

EXHIBIT 1

October 15, 2020

Bart Vincent, General Counsel
South Carolina Department of Corrections
4444 Broad River Rd.
Columbia, SC 29210

RE: COVID-19 on Death Row

Dear Mr. Vincent,

I write on behalf of Justice 360 and other attorneys representing individuals currently confined to death row at Broad River Correctional Institution. Based on communications with our clients, we understand that at least four (4) death row inmates have tested positive for COVID-19 since September 25, 2020. Since that time, the entire death row (Edisto) unit has been on quarantine and four (4) inmates have been isolated in disciplinary lockup cells since their positive test (regardless of whether or not they exhibit any symptoms of COVID-19).

We have three pressing concerns about SCDC's response to COVID-19 on death row:

Testing: Our understanding is that only six (6) of the thirty-six (36) people housed on death row have been tested for COVID-19 despite the fact that several other inmates on the unit have exhibited symptoms that are consistent with the virus. This is particularly concerning because over half of the inmates on the unit are 50 years old or older and many have preexisting health conditions that increase the danger posed by contracting COVID-19. We request that all of the inmates on death row be tested for COVID-19.

Isolation in disciplinary lockup cells: The men who have tested positive for COVID-19 are currently being isolated on the portion of the unit designed for disciplinary lockup and isolation.¹ They have virtually no personal property in those cells, and the isolation cells do not have power outlets. With no outlets, the men must pass their tablets (which they use for phone calls, reading, and entertainment) to an officer to be charged outside of the cells. At least one of the men currently on isolation has been there for over fourteen (14) days with no symptoms of COVID-19. He requested to be moved back to his regular cell (and was willing to have another COVID-19 test), but he was told he would need to remain isolated for at least twenty-one (21) days. It is our belief that the threat

¹ Several other inmates are regularly housed in the disciplinary lockup area and are now housed near the four men who have tested positive for COVID-19.

of being placed on isolation in disciplinary lockup cells for at least three (3) weeks is preventing other inmates from reporting symptoms that could lead to a COVID-19 test.

No access to mental health or legal meetings: Since the unit isolation began on or about September 25th, no in-person or video mental health or legal meetings have been allowed. We were informed that the officers will not take the inmates to the room where the computer for video meetings resides. Regarding legal meetings, I was told I would have to reschedule after the unit quarantine ended, but the date of the end of quarantine is unknown.

I understand the COVID-19 pandemic poses significant challenges for SCDC and recognize that you must operate to keep officers and inmates safe, but we believe the death row response has been punitive in ways unnecessary to ensure safety on the unit. I request a review of the procedures and adjustments to those procedures to ensure the inmates are not being subjected to cruel and unusual punishment as a result of the pandemic.

Thank you for your attention to this matter. I look forward to hearing from you.

Sincerely,



Lindsey S. Vann
Executive Director, Justice 360
lindsey@justice360sc.org

EXHIBIT 2

September 1, 2020

Bryan P. Stirling
Director, South Carolina Department of Corrections
PO Box 21787
Columbia, SC 29210

Re: South Carolina Department ("SCDC") of Corrections Execution Protocols

Dear Bryan:

We represent three death row inmates whose cases are nearing the end of their judicial appellate review proceedings: Richard Moore, Brad Sigmon, and Khalil-Divine Black Sun-Allah (FKA Freddie Owens). Each of these individuals has been denied relief in the Fourth Circuit Court of Appeals and will be seeking review by the Supreme Court of the United States in the coming weeks and months. Given the low number of cases that receive Supreme Court review, it is likely one or more of our clients will have execution dates set in the late fall or winter.

In anticipation of these likely execution dates, we write to ask you to provide us with the following information, which is necessary for us to adequately advise our clients regarding their choice of execution method pursuant to S.C. Code § 24-3-530 and to fulfill our duties to provide them with adequate legal representation.

- The SCDC **lethal injection directive or protocol** (current and/or as proposed to be in place at the time of the upcoming executions) and related information, including, but not limited to:
 - The type(s) of lethal injection drug(s) to be used;
 - The supplier(s) and/or compounder(s) of the lethal injection drugs (and any supplier(s) of components to be used in compounding) and the date or dates on which the drugs were manufactured;
 - Information about quality control measures used to ensure the purity and efficacy of the lethal injection drugs, including the results of any tests or analyses performed on the drugs;
 - Information about storage and handling of the lethal injection drugs, including, but not limited to: all current and past storage locations; temperature controls in the storage locations and any vehicles used for transport; light control measures in the storage locations and any vehicles used for transport; the chain of custody for the drugs; and the job titles and qualifications of all personnel with access to the storage location;

- The expiration dates of lethal injection drugs to be used in the executions, including, if relevant, the expiration dates of any stabilizing compounds and the expiration dates of the active execution drug or drugs;
 - The mechanism or formula to be used for determining dosages and rates of drug administration for individual condemned men;
 - Whether and how SCDC medical or other staff will conduct physical examinations of the condemned men prior to execution to identify any possible issues in administering the lethal injection drugs (*i.e.*, IV placement concerns) and/or medical issues that could affect the efficacy and or pain caused by the lethal injection drug(s); and
 - Whether and how SCDC medical or execution staff will monitor the condemned men during the lethal injection process to ensure the lethal injection drugs work as intended, including whether observers will be provided a line of sight to the condemned men, and what, if any, remedial steps SCDC will implement if the execution process appears to be compromised or ineffective.
 - Whether and what measure will be taken to ensure that inmate's counsel or other representative present at an execution will be able to communicate with outside authorities, including court personnel, in the event the lethal injection process does not appear to be working as intended, to seek the intervention of these authorities.
- The SCDC **electrocution directive or protocol** (current and/or as proposed to be in place at the time of the upcoming executions) and related information, including, but not limited to:
 - Information regarding the current operability of the electric chair, including the dates and nature of any repairs, modifications, or upgrades to the chair since its last use; the location and condition of the storage facility where the chair has been housed since its last use; and the dates and nature of any examinations or inspections of the chair since its last use;
 - Information regarding the current intended to be administered, the voltage intended to be administered, and how such voltage will be administered and for what length(s) of time to the condemned men, and the safety measures taken to ensure the electrocution will not result in a substantial risk of severe pain to the condemned men;
 - Information regarding any testing or proposed testing of the electric chair since its last use, including: the nature of the tests (e.g. use of live mammals, any electronic or electrical testing equipment, etc.); the results of any testing including raw data; and details and results of any additional testing contemplated before use;
 - Whether and how SCDC medical or other staff will conduct physical examinations of the condemned men prior to execution to identify any possible issues in administering the electric chair and/or medical issues that could impact the efficacy of the electric chair;
 - Whether and how SCDC medical or execution staff will monitor the condemned men during the electrocution process to ensure the electric chair works as intended, whether and what the "back off" plan is should the process not work as intended; and what, if any, remedial steps SCDC will implement if the execution process appears to be compromised or ineffective.

- Whether and what measure will be taken to ensure that inmate's counsel or other representative present at an execution will be able to communicate with outside authorities, including court personnel, in the event the lethal injection process does not appear to be working as intended, to seek the intervention of these authorities.
- Information of the following as it relates to both lethal injection and electrocution execution protocols:
 - Job titles and numbers of personnel to make up the execution team, including the titles and number of any SCDC staff, the titles and number of any federal, state, and local law enforcement officers, and the titles and number of any individuals hired on a contractual basis;
 - The professional qualifications of the execution team;
 - All documents describing the functions that will be performed by SCDC staff and any contractors who will participate in the executions;
 - The level of training received by each member of the execution team;
 - Details of any training received and/or proposed for members of the execution team; and
 - The price paid for any lethal injection drugs or materials used in lethal injection or electrocution, or, if any materials are donated, the fact of their donation.
- The following information as it relates to COVID-19 and executions by lethal injection or electrocution in the custody or control of SCDC:
 - Any modifications to the protocols and/or witness access planned due to the COVID-19 pandemic;
 - All records that relate to COVID-19 testing statistics at Broad River Correctional Facility, including the number of tests administered to prisoners and staff; the statistical results of those tests; the dates the tests were administered; the number of staff who tested positive who are included in the execution team; and
 - All documents or materials pertaining to any contact tracing and other steps taken by SCDC to identify staff and prisoners who may have been exposed to individuals infected with COVID-19 before any planned executions.

Thank you in advance for your assistance in this matter.

Sincerely,



Lindsey S. Vann
 Hannah L. Freedman
 Justice 360

Joshua Snow Kendrick
 Kendrick & Leonard, PC

Rob Lee
 Attorney-at-Law

Counsel for Richard Moore

Counsel for Brad Sigmon

Counsel for Freddie Owens

EXHIBIT 3



SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS
Safety, Service, and Stewardship

HENRY McMASTER, Governor
BRYAN P. STIRLING, Director

September 29, 2020

Justice 360
Ms. Lindsey S. Vann and Ms. Hannah L. Freedman
900 Elmwood Ave., Suite 200
Columbia, SC 29201

Kendrick & Leonard, PC
Mr. Joshua Snow Kendrick
1522 Lady St., Suite A
Columbia, SC 29201

Mr. Rob Lee
Attorney-at-Law
111 Witcover Street
Marion, SC 29571

Re: South Carolina Department (SCDC) of Corrections Execution Protocols

Dear Ms. Vann, Ms. Freedman, Mr. Kendrick and Mr. Lee:

Director Stirling asked that I review and respond to your correspondence of September 1, 2020. We appreciate you informing SCDC that Richard Moore, Brad Sigmon, and Freddie Owens are nearing the end of their judicial appellate review proceedings. The Attorney General's Office has given a similar timeframe for possible notices.

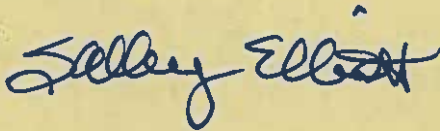
You have asked for the protocols for lethal injection and electrocution. First, as you are probably aware, we have publicly indicated that we do not have any of the drugs in our possession to perform an execution by lethal injection. Information about suppliers/and or compounders of the lethal injection drugs and information about security and medical personnel is not to be released given SCAG Opinion, 2015 WL 4699337. S.C. Code Section 24-3-580 prohibits the disclosure of the execution team member's identity or identifying information. The Attorney General opinion clarifies the meaning of "member of an execution team" broadly construing those terms and protecting the identities of individuals and companies involved in the process of an execution via lethal injection. We do not agree that you are entitled to the information you have requested. If you have authority for your request, please provide it to me.

Ms. Vann et al.
September 29, 2020
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The SCDC protocols to carry out an execution, whether by lethal injection or electrocution, have been developed and implemented over the years with the safety and security of all involved in mind. We continue to look at our processes in light of COVID-19. As you would agree, preventive measures to contain this disease have been quickly evolving. SCDC does have an extensive COVID-19 protocol that is on our website. We are also working on updating any preventive measures to be used during an execution during COVID-19.

Please forward any future correspondence related to execution protocols to me. If you have any questions, please let me know.

Sincerely,

A handwritten signature in blue ink that reads "Salley Elliott". The signature is written in a cursive style with a small dot above the 'i' in Elliott.

Salley W. Elliott
Chief Legal and Compliance Officer

cc: Mr. Bryan P. Stirling, Director of the South Carolina Department of Corrections
Honorable Alan Wilson, South Carolina Attorney General

EXHIBIT 4

The Death Penalty in South Carolina

Since August 6, 1912, there have been 243 executions carried out by the State of South Carolina. Prior to this date, executions were by hanging in the individual counties. Of the 243, 48 were white, and 195 were black. Also, 241 were men and two were women. The following table shows the frequency of executions in each decade.

Years	Number Executed	Location
1912-1920	47	CCI
1921-1930	38	CCI
1931-1940	68	CCI
1941-1950	57	CCI
1951-1960	24	CCI
1961-1962	7	CCI
1985	1	CCI
1986	1	CCI

Of those executed, 177 had been convicted of murder, 35 of rape, 27 of assault with intent to ravish, two of conspiracy and murder, and two of accessory before the fact of murder. The youngest person executed was a 14-year-old black male. The oldest was a 66-year-old black man. The average age at execution was 28 years.

Of the 243, 21 were sentenced in Spartanburg County, 17 were convicted in Greenville County, 19 were convicted in Richland County, 15 were sentenced in Charleston County, 14 in Lexington County, 11 in Orangeburg County, and 10 in Florence County. Fewer than 10 were sentenced in other counties. Jasper and Union are the only counties in South Carolina that have not sent someone to the electric chair. All of the above executions were in the old death house located at the Central Correctional Institution which was replaced in 1988 by the new Capital Punishment Facility (CPF) located at Broad River Correctional Institution

Facts About Death Row

Death row is located in Building U-3 at the Broad River Correctional Institution. Building U-3 has two wings of 48 cells each. (See attachment)

Presently, only one wing (48 single cells) comprises death row. Twenty-four cells are on the ground floor and 24 cells are on the second tier in a U-shaped configuration surrounding a common dayroom.

Each cell has a steel door with a 1-foot-6-inch-by-2-feet-10-inch window facing the dayroom which also serves as a food pass. It also has a 1-foot-4-inch-by-5-feet-4-inch security window at the rear of the cell.

The cells are 7 feet 8 inches wide, 11 feet deep (from front to back), and 9 feet high. The 8-inch-thick concrete brick walls around the cells are solidly grouted with concrete and has reinforcing steel throughout. The outside wall also has brick in addition to the concrete block. The top and bottom of each cell is poured in place reinforced concrete.

The cells are painted a light beige trimmed in dark brown. The ceiling is painted white. The floor has vinyl composition tile of a brown color.

The bunk is made of angle iron and is bolted to the floor and wall. It is 13 inches high, 30 inches wide and 76 inches long. The mattress is a 4-inch-thick fire retarding mattress manufactured by the South Carolina Department of Corrections.

A combination stainless steel lavatory and toilet are located in each cell. The cells have hot and cold running water, are air conditioned, and are protected with a special institutional sprinkler and smoke detection system.

Each cell is equipped with a locker, desk and chair made by the South Carolina Department of Corrections.

The cells are also equipped with an electrical outlet located above the stainless steel lavatory/toilet unit. The TV outlet is located on the wall close to the cell door.

Attached to the southeast corner of death row (Building U-3) is a multi-purpose building (approximately 2,470 square feet in size) which contains four offices, a regular library and law library, a multi-purpose room, two interview rooms, restrooms and two storage rooms. (See attachment)

The Electric Chair and Execution Chamber

The original death house was built in 1912 and was located at the Central Correctional Institution (CCI) in Columbia. In 1988, a new Capital Punishment Facility (CPF) was completed at the Broad River Correctional Institution adjacent to the Midlands Reception and Evaluation Center. This new facility replaced the old death house at CCI.

The execution chamber is a room 15 feet by 8 inches by 20 feet. The ceiling is 10 feet 4 inches high. The walls are brick and the floor is covered with a vinyl floor covering.

The electric chair sits facing the witness room. The chair sits nearly centered in the room on a 29-inch-by-27-inch-by-4-inch high platform. The top of the back of the chair is 54 inches high. The seat is 18-1/2 inches above the platform and is 18 inches by 24 inches. The headrest of the chair consists of two 16-inch-by-1-1/4-inch-by-2-3/4-inch pieces of wood placed 3-1/2 inches apart on the top of the chair back. The pieces are beveled to form a rest for the head.

The headpiece for the execution is composed of three layers. The inner layer is made up of a spongy-type substance. The second layer consists of a metal conductive surface, and the outer layer is made of black leather. An electrode connection is in the top of the headpiece. The 40-inch leather chin strap goes around the condemned man's head and buckles behind the headrest to hold the head in place. A dark brown, soft leather hood covers the head and is tied in back. A ground wire runs from a conductive band around the right calf to a plug on the platform.

