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Put Down the Phone! The Standard for Witness Interviews Is In-Person, Face-to-Face, One-on-One.

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"Don't use the phone. People are never ready to answer it. Use poetry."
Jack Kerouac

The proverb, "the longest way round is the shortest way home,"[4] applies where doing something carefully and properly will ultimately prove to be the quickest and most efficacious method of accomplishing an objective. Taking shortcuts will create problems requiring more time and effort down the line: you can have this done fast, or you can have this done right. The authors can think of no better application for this principle than the performance standard requiring in-person, face-to-face witness interviews.[5] In this article, a lawyer, a mitigation specialist, and an investigator team up to explain why other approaches to investigation, such as telephone or remote video link, are counter-productive, prone to failure, and constitute substandard work. Although the primary focus of this article is on standards that apply to capital mitigation work, the problems created by remote witness interviews are not unique to death penalty work; there are persuasive arguments and authority that the in-person interview standard applies in all criminal cases.[6] The authors will focus on helping defense team members adhere to and

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[4] James Joyce, ULYSSES (1922)

[5] Prevailing standards in death penalty cases require in-person, face-to-face, one-on-one interviews:

> 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. 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.

SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Guideline 10.11.C, *in* 36 Hofstra L. Rev. 677, 689 (2008) [hereinafter SUPPLEMENTARY GUIDELINES].

[6] ABA CRIMINAL JUSTICE STANDARDS, THE DEFENSE FUNCTION, Standard 4-3.3 (b) *Interviewing the Client* [hereinafter THE DEFENSE FUNCTION]; *See* Hugh M. Mundy, *It's Not Just for Death Cases Anymore: How Capital*

defend investigative standards to decision-makers who may pressure them to resort to substandard practices in the misguided belief that doing so will quickly and cheaply produce acceptable results.[7] The authors will outline the professional standards for investigative interviews, the social science supporting the in-person, face-to-face interview standard, and discuss examples of cases in which deviation from these standards was prejudicial to the client.

I. The In-Person, Face-to-Face Standard for Defense Interviews.

It is well-established that the standard for investigation in any human services profession, including law, requires in-person, face-to-face, one-on-one interviews. Police officers, social workers, parole officers, and defense investigators knock on doors and visit subjects in their homes. In the medical profession, the most important tool "is the face-to-face interview" because other methods of acquiring information "are inherently limited."[8] In the field of social work, the investigation performance standard requires in-person, in-home interviews:

> 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….[W]e….note the client's environment and the messages it conveys about the client and his or her situation.[9]

Similarly, minimum standards of performance for criminal defense work require in-person, face-to-face, one-on-one, culturally competent witness interviews. In all cases, capital and non-capital, criminal defense counsel has a duty to "interview the

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Mitigation Investigation Can Enhance Experiential Learning and Improve Advocacy in Law School Non-Capital Criminal Defense Clinics, 50 CAL. W. L. REV. 31 (2013).

[7] For helpful guidance on pandemic-related issues, which are beyond the scope of this article, see Cassandra Stubbs and Elizabeth Vartkessian, *Capital Investigation One Year into the Pandemic: When Field Work Can Resume (And Why That Day Is Not Yet Here)*, CHAMPION 20 (May 2021). For guidance on what teams can accomplish remotely without risk to the client when field work might be dangerous, see Sean D. O'Brien and Quinn C. O'Brien *I Know What You Did Last Summer: A User's Guide for Internet Investigations,* CHAMPION 18 (June 2017). However, none of these authors recommends any form of remote work as an adequate substitute for the one-on-one, face-to-face, in-person interview in the witness' home.

[8] BENJAMIN JAMES SADOCK & VIRGINIA ALCOTT SADOCK, KAPLAN & SADOCK'S SYNOPSYS OF PSYCHIATRY 6 (9th ed. 2003).

[9] BIANCA CODY MURPHY & CAROLYN DILLON, INTERVIEWING IN ACTION: PROCESS AND PRACTICE 28 (1998).

client as many times as necessary for effective representation, . . . [and] make every reasonable effort to meet in person with the client."[10] Of course, the underlying reasons for this standard—establishing trust and rapport, facilitating communication, and developing admissible, reliable evidence--are equally applicable to a client's family members and other witnesses.

A team of capital defense lawyers, mitigation specialists and mental health experts investigated prevailing standards of performance for the mitigation function of defense teams in death penalty cases. They interviewed lawyers, mitigation specialists, and mental health experts in every death penalty jurisdiction in the United States, including the U.S. Military, to learn how competent defense teams defend their clients. Based on their research and investigation, the team drafted guidelines and circulated them among practitioners at continuing legal education conferences across the country for feedback and revisions. That work confirmed that the standard for investigation requires in-person, face-to-face, one-on-one, culturally competent interviews of witnesses in criminal cases.[11] Those standards are published as the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases,[12] and they are relied upon by defense teams across the country to guide investigation into the delicate issues that must be explored in criminal cases. The Supplementary Guidelines do not describe a Cadillac defense; they articulate the appropriate standard of practice for defending a client in high-stakes criminal cases in which life and/or liberty are at issue. The objective of these professional standards is to achieve counsel's constitutional mandate to conduct a reasonable, thorough investigation into their clients' defense.[13] In addition to

[10] ABA CRIMINAL JUSTICE STANDARDS, THE DEFENSE FUNCTION, Standard 4-3.3 (b) *Interviewing the Client*. The Criminal Justice Standards apply to all cases, capital and noncapital, and the experiential rationale for in-person interviews of the client apply with equal force to the interview of family members and witnesses.

