

# *Study on quality assurance of legal aid cases for judicial review of death sentences*

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**Abstract:** The promulgation of the Legal Aid Act has made a breakthrough in the provision of legal aid in death penalty review proceedings, but it is not enough to improve the quantity of legal aid, for high-quality legal aid is the key. The purpose of this thesis is to discuss and evaluate the current situation and problems of the legal aid quality assurance system for death penalty review cases in China, and to put forward corresponding recommendations for improvement, so as to guarantee the right to apply for death penalty review of the accused and the right to defence of defence lawyers. In order to monitor the quality and effectiveness of legal aid for death penalty review cases, the Ministry of Justice could establish a mechanism for peer assessment of the quality of legal aid. Through the implementation of these improvement measures, the quality of legal aid will be enhanced and justice will be promoted.

## 1. Introduction

Article 25 of the Legal Aid Law, which came into effect on January 1, 2022, lists defendants applying for legal aid in death penalty review proceedings as those who should be provided with legal aid, and legal aid has made a breakthrough from the absence of legal aid to the existence of legal aid in death penalty review proceedings [1]. However, it is far from enough to be limited to "there"; as criminal legal aid develops, the quality of the cases is the real core. The Legal Aid Law specifies a third-party evaluation and case quality assessment system, and on December 30, 2020, the Ministry of Justice issued the "Rules for Peer Evaluation of the Quality of Criminal Legal Aid Cases" (SF/T0086 - 2020), which draws on the relevant indicators in the peer evaluation of criminal cases that have been implemented with good results and gives guidance to legal aid for death penalty review cases, which are divided into two aspects and "quality". The quality of legal aid for death penalty review cases is divided into two aspects and three time periods: before, during and after. On the one hand, from the point of view of defense lawyers, beforehand, legal aid lawyers should actively meet with each other, read the files in time, and fully inform each other; in the middle of the process, they have to choose a suitable plan for the aided person and provide the court with a complete and effective defense opinion; and in the aftermath, they need to standardize and organize the materials submitted for the contractor so as to facilitate the review. From the court's point of view,

the quality of legal aid for death penalty review cases should include: effective safeguards for the defendant's application to a legal aid lawyer beforehand, safeguards for the legal aid lawyer's right to defend during the process, and the presentation and analysis of the defense opinion in the adjudicatory documents afterward. Only when the implementation of these two aspects and three stages is fully guaranteed can legal aid be called qualified and of good quality, which is also the basis and key to improving the quality of legal aid for death penalty review cases [2]. If we understand the meaning of quality, we will be able to find the key to the lack of defense and the failure to protect the rights and interests of the aided persons in practice, and then we will be able to find the right remedy to improve the quality of the cases and the countermeasures.

## **2. Study on legal aid for death penalty review cases**

The China Judgment and Decision Website centrally publishes the effective judgment documents of courts at all levels, which is an important measure of judicial openness, and allows you to search for the required judgment documents. Enter the Judgment Website, use the advanced search function, select "criminal cases" for case type, "rulings" for document type, and "Supreme Court" for court level to retrieve Criminal verdicts labeled with "death penalty review" are retrieved. We retrieved the criminal verdicts on death penalty review from 2018 to 2022, and conducted statistical and empirically examine the defense situation of defense lawyers in the death penalty review process, with the aim of revealing the reality of the majority of the defendants in the death penalty review process, such as their weak financial strength, insufficient funds to hire defense lawyers for the death penalty review, their low academic qualifications that prevented them from effectively defending themselves, and The court's hearing of defence counsel is a mere formality, etc. The purpose of the study is to reveal the reality of the problems and analyze the reasons for them.

