DECLARATION OF EMILY OLSON-GAULT, ESQ.

1. I, the undersigned declarant, Emily Olson-Gault, am over eighteen years of age and competent to testify to the statements contained in this Declaration. I am an attorney licensed to practice law in the State of New York and the U.S. Supreme Court. I am the Director and Chief Counsel of the American Bar Association Death Penalty Representation Project, which is based in Washington, D.C.

2. The American Bar Association (“ABA”) created the Death Penalty Representation Project (the “Project”) in 1986 to address the lack of qualified counsel available to those facing a death sentence.

3. The ABA and the Project do not take a position on the death penalty itself. The Project is committed to ensuring that basic constitutional protections have been provided to all individuals who are charged with a capital crime or sentenced to death. To this end, the Project promotes policies and procedures that will guarantee that all those facing execution are represented at every stage of the proceedings.

4. The ABA has promulgated Guidelines that govern the appointment and performance of defense counsel in death penalty cases. The Project is sometimes asked to provide affidavits in death penalty cases about the ABA Guidelines and standards for representation, and it does so not to advantage a particular litigant but to ensure that basic constitutional protections and due process have been provided to all individuals facing a death sentence.


6. After the revision of the ABA Guidelines in 2003, the Project and other organizations developed the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (hereinafter “Supplementary Guidelines”) to address the urgent need to help defense counsel understand how to supervise the development of mitigation evidence and direct a key member of the defense team, the mitigation specialist. The Supplementary Guidelines are a complementary extension of the ABA Guidelines. They serve to spell out important features of the existing standards of practice that enable mitigation specialists and defense attorneys to work together effectively to uncover and develop evidence that humanizes the client. See Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 679 (2008).

7. The ABA Guidelines and Supplementary Guidelines have been cited favorably in nearly 400 state and federal capital appellate decisions, including the United States Supreme Court.

8. The Guidelines have been adopted in substantive part or officially acknowledged as an accurate description of the standard of care for defense representation in death penalty cases by organizations such as the State Bar of Texas, the Department for Public Advocacy for the Commonwealth of Kentucky, the Idaho Public Defender Commission, the Georgia Public Defender Standards Council, and numerous others. The ABA Guidelines have also been adopted in substantive part by state legislative action or court rule in Louisiana, Nevada, and Arizona. See ABA Death Penalty Representation Project, Implementation Fact Sheet (Jul. 2018), available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/ImplementationFactSheetJul2018.pdf.


10. The Guidelines are intended to provide guidance to judges and capital defense counsel regarding the skills and training death penalty counsel must possess when representing a person charged with a capital crime.

11. All capital cases require exceptional time and efforts simply due to the nature of the proceedings. See Guideline 1.1, Commentary at 923 (“Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution.” . . . Due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make ‘extraordinary efforts on behalf of the accused’” (quoting, first, Douglas W. Vick, Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences, 43 BUFF L. REV. 329, 357-58 (1995) and, second, ABA Standards for Criminal Justice: Defense Function, Standard 4-1.2(C), (3d ed. 1993)). The need for time and resources to prepare the defense is due in part to the tremendous amount of investigation that the capital team must complete to adequately represent a person facing a death sentence.

12. In my position as Director of the Project, I am in frequent contact with capital defenders and pro bono attorneys to discuss and assist with issues related to capital representation.

13. During the month of March 2020, I have spoken with capital defenders and pro bono attorneys all over the United States as they attempt to cope with the unprecedented situation
created by the COVID-19 global pandemic. My understanding from these conversations is that most capital defense teams are unable to conduct the large majority of the investigation and expert work required in capital representation (see ¶¶17-29, infra). This is due to restrictions set in place by state and local governments, as well as departments of corrections and institutional defender offices and law firms, out of a concern for public health and the welfare of employees. As a result, the time available to capital trial teams has been truncated significantly because of health concerns related to COVID-19.

14. Time is a scarce resource in all capital representation. The Guidelines recognize that the period of time prior to a capital trial is one of the most critical for development of the case and legal strategy. Guideline 1.1 notes that effective advocacy in early stages of a capital case “enabl[es] counsel to counsel his or her client and to obtain information regarding guilt that may later become unavailable” and “[t]hus, it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible . . . .” Guideline 1.1, History of Guideline, at 920. See also Guideline 10.2, Commentary, at 994 (“early investigation to determine weaknesses in the State’s case and uncover mitigating evidence is a necessity . . .”); Guideline 10.7, Commentary, at 1023 (“The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.”).

