

# Mitigating Death

**I**N THE PAST EIGHT YEARS, the United States Supreme Court has been vocal about the importance of capital mitigation specialists in death penalty defense. Beginning with *Williams v. Taylor* in 2000, and continuing with *Wiggins v. Smith* in 2003 and *Rompilla v. Beard* in 2005, the Court launched a series of decisions underscoring the importance of thorough capital mitigation investigation. Through these decisions, the Court examined trial counsel's failure to conduct extensive mitigation investigation and found that failure to thoroughly investigate capital mitigation constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

In addition to emphasizing that thorough mitigation investigation is critical to achieving effective assistance of counsel at the sentencing phase of a capital trial, these decisions also highlight the Court's recognition that a capital defense team must do an enormous amount of work prior to trial in order to be ready to present an effective mitigation defense. The clarity of the Court's decisions has also coincided, whether directly or indirectly, with a surge in hiring mitigation specialists in capital public defender offices, as well as with increased training opportunities for mitigation specialists nationwide.

**AT THE SAME TIME**, the Court's decisions say nothing about how to conduct a mitigation investigation or how capital defense attorneys should manage ethical issues and conflicting worldviews that may arise when the capital defense team is comprised of people from interdisciplinary professional backgrounds, which is often the case when mitigation specialists are professionally trained in a field other than law. Indeed, mitigation specialists come from a variety of backgrounds, such as social work, psychology, anthropology, history, law, and journalism. Although mitigation specialists utilize their prior professional training when they work on capital trial teams, mitigation is its own profession and is not a subspecialty of any one discipline.

One could view the increasing number of appointments and training of mitigation specialists on capital defense teams as evidence of an improvement in safeguarding the integrity of a capital defendant's constitutional right to a fair trial by ensuring effective assistance of counsel. At the same time, the rise of capital mitigation specialists has not occurred without the potential to introduce social costs into the capital trial system. These costs include the tension an interdisciplinary capital team experiences when its legal obligations and directives conflict with the non-legal professional training of some of its team members.



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**SUCH INTERNAL TENSIONS** can in turn impact the effectiveness of the capital defense, especially if conflicting norms result in a mitigation specialist disagreeing with the attorney's directives or compromising client confidentiality during the mitigation investigation. Moreover, competing ethical norms and worldviews may also impact the defendant's family or society at large, such as when a social-worker-trained mitigation specialist struggles against what she believes to be mandatory reporting requirements for child abuse—especially when mandatory reporting would detrimentally affect the defense at the sentencing phase of the capital trial.

In the same way that the Supreme Court's jurisprudence has not addressed these and other tensions that mitigation specialists bring to the death penalty arena, so have legal scholars failed to analyze these tensions. Much of the scholarship relating to capital mitigation specialists either gears itself toward practitioners or focuses on the use of mitigation information or mitigation specialists during the capital trial itself. ...

By examining critical issues that arise during the pre-trial investigation that social-worker-trained mitigation specialists conduct as members of capital defense teams, this article explores the inherent complexity that the Court's mitigation jurisprudence has brought to the death penalty arena. When the legal

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ethics and worldviews of capital defense attorneys conflict with the professional ethics and worldviews of mitigation specialists working on the capital defense team, such unresolved tensions have the potential to negatively impact the constitutional rights of the capital defendant by compromising the effective assistance of counsel the defendant receives.

**TO BEGIN THIS ANALYSIS**, Part I explains the historical development of capital mitigation specialists and the extent to which the Supreme Court’s capital jurisprudence and legal ethics have shaped the role of mitigation specialists. It analyzes pivotal moments in the Court’s early capital mitigation jurisprudence, and then discusses the role of the American Bar Association’s (ABA) *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA *Guidelines*) in establishing the core duties of mitigation specialists. Part I concludes by discussing three of the Court’s recent mitigation cases, *Williams*, *Wiggins*, and *Rompilla*, and how these cases rely, in part, on the ABA *Guidelines* to explain how capital mitigation investigation is a critical component of a capital defendant’s constitutional right to effective representation of counsel.

Part II discusses the different worldviews and practice methods that social workers bring to capital defense teams when they work as mitigation specialists. It contrasts a social worker’s multidimensional, systems-based approach to a capital defense attorney’s linear, diagnostic approach, concluding that a systems-based approach brings important depth, perspective, and expertise to the mitigation investigation.

Part III examines some ethical conflicts that capital attorneys and social-worker-trained mitigation specialists may experience when they work together on capital defense teams. Beginning with the ABA’s *Model Rules of Professional Conduct*, it first examines relevant legal ethics rules. It then examines relevant social work ethics rules by exploring provisions from the National Association of Social Workers’ *Code of Ethics*. Part III concludes by exploring the importance of recognizing the ethical tensions social workers experience when they work as mitigation specialists on capital defense teams.

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**THE ABA’S SUPPLEMENTARY GUIDELINES** clarified that from the capital defense attorney’s perspective, mitigation specialists are agents of defense counsel who are bound by the same rules of professional responsibility that govern defense counsel. Perhaps

the NASW could issue a *Supplemental Code of Ethics for Social Workers Serving as Mitigation Specialists* to explain that social workers who are employed to develop mitigation evidence for capital defense teams are agents of the team’s capital defense attorneys, so they are therefore bound by the same rules of professional responsibility that govern the capital defense attorneys with whom they work (even if those rules conflict with the NASW’s *Code of Ethics*).

This *Supplemental Code* could also highlight the distinction between social workers who are members of defense teams and social workers who are hired as independent experts by defense counsel: social workers who are members of capital defense teams abide by the same ethical rules that the attorneys on their teams follow, whereas social workers who are hired as independent experts abide by the NASW’s *Code of Ethics*.

By understanding how ethical norms and worldviews from law and social work interact, the article strives to ensure that interdisciplinary capital defense teams anticipate and resolve ethical conflicts in order to safeguard the capital defendant’s constitutional right to effective assistance of counsel. In this way, capital mitigation specialists can continue to help attorneys effectively safeguard the sacred constitutional rights of the capital defendant. ||||

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Excerpted with permission from 18 *Cornell Journal of Law and Public Policy* 337 (2009)  
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