There is a chest strap with a lap strap to hold the condemned man in the chair. These straps are 2-1/4 inches wide and 1/4 inch thick. The buckle end of the chest strap is 24 inches. The top end is 36 inches long. All four strap sections are attached to the back of the chair with metal screws. There are two 34-inch upper arm straps, each of which wraps around one of the man's arms and one of the uprights of the chair back. Each of the 31-inch lower arm straps wraps around the condemned man's arm and the chair arm. All four arm straps are two inches wide and 1/4 inch thick. Two 24-1/2 inch straps hold the condemned man's ankles to the base of the chair. They are 1/8 inch thick and 1 inch wide.

Ninety-six inches from the front of the chair are six windows approximately 24 inches by 120 inches. The witness area is 13 feet by 15 feet 8 inches. The window for viewing the execution is on the long wall between the witness area and the death chamber. There is a row of chairs for the witnesses.

The warden has a direct phone line in the Capital Punishment Facility to the deputy commissioner for operations who, in turn, will be in direct contact with the governor's office during the period directly preceding an execution. Backup phones are installed to ensure system reliability.

The executioner's room is 10 feet 9 inches by 12 feet and the ceiling is 8 feet 4 inches high. As you stand looking through the one-way mirror, the buttons to activate the chair are on the rear wall. There are three red buttons, each on a small metal box. All three buttons are capable of sending power to the chair, but only one is active during an execution.

Electric Chair Operations

Power to the chair is on an automatic cycle, activated when the active executioner's button is pushed. The cycle consists of 2,000 volts at five amps for five seconds followed by 1,000 volts at two amps for eight seconds followed by approximately 250 volts for two minutes.

There are three sources of power for the electric chair and death house. Either the building or the chair can be supplied from any of the sources independently. The power sources are S.C. Electric and Gas and two emergency generators installed permanently on SCDC property.

Power to the chair is tested by connecting the cables to a transformer. The secondary of the transformer is connected to a load bank of water heater elements that are selectively switched on to simulate the load anticipated at the time of the execution. A voltmeter and ammeter monitors the exact current that the system is delivering.

EXHIBIT 5

Affidavit of Teresa L. Norris

I, Teresa L. Norris, being duly, deposed and sworn do aver under penalty of perjury that:

1. I am an attorney licensed to practice law in the State of South Carolina.
2. I graduated from the University of South Carolina School of Law in 1990 and I was admitted to the South Carolina Bar the same year.
3. I am currently employed as Special Assistant Public Defender at the Charleston County Public Defender's Office.
4. I previously was a staff attorney and then Executive Director of Justice 360, which was then known as the South Carolina Death Penalty Resource Center or Center for Capital Litigation. After leaving Justice 360, I was in private practice in Columbia, South Carolina, before joining the Public Defender's Office in Charleston.
5. Both while employed by Justice 360 and in private practice I represented death sentenced inmates in South Carolina and other jurisdictions.
6. In that capacity, I have been present at the Capital Punishment Facility (CPF) at Broad River Correctional Institution on at least four occasions. I have been present in the execution chamber or adjacent witness room on four occasions and have been in the holding area in the same facility visiting my clients who were already held there prior to their execution on a few other occasions.
7. When Robert South was executed (5/31/96), death row was at the Broad River Correctional Institution (BRCI) where the CPF is. In fact, the building that housed death row and the CPF are essentially connected. While the row was still at BRCI, the inmates were moved to the CPF two to three days prior to their actual execution. I visited South in holding there, where there are two to three holding cells, but another attorney was with him during the minutes prior to the execution and his execution preparations. Instead, I was his counsel in the witness area during the execution. In that role, I was required to assemble, along with other execution witnesses at the Headquarters building of the South Carolina Department of Corrections right off of Broad River Road approximately an hour before the scheduled execution. I was held in one room separated from other witnesses, but there were victim's and state representatives in another room, and media representatives in a third room. Shortly before the execution, we were transported in vans the mile or so from the headquarters building to BRCI where the CPF is. There were separate vans for the media and prosecution witnesses so there were at least three vans for witnesses.
8. The witness room itself is a relatively small area that I would generally describe as smaller than a jury box in an average courtroom with no more than 10-12 chairs seated close together. The back and sides of the room are solid except for the door which is closed during the execution procedures. The front of the witness room is glass or plexiglass intermingled with bars. When the witnesses enter the room, there is a curtain drawn over the glass so that witnesses cannot see into the execution chamber itself until the appropriate time.
9. When the curtain is drawn so that witnesses can observe, the inmate is already in place. For Mr. South, this was lethal injection. He was positioned on a steel gurney, with straps holding him down and a needle already in his left arm with his left side facing the witness room. Behind his head no more than two to three feet was another adjacent room separated by tinted glass.



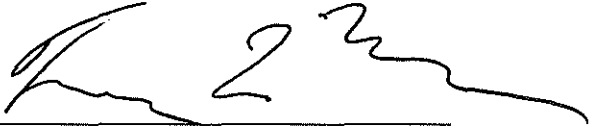
Out of that room came at least one intravenous line to his left arm. I do not recall whether there was a similar line to his right arm.

10. In the execution chamber with Mr. South was John Blume, another attorney for Mr. South, and at least two to three officials standing no more than three to five feet from Mr. South's feet. In all I would estimate the execution chamber itself to be no more than 12 x 15 feet, with the adjacent witness room being even more narrow.
11. After the witness curtain was drawn, an official read the execution order, Mr. Blume read Mr. South's final statement, and then Mr. Blume was escorted out of the execution chamber. The execution then commenced. There is a period of at minimum ten minutes after the chemicals start flowing before someone comes out of the area where the chemicals flow from, which is to the right of the witnesses, to check the inmate to verify death. After death is verified and an official pronounces that the sentence has been carried out, the witnesses are loaded back into their respective vans and returned to the headquarters building.
12. In front of the headquarters building, there are areas blocked off for protesters opposing the execution and for those there supporting the execution. Officials go to that front area and also make an official announcement that the execution has been carried out. For media and prosecution execution witnesses that choose to speak, there is typically a press conference of sorts out front of the SCDC headquarters building.
13. During two other executions (Anthony Green (8/23/2002) and Shawn Humphries (12/2/2005)) I was with my clients visiting at their holding cell in the CPF prior to the execution, moved to the execution chamber while they were strapped in, and then moved to the witness area and observed their death by lethal injection.
14. By the time Green was executed, death row had moved to Lieber Correctional Institution. The inmates would be brought from Lieber to BRCI in the middle of the night on the day of their execution. Prior to the execution, there are officers present in the control room observing inmates and their visitors. An hour or so before the scheduled execution, the inmate is offered Valium to keep them calm. When they are moved to the execution chamber, there is a team of at least 6-7 officers that escorts them to the execution chamber, which is no more than 30-50 feet away from the holding cells. The officers position the inmate for the execution. For both Green and Humphries, this was again lethal injection so they were strapped on the gurney in the same manner as South had been. After being strapped down, my view was blocked as the needles were placed in their arms, presumably to protect the identity of the executioners.
15. The executions proceeded in the same manner as with South except I was present in the execution chamber before the witness curtain was opened. I don't recall Mr. Green having a final statement for me to read so I was moved quickly to the adjacent witness room. With Mr. Humphries, I read his final statement and then moved to the witness room.
16. When James Neil Tucker was executed in the electric chair (5/28/2004), I was with him prior to the execution at his holding cell and was present when they strapped him in the electric chair but then left the CPF after reading his final statement and before he was put to death. The electric chair was positioned in the center of the execution chamber where the gurney had been placed for the other executions described above.
17. Based on my experience, it is not possible to abide by appropriate social distancing guidelines in the CPF, especially in the execution chamber and in the adjacent witness area. It is a



relatively small space and given the number of witnesses which S.C. Code § 24-3-550 allows to attend an execution and that typically are allowed, which has been as many as 11-12 in my experience, it is not possible to maintain the appropriate distance between witnesses in the witness area or between persons in the execution chamber and the CPF itself as recommended by health officials during the COVID-19 pandemic.


FURTHER AFFIANT SAYETH NAUGHT



Teresa L. Norris

10-30-20

Sworn to and subscribed before me
This 30 day of October, 2020



Notary Public for the State of South Carolina

My commission expires: 3-27-24

EXHIBIT 6

DECLARATION OF ELIZABETH VARTKESSIAN, PH.D.

IMPACTS OF COVID-19 PANDEMIC ON MITIGATION INVESTIGATION

I, Elizabeth Vartkessian, declare and state the following:

In May 2020 I submitted a declaration detailing the impacts that the COVID-19 pandemic has had on the ability of capital defense teams to engage in mitigation investigation in keeping with the applicable professional standards. I provided the declaration in order to outline the ways in which attempting to conduct mitigation investigation through methods other than those explicitly stated in the professional guidelines would pose grave risk to capital defendants by endangering relationships with witnesses and impeding future investigation. The United States is now six months into the global pandemic and additional information has been learned about the virus including the impact of relaxing stay at home orders and increased rates of COVID-19 transmission. It remains the case that capital defense teams are still unable to provide effective representation to their clients until there is a safe and reliable vaccine available or the transmission rate of COVID-19 has dropped in a significant and sustained way.

I. Qualifications

1. I have worked as a mitigation specialist for defense teams since 2004 in both trial and post-conviction cases. In the last 16 years, I have conducted mitigation investigations in nearly 40 death penalty cases and consulted on approximately 50 others. I have worked on federal capital cases originating in the 2nd, 3rd, 4th, 5th, 6th, 8th, and 9th circuits and capital cases originating in Alabama, Arkansas, Georgia, Florida, Texas, Louisiana, Oklahoma, Pennsylvania and South Dakota.
2. I am a licensed private detective in Maryland. I have been licensed as a private investigator in New York and Texas.

3. I have been an invited lecturer or faculty member at over 50 capital trainings held in Alabama, Arizona, Arkansas, Florida, Idaho, Louisiana, Maryland, Missouri, Oklahoma, Oregon, Pennsylvania, Texas and Virginia, in federal conferences, and internationally in the Czech Republic, England and Switzerland. I have been an invited lecturer or faculty member at juvenile defense trainings in Louisiana and Michigan.

4. I have published articles in peer reviewed journals and law reviews and have contributed to numerous edited volumes dedicated to research on capital punishment. I have also published on topics related to mitigation evidence in felony sentencing generally. Included in this declaration as an attachment is my curriculum vitae.

5. I hold a DPhil (Ph.D.) in Law from the University of Oxford St. Hilda's College, a MSc. in Comparative Social Policy from the University of Oxford St. Antony's College, and BAs in Political Science and Philosophy from the George Washington University.

6. I am the founding Executive Director of Advancing Real Change, Inc. ("ARC"), a national not-for-profit that conducts investigations in criminal cases. In addition to direct casework, my organization provides training and consultation to defense teams working across the country regarding the best practices of investigation.

II. World Wide Pandemic's Nationwide Impact

7. The United States is currently in the midst of the worst global public health crisis in over 100 years. The United States Secretary of Health and Human Services declared COVID-19 a Public health emergency on January 31, 2020. On March 13, 2020, the President of the United States declared a National Emergency. Since that time, the United States has identified more than

seven million cases, across all 50 states. This number is expanding by an average of approximately 44,000 new cases every day.¹

8. As of September 22 more than 200,000 Americans have died.² The United States has experienced more deaths from the virus than any other country in the world.³ To put this number into perspective, COVID-19 casualties are two and a half times the number of service member deaths from the Vietnam and Korean Wars combined.⁴

9. The CDC recorded a peak number of deaths, over 17,000 per week, in the midst of a nearly nationwide shut down in mid-April. These numbers decreased to between 3,000 and 5,000 deaths per week in June, before the relaxing of COVID-19 precautions around the Fourth of July holiday weekend preceded a spike in infections and the death rate climbed back up to nearly 8,000 persons per week.⁵

10. Efforts in states to return to normal activity by lowering social distancing restrictions have led to increased case counts. For example, on March 30 Arizona implemented a stay-at-home order and directed all non-essential businesses to cease activities other than maintaining minimal basic operations.⁶ Throughout the month of April, reported daily new cases were kept to under 500 a

¹ *United States COVID-19 Cases and Deaths by State*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days

² *Fourth-Largest U.S. School District to Allow Students back in Classroom*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/world/covid-coronavirus.html#link-19bfa512>

³ *Provisional death counts for coronavirus disease 2019*, CENTERS FOR DISEASE CONTROL AND PREVENTION, Sept. 28, 2020, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm>

⁴ *Supra* note 2.

⁵ *Provision death counts for coronavirus disease 2019*, CTRS. FOR DISEASE CONTROL AND PREVENTION Sept. 23, 2020, https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm

⁶ Exec. Order No. 2020-18, State of Arizona, <https://www.azdhs.gov/documents/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/novel-coronavirus/eo-stay-home-stay-healthy-stay-connected.pdf>

day. The order was lifted on May 15.⁷ By early June, Arizona was regularly reporting more than 1,000 daily new cases, spiking at 5,470 new cases on June 29.⁸ By June 10, 11 hospital ICUs were at capacity.⁹ Throughout the month of July, the daily death rate from COVID-19 was between 66 and 98¹⁰; it was the most fatal month for Arizonans ever recorded.¹¹

11. These grim numbers can obscure individual losses from every single, preventable death from COVID-19. For instance, as the school year started six American school teachers died from COVID-19.¹² These teachers, all under the age of 65 and some in their 20s and 30s, left behind students and communities that desperately needed their talents and compassion. Of one teacher, Nacoma James of Oxford, Mississippi it was said, “It would be impossible to count how many lives Coach Nacoma James touched during his life. He only wanted the best from his students and athletes each day.”¹³ Coach James was 42 years old.

12. Schools, colleges, and universities have had to switch to remote learning models as many that permitted in-person learning saw the virus spread quickly. For example, the University of

⁷ Gov. Ducey: Arison’s stay-at-home order will still be lifted Friday, ABC15 ARIZONA (May 15, 2020) <https://www.abc15.com/news/region-phoenix-metro/central-phoenix/gov-ducey-arizonas-stay-at-home-order-will-still-be-lifted-friday>

⁸ See generally, Arizona Department of Health Services Data Dashboard, <https://www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/covid-19/dashboards/>

⁹ Vaughn Hillyard and Corky Siemaszko, *Coronavirus is making a comeback in Arizona three weeks after governor lifted stay-at-home order*, NBC NEWS (June 10, 2020) <https://www.nbcnews.com/news/us-news/coronavirus-making-comeback-arizona-three-weeks-after-governor-lifted-stay-n1229436>

¹⁰ See generally, *supra* note 8.