### **2.1 Low participation of defense lawyers in death penalty review proceedings**

During the period from January 1, 2018 to December 31, 2022, a total of 271 published criminal rulings on death penalty review were retrieved from the adjudication documents network. Among them, there were 31 cases in which there was participation of lawyers in the ruling documents, which accounted for 11.4% of the sample size. In criminal proceedings, the effective participation of the defense lawyers will, to a large extent, make the right to defense of the suspects and the defendants to be protection, the 11.4% defense rate naturally cannot talk about the quality of defense. The main reason for the low defense rate of death penalty review cases is still the small number of lawyers who can serve as death penalty review lawyers, which in turn leads to higher lawyer's fees, and there is no realistic legal basis for criminal suspects and defendants in death penalty review procedures to apply for legal aid before January 1, 2022, as many people do not have the ability to afford lawyers' fees and do not meet the conditions for legal aid.

However, 224 of the rulings were appealed on their own initiative after being sentenced in the first instance, accounting for 82.6% of the sample size. This indicates that most defendants still have a strong desire to survive at this stage, and only a small number of clients are not paying attention to their right to defense or questioning the role of lawyers in the trial, thus giving up lawyers to defend them. In the case of such a high appeal rate, can have a lawyer to participate in their defense, but very few, the participation of lawyers is relevant to the judgement of the defendant and the community at large on the fairness of the death penalty review. In the past 10 years, China's death penalty review cases defendants have a strong demand for defense, death penalty review defense lawyers have failed to solve the serious imbalance between supply and demand [3]. The serious imbalance between the supply and demand of death penalty review lawyers has not been resolved. In the current economic situation, social attitudes and so on can not yet realize dramatic changes to solve the problem of low

defense rate, only require the person concerned to pursue the right to defense effect is not obvious, only the state sends legal aid lawyers to fill the serious lack of defense lawyers.

## **2.2 Lack of response to counsel's defense in the criminal decision on review of the death penalty**

One indicator of the effectiveness of counsel's advocacy is whether counsel's advice is accurate, relevant and comprehensive. In the 271 samples, 31 said "listened to the defense counsel", did not respond to the defense counsel's comments on any elaboration of 27, accounting for 87.1%, these 27 only indicated the existence of the defense counsel, the ruling for the defense counsel's comments are not mentioned, It is not known whether the defence counsel entered a plea of not guilty or a plea of guilty to a misdemeanour, what views were expressed on the original verdict, what evidence was challenged, and what new evidence was presented by the defence counsel; ruling documents clearly written defense counsel's opinion and the reasons for the opinion is not adopted only 4, accounting for 12.9% of the sample number, to the "zhang wei intentional homicide, rape, criminal second instance criminal verdict" as an example, the legal aid lawyers have put forward three opinions, the The court decided not to accept all of them based on evidence and facts. The most important part of the ruling, "the Court considers that the part" only states that it agrees with the relevant findings of the first and second instance, and pays no attention to the opinions of the defense lawyers, lacking a mechanism for reasoning in the document.

Some researchers has analyzed data from 491 death penalty review rulings from 2014 to 2017, and only "47" included "hearing from defense lawyers" or other relevant descriptions, a ratio of 4.9% [4]. Of these 47 rulings, only five explicitly stated the defense viewpoint of the attorney, and even if there was a defense viewpoint of the attorney, there was seldom any specific feedback. Hearing of defence counsel is not just a simple "listen" plus "record", should contain a response to the views of the Supreme People's Court in the death penalty review ruling on the hearing of defense opinions. Succinct statement of counsel's defence in the body of the text. Attaching the opinions of defence lawyers on facts, evidence, application of law and procedural issues, reflecting the work done by defence lawyers at the stage of death penalty review, is one of the criteria for improving the quality of legal aid in death penalty review cases.

