

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE,)	
)	
Movant,)	CAPITAL CASE
)	
v.)	Case No. M2016-01869-SC-R11-PD
)	
OSCAR SMITH,)	EXECUTION DATE:
)	June 4, 2020
Respondent.)	

**SUPPLEMENT TO
MOTION FOR STAY OF EXECUTION
DUE TO COVID-19 PANDEMIC**

Oscar Smith, by counsel, offers the following supplement to his Motion for Stay of Execution Due to COVID-19 Pandemic:

1. In the three weeks since Oscar Smith filed his motion for stay of execution, cases of COVID-19 cases have ballooned from 4,266 cases in 53 US Jurisdictions with 75 deaths to 374,329 cases in 55 US Jurisdictions with 12,064 deaths, according to the Center for Disease Control (CDC). <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited April 7, 2020).
2. Tennessee cases have risen from 78 cases with no related deaths to 4,132 confirmed cases and 72 related deaths. <https://www.tn.gov/health/cedep/ncov.html> (last visited April 7, 2020).

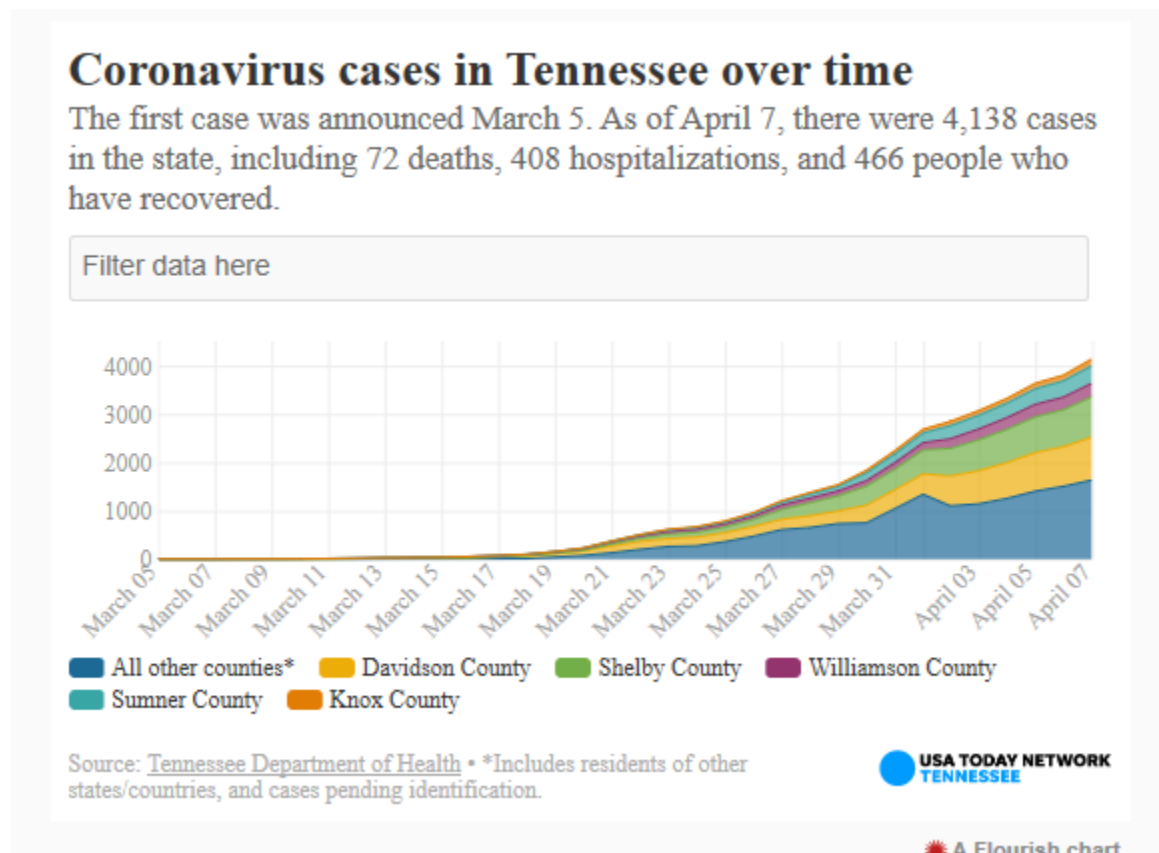
Confirmed cases in Davidson County rose from 46 to 1,075 with nine deaths.

