A State of Denial:

Texas Justice and the Death Penalty

Texas Defender Service

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Texas Defender Service (TDS) is a private, 501(c)(3) non-profit organization. Since 1995, TDS has provided direct representation to indigent inmates on Texas' death row, consulted with other lawyers litigating such cases, and intervened in unusual cases where expert legal assistance was urgently needed. We strive to improve the quality of representation for Texas death row inmates in three ways:

Direct Representation of Death-Sentenced Prisoners

TDS' staff attorneys handle a limited number of cases and strive to provide thorough representation that will serve as a benchmark of quality. By restricting the number of cases we handle, TDS is able to ensure that staff attorneys can devote sufficient time to thoroughly investigate and brief each case. TDS focuses its attention on cases with broad significance to capital representation in Texas.

Consulting, Training and Case-Tracking

In 1999, TDS received a three-year grant from the Death Penalty Representation Project of the American Bar Association, which permits TDS to (1) develop a system to track Texas capital cases; (2) identify issues and cases appropriate for impact litigation; (3) develop sample pleadings and brief banks to be distributed through a national website; (4) identify and intervene in cases of complete system failure; (5) provide "on the ground" assistance to the ABA's efforts to recruit law firms to take death penalty cases on a *pro bono* basis, and consult with those attorneys; and (6) work with other state and national organizations to train attorneys representing inmates on death row.

Trial Project

TDS' Capital Trial Project, the first of its kind in Texas, seeks to raise the quality of indigent capital trial defense in Texas. Specifically, the project provides targeted support on issues critical to capital trials by developing and compiling training materials and legal pleadings, providing limited individual case consultation, developing a system to identify capital defendants and their attorneys as soon after indictment as possible, collecting case specific information for purposes of tracking capital cases, creating and maintaining a database of forensic experts, and working with community groups and state government to promote policy initiatives and to raise public awareness of the fundamental unfairness of capital trials in Texas.

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A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY

Executive Summary

The nation is embroiled in a debate over the death penalty. Each day brings fresh accounts of racial bias, incompetent counsel, and misconduct committed by police officers or prosecutors in capital cases. The public increasingly questions whether the ultimate penalty can be administered fairly – free from the taint of racism; free from the disgrace of counsel sleeping through a client's trial; free from the risk of executing an innocent person. Support for the death penalty is falling, and across the country, momentum gathers for a moratorium. Even death penalty supporters – such as Illinois Governor George Ryan – have acknowledged the need for fundamental reform.

In Texas, the call for reform has been deflected by state officials' aggressive defense of the Texas system. Repeatedly, Governor Bush and others have defended the administration of the death penalty. Texas Attorney General John Cornyn has gone so far as to describe the death penalty in Texas as "a model for the nation."

This report challenges that confident assessment. To show why Texas justice is not a model for anyone, we have undertaken a preliminary examination of the Texas death penalty system. We have conducted original research into the discriminatory charging practices of Texas prosecutors. We studied hundreds of cases, including every published decision (and many unpublished decisions) of the Texas Court of Criminal Appeals in capital cases in the modern death penalty era. We examined over half of the capital post-conviction appeals filed in Texas since 1995 – a stage of the appeals that has never before been systematically scrutinized – and we evaluated treatment given to those appeals by the state courts.

In this Report, we explain and lay bare many disturbing features of a thoroughly flawed system.

CHAPTER ONE
A Brief Overview

In this Chapter, we set forth a preliminary introduction to the Texas death penalty system: the death row population, the procedure by which people are sentenced to death, and the outlines of the torturous path of post-conviction appeals.

CHAPTER TWO
Official Misconduct: A Deliberate Attack on the Truth

We examined and assembled in this report numerous examples of Texas death penalty trials in which the prosecutors failed to discharge their duty to learn, disclose, and speak the truth. After an extensive review of Texas death penalty cases in the post-Furman era, we

identified 84 cases in which a Texas prosecutor or police officer deliberately presented false or misleading testimony, concealed exculpatory evidence, or used notoriously unreliable evidence from a jailhouse snitch.

- In 41 of these cases, state officials intentionally distorted the truth-seeking process by engaging in practices that resulted in the presentation, or serious risk of presentation, of false or misleading evidence.

- In 43 documented cases prosecutors relied upon the inherently unreliable testimony of jailhouse informants, despite the obvious risk that inmates may fabricate testimony to curry favor with authorities. In many of those cases, such testimony was the primary evidence used to obtain a conviction.

Texas prosecutors freely engage in tactics that other jurisdictions have found violate due process. In multiple-defendant cases, for example, Texas prosecutors have presented irreconcilably inconsistent theories of the same crime: to the first jury, the prosecutor presents evidence and argument that 'A' shot the victim while 'B' stood by; in a later trial to a different jury, the same prosecutor presents evidence and argument that 'B' shot the victim, while 'A' stood by.

In other cases described in our report, police and prosecutors have suppressed evidence showing that someone other than the defendant committed the crime, have lost or destroyed potentially exculpatory evidence, have resisted the forensic examination of evidence that could exonerate the defendant, have manipulated witnesses' testimony to support the prosecution's theory despite contrary evidence, and have used threats against defendants or their family members to coerce confessions.