[11] *See* 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 (2008). Although the SUPPLEMENTARY GUIDELINES focus on the defense of capital cases, the research supporting in-person, face-to-face interviews applies in all contexts where a reliable factual record is important. *See* Dillon & Murphy, *supra* note 9, at 28, SADOCK & SADOCK, *supra* note 8, at 4.. Since the SUPPLEMENTARY GUIDELINES were published in 2008, they have been advocated as the standard for noncapital criminal defense work, *see* Hugh M. Mundy, *It's Not Just for Death Cases Anymore: How Capital Mitigation Investigation Can Enhance Experiential Learning and Improve Advocacy in Law School Non-Capital Criminal Defense Clinics*, 50 CAL. W. L. REV. 31 (2013), and for social worker performance in all contexts, Arlene Bowers *Andrews, American Bar Association Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases: Implications for Social Work*, 57 SOCIAL WORK 155 (2012).

[12] SUPPLEMENTARY GUIDELINES, *supra* note 5.

[13] *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 396 (2000), granting a new sentencing trial because "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." *Accord*, Wiggins v.

guiding the work of trial teams, guidelines provide a useful template for postconviction teams to challenge substandard trial work, to support requests for funding, and to train future defense teams. A key provision of the Supplementary Guidelines is that "[t]eam members must conduct in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses."[14]

The standard for witness interviews is the cold call; competent counsel train their investigators "to go to the home of a potential witness unannounced."[15] Indeed, e-mailing, writing, or telephoning ahead of time often creates obstacles to the investigation. A witness might hang up on an unknown caller and refuse to cooperate. Often, witnesses agree to meet an investigator but then fail to show up. Warning the witness ahead of time may result in the witness communicating with other witnesses, risking the distortion of the witness' recollection, or introducing dynamics that are outside the knowledge and beyond the control of the investigator. Even clients' family members will commonly miss or simply avoid advance appointments, especially if they have reason to suspect that the interview will broach family secrets or traumatic events.[16] Detectives knock on doors, unannounced – defense teams should do the same.

A. Perceiving information accurately.

Everyone has heard the axiom that 90% of communication is nonverbal. Its origin is in UCLA Psychology Professor Albert Mehrabian's research, which produced the familiar 7%-38%-55% Rule, i.e., that the meaning of interpersonal communication is carried 7% by words, 38% by tone of voice, and 55% by facial expressions and body language.[17] Dr. Mehrabian's research examined the common occurrence when words are incongruent with facial expressions, posture, tone of voice, or gestures in which case the nonverbal part of the message negates or

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Smith, 539 U.S. 510, 525 (2003), Rompilla v. Beard, 545 U.S. 374 (2005), Porter v. McCollum, 130 S. Ct. 447 (2009), and Sears v. Upton, 561 U.S. 945 (2010).

[14] *Supplementary Guideline* 10.11.C, in 36 HOFSTRA L. REV. at 689.

[15] Stubbs & Vartkessian, *supra* note 7, at 22.

[16] *Id.,* pp. 22-23, discussing these and other problems that flow from advance telephone or e-mail contact. *Also see* MURPHY & DILLON, *supra* note 4, explaining the importance of unannounced home visits. Another advantage of the home visit is that it minimizes the burden on witnesses, especially those for whom the time and expense of traveling to counsel's office for the interview might impose a hardship.

[17] ALBERT MEHRABIAN, SILENT MESSAGES: IMPLICIT COMMUNICATION OF EMOTIONS AND ATTITUDES (Wadsworth Publishing Co., 1981).

modifies the verbal message. When verbal and non-verbal messages are incongruent, the nonverbal behavior typically far outweighs the importance of the words used.[18] Dr. Mehrabian points to sarcasm as a common example of this. Saying "how wonderful!" with a negative tone of voice or a disgruntled frown is interpreted as "how bad!" because the tone of voice and facial expressions are more important than the words.[19] He concludes, "When any nonverbal behavior contradicts speech, it is more likely to determine the total impact of the message."[20] A telephone interviewer could not detect nonverbal cues that may be incongruent with the words being spoken; people "may use body language to express feelings they cannot express verbally, for example, a clinched fist, or nervous tearing at a tissue by a patient with an apparently calm outward demeanor."[21]

An interviewer will be unable to reliably interpret significant portions of a telephone conversation. Without seeing the subject, the interviewer cannot observe "general appearance, behavior, and body language, and the ways in which these factors provide diagnostic clues."[22] Hygiene, grooming and clothing can provide important clues about mood or mental health, so even a video interview of a witness will hide important details from the investigator or mitigation specialist.[23] It is also impossible over audio or video connections to see the subject's eyes or determine accurately whether he or she is able to establish and maintain eye contact. "Eyes can also reflect organic problems; for example, pupil dilation may signal a tumor or drug use."[24] Effective witness interviews must be in person so that the investigator can

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[18] *Id.,* p. 42-43.

[19] *Id.,* p. 55.

[20] *Id.,* p. 45. It is easy to find researchers who quibble with the mathematical weight ratio Dr. Mehrabian assigns to nonverbal component of communication, but no one questions the underlying premise that nonverbal behavior is a critical component of communication. Even if only "sixty-five percent of what is communicated is communicated nonverbally," it would still be necessary to conduct interviews in person, face-to-face. MURPHY & DILLON, *supra*, note 6, at 6.

[21] SADOCK & SADOCK, *supra* note 8, at 8. It bears emphasis that the ability to observe the witness in person is important to effective communication; the interviewer can better determine the witness' meaning, observe possible symptomology, gauge emotional responses to topics of inquiry, and employ empathetic active listening skills. While investigators may have a sense of witness honesty or credibility, those judgments should be viewed with appropriate caution and awareness that humans are notoriously unreliable lie-detectors. *See* Christian A. Meissener & Saul M. Kassin, *"He's guilty!" Investigator Bias in Judgments of Truth and Deception,* 26 L. & HUM. BEHAVIOR 469 (2002) (research findings suggest that training and experience did not increase the reliability of an investigator's ability to detect deceit, but increased the investigator's tendency to believe a subject is deceitful, and the tendency to overestimate their ability to judge deception accurately).

[22] *Id.,* at 6.

