuasive lay testimony").

72. The Virginia Capital Case Clearinghouse has a Motion for the Appointment of a Mitigation Specialist on file. Please call (540) 458-8557 for a copy of this motion.

73. 470 U.S. 68 (1985).

74. 476 S.E.2d 920 (Va. 1996).

75. Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (holding that the Due Process and Equal

held that the Due Process and Equal Protection clauses of the Fourteenth Amendment require the state to provide a mental health expert upon demonstration by the defendant that his sanity at the time of the offense will be a significant factor during his trial.[76] In so holding, members of the Court recognized that capital cases are fundamentally different than non-capital cases with respect to the needs of the accused.[77] In *Husske*, the Supreme Court of Virginia extended the holding in *Ake* to include any expert that the defendant requires in order to have the "basic tools of an adequate defense."[78] The *Husske* court further stated that "an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is 'likely to be a significant factor in his defense,' and that he will be prejudiced by the lack of expert assistance."[79] The subject of mitigation clearly will be a significant factor during sentencing in every capital case, and a thorough investigation always necessitates the assistance of a mitigation specialist.[80] Therefore, every capital defendant has a need for a mitigation specialist in order to have "the basic tools of an adequate defense."[81] Furthermore, because every capital defendant will suffer prejudice if he is denied a mitigation specialist, no showing of particularized need is necessary.[82]

Protection clauses of the Fourteenth Amendment require the state to provide psychiatric assistance when the "defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial"); Husske v. Commonwealth, 476 S.E.2d 920, 925 (Va. 1996) (holding that an indigent defendant's due process rights under *Ake* included the right of a defendant to request any kind of expert that is needed for the defendant to have "the basic tools of an adequate defense" upon a showing of particularized need, that the expert would assist in a subject material to the defense, and that denial of such services would result in a fundamentally unfair trial (quoting *Ake*, 470 U.S. at 77)).

76. *Ake*, 470 U.S. at 83.

77. *Id.* at 87 (Burger, C.J., concurring) ("In capital cases the finality of the sentence imposed warrants protections that . . . may not be required in other cases.").

78. *Husske*, 476 S.E.2d at 925.

79. *Id.* (quoting *Ake*, 470 U.S. at 82–83 (citation omitted)).

80. *See* VA. CODE ANN. § 19.2-264.4(B) (Michie Supp. 2003) ("Evidence which may be admissible [at sentencing] . . . may include the circumstances surrounding the offense, the history and background of the defendant, and *any other facts in mitigation* of the offense." (emphasis added)); *Wiggins*, 123 S. Ct. at 2536–37 (holding that a mitigation investigation that did not include the preparation of a social history report by a forensic social worker fell short of the prevailing professional standards of Maryland capital defenders and the standards for capital defense work articulated by the ABA).

81. *See Husske*, 476 S.E.2d at 926 (holding that the Commonwealth's requirement to provide indigent defendants with the "basic tools of an adequate defense" may include the appointment of non-psychiatric experts).

82. *See infra* notes 89–94 and accompanying text.

C. *Making a Motion for Ex Parte Hearings on the Motion For the Appointment of a Mitigation Specialist*[83]

If a court rules that a factual showing is indeed required for the appointment of a mitigation specialist, this showing must be made at an ex parte hearing.[84] The denial of an opportunity to make this showing ex parte will prejudice a capital defendant because it will reveal his theory of the case and defense strategy to the Commonwealth.[85] The United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."[86] The United States Supreme Court has held that this privilege against self-incrimination "includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution."[87] A capital defendant will necessarily disclose information regarding his defense strategy and theory of the case in his attempt to make a factual showing as to the necessity of a mitigation specialist unless an ex parte hearing is granted to make this showing.[88]

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83. The Virginia Capital Case Clearinghouse has a Motion for Ex Parte Hearings on Defendant's Motions for Expert Assistance on file. Please call (540) 458-8557 for a copy of this motion.

84. The Supreme Court of Virginia held that there is no constitutional right to an ex parte hearing on an indigent defendant's motions for expert assistance. Ramdass v. Commonwealth, 437 S.E.2d 566, 571 (Va. 1993) (citing O'Dell v. Commonwealth, 364 S.E.2d 491, 499 (Va. 1988)). However, the *Ramdass* court relied upon language in *O'Dell* that does not support the notion that there is no constitutional right to ex parte hearings on motions for expert assistance. *See O'Dell*, 364 S.E.2d at 499 (holding that O'Dell's request for an ex parte hearing on motions for expert assistance should be denied because he had "no constitutional right requiring the Commonwealth to provide funding for th[e] *type of expert assistance*" he requested (emphasis added)). Unfortunately, Virginia courts have continued to cite the *Ramdass* court's erroneous interpretation of its holding in *O'Dell*. *See, e.g.*, Weeks v. Commonwealth, 450 S.E.2d 379, 388 (Va. 1994).

85. *See Ake*, 470 U.S. at 82-83 (holding that the need for the assistance of a psychiatrist is readily apparent "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense"); Wardius v. Oregon, 412 U.S. 470, 476 (1970) (holding that "[i]t is *fundamentally unfair* to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State" (emphasis added)).

86. U.S. CONST. amend. V.

87. Maness v. Meyers, 419 U.S. 449, 461 (1975).

88. *See* United States v. Meriwether, 486 F.2d 498, 506 (5th Cir. 1973). The court in *Meriwether* stated:

> The *ex parte* provision of [former Rule 17 of the Federal Rules of Criminal Procedure] was not intended to protect the defendant from opposition from the prosecutor; it was intended to shield the theory of his defense from the prosecutor's scrutiny. Allowing the prosecutor to observe the defendant's support of his motion permits this scrutiny, even when the prosecutor remains silent.