Several innocent men have been released from Texas's death row. These wrongful convictions usually stemmed from misconduct committed by prosecutors or police officers. In the overwhelming majority of these cases, the misconduct that sent these men to death row only came to light years after the trial had ended. Since official misconduct is by its nature hidden, it is always difficult to expose. Today, new procedures sharply limit a defendant's ability to secure review of his case in state and federal court, making it unlikely that the truth about the wrongful conviction of an innocent person will ever come to light.

CHAPTER THREE
A Danger to Society: Fooling the Jury with Phony Experts

We treat separately another kind of official misconduct: those cases involving junk science, including "predictions" of future dangerousness, hair comparison evidence, and bite mark testimony. Of the sample we examined, we found *160 cases* which contained some form of "scientific" evidence of dubious reliability.

- In 121 cases, an "expert"psychiatrist testified with absolute certainty that the defendant would be a danger in the future. In the majority of those cases, the

predictions were based on hypothetical questions, or only the most perfunctory interview with the defendant. These impossibly certain predictions of future behavior have been universally condemned as junk science. When the American Psychiatric Association expelled from its ranks the leading proponent of this testimony, he attacked the APA as "a bunch of liberals who think queers are normal."

- In 36 cases, the state relied upon hair comparison testimony – a practice which has been repeatedly proved to be inaccurate and misleading – to obtain a conviction. This "science" is fully replaceable by highly reliable mitochondrial DNA technology.

Because many case records and court opinions are unavailable, these numbers are extremely conservative, and likely represent only a fraction of the cases in which the state relied upon junk science to obtain a conviction and sentence of death.

CHAPTER FOUR
Race and the Death Penalty: The Inescapable Conclusion

In this Chapter, we studied the persistent racism in the Texas death penalty, interviewing practitioners across the state regarding the jury selection process, researching the effect of discrimination statewide, and conducting original research into the charging practices of one East Texas county.

Though more comprehensive statewide research must be done, our data reveals a clear pattern of disparity in the punishment meted out to those convicted of killing whites as compared to those convicted of killing non-whites, despite the fact that black males are the most likely murder victims. Our research indicates that the death penalty is used most often to punish those convicted for murdering white women, the least likely victims of murder.

- While a 1998 study indicates that 23% of all Texas murder victims were black men, only 0.4% of those executed since the reinstatement of the death penalty were condemned to die for killing a black man.

- Conversely, as of 1998, white women represented 0.8% of murder victims statewide, but 34.2% of those executed since reinstatement were sentenced to die for killing a white woman.

- Capital juries in the counties we profile are far "whiter" than the communities from which they are selected. The overall picture that emerges of the Texas death penalty is stark: non-whites are for the most part excluded from the process of assessing a punishment that is disproportionately visited upon them. African-American Texans are the least likely to serve on capital juries, but the most likely to be condemned to die.

CHAPTER FIVE
Executing the Mentally Retarded

Despite a growing national consensus that defendants with the mental age of a child should not be subject to the death penalty, Texas continues the practice of allowing the mentally retarded to be sentenced and put to death. Thirteen states and the federal government have banned the execution of the mentally retarded. Just last year, the Texas Senate passed a bill to ban the execution of the mentally retarded, but the bill was scuttled by the Texas House of Representatives.

Although there are many inmates – both those executed and those who are still on death row – who have never undergone even preliminary I.Q. testing, we know that, to date, Texas has executed at least six mentally retarded inmates. In this section, we profile two such men: one who has been executed; one who is still on death row.

- Mario Marquez, whose jury never heard he was retarded, with an I.Q. of 66. When the trial judge and prosecutor learned the extent of Marquez's impairment, they joined his new lawyer in asking that he be spared. Their plea fell on deaf ears and Marquez was executed the day George W. Bush was inaugurated Governor.

- Doil Lane, who may soon be executed by the State of Texas. After Lane gave a confession to a Texas Ranger, he crawled into the officer's lap and began to cry. Throughout his life, Lane's I.Q. has measured consistently between 62 and 70.

CHAPTERS SIX AND SEVEN
The Right to Counsel in Texas: You Get What You Pay For; and
Sham Appeals: The Appearance of Representation in State Habeas Corpus

Recent publicity has focused the nation's attention on Texas defense lawyers who slept through capital trials, ignored obvious exculpatory evidence, suffered discipline for ethical lapses, or used drugs or alcohol while representing an indigent capital defendant at trial. Defenders of the system dismiss these cases as an aberration. Our research indicates otherwise.

- In some cases, counsel's performance was the product of his own greed or ineptitude. Joe Lee Guy was represented at trial by an attorney who ingested cocaine on the way to trial, and consumed alcohol during court breaks. Guy's state habeas attorneys failed to investigate the misconduct – which means those facts may never be considered by either a state or federal court.