<https://www.tennessean.com/story/news/local/2020/04/07/coronavirus-tennessee-latest-updates-governor-lee-gallatin-nursing-home/2958864001/>

(last visited April 7, 2020).

3. Davidson County continues to lead the state in numbers of confirmed cases. <https://www.tn.gov/health/cedep/ncov.html>.

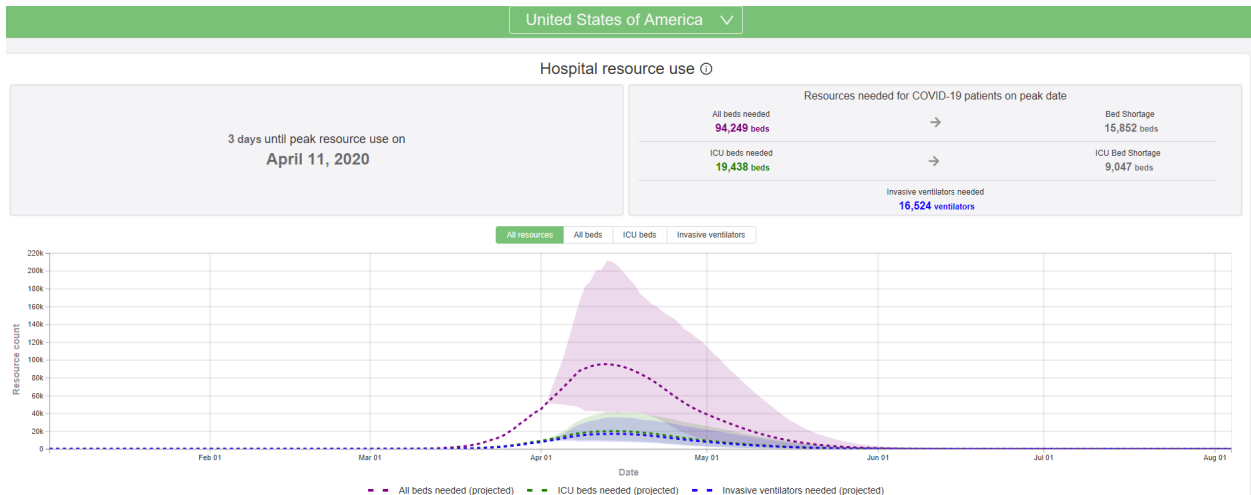
Surrounding counties also report significant increases in cases: Sumner (361 cases with 15 deaths); Williamson (278 cases with 3 deaths); Rutherford (178 cases with 3 deaths); Wilson (113 cases); Robertson (65 case). *Id.* A chart published in the Tennessean illustrates the speed with which the virus took hold in Tennessee:



<https://www.tennessean.com/story/news/health/2020/04/01/coronavirus-tennessee-what-know-spreading-pandemic/5097440002/> (April 1, 2020, updated 3:56 p.m. April 7, 2020) (last visited April 7, 2020).

4. Experts predict that, even with the social distancing orders now in place, the coronavirus epidemic will peak in Tennessee by April 15, but that deaths and hospitalizations will continue to rise for some time to come. <https://www.tennessean.com/story/news/2020/04/06/covid-19-projection-tennessee-data-shows-fewer-deaths/2954202001/> (last visited April 7, 2020).

5. Experts predict that the nation will continue to struggle with the coronavirus through the end of May.



<http://covid19.healthdata.org/united-states-of-america> (last visited April 8, 2020).¹

¹The scientific models relied on by government officials presume strict social distancing through at least the end of May.