15. When the time to perform these essential functions is truncated, whether by operation of the legal system or by something wholly external like a natural disaster, counsel will not have adequate time to prepare their case and this, in turn, jeopardizes due process and fairness in capital cases. See ABA Guideline 6.1, Commentary, at 969 (“Regardless of the context, no system that involves burdening attorneys with more cases than they can reasonably handle can provide high quality legal representation. In the capital context, no such system is acceptable.”).

16. The Guidelines’ description of the nature of investigation required in capital cases provides insight into the extraordinary need for time in all capital proceedings.

17. Capital defense counsel and their team must conduct thorough, independent investigations related to both the guilt and penalty phases of the trial. See ABA Guideline 10.7(A). This requirement is ironclad; an admission of guilt by the client, the client’s direction not to investigate, or any other extenuating circumstances do not change or lessen counsel’s obligations in this area. See ABA Guideline 10.7(A)(1)-(2). ABA Guideline 10.10.1 recognizes that defense counsel must be afforded the time not only to investigate and obtain discovery, but also to shape the fruits of the investigation into a comprehensive strategy governing each facet of the trial and pre-trial proceedings. To avoid credibility-damaging inconsistencies between the guilt and penalty phases, “it is critical that, well before trial, counsel formulate an integrated defense theory.” ABA Guideline 10.10.1, Commentary, at 1047.
18. As part of the requisite investigation, capital cases also require comprehensive, multi-
generational psychosocial history construction based on “exhaustive investigation.” ABA
Guideline 4.1, “Defense Team and Supporting Services,” Commentary, at 959. These
histories must extend back at least three generations in the defendant’s family. See also
Supplementary Guideline 10.11(E)(2)(a).

19. The areas for investigation include: (1) medical history, including “hospitalizations, mental
and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition,
developmental delays, and neurological damage;” (2) family and social history; (3)
educational history; (4) military service; (5) employment and training history; and (6) prior
juvenile and adult correctional experience. Guideline 10.7, Commentary, at 1022-23. See
also Supplementary Guideline 10.11(B) (listing the same areas enumerated by the ABA
Guidelines and further adding “multi-generational family history, genetic disorders and
vulnerabilities, as well as multi-generational patterns of behavior; . . . religious, gender,
sexual orientation, ethnic, racial, cultural and community influences; socio-economic,
historical, and political factors.”)

20. The areas for investigation listed in ABA Guideline 10.7 are not intended to be exhaustive,
and the Guidelines explicitly contemplate additional investigation for other legal issues:
“Additional investigation may be required to provide evidentiary support for other legal
issues in the case . . . Whether within the criminal case or outside it, counsel has a duty to
pursue appropriate remedies if the investigation reveals that such conditions exist.”
Guideline 10.7, Commentary, at 1027. See also Supplementary Guideline 10.11(B) (“The
defense team must conduct an ongoing, exhaustive and independent investigation of every
aspect of the client’s character, history, record and any circumstances of the offense, or
other factors, which may provide a basis for a sentence less than death.”).

21. The ABA Guidelines outline a dual-track approach to conducting this investigation,
requiring both witness interviews and records collection. See Guideline 10.7, Commentary,
at 1024 (“It is necessary to locate and interview the client’s family members (who may
suffer from some of the same impairments as the client), and virtually everyone else who
knew the client and his family, including neighbors, teachers, clergy, case workers, doctors,
correctional, probation, or parole officers and others” and “[r]ecords—from courts,
government agencies, the military, employers, etc. . . . should be requested concerning not
only the client, but also his parents, grandparents, siblings, cousins, and children.”)

22. Simply locating a single source for this information is often insufficient. The Guidelines
recognize that “[t]he collection of corroborating information from multiple sources—a
time-consuming task—is important wherever possible to ensure the reliability and thus the
persuasiveness of the evidence.” ABA Guideline 10.7, Commentary, at 1025 (emphasis
added).