[23] *Id.,* at 238, 491-92.

[24] MURPHY & DILLON, *supra* note 9, at 62.

"perceive data from multiple sources," including "nonverbal cues, [and] listening at multiple levels."[25]

Interview by video conferencing is also a poor substitute for in-person investigative interviews.[26] "The academic scholarship on video communication in other contexts offer important insights and sound an alarm: the ability of video to achieve the same level of effective communication as in-person interactions is not possible."[27] Over video, eye contact is impossible.[28] This is not an insignificant problem:

> A great amount of information is passed through gaze and face expressions during a communication including signalization of attention and interest, disagreement with what is being said as well as a tendency to speak (instead of interrupting the speaker verbally). The concept of gaze awareness is designating a state, when those communicating are well aware of the others gaze direction (this is the normal situation in face-to-face communications).[29]

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[25] SADOCK & SADOCK, *supra* note 8, at 5. By emphasizing the need to tune in on body language, eye contact, tone, and demeanor, the authors are focusing on the effectiveness of communication, encouraging the witness to answer questions and willingly disclose information. The authors do not mean to suggest that investigators make judgments about the truthfulness of the information or the veracity of the witness; only further, independent investigation can do that. Humans are notoriously bad lie detectors. *See* Meissner & Kassin, *He's Guilty, supra* note 21, at 23, and MALCOLM GLADWELL, TALKING TO STRANGERS: WHAT WE SHOULD KNOW ABOUT THE PEOPLE WE DON'T KNOW (Little, Brown & Co. 2021).

[26] *See, e.g.,* Phan v. State, 290 Ga. 588, 598, 723 S.E.2d 876, 885 (Ga. 2012), where the Georgia Supreme Court accepted expert testimony that a capital defendant's family members who still lived in Vietnam could not be effectively interviewed by Skype.

[27] Lisa Bailey Vavonese, Elizabeth Ling, Rosalie Joy, and Samantha Kobor, *How Video Changes the Conversation: Social Science Research on Communication Over Video and Implications for the Criminal Courtroom*, National Legal Aid & Defender Association Center for Court Innovation, 15 (Sept., 2020), available at https://www.courtinnovation.org/sites/default/files/media/document/2020/Monograph_RemoteJustice_12032020.pdf (last visited October 15, 2021).

[28] *Id.,* at 4, citing Petr Slovak, "Effect of Videoconferencing Environments on Perception of Communication," 1 CYBERPSYCHOLOGY: JOURNAL OF PSYCHOSOCIAL RESEARCH ON CYBERSPACE, 8 (2007). Professor Slovak reviewed students that identified "four basic principles that have to be fulfilled (independently on the media used) if we want to achieve an effective communication. These are the needs: (1) to make contact, (2) to allocate turns at talk, (3) to monitor understanding and audience attention and (4) to support deixis - it is the possibility to see and use the artifacts used during themeeting (usually the document the discussing party is speaking about, paper used to draw diagrams on, etc.)." *Id.,* 1. He found that videoconferencing is measurably inferior to in-person, face-to-face dialogue on all four principles.

[29] *Id.,* 4.

Researchers refer to this important aspect of interpersonal communication as "gaze awareness," through which people intuitively judge others.[30] Based on where one perceives another to be gazing, one intuitively makes a range of judgments about others, such as whether they are attentive, friendly, confidant, sincere, defensive, evasive. or bored.[31] The inability of video conferencing to approximate gaze awareness leads to what researchers refer to as "gaze error," which ""is a serious problem because not only are intended cues lost, but also unintended cues may be communicated: downcast eyes, sideways gaze, or gazing 'over someone's head' replaces what should have been direct eye contact."[32] Video technology has many other limitations that makes it inferior to in-person conversations on virtually every level. Interruptions and distractions are more frequent, language barriers are heightened, and perceptions of others are negatively affected across the board.[33]

In addition to the pitfalls that video conferencing shares with telephone interviews, there are additional problems that are unique to video. If video is used in lieu of an in-person interview, by necessity the technology and communication coordination would have to be arranged by making initial contact by telephone, or even worse, by e-mail. Once again, the reluctant witness will hang up or refuse to respond, and easily prevent the interview from taking place. In the authors' experience, physical addresses are the most commonly available and easily found contact information; telephone and e-mail contacts are often not known or available. Technology provides yet another obstacle, particularly in criminal defense and capital defense work where more often than not, clients, family, and witnesses are indigent, and simply do not have the equipment and internet subscriptions necessary to participate in a video conference. Even a request that such a witness try to set up

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[30] *Id., Also see* Jim Gemmell, Kentaro Toyama, C. Lawrence Zitnick, Thomas Kang, &Steven Seitz, "Gaze awareness for Video-Conferencing: A Software Approach," IEEE MULTIMEDIA 26 (Oct.-Dec. 2000), available online at https://www.researchgate.net/publication/3338602_Gaze_awareness_for_video-conferencing_A_software_approach (last visited October 16, 2021).

[31] Bailey, et al., supra note 28 at 4, *citing* Steve Whittaker, *Theories and Methods in Mediated Communication, in* HANDBOOK OF DISCOURSE PROCESSES 266 (Lawrence Erlbaum Associates Publishers, 2003), and David Nguyen & John Canny, *More than face-to-face: Empathy effects of video framing*, PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 434 (2009).

[32] Bailey, et al., *supra* note 28, at 4, quoting Nguyen & Canny, *supra* note 32, at 424.