¹¹ Morgan Loew, *Arizona reports record deaths in July*, AZFAMILY (Aug. 19, 2020), https://www.azfamily.com/news/continuing_coverage/coronavirus_coverage/arizona-reports-record-deaths-in-july/article_82e6ae2a-e28a-11ea-8dc5-e73d82bd9a41.html

¹² Jemima McEvoy, *At least 6 U.S. Teachers Have Died From COVID-19 Since Schools Reopened*, FORBES (Sept. 10, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/09/10/at-least-6-american-teachers-some-in-their-20s-and-30s-dead-from-covid-19/#d311c0c40499>

¹³ *Id.*

North Carolina at Chapel Hill switched to online only classes after being open for one week when 130 people tested positive for the virus. Similarly, a high school in Georgia drew attention for photos of crowded hallways that circulated after it opened for the year on August 3. By August 12, the school had confirmed 35 COVID-19 cases and switched to a hybrid schedule of in-person and remote classes.¹⁴

13. Early in the pandemic, the high risk involved in attempting to continue courthouse activities quickly became apparent. On March 12, Judge Johnny Lee Baynes presided over “business as usual” in a Brooklyn courtroom; just two weeks later, Judge Baynes had died of complications related to the coronavirus, while several others passing through the courthouse around that time tested positive.¹⁵ At the Harlem Community Justice Center, court officer Anibal Ortiz fell ill on the job in mid-March and was hospitalized with the virus for 21 days, including five days on a ventilator. In order to save his life, doctors had to amputate his left arm below the elbow.¹⁶ Months later, courts seeking to resume normal operations have seen the virus return as they do so. In New York, the Queens Supreme Court began reopening to some staff in June and was expected to increase access to visitors following Labor Day.¹⁷ On September 11, a staff

¹⁴ Carolyn Twersky, *Georgia HS That Went Viral For Crowded Hallswas Moves to Hybrid Teaching Plan After Reporting 35 COVID Cases*, SEVENTEEN (Aug. 12, 2020), <https://www.seventeen.com/life/school/a33587128/georgia-school-viral-reopening-switches-partial-online-learning-reporting-covid/>

¹⁵ Noah Goldberg, *A Brooklyn courthouse was still packed as coronavirus spread. Judges, their staffs and lawyers are paying the price*, DailyNews (Apr. 8, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-brooklyn-supreme-court-civil-covid-19-judges-attorneys-20200409-byebigdbpbvcv3he7wf5hxombju-story.html>

¹⁶ Reuven Blau, *Court Officer Makes Life or Death Judgment in COVID Fight*, THE CITY (May 7, 2020), <https://www.thecity.nyc/coronavirus/2020/5/7/21257156/court-officer-makes-life-or-death-judgment-in-covid-fight>

¹⁷ Mary Murphy, *Courts try to resume in person proceedings during pandemic*, PIX11 (Aug. 21, 2020), <https://www.pix11.com/news/coronavirus/courts-try-to-resume-in-person-proceedings-during-pandemic>

member there tested positive for COVID-19, the first positive test in that division since April 30.¹⁸ In other places, plans to resume trials have challenged the idea that it is safe to do so. For example, on September 9, the second jury trial to be attempted during the pandemic in Payne County, Oklahoma, ended in a mistrial the day after jury selection because a witness was showing symptoms of COVID-19.¹⁹ In August, a mistrial was declared in a case in Brazos County, Texas, after an inmate who had tested positive was accidentally transported to court.²⁰ In another county in the state, responses to jury summons have decreased from the normal rate of around 400 – 500 people per week to around 100 per week.²¹ In Jefferson County, Kentucky, three Circuit Court dockets were suspended throughout the month of September after three county prosecutors tested positive and an additional 16 staff members were placed in quarantine.²² Countless other jurisdictions report closures, mistrials, and other obstacles that have wasted court resources and introduced potential threats to the health of those present.

14. Six months into the pandemic it is now clear that many early predictions underestimated the death toll from COVID-19. For example, a projection by the Institute for Health Metrics and

¹⁸ David Brand, *Queens Supreme Court secretary tests positive for COVID-19*, QUEENS DAILY EAGLE (Sept. 14, 2020), <https://queenseagle.com/all/queens-supreme-court-secretary-tests-positive-for-covid-19>

¹⁹ Ashlynd Huffman, *COVID-19 plays role in judge declaring mistrial*, STILLWATER NEWS PRESS (Sept. 10, 2020), https://www.stwnewspress.com/news/covid-19-plays-role-in-judge-declaring-mistrial/article_d817efe5-bbef-5098-b753-f6ed12b1c1f7.html

²⁰ Adrienne DeMoss, *Mistrial in Brazos County after inmate with COVID-19 accidentally brought to courthouse*, KBTX-TV (Aug. 19, 2020), <https://www.kbtx.com/2020/08/19/mistrial-in-brazos-county-after-inmate-with-covid-19-accidentally-brought-to-courthouse/>

²¹ Angel San Juan, *Covid-19 scaring potential jurors in Jefferson County from fulfilling their civic duty*, KFDM (Sept. 25, 2020), <https://kfdm.com/news/local/covid-19-scaring-potential-jurors-in-jefferson-county-from-fulfilling-their-civic-duty>

²² Andrew Wolfson, *COVID-19 outbreak in Jefferson County Attorney's Office forces suspension of court cases*, LOUISVILLE COURIER JOURNAL (Sept. 4, 2020), <https://www.courier-journal.com/story/news/2020/09/04/covid-19-cases-jefferson-county-attorney-office-threatens-court/5719687002/>

Evaluation in early May predicted that the number of U.S. deaths would be 134,475 by early September— nearly 50,000 fewer than the actual number of deaths recorded by the CDC as of early September. The Institute for Health Metrics and Evaluations now projects 415,090 U.S. deaths by January 1 if states continue with the same limited restrictions.²³

15. The scientific community has continued throughout the summer to warn that this crisis is far from over. The American Medical Association noted that even as the hope for a COVID-19 vaccine increases, the barriers to the roll out of a vaccine are among the many challenges that the Coronavirus response efforts will face as the year wears on. If the FDA is able to approve a vaccine, the effectiveness of that vaccine will depend on it becoming widely available and accessible to hundreds of millions of Americans.²⁴

16. There remains wide concern that as the temperatures begin to dip and the U.S. enters winter, COVID-19 will follow the seasonal trends of previous coronaviruses and other respiratory diseases, and numbers will again increase dramatically. To the extent that social distancing and other protective measures remain in place, we may be protected from the full impact of adding flu season to the existing pandemic. However, should jurisdictions fail to take appropriate precautions, there is a significant risk that hospitals will be overwhelmed.²⁵

III. Impacts on key populations

Correctional facilities

²³ See generally, *COVID-19 projections data*, accessed at: <https://covid19.healthdata.org/united-states-of-america?view=total-deaths&tab=trend>

²⁴ Timothy M. Smith, *Dr. Ezekiel Emanuel: “Bottleneck” issues ahead for COVID-19 vaccine*, AMA (Aug. 26, 2020), <https://www.ama-assn.org/delivering-care/public-health/dr-ezekiel-emanuel-bottleneck-issues-ahead-covid-19-vaccine>

²⁵ Jessica Glenza, *Flu and Covid: winter could bring ‘double-barrel’ outbreak to US, experts say*, THE GUARDIAN (Aug. 15, 2020), <https://www.theguardian.com/world/2020/aug/15/covid-19-flu-season-us-influenza-vaccine>

17. The spread of COVID-19 in carceral institutions continues to be out of control. Infection has been found at all levels of corrections – local, state, and federal – since very early in the outbreak of the virus in the United States.

18. Outbreaks within such institutions often see the rapid and deadly spread of the disease much more acutely than in other settings. For instance, on September 1, South Central Correctional Facility located in Clifton, Tennessee reported its first COVID-19 death in the midst of a new outbreak, with 1,144 of the 1,410 inmates testing positive.²⁶

19. Throughout the summer and as recently as the first week in September, outbreaks have continued with staggering magnitude in other state prison systems. The California Department of Corrections and Rehabilitation (CDCR) saw spikes in active COVID-19 cases among imprisoned persons throughout the summer, with a 2,170 infections in June and 2,683 infections in July. As of September 9, 2020, the CDCR had confirmed 11,476 total cases of COVID-19, with 1,206, or just over 10%, of those infections confirmed within the preceding 14 days.²⁷

20. The California State Prison at San Quentin saw its highest numbers of COVID-19 infection and loss of life in July, with over 2,000 infections and 26 deaths. Infection rates were high with 707 persons per 1,000 persons in San Quentin contracting COVID-19. This rate compares to a CDCR average of 113.9 infected persons per 1,000 persons, a California average of 18.8 infected persons per 1,000 persons, and a US average of 19.1 infected persons per 1,000 persons.²⁸

²⁶ Chuck Morris, *State reports inmate death at Wayne County prison*, NEWS4 NASHVILLE (Sept. 1, 2020), https://www.wsmv.com/news/davidson_county/nearly-1-000-inmates-test-positive-for-covid-19-at-wayne-co-prison/article_bacc1ed2-ebbe-11ea-948b-0b76e966254c.html

²⁷ See generally, California Dept. of Corrections and Rehabilitation, <https://www.cdcr.ca.gov/covid19/population-status-tracking/>

²⁸ *Id.*

21. There are many ways to introduce the virus into a detention facility, including from staff, visits from family, friends, lawyers, newly admitted inmates, transfers in and out of the institution for court appearances or medical needs, to name but a few.

22. Transfers in particular have caused surges in the spread of virus as local jails across the country are responsible for admitting and releasing about 200,000 people every week.²⁹ The outbreak at San Quentin, for example, began after prisoners were transferred from a known hotspot without any testing being conducted.³⁰

23. Likewise, transfers by the United States Marshals have also caused the virus to spread. It is estimated that the agency conducts more than 1,000 prisoner movements per day in any given year.³¹ As of early August, nearly 3,500 people in Marshals' custody had tested positive for COVID-19, and 13 had died.³²

24. Movement in and out of facilities for any reason can lead to increased infection rates. At the federal death row facilities in Terre Haute, where executions were performed in July, August, and September despite warnings of the increased risk involved in bringing individuals from across the country into the prison to perform execution-related duties, three prisoners have died of the

²⁹ Anna Flagg and Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, THE NEW YORK TIMES (Mar. 31, 2020), <https://www.nytimes.com/2020/03/31/upshot/coronavirus-jails-prisons.html>

³⁰ Megan Cassidy, *San Quentin officials ignored coronavirus guidance from top Marin County Health officer, letter says*, SAN FRANCISCO CHRONICLE (Aug. 11, 2020), <https://www.sfchronicle.com/crime/article/San-Quentin-officials-ignored-coronavirus-15476647.php>

³¹ *See*, United States Marshals Services, "Fact Sheet – U.S. Marshals Service – 2020," <https://www.usmarshals.gov/duties/factsheets/overview.pdf>

³² Keegan Hamilton and Keri Blakinger, *'Con-Air' is Spreading COVID-19 All Over the Federal Prison System*, THE MARSHALL PROJECT (Aug. 13, 2020), <https://www.themarshallproject.org/2020/08/13/con-air-is-spreading-covid-19-all-over-the-federal-prison-system>

virus and 206 people at the facility had tested positive as of September 21, compared to just 11 positive cases two weeks prior to the first execution.³³

25. In addition to transfers in and out of facilities, detained people cannot effectively social distance and have less access to hygiene products making frequent hand washing and cleansing of surfaces less likely. Carceral settings have also been slower to adopt consistent symptom screening, temperature checks and isolation of infected persons to prevent infection and the spread of the virus. As a result, the risk of COVID-19 transmission to the 2.2 million people incarcerated in the United States is far greater than in non-custodial institutions.³⁴ Indeed, the patterns of highly clustered, fast moving, and poorly controlled outbreaks in prisons and jails have continued throughout the summer of 2020. As of September 19, 2020, the CDC reported that 1,225 correctional and detention facilities had been impacted by the virus.³⁵ As of September 26, 2020 68 correctional officers in the United States have died of COVID-19.³⁶

26. The high risk to those working and living in detention centers has also significantly impacted the communities around them. Studies now available from earlier in the pandemic reveal the close connection between outbreaks in detention facilities and infection rates in surrounding communities. A forthcoming peer-reviewed study in *Health Affairs*, as reported on by Pew Charitable Trusts, looked at cases in Cook County, IL and found “cycling through Cook County

³³ *BOP Data Show Federal Execution Likely Caused COVID-19 Spike*, ACLU (Sept. 21, 2020), <https://www.aclu.org/press-releases/bop-data-show-federal-executions-likely-caused-covid-19-spike>

³⁴ Decl. of Dr. Joe Goldenson at 8, *Purkey v. Barr & Carvajal*, No. 1:19-CV-03570-TSC (D.D.C, June 21, 2020).

³⁵ See generally, *Coronavirus Disease 2019 data for Correctional Facilities*, <https://covid.cdc.gov/covid-data-tracker/#correctional-facilities>

³⁶ *COVID-19: corrections deaths*, Corrections1 (Sept. 24, 2020), <https://www.corrections1.com/coronavirus-covid-19/articles/covid-19-corrections-deaths-CF3nGFJe7JyxB6c/>

Jail was associated with 15.9% of COVID-19 cases in Chicago and 15.7% in Illinois as of late April.”³⁷

Disproportionate impact on racial and ethnic minorities

27. The coronavirus is affecting some communities with a greater pervasiveness and deadlier consequences than others. Reports have continuously confirmed vastly uneven infection and death rates throughout the country.

28. A June study by the nonprofit research group The Brookings Institute looked closely at race gaps in COVID-19 infection, illness, and death. The disproportionate effects of COVID-19 on Black and Brown persons are marked, particularly for younger age groups. For persons aged 85 and older, Black Americans are dying at a rate of about 880 deaths per 100,000 persons, while Hispanic or Latino Americans are dying at a rate of 573 deaths per 100,000 persons and White Americans are dying at a rate of 436 deaths per 100,000 persons – exactly half that of their Black counterparts. Meanwhile, for Americans aged from 45-54 years old, Black and Hispanic/Latino death rates are at least six times higher than for White persons.³⁸

29. People of color are at significantly higher risk due to COVID-19 than their white counterparts across every age bracket, with Black Americans experiencing the highest burden of death and illness of all racial groups. Black Americans are 2.6 times more likely to be infected with COVID-19, 4.7 times more likely to become hospitalized due to COVID-19 related illness,

³⁷ Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, PEW (July 1, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities>

³⁸ Tim Ford, Sarah Reber, Richard V. Reeves, *Race gaps in COVID-19 deaths are even bigger than they appear*, BROOKINGS (June 16, 2020), <https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/>

and 2.1 times more likely to die from complications related to the virus.³⁹ Hispanic or Latino persons are 2.8 times more likely to be infected, 4.6 times more likely to be hospitalized, and 1.1 times more likely to die from the virus than their White counterparts.

Other Vulnerable Populations

30. At the start of the pandemic several groups were identified as being at a far greater risk than others for severe illness should they become infected. For instance, people over 65, those living in nursing homes, and people of all ages with underlying health conditions, including moderate to severe asthma, chronic lung disease, diabetes, severe heart disease, liver disease, the immunocompromised, and people with severe obesity. Almost 90 million people, or roughly 4 out of 10 people, fall into this higher risk category, due to their age, or underlying condition.⁴⁰

31. Although the virus is most dangerous for those in this higher risk category, not a single demographic has escaped COVID-19's deadly reach. Children in particular were thought to be practically immune to the virus, but it is now clear that children, including infants, can become gravely ill from COVID-19.