## **3. Dilemma of legal aid for death penalty review proceedings**

### **3.1 Safeguards for applications for legal aid in death penalty review proceedings**

A defence system that provides legal aid on application requires that the defendant's right to apply must be fully guaranteed, if the right to apply is not guaranteed, there is no way to talk about subsequent defence. If the death penalty review process is to play a real role in preventing and correcting errors, it is necessary first to increase the scope of participation by lawyers, and then to ensure the quality of their participation, the first step being the basis for the second. The promulgation of the Legal Aid Law has greatly alleviated or even eliminated the plight of defendants in death penalty review proceedings who do not have a defense attorney. The law lists defendants applying for legal aid in death penalty review proceedings as those who should be subject to legal aid, ensuring the quality of death penalty cases, and the legal aid lawyers will make up for the vacancies in the defense lawyers in a large number of cases, and will become the main force for effective defense [5]. The main problem has now evolved from the previous "lack of participation by defense lawyers" to "safeguarding the application for legal aid by defendants in death penalty review proceedings", ensuring that defendants are able to apply for legal aid lawyers without difficulty.

In the Legal Aid Law and related laws, only in the death penalty review process "shall inform" the defendant "in writing that he or she may apply for legal aid", "inform" is too general. The provisions

of the "written notice" are too general, at a minimum, this should include: the legal basis for applying for legal aid, the method of applying for legal aid, the rights and obligations of the defendant as well as the legal aid lawyer, and the possible adverse consequences of waiving legal aid, etc. According to the survey statistics of the death penalty review decision from 2018 to the present, the vast majority of defendants do not have a high level of education, so the "written notice" is a good way to inform the defendant that he or she can apply for legal aid. The "written notice" is not only written on paper, but the judicial staff should also explain the relevant issues in a way that the defendant can understand. Finally, there should be a signature of the defendant to show that he or she has fully understood his or her right to apply for a legal aid lawyer at the stage of death penalty review and made a decision to apply or not to apply, especially not to apply, should be written in detail the reasonable reasons for not applying, and if the reasons are not reasonable, the judicial staff should be inquired in person in order to ensure that the defendant fully implements the right to apply.

### 3.2 Safeguards for counsel in death penalty review proceedings

The Criminal Procedure Law was updated in 2012, making significant changes to the death penalty review process, and strengthening the defense rights and interests of the defendant [6]. Specifically: first, the Supreme People's Court shall personally question the defendant in a death penalty review when approving a death penalty case; second, it shall hear the defense opinions of the defense lawyers; and finally, it clarifies the rights of the lawyers to inspect, excerpt, and copy the case files. In death penalty review proceedings, some defendants have difficulty in giving a systematic defence due to their lack of expertise in the law and individual freedom. If lawyers are allowed to advise the judge on the guilt or innocence of the accused and the circumstances of the offence, this will have an impact on the judge's judgement of the truth of the case as a whole, and thus on whether the death penalty should be carried out.

Of the 271 samples, 27 indicated that they had "listened to the opinions of the defense lawyers" but did not elaborate on or respond to the opinions of the defense lawyers, and these 27 rulings made no mention of the opinions of the defense lawyers, so that the defense opinions of the lawyers were not taken seriously. The supreme people's court judges to accept and respond to the defense opinion, is to realize the high quality of the defense of the preconditions. In practice, defense lawyers are not able to be timely arranged to meet with the contractor judge, defense lawyers usually can only reflect their opinions with the judge's assistant or even the clerk, and do not have the opportunity to communicate directly with all the judges of the collegial panel, the upward communication of the opinions is not as effective as it should be, and there is no formation of the downward feedback. In the death penalty review procedure, the opinions of the lawyers are the manifestation of the right of the accused to a defense, the Interpretation of the Criminal Procedure Law of the People's Republic of China, Article 434 states, "During the death penalty review period, if a defense lawyer requests to reflect his or her opinion in person, the relevant panel of the Supreme People's Court shall hear his or her opinion in the office." Compared to the previous article, this provision limits the hearing of opinions to the relevant members of the collegial panel, reasonably removes the judge's assistant or clerk, and clarifies the subject matter of the opinions of the defense lawyers, avoiding the omission or misinterpretation of opinions caused by uploading and downloading.