In *Ake*, the United States Supreme Court held that "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent."[89] Because the Court found that the need for psychiatric assistance was apparent only after the ex parte showing was made, it can be inferred that *Ake* permits the defendant to make a factual showing ex parte.[90] Indeed, of the thirty-eight United States jurisdictions that allow the death penalty, seven have made this inference and have held that *Ake* constitutionally mandates an ex parte hearing on expert assistance.[91] Additionally, eight states, as well as the federal government, make an ex parte hearing statutorily available to a criminal defendant.[92]

The Commonwealth's presence at a hearing on a capital defendant's request for a mitigation specialist will necessarily cause substantial and significant information about the defense strategy to be communicated to the Commonwealth in violation of the defendant's Sixth Amendment right to effective assistance of counsel.[93] The United States Supreme Court has noted that this right "can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private *and that his lawful preparations for trial are secure*

Id.

89. *Ake*, 470 U.S. at 82–83.

90. *See id.* (stating that after an ex parte hearing demonstrating that sanity is a significant factor to the defense, the need for the assistance of a psychiatrist is readily apparent).

91. *See* Fitzgerald v. State, 972 P.2d 1157, 1166 (Okla. Crim. App. 1998) (holding that in order "[t]o qualify for expert assistance, a defendant must make 'an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense' " (quoting *Ake*, 470 U.S. at 82)); *Ex parte* Moody, 684 So. 2d 114, 122 (Ala. 1996) (supporting same proposition); State v. Ballard, 428 S.E.2d 178, 180 (N.C. 1993) (supporting same proposition); Dunn v. State, 722 S.W.2d 595, 595–96 (Ark. 1987) (supporting same proposition); Williams v. State, 958 S.W.2d 186, 192–93 (Tex. Crim. App. 1997) (supporting same proposition); State v. Peeples, 640 N.E.2d 208, 212 (Ohio Ct. App. 1994) (supporting same proposition); State v. Newcomer, 737 P.2d 1285, 1291 (Wash. Ct. App. 1987) (supporting same proposition).

92. *See* 18 U.S.C. § 3006A(e)(1) (2000) ("Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application."); CAL. PENAL CODE § 987.9(a) (West 2001 & Supp. 2003) (providing that "[t]he fact that an application [for funds for the specific payment of investigators for the preparation or presentation of the defense] has been made shall be confidential and the contents of the application shall be confidential"); DEL. SUPER. CT. CRIM. R. ANN. 44(e)(4) (2003) ("Upon prior application assigned counsel may apply ex parte for funds to pay for . . . investigative, expert, or other services necessary for adequate representation."); KAN. STAT. ANN. § 22-4508 (1995) (providing for an ex parte hearing); NEV. REV. STAT. 7.135 (2001) (providing for an ex parte hearing); N.Y. JUD. LAW § 35-b(8) (McKinney 2002) (providing for an ex parte hearing); OR. REV. STAT. § 135.055(3)(a) (2001) (providing for an ex parte hearing); S.C. CODE ANN. § 16-3-26(C)(1) (Law. Co-op. 1985 & West Supp. 2001) (providing for an ex parte hearing); TENN. CODE ANN. § 40-14-207(b) (2003)(providing for an ex parte hearing).

93. *See* U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense").

against intrusion by the government, his adversary in the criminal proceeding."[94] This ruling supports the notion that the Commonwealth must not be permitted to intercept the defense strategy in any way. Therefore, the Commonwealth's mere presence at a capital defendant's hearing on a motion for the appointment of a mitigation specialist will result in the communication of substantial and significant information about the defense strategy in violation of the defendant's Sixth Amendment right to the effective assistance of counsel.

IV. A Mitigation Specialist As a Matter of Right[95]

A. The Establishment of Virginia Capital Defense Units Creates Constitutional Rights to a Mitigation Specialist

1. The Statewide Standard for Capital Defense Work in Virginia

In 2002, the Virginia General Assembly ("General Assembly") mandated the Public Defender Commission ("PDC") to create four Capital Defense Units ("CDUs") to serve the needs of the Commonwealth's capital defendants.[96] In following this mandate, the PDC determined that each CDU be staffed with capital defense attorneys, a fact investigator, and a mitigation specialist.[97] The lead attorney at each CDU has determined that all defendants represented by the CDU attorney will also have access to the assistance of the CDU's fact investigator and the mitigation specialist.[98] Furthermore, the Code of Virginia grants, as a matter of right, a 3:1 expert to every capital defendant.[99] Thus, the defense

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94. Weatherford v. Bursey, 429 U.S. 545, 554 n.4 (1977) (quoting Brief of Amicus Curiae United States at 24 n.13, Weatherford v. Bursey, 429 U.S. 545 (1977) (No. 75-1510) (emphasis added) (citations omitted)).

95. Portions of this section are based substantially on the Virginia Capital Case Clearinghouse's Motion for Appointment of a Mitigation Specialist, *supra* note 72. This motion was written by Joseph Dunn, with assistance provided by Whitnan J. Hou, Roger D. Groot, and the author.

96. VA. CODE ANN. § 19.2-163.2.10 (Michie Supp. 2003) (requiring the PDC to "establish four regional capital defense units by the end of fiscal year 2004").

97. *See* CDU Affidavits, *supra* note 45 (stating that the staff of each CDU consists of three capital defense attorneys, a fact investigator, and a mitigation specialist).