32. Although children infected with COVID-19 are less likely to develop severe illness as compared with adults, the rate of hospitalization among children is increasing. While children have lower rates of mechanical ventilation and death than adults, 1 in 3 children hospitalized with COVID-19 in the United States were admitted to the intensive care unit, which is the same in

³⁹ *Hospitalization and Death by Race/Ethnicity*, CTRS. FOR DISEASE CONTROL AND PREVENTION Last updated: Aug. 18, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html>

⁴⁰ Wyatt Koma, Tricia Neuman, Gary Claxton, et al., *How Many Adults Are At Risk of Serious Illness If Infected With Coronavirus*, KAISER FAMILY FOUNDATION (Apr. 23, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/how-many-adults-are-at-risk-of-serious-illness-if-infected-with-coronavirus/>

adults.⁴¹

33. COVID-19 has also been linked with serious related symptoms in otherwise healthy children involving multiple organ failure, widespread inflammation, and in many cases heart failure. The CDC issued a health advisory about this disturbing new collection of symptoms, labeling it multisystem inflammatory syndrome in children (MIS-C).⁴² By July 29, a total of 570 patients had been reported to suffer from MIS-C, with 490 of those patients having four or more organ systems involved and the majority requiring significant intensive care unit stays.⁴³

34. Among those who survive the virus, its long-term impact is still largely unknown, but early indications are troubling. An article in *Nature* published in mid-September noted that “preliminary studies and existing research into other coronaviruses suggest that the virus can injure multiple organs and cause some surprising symptoms,”⁴⁴ including damage to the lungs, immune system, the heart, and other organs. It may be years before the full toll of COVID-19 on even otherwise-healthy subjects is known.

IV. Implications for mitigation investigation in capital cases

35. In May 2020, I provided a declaration detailing the inability of defense teams to conduct mitigation investigation in death penalty cases. That declaration provided significant detail about the professional standards for mitigation investigation and myriad reasons why attempts to work

⁴¹ *Infections Among Children*, CTRS. FOR DISEASE CONTROL AND PREVENTION, Last updated Aug. 14, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/pediatric-hcp.html>

⁴² *Multisystem Inflammatory Syndrome in Children (MIS-C) Associated with Coronavirus Disease 2019 (COVID-19)*, CTRS. FOR DISEASE CONTROL AND PREVENTION, (CDCHAN-00432), May 14, 2020, <https://emergency.cdc.gov/han/2020/han00432.asp>.

⁴³ *COVID-19 Associated Multisystem Inflammatory Syndrome in Children – United States, March-July 2020*, CTRS. FOR DISEASE CONTROL AND PREVENTION, 69 (32), 1074-1080, Aug. 14, 2020, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6932e2.htm>

⁴⁴ Michael Marshall, *The lasting mystery of coronavirus long-haulers*, NATURE (Sept. 14, 2020), <https://www.nature.com/articles/d41586-020-02598-6>

around conducting in-person interviews with the client and witnesses and records collection would likely have dire consequences for capital defendants. That declaration is included as Attachment B.

36. In order for mitigation evidence to be obtained, a potential witness needs to be in the right frame of mind to discuss difficult experiences and memories. Given the communities from which most capital defendants come, witnesses are at a greater likelihood of having contracted the virus at some point or having had a close family member contract the virus. They may be experiencing significant disruption in their schedules, financial well-being, and mental health due to job loss (permanent or temporary), school closures, or closures of other community services. All of these factors may increase the perceived violation of an interview attempt under pandemic conditions and result in even more significant barriers to a return attempt by the mitigation specialist. In some cases, due to more family members being at home due to lack of employment, at-home schooling, or simply limited options to go elsewhere, it may be impossible to conduct an interview with adequate privacy even if the mitigation specialist is admitted into the home.

37. The longevity of the pandemic is creating obstacles even in some previously established witness relationships. A client family member, for example, who has previously been open and engaged in the interview process may, after the strain of the past several months, have less capacity for or interest in continuing even casual contact with a mitigation specialist. Pushing such witnesses would only alienate the witness and damage existing rapport. As a result, once interviewing can resume, mitigation specialists may often find themselves in the position of having to carefully rebuild relationships rather than picking up where they left off.

38. At the same time, our clients themselves have been significantly impacted by the pandemic in ways that render them less able to assist us in understanding their life histories. In addition to

being subjected to the stress of added restrictions as facilities attempt to control virus transmission under difficult circumstances and the awareness of their increased risk of infection, many of our clients are living in constant fear of the impact the pandemic may be having on their families. One of our own clients, for example, recently went through a period during which both his grandmother, mother, and brother were sick with the virus.

39. Even when there have been no known cases among a client's family, the awareness of high transmission rates in their communities of origin – including hotspots such as Brooklyn (which hit a peak of 200 deaths in a single day in mid-April⁴⁵) or New Orleans (which hit a peak of 32 deaths in a single day in mid-April⁴⁶) – has often meant that concern for loved ones is the overriding subject of any conversation. This anxiety is only exacerbated by limitations on outside contact, as formerly in-person legal visits are limited to phone or video and contact with family members is limited to cost-prohibitive methods such as pay-per-minute phone calls or pay-per-message emails.

40. As the pandemic has worn on, some capital defense teams, including those in federal, state, and local public defender offices have attempted to continue the field work component of mitigation investigation, many times over the objection of the mitigation specialists on the case. Those efforts, as predicted, have backfired and created more issues for the mitigation specialist, and by extension the capital client.

41. Reports from around the country include stories like the following. A capital trial team sent the mitigation specialist to travel to Chicago to attempt to interview a relative of the client's, and when the mitigation specialist showed up on their porch, the mitigation specialist was angrily told

⁴⁵ See generally, *NYC COVID-19: data*, <https://www1.nyc.gov/site/doh/covid/covid-19-data-boroughs.page>

⁴⁶ Dan Swenson, Amie Just, Kyle Whitfield, *Louisiana coronavirus: 165,091 cases, 5,298 dead, 563 in hospital, 149,640 recovered*, NOLA.COM (Sept. 28, 2020), https://www.nola.com/news/coronavirus/article_7cb2af1c-6414-11ea-b729-93612370dd94.html

to go away. These were people who were expected to be friendly to the client, but they were upset that someone came to see them during a pandemic. Now the team is contemplating when it will be safe to try again, and whether a different mitigation specialist should attempt to initiate contact in light of the degree of anger or fear encountered in the first unsuccessful attempt.

42. Various courts, when presented with detailed and case specific information discussing the detrimental effects of attempting in-person visits, have agreed with the capital defendant. See, U.S. v. Crusius, 2020 WL 4340550 (W.D. Texas, El Paso Division, July 28, 2020) (stating, “[n]ot surprisingly, as Defendant painstakingly expounded in his June 15, 2020 ‘Status Report’ (ECF No. 80) and the instant motion, the COVID-19 pandemic, together with the ensuing national and state emergency declarations, local stay-at-home orders, and the Center for Disease Control (“CDC”) Guidelines, have effectively crippled the defense counsel's mitigation investigation.”

43. Mitigation investigation must be meaningful; it needs to be conducted in a way that ensures the greatest chance of obtaining information and connecting with the witness so follow up contact is welcome. The pandemic clearly prevents such meaningful mitigation investigation from taking place. See, U.S. v. Crusius, 2020 WL 4340550 (W.D. Texas, El Paso Division, July 28, 2020) (stating, “[t]o make matters worse, contacting potential witnesses solely through telephone would prove devastating to the defense team in trying to obtain any mitigating evidence from them... As such, the Court agrees with Defendant that attempting to conduct in-person interviews during these times would not only go against all ensuing federal and state orders and the advice of the national public health authorities, but also risk damaging any possible relationship between his defense team and potential mitigation witnesses”.)

44. Conducting phone or video interviews rather than unannounced in-person interviews with witnesses is also fodder for reversals on the grounds of ineffective assistance of counsel, as

subsequent defense teams who do follow the standard of care may later discover much more about the client's life and potential mitigating factors. See, *Harries v. Bell*, 417 F.3d 631, 638 (6th Cir. 2005) (concluding that "counsel failed to conduct a constitutionally adequate investigation" in part because counsel "limited their investigation to contacting by telephone Harries's mother and brother"); *Ferrell v. Hall*, 640 F.3d 1199, 1219 n. 14 & 1229 (11th Cir. 2011) (finding counsel ineffective at the penalty phase where, in part, "many" of the mitigation interviews "were conducted not in person but by telephone"); *Brown v. Thaler*, 684 F.3d 482, 488 (5th Cir. 2012) (noting, without disapproval, an investigator's professional opinion that "interviews [for a postconviction investigation] must be conducted in person rather than by telephone so that trust and rapport between the investigator and witnesses can be developed" and that "repeat interviews were necessary in order to obtain affidavits."); *Doe v. Ayers*, 782 F.3d 425, 438-39 (9th Cir. 2015) (finding ineffective assistance where trial counsel conducted interviews by telephone rather than in person, and where the few in person interviews conducted were in the presence of family and friends); *Correll v. Ryan*, 539 F.3d 938, 945 (9th Cir. 2008) (noting that "counsel testified that he met only once with defendant's father, sister, and brother, 'around the kitchen table at the same time,'" and concluding that those interviews were "worthless"); *Doss v. State*, 19 So. 3d 690 (Miss. 2009) (on rehearing, counsel found ineffective in capital sentencing for failing to adequately investigate and present mitigation).

45. In cases in which the client's narrative requires investigation into multiple geographic locations, logistical issues stemming from the ongoing restrictions may make field work of any type all but impossible. For mitigation specialists working as employees of government agencies, jurisdiction-wide policies may be in place prohibiting or discouraging overnight out-of-state

travel.⁴⁷ Broader interstate travel restrictions may prohibit travel between certain states altogether or impose quarantine requirements on incoming travelers from certain states with high rates of infection. In New York, for example, as of September 15, travelers from 30 states and territories were required to self-quarantine for 14 days upon their arrival. Those violating a quarantine order may be subject to a civil penalty of up to \$10,000 or imprisonment up to 15 days.⁴⁸ Restrictions upon entry vary from state to state and are often based on cases by population of the state of origin; as a result, they change frequently as testing results vary. In some states, requirements may be different even from one county to the next as parts of the state advance to new stages for reopening at different rates. As logistically challenging as it may be for teams to meet these requirements, the even greater concern is the high possibility for error, whether or not official restrictions exist. One trip by an asymptomatic mitigation specialist with COVID-19 may impact not only the communities she visits – which are often the most vulnerable – but also those she travels through and her colleagues and family upon her return. The role of the courts is to protect people, not to endanger lives by forcing mitigation specialists and other members of a capital defense team to feel pressured into taking such a risk in order to defend their clients.

46. Even when travel or the intended contact is limited, mitigation specialists who have ventured out have risked their own health and those of the witnesses. For example, a mitigation specialist flew to another state under pressure from the attorneys to conduct interviews with the client’s family and acquaintances. The mitigation specialist showed up at a family member’s

⁴⁷ See, Maryland Dep’t. of Budget and Mgmt., Maryland’s agency guidelines under Level II - Flexible Operations, <https://dbm.maryland.gov/employees/Pages/COVID19.aspx>

⁴⁸ See, New York Dep’t. of Health, Frequently Asked Questions Regarding Quarantine Restrictions on Travelers Arriving in New York State Following Out of State Travel, (July 2, 2020), https://coronavirus.health.ny.gov/system/files/documents/2020/07/nys-covid-travel-advisory-faq_0.pdf

door wearing a mask and was invited inside to sit down at a meal. The mitigation specialist did not feel able to avoid the invitation and ended up sitting at the family's table for several hours, unmasked while eating. And yet home visits are a necessity to competent social history investigation. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 395, n. 19 (2000), detailing compelling mitigation evidence documented by a social worker following an in-home visit, based solely on her observations of the conditions in the family home. Mitigation specialists conduct interviews in the field. By going to the home of a witness or family member, the mitigation specialist will observe things about the interview subject that would not be visible in the office, thus providing a deeper perspective:

The home visitor often has greater opportunity to meet the client's friends and family; see family pictures; note relationships with cherished pets and neighbors that the client may not think to mention in the office; and experience the way the client puts together, develops, and protects living space. . . . [We] note the client's environment and the messages it conveys about the client and his or her situation.

Bianca Cody Murphy & Carolyn Dillon, *INTERVIEWING IN ACTION: PROCESS AND PRACTICE* 28 (1998). In-home visits are essential to effective mitigation work, and yet in a pandemic this standard puts the lives of witnesses and defense team members at risk, and risks the creation of new barriers to disclosure of sensitive, personal life history investigation.

47. Outbreaks of COVID-19 have been inconsistent as the spread of the virus may be on the decline in some places, but it is on the increase in other places. As noted above, this is also true in detention facilities. This aspect of the pandemic is especially problematic because people who have touched our clients' lives move over time requiring the mitigation specialist to travel to other states, putting many people at risk. It increases the risk to witnesses, and it especially increases the risk to mitigation specialists and investigators. New outbreaks occur in different regions at

different times because of local events and the wide variety of responses to the virus, from lock-downs to no-mask localities.

48. Mitigation specialists are also now facing the prospect of not being hired for adhering to advice from public health agencies and their own professional standards. I am aware of several cases in which capital defense teams declined to hire mitigation specialists for refusing to conduct phone or video interviews with witnesses. This suggests that such teams may be turning to underqualified mitigation specialists who do not fully understand or comply with the standards of investigation that are constitutionally guaranteed to capital defendants. Investigations conducted under such circumstances are likely to be lacking in ways that extend far beyond the limitations of the pandemic itself.

49. There is a significant chance that the teams that are acquiescing to pressure, whether actual or perceived, will miss valuable parts in their mitigation investigation. Because of the disproportionate impact of the virus itself, an attempt to resume investigation would mean that clients of color or other vulnerable populations would be structurally more likely to have pieces of their investigation missed, as more vulnerable witnesses and institutional sources of records or other information are more likely to self-select out of an investigation conducted under pandemic conditions.

50. Court proceedings themselves may introduce significant disparities under these conditions. Juries that rely on responses from those who believe that they are less at risk or who are confident in their ability to obtain adequate care in the event that they become sick may exacerbate jury underrepresentation of more vulnerable populations. Alternatively, any proceedings that rely on video or other remote means may structurally exclude those who either cannot afford reliable internet service or live in a location that simply does not have access to it.

Even those who have the technological capacity to participate in such an undertaking will do so in a way that limits their ability to understand non-verbal cues and other aspects of testimony that would be present during in-person proceedings.

51. Ultimately, an adequate mitigation investigation requires that the mitigation specialist both learn to understand her client as a whole person and to convey that understanding to those who will determine whether that person lives or dies. Family history, going three generations back, is an essential part of this task, which means that the same kind of careful investigation into the mental health, social and behavioral history of aunts, uncles, grandparents, great-grandparents, cousins, and offspring must be undertaken. *See* Richard G, Dudley, Jr. & Pamela Blume Leonard, *Getting it Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963 (2008). This is not an objective that can be achieved by checking questions off of a list. Not only do defendants whose lives are on the line have a constitutional right for their stories to be told in a complete and compelling manner, but the jurors who are faced with making a decision of such magnitude deserve to have the confidence that they have been presented with all of the information that would have mattered to them.

CONCLUSION

52. The death penalty is an entirely discretionary sentence; it is never required to be sought or imposed. It is also by its nature irreversible and therefore requires the higher level of reliability demanded by decades of precedent. While the decision to seek a death sentence is discretionary, the obligation for capital defense teams to adhere to the professional standards is not. Capital defense teams have a legal and ethical obligation to their clients to conduct investigation in keeping with the professional standards as articulated in the case-law and professional guidelines. Capital

defense investigative standards have evolved to enable “prosecutors, juries, and judges to make fully informed and reliable life-or-death decisions.” Sean D. O’Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 700 (2008), citing *Wiggins v. Smith*, 539 U.S. 510, 525 (2003), *Williams v. Taylor*, 529 U.S. 362, 396 (2000), and many other cases in which death sentences were vacated because substandard investigations deprived decision-makers of important information about a capital defendant.

53. The commitment by capital defense teams, prosecutors, and judges to ensure the constitutional right of a capital defendant to have a meaningful mitigation investigation that is accurate, comprehensive, and reliably done cannot fail now. Mitigation investigation cannot proceed in a pandemic without violating minimum standards of performance. In short, mitigation investigation cannot proceed until it can be done in complete safety for both witnesses and capital defense team members.

