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Pay Now or Pay Later, the Costs of Not Trying Capital Cases Right the First Time

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Many years ago I represented a person charged with capital murder in a rural county of North Carolina. We were engaged in jury selection and were attempting to obtain a jury composed of a spectrum of citizens in the county. I kept my eye on a potential juror sitting in the audience who was reading the Wall Street Journal as he waited to be questioned. When his turn came to sit in the jury box, he was asked, among other things, if he held any beliefs that would make it difficult for him to be fair to both sides. The juror responded, “Yes, I believe it costs the taxpayers a lot more money to house someone for the rest of their life than it does to execute them, and I don’t think we should have to pay that expense.”

Over the past several years, that attitude has perceptibly changed and jurors are beginning to understand that adding one more inmate to a prison population of 40,000 does not impact the total prison budget nearly as much as singling out a person for execution and devoting all the resources necessary to have that person executed.

In this article I would like to discuss one facet of capital litigation which is little discussed, but comprises a significant amount of the overall cost of the State’s effort to put a person to death. When I started trying murder cases in the 1970’s, there was one trial. Now, there are two. All defense lawyers are familiar with the concept that, “First, we try the defendant, then we try the defendant’s lawyer.”

At the conclusion of the direct appellate review of a sentence of death, a capital defendant in North Carolina is entitled to have two attorneys appointed to scrutinize the performance of trial counsel, the conduct of the prosecutor and judge, and whether there was any misconduct of jurors. These attorneys will determine if any of these factors may have deprived the Defendant of a trial which was consistent with the guarantees of the federal and state constitution. Associated with that proceeding are investigators and experts who assist the post-conviction attorneys.

By definition, direct appeals involve only those errors in the trial which are apparent from the face of the record of the trial. Post-conviction proceedings involve those matters which were not part of the trial but should have been, or matters which were undisclosed by the State or the jurors. The Sixth Amendment guarantees a citizen the right to have an effective attorney representing him. Of course, *Strickland v. Washington*, 466 U.S. 668 (1984) is the touchstone of the Sixth Amendment guarantee, with its requirement of objectively reasonable counsel. Over the years, the Court has been fleshing out the contours of the right to effective counsel in cases such as *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005)

In my experience, most capital trials are more concerned with who committed the murder than they are with the state of mind of the defendant at the time of the offense or the life experience of the defendant leading up to the offense. Quite often, during the first time I speak with jurors during the selection process I tell them that the case is not about “who,” but is about “why.” In many respects, the investigation of a defendant’s life story and the preparation for a capital sentencing hearing is much more difficult, and costly, than dealing with issues of guilt or innocence.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court constitutionalized the prohibition against executing mentally retarded defendants, which had become a matter of statutory law in many states. In *Atkins*, the Court held that it was cruel and unusual punishment to execute someone with the mind of a child. A two pronged test was announced that a person with sub-average intellectual functioning and deficits in adaptive skills functioning, manifested before the age of eighteen, is immune from execution. The *Atkins* decision brought with it a whole new arena for litigation, both pretrial and post-trial, related to the IQ and adaptive skills functioning of defendants and a whole new set of associated costs.

Compared to cases tried even ten or fifteen years ago, defense lawyers today have access to information and assistance which is light-years ahead of the relative vacuum within which we used to operate. Mitigation investigators who can put together a complete social history of the defendant’s life, mental health experts, crime scene investigators, etc. are now common-place, which tends to put the defense on a more equal footing with the State and its vast resources. Many states have resource centers

composed of experts in capital litigation who provide trial level guidance to attorneys. Recently, in North Carolina, the Public Appellate Defender's Office has started assigning appellate experts who help ensure that potential appellate issues are properly preserved for later litigation. Numerous listservs and blogs exist which are very helpful to capital litigators as they prepare for trial with all of these resources. Because of this abundance of resources we do a better job than before.

I would like to make two comments about the changes outlined above. First, as expensive as all that assistance may be, I think it is cheaper than the alternative. As I like to remind my prosecutorial adversaries with whom I enjoy a good enough relationship to kid, the District Attorney has an interest in me doing as competent a job as I can do. If I don't, they will be my lawyers in later proceedings in state or federal court.

Our local judge used to be an assistant district attorney and it was difficult to obtain rulings favorable to the defense in close cases in the areas of discovery or exclusion of evidence. Just in the past few years, however, he has perceptibly changed his approach, having said on more than one occasion, "Let's do this right one time." Defense motions which might have been denied a few years ago are now being granted, in the judge's words, "Out of an abundance of caution."

One of my favorites is a motion I have filed a half dozen times and which I just argued in a recent case. It is entitled, "Motion for Order Requiring Investigating Officers to Certify that all Discovery Has Been Provided to the District Attorney's Office." Not only did the judge grant my request that the lead investigating officer from each agency involved put in writing that they had disclosed all the evidence that the defendant was entitled to receive, the district attorney consented to the entry of the order! Undisclosed discovery is a common issue alleged in the attempt to receive a new trial. In arguing this motion last September in an adjoining county, the judge, before granting my motion, revealed the shift in attitude which has occurred over the years. Judge Albright stated, "Back when I was a prosecutor, the attitude of the State on discovery issues was 'I've got mine, you get yours.'" Giving Judge Albright his due, I think his favorable ruling was not only based on an acknowledgement of realities, but also a realization of basic fairness.

Secondly, rather than dreading the eventual examination under the microscope that our trial performance carries, defense lawyers welcome it. It provides additional incentive for us to do our jobs properly. However, litigation is a human endeavor, with all the competing pressures of trying to find the time to do everything possible to be ready for trial. One of the arguments I quite often make in addressing civic groups about why I oppose the death penalty, is that in my opinion no one is competent to defend a person whose life is at stake. Total preparation can never be achieved because, unlike searching a real estate title or preparing a tax return, lawyers who try capital cases can never have the confidence that they have done their job "right." I've never gone into a capital trial thinking that I have done everything that I would have liked to have done in preparing for the trial. So, if I have not done something, or have done something improperly, I welcome the scrutiny because, if a person dies, it should be because of something they did, not because of something I did or did not do.

The changes which I have described in the practice of capital litigation are not cheap, but I believe they are good policy and justified. If the State desires to kill someone, the rule of law requires that such action be carried out consistently with the defendant's constitutional rights.

I used to fairly often "butt heads" with our local judge, the Honorable James M. Webb, during motions, hearings and trials. Now, when I talk with lawyers around the state, I tell them that if Judge Webb is designated to preside over their capital trial, they will get a fair one, because I believe he genuinely endorses the notion that, "Let's do this right one time." Given the magnitude of what the State is trying to do, the process is, as it should be, expensive. And if people don't want to do it right, then, to me, the only option is to not do it.