98. *Id.*

99. VA. CODE ANN. § 19.2-264.3:1 (Michie Supp. 2003). The statute provides:

> Upon (i) motion of the attorney for a defendant charged with or convicted of capital murder and (ii) a finding by the court that the defendant is financially unable to pay for expert assistance, the court *shall* appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition, including . . . whether there are any other *factors in mitigation* relating to the history or character of the defendant or the defendant's mental condition at the time of the offense.

Id. (emphasis added).

team for every defendant represented by a CDU attorney will consist of two capital defense attorneys, a fact investigator, a 3:1 mitigation expert, and a mitigation specialist.[100] This defense team conforms with the American Bar Association's ("ABA's") Guidelines for the creation of a capital defense team.[101]

The General Assembly has required that when a circuit judge appoints defense counsel to an indigent capital defendant, "one of the attorneys appointed shall be from a capital defense unit maintained by the Public Defender Commission."[102] The only exceptions to this rule are if the appointment of a CDU attorney would create a conflict of interest or if justice requires the appointment of another attorney.[103] Because appointment of a CDU attorney is mandated subject to these two narrow exceptions, the General Assembly has recognized the importance of supplying the services of the CDU staff to all indigent capital defendants.[104] Thus, the General Assembly's creation of CDUs establishes a statewide standard of practice for capital defense work in the Commonwealth. Therefore, the statewide standard of practice for capital defense in Virginia includes a mitigation investigation conducted by a mitigation specialist.[105] Because the CDU sets a statewide standard of practice that includes the use of a mitigation specialist and because the CDU team conforms with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, the failure to appoint a mitigation specialist to a non-CDU defendant will result in a violation of the defendant's Sixth Amendment right to the effective assistance of counsel.[106]

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100. *Id.*; *see* CDU Affidavits, *supra* note 45 (stating that the staff of each CDU consists of three capital defense attorneys, a fact investigator, and a mitigation specialist).

101. *See* ABA Guidelines for Death Penalty Defense, *supra* note 60, 4.1(A), at 28 (providing that "[t]he defense team should consists of no fewer than two attorneys . . . an investigator, and a mitigation specialist"). The Guidelines further indicate that the defense team should also include "at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." *Id.*

102. VA. CODE ANN. § 19.2-163.7 (Michie Supp. 2003).

103. VA. CODE ANN. § 19.2-163.4 (Michie 2000) (requiring that attorneys, provided pursuant to section 19.2-163.2, be appointed to indigent defendants "unless (i) the public defender is unable to represent the defendant or petitioner by reason of conflict of interest or (ii) the court finds that appointment of other counsel is necessary to attain the ends of justice").

104. *Id.*; *see* VA. CODE ANN. § 19.2-163.7 (requiring appointment of a CDU attorney in each Virginia capital case).

105. *See* CDU Affidavits, *supra* note 45 (asserting that a "mitigation specialist will be assigned to perform a mitigation investigation in every case to which the [CDU] is appointed").

106. *See infra* Part IV.A.2 (discussing the application of Wiggins v. Smith, 123 S. Ct. 2527 (2003)).

2. *Failure of a Capital Defender to Comply With Prevailing Professional Standards Violates a Defendant's Sixth Amendment Guarantee of Effective Assistance of Counsel*

a. *The Capital Defender's Duty to Perform a Mitigation Investigation*

An attorney representing a capital defendant in Virginia has a duty to investigate and produce evidence that mitigates the act of capital murder. The Code of Virginia provides that, in the sentencing phase, evidence may be presented on any matter that the court considers relevant to the sentence, including the "history and background of the defendant, and any other facts in mitigation of the offense."[107] The Code further provides, as a matter of right, the appointment of a mental health expert to assist the defendant in the preparation and presentation of mitigation evidence during sentencing.[108] Because mitigation is the only issue for the defense at sentencing and the statute provides for assistance of the presentation of this evidence, a mitigation investigation must be conducted in preparation of the penalty phase.[109] Therefore, a capital defender has a duty under the Virginia criminal procedure statutes to discover and present mitigation evidence.[110]

The United State Supreme Court also set forth standards for presentation of mitigation evidence by a capital defender. In *Strickland v. Washington*,[111] the capital defender began to prepare for the sentencing hearing by speaking to the capital defendant about his background and by speaking to the defendant's wife and his mother once by telephone.[112] However, the defense counsel decided

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107. VA. CODE ANN. § 19.2-264.4(B) (Michie Supp. 2003).

108. VA. CODE ANN. § 19.2-264.3:1 (Michie Supp. 2003).

109. *Id.*; *see also* VA. CODE ANN. § 19.2-264.4(D). The Virginia Code provides:

> The verdict of the jury *shall be* in writing, and *in one of the following forms*: (1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible, or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and *having considered the evidence in mitigation of the offense*, unanimously fix his punishment at death . . ." or (2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and *having considered all of the evidence in aggravation and mitigation of such offense*, fix his punishment at (i) imprisonment for life; or (ii) imprisonment for life and a fine of $________".

Id. (emphasis added).

110. *See* VA. CODE ANN. § 19.2-264.4(B) (providing that a capital defendant may present any evidence in mitigation during the penalty phase of his trial); VA. CODE ANN. § 19.2-264.3:1(A) (requiring that, upon motion of a capital defendant, a court appoint a mental health expert, *inter alia*, for the preparation and presentation of evidence in mitigation of his offense).

111. 466 U.S. 668 (1984).