23. The Guidelines also make clear that in-person interviews with the client, witnesses, and
family members are at the core of any adequate investigation: “Team members must
conduct in-person, face-to-face, one-on-one interviews with the client, the client’s family, and other witnesses who are familiar with the client’s life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation.” Supplementary Guideline 10.11(C) (emphasis added). See also ABA Guideline 10.5, Commentary, at 1008 (“Even if counsel manages to ask the right questions, a client will not—with good reason—trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls.”). Remote technology options such as video conferencing and phone calls do not provide an adequate alternative for capital defenders, mitigation specialists, experts, or investigators.

24. This time-intensive, in-person contact is essential for establishing a relationship of trust with the client, client’s family, and other witnesses, which is indispensable to effective representation. See Supplementary Guideline 10.11(C) (“Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding.”); ABA Guideline 10.5 and Commentary, at 1008 (“Client contact must be ongoing, and include sufficient time spent at the prison to develop a rapport between attorney and client.”) (emphasis added).

25. In-person visits with the client and client’s family are also a crucial tool in dictating the defense team’s choices regarding necessary mental health screening and experts, which are especially important given the near-ubiquity of mental health issues in capital cases. Defense counsel’s observations of the client’s mental state are a necessary piece of the puzzle, as are the observations of a member of the defense team specifically trained to screen for disorders and recommend follow-up investigation and appropriate experts. See ABA Guideline 4.1, Commentary, at 956. In many cases, the results of such observation render a “psychologist or other mental health expert [] a needed member of the defense team.” ABA Guideline 10.4, Commentary, at 1004.

26. The mental health services provided as a result of observations and screenings are also oftentimes necessary to ensure that a client is “cognitively and emotionally competent to make sound decisions concerning his case.” ABA Guideline 4.1, Commentary, at 959. Moving capital proceedings forward while in-person visits cannot take place prevents counsel from ensuring that the client is competent.

27. Additionally, expert evaluations of the client are time-consuming, particularly for issues related to intellectual disability and mental illness or competency. See ABA Guideline 4.1, Commentary, at 956 (“Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process.”). In order to ensure the heightened reliability of such evaluations, a thorough investigation must first be conducted. Id. (“Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.”); see also
ABA Guideline 4.1, Commentary, at 959 (the mitigation specialist “provides social history information to experts to enable them to conduct competent and reliable evaluations”). Judgment calls regarding which expert evaluations are recommended are necessarily the product of in-person visits between the client and the defense team and are informed by a comprehensive and thorough investigation. See ¶¶25-26, supra.

28. The investigation is also a necessary precursor to making key strategic decisions and preparing pleadings. See ABA Guideline 10.7, Commentary, at 1021 (“Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client’s competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case.”).

29. Similarly, the investigation informs voir dire, which is necessarily time-intensive. The Guidelines make clear that counsel must “devote substantial time” to preparation for jury selection. ABA Guideline 10.10.2, Commentary, at 1051. Given the importance of “choosing a jury most favorable to the theories of mitigation that will be presented,” id., appropriate voir dire preparation can only occur once the defense team has completed its rigorous investigative duties.

30. The norms of practice reflected in the ABA Guidelines are not aspirational. See Guideline 1.1, Commentary, at 920. They represent the minimum requirements for adequate representation. If counsel lacks adequate time to prepare their case, or if defense counsel, mental health experts, investigators and mitigation specialists are unable to conduct in-person meetings and interviews to discharge the duties outlined in ¶¶17-29 above, fundamental fairness and accuracy are put at risk.

31. As the Guidelines have recognized, the provision of effective representation at trial is essential to due process in capital cases. In mandating the provision of high quality legal representation at the trial level of a capital case, [the Guidelines] recognize[] the simple truth that any other course has weighty costs—to be paid in money and delay if cases are reversed at later stages or in injustice if they are not.” ABA Guideline 1.1, Commentary, at 930.

32. The ABA Guidelines are the most authoritative and up-to-date articulation of the investigative and other responsibilities of capital defense counsel. The American Bar Association believes that meeting these responsibilities is essential to ensuring justice in capital cases.
I hereby swear under penalty of perjury that the above and foregoing is a true and correct statement.

Dated this 2nd day of April, 2020.

Emily Olson-Gault