- In other cases, blame lies with the State's refusal to both appoint lawyers with sufficient experience and training and to fund an adequate defense. For example, despite knowing about his client's history of mental illness, Paul Colella's lawyer failed to make any inquiry into his client's psychiatric history. The only evidence

Colella's jury heard about his background before sentencing him to death was a brief plea from his mother.

Further, the Texas Court of Criminal Appeals routinely denies any remedy to inmates whose court-appointed lawyers performed poorly. The Court has forced lawyers to remain on capital cases even when the lawyers themselves expressed doubts about their ability to handle such cases, and it has denied relief to two death row inmates whose lawyers slept through trial. The Court's rationale in these two cases – that the inmate failed to show that he was harmed by counsel's sleeping – reflects a profound disregard for the constitutionally-guaranteed right to effective assistance of counsel.

When the truth has been hidden by the State or ignored by defense counsel at trial, post-conviction appeals are the only opportunity an inmate has to set the record straight. Yet the quality of counsel in these appellate proceedings has received almost no attention. To evaluate whether post-conviction counsel in Texas are providing the representation demanded by a capital case, we examined over half the post-conviction appeals filed in Texas since 1995 (187) – a study never before conducted. Our findings are deeply unsettling.

- In 42% of the appeals, post-conviction counsel appeared to have conducted no new investigation, and raised no extra-record claims – even though this is the only type of claim that can be considered for review in such a proceeding.

- In many cases, appointed attorneys merely repeated, sometimes word-for-word, claims which had already been rejected by the courts in a previous appeal- practically guaranteeing that there would be nothing for the courts to review in state *or* federal court.

- In approximately one-third of the cases reviewed, the post-conviction application was under 30 pages long. In 17%, the application was under fifteen pages long. Such short applications can barely contain the requisite procedural formalities, let alone the legal arguments and factual assertions that are necessary to present a constitutional claim of error.

- In a number of cases where patently inadequate state habeas applications were filed, subsequent investigation has revealed significant constitutional errors – including an alcoholic trial attorney and a possible claim of innocence – that were not reflected in the habeas application, and would have remained undiscovered if they had continued on the normal track of Texas habeas appeals.

Further, the Court of Criminal Appeals has displayed disgraceful indifference to these problems. The Court has taken no action to protect the rights of defendants – who were promised "competent" counsel by the Texas Legislature – even when the post-conviction lawyers it appoints have displayed obvious signs of inexperience and incompetence. Not only is there no standard of review for these appointed attorneys, there also is no oversight of their work.

CHAPTER EIGHT
The Myth of Meaningful Review

Officials in Texas insist that redundant levels of appellate review will prevent wrongful convictions, and that deficiencies at trial will be corrected in post-conviction appeals. This rhetoric of "super due process" is meant to reassure the public that, despite the astounding number of executions in Texas, each case has received close scrutiny in the state and federal courts. In many cases, however, the notion of careful and meaningful review is a myth. For example, our study found that:

- In the great majority (79% of the 103 cases studied) of post-conviction cases, the judge never held an actual hearing on the inmate's claims of constitutional error, but instead relied merely on whatever documents were submitted.

- In 83.7% of the cases reviewed, the trial court's factual findings were identical or virtually identical to those filed by the prosecutor. In 93% of these cases, the Court of Criminal Appeals summarily adopted the trial court's "opinion." In all but the most unusual cases, the opinion then binds the federal court.

Few cases illustrate the myth better than Gary Graham's. After Graham's initial post-conviction proceedings proved unsuccessful, his new post-conviction attorneys found compelling evidence to support Graham's longstanding claim of innocence. Graham spent the next seven years trying to secure an evidentiary hearing – in state and federal courts – at which the strength of his newly developed evidence of innocence could be measured against the prosecution's single eyewitness. He never got it. The state courts adopted "findings" penned by the prosecutor assessing Graham's innocence claims as if there had been a hearing where witnesses testified – but there was no such hearing. The prosecutor's version of the facts controlled the litigation in subsequent proceedings, and no federal court ever reviewed the merits of Graham's claims.

CHAPTER NINE
A Bitter Harvest

In our final chapter, we profile the cases of six men executed despite substantial and compelling doubt about their guilt. Some of these cases received widespread national attention, like the case of Gary Graham. Others were executed in obscurity. These six men, however, have at least two things in common. In each case, the truth came to light long after the trial – long after it had been suppressed by the State of Texas, ignored by defense counsel at trial, or dismissed by the courts. And in each case, the truth came too late.

CONCLUSION

Five years ago, the State of Texas implemented several changes in the system of review of death penalty convictions. These changes, however, have done very little to repair a system that needs fundamental reform. Indeed, some of the changes have backfired. The reforms to state post-conviction appeals were intended to speed up the process, while ensuring fairness by granting defendants a right to competent legal assistance. However, many of the lawyers appointed under the law do not know how to provide effective representation in state habeas proceedings and end up grossly mishandling this critical stage of the case. Thus, the 1995 reforms created merely an appearance of review, and thwarted meaningful access to the state and federal courts. Neither this reform, nor any other, has slowed the Texas death penalty system's powerful but flawed rush to execution.