I declare under penalty of perjury under the laws of Maryland that the foregoing is true and correct and was executed this 28th day of September 2020 in Baltimore, Maryland.



Elizabeth Vartkessian, Ph.D.

Attachment A

Curriculum Vitae of Elizabeth Vartkessian, Ph.D.

CURRICULUM VITAE

Elizabeth S. Vartkessian, Ph.D.

309 N. Charles St., 3rd floor

Baltimore, MD 21201

Phone: (281) 217-0946 esv@advancechange.org

EDUCATION

- 2012 Ph.D. in Law (DPhil)
University of Oxford, St. Hilda's College—Oxford, England
- 2004 M.S. in Comparative Social Policy (M.Sc.)
University of Oxford, St. Antony's College—Oxford, England
- 2003 B.A., Political Science; B.A., Philosophy; Minor, Africana Studies, *Magna Cum Laude*
George Washington University, Washington D.C.

PROFESSIONAL EXPERIENCE

2014-Present *Founding Executive Director*, Advancing Real Change, Inc. (ARC, Inc.),
Baltimore, Maryland.

ARC, Inc. promotes justice by ensuring that the life histories of people charged with crimes are at the forefront of their cases. ARC, Inc. engages in casework, provides training and consulting services to legal teams regarding the best practices of life history investigations.

In addition to working as a mitigation specialist further tasks as the Executive Director include:

- Managing daily office operations of 11 full-time staff.
- Providing direct supervision to all mitigation and records collection specialists.
- Reporting to the Governing Board of Directors.
- Overseeing office finances.
- Leading fundraising efforts.
- Engaging in coalition building and community outreach.
- Providing training and consultation services to defender organizations and private bar attorneys.
- Maintaining a discrete caseload as a mitigation specialist in complex cases.
- Licensed as a Private Detective in Maryland, number 101-24647.

2010-2014 *Mitigation Specialist*, private consulting services for capital and cases involving juvenile life sentences.

- Built a successful private mitigation practice.
- Engaged in networking including identifying clients and marketing.

CURRICULUM VITAE

- Ran daily operations, including budgeting, invoicing, accounting, and collection of payments.
- Obtained a private investigator license in New York.
- Trained as a Defense Victim Outreach Liaison.

2004-2010 *Mitigation Specialist*, The Gulf Region Advocacy Center, Houston, Texas.
Life history investigator for death penalty cases at trial and post-conviction stages.
Regular tasks included:

- Providing expert testimony regarding the standard of care for the development and presentation of mitigating evidence in death penalty cases.
- Interviewing the client for the purpose of preparing a social history.
- Identifying, locating, and interviewing family, friends, and other witnesses for the purpose of preparing a social history.
- Collecting and evaluating birth, medical, education, social welfare, employment, incarceration, military, and other records of clients and family members for the construction of a social history.
- Investigating and researching issues related to medical history; prenatal, pediatric and adult health; exposure to harmful substances *in utero* and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religion, gender and sexual orientation; ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.
- Working with the client's family, community, and clergy in the development of other favorable evidence for the client.
- Analyzing information gathered in investigation to determine potential expert witness consultations.
- Writing memoranda analyzing the factual information obtained from witnesses and historical documents in light of the principles discerned from the professional literature.

INVITED GUEST LECTURES, PRESENTATIONS, AND TRAINING SESSIONS

- 2020 Federal Death Penalty Strategy Session. "Thoughts on the Future of Mitigation". Presentation by video. October 26 (confirmed).
- 2020 Los Angeles County Public Defender: "Conducting Capital Investigation During COVID-19". Presentation by video. Los Angeles, California. October 23 (confirmed)
- 2020 Advancing Real Change, Inc.: *Mitigation Webinar Series*. "Mitigation Investigation During COVID-19: Six Months In". Baltimore, Maryland. September 29.

CURRICULUM VITAE

- 2020 Thurgood Marshall, School of Law: *Capital Punishment*. Topic: the development of mitigation evidence in capital cases. Guest speaker by video. Houston, Texas. June 9.
- 2020 Advancing Real Change, Inc.: *Mitigation Webinar Series*. “Mitigation Investigation During COVID-19”. Baltimore, Maryland. April 7.
- 2020 American Civil Liberties Union, Scharlette Holdman Mentorship Training. Plenary speaker session topic “ABA Guidelines” and “Advanced Interviewing Skills”. New Orleans, Louisiana. March 12-13.
- 2020 Georgetown University, School of Law: *Capital Punishment*. Topic: the development of mitigation evidence in capital cases. Guest speaker. Washington D.C. March 4.
- 2019 Advancing Real Change, Inc.: *Mitigation Training Series*. Curriculum coordinator and plenary session speaker topic “Mitigation’s Power and Purpose”. Houston, Texas. December 6-8.
- 2019 Federal Death Penalty Strategy Session, Closing Comments: Thoughts on Pleas and Deauthorization. San Diego, California. November 14-16.
- 2019 *Bring Your Own Case* training, Curriculum coordinator and faculty member. Supported by National Association of Criminal Defense Lawyers and a grant from the Bureau of Justice. Tallahassee, Florida. November 8-10.
- 2019 Arkansas Association of Criminal Defense Lawyers: *Death Penalty Conference*. Plenary session speaker, “Ethics of Mitigation Investigation”. Rogers, Arkansas. October 25-26.
- 2019 Louisiana State Public Defender, Faculty member and plenary session speaker for capital and *Miller/Montgomery* tracks, topics “Mitigation’s Power and Purpose”, “Assets-Based Mitigation Evidence”, “Identifying Trauma”. Kenner, Louisiana. October 23-25.
- 2019 University of Texas, Capital Punishment Clinic: Tools for Organizing Casework. Austin, Texas. September 18.
- 2019 Authorized Case Consultation and Training. Federal Resource Counsel, “Capital Jury Selection”. St. Louis University School of Law. June 6-8.
- 2019 Advancing Real Change, Inc.: *Baltimore Training Series*. Curriculum coordinator and plenary session speaker, “Mitigation 101” and “Mitigation’s Power and Purpose”. May 16-18.

CURRICULUM VITAE

- 2019 Bellarmine University, Topic: “Capital Mitigation” (by video). April 10.
- 2019 Amicus U.S. Death Penalty Training, “Mitigation 101”, “Working with Clients”, “Investigating and Litigating Mental Health and Trauma”, and “Getting in the Door and Conducting Witness Interviews”. London, England. March 23-24.
- 2018 The Virginia Bar Association, 26th Annual Capital Defense Workshop, plenary session speaker, “School to Prison Pipeline as Mitigation”. Richmond, Virginia. November 16.
- 2018 26th Annual Federal Death Penalty Strategy Session, plenary speaker “Preparing for Authorization”. Tampa, Florida. November 7-9.
- 2018 Amicus U.S. Death Penalty Training, “Mitigation 101”, “Common Claims and How to Prepare Evidence”, Unearthing Records that Will Change the Face of a Case”, “Working with Clients”, “Identifying Signs and Symptoms of Mental Health and Trauma”, and “Getting in the Door and Conducting Witness Interviews”. London, England. November 3-4.
- 2018 Louisiana State Public Defender, Faculty member and plenary session speaker, “Working with Experts”, “Capital Jury Project: Findings and Application”, and “Developing Themes and Theories in Juvenile Cases”. Kenner, Louisiana. October 24-26.
- 2018 University of Texas, Capital Punishment Clinic: Tools for Organizing Casework. Austin, Texas. September 19.
- 2018 Office of the Public Defender in the Ninth Circuit, Sentencing Strategies Seminar, plenary session speaker, “Preparing for Your Penalty Phase and Sentencing”. Orlando, Florida. August 6-7.
- 2018 Miami Public Defender, in-house training. Case management and document processing. Miami, Florida. May 7-9.
- 2018 University of Texas, Capital Punishment Clinic: Mitigation Advocacy. Panelist discussing empirical assessments of successful mitigation in capital and non-capital cases. Austin, Texas. April 7-8.
- 2018 Advancing Real Change, Inc.: *Baltimore Mitigation Training*. Curriculum coordinator and plenary session speaker, “Mitigation: The Heart of Criminal Defense,” and “Forward-looking Mitigation and Re-entry”. Baltimore, Maryland. March 16-18.
- 2018 American Civil Liberties Union, *Bring Your Own Case Training*. Faculty member and plenary session speaker, “What Must Be Done in Every Case: Mitigation Investigation”. Perdido Beach, Alabama. February 28-March 2.

CURRICULUM VITAE

- 2018 Alabama Criminal Defense Lawyers Association: *Capital Training*. Plenary Speaker, “Basics of Case Organization and Tools of the Mitigation Trade”, and “Compelling Narratives: Mitigation Themes and Theories” Birmingham, Alabama. January 18-20.
- 2017 Atlantic Center for Capital Representation: *Bring Your Own Case Training*. Faculty member and plenary session speaker, “Themes and Theories”. Lafayette Hill, Pennsylvania. November 29-December 2.
- 2017 Amicus U.S. Death Penalty Training, “Mitigation 101”, “Common Claims and How to Prepare Evidence”, Unearthing Records that Will Change the Face of a Case”, and “Getting in the Door and Conducting Witness Interviews”. London, England. November 4-5.
- 2017 Louisiana State Public Defender, Faculty member and plenary session speaker, “Ethical Obligations of the Mitigation Investigation”, “Mitigation in *Miller* cases”, and “Capital Juror Research”. Kenner, Louisiana. October 18-20.
- 2017 Virginia Correctional Association: *Stop Blocking the Exit*. Panelist, “Struggles and Success of the Journey Home”. Williamsburg, Virginia. October 12.
- 2017 Georgetown University, School of Law: *Capital Punishment*. Topic: the development of mitigation evidence in capital cases. Guest speaker. Washington D.C. October 11.
- 2017 Federal Criminal Defense Seminar, Administrative Offices of the U.S. Courts. “Mitigation Investigation and Mental Health Evidence”. Philadelphia, Pennsylvania. August 24.
- 2017 The Gulf Region Advocacy Center: *Mitigation Skills Training*. Faculty member and plenary session speaker, “Records Collection”. Houston, Texas. August 7-9.
- 2017 Habeas Assistance and Training Counsel Project: *Fourteenth Annual National Seminar on the Development and Integration of Mitigation Evidence*. “Basics of Case Organization and Tools of the Mitigation Trade”. Baltimore, Maryland. April 7.
- 2017 Florida Defender Organization: Topic: “Compelling Narratives: Mitigation Themes and Theories” (by videoconference). March 24.
- 2017 Georgetown University, School of Law: *Capital Punishment*. Topic: the development of mitigation evidence in capital cases. Guest speaker. Washington D.C. March 23.

CURRICULUM VITAE

- 2017 Yale School of Management: *Yale Philanthropy Conference*. Invited panelist, “A Public Voice: Rethinking How Advocacy Supports Mission”. New Haven, Connecticut. February 24.
- 2017 Advancing Real Change, Inc.: *Baltimore Mitigation Training*. Curriculum coordinator and plenary session speaker, “Best Practices of Mitigation Investigation,” and “Forward-looking Mitigation”. Baltimore, Maryland. February 10-11.
- 2017 Yale School of Law: *Educational Opportunity and Juvenile Justice Clinic*. Topic: records collection and interviewing basics for mitigation development. Guest speaker. New Haven, Connecticut (by videoconference). January 31.
- 2016 Atlantic Center for Capital Representation: *Bring Your Own Case Training*. Faculty member and plenary session speaker, “Themes and Theories”. Lafayette Hill, Pennsylvania. December 15-17.
- 2016 Michigan State Appellate Defender: *Juvenile Life Mitigation Training*. Curriculum coordinator and plenary session speaker, “Best Practices of Mitigation Investigation”. Detroit, Michigan. December 8-9.
- 2016 Louisiana State Public Defender: *Bring Your Own Case Training*. Faculty member and plenary session speaker, “Walk a Mile in My Shoes: A Day in the Life of Your Client”. Baton Rouge, Louisiana. October 19-21.
- 2016 University of Baltimore, School of Law: *Capital Punishment*. Topic: the development of mitigation evidence in capital cases. Guest speaker. Baltimore, Maryland. April 25.
- 2015 Maryland Office of the Public Defender, *Summer Law Clerk Training*. Plenary session speaker, “Mitigation: The Heart of Criminal Defense”. Baltimore, Maryland. May 27.
- 2015 Habeas Assistance and Training Counsel Project: *Twelfth National Seminar on the Development and Integration of Mitigation Evidence*. “Basics of Case Organization and Tools of the Mitigation Trade”. Baltimore, Maryland. April 12.
- 2015 Arizona Capital Representation Project: *Bring Your Own Case Training*. Faculty member Phoenix, Arizona. April 1-3.
- 2015 University of Maryland, School of Law: *Social Work and Law*. Topic: social work assessments and sentencing determinations. Guest speaker. Baltimore, Maryland. March 30.

CURRICULUM VITAE

- 2015 Georgetown University, School of Law: *Capital Punishment*. Topic: the development of mitigation evidence in capital cases. Guest speaker. Washington D.C. March 19.
- 2015 Administrative Offices of the U.S. Courts: *Fourth Annual Capital Mitigation Skills Workshop*. Faculty member and plenary session speaker, “Basics of Case Organization and Tools of the Mitigation Trade”, Kansas City, Missouri. January 15-18.
- 2014 Atlantic Center for Capital Representation: *Bring Your Own Case Training*. Faculty member and plenary session speaker, “Themes and Theories”. Lafayette Hill, Pennsylvania. November 20-22.
- 2014 Arkansas Association of Criminal Defense Lawyers: *Death Penalty Conference*. Plenary session speaker, “Records Collection” and “What Matters to Capital Jurors”. Rogers, Arkansas. October 31-November 1.
- 2014 Oregon Capital Resource Center: Plenary session speaker, “Capital Jurors and Mitigation Evidence”. Gleneden Beach, Oregon. October 10-11.
- 2014 Florida Death Penalty Training Program: *Life Over Death*. Plenary session speaker, “What Matters to Capital Jurors”. Orlando, Florida. September 5.
- 2014 The Gulf Region Advocacy Center: *Bring Your Own Case Training*. Plenary session speaker, “Capital Jurors and Mitigation Evidence”; “Developing the Social History”; “Effective Team Work”. Faculty member. St. Louis, Missouri. August 15-17.
- 2014 Atlantic Center for Capital Representation: *Mitigation Skills Training*. Planner and faculty member. Philadelphia, Pennsylvania. August 8-9.
- 2014 University of Baltimore, School of Law: *Capital Punishment*. Topic: the development of mitigation evidence in capital cases. Guest speaker. Baltimore, Maryland. June 10.
- 2014 Maryland Office of the Public Defender, Summer Law Clerk Training. Plenary session speaker, “Mitigation: The Heart of Criminal Defense”. Baltimore, Maryland. May 28.
- 2014 Georgetown University, School of Law: *Capital Punishment*. Topic: the development of mitigation evidence in capital cases. Guest speaker. Washington D.C. February 27.
- 2013 The Gulf Region Advocacy Center: *Mitigation Skills Training*. Faculty member. Houston, Texas. November 20-22.