<https://www.washingtonpost.com/news/powerpost/paloma/daily->

6. Tennessee has taken significant steps toward mitigation of the virus' spread:

- On March 23, Governor Lee formed the COVID-19 Unified Command. <https://www.tn.gov/governor/covid-19/unifiedcommand.html> (last visited April 7, 2020).
- On March 25, this Court extended its previous order declaring a judicial state of emergency and providing additional guidance to the Courts to limit in-person proceedings and take other necessary steps in recognition of the “Judicial Branch’s obligation to mitigate the risks associate with COVID-19.” *In Re COVID-19 Pandemic, Order Continuing Suspension of In-Person Court Proceedings and Extension of Deadlines*, No. ADM2020-00428 (Tenn. Mar. 25, 2020). http://tncourts.gov/sites/default/files/docs/order_-_2020-03-25t120936.486.pdf (last visited April 7, 2020).
- On March 26, 2020, the State of Tennessee launched a social distancing campaign, “Do Your Part, Stay Apart.” <https://www.tn.gov/governor/news/2020/3/26/state-of->

[202/2020/03/30/daily-202-coronavirus-model-touted-by-white-house-assumes-social-distancing-will-stay-in-effect-through-may/5e8196e988e0fa101a75580d/](https://www.tn.gov/governor/news/2020/3/30/daily-202-coronavirus-model-touted-by-white-house-assumes-social-distancing-will-stay-in-effect-through-may/5e8196e988e0fa101a75580d/) (last visited April 8, 2020) (University of Washington Scientist Dr. Chris Murray’s “model is premised on the assumption that federal guidelines for social distancing, designed to slow the spread of the virus, will stay in effect until the end of May. ‘That’s what we believe is going to happen because nobody’s really going to want to let up,’ he explained. ‘Even if the deaths are trending down nationally, some states may still be going up.’)

[tennessee-launches--do-your-part--stay-apart--campaign.html](#) (last visited April 7, 2020). The campaign added downloadable twitter ads, posters, and other promotional materials all designed to encourage Tennesseans to stay home to mitigate the impact of the virus in our state. The Safer at Home Toolkit is available at <https://www.tn.gov/governor/covid-19/toolkit.html> (last visited April 7, 2020).

- On March 30, 2020, Governor Lee issued a state-wide “Safer at home order.” Tennessee Administrative Office of the Courts, <https://www.tn.gov/governor/covid-19/covid-19-daily-bulletin/2020/3/30/covid-19-bulletin--8.html> (tncourts.gov, then Coronavirus and Court Leadership, then Tennessee Government Actions, then Bulletin #8)
- On April 2, 2020, Governor Lee imposed a stricter “Shelter in Place Order.” *Id.* <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee23.pdf> (tncourts.gov, then Coronavirus and Court Leadership, then Tennessee Government Actions, then Executive Order #23).
- On April 2, 2020, the CDC recommended that all Americans wear masks anytime they leave their homes to mitigate the spread of the virus. CDC, *Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission*,

<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html> (last visited April 7, 2020).

- Courts throughout the state have implemented their own procedures designed to mitigate the spread of the disease. This Court continues to catalogue these efforts.

<https://www.tncourts.gov/Coronavirus> (last visited April 7, 2020).

7. Mr. Smith’s legal team continue to abide by the orders of Nashville Mayor Cooper and Governor Lee. But doing so has resulted in the loss of critical time needed to represent Mr. Smith during this crucial period.

8. Emily Olson-Gault, Director and Chief Counsel of the American Bar Association Death Penalty Representation Project, explains the unique responsibilities of counsel representing men with imminent execution dates in a declaration dated April 3, 2020:

Underlying much of the ABA Guidelines is the recognition that defending capital cases requires extraordinary time and effort at every stage of a capital proceeding, including postconviction, habeas corpus, and once an execution warrant has issued. See Guideline 1.1, Commentary (“Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution.’ ... Due to the extraordinary and irrevocable nature of the penalty, at every stage of the

proceedings counsel must make ‘extraordinary efforts on behalf of the accused’” (quoting, first, Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 *BUFF. L. REV.* 329, 357-58 (1995) and, second, *ABA Standards for Criminal Justice: Defense Function*, Standard 4-1.2(C), (3d ed. 1993)). The need for time and resources to prepare the defense is due in part to the tremendous amount of investigation that the capital team must complete to adequately represent a person under a death sentence.