In this report, we have assembled an unprecedented volume of objective evidence that raises profound questions about the fairness of how and when the death penalty is applied. We articulate the scope and breadth of the underlying problems, and offer preliminary recommendations for change. We confirm the critical need for a thorough investigation of every capital case, and we show that all too often, such an investigation either does not take place, or takes place too late for the courts to consider it. In short, we lay bare a system in desperate need of reform. We urge all who are committed to justice to read our report thoughtfully. It compels the conclusion, reached by increasing numbers of Americans, that our current method of enforcing the death penalty does violence to the ideal of basic fairness that is supposed to be the foundation of our criminal justice system.

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PREFACE

Texas leads the nation in executions, and has the second largest death row in the country. While anecdotes about Texas's administration of the death penalty are legion, there is relatively little concrete statistical data about the system as a whole. Due in large part to the problems identified in this report – especially the lack of competent trial and post-conviction counsel, and state misconduct – it is impossible to know the extent to which the fundamental fairness of many Texas death penalty cases has been compromised without first conducting a thorough investigation of each case. In fact, some of the cases discussed in this report only came to our attention by pure chance, usually when a crisis arose that required immediate intervention.

Thus, our report, while representing a careful and time-consuming examination of a number of issues vital to the administration of the death penalty in Texas, merely scratches the surface. What is clearly visible through this window into the system, however, is that an intolerably high number of people are being sentenced to death and propelled through the appellate courts in a process that lacks the integrity to reliably identify the guilty or meaningfully distinguish those among them who deserve a sentence of death.

CHAPTER ONE

Brief Overview: The Death Penalty in Texas

I. Texas's Death Row

To fully evaluate capital punishment in Texas, one must appreciate the relative frequency with which it is imposed and the legal procedures governing its use. In 1972, in Furman v. Georgia, the United States Supreme Court invalidated the existing system of capital punishment.[1] Some Justices of the highly fractured Court compared the arbitrary manner by which people were convicted and sentenced to death to a "lottery"[2] or getting "struck by lightning."[3] The result was that, while the Court did not condemn the practice altogether, capital punishment was rejected in its then-existing form. In the wake of Furman, the Texas Legislature enacted a new death penalty statute,[4] which the Supreme Court upheld in 1976.[5] When we speak of "the modern era" of the death penalty, we mean the death penalty as it has been administered since 1976.

There are currently 438 men on death row at the Terrell Unit of the Texas Department of Criminal Justice, Institutional Division, in Livingston, Texas, and seven women on death row at the Mountain View Unit in Gatesville, Texas. In the modern era, we have condemned 857 people to death – approximately one every 11 days. On average, 40-50 new people arrive each year. One-third are sent by Harris County (Houston).[6] Approximately 64% of Texas's death row are people of color (40% African American; 22% Hispanic; 1% Other); the remaining 36% are Caucasian.

In 1982, Charlie Brooks became the first person executed in Texas in the modern era. As of this report, Texas has executed 232 people since then – three times as many as the state with the second highest number of executions, Virginia.[7] If Texas were a country, it would rank fifth in the world in executions. So far this year, Texas has executed 33 people, and eight more

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[1] Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam).

[2] *Id.* at 293 (Brennan, J., concurring).

[3] *Id.* at 309 (Stewart, J., concurring).

[4] TEX. CODE CRIM. PROC. art. 37.071 (1974). For a thorough discussion of the legislative history of the Texas post-Furman death penalty statutory scheme, see Michael Kuhn, Note, *House Bill 200: The Legislative Attempt to Reinstate Capital Punishment in Texas*, 11 HOUS. L. REV. 410 (1974).

[5] Jurek v. Texas, 428 U.S. 262 (1976).

[6] *See* Texas Department of Criminal Justice, *Offenders on Death Row, at* http://www.tdcj.state.tx.us/stat/offendersondrow.htm. Those figures would have been considerably higher but for a series of Supreme Court capital cases from Texas in the 1980s that invalidated well over 100 death sentences. *See* Penry v. Lynaugh, 492 U.S. 302 (1989); Estelle v. Smith, 451 U.S. 454 (1981) Adams v. Texas, 448 U.S. 38 (1980).

[7] *See* Death Penalty Information Center, *Executions, at* http://www.deathpenaltyinfo.org/facts.html#Executions. As of August 1, 2000, the number of people executed in Virginia was 77. *Id.*

executions are scheduled to take place before the end of the year.

