

THE DEFENSE FUNCTION IN A CAPITAL CASE
Supplement to Testimony of Harry J. Trainor, Jr.
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Let me say, right off the bat, that Maryland's system of capital defense is better than many other state capital defense systems. The lawyers I know in Maryland who are regularly involved in the defense of capital cases are a relatively small, but dedicated and well-qualified, group. We don't have lawyers who sleep through trials, like some of the states we hear about in the news. Clients are usually represented by experienced attorneys – though that was not always the case –and we have an excellent Office of the Public Defender. The Capital Defense Unit of that office, although perhaps seriously underfunded, is run by a highly-qualified and experienced capital litigator who supervises approximately three other dedicated lawyers who keep the defense function in Maryland capital cases running.

These factors have led some people to say that Maryland doesn't have any problems in the area of capital defense. Because our system is better than some others, they say it is as good as it needs to be. I'm here to correct that myth. There *are* problems with the capital defense function in Maryland, and when a life is on the line, "better than some" is not good enough.

For one thing, good intention and high skill level cannot make up for a lack of resources. Defendants facing capital charges generally rely on the services of the public defender, and because these cases require so much legal work, the capital defense unit is

often required to ask private defense counsel to represent capital defendants at trial. These teams are often experienced, but, in order to take these appointments in Maryland state court cases, private defense counsel must agree to limit billing for attorney time to \$50.00 per hour – the second lowest pay rate in the country – in addition to capping the total cost even if the attorney puts in more hours than the cap allows. Virtually any private attorney accepting such a case does so at a great financial sacrifice, since \$50.00 per hour is not sufficient in most cases to begin to cover the office overhead, much less the salary of the attorney. Compare this to the federal system, which pays an hourly rate at more than 3 times Maryland’s rate and with no cap¹.

Keep in mind this is not a question of greedy lawyers wanting bigger and bigger profits. The reality is that death penalty cases are so complex and so labor intensive that low-paid attorneys actually have to choose between putting on an adequate defense and losing money on the case.

The last Maryland capital case I tried, a case that went to trial earlier this year, took almost 600 hours of my time, causing me to decide that I could not meet my obligations to my client and at the same time meet my financial obligations to my law partners. As a result I made the decision that during the trial I would literally remove

¹ In contrast to Maryland, in the federal system defense counsel in appointed capital cases are currently paid at \$170.00 per hour with no cap for all work in and out of court. According to the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 9.1(B)*: “Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.”

myself from the firm's payroll and not take a salary. During the trial and the weeks preceding the trial I was forced to devote 100% of my time to the case, being thereby unable to accept new cases from clients paying normal legal fees. From a financial standpoint, virtually every private attorney accepting a capital appointment in Maryland will suffer much the same way.

Maryland is lucky that there is a small pool of dedicated attorneys who often do make these kinds of personal sacrifices for their clients. But this is not a function of the system working. A system that puts a person's life on the line cannot hang its hopes on the sheer luck that a few extraordinary good samaritans will always be there and be willing to make these kinds of sacrifices. The enormous commitment of time required for adequate representation of a capital defendant and the stress associated with the great responsibility that a trial team has accepted in protecting another human being from execution is quite literally — emotionally draining. For these reasons and others, many conscientious and qualified lawyers in private practice are at times unable to accept an appointment to a Maryland capital case. I know of one expert who refuses to work for the state on these cases anymore because the hourly rate is so low. Young attorneys know of the burn-out and financial sacrifice associated with capital defense and they are choosing not to go into this area of law.

Defending a capital case is highly specialized legal work, requiring a team of lawyers for each case, who have adequate training and a depth of experience in defending capital cases. It is important to note that the complexity and resources required for capital

defense is not just the lawyers' doing, but is legally mandated by the Supreme Court of the United States, which has long held that "death is different" and must be treated with special consideration.