112. Strickland v. Washington, 466 U.S. 668, 672–73 (1984).

neither to investigate further nor to present any mitigating evidence at sentencing, due to a "sense of hopelessness about overcoming the evidentiary effect of [the defendant's] confessions to the gruesome crimes."[113] The defendant appealed his conviction and death sentence on the grounds that, *inter alia*, his counsel provided ineffective assistance because he "failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts."[114] The Court, in determining the standard for a claim of ineffective assistance of counsel in a capital case, held that defense counsel has a duty to make reasonable investigations into potential defenses or to make a reasonable determination that makes particular investigations unnecessary.[115] The Court further held that "[p]revailing norms of practice as reflected in American Bar Association standards and the like, . . . are guides to determining what is reasonable."[116] In short, the Court in *Strickland* required at least a reasonable mitigation investigation according to prevailing practice norms, such as those provided in the ABA Guidelines.[117]

The United States Supreme Court focused its reasoning on the duty of a capital defender to investigate mitigating evidence in *Williams v Taylor*.[118] In *Williams*, the defendant wrote a letter to local police confessing to murder while in jail for an unrelated offense.[119] Williams was eventually convicted of capital murder.[120] At the penalty phase, his counsel focused their argument on "the fact that Williams had initiated the contact with the police that enabled them to solve the murder," and failed to present other relevant mitigating evidence.[121] The

113. *Id.* at 673 (citations omitted). In addition to the defendant's confessions, trial counsel's sense of hopelessness was augmented by the defendant's decisions to waive the right to a jury trial, to plead guilty to all charges, and to waive his right to an advisory jury at the capital sentencing hearing. *Id.* at 672.

114. *Id.* at 675.

115. *Id.* at 691.

116. *Id.* at 688.

117. *Id.*

118. Williams v. Taylor, 529 U.S. 362, 396 (2000) (holding that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision because counsel had not "fullfill[ed] their obligation to conduct a thorough investigation of the defendant's background").

119. *Id.* at 367.

120. *Id.* at 368.

121. *Id.* The *Williams* Court considered the fact that an array of mitigating evidence had been overlooked:

> The omitted mitigating evidence included the following: records that demonstrated the defendant was physically abused by his parents, removed from their care due to criminal neglect, abused in foster care, returned to his parents, found to be borderline mentally retarded, and testimony asserting he helped crack a prison drug ring and

Court held that the failure of the defense counsel to investigate properly mitigation evidence violated the Sixth Amendment protection against ineffective assistance of counsel.[122] The holding of the *Williams* Court stands for the proposition that defense counsel have a duty to find and present mitigation evidence in a capital case.[123]

b. Identifying Prevailing Professional Standards: A Closer Look at Wiggins v. Smith

The United States Supreme Court's recent decision in *Wiggins v Smith*[124] further clarified the standard for determining whether a capital defender fulfilled his duty to find and present mitigating evidence in capital cases.[125] In *Wiggins*, the defendant elected to be sentenced by a jury after being convicted of first-degree murder, robbery, and theft.[126] Defense counsel moved to bifurcate the sentencing proceeding, hoping to convince the jury that Wiggins was not directly responsible for the murder and then, if necessary, to present a mitigation case.[127] The trial court denied the motion and commenced the sentencing proceedings.[128] During these proceedings, defense counsel failed to discuss substantially any mitigation evidence in the presence of the jury, and the jury imposed a sentence of death.[129]

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returned a prison guard's wallet.

Janice L. Kopec, Case Note, 15 CAP. DEF. J. 213, 219 n.59 (2002) (analyzing McWee v. Weldon, 283 F.3d 179 (4th Cir. 2002) (citing *Williams*, 529 U.S. at 395–96)).

122. *Williams*, 529 U.S. at 396–97.

123. *See Wiggins*, 123 S. Ct. at 2535 (discussing that its holding in *Williams* "conclud[ed] that counsel's failure to *uncover and present* voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' [sic] voluntary confessions because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background.' " (emphasis added)).

124. 123 S. Ct. 2527 (2003).

125. *Wiggins*, 123 S. Ct. at 2535–37 (holding that defense counsel's failure to utilize funds available to hire a forensic social worker to prepare a social history report, falling short of both the prevailing professional standards in Maryland and the standards articulated by the ABA Guidelines, amounted to a violation of the defendant's Sixth Amendment right to the effective assistance of counsel). For a complete discussion of Wiggins v. Smith, see Terrence T. Egland, Case Note, 16 CAP. DEF. J. 101 (analyzing Wiggins v. Smith, 123 S. Ct. 2527 (2003)).

126. *Wiggins*, 123 S. Ct. at 2532.

127. *Id.*

128. *Id.*

129. *See id.* (noting that, prior to closing arguments, one of Wiggins's attorneys "made a proffer to the court, outside the presence of the jury, to preserve bifurcation as an issue for appeal. He detailed the mitigation case counsel would have presented had the court granted their bifurcation motion"). Wiggins's counsel did briefly explain during opening statements that they would

In federal habeas, Wiggins presented the testimony of a licensed social worker who had prepared a complete social history report detailing "severe physical and sexual abuse [Wiggins] suffered at the hands of his mother and while in the care of a series of foster parents."[130] Wiggins claimed that his Sixth Amendment right to effective assistance of counsel at sentencing was violated because his attorneys had "fail[ed] to investigate and present mitigating evidence of his dysfunctional background."[131] The United States Supreme Court, relying on the standards announced in *Strickland* and *Williams*, held that Wiggins's Sixth Amendment right to effective assistance of counsel had been violated by his attorneys' failure to investigate reasonably his case for mitigating evidence.[132] In so finding, the Court held that a capital defender's obligation under *Strickland* to make a reasonable investigation or a reasonable determination that such an investigation is unnecessary requires that an attorney's performance comply with "reasonableness under prevailing professional norms."[133] The *Wiggins* Court then commented that it would rely on the standards set forth in the ABA Guidelines as well as the standard practice in Maryland capital cases in order to determine what was reasonable under the *Strickland* standard.[134]