However, in the actual implementation, the judges involved in the hearing of the opinion is only a form of hearing, some even in the hearing of the opinion before not even consult the file, and the lack of direct communication with the defense counsel, and whether to adopt the opinion of the defense counsel also did not promptly explain, which led to the adoption of the opinion of the degree is very limited [7]. The degree of adoption of the opinion is very limited. When some lawyers have doubts about various aspects of a case, the probability that an application to the judge for access to evidence

will not be followed up is high, which poses a great challenge to the preparation and direction of the lawyers' defense.

#### **4. Improvement of legal aid mechanisms for the death penalty review process**

##### **4.1 Safeguards for defendants in death penalty review proceedings**

After the promulgation of the Legal Aid Law, legal aid lawyers will make up a large number of vacancies for defense lawyers and become the backbone of an effective defense. How to safeguard the application for legal aid for defendants in death penalty review proceedings and ensure that they can successfully apply for legal aid lawyers has become the key to safeguarding the right of the accused to a defense, and it is prominent to ensure that defendants are notified of that right in a timely manner and that they submit their application to the Supreme People's Court. It is particularly important to ensure that defendants are informed of this right in a timely manner and file an application with the Supreme People's Court, and to inform and file the application in writing is more conducive to the protection of the defendant's legal rights [8]. Article 2 of the Provisions on Legal Aid for the Review of the Death Penalty states that "the defendant shall be informed in person of the possibility of applying for legal aid at the time of service of the death sentence, and the application for legal aid shall be forwarded with the case." However, the application form for legal aid does not specify how to ensure that the defendant is aware of his or her rights, how to ensure that the defendant expresses his or her claims truthfully, soberly and voluntarily, and how to ensure that, even if the defendant waives his or her application, the judicial officer informs him or her of the consequences of waiving his or her rights. Therefore, it is recommended to stick to paper legal aid applications. The Application for Legal Aid in Death Penalty Review Cases should be made with reference to the Production of Legal Aid Applications. The application should contain information on whether the defendant has been informed of his or her right to legal aid and the possible adverse consequences of waiving that right. In view of the fact that the vast majority of defendants have a limited level of education and are unable to understand special legal terminology, the judicial officer should inform and explain in a manner that the defendant can understand. When applying for or waiving legal aid, a complete record in writing is required. In addition, it is important to ensure that the duty counsel is present when the application is filled out to ensure that the defendant enjoys the rightful rights and expresses the wishes soberly. The duty counsel, who has no objection to the process of informing the judicial officer and whether the defendant has signed voluntarily, should sign the application and file a copy for retention. Paper-based applications for legal aid ensure that defendants are aware of their rights at minimal cost, provide effective oversight of judicial officers and serve as a strong supporting document for review.

##### **4.2 Guaranteeing substantive feedback from counsel in defence of death penalty review proceedings**

In practice, defense lawyers can not be arranged to meet with the judges in time when they express their opinions upwards, and most of them can only reflect their opinions with the judge's assistants or even the clerks. In response to the formalization of the judge's hearing of defense opinions and the failure of the ruling to respond effectively to the opinions of the defense lawyers, we propose the following three recommendations: first, when the defense lawyers express their opinions in person, the entire panel will listen to them face to face for at least once [9]. When legal aid lawyers are assigned, they should be informed of the list of judges and panel members in a timely manner, so that legal aid lawyers can make direct contact with them and ensure open communication. All members of the panel to listen to lawyers face to face effectively strengthen the judge's personal experience of the

case, and the judge of the opinion of the hearing effect will have a direct impact on the court of lawyers on the quality of the defense. Secondly, the implementation of "hearing defense counsel" article 7, when hearing defense counsel in person, should make a transcript, signed by the defense counsel attached to the file, this will ensure the correctness and completeness of the defence. Third, the death penalty review of criminal verdicts should be added to the description of the defense lawyers and defense opinions.[10]. In the instrument, the name of the legal aid lawyer, the law firm to which he belongs is indicated, and the opinions put forward before the court are set out in detail, the unreasonable parts of the judgment of the first and second instance are challenged, as well as the investigation of the relevant evidence application. In order for the instrument to be justified, it is not only required that the opinion be set out, but also that the judge set out the reasons for adopting or not adopting each opinion. In particular, a convincing explanation must be given for the inadmissibility of the opinion, excluding all questionable parts and ensuring that the result is unique, so that the outcome of the review is perceived as justice rather than injustice.