Attachment A at 2-3. Ms. Olson-Gault continues:

During the month of March 2020, I have spoken with capital defenders and pro bono attorneys all over the United States as they attempt to cope with the unprecedented situation created by the COVID-19 global pandemic. My understanding from these conversations is that most capital defense teams are unable to conduct the large majority of the investigation and expert work required in capital representation (*see* ¶¶18-31, *infra*). This is due to restrictions set in place by state and local governments, as well as departments of corrections and institutional defender offices and law firms, out of a concern for public health and the welfare of employees. As a result, the already extremely limited time available to capital teams has been truncated significantly because of health concerns related to COVID-19.

Time is a scarce resource in all capital representation, and never more so than at the post- conviction or habeas corpus stages, or when an execution warrant has issued. *See* Guideline 1.1, Commentary (“Post-judgment proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial. In addition, death penalty cases at the post- conviction stage may be subject to rules that provide less time for preparation than is available in noncapital cases. Substantive pleadings may have to be prepared simultaneously with, or even be delayed for, pleadings to stay the client’s execution.”); Guideline 10.15.1, Commentary, n.335 (“When a capital case enters a phase of being ‘under warrant’—i.e., when a death warrant has been signed—time commitments for counsel increase, “due in large part to the necessary duplication of effort in the preparation of several petitions which might have to be filed simultaneously in different courts.”).

When the already limited time is further truncated, whether by operation of the legal system or by something wholly external like a natural disaster, counsel will not have adequate time to prepare their case and this, in turn, jeopardizes due process and fairness in capital cases. *See*

Guideline 6.1, Commentary (“Regardless of the context, no system that involves burdening attorneys with more cases than they can reasonably handle can provide high quality legal representation. In the capital context, no such system is acceptable.”).

The Guidelines’ description of the nature of investigation required at every stage of a capital proceeding provides insight into the extraordinary need for time in all capital proceedings.

Id. at 3.

9. The State of Texas has now stayed a total of three executions in light of COVID-19. Death Penalty Information Center, *Texas Court of Criminal Appeals Stays Third Execution Amidst Coronavirus Concerns*, <https://deathpenaltyinfo.org/stories/news-brief-texas-court-of-criminal-appeals-stays-third-execution-amidst-coronavirus-concerns> (last visited April 7, 2020).

10. A stay of Mr. Smith’s execution will benefit the prison at this time. The risk of spreading the coronavirus inside a penal institution is enormous. This Court ordered each county to present a plan for the reduction of pre-trial detainees in recognition of the inherent risk posed by institutional confinement .

The presiding judge or the designee of the presiding judge of each judicial district shall develop a written plan to affirmatively address issues regarding the incarceration of nonviolent offenders in furtherance of efforts to reduce the jail

population, including but not limited to bond reductions or eliminations, deferred sentences, and suspended sentences.

In Re COVID-19 Pandemic, Order Continuing Suspension of In-Person Court Proceedings and Extension of Deadlines, No. ADM2020-00428 (Tenn. Mar. 25, 2020).

11. An execution takes prison staff away from their day-to-day duties. Every staff member who is pulled away from his or her primary responsibility of keeping the institution safe represents an opportunity for the virus to infiltrate the institution. Once inside a prison environment, the virus will spread like wildfire. *See* Associated Press, US Prisons Called a Coronavirus “Tinderbox,” Courthouse News Service (Mar. 19, 2020), <https://www.courthousenews.com/us-prisons-called-a-coronavirus-tinderbox/> (last visited April 7, 2020). Inmates and staff alike are at risk.

12. Conducting an execution during a pandemic presents needless additional risk to the staff and the almost 800 inmates of Riverbend Maximum Security Institution. Tennessee Code Annotated § 40-30-116 requires the admission of media witness and witnesses representing the victims’ families to any execution. The execution protocol does not address the carrying out of executions in the time of the COVID-19 pandemic. Prison staff will require additional training in providing safeguards to protect witnesses to the execution, the media, lawyers for the state and defense, and others who will attend the execution.