II. The Capital Offense and Trial

Texas permits the death penalty to be imposed for 11 offenses. These include murder during the course of a burglary, robbery, or sexual assault; murder for hire; and the murder of a child who is less than six years old.[8] If a defendant is charged with a death-eligible offense, the prosecution then chooses whether to seek the death penalty.[9]

Death penalty trials are bifurcated into a "guilt/innocence phase" and a "sentencing phase." During the initial phase, the jury determines whether the defendant committed the offense charged. If a defendant is found guilty of a capital offense, and the prosecution is seeking the death penalty, the case enters the sentencing phase.[10] The sentencing phase occurs in the same court, before the same jury, and generally follows immediately after the conclusion of the guilt/innocence phase. At the sentencing phase, the jury may hear evidence regarding the defendant's character, personal background, criminal history, and/or mental health.[11]

At the end of the sentencing phase, the trial judge submits questions, known as "special issues," to the jury. The first question, which is always asked, is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (the "future dangerousness" question).[12] The second question is "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken."[13] This question is asked only if the evidence submitted in the guilt/innocence phase raises the possibility that, although another's acts actually caused the victim's death, the defendant may be held responsible for the death as well.[14] This might occur, for instance, if the defendant and an accomplice committed a robbery, and the accomplice shot a bystander.[15]

If the jury answers "no" to either question, the death sentence may not be imposed, and the defendant is sentenced to life in prison. A person who is sentenced to life in prison on a capital crime is not eligible for parole until he has been incarcerated for 40 years.[16]

If the jury answers "yes" to each question, it considers a third question: "[w]hether,

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[8] TEX. PENAL CODE § 19.03.

[9] TEX. CODE CRIM. PROC. art 37.071(1).

[10] TEX. CODE CRIM. PROC. art 37.071(2)(a).

[11] TEX. CODE CRIM. PROC. art 37.071(2)(a).

[12] TEX. CODE CRIM. PROC. art 37.071(2)(b).

[13] TEX. CODE CRIM. PROC. art 37.071(2)(b).

[14] TEX. CODE CRIM. PROC. art 37.071(2)(b).

[15] TEX. CODE CRIM. PROC. art 37.071(2)(b)(2); TEX. PENAL CODE § 7.01 & 7.02 (on law of the parties).

[16] TEX. CODE CRIM. PROC. art 37.071(2)(e)(2)(B).

taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment, rather than a death sentence be imposed."[17] If the jury answers "yes" to this final question, the defendant is sentenced to life in prison. If the jury answers "no," the defendant is sentenced to die.[18]

III. The Appeal and Post-Conviction Review

After the conviction and death sentence, death penalty cases are subject to essentially three stages of post-conviction review: direct appeal, state "habeas corpus" proceedings, and federal "habeas corpus" proceedings.[19] The "direct appeal" is conceptually (and usually chronologically) the first post-trial review. On direct appeal, the prisoner generally raises challenges to rulings made by the judge during trial, such as the judge's decision to admit or exclude a certain item of evidence, a faulty instruction to the jury, or the improper questioning of witnesses. Such issues, by their nature, appear "on the record" of the trial; that is, all the information necessary for the reviewing court to decide them is present in the transcript of testimony, written motions, and other documents from the trial. Indeed, during the direct appeal, the defendant's attorney cannot go "outside the record." If the attorney learns of new facts relevant to the fairness of the defendant's conviction which were not mentioned during the trial, she may not mention them in the direct appeal.

"Habeas corpus" proceedings, on the other hand, most often involve constitutional questions about the fairness of the trial (whether the prisoner's trial lawyer performed competently, or whether the prosecution suppressed evidence that someone other than the prisoner may have committed the crime), which usually cannot be decided based on the trial record alone. Instead, issues raised in habeas corpus proceedings rely on facts which do not appear in the record. For example, an attorney may discover during a habeas appeal that the trial attorney failed to investigate his client's mental health history, so relevant evidence must be added to the trial record. Or, an attorney may review the State's file and discover a document that reveals an eyewitness identified someone other than the defendant, a document that should have been turned over to the trial defense attorney.

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[17] TEX. CODE CRIM. PROC. art 37.071(2)(e).

[18] TEX. CODE CRIM. PROC. art 37.071(2)(g). Under the statute as originally enacted, juries were asked to answer three narrow statutory special issues: (i) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (ii) whether there is a reasonable probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society; and (iii) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. TEX. CODE CRIM. PROC. art. 37.071 (1974). Upon unanimous affirmative answers to the special issues, a death sentence was automatic; a negative answer to any one special issue by ten or more jurors would result in a life sentence. TEX. CODE CRIM. PROC. art. 37.071 (1974). Article 37.071 was significantly amended in 1991, effective with respect to all capital murders committed after September 1, 1991. TEX. CODE CRIM. PROC. art. 37.071 (1991).

[19] Terminology can be arcane in this area of the law. "Direct appeal" is also called "direct review." Habeas corpus proceedings are also called "post-conviction" or "collateral attack" proceedings.

The issues raised in state court define and limit the scope of habeas review in federal court. While there are numerous constraints on a federal court's power to correct errors in the state court proceedings, the overriding principle is simply that the quantity of review in federal court will be, at most, no greater than the extent of review in state court. That means, in turn, that the *quality* of review in federal court depends directly on the *quality of representation* in the earlier, state court stages of the process. If the defendant had competent counsel during state court proceedings, and that lawyer raised every available challenge in precisely the manner required by state procedural rules, then he will be entitled to at least some examination of those claims in federal court. If, however, the lawyer during state court proceedings (whether at trial, on direct appeal, or in habeas corpus) is incompetent, and fails to make the right legal objections in the right way at the right time, then the defendant may lose his claim to any subsequent review of whether he had a fair trial.

