

What is the Actual Cost Involved in the Indigent Defense of a Capital Case?
A Consideration of the Practical Realities Involved in Representing the Indigent in Death Penalty
Defense Cases.

March 20, 2010 by [Terry Lenamon's Death Penalty Blog](#)

The constitutional right to counsel for those who cannot afford their own lawyer means that the government foots the bill for the defendant's legal counsel. This is true for a great many criminal cases (and the [expansion of the right to counsel](#) continues with the United States Supreme Court), but it is especially important when the [state is seeking the death penalty](#) in a criminal matter.

The Legalities: Legal Attempts to Satisfactorily Address the Crisis in Indigent Defense Costs

No one really challenges that an individual has the right to legal representation when his/her life is on the line. Many people challenge how to pay for that expense, and much has been – and continues to be – written about the [complexities involved in indigent defense cost coverage](#).

For example, in February 2010, the [American Constitution Society for Law and Policy \(ACS\) released a study \(.pdf\)](#) revealing fatal flaws in the procedures surrounding Texas' indigent defense representation. Research was undertaken on a national scale by the Constitution Project and in April 2009, its results were released in a comprehensive, 232 page report on indigent defense entitled "[Justice Denied: American's Continuing Neglect of our Constitutional Right to Counsel \(.pdf\)](#)." There, preeminent legal experts agreed that the current system is chaotic and failing, and offered twenty-two (22) suggestions for salvaging the methodology in which indigent defense is provided in this country.

The Practicalities: Where Does the Money Go?

There are not as many articles written that provide detail on the practicalities of representing the indigent defendant in a capital case. Perhaps lawyers assume that other lawyers know what's being talked about – but that presupposes that others (including every taxpayer in this country) are not interested in the details.

Actual costs involve not only legal fees and the expenses directly attached to the lead attorney's efforts, as well as the additional legal counsel that must be involved in a capital case, but the expenses involved in a wide variety of other vital and necessary areas. These include expert costs, transcription fees, travel expenses, and other needs that rapidly contribute to the high cost of these death penalty cases.

1. The Attorneys' Time

When the state decides to pursue the death penalty in a case, the prosecutor essentially makes two cases out of one. This is because the entirety of the case – from preparation through all the

appeals – will now deal with two trains riding on the same track: first, the determination of guilt or innocence (trial phase) and second, the determination of punishment – and whether the defendant will die for the crime (penalty phase). It will take more than one attorney to defend this case.

Two attorneys are going to be needed in a death penalty defense case. There is simply too much to do for one lawyer to meet his legal and ethical duties of representation otherwise. And, there's the matter of death-qualification: in Florida, as well as most other states, an attorney cannot defend a capital case unless he's been approved to do so, based upon education and past experience in similar matters. When the state is asking to kill a citizen, it's not time for a greenhorn to hurdle a learning curve.

Therefore, at the minimum, you have two attorneys who are working the case. Both will be experienced lawyers. Both will be able to bill a higher hourly rate than a newbie lawyer on any criminal matter. And, in indigent defense cases, it goes without saying that both will be earning much less on the indigent case than they would be on a paying client's case (lost opportunity costs, from an accounting perspective).

2. The Attorneys' Direct Costs (Fixed Representation Costs)

Accompanying the defense attorneys' personal involvement are all those fixed expenses that are tied to his or her legal service. Each lawyer has an hourly rate that must add up over time to a total amount of revenue that can cover his fixed expenses – the things that he has to have up and running in order to do his job.

These fixed costs include all the basics: cellphone expense, office rent, equipment expense (buying the phone system, the copier, the computers, the printers, the fax machines), Lexis or WestLaw contracts (longterm contracts for access to legal research databases), electricity, even the costs of coffee (or a coffee service).

These costs also include salaries for the paralegals, associate attorneys, staff investigators, firm couriers, and other support staff that work on the legal team to get things done. Those motions don't get written, finalized, printed, faxed, and distributed to the court and counsel by the lawyer alone. Many people working together – and working hard, sometimes in very emotional and stressful times – get these things done.

3. Attorneys' Travel to Visit the Client Behind Bars

Indigent defendants facing the death penalty usually aren't out on bail. They're usually living in a cell near the courthouse where their case will be tried. If a public defender is representing them, then his/her office might be nearby. However, if the court has decided to appoint an attorney to represent the defendant, then that lawyer will have to travel from his/her office to the jail in order to meet with the client.

There may be lots of meetings between attorney and client in a death case. And never, ever does the lawyer get the economic advantage of the client coming to him.

4. Investigation Costs – Guilt Phase

First things first, it is the job of the criminal defense attorney to fight – and fight hard – against the prosecutor’s attempt to prove beyond a reasonable doubt that the defendant is guilty of the crime. This is essential for our system of justice. A lazy criminal defense attorney may let down his or her guard against insuring the rights established in our constitution (and our laws) are respected, and with an over-zealous state’s attorney, those rights will be trampled or ignored. It is only through a vigorous adversarial stance that all of us can feel safe in our freedom from government control.

Therefore, a defense attorney in a death case must investigate every lead, every fact, every tidbit that makes up the case. The entirety of the prosecution’s case must be understood, and its weaknesses exposed. The circumstances of the crime must be understood independently of the state’s efforts. The defense must investigate independently exactly what happened in the underlying situation that resulted in the defendant being charged. To do otherwise means the defense just trusts the efforts of the state – and that’s dangerous (and unethical, and illegal).

