THE ADEQUACY OF REPRESENTATION IN CAPITAL CASES

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Mr. Chairman and members of the Subcommittee:

Thank you for inviting me to speak on the subject of the adequacy of representation in capital cases, an issue that has been of great importance to me for the more than 20 years that I have been practicing law. Unlike some others testifying this morning, I cannot make any claim to expertise on this question. I am a civil litigator, not a criminal lawyer. But throughout my career, I have felt it important to devote a meaningful percentage of my time to pro bono work, and much of that work has been representing death sentenced prisoners in postconviction challenges. I have represented several people over the years in these kinds of cases. One of the cases, involving a Maryland prisoner named Kevin Wiggins, ended up making its way to the Supreme Court. That experience has given me a window on this process, and has reinforced powerfully a point that should be obvious but perhaps is not -- assuring effective representation for capital defendants is critical to the very legitimacy of our system of justice. It is not just a matter of the stakes for the defendant -- which obviously could not be higher. If defense lawyers do not do their job, we can have no confidence in the outcome of capital trials, and no faith that a death sentence is just.

The right place to start in thinking about the issue of adequate representation in capital cases is the special nature of a capital trial. The capital sentencing process presents unique challenges for, and imposes unique obligations on, defense counsel. Those obligations and challenges flow from the constitutional requirement, which has been part of our Eighth Amendment law for more than three decades, that sentencing procedures in capital cases must provide an opportunity for a defendant to offer any argument in mitigation of sentencing. That is, a defendant must be given the opportunity to put before the sentencer any aspect of his background or character, as well as any circumstance of the criminal act itself, that might reasonably lead a sentencing jury to conclude that the defendant should receive a penalty less then death. As the Supreme Court, speaking through Justice O'Connor, put it in the 1989 decision in *Penry v. Lynaugh*, "[e]vidence about a the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." 492 U.S. at 319. The goal of the process is to ensure a "reasoned moral response" on the part of the sentencer -- to evaluate the defendant's culpability not only in terms of the facts of the crime itself but also, and more importantly, in the context of the defendant's life history.

This elemental constitutional requirement -- a process that ensures a "reasoned moral response" at the sentencing phase of a capital trial -- defines and directs the professional responsibilities of defense counsel. To be sure, defense counsel must do the hard work necessary to contest the prosecution's proof of guilt to the underlying crime. That will mean thorough investigation of the facts of the crime, interviewing witnesses, developing DNA evidence in appropriate cases, etc. But daunting as that work is, it is only part of the task. Defense counsel must build the case for life to be presented at the sentencing hearing in the event the client is convicted at the guilt/innocence stage of the proceeding. In very many (probably most) cases, the lawyer's best hope will lie in convincing the jury to spare the client at sentencing, and not in convincing the jury to acquit at the guilt-innocence phase of the proceedings.

Yet in case after case we see that defense counsel does not do the work needed. That was the point of the Supreme Court's decision in the case I litigated, *Wiggins v. Smith*. In that case, defense counsel decided that they had a good case at the guilt/innocence phase of the trial -- that they could defeat the prosecution's effort to show beyond a reasonable doubt that Mr. Wiggins committed the murder with which he had been charged. So they developed that part of the case -- the case for innocence. But they did next to nothing to develop the case for life -- the argument that Wiggins should be considered less culpable based on his background, character and life experience, and therefore spared death if convicted of the crime. As it turned out, they did not prevail at the guilt/innocence phase. So all they were left with to try to spare Wiggins' life at sentencing was the argument to the sentencing jury that the evidence of his guilt was not so clear and that they should err on the side of caution in deciding the appropriate sentence.

We took the case on at the postconviction stage and stayed with it for the more than 10 years it took to work the case through first state and then federal postconviction review. What we tried to do at the postconviction stage was replicate the work that should have been done earlier. We gathered all the evidence we could about Wiggins' background, upbringing and emotional and psychological health. Critically, we retained a "social history" expert to help us develop that evidence -- someone trained in what it takes to ferret out information from old records and expert in the kinds of interview techniques needed to get people to talk about difficult subjects. Through this effort, which involved hundreds of hours of attorney time in addition to the services of the social history expert, we were able to put together a mitigation case that the Supreme Court would ultimately describe as "powerful." As it turns out, Wiggins had an almost unimaginably horrible childhood. We was routinely abused by his alcoholic mother -- including one instance in which she took his hands and forced them onto a heated burner on the stove to teach the young boy a lesson about playing with matches -- and often went unfed. This persisted until he was 6 years old, when the social services authorities took him from her and placed him in foster care. Unfortunately, he fared little better in the foster care system, which in Baltimore, Maryland at the time was notoriously bad. His foster father in one of his first placements sexually molested him routinely over the course of several years -- leading him eventually to request a different placement. When the authorities moved him to another home, he was subjected to gang rapes by the natural

sons of the new foster family. Eventually he ran away from home as a teenager and lived on the streets. One police officer we found told us that he remembers Wiggins sleeping underneath parked buses at the municipal bus depot in the winter months. Not surprisingly in view of this history, the school and medical records documenting his youth showed a variety of ailments over the years suggesting malnutrition and abuse, as well as repeated diagnoses of borderline mental retardation.