[33] *See* Bailey, et al., *supra* note 28, pp. 7-10. *Also see* Chris Fullwood, *The effect of mediation on impression formation: A comparison of face-to-face and video-mediated conditions*, 38 Applied Ergonomics 267, 271 (2007), finding that "video-mediated impression formation for attitudes concerning intelligence and likeability are less favourable than face-to-face impression formation." For an amusing parody of the ubiquitous problems and issues with video conferencing, see Zoom Meeting Parody, YouTube, https://www.youtube.com/watch?v=6Lmf53ZSrNA (last visited October 16, 2021).

a video interview could embarrass the witness or emphasize the cultural and economic gap between the defense team and the witness.[34]

While videoconferencing has been a useful tool to reduce the overcrowding of hospitals and slow the spread of a highly contagious virus, the recent reliance on telehealth necessitated by the pandemic does not diminish concerns about the reliability and effectiveness of attempting witness interviews via video conferencing. Telehealth is not new. In the psychiatric field, it has been around "for more than half a century"[35] and studies have found it to be an acceptable and effective option in the delivery of a range of psychiatric services.[36] One of the most significant concerns in the psychiatric field is the "perceived difficulty of developing an effective therapeutic relationship in the absence of non-verbal clues."[37] While some studies found that there were disadvantages compared to face-to-face care, many found that it was possible to develop a therapeutic alliance via telehealth.[38] However, it is important to note the critical difference between the delivery of psychiatric or psychological services and mitigation investigation as discussed in this article. Most individuals engaged in telehealth want the services as opposed to defense investigation in which witnesses are often very reluctant in the beginning. Understanding that an individual's engagement in psychological services is important "[p]oor acceptance has been cited as a factor that reduces compliance and motivation to engage in mental health assessments. Inadequate acceptance of TMH [telehealth mental practice] by either the patient or the practitioner can therefore be expected to have a negative influence on the validity and reliability of psychological assessments."[39]

Telephone or video interviews are not adequate substitutes for in-person, face-to-face communication.

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[34] Poor families' lack of access to online communication and resources has been exposed by the attempted shift to online learning during the recent pandemic. See, e.g., Paloma Esquivel, Howard Blume, Ben Poston, & Julia Barajas, *A generation left behind? Online learning cheats poor students, Times survey finds,* LOS ANGELES TIMES (Aug. 13, 2020), discussing the significant disparities in access to online learning technology between poor and affluent families.

[35] Chakrabarti, Subho. Usefulness of telepsychiatry: A Critical Evaluation of Videoconferencing-based Approaches. World Journal of Psychiatry, Volume 5, Issue 3 September 2015 at 286.

[36] *Id.*.

[37] *Id.,* at 295.

[38] *Id.*

[39] Luxton, Pruitt and Osenbach. Best Practices for Remote Psychological Assessment via Telehealth Technologies. Professional Psychology: Research and Practice 2014, Vol 45, No. 1, 27-35.

B. Active Listening & Rapport.

Telephone and remote video communication are inadequate because of what the interviewer misses out on by not being present with the subject of the interview. Equally important is that the person being interviewed cannot read the nonverbal communication from the interviewer. This could be fatal to the interviewer's ability to establish trust and rapport, or to make the witness comfortable enough to disclose personal, uncomfortable facts. Active listening skills can put the witness at ease, respond to the witness' distress, help the witness warm up, overcome the witness' suspiciousness, help the witness feel understood, and enable the interviewer to express empathy for the witness' pain and tune in on the witness' affect.[40]

The Supplementary Guidelines repeatedly emphasize the importance of establishing rapport with clients and witnesses, as is true in any human services profession. Rapport is "a relationship between the [client or witness] and [the defense team] that reflects warmth, genuine concern, and mutual trust."[41] Department of Justice interview standards for law enforcement officers also provide that in the investigation of any kind of case, investigating officers must "[d]evelop rapport with the witness" because "[a] comfortable witness provides more information."[42] European law enforcement standards also recognize that "Building rapport is a fundamental requisite for good interviewing."[43] Because no European country practices capital punishment, these standards address all criminal cases.

Building rapport is virtually impossible to do over the telephone because the interviewer cannot deploy active listening skills. The interviewer must be able to respond empathically to "facilitate the development of rapport."[44] Building rapport requires interpersonal communication skills that cannot be used in a phone call or video conference, such as making eye contact and detecting and responding to a subject's apprehension or anxiety.[45] The interviewer must employ patience and

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[40] EKKEHARD OTHMER & SEIGLINDE OTHMER, THE CLINICAL INTERVIEW USING THE DSM-IV 41-43 (1994). Also see Marshall B. Rosenberg, NONVIOLENT COMMUNICATION: A LANGUAGE OF LIFE-CHANGING TOOLS FOR HEALTHY RELATIONSHIPS (PuddleDancer Press, 3rd Ed. 2015), discussing the importance of empathetic listening in multiple professions and settings.

[41] SADOCK & SADOCK, *supra* note 8, at 2.

[42] EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT, U.S. Department of Justice Office of Justice Programs 22 (October 1999).

[43] Michael Boyle & Jean-Claude Vullierme, *A Brief Introduction to Investigative Interviewing: Promoting Shared Principles and Professional Standards in European Policing,* COUNCIL OF EUROPE 22 (October 2018) ("Rapport is a fundamental requisite for good interviewing.")

[44] *Id.,* at 6.

[45] *Id.,* at 4.

compassion to engage with the witness while inquiring "into sensitive and intimate areas which are frightening and humiliating," including any trauma or stress that might be associated with the interview and the subject matter.[46] Effective investigation will invade sensitive subjects, exposes raw nerves, or potentially re-traumatize the witness.[47] A sensitive interviewer will know when a long pause, even several moments of silence, would allow a witness to collect herself before continuing, communicate empathy, or signal an expectation of further information. But in a remote interview, the subject may conclude the discussion is over, or that the connection has been lost. Remaining silent at appropriate intervals is an effective interview and rapport-building technique that cannot be employed in a telephone call. Additionally, a sentencing investigation will inevitably probe "the kind of troubled history [the Court has] declared relevant to assessing a defendant's moral culpability."[48] These are not the kinds of conversations one has with a relative stranger over the telephone; attempting to explore these subjects over the phone is unlikely to produce useful information.[49] In an interview setting where the best "question" is often a simple, encouraging nod from the interviewer to go on, phone and video communication simply will not do.

