

Statement of

Deborah T. Fleischaker

before the

MARYLAND DEATH PENALTY STUDY COMMISSION

August 5, 2008

Good afternoon. Thank you for the opportunity to appear today and share my views. I am Deborah Fleischaker, Director of State Legislative Affairs at Families Against Mandatory Minimums. More relevant to today's proceedings, I was the Director of the American Bar Association Death Penalty Moratorium Implementation Project between December 2001 and June 2008. While I am speaking today on my own behalf, and not for Families Against Mandatory Minimums or the American Bar Association, I will share with the Commission some of what I learned during my tenure at the ABA.

Fairness and accuracy together form the foundation of the American criminal justice system. These goals are particularly important in cases in which the death penalty is sought. Because they involve life-or-death decisions, capital cases are unique in our criminal justice system. As the Supreme Court has said repeatedly, "death is different." Capital cases are the most visible and complicated of all criminal cases, and the consequences of making mistakes in these cases are the most extreme.

It therefore follows that the laws and judicial decisions that govern this highly specialized area of law cases that are far more demanding, complex, costly, and, of necessity, protracted, than other criminal cases. In order to defend a capital case effectively, defense counsel must invest hundreds of hours in preparation, hire investigators and experts, such as mental health professionals and forensic scientists, and have a thorough knowledge of the highly specialized body of death penalty law.

Capital trials actually involve two separate proceedings: one to determine whether the accused is guilty of the charged capital offense, and a second, known as the sentencing or penalty phase, to determine punishment.

At the sentencing phase of a capital trial, the prosecutor is permitted to present what are known as aggravating circumstances – evidence about the offense or the defendant and his background, such as prior criminal conduct – to argue in favor of a verdict of death. The defense presents circumstances in mitigation – evidence supporting a decision to impose a sentence other than death. The U.S. Supreme Court has ruled that the decision-maker must be able to consider any relevant information regarding the defendant's character or background or the circumstances of the offense that mitigates against the imposition of the death penalty. The scope of potential mitigating evidence and its importance in the sentencing decision requires that defense counsel engage in an exhaustive life history investigation with the assistance of a multi-disciplinary team of professionals. When undertaken with the requisite degree of thoroughness, this examination of the client and his family history – often the key to providing the decision-maker with an understanding of why the crime occurred – is demanding and costly.

With this understanding of the unique complexities of capital punishment, in February 2003, the American Bar Association (ABA) Death Penalty Moratorium Implementation Project decided to assist a number of the capital jurisdictions that had not yet conducted comprehensive examinations of their death penalty systems by examining those systems and preliminarily determining the extent to which they achieve fairness and provide due process.

Each assessment was conducted by a state-based assessment team, which was comprised of or had access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, and law school professors. Team members were not required to support or oppose the death penalty or a moratorium on executions. Each team's findings provided information on how state death penalty systems are functioning in design and practice and were intended to serve as the bases from which states could launch comprehensive self-examinations. Because capital punishment is the law in each of the assessment states, and because the ABA has no position on the death penalty per se, the teams focused exclusively on capital punishment laws and processes and do not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty.

The ABA looked at eight state death penalty systems in detail, in Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee, and found that each of the state systems studied has grave problems. While the scope and detail of the problems differ, the largest and most problematic of these is the quality and availability of competent legal representation for capital defendants and death row prisoners. As a result of the state assessments, the ABA concluded that the problem of ineffective defense representation in capital cases is a consistent and systemic problem throughout death penalty jurisdictions. Allow me to explain.

The U.S. Supreme Court long ago decided that anyone who is too poor to retain a lawyer and faces prosecution for a crime that could result in a jail or prison sentence is entitled to appointed counsel at trial and at the first appeal as of right. The Court has also ruled that the right to counsel includes the right to a competent lawyer.

As I said earlier, because “death is different,” many of the legal issues involved in death penalty cases, and in particular the constitutional doctrines, are unique to capital cases. Competent representation at the different stages of a capital case – trial, appeal, and post-conviction review – requires specialized training, significant experience and intense preparation. Failure to understand the intricacies of the law can lead to errors that may be fatal to the client. Indeed, the effectiveness of defense counsel is the single most critical factor that determines whether an individual will receive a fair trial, and ultimately, a death sentence.

Clearly, not all lawyers are qualified to handle the exceptional challenges involved in defending a capital case. As Stephen Bright, founder of the Southern Center for Human Rights, has explained, “There are some outstanding lawyers who will occasionally take a capital case, but they find those cases drain them emotionally and financially. In states where there are hundreds of capital cases pending at any one time, there are not nearly enough good lawyers willing to take the cases for the small amount of money paid to defend them. And there are conscientious lawyers who, although lacking experience, training and resources, attempt to do the best they can in defending people in capital cases.”