Moreover, in any system of post-trial review of capital cases, the *substance* of the verdict – for example, whether the defendant is, in fact, guilty or deserving of a death sentence – is almost never at issue. Instead, the overwhelming majority of appellate and post-conviction proceedings concern whether the *procedures* that led to the verdict met minimal standards, not whether the defendant is innocent, or what the appropriate sentence should be. Incredibly, in *federal* habeas corpus proceedings, the Fifth Circuit has held it has no power to assist a defendant who can show that he did not commit the crime but cannot point to anything irregular about the procedures used to convict him.[20]

Finally, it is crucial to understand that the inmate has only "one bite at the apple." Second or "successive" habeas petitions – in either state or federal court – are looked on with extreme disfavor; only in very rare cases will the courts even consider such appeals. For all intents and purposes, if the facts are not discovered and properly presented in the defendant's initial habeas corpus proceedings, they will never be considered by the courts, no matter how grave the constitutional error alleged.

[20] *See, e.g.,* Lucas v. Johnson, 132 F.3d 1069, 1074 (5th Cir.), *cert. denied*, 524 U.S. 965 (1998); Herrera v. Collins, 954 F.2d 1029, 1033-34 (5th Cir. 1992), *aff'd*, 506 U.S. 390 (1993).

CHAPTER TWO

Official Misconduct: A Deliberate Attack on the Truth

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. . .[and] whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

United States Supreme Court in Berger v. United States (1935)[1]

I. Introduction: Tilting the Scales of Justice

The stakes in capital cases are high – not only for the accused and defense counsel, but also for police officers and prosecutors. Rightly or wrongly, prosecutors in Texas often rely heavily on their record in capital prosecutions, or their zeal in being willing to prosecute for death, to appeal to the electorate. Similarly, police officers feel intense pressure to solve capital crimes and to help prosecutors succeed in the prosecution of capital crimes. The cumulative pressures to get convictions and death sentences and have executions carried out in capital cases all too often push prosecutors and police officers away from the prosecutorial principles expressed in Berger v. United States or in the contemporary statement of the same principles contained in the Texas Code of Criminal Procedure. While it is "the primary duty of all prosecuting attorneys . . . not to convict, but to see that justice is done," and "not [to] suppress facts or secrete witnesses capable of establishing the innocence of the accused,"[2] the political pressures squeezing in on law enforcement officials in capital cases often make these duties hard to honor.

Caught in the vise of political pressure, police and prosecutors have left a record that no one should be proud of. In one case, for example, an innocent man was repeatedly tried on flimsy evidence and fabricated testimony. In another, a police officer obtained a dubious confession through threats of torture to the defendant's family, then lied about his knowledge of this scheme at trial. In yet another, police and prosecutors pursued an innocent African American, despite evidence that showed that one of the defendant's white co-workers was the killer.

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[1] Berger v. United States, 295 U.S. 78, 88 (1935), *overruled on other grounds by* Stirone v. United States, 361 U.S. 212 (1960). *See also* United States v. Leon, 468 U.S. 897, 900-901 (1984) (recognizing general goal of establishing "procedures under which criminal defendants are acquitted or convicted on the basis of all the evidence which exposes the truth") (internal citation and quotation omitted).

[2] TEX. CODE CRIM. PRO. art. 2.01.

Tragically, the cases of official misconduct described in this chapter are not rarely occurring aberrations. Compelling evidence of misdirected prosecutions, police work designed to convict a predetermined suspect, and the knowing presentation of false testimony surfaces all too often in Texas capital cases. Identified in this report are 41 cases[3] in which official misconduct contributed to the death penalty. As we explain in the conclusion to this chapter, we believe that we have captured only a portion of such cases, because official misconduct is most often concealed and difficult to expose.

No system of justice is immune from the danger of official wrongdoing. The test of whether a legal system merits public confidence is not its infallibility, but rather its capacity to limit abuses of power, to expose those abuses when they occur, and to provide meaningful remedies. As the record compiled in this chapter demonstrates, the Texas death penalty system fails the test. Far too often, the objective of the people's representatives in Texas death penalty cases is not to find the truth, but to get a conviction against a convenient or vulnerable suspect. Far too often, appellate judges in Texas have rationalized or simply overlooked injustice.

II. The Tip of the Iceberg: A Reappraisal of Some Classic Misconduct Cases

For justice to be served, prosecutors and police first must learn the truth: they may not intentionally avoid evidence that points away from their favored suspect,[4] nor, of course, may they manufacture false evidence.[5] Second, prosecutors must disclose the truth and provide all exculpatory evidence to the defense.[6] Third, police and prosecutors must speak the truth: they may not present testimony they know to be false, and they must correct any perjury of which they become aware during trial.[7]

These duties – to learn, disclose and speak the truth – are vital safeguards against wrongful convictions, unfair sentences and the execution of the innocent. These safeguards have been absent in too many Texas cases.[8]

It might be tempting to view the cases we discuss in this chapter as aberrations in an otherwise dependable process. A careful re-examination of these cases reveals a troubling pattern, however – especially when viewed in the larger context of this report. These cases, in which official misconduct has been exposed, are not the successes of a functioning system of justice. Texas officials can take no credit for the release of innocent people from death row;

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[3] *Infra*, Appendix Two

[4] ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.11 (3d ed. 1993).