5. Investigation Costs – Penalty Phase

Along with investigating the crime, the defense in a death penalty case must investigate all the circumstances that make up the state’s “aggravating factors” as well as determine the facts that can be argued as “mitigating circumstances” should the possibility of a sentence of death be reached in the trial. This investigation can be wide, covering lots of territory and time, as well as deep, involving numerous psychological components.

Was the defendant mentally disturbed at the time? Is he mentally challenged to the point that he is considered “mentally retarded” under case precedent (and therefore not subject to the penalty of death)? Are there circumstances of abuse or neglect in his history that help explain the events and lead themselves to mercy? The investigation costs involved in the penalty phase can be just as costly as those in the guilty phase, maybe even higher.

5. Consulting Expert Costs – Guilt Phase

No lawyer worth his salt is going to pretend that he’s an expert on everything. Good lawyers readily admit they’re not even experts on all areas of the law, referring clients as needed to divorce attorneys or tax law firms, or immigration counsel.

In indigent defense cases, lawyers will need expert advice on a variety of facts and circumstances in order to understand what they’re dealing with – and yet, these experts won’t be needed to testify. Sometimes, consulting-only experts get the trial lawyer well-versed enough in the particular area (e.g., some component of forensics, say soil samples, or some area of psychological disorder, such as behaviors that suggest fetal alcohol syndrome) so that the testifying experts can be located and hired.

Rarely are these experts cheap, and they usually bill by the hour. The attorney usually knows them, they have a rapport, and maybe the discussions can be had over the phone, with the help of a courier service or delivery company. Costs will be kept as low as possible, but no expert worth the attorneys' time is going to be inexpensive. They will charge a rate commiserate with their level of expertise.

6. Consulting Expert Costs – Penalty Phase

Consulting experts in the penalty phase may be even more necessary than in the trial phase. Psychiatric consultations on the childhood facts and the current behaviors of the defendant may be needed in order for the attorney to understand what issues he or she is facing in mitigation. Does the defense team need to pursue physical testing or mental testing or both? The legal team won't know, they'll need to consult an expert to guide them.

7. Testifying Expert Costs – Guilt Phase

Testifying experts in the guilt phase will cover all manner of the guilt determination. Law enforcement experts, forensic accountants, crime lab technicians, there is an infinite number of professionals that may be needed to bring the full, factual story to the fact-finder in the case.

Since their expertise, as well as their opinions in the particular case, will be subjected to review by the court before they are allowed to testify, their costs will include the completion of reports and the possibility of court hearings focused solely upon motions to the court on whether or not they should take the stand. The costs here, given their hourly rate, can skyrocket.

8. Testifying Expert Costs – Penalty Phase

After the defendant is found guilty, testifying experts that usually involve at least a doctorate level if not a medical degree will be needed. Mitigation factors involve a number of mental and physical factors that must be addressed. Psychiatric and psychological expertise is mandated. Psychiatrists and psychologists are never cheap, and again, since they are testifying, they may well file reports, and face courtroom scrutiny where they are essentially on trial as to their qualifications before they begin their work, providing an opinion on the underlying case itself.

9. Trial Preparation – Guilt Phase

Defending a capital case at the trial phase is an enormous undertaking. Every document must be reviewed, every witness's recollection understood. Investigators' contributions, expert opinions, and legal briefing must be threaded together into an understanding of what has happened to bring this defendant before this tribunal – and a defense must be mounted as to why he should be allowed to walk free. Hours and hours of attorney time is involved here, as well as those of the legal team. Trial itself may take weeks or months, and preparation happens well into every night and weekend, preparing for the next day, the next week. It is very, very expensive.

10. Trial Preparation – Penalty Phase

Preparation for the event that a guilty verdict is returned begins long before the defense rests. The defense team must dovetail its preparation for the guilt phase with its preparation for the penalty phase, although there may be some work done in preparation for trying the penalty phase that does not occur until guilt has been decided. As described above, there is much, much preparation before a defense attorney will argue against the aggravating factors and for mitigating circumstances in a request for mercy when death is being deliberated. Experts, investigation, legal research, and other time-consuming tasks will be involved. It is not unusual for a single expert's fee in a penalty phase to exceed \$50,000.00.

A Florida County Expert Invoice as an Example of the Detailed Costs Involved Here

How can an expert's fee be so high? An example of the detail involved here can be seen in [the online invoice](#) made available by Gwinnett County, Florida, for use by experts.

Note the hours that the expert is to complete on the form for the categories interview, research, consultation, report preparation, conference with attorney, trial preparation, attend court, and "other". Assuming the expert charges \$500/hour, and charges only a single hour for each of these categories (highly unlikely), the fee would be \$4000.00 – and no expert is going to spend just one hour on these tasks.

Death at the Hands of the Government is the Issue: Indigent Defense in Capital Cases Is Complicated and Costly Because It Should Be.

The right to counsel in a case where an American citizen has been charged with a crime, and the state decides to seek the punishment of death in the case, must stand as sacrosanct. It is an honor to be among those chosen to act as defense counsel in these situations.

However, in all the debate of budgetary costs and the best methods of meeting indigent defense expense, too little light has been shed on how much effort and wherewithal must be undertaken in the fight to save someone's life from capital punishment. Perhaps when more people understand how big the battlefield is, and how much work is involved in each of these cases, then the availability of funds to address the current financial crisis will be more easily found.