C. Developing Reliable, Admissible Information.

Essential investigative skills include the ability to "identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information."[50] Telephone interviews fail this requirement because the interviewer "is not able to confirm the identity of the person with whom she is speaking, nor can she be sure that the potential witness is in a private place, away from others, and able to speak freely."[51]

A significant limitation of telephone or video interviews is the impossibility of knowing who is present at the other end of the call, and whether the person who has answered the phone can speak freely. Investigators must "attempt to speak with [witnesses] privately to determine if there is anything that they . . . were reluctant to

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[46] Lee Norton, *Capital Cases: Mitigation Investigations*, CHAMPION, May 1992, at 44.

[47] Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, CHAMPION, Jan.-Feb. 1999, at 36.

[48] *Wiggins v. Smith*, 539 U.S. 510, 534, 535 (2003). Also see *Rompilla v. Beard, supra,* at 393, explaining that Ronald Rompilla's life history that included exposure to alcohol in utero and infancy by neglectful parents "'might well have influenced the jury's appraisal' of [Rompilla's] culpability."

[49] *See* O'Brien, *supra* note 11, at 740-753, for a discussion of the importance of the face-to-face interview to build rapport and encourage disclosure of the kind of sensitive information essential to competent defense work.

[50] Supplementary Guideline 5.1.C, 36 HOFSTRA L. REV. at 682.

[51] Stubbs & Vartkessian, *supra,* p. 23.

say in front of someone else."[52] Life histories of criminally charged clients often involve physical or sexual maltreatment at the hands of caretakers, parents, or family members; "it is obvious that these topics will not be freely discussed in the presence of the guilty parent or party."[53] Health care providers recognize that "[m]ost patients do not speak freely unless they have privacy and are sure that their conversations cannot be overheard."[54] The presence of a third person who can hear the witness' half of the interview without the investigator's knowledge is a critical variable that can only be controlled in an in-person interview. This is especially problematic in a prison setting, where an overheard conversation can lead to an assault, or worse. Attempting telephone interviews of the client or potential prisoner witnesses in this setting would be fruitless at best, very dangerous at worst.

Finally, it is difficult for the parties to a telephone call to know definitively the identity of the person on the other end of the call, and to prove that identity in court. In one high publicity case, discussed below, the client's brother did not trust that the investigator was who she said she was, believing she may have been yet another reporter trying to get an interview.[55] Not only will this affect the willingness of the witness to provide information to a stranger over the telephone, but it will add to the defense burden of authenticating the call.[56] This will increase the defense burden of persuading the jury that the person called is actually the witness in question, and that content of the call is accurate and reliable.[57] The need for accurate and reliable information in high stakes criminal cases cannot be understated. Because the objective of the defense investigation is to produce evidence and testimony that will be used in an adversarial proceeding in which it will be subject

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[52] SADOCK & SADOCK, *supra* note 8, at 7.

[53] Jeff Blum, *Investigation in a Capital Case: Telling the Client's Story*, CHAMPION, Aug. 1985, at 30.

[54] SADOCK & SADOCK, *supra* note 8, at 8.

[55] Eaton v. Wilson, No. 09-CV-0261-J, 2014 U.S. Dist. LEXIS 163567, 2014 WL 6622512 (D. Wyo. Nov. 20, 2014).

[56] "For a telephone conversation, evidence that a call was made to the number assigned at the time to: (A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or (B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone." Fed. R. Evid. 901 (b)(6). It is not enough to show that the person called identified himself or herself by name.

[57] *See* The Hon. Mark W. Bennett, *"Earwitnesses": Dangerous Misidentification Lurks in Fed. R. Evid. 901(B)(5) and Supreme Court Precedent in Light of Empirical Social Science,* 44 LAW & PSYCHOL. REV. 1 (2020), discussing the notorious unreliability of testimony purporting to identify a person by voice alone. "Research findings going back nearly a century demonstrate that ear witnesses are even less reliable than eye witnesses." Helen Fraser, *The Reliability of Voice Recognition by "Ear Witnesses": An Overview of Research Findings,* 6 LANGUAGE & LAW 1, 4 (2019). Allowing an investigator to conduct witness interviews over the telephone provides the opposing party ample ammunition to challenge the integrity and reliability of the investigation. No competent attorney would leave their case open to such avoidable attacks.

to cross-examination and strict scrutiny by the prosecutor, it is essential that the defense team "identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant, and reliable information."[58]

D. Observing Symptoms and Conditions.

The above discussions about the need to establish rapport, effectively interview, and actively listen to witnesses applies in all cases, both capital and non-capital. The Supplementary Guidelines emphasize that in a death penalty case, at least one team member must have the training and experience to observe "general signals of mental disorder rather than definitive symptoms of one particular psychiatric illness" because, "if properly noted by the legal team and passed on to the mental health expert, [they] will help guide the expert to make a more accurate evaluation."[59] The in-person interview standard exists because this cannot be done over the telephone or by Zoom. Without the benefit of in-person observation, a subject's reference to [hallucinations] may be so subtle as to avoid detection."[60] Delusions or phobias can likewise be misinterpreted. For example, "[c]lients with the false belief that their attorneys are out to get them often prompt defensive behavior in their counsel rather than recognition that persistent beliefs along this line may be a signal of psychosis or paranoia."[61] A subject who is hyper-alert to his surroundings, and who "constantly checks behind and around himself, may be exhibiting hypervigilance, a sign of post-traumatic stress disorder."[62] "Slow movements and slow speech (psychomotor retardation) as well as slow reactions can be both a general psychiatric sign, as well as a marker of brain damage."[63] An in-person interviewer can observe the subject as he walks into the interview and how he physically handles objects, such as pencil and paper, or opens food wrappers, because balance, gait, coordination, and fine motor skills can provide clues of

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[58] Supplementary Guideline 5.1.C., 26 HOFSTRA L. REV. at 682. This is especially true in death penalty cases, where there is a heightened "need for reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina*,* 428 U.S. 280, 305 (1976).