[5] Napue v. Illinois, 360 U.S. 264, 269 (1959).

[6] Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 153-54 (1972).

[7] *E.g.* Alcorta v. Texas, 355 U.S. 28, 31 (1957).

[8] For the purposes of our study, state misconduct is narrowly defined. It includes only *deliberate conduct by state actors that intentionally distorts the truth seeking process*. It excludes forms of procedural misconduct that, although clear violations, do not directly implicate the pursuit of truth. We focus only on those practices that result in the presentation, or serious risk of presentation, of evidence that is false or misleading.

each has been saved despite the resistence of state officials. And, as the case of Cesar Fierro reveals, even in cases where official misconduct has been exposed, the courts have sometimes refused to provide a remedy.

Clarence Brandley

> *The court unequivocally concludes that the color of Clarence Brandley's skin was a substantial factor which pervaded all aspects of the State's capital prosecution of him.*[9]

The prosecution of Clarence Brandley was born of public panic and overt racism. Brandley was the black supervisor of four white janitors at Conroe High School, where in August 1980, a white girl was found raped and murdered in the school auditorium.[10] The school was flooded with telephone calls by frightened parents who refused to send their children to school until the murderer was caught.[11] The authorities announced to the public that a suspect would be arrested before classes started the following week.[12]

A number of people in the high school on the day of the murder were potential suspects, including Clarence Brandley and the other janitors. But as a local police officer later said, "[t]he nigger was elected."[13] Clarence Brandley became the immediate and sole focus of the investigation.[14]

Police and prosecutors covered up or simply ignored a mass of evidence that might have led to the true killer. One janitor was threatened with arrest when he tried to tell the investigator that another white janitor had accosted the victim shortly before she disappeared. The defense was never told that a man matching the description of that same janitor was seen leaving the area shortly after the victim was last seen alive.[15]

Police found a Caucasian pubic hair that did not belong to the victim near the victim's vagina. The State, however, resisted efforts to obtain hair samples for comparison from the other janitors, who had seen the victim moments before the assault.[16] The State also refused to obtain blood samples from the other janitors despite finding blood inconsistent with Brandley's blood type on the victim's shirt. Not until years later was it learned that the blood on the shirt

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[9] Ex parte Brandley, 781 S.W.2d 886, 933 (Tex. Crim. App. 1989).

[10] Brandley v. State, 691 S.W.2d 699, 701 (Tex. Crim. App. 1985).

[11] James McCloskey, *Criminal Justice Ethics the Death Penalty: a Personal View*, CRIM. JUST. ETHICS, June 22, 1996 at P2.

[12] Ex parte Brandley, 781 S.W.2d at 888.

[13] *Id.* at 890.

[14] Brandley v. State, 691 S.W.2d at 701.

[15] Ex parte Brandley, 781 S.W.2d. at 888 & 891.

[16] *Id.* at 890.

was the same type as the blood of the white janitor who had been seen accosting the victim.[17] The blood and hair evidence was later lost. Moreover, after the autopsy discovered the presence of semen in the victim's vagina, the State failed to run an analysis of the sample to determine the blood type of the donor.[18]

Police and prosecutors also coached, manipulated and threatened witnesses to ensure that they would present a consistent story inculpating Brandley.[19] An all-white jury lost little time in sentencing him to death. Eleven months after the conviction, Brandley's attorneys discovered that 166 of the 309 trial exhibits had vanished.[20]

Because of the misconduct of the officials who prosecuted him, Clarence Brandley spent nearly a decade on death row for a crime he did not commit. His release came only after an intense public campaign on his behalf by civil rights organizers, volunteer investigators, and the media. Since his release in 1990, Clarence has been a church minister near Houston.[21] One can only wonder what his fate would have been had there been no public outcry about his case.

Ricardo Aldape Guerra

The concept of deceit was planted by the police and nurtured by the prosecutors.[22]

When official misconduct occurs, it often begins in the initial stages of a prosecution, during the police investigation. Murders that are designated as capital cases frequently arouse considerable public outrage and extensive publicity, placing the authorities under extraordinary pressure to obtain a death sentence.

In 1982, Houston police officer J.D. Harris was shot and killed after approaching the car in which Carrasco Flores and Ricardo Aldape Guerra had been riding. Within an hour of the shooting, Flores was killed in a shootout with the police. Officer Harris's gun was found in Flores's waistband, and a gun that had been used to kill a bystander was under Flores's body.[23] As one of the prosecutors would later admit, "the physical evidence . . . totally pointed towards

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[17] *Id.*

[18] *Id.*

[19] The police investigator took the other janitors on a "walk through" of the crime scene, after which at least one witness changed his statement. The same investigator assaulted one of the janitors and threatened to "blow" his brains out. When the janitor complained to the district attorney's office, he was told that it would be taken care of. Nothing was done to rein in the investigator's rampant misconduct. *Id.* at 889-90.

