March 16, 2005

Representative Joe Fowlkes
District address:
8262 Lewisburg Highway
Cornersville, TN 37047

and

32 Legislative Plaza
Nashville, TN  37243

Senator Curtis Person, Jr.
5863 Gardens Reach Cove
Memphis, TN  38120

and

308 War Memorial Building
Nashville, TN  37243

Re:  TN SB 203 and TN HB 1170
   Prohibiting Ex Parte Hearings to Determine the Necessity of
   Investigative or Expert Services for Indigent Capital Defendants

Dear Representative Fowlkes and Senator Person:

   It is my pleasure to submit the following commentary on behalf of the
American Bar Association (“ABA”) regarding the Senate Bill 203 and House Bill
1170 currently under consideration by the Tennessee Legislature. I am the
Director of the ABA Death Penalty Representation Project. I have reviewed the
proposed bill and have consulted with a number of practicing Tennessee
attorneys.

   As you may know, the ABA has long been concerned with the provision of
effective and ethical representation for all those who might be or have been
sentenced to death. In 2003, the ABA approved revised guidelines for defense
counsel in capital cases, which I have enclosed for your convenience. The
ABA Guidelines for the Appointment and Performance of Defense Counsel in
Death Penalty Cases (“ABA Guidelines”) articulate the national standard of
practice for the defense of all capital cases. State and federal courts, including
the United States Supreme Court, have cited to the ABA Guidelines with
Mitchell, 354 F.3d 482, 486 (6th Cir. 2003) (“[T]he Wiggins case now stands for
the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases.

This commentary will identify the ways in which SB 203/HB 1170 does not comport with these "well-established norms" and possibly interferes with the delivery of high quality legal representation that all capital defendants are entitled to receive.

A. The Necessity of Expert Assistance in Capital Cases

The ABA Guidelines describe a “team approach” for effective capital defense. See Guideline 4.1, The Defense Team and Supporting Services. This is because:

National standards on defense services have consistently recognized that quality representation cannot be rendered unless assigned counsel have access to adequate “supporting services [including] secretaries[,] investigators [, and] … expert witnesses, as well as personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencings.”


The ABA Guidelines, therefore, require that:

The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist… [t]he defense team should also contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders and impairments.

ABA Guideline 4.1 (A) 1, 2. This Guideline requires that defense counsel receive the assistance of all expert, investigative, and other ancillary or professional services with the same confidentiality of communication as counsel paying such persons from private funds would have. Guidelines 4.1 (B) (2).

Of particular importance in capital cases is the role of an expert “mitigation specialist” to coordinate the investigation, preparation and presentation of the penalty phase defense. As the Spencer Report found:

Penalty phase investigators, or "mitigation specialists," as they have come to be called, are individuals trained and experienced in the development and presentation of evidence for the penalty phase of a capital case. Their
work is part of the existing "standard of care" in a federal death penalty case (internal citations omitted). Because the hourly rates charged by mitigation specialists are lower than those authorized for appointed counsel, employment of a mitigation specialist is likely to be a cost-effective approach to developing the penalty phase defense.

Federal Death Penalty Cases: Recommendations Concerning The Cost And Quality of Defense Representation, Subcommittee on Federal Death Penalty Cases, Committee on Defender Services Judicial Conference of the United States, May 18, 1998, adopted by the Judicial Conference of the United States September 15, 1998, at 51; see also Federal Judicial Center Resource Guide, p. 14-15 (noting that the appointment of a mitigation specialist is the “standard of care” in capital cases and that, in most cases, such experts are in high demand and not available locally).

Selecting and compensating experts for the defense are an essential part of an effective defense. They must be fully compensated at a rate “that is commensurate with the provision of high quality legal representation” and which fairly reflects the expert's or investigator's “specialized skills.” Guideline 9.1(C). The ABA Guidelines encourage jurisdictions to maintain a parity between the resources available to the prosecution and the defense. Id. at commentary.

B. The statutory right to an ex parte hearing in capital cases in Tennessee

Current Tenn. Code. Ann. § 40-14-207(b)(1984) allows for ex parte hearings in capital cases. Indigent defense counsel can request funds for services, and “the court in an ex parte hearing may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected.” Id. See also Tenn.Sup.Ct.R. 13 § 5(a)(1994)(same). This statutory right also applies in the state post-conviction litigation of capital cases. See Owens v State, 908 S.W.2d 923 (Tenn. 1995).

C. SB 203/HB 1170 Prohibit Ex Parte Hearings in Indigent Capital Cases and Interfere with Defense Counsel’s Ability to Deliver High Quality Legal Representation to Capital Defendants

SB 203/HB 1170 would prohibit ex parte hearings for all indigent defense requests. Such a requirement would put Tennessee at odds with the accepted and recommended practices in other capital jurisdictions. "Many jurisdictions provide, by statute or case law, that requests for expert assistance may be made ex parte so that indigent defendants are not required to divulge confidential work product to the prosecution.” Commentary to the ABA Guidelines, Guideline 10.4,
n. 176 and citing statutory authority from the United States Code that applies in all federal prosecutions, statutory authority from the states of California, Kansas, Minnesota, Nevada, New York, South Carolina, Tennessee, and case authority from the states of Alabama, Georgia, Oklahoma, and Texas).

There is no question that requiring defense counsel to disclose its selection of experts in an open hearing and defend the necessity of his choices to the government’s counsel will have a chilling effect on counsel’s ability to deliver high quality legal services. Such strategic choices must be independent and require the protection of confidentiality. This is especially true when the issues include the sensitive nature of the defendant’s mental health. The essential nature of this function means that limitations on counsel’s ability to select and retain experts will affect the constitutionality of the trial and the result, thus requiring unnecessary resentencings and retrials.

Importantly, as noted earlier, the government is under no similar obligation to disclose and defend its choice of experts to the defense, despite its commensurate use of public funds. Nor are capital defendants who can pay for experts required to disclose and defend their choices. This prohibition would therefore impermissibly disadvantage only impoverished defendants. SB 203/HB 1170 runs contrary to the ABA Guidelines and the spirit of the Criminal Justice Act itself, which seeks to put defendants on equal footing with the government.

D. Summary and Conclusion

In sum, SB 203/HB 1170 appears to conflict with the ABA Guidelines in significant and troubling respects, to the extent that it would not permit constitutionally effective capital representation and the delivery of high quality legal representation. The ABA offers its assistance and resources to assist with the legislature’s consideration of this provision. I would be happy to have a representative of the ABA present for any meetings or hearing that the legislature may schedule on this subject. In the meantime, if you have any questions or if I can be of assistance, please do not hesitate to contact me. Thank you for your consideration.

Respectfully submitted,

Robin M. Maher, Esq.
Director
ABA Death Penalty Representation Project