13. Should the Court fail to stay Mr. Smith’s execution, additional members of the public—unconnected to any penological purpose or security measure—will enter the facility thereby presenting additional

risk to the staff and incarcerated people—a risk that could be completely obviated by a short delay in Mr. Smith’s execution.

14. Mr. Smith faces irreparable harm absent a stay.

WHEREFORE, the motion should be granted.

Respectfully submitted this 8th day of April, 2020.

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BY: /s/ Kelley J. Henry
Counsel for Oscar Smith

CERTIFICATE OF SERVICE

I, Kelley J. Henry, certify that a true and correct copy of the foregoing was served via email and electronic filing to opposing counsel, Samantha Simpson, Asst. Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202 on this 8th day of April, 2020.

BY: /s/ Kelley J. Henry
Counsel for Oscar Smith

ATTACHMENT A

DECLARATION OF EMILY OLSON-GAULT, ESQ.

1. I, the undersigned declarant, Emily Olson-Gault, am over eighteen years of age and competent to testify to the statements contained in this Declaration. I am an attorney licensed to practice law in the State of New York and the U.S. Supreme Court. I am the Director and Chief Counsel of the American Bar Association Death Penalty Representation Project, which is based in Washington, D.C.
2. The American Bar Association (“ABA”) created the Death Penalty Representation Project (the “Project”) in 1986 to address the lack of qualified counsel available to those facing a death sentence.
3. The ABA and the Project do not take a position on the death penalty itself. The Project is committed to ensuring that basic constitutional protections have been provided to all individuals who are charged with a capital crime or sentenced to death. To this end, the Project promotes policies and procedures that will guarantee that all those facing execution are represented at every stage of the proceedings.
4. The ABA has promulgated Guidelines that govern the appointment and performance of defense counsel in death penalty cases. The Project is sometimes asked to provide affidavits in death penalty cases about the ABA Guidelines and standards for representation, and it does so not to advantage a particular litigant but to ensure that basic constitutional protections and due process have been provided to all individuals under a death sentence.
5. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter “ABA Guidelines” or “Guidelines”), first adopted in 1989, were revised and updated in 2003 so that they would accurately reflect current death penalty law and practice. 31 HOFSTRA L. REV. 913 (2003), *available at* <http://ambar.org/2003guidelines>. The Death Penalty Representation Project led the effort to revise and update the Guidelines. The ABA House of Delegates approved the revised ABA Guidelines in February 2003.
6. After the revision of the ABA Guidelines in 2003, the Project and other organizations developed the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (hereinafter “Supplementary Guidelines”) to address the urgent need to help defense counsel understand how to supervise the development of mitigation evidence and direct a key member of the defense team, the mitigation specialist. The Supplementary Guidelines are a complementary extension of the ABA Guidelines. They serve to spell out important features of the existing standards of practice that enable mitigation specialists and defense attorneys to work together effectively to uncover and develop evidence that humanizes the client. *See* Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 679 (2008).
7. The ABA Guidelines and Supplementary Guidelines have been cited favorably in nearly 400 state and federal capital appellate decisions, including the United States Supreme Court.

See, e.g., Padilla v. Kentucky, 559 U.S. 356, 366-67 (2010) (“We long have recognized that ‘[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ...’” (citing *Bobby v. Van Hook*, 558 U.S. 4 (2009) (per curiam)); *Florida v. Nixon*, 543 U.S. 175, 191, 191 n.6 (2004); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). *See also* ABA Death Penalty Representation Project, *List of Cases Citing the Guidelines* (Mar. 27, 2020), available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/allcites.pdf.