The United States Supreme Court has long referred to the ABA Guidelines as "guides to determining what is reasonable."[135] The ABA seeks to overcome the conflict between the need to gather detailed information and the common unwillingness of capital defendants to discuss personal matters with counsel.[136] To this end, the ABA developed guidelines specifically related to the composition of a capital defense team.[137] The ABA Guidelines for Death Penalty Defense require that a capital defense team consist of at least two attorneys, a fact investigator, a mental health expert, and a mitigation specialist.[138] These Guide

present evidence of mitigation, but this explanation only amounted to five sentences. *Id.*

130. *Id.* at 2533.

131. *Id.* at 2532.

132. *Wiggins*, 123 S. Ct. at 2535–37.

133. *Id.* at 2535 (quoting *Strickland*, 466 U.S. at 691).

134. *Id.* at 2537.

135. *Id.* at 2536–37 (quoting *Strickland*, 466 U.S. at 688).

136. ABA Guidelines for Death Penalty Defense, *supra* note 60, Commentary to 10.7, at 82–83 (recognizing that a mitigation specialist is "trained to recognize and overcome these barriers, and . . . has the skills to help the client cope with the emotional impact of such painful disclosures," making the specialist "invaluable in conducting this aspect of the investigation").

137. *See generally* ABA Guidelines for Death Penalty Defense, *supra* note 60.

138. ABA Guidelines for Death Penalty Defense, *supra* note 60, 4.1(A), at 28 (requiring that a capital defense team "consist of no fewer than two attorneys . . . an investigator, and a mitigation specialist"). This Guideline further indicates that one member of the team be qualified to evaluate the defendant for the "presence of mental or psychological disorders or impairments." *Id.* The commentary following this guideline more thoroughly explains the ABA's decision to include a mitigation specialist on a defense team, noting that a mitigation specialist is "an indispensable member of the defense team throughout all capital proceedings." ABA Guidelines for Death

lines further recognize that "the use of a mitigation specialist has become 'part of the existing *standard of care*' in capital cases, ensuring 'high quality investigation and preparation of the penalty phase.'"[139] Therefore, a capital defense team that does not include a mitigation specialist will necessarily fall short of the requirements of the ABA Guidelines for Death Penalty Defense.

The *Wiggins* Court further determined that the prevailing professional standards for Maryland capital cases "included the preparation of a social history report," and that counsel fell short of these standards by failing to utilize funds available to retain a forensic social worker to prepare such a report.[140] Thus, in order to have presented an effective mitigation case during the sentencing phase, Wiggins's counsel should have hired a forensic social worker to prepare a social history report.[141] This report would require the social worker to interview any persons who had knowledge of Wiggins's life, to review all of his institutional records, to scrutinize any mental health records, and to conduct a thorough background investigation on members of Wiggins's family.[142] Because Wiggins's attorneys failed to hire a social worker to commission a social history report and uncovered no evidence suggesting that a mitigation case would have been fruitless or counterproductive, they fell short of the prevailing professional standards of capital defense work in Maryland and violated his constitutional rights to effective assistance of counsel.[143] Therefore, in order to protect a Virginia capital defendant's Sixth Amendment rights, defense counsel must comply with the prevailing professional standards of capital defense work in Virginia.

A court that fails to appoint a mitigation specialist to a non-CDU defendant in Virginia violates the defendant's Sixth Amendment right to the effective assistance of counsel. As discussed above, the prevailing professional standard for capital defense work in Virginia requires appointment of a CDU attorney to all indigent defendants, unless a conflict of interest arises or justice requires that

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Penalty Defense, *supra* note 60, Commentary to 4.1, at 33. Furthermore, "the use of a mitigation specialist has become 'part of the existing *standard of care*' in capital cases, ensuring 'high quality investigation and preparation of the penalty phase.'" *Id.* (emphasis added) (citations omitted).

139. ABA Guidelines for Death Penalty Defense, *supra* note 60, Commentary to 4.1, at 33 (emphasis added) (citations omitted).

140. *Wiggins*, 123 S. Ct. at 2536.

141. *Id.*

142. *See id.* at 2536–37 (noting that defense counsel "abandoned" their investigation after gaining only a rudimentary knowledge of Wiggins's history from a limited set of sources). The Court cited ABA Guidelines recommending that defense counsel investigate and present evidence for an array of potentially mitigating topics, including "medical history, educational history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences." *Id.* (citing ABA Guidelines for Death Penalty Defense, 11.8.6, at 133).

143. *Id.* at 2537.

another attorney be appointed.[144] Additionally, the CDU's mitigation specialist will complete a mitigation investigation in every capital case assigned to the CDU. Thus, the prevailing professional standard of capital defense work in Virginia includes the use of a mitigation specialist.[145] A Virginia circuit court that refuses to appoint a mitigation specialist to a non-CDU defendant will deny defense counsel the opportunity to meet Virginia's prevailing professional standards of capital defense work.[146] This refusal would also fail to meet the standards articulated by the ABA.[147] Because the denial of a mitigation specialist would preclude a defense team from meeting either the prevailing professional practices of Virginia or the standards articulated by the ABA, the defendant's right to effective assistance of counsel would be denied.[148] Therefore, a mitigation specialist must be appointed to all Virginia capital defendants in order to guarantee their Sixth Amendment right to effective assistance of counsel.