[59] Deana Dorman Logan, *Learning to Observe Signs of Mental Impairment*, 19 CAL. ATTY'S FOR CRIM. JUST. F. 40, 40 (1992) (footnote omitted).

[60] *Id.,* at 41.

[61] *Id.*

[62] *Id.,* at 48, citing DSM-III 250 (1987).

[63] *Id.,* at 48, citing (citing Harvey S. Levin et al., *Neuropsychological and Intellectual Assessment of Adults*, in 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 500, tbl.9.5-2 (Harold I. Kaplan & Benjamin J. Sadock eds., 5th ed. 1989)).

impairment.[64] These are just a few examples of important evidence that will be missed if interviews are conducted over the telephone. In both capital and non-capital cases, understanding these things about the person being interviewed can be critical to making informed decisions about case development and presentation.

There are many contexts in which an investigator in a criminal case must be aware of potential mental or physical health symptoms. Does an identification witness wear eyeglasses? Does he or she require a cane, walker, or wheelchair to move about? These and other observations about a witness might be important to whether a prosecution or defense theory about what happened is plausible or not. In one Missouri case, a jury should have been made aware of the defendant's impaired motor skills and visual-spatial disabilities flowing from his autism spectrum disorder, which decreased the likelihood that he could have done the things that the state's witnesses had claimed. It was therefore error to exclude expert testimony about the defendant's impairments.[65] Such conditions in a defendant or a witness can be vital to reliable decision making in a case, but the signs and characteristics of such impairments would easily elude a telephone or video interviewer.

One more critical component that underscores the importance of in-person interviews is the opportunity to both explore the home and neighborhood environment. Not only does it provide insight[66] into the client's home life and neighborhood, but often it leads to locating additional witnesses such as neighbors who might otherwise be unknown to the defense team. Lastly, it only makes sense that to delve into such personal and often shameful parts of their life, that witnesses would be most comfortable in their home environment. As Russell Stetler noted:

> "Life-history witnesses should generally be interviewed in the setting which is most likely to evoke memories of the client – in the home, in the case of family members; at school, in the case of teachers; at work, if the witness is a former employer, etc. The goal of the visit is always to gather documents, snapshots, artwork, report cards, and other memorabilia, as well as to conduct the interview. The home environment or the school the client attended is

[64] *Id.,* at 49.

[65] *State v. Boyd,* 143 S.W.3d 36 (Mo. App. 2004).

> itself a rich source of information about the client's social milieu.[67]

Stetler is not the only expert to emphasize the need for showing up in person to collect physical evidence. Vivid details are important in persuading jurors. In putting together a defendant's life story, for example, experts say that the investigation should collect "personal records and objects from the family such as photographs, report cards, favorite books, or even a baseball mitt."[68] A home visit also enables the investigator or mitigation specialist to learn about the clients' or witness' environment. See, e.g., *State v. Doss*, where an ineffective lawyer's reliance on telephone interviews prevented the discovery of mitigating evidence "that the family had lived in a very poor, bad, drug-infested neighborhood where gangs were prevalent in Chicago."[69] Home visits produce opportunities to identify and gather such evidence; phone calls and video conferences do not.

II. Judicial Decisions Supporting the In-Person Performance Standard

The Supreme Court made clear in *Padilla v. Kentucky*[70] that defense counsel performance standards are derived from multiple sources in addition to judicial precedent. In determining what performance will meet prevailing professional norms in the context of a particular case, the Court looked to American Bar Association Standards,[71] standards published by the National Legal Aid and Defender

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[67] Russell Stetler, *Mitigation Evidence in Capital Cases*, CALIFORNIA DEFENDER (First Quarter/Spring 2001), at 59; *see also* Stetler, *supra* note 47, at 38-39. A well-known example is the Supreme Court's reliance on powerful evidence that could only have been discovered by a social worker's home visit to the client's home and documentation of the conditions that she observed there:

> The home was a complete wreck … There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash … The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. … The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey.

Williams v. Taylor, 529 U.S. 362, 395 n. 19 (2000).

[68] Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 361 (1993), (quoting Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695, 705 (1991)).

[69] 19 So. 3d 690. 701 (Miss. 2009).

[70] 559 U.S. 356 (2010).

[71] 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 . . . ." *Id.*, at 366, citing Bobby v. Van Hook, 558 U.S. 4, 7 (2009) (per curiam); Florida v. Nixon, 543 U.S. 175, 191, and n. 6 (2004); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); Williams v. Taylor, 529 U.S. 362, 396 (2000). Although such guidelines are not "inexorable commands, . . . these standards may be valuable measures of the prevailing professional norms of effective representation, especially

Association, research published by the Department of Justice, scholarly law review articles, treatises, professional bar journals (including The Champion), and opinions of experts in the field to determine what prevailing standards require of counsel. [72] Relying solely on appellate cases to determine performance standards is inherently flawed, as appellate courts only examine unsuccessful cases under the deferential *Strickland v. Washington*[73] standard. It would be as if the medical profession derived standards of performance by looking only at cases in which the patient died. The *Padilla v. Kentucky* approach is a far more reliable way to determine what prevailing performance standards require a lawyer to do for the client.[74] Judicial decisions regarding the in-person investigative standard must be viewed in this light; the existence of cases rejecting *Strickland* claims based on trial counsel's reliance on telephone investigation is unpersuasive evidence that telephone interviews comply with professional standards of care. "No group of individuals and no industry or trade can be permitted, by adopting careless and slipshod methods to save time, effort, or money, to set its own uncontrolled standard at the expense of the rest of the community."[75]

One successful death penalty habeas corpus case provides a perfect example of the inadequacy of telephone interviews of witnesses, including members of the client's family who would reasonably be expected to cooperate. The trial attorney in that case, to save money and resources, and contrary to minimum standards of performance, insisted that his investigator and mitigation specialist contact every witness by telephone to determine whether an in-person interview would be

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as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." Padilla, at 367.