Eventually, of course, the Supreme Court found that Wiggins was denied his Sixth Amendment right to the effective assistance of counsel. Specifically, the Court held that the failure of Wiggins' lawyers to conduct a thorough investigation of his background failed to meet the minimal standards to which counsel must conform to provide effective assistance. And it found that Wiggins was prejudiced by his counsel's ineffectiveness because there was a reasonable possibility that a sentencing jury hearing the evidence that Wiggins' trial lawyers never developed would have decided not to impose a death sentence. On retrial, we continued to represent Wiggins on retrial proceedings in Maryland. We put in hundreds of additional hours of effort to build a case in mitigation and eventually persuaded the prosecution to agree to a plea bargain that eliminated the possibility of a death sentence.

It is possible, I suppose, to say that the Wiggins story is a success story, that it shows how pro bono representation by large corporate firms can make a difference. But the opposite is true. We are proud of our work on this and other cases. But the fact that we need to step in to do such work represents a failure of the system -- one that frustrates the interests of justice all around. The postconviction proceedings in Wiggins' case took more than a decade to resolve, and absorbed enormous resources not only of our firm but also of the state, which had to defend the hard-fought case. During that entire time, there was no certainty and no finality. Wiggins was forced to live with the possibility that he would eventually be executed. The victim's family was denied closure, and the public's confidence in our system of justice was certainly sapped by the interminable delays. All of that could have been avoided had Wiggins' trial counsel done their job effectively in the first place.

This kind of story is all too common. Lawyers routinely fail to do the hard work that is required of them to represent defendants effectively in capital cases. Not every case ends in vindication of the defendant's interests as *Wiggins* did. But many do. And the fact that the representation afforded capital defendants is so often so inadequate is a big part of the reason why postconviction proceedings (state and federal) have assumed such an important role in adding at least some measure of fairness to our capital punishment system. This is not because the norms have not been articulated clearly. The ABA has spoken in clear terms in setting standards for the profession to govern capital defense. And the Supreme Court has spoken in clear terms as well, not only in *Wiggins* but also in the 2000 decision in *Williams v. Taylor*, 529 U.S. 362, and the 2005 decision in *Rompilla v. Beard*, 545 U.S. 374.

Yet in a dishearteningly high number of cases trial lawyers defending people accused of capital crimes continue to fail to do the work necessary to defend their clients

effectively. Sometimes, the explanation will be bad decision-making. A lawyer may feel that he or she has a better strategy for gaining acquittal or avoiding death, one that does not require a thorough investigation. Of course, until a lawyer does the thorough investigation, there is no way to know which strategic option is in the client's best interest. Or a lawyer may simply not comprehend what is required to provide effective representation. Or a lawyer may simply not want to rock the boat in situations where there is no professionalized public defender system and lawyers depend on appointments from local judges to sustain their practice. Most often, however, it is simply a matter of resources. After all, effective representation of a capital defendant often means an investment of many hundreds of hours of lawyer and investigator time. At fixed fees per case, or at the shockingly low hourly rates that have historically prevailed in some locations, a lawyer's own economic well-being would be put at risk by investing the needed effort. Similarly, without access to resources, a lawyer cannot retain the experts needed to develop a case effectively.

The right answer here is clear: more resources. Lawyers defending those accused of capital crimes need to be paid at a level that enables them to put in the effort needed -- the hundreds of hours that it typically takes to do the job right. They need the funds to hire experts -- DNA experts, psychologists, social history experts. And they need the funds to hire investigators to help them dig deeply into the client's history. Ensuring these resources serves everyone's interests. Effective representation at trial increases the public's confidence in the outcome of criminal trials. It takes the pressure off postconviction proceedings, and ensures that the initial trial remains the main event. Postconviction proceedings can function as a safety valve for the rare case -- rather than the backstop for inadequate lawyering at trial. We get more certainty. We get fewer delays. Most importantly, we serve the interests of justice and vindicate the fundamental importance of the right to counsel. That is something that no amount of pro bono representation after the fact in postconviction proceedings can accomplish. Victory in a postconviction proceeding -- particularly one in which the conviction or sentence is invalidated based on ineffective assistance of counsel at trial -- may ultimately advance the interests of justice, but it represents a failure of the system, and an expensive one at that. And private firms cannot possibly handle on a pro bono basis all of the cases that need to be handled under our current system, especially given the hundreds or thousands of hours of attorney time that must be invested to do those cases effectively. We should be investing in the integrity of the criminal trial process, so a case like Wiggins becomes a rare exception and not typical example of our failings.