3. *The Fourteenth Amendment Guarantee of Equal Protection Requires That Courts Provide a Mitigation Specialist to Any Non-CDU Defendant*

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*."[149] The Code of Virginia requires that when counsel is appointed to an indigent defendant charged with a capital offense, "one of the [two required] attorneys shall be from a [CDU]."[150] Because of each CDU's limited staff size, the four CDUs cannot represent every capital defendant in Virginia.[151] The Code prohibits a CDU from representing a capital defendant if a conflict of interest, such as a co-defendant already represented by the CDU, exists.[152] Therefore, not all capital defendants will be

144. *See supra* Part IV.A.1

145. *See id.*

146. *See Wiggins*, 123 S. Ct. at 2536 (noting that defense counsel's failure to commission a social history report of the defendant by a forensic social worker fell short of the prevailing Maryland professional standards for the defense of capital cases).

147. *See* ABA Guidelines for Death Penalty Defense, *supra* note 60, 4.1(A)(1), at 28 (indicating that a capital defense team should include a mitigation specialist).

148. *See Wiggins*, 123 S. Ct. at 2536–37 (holding that defense counsel's mitigation investigation was unreasonable and denied defendant's Sixth Amendment right to effective assistance of counsel where it failed to meet the prevailing professional standards of Maryland and the standards articulated by the ABA).

149. U.S. CONST. amend. XIV (emphasis added).

150. VA. CODE ANN. § 19.2-163.7 (Michie 2000).

151. *See* CDU Affidavits, *supra* note 97 and accompanying text.

152. *See* VA. CODE ANN. § 19.2-163.4 (Michie 2000) (requiring that a CDU attorney be appointed to indigent capital defendants "unless (i) the [CDU attorney] is unable to represent the defendant or petitioner by reason of conflict of interest or (ii) the court finds that appointment of other counsel is necessary to attain the ends of justice").

represented by an attorney from one of the four CDUs. Because attorneys from a CDU are not always available, two capital qualified non-CDU public defenders or private attorneys are often appointed to represent indigent capital defendants.[153]

The CDUs have mitigation specialists on staff to assist in the investigation of a defendant's biosocial and psychosocial history.[154] Accordingly, capital defendants represented by an attorney from a CDU automatically have the use of a mitigation specialist without having to make a request to the court or to make any showing of particularized need.[155] This statutory scheme gives rise to an inconsistency in the trial resources available to capital defendants. In a recent Virginia capital murder case, two defendants were tried under a joint participation theory and were both convicted of capital murder for killing a fellow inmate.[156] Applying the facts of this case to the statutory scheme, one defendant may have been provided a mitigation specialist as a matter of right while the other would have been required to make a showing of particularized need to the court before it would even consider granting such a specialist.[157] The Commonwealth cannot have a rational interest in providing a mitigation specialist to one co-defendant while denying a mitigation specialist to the other. On the contrary, the Commonwealth has an inherent interest in the "fair and accurate adjudication of criminal cases."[158] The current statutory scheme would supply one co-defendant with a mitigation specialist while potentially denying the other the same resource, resulting in a trial that is neither fair nor accurate for the non-CDU co-defendant. Therefore, failure to provide a mitigation specialist to the co-defendant as a matter of right would violate the Equal Protection Clause of the Fourteenth Amendment.

This equal protection disparity is not limited to co-defendants. Any defendant who is not appointed an attorney from a CDU is denied the opportunity to utilize the CDU-staffed mitigation specialist. An indigent defendant represented by a non-CDU public defender or an appointed private counsel would not have

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153. *See id.* (providing in pertinent part that an attorney from a CDU is not required when "the court finds that appointment of other counsel is necessary to attain the ends of justice").

154. *See* CDU affidavits, *supra* note 45 (noting that the staff of each Virginia CDU will include a mitigation specialist).

155. *See id.* (noting that "[t]he mitigation specialist will be assigned to perform a mitigation investigation in every case to which the [CDU] is appointed" and that "[t]he scope and extent of the mitigation specialist's work will be directed by [the head of the CDU] without the necessity of judicial approval or notice to the Commonwealth").

156. *See generally* Lenz v. Commonwealth, 544 S.E.2d 299 (Va. 2001); Remington v. Commonwealth, 551 S.E.2d 620 (Va. 2001).

157. One defendant would be appointed a CDU attorney (and thus a mitigation specialist) while the other could not be due to the potential conflict of interest. VA. CODE ANN. §§ 19.2-163.4, 163.7.

158. *Ake*, 470 U.S. at 79.

the available funds to hire privately a mitigation specialist. Instead, he must request such funds from a court and may be required to make a special showing of particularized need in the presence of the Commonwealth's Attorney.[159] This showing would necessarily communicate confidential defense strategy to the Commonwealth.[160] The United States Supreme Court has inferred that if a defendant's trial strategy was communicated to the prosecution, the result would be a violation of defendant's due process rights and a deprivation of the defendant's right to the effective assistance of counsel.[161] Because non-CDU defendants are required to make a showing of particularized need and CDU defendants are not, the non-CDU defendants are deprived of a right that CDU defendants automatically possess. Therefore, the requirement that a non-CDU defendant make a showing of particularized need for a mitigation specialist violates the Fourteenth Amendment guarantee of equal protection under the law.