[72] "[A]uthorities of every stripe--including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications--universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients." Padilla v. Kentucky, *supra,* at 367-68.

[73] 466 U.S. 668 (1984).

[74] For an excellent holistic discussion of how standards of performance are established and evolve, see Russell Stetler and W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation,* 41 HOFSTRA L. REV. 655 (2013).

[75] *Id*, at 663, quoting RESTATEMENT (SECOND) OF TORTS § 295A cmt. c (1965). Because of this principle, caution is advised in relying on cases such as United States v. Thornhill, 34 F. Supp. 334, 363 (S.D.N.Y. 2014), Madrigal v. Yates, 662 F. Supp. 2d 1162 (C.D. Cal. 2009), Fautenberry v. Mitchell, 515 F.3d 614, 634 (6th Cir. 2008), and Turner v. Williams, 35 F.3d 872, 896 (4th Cir. 1994), which rejected ineffective assistance of counsel claims where trial counsel's allegedly deficient performance included reliance on telephone interviews of witnesses. Turner acknowledged that "face-to-face meetings with witnesses may be the more desirable approach," but did not conclude that telephone interviews are *per se* unreasonable under Strickland. *Id,* at 896. The more probative cases are those in which postconviction counsel's thorough in-person investigation produced evidence that trial counsel's telephone interviews did not.

productive.[76] United States District Judge Alan B. Johnson held that "[Trial counsel's] preference for telephone screening and telephone interviews rather than in person interviews of potential mitigation witnesses was . . . in conflict with the prevailing standards of performance for mitigation investigation during his representation of Petitioner."[77] Russell Stetler, then the National Mitigation Coordinator for the Federal Public Defender System, testified as an expert witness before Judge Johnson that trial counsel's practice of screening and interviewing mitigation witnesses by telephone was "a textbook for how not to do it."[78] Judge Johnson discussed several witnesses whose mitigating testimony was lost because of the team's failure to use in-person, face-to-face witness interviews. A good example of the dangers of trial counsel's substandard approach is the reaction it prompted from the client's brother, Richard Eaton:

> Dale's crime and his prosecution have been very difficult for my family. We all have our issues about it. The high publicity and the facts surrounding the crime added to the trauma. Judy and Sharon are hurt by what Dale did because their images were tarnished. I was hurt by his crime because it is my image of Dale that is tarnished. I really looked up to Dale and respected him. It was in the middle of all that when I got a telephone call from Priscilla Moree, the investigator who worked for Wyatt Skaggs, asking me some very personal questions. I had never met this woman, and her approach really turned me off. On top of that, I then got a nasty letter from Wyatt Skaggs telling me that my brother's death would be on my head, and that really made me mad. No one ever came to talk to me in a way that reflected some understanding of what we were going through as a family. No one explained the legal process to us, no one ever talked to us about the evidence in the case, and no one attempted to explain to us what happened or why it might have happened. They started right in talking about personal, embarrassing things and I had no idea why that was necessary. It turned me off. If Mr. Skaggs had approached us with some sensitivity to

[76] Judge Johnson's unpublished decision is available on Lexis and Westlaw as Eaton v. Wilson, No. 09-CV-0261-J, 2014 U.S. Dist. LEXIS 163567, 2014 WL 6622512 (D. Wyo. Nov. 20, 2014).

[77] *Id.,* 2014 U.S. Dist. LEXIS 163567 at *100.

[78] *Id.,* 2014 U.S. Dist. LEXIS 163567 at *189.

> what we were going through, things might have been different.[79]

Judge Johnson credited Mr. Stetler's testimony that not only was it unreasonable to commence contact with a witness by telephone, but that it was also unreasonable to drop pursuit of a witness because of one negative telephone call.[80] Judge Johnson discussed several other witnesses in the case who were interviewed by telephone but not called to testify, based only on the limited information developed over the phone.[81]

Richard Eaton provided compelling mitigating testimony at the federal habeas corpus hearing before Judge Johnson, and his explanation for not cooperating with the trial team illustrates most of the reasons that telephone interviews are substandard performance:

- "I wasn't very happy with the phone call, with the insensitivity of the matter and not showing enough, you know, respect or anything to come person to person and talk about something like this, not over the phone. That's not a way to do that."[82]
- "She was asking things about our family that, you know, I'm not gonna talk to anybody over the phone about."[83]
- "Well, I had a few calls from reporters, and I wasn't happy with that either, you know. You know, and somebody just calling me up out of the blue and, uh, start asking me stuff about our family, they have no business to know it."[84]
- "I felt like they really didn't care."[85]

Judge Johnson also noted that the client's son, Ed Eaton, responded to the mitigation specialist's attempted telephone interview in much the same way:

> I was contacted once by telephone by an investigator on my dad's defense team before his trial. The conversation

[79] *Id.,* at *188-89.

[80] *Id.,* at *187.

[81] *See id.,* at *98-99, *201-02, *417-418.

[82] *Id.,* at *213.

[83] *Id.,* at *214.

[84] *Id.*

[85] *Id.,* at *215.

