

THE MITIGATION SPECIALIST AS AN INTEGRAL PART OF THE DEFENSE TEAM IN A CAPITAL MURDER CASE

Until the death penalty is formally waived in writing or on the record, a person charged with first degree murder is subject to the possible penalty of death. Section 921.141 Florida Statutes. The State does not need to file a formal *Notice of Intention to Seek the Death Penalty* in order to seek the execution of the Defendant. F.R.Cr.P. 3.202. A timely death notice simply triggers reciprocal discovery obligations on the Defendant with regard to evidence of mental mitigation. F.R.Cr.P 3.202. Thus, the fact that the State has not yet filed a Death Notice is of no moment, and counsel should therefore proceed as if the case is a capital one.

Defense counsel in a capital case has an immediate obligation to request of the Court the appointment of experts to assist the defense regarding both phases of a capital trial. *See* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“the Guidelines” or “Guidelines”), 31 HOFSTRA LAW REV. (Summer 2003). “Counsel at *every stage* have an obligation to conduct thorough and independent investigation relating to the issues of both guilt and penalty.” Guideline 10.7, emphasis added. The Guidelines have been approved by the United States Supreme Court as “well defined norms”, Wiggins v. Smith, 539 U.S. 510 (2003), and “apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, [and] trial . . .”. Guideline 1.1.

Pursuant to the Guidelines, lead counsel should, “as soon as possible after designation . . . assemble a defense team by . . . selecting and making any appropriate contractual agreements . . . in such a way that the team includes:

- a. at least one mitigation specialist and one fact investigator;
- b. at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and
- c. any other members needed to provide high quality legal representation.”

A mitigation specialist is more than simply an investigator for the penalty phase. She not only compiles a complete life history of the Defendant which may be presented to the capital jury, but is essential to developing and maintaining rapport with the client and his or her family. Perhaps as important, a mitigation specialist is essential to gathering and identifying mitigation evidence which may be used to persuade the State to not seek the death penalty or to waive death as a possible penalty after an initial decision to seek death has been made. Thus, a mitigation specialist has as much value at the early stages of a capital case as she has after a *Death Notice* has been filed by the State. As stated by the Commentary to Guideline 4.1 of the A.B.A. Guidelines:

A mitigation specialist is . . . an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and

information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (*e.g.* family sexual abuse) that the defendant may have never disclosed. They have the clinical skill to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf.

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

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

For all of these reasons 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."

(Footnotes and citations omitted).

Defense counsel normally does not have the time or training to conduct the especially thorough investigation required for a defendant in a capital case. Even when counsel has personally identified numerous avenues of mitigation, a mitigation specialist can further develop that evidence and conduct necessary follow-up, whether in the field, with the client, or with documentary evidence. In sum, a mitigation specialist is an invaluable member of the defense team, and one which should be involved in every potential capital case at the earliest possible time.

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