8. The Guidelines have been adopted in substantive part or officially acknowledged as an accurate description of the standard of care for defense representation in death penalty cases by organizations such as the State Bar of Texas, the Department for Public Advocacy for the Commonwealth of Kentucky, the Idaho Public Defender Commission, the Georgia Public Defender Standards Council, and numerous others. The ABA Guidelines have also been adopted in substantive part by state legislative action or court rule in Louisiana, Nevada, and Arizona. *See* ABA Death Penalty Representation Project, *Implementation Fact Sheet* (Jul. 2018), available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/ImplementationFactSheetJul2018.pdf.
9. The ABA Guidelines did not themselves create the national standard of care for capital representation; rather they simply codified long-standing norms of capital defense practice in the United States. *See Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003) (“the [ABA Guidelines] merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases.”).
10. They are intended to provide guidance to judges and capital defense counsel regarding the skills and training death penalty counsel must possess when representing a person charged with a capital crime or sentenced to death.
11. The professional norms encapsulated by the ABA Guidelines govern every stage of capital proceedings. *See* Guideline 1.1(B) (“These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, postconviction review, clemency proceedings and any connected litigation.”). In a capital case, “every stage” includes litigation in the context of an issued execution warrant, *see* Guideline 10.15.1, “Duties of Post-Conviction Counsel,” Commentary, at 1081 n.335, as well as “advocacy outside the confines of the capital case itself,” such as systemic and administrative challenges. Guideline 1.1, Commentary, at 923-24.
12. Underlying much of the ABA Guidelines is the recognition that defending capital cases requires extraordinary time and effort at every stage of a capital proceeding, including post-conviction, habeas corpus, and once an execution warrant has issued. *See* Guideline 1.1, Commentary (“‘Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution.’ . . . Due to the extraordinary and irrevocable nature of the penalty, at every stage of the

proceedings counsel must make ‘extraordinary efforts on behalf of the accused’” (quoting, first, Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357-58 (1995) and, second, ABA Standards for Criminal Justice: Defense Function, Standard 4-1.2(C), (3d ed. 1993)). The need for time and resources to prepare the defense is due in part to the tremendous amount of investigation that the capital team must complete to adequately represent a person under a death sentence.

13. In my position as Director of the Project, I am in frequent contact with capital defenders and pro bono attorneys to discuss and assist with issues related to capital representation.
14. During the month of March 2020, I have spoken with capital defenders and pro bono attorneys all over the United States as they attempt to cope with the unprecedented situation created by the COVID-19 global pandemic. My understanding from these conversations is that most capital defense teams are unable to conduct the large majority of the investigation and expert work required in capital representation (*see* ¶¶18-31, *infra*). This is due to restrictions set in place by state and local governments, as well as departments of corrections and institutional defender offices and law firms, out of a concern for public health and the welfare of employees. As a result, the already extremely limited time available to capital teams has been truncated significantly because of health concerns related to COVID-19.
15. Time is a scarce resource in all capital representation, and never more so than at the post-conviction or habeas corpus stages, or when an execution warrant has issued. *See* Guideline 1.1, Commentary (“Post-judgment proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial. In addition, death penalty cases at the post-conviction stage may be subject to rules that provide less time for preparation than is available in noncapital cases. Substantive pleadings may have to be prepared simultaneously with, or even be delayed for, pleadings to stay the client’s execution.”); Guideline 10.15.1, Commentary, n.335 (“When a capital case enters a phase of being ‘under warrant’—i.e., when a death warrant has been signed—time commitments for counsel increase, “due in large part to the necessary duplication of effort in the preparation of several petitions which might have to be filed simultaneously in different courts.””).
16. When the already limited time is further truncated, whether by operation of the legal system or by something wholly external like a natural disaster, counsel will not have adequate time to prepare their case and this, in turn, jeopardizes due process and fairness in capital cases. *See* Guideline 6.1, Commentary (“Regardless of the context, no system that involves burdening attorneys with more cases than they can reasonably handle can provide high quality legal representation. In the capital context, no such system is acceptable.”).
17. The Guidelines’ description of the nature of investigation required at every stage of a capital proceeding provides insight into the extraordinary need for time in all capital proceedings.