CURRICULUM VITAE

- 2013 Atlantic Center for Capital Representation: *Bring Your Own Case Training*. Faculty member. Lafayette Hill, Pennsylvania. September 25-28.
- 2013 University of Baltimore, School of Law: *Capital Punishment*. Topic: the development of mitigation evidence in capital cases. Guest speaker. Baltimore, Maryland. May 28.
- 2013 Oregon Capital Resource Center: Plenary session speaker, “Capital Jurors and Mental Health Mitigation Evidence”. Portland, Oregon. April 19-21.
- 2013 University at Albany, School of Criminal Justice: *Qualitative Research Methods*: Topic: intensive interviewing techniques and conducting field research. Guest speaker. Albany, New York. January 22.
- 2012 University at Albany, School of Criminal Justice: *Law and Psychology*: Topic: the role of mitigation evidence in juror decision-making in capital cases. Guest speaker. Albany, New York. October 31.
- 2012 Idaho Federal Defenders Annual Training Seminar: Plenary session speaker, “Capital Jurors and Mitigation Evidence”. Boise, Idaho. September 13.
- 2012 Habeas Assistance and Training Counsel Project: Ninth National Seminar on the Development and Integration of Mitigation Evidence. Plenary session speaker, “Capital Jurors and Mitigation Evidence”. Atlanta, Georgia. April 28.
- 2008 Reprieve U.K. *Death Penalty Investigators Training*. Faculty member. London, England. March 29-30.
- 2007 Reprieve U.K. *Death Penalty Investigators Training*. Faculty member. London, England. April 21.
- 2007 National Consortium for Capital Defense Training funded by the Bureau of Justice Assistance: *Capital Defense Mitigation Issues*. Faculty member. Plano, Texas. March 23-24.
- 2007 The Gulf Region Advocacy Center: *Mitigation Skills Training*. Faculty member. Houston, Texas. January 19-21.
- 2006 Texas Criminal Defense Lawyers Association: *Mitigation Training*. Faculty member. Dallas, Texas. April 20-21.
- 2005 Capital Unit of the Oklahoma City Public Defenders Office: *Conducting Mitigation Investigation*. Faculty member. Oklahoma City, Oklahoma. September 20-23.

PROFESSIONAL TRAININGS AND CONFERENCES ATTENDED

CURRICULUM VITAE

- 2019 NAACP Legal Defense Fund, Inc. 40th Annual Capital Punishment Training Conference. Tarrytown, New York. July 11-14.
- 2019 Authorized Case Consultation Training, Federal Resource Conference. Atlanta, Georgia, January 22-24.
- 2015 Post-2255 Litigation and Advocacy, Federal Capital Habeas Project Training Conference. Philadelphia, Pennsylvania, July 21-22.
- 2015 NAACP Legal Defense Fund, Inc. 36th Annual Capital Punishment Training Conference. Warrenton, Virginia. July 9-12.
- 2014 Defense Initiated Victim Outreach Training, sponsored by the Administrative Offices of the U.S. Courts. Santa Clara, California. September 15-19. (by application).
- 2014 NAACP Legal Defense Fund, Inc. 35th Annual Capital Punishment Training Conference. Warrenton, Virginia. July 17-20.
- 2014 Eleventh National Seminar on the Development and Integration of Mitigation Evidence in Capital Cases sponsored by the Administrative Offices of the U.S. Courts. Philadelphia, Pennsylvania. March 27-30.
- 2013 Eighteenth Annual National Federal Habeas Corpus Seminar sponsored by the Administrative Offices of the U.S. Courts. Cleveland, Ohio. August 15-18.
- 2013 NAACP Legal Defense Fund, Inc. 34th Annual Capital Punishment Training Conference. Warrenton, Virginia. July 11-14.
- 2013 Tenth National Seminar on the Development and Integration of Mitigation Evidence in Capital Cases sponsored by the Administrative Offices of the U.S. Courts. Baltimore, Maryland. April 4-7.
- 2011 Law and Society Annual Meeting, San Francisco, California. June 2-5.
- 2011 Vermont Law School Symposium, New Perspectives on Capital Punishment, South Royalton, Vermont. February 11.
- 2009 NAACP Legal Defense Fund, Inc. 30th Annual Capital Punishment Training Conference. Warrenton, Virginia. July 9-12.
- 2008 Law and Society Annual Meeting, Montreal, Quebec. May 29-June 1.
- 2006 Mitigation Seminar sponsored by the Habeas Assistance and Training Counsel: The Development and Integration of Mitigation Evidence in Capital Cases. Washington D.C. April 27-30.

CURRICULUM VITAE

- 2006 Third National Forensics Seminar sponsored by The Habeas Assistance and Training Counsel. San Antonio, Texas. January 26-29.
- 2006 National Consortium for Capital Defense Training funded by the Bureau of Justice Assistance. Plano, Texas. January 11-14.
- 2005 National Association of Criminal Defense Lawyers Death Penalty Seminar. Oklahoma City, Oklahoma. September 30-October 2.
- 2005 A Fighting Chance: Themes and Theories of Mitigation Investigation. New Orleans, Louisiana. June 1-3.
- 2005 Records collection, Juror and Witness Interviews and Legal Aspects of Investigative Work. Houston, Texas. April 12-14.
- 2005 National Legal Aid and Defender Association: Life in the Balance. New Orleans, Louisiana. March 18-22.
- 2005 Capital and Mental Health Seminar. Houston, Texas. February 23-25.

ACADEMIC POSITIONS

- 2013-present *Research Fellow*, School of Criminal Justice, University at Albany
- 2012-2013 *Adjunct Professor*, School of Criminal Justice, University at Albany
Introduction to Criminal Justice Processes
- 2010-2011 *Discussion Leader*, School of Criminal Justice, University at Albany
Introduction to Criminal Justice Processes
Introduction to Criminology

PUBLICATIONS

- 2019 Vartkessian, Elizabeth S., "Including Assets-Based Mitigation in Sentencing" *Criminal Justice Policy Review*. Published on-line (August 9) ahead of print, <https://journals.sagepub.com/doi/10.1177/0887403419866887>.
- 2018 Sean O'Brien, Elizabeth S. Vartkessian, and Marla Sandys "Psychological Defenses and Mitigation" in *Forensic Science Reform: The Psychology and Sociology of Wrongful Convictions*. Wendy J. Koen and Michael Bowers (Eds). Elsevier.
- 2018 Riner, Robin and Elizabeth S. Vartkessian. "Showing Humanity: How Defense Attorneys Use Mitigation Narratives to Advocate for Clients" in *Language &*

CURRICULUM VITAE

Social Justice: Case Studies on Communication & the Creation of Just Societies.

- 2018 Vartkessian, Elizabeth S. (July 12). "All Serious Crimes Deserve Podcast-Style Scrutiny" Published by *The Baltimore Sun*, Retrieved from: <http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0713-curtis-flowers-20180711-story.html>.
- 2017 Vartkessian, Elizabeth S. (April 27). "The Tragic Life and Cruel Execution of Ledell Lee" Published on-line by *The Marshall Project* and *Vice News*, Retrieved from: https://www.vice.com/en_us/article/the-tragic-life-and-cruel-execution-of-ledell-lee.
- 2017 Sandys, Marla, Elizabeth S. Vartkessian, Heather Pruss, and Sarah Walsh, "Setting the Stage and Listening to What Jurors Have to Tell Us About Mitigation" in Edward Monahan and Jim Clark (Eds.) *Mitigation in Capital Cases: Understanding and Communicating the Life Story. American Bar Association.*
- 2017 Vartkessian, Elizabeth S., Jonathan Sorenson, and Christopher E. Kelly. "Tinkering with the Machinery of Death: Juror Decision-Making in Texas Death Penalty Trials During Two Statutory Eras" *Justice Quarterly*. 34(1): 1-24.
- 2014 Bowers, William, Christopher E. Kelly, Ross Kleinstuber, Elizabeth S. Vartkessian, and Marla Sandys. "The Life or Death Sentencing Decision: It's at Odds with Constitutional Standards, Is it Beyond Human Ability?" in James R. Acker, Robert M. Bohm, and Charles S. Lanier (Eds.) *America's Experiment with Capital Punishment*. Carolina Academic Press.
- 2012 Vartkessian, Elizabeth S. "What One Hand Giveth, the Other Taketh Away: How Future Dangerousness Corrupts Guilt Verdicts and Produces Premature Punishment Decisions in Capital Cases." *Pace Law Review*. 32: 447-543.
- 2011 Vartkessian, Elizabeth S. and Jared P. Tyler. "Legal and Social Exoneration: The Consequences of Michael Toney's Wrongful Conviction." *Albany Law Review*. 75: 1467-1498.
- 2011 Vartkessian, Elizabeth S. "Dangerously Biased: How the Texas Capital Sentencing Statute Encourages Jurors to be Unreceptive to Mitigation Evidence." *Quinnipiac Law Review*. 29: 237-288.

WORKS IN PROGRESS

Vartkessian, Elizabeth S., Christine Land, and Alice Gould, "How Evidence of Mental Illness Becomes Aggravating: An Analysis of Texas Capital Cases" (Manuscript)

CURRICULUM VITAE

RESEARCH EXPERIENCE

- 2017-present *Co-investigator with Scott Sundby*
Capital Jury Project, Arizona data collection
- 2010-2013 *Visiting Researcher*, School of Criminal Justice, University at Albany, State University of New York
Capital Jury Project
- 2008-2010 *Primary Investigator*, Research Foundation of the State University of New York, Hindelang Criminal Justice Research Center
Capital Jury Project, Texas data collection

SCHOLARSHIPS, GRANTS, AND AWARDS

- 2018 Resolution by the City Council of Baltimore recognizing ARC, Inc.'s work
- 2017 United States Human Rights Network, Human Rights Builders Award (for ARC, Inc.'s work to bring empathy to the criminal legal system)
- 2015 J.M. Kaplan Social Innovation Prize Awardee (private foundation grant to support the work of ARC, Inc.)
- 2014 Research Affinity Group (private foundation grant)
- 2010 Research Affinity Group (private foundation grant)
- 2009 Criminology Department, Oxford University (partial tuition)
- 2009-2008 St. Hilda's Graduate Student Scholarship (partial tuition)
- 2008 Alpha Delta Pi Foundation (academic, philanthropic, and social society grant)
- 2008 Law and Society Graduate Students Workshop Grant
- 1999-2003 George Washington University's Presidential Scholarship

ACADEMIC PAPERS PRESENTED

- 2018 Vartkessian, Elizabeth S. and Kaylesh Ramu, Paper entitled "*Improving Outcomes in Juvenile Life Without Parole Resentencings: A Preliminary Analysis of National Transcripts*" Legal Services for the Indigent: The Impact of Policy Changes, The American Society of Criminology, Atlanta, Georgia.

CURRICULUM VITAE

- 2017 Vartkessian, Elizabeth S., Paper entitled “*Mitigation’s Role in Criminal Defense*” Legal Services for the Indigent: Social Work, Mitigation, and Holistic Defense, The American Society of Criminology, Philadelphia, Pennsylvania.
- 2017 Vartkessian, Elizabeth S., Paper entitled “*Capital Juror’s Response to Mental Health Evidence: Context Matters Most*” International Academy of Law and Mental Health, Prague, Czech Republic.
- 2013 Vartkessian, Elizabeth S. and Christopher E. Kelly, Paper entitled “*Capital Improvements? Juror Decision-Making in Texas Death Penalty Trials Before and After Penry v. Lynaugh*” Law and Society Association, Boston, Massachusetts.
- 2011 Acker, Jim, William J. Bowers, Andrew L.B. Davies, Elizabeth S. Vartkessian, and Kay Lang, Paper entitled “*Families and Friends of Homicide Victims: Violent Bereavement and Adaptation*” The American Society of Criminology, Washington D.C.
- 2011 Vartkessian, Elizabeth S., Paper entitled “*What One Hand Giveth, the Other Taketh Away: How Future Dangerousness Corrupts Guilt Verdicts and Produces Premature Punishment Decisions in Capital Cases*” School of Criminal Justice, University at Albany.
- 2011 Bowers, William J., Wanda Foglia, Elizabeth S. Vartkessian, Marla Sandys, and Christopher E. Kelly, Paper entitled “*The Receptivity of Courts to Empirical Evidence of How Jurors Decide Death Penalty Cases: The Capital Jury Project (CJP) as a Case Study*” Michigan State Law School Symposium, East Lansing, Michigan.
- 2010 Vartkessian, Elizabeth S., Paper entitled “*Fatal distraction: Does the Texas capital sentencing statute discourage the consideration of mitigating evidence?*” Law and Society Annual Meeting, Chicago, Illinois.
- 2009 Vartkessian, Elizabeth S., Paper entitled “*Persuasive Mitigation Evidence in Texas Capital Cases*” Law and Society Annual Meeting, Denver, Colorado.
- 2008 Vartkessian, Elizabeth S., Paper entitled “*Making the Case for Life: Patterns of Successful Mitigation Evidence Presented to Capital Juries in Texas*” St. Hilda’s College, Oxford University.

BOARD MEMBERSHIPS

- 2008-Present Governing Board of the Gulf Region Advocacy Center
A non-profit law office committed to providing quality defense services to indigent defendants facing capital charges primarily in Texas and throughout the south.

CURRICULUM VITAE

REVIEWER

Justice Quarterly
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Attachment B

Declaration of Elizabeth Vartkessian, Ph.D. dated May 27, 2020

DECLARATION OF ELIZABETH VARTKESSIAN, PH.D.

IMPACTS OF COVID-19 PANDEMIC ON MITIGATION INVESTIGATION

I, Elizabeth Vartkessian, declare and state the following:

I submit this declaration to detail the impacts that the COVID-19 pandemic has had on the ability of capital defense teams to engage in mitigation investigation in keeping with the applicable professional standards. I also provide this declaration in order to outline the ways in which attempting to conduct mitigation investigation through methods other than those explicitly stated in the professional guidelines would pose grave risk to capital defendants by endangering relationships with witnesses and impeding future investigation. As parts of the United States begin the experiment of relaxing stay at home orders, capital defense teams will continue to be unable to provide effective representation to their clients until there is a vaccine available or the transmission rate of COVID-19 dramatically drops.

I. Qualifications

1. I have worked as a mitigation specialist for defense teams since 2004 in both trial and post-conviction cases. In the last 16 years, I have conducted mitigation investigations in nearly 40 death penalty cases and consulted on approximately 50 others. I have worked on federal capital cases originating in the 2nd, 3rd, 4th, 5th, 6th, 8th, and 9th circuits and capital cases originating in Alabama, Arkansas, Georgia, Florida, Texas, Louisiana, Oklahoma, Pennsylvania and South Dakota.

2. I am a licensed private detective in Maryland. I have been licensed as a private investigator in New York and Texas.

3. I have been an invited lecturer or faculty member at over 50 capital trainings held in Alabama, Arizona, Arkansas, Florida, Idaho, Louisiana, Maryland, Missouri, Oklahoma,

Oregon, Pennsylvania, Texas and Virginia, in federal conferences, and internationally in the Czech Republic, England and Switzerland. I have been an invited lecturer or faculty member at juvenile defense trainings in Louisiana and Michigan.

4. I have published articles in peer reviewed journals and law reviews and have contributed to numerous edited volumes dedicated to research on capital punishment. I have also published on topics related to mitigation evidence in felony sentencing generally. Included in this declaration as an attachment is my curriculum vitae.

5. I hold a DPhil (Ph.D.) in Law from the University of Oxford St. Hilda's College, a MSc. in Comparative Social Policy from the University of Oxford St. Antony's College, and BAs in Political Science and Philosophy from the George Washington University.

6. I am the founding Executive Director of Advancing Real Change, Inc. ("ARC"), a national not-for-profit that conducts investigations in criminal cases. In addition to direct casework, my organization provides training and consultation to defense teams working across the country regarding the best practices of investigation.