The Supreme Court's ruling in the Maryland case of *Wiggins v. Smith*² further compounded and intensified the already complex process of defending a capital case. The Court ruled that it would look to the *A.B.A. Guidelines for Appointment and Performance of Counsel in Death Penalty Cases* to determine whether a defense attorney has provided an adequate defense. The *ABA Guidelines* consist of 103 pages, with more than 350 footnotes, setting forth detailed requirements for the appointment and performance of counsel in death penalty cases. The clear message from the Supreme Court of the United States is that if Maryland attorneys in capital cases do not fully adhere to these hundreds of pages of standards, we can expect that convictions and/or sentences in death penalty cases will ultimately be reversed and sent back for retrial and re-sentencing. The fact that the Court used a Maryland case to make that ruling only further highlights the fact that even in Maryland our defense system needs improvement.

The American Bar Association Guidelines include the following requirements:

1. The defense team should consist of no fewer than two attorneys, an investigator and a mitigation specialist.
2. The attorneys must be highly-qualified to defend a capital case by experience and training.

² 539 U.S. 510, 123 S.Ct. 2527 (2003).

3. The attorneys must have demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases.
4. Defense Counsel have an obligation to conduct thorough and independent investigations relating both to the issues of guilt *and penalty*. These investigations must be conducted regardless of any statement or admission by the client, and regardless of the client's wishes. This means that defense counsel is required to discover, at a minimum, all reasonably available information and records³ regarding the client's:
 - A. Medical history;
 - B. Educational history;
 - C. Employment history;
 - D. Training;
 - E. Family history;
 - F. Social history;
 - G. Prior juvenile justice experience;
 - H. Adult correctional experience;
 - I. Religious influences and history; and,

³ The records that must be located and reviewed pertain not only to the client, but also his or her siblings, parents, and other family members, and include but are not limited to: school records; social services and welfare records; juvenile dependency or family court records; medical records; military records; employment records; criminal and correctional records; family birth, marriage, and death records; alcohol and drug abuse assessment and treatment records; and INS records. *See, ABA Guideline 10.7, pg. 84, Commentary.*

J. Cultural influences.

(It is worth noting that this very complicated requirement of the capital defense function is wholly unique to death penalty cases.)

5. Defense counsel must consider, thoroughly investigate the basis for, evaluate, and assert all legal claims potentially available.
6. After all of the investigation is done, trial counsel must explore every possible disposition short of death and, absent reaching such a disposition, must formulate a theory of defense that will be effective in connection with both guilt/innocence and penalty, and must minimize any inconsistencies.
7. Defense counsel must be familiar with all precedents relating to questioning and potentially challenging potential jurors, including the procedures surrounding “death qualification” concerning any potential juror’s beliefs about the death penalty.
8. The defense case concerning penalty must be thoroughly investigated and discussed with the client, including strategy, potential witnesses, experts, exhibits, information regarding potential alternatives to the death sentence, and demonstrative evidence, to include photos, videos and physical objects that may humanize the client or portray him positively.

The requirements put on defense counsel by the *ABA Guidelines*, and endorsed by the Supreme Court in *Wiggins* as “guides to determining what is reasonable” demand near

perfection. Near perfection *should* be required of a system that permits government to take a human life, but even with well qualified counsel we must recognize that a system run by human beings will never be perfect or even near-perfect. We have had errors and reversals here that highlight our imperfect system. This is what happens when an appropriately high standard is applied to dedicated lawyers doing extremely difficult work — there will always be an error rate. Some errors are caught at the appellate level and the cases are sent back for re-trial or re-sentencing, but there will always be errors that are not caught. A notable example of unacceptable error in Maryland's system of capital litigation is in the case of Kirk Bloodsworth, a man who we all know of who paid an unconscionable penalty, and almost lost his life, for a crime he did not commit.

With all of the expense and time and dedication that Maryland currently puts in to capital defense, it is still not adequate to save private attorneys from having to forgo their salaries to defend these cases, and it is still not adequate to create a system free from error. We are spending an enormous amount of money on capital defense, and even still defendants in Maryland are getting justice on the cheap, or on the backs of private attorneys, experts, and investigators who will not always be there if this problem continues. The amount of resources it would take to improve that situation would be quite significant, to say the least.

It is my personal hope that at the end of this study period, this commission will recognize that perhaps it is time that Maryland followed the trend away from the death penalty, so that a person will not live or die based on the resources and experience of his

or her attorneys. Life without possibility of parole is severe punishment and an adequate substitute for the death penalty that serves justice, and protects the citizens of Maryland.