> was brief and much like the Natrona County investigators, she wanted to know whether my father was abusive to me and the rest of our family. I was angry and confused over what my father was accused of and the brief telephone conversation did not make me feel comfortable being forthcoming with a total stranger about myself, my father, or our troubled family history. Had she spent time with me and gained my trust, I might have talked with her and told her what I have told his current attorneys. I would have testified on my father's behalf.[86]

In large part because of their failure to interview witnesses in person, Judge Johnson found that "The mitigation investigation by Mr. Skaggs and the trial team resulted in only a 'rudimentary knowledge . . . from a narrow set of sources,' and as a result 'fell short of the standards for capital defense work,' and was therefore deficient as measured against the ABA Guidelines."[87] Trial counsel's ineffectiveness was directly linked to his overreliance on the telephone. "Mr. Skaggs' preference for telephone screening and telephone interviews rather than in person interviews of potential mitigation witnesses was . . . in conflict with the prevailing standards of performance for mitigation investigation during his representation of [Mr. Eaton]."[88]

Eaton v. Wilson is but one example of decisions illustrating the in-person, face-to-face standard for interviewing witnesses. In interlocutory appeals involving funding to conduct in-person interviews of the client's family of origin who lived in Vietnam, the Georgia Supreme Court noted that the standard calling for in-person interviews, rather than by telephone or by Skype, was "essentially undisputed."[89] In a pretrial federal case that was potentially capital, U.S. District Judge David C. Guaderrama noted that "contacting potential witnesses solely though telephone would prove devastating to the defense team in trying to obtain any mitigating evidence from them."[90] Referring to the global pandemic, Judge Guaderrama

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[86] *Id.,* at *217.

[87] *Id.,* at *218-219.

[88] *Id.,* at 100. Judge Johnson noted that this is particularly true in capital cases; "Any attempt to interview a family member over the telephone about the subjects which must be broached in the investigation of a capital case invites failure." *Id.,* at *215-216.

[89] Phan v. State*,* 290 Ga. 588, 598, 723 S.E.2d 876, 885 (Ga. 2012).

[90] *United States v. Crucius,* No. EP-20-CR-00389-DCG, 2020 U.S. Dist. Lexis 132901, *9 (W.D.Tex. filed, Jul. 28. 2020). Counsel for Crucius was asking Judge Guaderrama to order the Government to postpone the preauthorization meeting with defense counsel required under the Department of Justice Death Penalty Protocol because of the

concluded 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."[91]

It is much easier to hang up the phone than it is to get rid of a trained, politely persistent investigator or mitigation specialist who shows up on your porch. Because telephone interviews cannot provide the nature and quality of evidence essential to reliable outcomes in criminal cases, it is not hard to find cases, like Eaton's, in which trial counsel were found ineffective for conducting investigation by telephone. In *Harries v. Bell*, the court concluded 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."[92] The Eleventh Circuit Court of Appeals in *Ferrell v. Hall* found trial counsel ineffective in part because "many" of the witness interviews "were conducted not in person but by telephone."[93] In *Doe v. Ayers*, trial counsel was found incompetent for conducting interviews by telephone rather than in person, and the few in person interviews that he did perform took place in the presence of family and friends.[94] Likewise, in *Thomas v. Kelley*, trial counsel's deficient performance included conducting telephone and group interviews.[95] Even the Mississippi Supreme Court found ineffective performance where trial counsel "failed to do anything more than a brief, cursory telephone interview with Sadie Doss, who was his sole mitigation witness."[96] In each of these cases, standard-compliant postconviction investigation produced substantial evidence that the trial team overlooked by using the telephone instead of in-person, face-to-face interviews.

Conclusion

Conducting investigation on the telephone is ineffective and counterproductive, and any perception that investigation by telephone or video is

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pandemic, and Judge Guaderrama concluded that he did not have the authority to order the Government to postpone its decision whether to seek or waive the death penalty.

[91] *Id.*

[92] 417 F.3d 631, 638 (6th Cir. 2005).

[93] 640 F.3d 1199, 1219 n. 14 & 1229.

[94] 782 F.3d 425, 438-39 (9th Cir. 2015).

[95] 2017 WL 1239148, *24 (W.D. Arkansas, March 31, 2017).

[96] Doss v. State, 19 So. 3d 690 (Miss. 2009).

more efficient or cost-effective is illusory. The practice and science are compelling; the use of remote communication technology in lieu of in-person, face-to-face interviews irrefutably impedes the defense investigative efforts. The substantial risk that telephone or video interviews will not induce disclosure and cooperation from witnesses, or worse that the witness will have a negative impression of the defense team, and be less likely to cooperate in the future, is entirely avoidable. No coach ever told a team to put forth a seven to 35-per-cent effort, and no defense attorney should direct or allow the use of investigative practices known to produce inferior results. This is why the in-person, face-to-face interview of clients and witnesses is the standard of performance for defense counsel in cases where their client's life and/or liberty is at stake.

Professional guidelines help defense teams better represent their clients in multiple ways. By articulating prevailing standards, guidelines inform the work of defense teams, and help them make better choices in representing their clients. While the Supreme Court has said multiple times that prevailing standards require defense counsel to conduct a thorough investigation,[97] professional guidelines provide authority for what constitutes a thorough investigation. Guidelines can also be used to support arguments for adequate funding, particularly in offices that are not sufficiently staffed to enable in-person interviews of clients and witnesses, and "to help courts understand what effective representation requires."[98] Guidelines are also useful in training the next generation of attorneys and legal professionals. Finally, as the *Eaton v. Wilson* decision demonstrates, guidelines can be used as a template by postconviction teams to challenge substandard work by prior counsel. Where prior counsel has relied on telephone interviews, postconviction counsel must interview those witnesses in person, face-to-face. The likelihood that more useful and persuasive evidence will be found and developed is immense.

Professional standards require in-person, face-to-face, one-on-one culturally competent witness interviews. Accept no substitutes.

[97] Defense counsel conduct "a thorough investigation of the defendant's background." Williams v. Taylor, 529 U.S. 362, 396 (2000). *Accord*, Wiggins v. Smith, 539 U.S. 510, 525 (2003), Rompilla v. Beard, 545 U.S. 374 (2005), Porter v. McCollum, 130 S. Ct. 447 (2009), and Sears v. Upton, 561 U.S. 945 (2010).
[98] Stetler & Wendel, *supra* note 74, at 696.