18. Capital defense counsel and their teams *at every stage of a capital proceeding* must conduct thorough, independent investigations related to both the guilt and penalty phases of the trial. *See* ABA Guideline 10.7(A); Guideline 10.15.1(E)(4) (post-conviction counsel must “continue an aggressive investigation of all aspects of the case”). Because “the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case,” post-conviction investigation must be “thorough” and “independent.” Guideline 10.15.1, Commentary, at 1085-86.
19. Additionally, investigation in post-conviction proceedings poses specific challenges and unique obligations, as it requires a reinvestigation of “the facts underlying the conviction and sentence,” a re-investigation of the client to put together a more thorough and up-to-date social history, and additional investigation into “trial counsel’s performance, judicial bias, or prosecutorial misconduct.” Guideline 10.15.1, Commentary, at 1086. The ABA Guidelines make clear that this obligation – like the other requirements of capital defense counsel – is “on-going” and contemplates all phases of litigation subsequent to the trial. Guideline 10.15.1(E).
20. As part of the requisite investigation, capital cases also require comprehensive, multi-generational psychosocial history construction based on “exhaustive investigation.” ABA Guideline 4.1, “Defense Team and Supporting Services,” Commentary, at 959. These histories must extend back at least three generations in the defendant’s family. *See also* Supplementary Guideline 10.11(E)(2)(a).
21. The areas for investigation include (1) medical history, including “hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage;” (2) family and social history; (3) educational history; (4) military service; (5) employment and training history; and (6) prior juvenile and adult correctional experience. Guideline 10.7, Commentary, at 1022-23. *See also* Supplementary Guideline 10.11(B) (listing the same areas enumerated by the ABA Guidelines and further adding “multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; . . . religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.”).
22. The areas for investigation listed in ABA Guideline 10.7 are not intended to be exhaustive, and the Guidelines explicitly contemplate additional investigation for other legal issues: “Additional investigation may be required to provide evidentiary support for other legal issues in the case . . . Whether within the criminal case or outside it, counsel has a duty to pursue appropriate remedies if the investigation reveals that such conditions exist.” Guideline 10.7, Commentary, at 1027. *See also* Supplementary Guideline 10.11(B) (“The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client’s character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death.”).
23. The ABA Guidelines outline a dual-track approach to conducting this investigation, requiring both witness interviews and records collection. *See* Guideline 10.7, Commentary,

at 1024 (“It is necessary to locate and interview the client’s family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers and others” and “[r]ecords—from courts, government agencies, the military, employers, etc. . . . should be requested concerning not only the client, but also his parents, grandparents, siblings, cousins, and children.”).

24. Simply locating a single source for this information is often insufficient. The Guidelines recognize that “[t]he collection of corroborating information from multiple sources—a *time-consuming task*—is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.” Guideline 10.7, Commentary (emphasis added).
25. The Guidelines also make clear that in-person interviews with the client, witnesses, and family members are at the core of any adequate investigation: “Team members must conduct *in-person, face-to-face, one-on-one* interviews with the client, the client’s family, and other witnesses who are familiar with the client’s life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation.” Supplementary Guideline 10.11(C) (emphasis added). *See also* ABA Guideline 10.5, Commentary, at 1008 (“Even if counsel manages to ask the right questions, a client will not—with good reason—trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls.”). Remote technology options such as video conferencing and phone calls do not provide an adequate alternative for capital defenders, mitigation specialists, experts, or investigators.
26. This time-intensive, in-person contact is essential for establishing a relationship of trust with the client, client’s family, and other witnesses, which is indispensable to effective representation. *See* Supplementary Guideline 10.11(C) (“Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding.”); ABA Guideline 10.5 and Commentary (“Client contact must be ongoing, and *include sufficient time spent at the prison to develop a rapport between attorney and client.*”) (emphasis added); ABA Guideline 10.15.1(E)(1)-(2) (Post-conviction counsel must “maintain close contact with the client” and “monitor the client’s mental, physical, and emotional condition [.]”).
27. In-person visits with the client and client’s family are also a crucial tool in dictating the defense team’s choices regarding necessary mental health screening and experts, which are especially important given the near-ubiquity of mental health issues in capital cases. Defense counsel’s observations of the client’s mental state are a necessary piece of the puzzle, as are the observations of a member of the defense team specifically trained to screen for disorders and recommend follow-up investigation and appropriate experts. *See* ABA Guideline 4.1, Commentary, at 956. In many cases, the results of such observation render a “psychologist or other mental health expert [] a needed member of the defense team.” Guideline 10.4, Commentary, at 1004.