Effective representation in any aspect of a capital proceeding requires, at the least, (a) lawyers who have substantial specialized training and experience in the complex laws and procedures that govern a death penalty case, (b) full and fair compensation to the lawyers who undertake these cases, and (c) adequate funding for engaging critical investigators and experts. The ABA *Guidelines for the Qualification and Performance of Defense Counsel in Death Penalty Cases* speak of a “defense team” approach, which reflects the necessary “pool” of expertise that is required for the delivery of high quality legal representation in all capital cases.

It is also vital that effective representation be provided at *every* stage of the proceedings – at trial, on appeal, and through state post-conviction proceedings – a because each level of appellate review plays a unique role in death penalty proceedings, because evidence of innocence and/or constitutional errors are not always immediately available, and because the law may change over the years as legal and social norms evolve (for example, the law now excludes the mentally retarded and juveniles from death penalty eligibility where it once did not).

It is therefore of grave concern that the federal and state courts and legislatures have construed existing laws and enacted new legislation in ways that significantly curtail the availability of state and federal *habeas corpus* review to death row inmates, even when they have been convicted or sentenced to death as a result of serious and prejudicial constitutional violations. These changes have added layers of complexity to capital representation and have exacerbated the national shortage of qualified lawyers for individuals facing the death penalty.

Under current case law, a constitutional violation of the Sixth Amendment right to effective assistance of counsel is established by a showing that the representation was not only deficient but also prejudicial to the defendant—that is, there must be a reasonable probability that, but for defense counsel’s errors, the result of the proceeding would have been different.¹

Even with these exceptionally high standards, a comprehensive study² in 2000 shows definitively that ineffective legal representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants. The study found that between 1973 and 1995, state and federal courts undertaking reviews of capital cases identified sufficiently serious errors to require retrials or re-sentencing in 68 percent of the cases reviewed.³ In Maryland, the rate of serious constitutional error was even higher at 77% of capital cases.

One example of this sort of constitutional error in a Maryland case occurred in *Wiggins v. Smith*, where the U.S. Supreme Court reversed Kevin Wiggins’ death sentence on the basis of inadequate representation by his original trial attorney for failing to conduct a minimally adequate mitigation investigation into Wiggins’ past.⁴ Justice O’Connor, writing for the court, noted, “The mitigating evidence counsel failed to discover and present in this case is powerful. . . [W]iggins experienced severe privation and abuse in the first six years of his life while in the

¹ Strickland v. Washington, 466 U.S. 668 (1984).

² JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), available at <http://www.thejusticeproject.org/press/reports/broken-system-studies.html>.

³ *Supra* n.1.

⁴ *Wiggins v. Smith*, 539 U.S. 510 (2003).

custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case. Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability."⁵ The Court concluded that it was quite reasonable to assume that the jury would have reached a different sentence had they been apprised of such evidence.

Another example in Maryland of substandard quality of counsel is found in the case of Flint Gregory Hunt, executed in 1997 for the murder of a police officer in Baltimore City. Three private attorneys were assigned to represent Hunt at his original trial. Two of the three were real estate lawyers who were later disbarred for stealing client trust money. The third lawyer was recruited by these two just a few weeks before trial. This lawyer had experience trying felony cases, but no death penalty experience. None of the three ever bothered to avail themselves of the materials available at the Public Defender's office or elsewhere. Consequently, the defense never raised important facts like that Hunt was high on PCP when the shooting occurred, which might well have countered the prosecution's case that the murder was pre-meditated, and thus death-eligible.

While Maryland was not included in the ABA assessment, there are red flags that indicate that Maryland is not immune from the problems of inadequate representation that plague other states. According to The Spangenberg Group, Maryland provides only \$50 per hour to appointed counsel in capital cases at trial, a wholly inadequate amount given the complexity of capital cases, and one of the lowest payment rates in the country.⁶ According to a recent defense motion filed in Lee Edward Stephens' capital case, this rate would allow the defense attorneys to dedicate 400 hours of work to the case, "less than a third of what attorneys arguing federal capital cases receive."⁷ Given that the lawyers anticipate working in excess of 1,200 hours on the expected 10-week trial, they must choose between "represent[ing] Mr. Stephens to the best of their ability and fac[ing] financial ruin, or neglect[ing] Mr. Stephens' case to pay the bill and book[ing] their client a bunk in death row."⁸

The law and basic notions of fairness require that the ultimate penalty of death must be reserved for only the worst offenders. Putting aside the question of whether bias and arbitrariness can be removed in order to make that determination, one thing is certain: appointing, training, and funding qualified and experienced defense counsel in all capital cases is the only way we can meet these expectations. Unfortunately, my work in assessing state death penalty systems has shown that this is not happening. Our laws require that we make good on the promise of justice for all capital defendants. If this is impossible, the death penalty should not remain an option.

⁵ *Supra* at 535.

⁶ THE SPANGENBERG GROUP, RATES OF COMPENSATION FOR COURT-APPOINTED COUNSEL IN CAPITAL CASES AT TRIAL: A STATE-BY-STATE OVERVIEW (JUNE 2007).

⁷ *See* Nicole Fuller, *Capital case lawyer pay called low*, THE BALTIMORE SUN (June 17, 2008).

⁸ *Id.*