B. Fourteenth Amendment Due Process Right to the Basic Tools Of an Adequate Defense Under Ake *and* Husske

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[162] In its decision in *Husske*, the Supreme Court of Virginia held that this clause requires "that the Commonwealth of Virginia, upon request, provide indigent defendants with 'the basic tools of an adequate defense,' and, that in certain instances, these basic tools may include the appointment of non-psychiatric experts."[163] The court further held, however, that this right to expert assis-

159. *See Husske*, 476 S.E.2d at 925 (holding that "an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is 'likely to be a significant factor in his defense,' and that he will be prejudiced by the lack of expert assistance" (quoting *Ake*, 470 U.S. at 82-83) (internal citations omitted)); *Ramdass*, 437 S.E.2d at 571 (holding that there is no constitutional right to an ex parte hearing on an indigent defendant's request for expert assistance (citing *O'Dell*, 364 S.E.2d at 499)). The court's holding in *Ramdass*, however, is erroneous. *See supra* note 84 and accompanying text (explaining that *Ramdass* misinterpreted the applicable language from *O'Dell*).

160. *See Meriwether*, 486 F.2d at 506 (stating that allowing the prosecutor to observe when the defense presents support for its motion denies the defense its ability to shield its case "from the prosecutor's scrutiny"); *see also supra* note 88 and accompanying text.

161. *See Wardius*, 412 U.S. at 476 (holding that "[i]t is *fundamentally unfair* to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State" (emphasis added)); *Weatherford*, 429 U.S. at 554 n.4 (noting that a defendant's Sixth Amendment rights "can be meaningfully implemented only if a criminal defendant knows that . . . his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding").

162. U.S. CONST. amend. XIV.

163. *Husske*, 476 S.E.2d at 925 (quoting *Ake*, 470 U.S. at 77) (internal citations omitted).

tance was not absolute.[164] The *Husske* court held that, before a court appoints such an expert at the Commonwealth's expense, the defendant would be required to make a showing that "the subject which necessitates the assistance of the expert is 'likely to be a significant factor in his defense,' and that he will be prejudiced by the lack of expert assistance."[165] The subject of mitigation clearly will be a significant factor during sentencing in *every* capital case, and a thorough investigation *always* necessitates the assistance of a mitigation specialist.[166] Because an adequate mitigation investigation cannot be conducted without the assistance of a mitigation specialist, the denial of this assistance will necessarily prejudice the defendant.[167] Therefore, no factual showing of particularized need is required for a mitigation specialist.

The *Husske* requirement for a showing of particularized need stems from the specific types of expert assistance requested in *Ake* and *Husske*.[168] *Ake* involved a defendant's request for the assistance of a psychiatrist to explore the issue of the defendant's sanity.[169] The *Ake* court recognized, however, that insanity is not a defensive issue in every capital case.[170] Similarly, *Husske* involved the defendant's request of a DNA expert to assist his challenge of the Common-

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164. *Id.*

165. *Id.* (quoting *Ake*, 470 U.S. at 82–83) (internal citations omitted). The *Husske* court further noted that a "defendant may satisfy this burden by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial." *Id.* (citing State v. Mills, 420 S.E.2d 114, 117 (N.C. 1992)).

166. *See* VA. CODE ANN. § 19.2-264.4(B) (Michie Supp. 2003) (providing in pertinent part: "[e]vidence which may be admissible [at sentencing] . . . may include the circumstances surrounding the offense, the history and background of the defendant, and *any other facts in mitigation* of the offense" (emphasis added)); *Wiggins*, 123 S. Ct. at 2536–37 (holding that a mitigation investigation that did not include the preparation of a social history report by a forensic social worker fell short of the prevailing professional standards of Maryland capital defenders and the standards for capital defense work articulated by the ABA).

167. *See* ABA Guidelines for Death Penalty Defense, *supra* note 60, Commentary to 4.1, at 33 (arguing that "the use of mitigation specialists has become 'part of the existing standard of care' in capital cases, ensuring 'high quality investigation and preparation of the penalty phase' ") (quoting Subcommittee on Federal Death Penalty Cases Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, at 24 (1998); *see also Husske*, 476 S.E.2d at 925 (stating that a defendant can prove prejudice by "demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial" (citing *Mills*, 420 S.E.2d at 117)).

168. *Ake*, 470 U.S. at 82–83 (holding that the defendant was required to make a showing that sanity was likely to be a significant factor at trial because this factor is not an issue in every criminal proceeding); *Husske*, 476 S.E.2d at 925 (holding that the defendant failed to show a particularized need for a DNA expert and that he would be prejudiced without the assistance of this expert).

169. *Ake*, 470 U.S. at 72.

170. *Id.* at 82.

wealth's DNA evidence.[171] DNA evidence, like a defendant's sanity, is also not an issue in every case.[172] Thus, the proper way to show the "particularized need" for an expert's assistance on an issue that is a "significant factor" in cases like *Ake* and *Husske* is by factual presentation of evidence that establishes how the issue will be important.[173]

In the penalty phase of a Virginia capital case, mitigation is not only always an issue, it is the *only* issue for the defendant. The Code of Virginia provides that, during the sentencing phase of a capital case, "evidence may be presented as to any matter which the court deems relevant to sentence," including "the history and background of the defendant, and any other facts in mitigation of the offense."[174] Furthermore, the verdict form in a capital case only considers aggravators and mitigators, thus making mitigation the only issue for the defense.[175] Mitigation is a significant factor *per se*. A factual presentation proving particularized need, as required by *Ake* and *Husske*,[176] is not necessary because the requirements for a capital conviction establish that mitigation evidence will be a significant factor during sentencing.[177] Therefore, following the reasoning of *Ake* and *Husske*, a capital defendant has a due process constitutional right to a mitigation specialist without having to make a showing of particularized need.