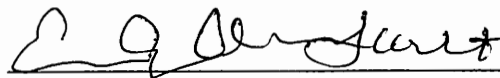
28. The mental health services provided as a result of observations and screenings are also oftentimes necessary to ensure that a client is “cognitively and emotionally competent to make sound decisions concerning his case.” Guideline 4.1, Commentary, at 959. Moving capital proceedings forward while in-person visits cannot take place prevents counsel from ensuring that the client is competent.
29. Additionally, expert evaluations of the client are time-consuming, particularly for issues related to intellectual disability and mental illness or competency. *See* Guideline 4.1, Commentary (“Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process.”). In order to ensure the heightened reliability of such evaluations, a thorough investigation must first be conducted. *Id.* (“Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.”); *see also* Guideline 4.1, Commentary, at 959 (the mitigation specialist “provides social history information to experts to enable them to conduct competent and reliable evaluations”). Judgment calls regarding which expert evaluations are recommended are necessarily the product of in-person visits between the client and the defense team, *see* ¶¶27-28, *supra*, and are informed by a comprehensive and thorough investigation.
30. The investigation is also a necessary precursor to making key strategic decisions and preparing pleadings. *See* ABA Guideline 10.7, Commentary, at 1021 (“Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client’s competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case.”).
31. In addition to the above-described duties and decisions, cases with an active execution warrant require additional urgent, time-consuming tasks that cannot be completed prior to the issuance of the warrant, such as the preparation of petitions for executive clemency, seeking stays of execution, and arranging for expert evaluations regarding the clients’ competency to be executed. *See* Guideline 1.1, Commentary at 937 (“Recent advances in the use of DNA technologies, combined with restrictions on the availability of post-conviction review, have elevated the important role that clemency has played as the “fail-safe” of the criminal justice system, and *increased the demands on counsel*”) (emphasis added); Guideline 10.15.1(B) (“If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.”); Guideline 10.15.2(B)-(D) (detailing duties of clemency counsel, including duty to “conduct an investigation in accordance with Guideline 10.7”).
32. The norms of practice reflected in the ABA Guidelines are not aspirational. *See* Guideline 1.1, “Objective and Scope of Guidelines,” Commentary, at 920. They represent the minimum requirements for adequate representation. If counsel lacks adequate time to prepare their case, or if defense counsel, mental health experts, investigators and mitigation

specialists are unable to conduct in-person meetings and interviews to discharge the duties outlined in ¶¶18-31 above, fundamental fairness and accuracy are put at risk.

33. As the Guidelines have recognized, there is an indispensable need for “effective representation on appeal, in state and federal post-conviction proceedings, and in applications for executive clemency. Because each of those proceedings has a unique role to play in the capital process, because both legal and social norms commonly evolve over the course of a case, and because of ‘the general tendency of evidence of innocence to emerge only at a relatively late stage in capital proceedings,’ jurisdictions that retain capital punishment must provide representation in accordance with the standards of these Guidelines, as outlined in Subsection B, ‘at all stages of the case.’” Guideline 1.1, Commentary at 929-30. The Guidelines “recognize[] the simple truth that any other course has weighty costs—to be paid in money and delay if cases are reversed at later stages or in injustice if they are not.” *Id.* at 930.
34. The ABA Guidelines are the most authoritative and up-to-date articulation of the investigative and other responsibilities of capital defense counsel. The American Bar Association believes that meeting these responsibilities is essential to ensuring justice in capital cases.

I hereby swear under penalty of perjury that the above and foregoing is a true and correct statement.

Dated this 3rd day of April, 2020.



Emily Olson-Gault