#### **4.3 Establishment of a peer assessment system for the quality of legal aid in death penalty review cases**

Death penalty review cases are highly specialized, with deep trade barriers, and the subjective evaluation of laymen, including recipients, cannot be used as the basis for judging the professional level and quality of the case. Only professional evaluation by professionals in the industry based on specific norms and standards is objective and correct.[11] The professional evaluation by peers in the industry is the most objective and fair when evaluating whether the operation and handling of a case by a lawyer is accurate, proper and standardized.

According to the meaning of the quality of legal aid in death penalty review cases, corresponding assessment indicators can be set. From the point of view of the defence counsel, they should actively meet with the recipient, read the file in a timely manner, fully inform the recipient and, in the event, choose the option that suits the recipient and provide the court with a complete and effective defence opinion. Subsequently, the submission of the contractor's materials was standardized for review to ensure the quality of legal aid for death penalty review cases. Therefore, the first-level indicators should include: actively and effectively meeting with the aided person, timely reading of the file, Fully informing recipients of their rights, providing effective defense opinions, and standardizing and submitting the contractor's materials. After the release of the Peer Evaluation Rules on the Quality of Legal Aid Cases for Death Penalty Review, professional evaluators were selected; these evaluators needed to have extensive experience in handling major criminal cases, death penalty cases, and legal aid, and more than 10 consecutive years of practical experience in legal services in related fields. Evaluators are screened by the judiciary or legal aid organizations they have established and are trained and tested before participating in evaluations. Peer assessment officers to exercise substantive judgement in assessing the case. Evaluating the correctness of the defence strategy and methodological thinking of the contracting attorney relies on the individual's professional knowledge as well as on an assessment of their value. The rules of evaluation are used to determine whether the conduct of the contracting attorney is standard and whether the case is being handled in a competent manner.

Availability of the Rules for Peer Assessment of the Quality of Legal Aid Cases for Death Penalty Review with peer assessors the indicators of the Peer Assessment Rules for the Quality of Legal Aid Cases on Death Penalty Review have since been further refined and improved. This is ultimately reflected in the improvement of the quality of legal aid case collation. It can be predicted that with the addition of legal aid to the death penalty review process, the number of commissioned cases will decrease, more professional criminal lawyers will turn to handling death penalty review legal aid

cases[12] and a large influx of excellent legal resources for death penalty review cases, the quality assessment criteria for death penalty review legal aid cases will become increasingly refined, gradually leading to an improvement in the quality of cases.

## 5. Summary

It has been two years since the Legal Aid Law was formally implemented, among the 271 judgments searched were two exceptional rulings - Zhou Liang's Criminal Ruling of Second Instance for Robbery and Zhang Wei's Criminal Ruling of Second Instance for Intentional Murder and Rape, which were undertaken by two legal aid lawyers, Hu Xingzhong and Sun Hongyan, respectively. This is the practical application of legal aid in the death penalty review process, but also as the last threshold of human rights safeguards, reflecting the state's care for the defendants in death penalty review cases and determination to uphold social justice [13]. The State's care for the defendants in death penalty review cases and its determination to firmly uphold social justice. Through the analysis of real-life data, we summarize the real-life dilemmas faced by legal aid in the death penalty review procedure, and put forward corresponding suggestions on the improvement of the procedure and the real-life problems. As scholars deepen their theoretical research in this area and judicial officials enrich their experience in practice, it is believed that, in the near future, every defendant in death penalty review cases will be able to have a high-quality legal aid attorney, and experience the protection and concern of the Party and the State, and that the legal aid system for death penalty review cases will be more complete.

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