II. World Wide Pandemic

7. The United States is currently in the midst of the worst global public health crisis in over 100 years. The United States Secretary of Health and Human Services declared COVID-19 a public health emergency on January 31, 2020.¹ On March 13, 2020, the President of the United States declared a National Emergency. Since that time, the United States has identified well over a million cases, across all 50 states. This number is expanding by at least 25,000 new cases every day, a 2-4% rate of increase. Since the beginning of April, over 1,000 people, and sometimes

¹ See U.S. Dept. of Health and Human Serv., Determination that a Public Health Emergency Exists, Jan. 31, 2020.

upwards of 2,000, have died daily from the virus in the United States.² The total number of U.S. deaths currently exceeds 100,000.³

8. The Federal Emergency Management Agency (FEMA) forecasts a daily death toll increasing to about 3,000 on June 1, 2020.⁴ The Institute for Health Metrics and Evaluation predicts that the number of U.S. deaths will increase by September to an estimated 134,475 cases.⁵ Another model, used by the Center for Disease Control (CDC) projects the most likely scenario will result in an additional 100,000 deaths by August 4, 2020.⁶

9. Scientists at The Center for Infectious Disease Research and Policy at the University of Minnesota report that “we must be prepared for at least another 18-24 months of significant COVID-19 activity.”⁷ Dr. Zeke Emanuel, a special advisor to the director general of the World Health Organization (WHO) has also confirmed what the majority of epidemiologists warn: we cannot anticipate a return to normal for at least 18 months, “The kind of normal where we go traveling, we go to restaurants, we go to concerts, we go to religious services, we go on cruises, until we have a vaccine that protects everyone, that’s 18 months. It’s not going to be sooner.”⁸ In other words, we have to be prepared for the impact from COVID-19 to be long-term.

² John Eligon, et al., *Models Project Sharp Rise in Deaths as States Reopen*, THE NEW YORK TIMES, May 4, 2020, www.nytimes.com/2020/05/04/us/Coronavirus-live-updates.

³ <https://www.worldometers.info/coronavirus/country/us/> last visited May 18, 2020. US death total 91,306

⁴ Julie Bowman, Mitch Smith, and Amy Harmon, *With New Hot Spots Emerging, No Sign of a Respite*, THE NEW YORK TIMES, May 5, 2020, <https://www.nytimes.com/2020/05/05/us/coronavirus-deaths-cases-united-states.html>.

⁵Eligon, *supra*, note 2.

⁶ COVID-19 Projections Using Machine Learning, www.covid19-projections.com (last visited May 7, 2020).

⁷ Kristine A. Moore, Marc Lipsitch, John M. Barry, and Michael T. Osterholm, *COVID-19: The CIDRAP Viewpoint, Part 1: The Future of the COVID-19 Pandemic: Lessons Learned from Pandemic Influenza*, CENTER FOR INFECTIOUS DISEASE RESEARCH AND POLICY, UNIVERSITY OF MINNESOTA, April 30, 2020, https://www.cidrap.umn.edu/sites/default/files/public/downloads/cidrap-covid19-viewpoint-part1_0.pdf.

⁸ Meg Cunningham, *Federal Government Need 18-Month Plan for Life to Return to Normal: Dr. Zeke Emanuel*, ABC NEWS, April 8, 2020, <https://abcnews.go.com/Politics/federal-government-18-month-plan-life-return-normal/story?id=70046439>.

III. Impacts on key populations

Correctional facilities

10. Those working and living in correctional facilities have been especially hard hit by the virus. The first week of May, the U.S. county with the highest per capita infection rate by far was Trousdale County, Tennessee, home of Trousdale Turner Correctional Center in Hartsville, Tennessee.⁹ Over the course of 10 days, the county went from 27 reported cases to 1,344. More than half of the inmates and staff members at the prison have tested positive for COVID-19, after the state ordered the prison's operator, CoreCivic, to test all inmates.¹⁰ This outbreak is far from exceptional. Prior to Trousdale County, the country's biggest COVID-19 hotspot was Marion Correctional Institution in Ohio. Of the near 2,500 inmates there, 2,011 tested positive for COVID-19, and at the time of reporting, 11 had died.¹¹

11. Rampant coronavirus infection has been found at all levels of corrections – local, state, and federal. The Federal Bureau of Prisons released figures in late April showing that 70% of the inmates tested within its system have come back positive for COVID-19. They report they have tested only about 2,700, just under 2% people of the 146,000 within their facilities.¹² In early May, the Texas Department of Criminal Justice (TDCJ) reported similar numbers coming out of their prison system. TDCJ tested about 1,700 inmates, roughly 1% of the state's prison population, with

⁹ Bowman, *supra*, note 4.

¹⁰ Ben Hall, *Family Members Shocked by Latest Covid-19 Numbers Inside State Prisons, CoreCivic Prison Has Most*, SCRIPPS MEDIA, INC., May 1, 2020, <https://www.newschannel5.com/news/newschannel-5-investigates/family-members-shocked-by-latest-covid-19-numbers-inside-state-prisons-corecivic-prison-has-most>

¹¹ Editorial Board, cleveland.com, and The Plain Dealer, *Ohio's Marion Prison Reveal Coronavirus Challenges Behind Bars. None is Easy. All Are Urgent*, CLEVELAND.COM, May 6, 2020, <https://www.cleveland.com/opinion/2020/05/Ohio's-Marion-prison-reveals-coronavirus-challenges-behind-bars-none-is-easy-all-are-urgent.html>.

¹² Michael Balsamo, *Over 70% of tested inmates in federal prisons have COVID-19*, AP NEWS, April 29, 2020, <https://apnews.com/fb43e3ebc447355a4f71e3563dbdca4f>.

more than 70% testing positive for COVID-19.¹³ These numbers are far worse than the general population of the United States, which is estimated to be about 11% of those tested receiving positive results.¹⁴ According to data from the CDC, 86% of jurisdictions, across 420 correctional and detention facilities, report at least one positive confirmed case of coronavirus among incarcerated or detained persons or staff members.¹⁵

12. The 2.2 million incarcerated and detained persons in the United States are at an increased risk for COVID-19 for several reasons. First are the many ways in which COVID-19 can be introduced into a facility, from staff to inter system person transfers, to visits from family, friends, lawyers, from court appearances, to newly admitted persons. Local jails across the country, for instance, are responsible for admitting and releasing about 200,000 people every week.¹⁶ Secondly, once introduced, there is a heightened potential for COVID-19 to spread because social distancing measures which have managed to slow the rate of transmission in many communities are essentially impossible in close, often over crowded, prison quarters.

Disproportionate impact on racial and ethnic minorities

13. The coronavirus is affecting some communities with a greater pervasiveness and more dire consequences than others. According to the CDC, “current data suggest a disproportionate burden of illness and death among racial and ethnic minority groups.”¹⁷ Reports have confirmed vastly

¹³ Jolie McCullough, *70% of Texas Prisoners Tested Have the Coronavirus. Experts Say It's Time for More Testing and Fewer Inmates*, THE TEXAS TRIBUNE, May 4, 2020, <https://www.texastribune.org/2020/05/04/coronavirus-Texas-prisons-testing/>.

¹⁴ US Historical Data, <https://covidtracking.com/data/us-daily>, (last visited May 7, 2020).

¹⁵ Megan Wallace, Liesl Hagan, Kathryn G. Curran, et al., *COVID-19 in Correctional and Detention Facilities - United States, February-April 2020*, MMWR MORB MORTAL WKLY REP., May 6, 2020, <http://do.doi.org/10.15585/mmwr.mm6919e1>.

¹⁶ Anna Flagg and Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, THE NEW YORK TIMES, Mar. 31, 2020, <https://www.nytimes.com/2020/03/31/upshot/coronavirus-jails-prisons.html>.

¹⁷ COVID-19 in Racial and Ethnic Minority Groups, CENTERS FOR DISEASE CONTROL AND PREVENTION, Apr. 22, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>.

uneven infection and death rates throughout the country. For instance, in Wisconsin's Milwaukee County, all COVID-19 related deaths as of March 27 were people of color.¹⁸ The same news report also noted that as of April 2 Michigan's black residents accounted for 40% of COVID-19 deaths, nearly triple their state's population. Similar death or infection rates have appeared in a number of cities, including New Orleans, Chicago, and Charlotte, North Carolina.¹⁹ In a recent study looking at 8 hospitals in Georgia, researchers found more than 80% of COVID-19 patients were black.²⁰

Other Vulnerable Populations

14. Although people of color have been especially hard hit by COVID-19 some other groups are at a far greater risk for severe illness should they become infected. For instance, people over 65, those living in nursing homes, and people of all ages with underlying health conditions, including moderate to severe asthma, chronic lung disease, diabetes, severe heart disease, liver disease, the immunocompromised, and people with severe obesity. Almost 90 million people, or roughly 4 out of 10 people, fall into this higher risk category, due to their age, or underlying condition.²¹

15. Although the virus is most dangerous for those in this higher risk category, not a single demographic has escaped COVID-19's deadly reach. Chicago reported its youngest victim as a

¹⁸ Scott Bauer, *Milwaukee's black community hit hard by coronavirus*, THE ASSOCIATED PRESS, Mar. 27, 2020, <https://apnews.com/b52e4e9a63d64e3a25109f09010508b6> (stating, "[a]ll eight people who died from the coronavirus in Milwaukee County were black, and seven of the eight lived in the city. The eight deaths were five men and three women, ranging in age from 54 to 79.")

¹⁹ Zoe Carpenter, *What We know About the Covid-19 Race Gap*, THE NATION, May 4, 2020, <https://www.thenation.com/article/society/Covid-19-racial-disparities/>.

²⁰ Rachael Weiner, *More than 80 Percent of Hospitalized Covid-19 Patients in Georgia were African American, Study Finds*, THE WASHINGTON POST, April 29, 2020, http://www.washingtonpost.com/health/more-than-80-percent-of-hospitalized-Covid-patients-in-Georgia-were-African-American-study-finds/2020/04/29/a71496ea-8993-11ea-8ac1-bfb250876b7a_story.html.

²¹ Wyatt Koma, Tricia Neuman, Gary Claxton, et al., *How Many Adults Are At Risk of Serious Illness If Infected With Coronavirus*, KAISER FAMILY FOUNDATION, Apr. 23, 2020, <https://www.kff.org/coronavirus-covid-19/issue-brief/how-many-adults-are-at-risk-of-serious-illness-if-infected-with-coronavirus/>.

12-year-old boy who died from COVID-19 induced pneumonia. Michigan reported the death of a 5-year-old girl who was the daughter of a first responder, while around the same time Connecticut reported the death of a 6-week old infant. At least 14 children have died in New York State.²² At the beginning of May reports started to come in of serious symptoms related to the coronavirus in otherwise healthy children involving multiple organs, widespread inflammation, and in many cases heart failure. On May 14, 2020, the CDC issued a health advisory about this disturbing new collection of symptoms, labeling it multisystem inflammatory syndrome in children (MIS-C).²³ As of May 17, three New York State children have died of the syndrome, and 137 were being investigated in the state.²⁴ COVID-19 related strokes in previously healthy adults in their 30s, 40s, and 50s have been reported as well. Many of these patients were not even aware that they carried the virus.²⁵ Scores of healthy men and women in their 20s and 30s have died.

IV. Implications for mitigation investigation in capital cases

Establishment of national capital defense standards

16. Mitigation investigation is a unique aspect of capital defense work that requires a working knowledge of mental health, trauma, interviewing skills, research, and law, among other areas related to the growth and development of an individual. It cannot be conducted effectively without the proper training. This includes a working knowledge of the professional guidance and standards

²² NEW YORK STATE DEPARTMENT OF HEALTH, <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n&%3Amobile=true> (last visited May 20, 2020).

²³ *Multisystem Inflammatory Syndrome in Children (MIS-C) Associated with Coronavirus Disease 2019 (COVID-19)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (CDCHAN-00432), May 14, 2020, <https://emergency.cdc.gov/han/2020/han00432.asp>.

²⁴ Pam Belluck, 'Straight-Up Fire' in His Veins: Teen Battles New Covid Syndrome, THE NEW YORK TIMES, May 17, 2020, <https://www.nytimes.com/2020/05/17/health/coronavirus-multisystem-inflammatory-syndrome-children-teenagers.html?referringSource=articleShare>.

²⁵ Thomas J. Oxley, J. Mocco, Shahram Majidi, et al., *Large-Vessel Stroke as a Presenting Feature of Covid-19 in the Young*, THE NEW ENGL. J. OF MED. (Apr. 2020) <https://www.nejm.org/doi/full/10.1056/NEJMc2009787>.

set out by United States Supreme Court precedent and standards produced by reputable national organizations engaged in the work of providing training and support to practitioners throughout the country.

17. To provide guidance to capital defense teams, in 2003 the American Bar Association updated the Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereafter “ABA Guidelines”). These standards were years in the making and ultimately approved by the ABA House of Delegates – a diverse body of elected ABA membership responsible for directing the policy of the nation’s largest professional legal association. The membership that passed the ABA Guidelines included prosecutors, former judges, defense attorneys, civil litigators, and others who agreed that the standards set out in the ABA Guidelines were essential to protect the rights of capital defendants.

18. In 2008, the ABA Death Penalty Representation Project and Hofstra Law Review published the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 677 (2008) (hereafter “ABA Supplementary Guidelines”). Again, this project was undertaken by a cross section of leadership internal and external to the ABA. It focused on providing further specific information related to the mitigation function for capital defense.

19. The ABA notes that “[t]he Guidelines reflect well-established national norms of capital defense practice and have been adopted as Association Policy regarding the minimum requirements for the defense effort in capital cases.”

20. The professional standards are not aspirational, but legitimately attainable in every capital case. Death penalty jurisprudence has erected a complex scaffolding of requirements for defense teams to follow. Since the death penalty was reinstated in 1976, the Court has emphasized that

death is different. “Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”²⁶ In order for capital punishment to be lawful, jurors must have the opportunity to hear about the history of the defendant. Because a capital sentencer must “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,”²⁷ the defense team must undertake a broad investigation into the background, character, and history of the capital defendant. In addition to informing the potential sentencer of information critical to rendering a moral decision in a capital case, this investigation also informs trial counsel’s strategy concerning motions practice, jury selection, the selection of experts, the focus of the defense’s case at guilt, and many other critical aspects of capital defense that extend far beyond sentencing.

21. Mitigation investigation proceeds on two primary tracks – in-person, face-to-face visits with the client and potential witnesses, and exhaustive records collection. As the collection of information by those primary means occurs, the mitigation specialist must organize and evaluate this information. Supplementary Guidelines 10.4.A & 10, 11.G, 36 HOFSTRA L. REV. at 688 -692. This is most often done through the creation of master case files such as a comprehensive list of potential witnesses, chronology, records logs, theory memos, and other digests or summaries.

22. Mitigation specialists also aid counsel in identifying appropriate mental health experts. A primary role of a mitigation specialist is to work with counsel and mental health experts through

²⁶ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)

²⁷ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

facilitating contact with the client and key witnesses, and records collection. In addition to the mitigation specialist being best positioned to perform this function on the team, it is also more cost effective than having the mental health professional do it herself.

In person interviews cannot be substituted

23. Mitigation investigation seeks to understand the biological, psychological, and social history of the defendant. This is done by conducting face-to-face in-person interviews with the client, his family, caretakers, friends, community members, teachers, coaches, religious community, and others who have knowledge of the defendant and his family. A client's full social history must include both the static facts of his life history, such as income, work, and housing; and the dynamic narrative of complex human experiences of his life, such as neglect, loss, or love. *See* Supplementary Guideline 10.11.C (“Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client’s family, and other witnesses who are familiar with the client’s life, history, or family history or who would support a sentence less than death.”)