C. *The Eighth Amendment Prohibition Against Cruel and Unusual Punishment*

The Eighth Amendment provides that "cruel and unusual punishment [shall not be] inflicted."[178] The United States Supreme Court has asserted that this amendment stands to assure that a state's power to punish "is exercised within the limits of civilized standards."[179] In *Woodson v. North Carolina*,[180] the Court expanded on this earlier decision, holding "that in capital cases, the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circum-

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171. *Husske*, 476 S.E.2d at 923.

172. *See* Sonja L. DeWitt, Note, *The Indigent Criminal Defendant, DNA Evidence and the Right to an Expert Witness: A Comparison of the Requirements of Due Process in* State v. Dubose *and* Harris v. State, 6 B.U. PUB. INT. L.J. 267, 288 (1996) (noting that "*when the state uses DNA evidence* to identify the defendant as the perpetrator of the crime *and the defendant contests his involvement*, DNA evidence necessarily will be significant" (emphasis added)).

173. *See Husske*, 476 S.E.2d at 925 (discussing "particularized need"); *Ake*, 470 U.S. at 82–83 (discussing "significant factor").

174. VA. CODE ANN. § 19.2-264.4(B).

175. VA. CODE ANN. § 19.2-264.4(D); *see supra* note 109 and accompanying text.

176. *Ake*, 470 U.S. at 82–83; *Husske*, 476 S.E.2d at 925.

177. VA. CODE ANN. § 19.2-264.4(D); *see supra* note 109 and accompanying text.

178. U.S. CONST. amend. VIII.

179. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) (deciding that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man").

180. 428 U.S. 280 (1976).

stances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[181] This requirement to present the jury with sufficient "character and record" evidence necessitates an extensive investigation into the biosocial and psychosocial history of a capital defendant.[182] Thus, a mitigation specialist is required to protect a capital defendant's Eighth Amendment rights to have his character and record, as well as the circumstances of his crime, considered by a jury.

V. *Conclusion*

A mitigation specialist is absolutely necessary in capital defense work. A mitigation specialist uses her experience and training as a social worker to conduct a thorough investigation into every aspect of the social history of the defendant, his family, and his surroundings. This specialist conducts numerous interviews of the defendant's family, friends, co-workers, clergymen, former coaches, physicians, and fellow prisoners. She works to gain the trust of those who have knowledge of the defendant, and to help them understand the importance of mitigation evidence, so they will be more willing and able to provide the defense team with the best mitigation case possible. The mitigation specialist also scrutinizes the defendant's school, medical, foster care, employment, military, and any other institutional records, searching for clues that may uncover potentially mitigating evidence.

The mitigation specialist will use the information gathered during the mitigation investigation to compile a detailed chronology of the defendant's life. This information allows the defense counsel to construct the most effective case in mitigation. Defense counsel should first use this information to select a 3:1 expert who will be most beneficial to the defense team. Together, the defense counsel, mitigation specialist, and 3:1 expert will plan a strategy for evaluation of the defendant, for preparation of the mitigation case, and for presentation of the case to the jury.[183] Once the themes of the mitigation case are determined by the defense team, the mitigation specialist will assist in the preparation of both expert and lay witnesses in order to most effectively persuade the jury to return a verdict less than death.

Every Virginia capital defendant is entitled to a mitigation specialist as a matter of right. According to the United States Supreme Court's and the Su-

181. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (citing *Trop*, 356 U.S. at 100) (citations omitted) (holding that the Eighth Amendment requires that the character and record of a capital defendant and the circumstances surrounding his crime be considered by a jury in the process of inflicting the death penalty).

182. *Id.*; Velloney, *supra* note 5, at 32.

183. *See* E-mail from Deans, *supra* note 38 (noting that mitigation specialists prefer to meet periodically with the entire defense team in order to be constantly updated on what the Commonwealth may be considering to present as non-statutory aggravation evidence).

preme Court of Virginia's decisions in *Ake* and *Husske*, respectively, capital defendants are entitled to the appointment of expert assistance in order to have "the basic tools of an adequate defense." Because no other member of the defense team has the experience and training of a mitigation specialist, the court must appoint a capital defendant this specialist as a "basic tool." Furthermore, the Sixth Amendment right to effective assistance of counsel requires that a mitigation specialist be appointed in every Virginia capital case. The Code of Virginia has created a statewide standard for capital defense work and has conformed to the ABA Guidelines for capital defense in establishing four regional CDUs with a mitigation specialist on staff. The United States Supreme Court's decision in *Wiggins* requires that a mitigation investigation meet these statewide and ABA standards. The establishment of the CDUs also creates Fourteenth Amendment due process and equal protection right in non-CDU defendants to the appointment of a mitigation specialist. Because a capital defendant represented by a CDU will have access to the services of a mitigation specialist automatically and without a showing of need, the requirement of a showing of particularized need for a non-CDU defendant pursuant to *Ake* and *Husske* would violate his due process and equal protection rights by providing the Commonwealth with detailed information of the defense strategy. Finally, the respect for humanity underlying the Eighth Amendment requires an individualized assessment of a defendant's character and record and the underlying circumstances of the offense. Because a mitigation specialist is the only member of the defense team who can thoroughly compile such information, she must be appointed in every capital case.