24. Maximizing the accuracy of information provided in an interview requires the mitigation specialist to build rapport with the witness. *See* Supplementary Guidelines 5.1.C & 10.11.C. While some information may be quite easy to share, many of the topics that must be explored in a mitigation investigation are highly sensitive. A competent mitigation investigation will invade dark, shameful family secrets; it “exposes raw nerves, re-traumatizes, scratches at the scars nearest the client’s heart.” *See* Russel Stetler, *The Mystery of Mitigation: What Jurors Need to Make A Reasoned Moral Response in Capital Sentencing*, 11 Univ. of Pennsylvania J. of Law and Social Change 237, 251 (2007-2008) (citing Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, CHAMPION, Jan.-Feb. 1999, at 36.) It is often only in the context of strong rapport, built through warm and welcoming tone, smiles, eye contact, and calming body language that witnesses have

the space and support to speak truthfully and expansively about sensitive topics central to a proper mitigation investigation. The accuracy of a witness's reporting on sensitive topics depends on their being in an appropriate state of mind to disclose such information and upon a mitigation specialist having spent the appropriate amount of time, which is often significant, to allow the witness to make such disclosures. Like mitigation specialists, individuals in other professions engaged in soliciting sensitive information from people recognize the importance of rapport building to obtaining accurate information. See Allison Abbe, Susan E. Brandon, *Building and maintaining rapport in investigative interviews*, 15 POLICE PRACTICE AND RESEARCH 3, 207-220; See also Risan, Patrick, Per-Einar Binder, and Rebecca Jane Milne, *Establishing and maintaining rapport in investigative interviews of traumatized victims: a qualitative study*, 12 POLICING: A J. OF POL'Y AND PRAC. 4, 372-387 (2018).

25. A mitigation specialist performs interviews by going to the home of a potential witness unannounced. "By going to the home of a witness or family member, the mitigation specialist will observe things about the interview subject that would not be visible in the office, thus providing a deeper perspective." Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 746 (2008). Making arrangements ahead of time by phone can result in several barriers to speaking with the witnesses, including the witness not answering or hanging up on an unknown caller; the witness being concerned about not being able to see and verify the identity of the person with whom they are speaking; the witness suggesting that they are open to meeting in person, but then deciding not to for various reasons; witnesses refreshing or shaping their memories in ways that distorts rather than aids in their recollections; or the witness contacting other witnesses and

coordinating in ways that result in a loss of control over the timing of contact with other witnesses and in the creation of potential privacy issues.

26. Mitigation investigation is field based work. More can be learned about a person, their habits, beliefs, and values by a single visit to their home than can be learned in any number of conversations over the phone or by video. The items on a person's wall, the presence or absence of furniture, whether a home is cared for and maintained or disorganized and unkempt, whether there is central air or heating, if there is a particular smell or odor, whether there is a place to eat with others, if the walls have paint chips that have peeled away, if there are pets and how they are treated, and who stops by the home or calls are some but not an exhaustive list of examples of important data points which cannot be obtained through other means. *See* Bianca Cody Murphy, Carolyn Dillon, *Interviewing in Action: Process and Practice*, 28 (1998).

27. Being in person with a witness for an extended period of time enables the mitigation specialist to observe the witness's ability to track conversation and maintain eye contact and observe their spontaneous behaviors. In person visiting enables a mitigation specialist to respond to subtle indicators of a witness's fatigue or emotional wellbeing in ways that preserve the rapport and accuracy of information. Finally, being in person allows a specialist to ensure that the conversation is taking place out of ear shot of anyone else. "Mental health experts recognize that '[m]ost patients do not speak freely unless they have privacy and are sure that their conversations cannot be overheard.'" O'Brien, *supra* (quoting Benjamin James Sadock and Virginia Alcott Sadock, *Kaplan & Sadock's Synopsis of Psychiatry*, 136 (9th ed. 2003)).

28. Attempts by mitigation specialists to conduct unannounced visits to witnesses during a global pandemic are unlikely to be effective. The vast majority of capital defendants come from the same communities that are being ravaged by COVID-19. Witnesses will not view it as safe to

let a stranger into their homes. Reports from capital defense team members at the start of social distancing confirm this – attempts at in-person interviews were met with angry responses and requests not to return, creating barriers to attempting the witness at a later date. Even if a witness does permit the mitigation specialist inside, wearing a facemask or other personal protective equipment is likely to compromise the interview’s effectiveness.

29. Likewise, if trying to suggest alternatives to having the interview take place elsewhere, such as in an open space to minimize risk or reduce the need for personal protective equipment, the dynamic of being in a public space is highly likely to interfere with rapport building or disclosure. Therefore, there are no circumstances during pandemic conditions under which mitigation specialists are able to perform witness interviews to the standard required by the ABA.²⁸

Phone or video interviews are not satisfactory

30. Phone interviews with witnesses unavoidably introduce connection issues, lack of certainty of who one is talking to, and the inability to establish trust. Furthermore, phone interviews assume facts about a witness that cannot be relied upon, like a witness’s ability to hear, understand, and speak with confidence and privacy in their own physical location. See, e.g., *Eaton v. Wilson*, No. 09-CV-261-J, 2014 U.S. Dist. LEXIS 163567, at *100-103, 187-192 (Nov. 20, 2014), finding trial counsel’s performance deficient in part because trial counsel attempted to conduct mitigation investigation over the telephone. The district court’s opinion in *Eaton* provides several good examples of what went wrong because the trial team relied on telephone calls rather than in-person interviews.

²⁸ All the reasons that defense teams should not attempt to interview witnesses during the pandemic apply equally to interviewing victims and homicide survivors, which is necessary and commonly done by death penalty defense teams. See Mickell Branham & Richard Burr, *Understanding Defense-Initiated Victim Outreach and Why it is Essential in Defending a Capital Client*, 36 HOFSTRA L. REV. 1019 (2008).

31. Likewise, in the context of the conditions described above, visits to correctional facilities cannot take place safely.²⁹ Though prison regulations may begin allowing for the possibility of legal visits, the safety of clients, defense team members and their families, prison officials, and others must be considered. Even in those cases where visits may be possible, initial access to clients may be irregular or unreliable as prison policies change in response to COVID-19.

32. Alternative methods for communicating with clients are not an acceptable substitute for in person visits, especially to have discussions concerning decisions such as whether to accept a plea offer, case strategy, preparing a client to testify or speak in allocution, or exploring with a client the delicate mitigation issues related to his case. Clients cannot safely discuss their relationships or interactions with staff or other inmates. Phone calls prevent members of the defense team from observing client symptoms and behaviors, or observing possible injuries from altercations that occurred while in custody. *See Logan D. D., Learning to observe signs of mental impairment*, 19 California Attorneys for Criminal Justice 5-6, 40-50 (1992). Because often only defense team members have access to the client over time, it is their duty to “act as the observational caretakers for the mental status symptoms of the client.”

33. Clients and defense team members are rightly concerned about whether information conveyed over the phone is truly confidential. There have been numerous incidents where defense team calls have been recorded and provided to prosecutors even though the communications were assured to be protected by legal privilege.³⁰

²⁹ *See* Missouri Dept. of Corrections, *Visiting Suspension Extended Through June 18*, May 13, 2020, accessed at <https://content.govdelivery.com/accounts/MODOC/bulletins/28b61ec>.

³⁰ Katie Bernard and Steve Vockrodt, *Federal Judge Holds Kansas City, Kansas, U.S. Attorney's Office in contempt of court*, THE KANSAS CITY STAR, Aug. 14, 2019, <https://www.kansascity.com/news/state/kansas/article233985767.html>

34. Under these conditions most expert evaluations, which may require extended periods of time to conduct, may require the client to be able to physically interact with objects as part of an assessment. In capital cases, the need to ensure the performance validity of testing is paramount to the ability of counsel, courts, and potential jurors to rely on the findings. Many psychological tests cannot adequately account for such measures over video conferencing. Thus, critical assessments and evaluations are not able to take place until it is safe for experts to enter correctional facilities and conduct in-person face-to-face assessments.

Records collection must be exhaustive

35. Records collection and other kinds of document collection must progress at the same time as interviews. Extensive records collection and research is required in advance of an interview to guide the mitigation specialist's approach to the visit and following an interview to triangulate the information obtained. "Triangulation of data refers to obtaining data from more than one source and, preferably from more than one type of source. For example, a head injury should be documented by several witnesses and by medical records. This insures the reliability of information, as well as providing more details for each incident." Lee Norton, *Capital Cases: Mitigation Investigations*, CHAMPION, May 1992, at 45. This approach to developing mitigation evidence is modeled on the medical profession, which requires that "the expert corroborate this information independently before he relies on it." Richard Dudley, Jr., & Pamela Blume Leonard, *Getting it Right: Life History as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 981 (2008). In order to reach a conclusion about a patient's functioning a doctor cannot rely on self-reporting. Instead, they will seek out records from other facilities to ensure that they have a broader picture of the individual they treat.

36. The process of developing mitigation investigations requires that information be substantiated both in the recollections of witnesses and in coordination with contemporaneous records of the time in question. Because of the relationship between these two types of evidence, the development of one informs the development of the other. If, for example, a record names one person involved in a particular hospital stay, conversation with that person may be required to investigate the details necessary to collect the full record of that stay, which in turn may provide more indications of individuals with information about that hospital stay. In this way, neither the records nor the field interview aspect can continue to develop fully while the other is impeded.

Mitigation specialist Lee Norton explains:

“It is insufficient to talk to witnesses only once because each new individual recalls different facts and anecdotes; if an aunt provides an account of a head injury which the mother forgot to mention, it is necessary to go back to the mother and ask about it. Similarly, an interview may reveal records that must be obtained which in turn raise new questions, questions which necessitate interviewing several witnesses again.”

Norton, *supra*, at 45. A good example of the ways in which records may inform and drive multiple interviews with witnesses is *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004), rev’d sub nom., *Rompilla v. Beard*, 545 U.S. 374 (2005). After the post-conviction team found documentary evidence of Mr. Rompilla’s wretched childhood and mental illness, they conducted additional interviews with members of Rompilla’s siblings and learned that “[a]ll of the children lived in terror” of their violent father. *Id.* at 279.

37. Obtaining third party documentation related to the client, his biological and/or foster family, and his community is essential for building a working understanding of the client. Third party, contemporaneous documents provide substantiation of witness information. Third party

documentation provides the perspective of professionals who observed and recorded aspects of the client, family, and community life from a different and unique perspective.

38. COVID-19 related closures, partial closures, furloughs, and alternative working situations impact the ability of various institutions to locate and release records. Many hospitals that are carrying a higher than average capacity of COVID-19 patients or are preparing to do so have limited the functionality of their departments that do not serve this current need, like records departments. Many school systems have moved entirely to having administrators work from home, making all of their paper files temporarily inaccessible. The capacity of inward facing service institutions like hospitals, prisons, treatment facilities, and social service agencies, have responded to the heightened need to attend to the health and social distancing needs of their primary clients and have slowed or stopped outward facing functions like records maintenance and request fulfillment. Finally, court closures and/or furloughed court clerks have rendered court records that teams must collect for witnesses inaccessible.

39. Because of remote work and other limitations, some responses to requests for records are limited only to whatever has been digitized, while paper copies are currently inaccessible. As a complete social history necessarily includes three generations, much of the necessary materials are too old to be available through electronic means. Most courthouses, medical facilities, social services, vital records departments, and other critical items are not included in digitized holdings.

V. Reversal rates and other costly mistakes

40. There are many cases of ineffective assistance of counsel where a defendant's trial has been remanded due to the failure of the capital trial team to conduct mitigation investigation in this way. Courts have consistently recognized that when the Guidelines are not followed, critical information is often missed.

41. A study published in 2000 by James Liebman assessed the overall error rate in capital cases over a 23-year period and found the overall rate of prejudicial error was 68%.³¹ In other words, courts found serious, reversible error in nearly 7 out of every 10 of the capital cases that were finally reviewed during this period.

42. The study also found that errors that lead courts to overturn capital sentences were integral to the potential outcomes of cases. The three most common errors identified were: (1) egregiously incompetent defense lawyers (37%); (2) prosecutorial misconduct, often the suppression of evidence of innocence (19%); and (3) faulty instructions to jurors (20%). Combined, these constitute 76% of all error in capital punishment proceedings. As the authors of the study noted, “[t]his amount of error imposes terrible costs on victims' families, the innocent, taxpayers, and the judicial system. Together, they undermine the finality, retribution and deterrence that are the reasons usually cited for having a death penalty”.³²

43. Another study published in 2009 analyzed more than 4,500 habeas applications raising either guilt or punishment-phase challenges, or both, to state imposed death sentences. The researchers also observed an overall error rate of some 68% during the study period. Specifically, for every 100 cases involving death-sentenced prisoners, forty-seven inmates obtained relief during state court appeals. Of the remaining fifty-three, twenty-one obtained relief during federal habeas proceedings for an overall error rate of 68%.³³

³¹ James S. Liebman, Jeffrey Fagan, Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, COLUMBIA LAW SCHOOL, PUBLIC LAW RESEARCH PAPER NO. 15 (2000)

https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2220&context=faculty_scholarship
³² *Id.*

³³ David R. Dow and Eric M. Freedman, *The Effects of AEDPA on Justice*, 261 (2009)
https://scholarlycommons.law.hofstra.edu/faculty_scholarship/756/

44. For every nine people executed one person has been exonerated.³⁴

45. If cases are pushed forward without the opportunity for proper investigation to be done in accord with the professional standards, it is highly likely that irreversible mistakes will be made. By preventing capital defense teams from being able to conduct an ABA required investigation at any stage of capital litigation there is an enormous risk of mistakes failing to be caught.

CONCLUSION

46. Capital cases have long been categorized as different from all other criminal cases due to the gravity of the sentence involved. Seeking to pursue the death penalty in any given case is an entirely discretionary decision made by a prosecutor. It is not mandatory. When a case proceeds capitally, all of these aspects of investigation detailed above must take place because following the professional standard of care is often the difference between a defendant receiving a death sentence or something else. It cannot be appropriate to suspend the constitutional rights guaranteed to capital defendants. Nor should it be the responsibility of mitigation specialists or other members of the capital defense team to do less for their clients during this pandemic, to place their own health and well-being in conflict with their clients' interests in determining what investigative tactics to pursue, or to expect investigations in their cases to progress sufficiently under substandard conditions. If that occurs, it is highly likely that years from now capital cases that went forward during this pandemic will be under review by appeals courts and will likely result in reversal because of substandard investigation. Reversals have both financial implications and a very real and critical human toll on all parties involved in a capital case and should be prevented through all possible means.

³⁴ See [https://eji.org/issues/death-penalty/\(discussing innocence and error in light of the American Death Penalty\)](https://eji.org/issues/death-penalty/(discussing%20innocence%20and%20error%20in%20light%20of%20the%20American%20Death%20Penalty)).

47. Mitigation investigation cannot proceed in a pandemic without violating minimum standards of performance. Interviews of clients, witnesses, and victims must be conducted in person, face-to-face. Telephone or video interviews are not acceptable. While some document gathering can be done by mail, many facilities are closed, records clerks are not deemed essential personnel, and some records must be obtained in person. In short, mitigation investigation cannot proceed until it can be done in complete safety.

I declare under penalty of perjury under the laws of Maryland that the foregoing is true and correct and was executed this 27th day of May 2020 in Baltimore, Maryland.



Elizabeth Vartkessian, Ph.D.