[20] As noted in *Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions*, Staff Report of the Congressional Subcommittee on Civil and Constitutional Rights, October 21, 1993.

[21] James McCloskey, *Criminal Justice Ethics the Death Penalty: a Personal View*, CRIM. JUST. ETHICS, June 22, 1996, at P2.

[22] Guerra v. Collins, 916 F. Supp. 620, 634 (S.D. Tex. 1995).

[23] Guerra v. State, 771 S.W.2d 453, 457-59 (Tex. Crim. App. 1988).

Carrasco Flores as being the shooter."[24]

But since Flores was dead, the police turned their attention to Ricardo Guerra. At trial, five witnesses testified that they had seen Guerra shoot Officer Harris.[25] Based on this apparently overwhelming evidence, the jury convicted Guerra and sentenced him to die.

In reality, however, the police had threatened and manipulated witnesses into giving testimony implicating Guerra. For instance, when one juvenile witness told police officers at the crime scene that she had not seen the shooting, an officer threatened to take away her daughter unless she cooperated.[26] Both police and prosecutors engaged in an elaborate scheme to ensure that witnesses would tell a consistent – albeit false – story implicating Guerra.[27] Statements and forensic evidence clearly indicating that Flores alone had shot Officer Harris were concealed,[28] as the trial prosecutors presented witness after witness, knowing their testimony was false.[29]

As with Clarence Brandley, the State secured a death sentence by resorting to elaborate deceptions and by defending those deceptions for years, until their case finally collapsed under the weight of the evidence that Ricardo Aldape Guerra was innocent. In overturning Guerra's conviction and death sentence, a federal court later determined that "[t]he mood and motivation arising out of this case was to convict Guerra for the death of officer Harris even if the facts did not warrant that result . . . [because] Carrasco had been killed and [there was a] strong, overwhelming desire to charge both men with the same crime, even if it was impossible to do so."[30] The court then ordered a new trial, finding that "the extent of the prosecutorial misconduct was legion."[31] A panel of the U.S. Fifth Circuit Court of Appeals later upheld that order.[32] Significantly, Guerra's conviction and death sentence had been twice affirmed by the Texas Court of Criminal Appeals,[33] and he was not released until his case had been reviewed a total of

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[24] Guerra v. Collins, 916 F. Supp. at 630 n.7.

[25] *Id.*

[26] *Id.* at 624-25.

[27] As the federal court explained, the police prepared multiple written statements that falsified the oral statements given by at least 5 witnesses, *id.* at 631-34, and "the prosecutors joined the hunt by conducting a reenactment of the shooting shortly after the incident with various chosen witnesses participating. This procedure permitted the witnesses to overhear each other and conform their views to develop a consensus view." *Id.* at 629.

[28] *Id.* at 631-35.

[29] *Id.* at 635-36. The questioning and argument by the prosecutors was also designed to mislead the jury and thereby corrupt the fact finding process. "On no less than five . . . occasions, the prosecutor included with the question, an incorrect statement of the witness' prior testimony." In its closing argument, the prosecution relied on facts that it knew to be false. *Id.* at 636.

[30] *Id.* at 626.

[31] *Id.* at 637.

[32] Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996).

[33] Guerra v. State, 771 S.W.2d 453 (Tex. Crim. App. 1988).

six times.[34] Ricardo Aldape Guerra spent 15 years on death row for a crime he did not commit.[35]

Strikingly, the truth about Mr. Guerra's case might never have emerged except for the intervention of the Mexican Consulate, which persuaded a prominent Texas law firm to pursue Guerra's federal post-conviction appeals without charge. The investigation of Guerra's case took four years and consumed more than two million dollars of billable hours.[36] The vast majority of death row prisoners in Texas can never expect to receive legal representation even faintly approaching the representation Guerra received.[37]

Kerry Max Cook

> *Prosecutorial and police misconduct has tainted this entire matter from the outset. . . . [Its] taint, it seems clear, persisted until the revelation of the State's misconduct in 1992.*[38]

In 1978, Kerry Max Cook was convicted and sentenced to death for the brutal sexual assault and murder of his neighbor, Linda Joe Edwards.[39] Despite significant evidence pointing to other suspects, police and prosecutors in Tyler, Texas focused their efforts on securing a death sentence against Cook, whose fingerprints were found on the outside of the victim's patio door.[40]

As recounted by the Texas Court of Criminal Appeals 18 years later, the local authorities spared no effort to convict and execute Mr. Cook. For example, these law enforcement agents concealed evidence that pointed to other suspects.[41] They persuaded a fingerprint expert to lie, pressuring him to swear that Cook's fingerprints had been left at the approximate time of the murder – testimony the expert would later admit was completely unfounded.[42] And there was more.

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[34] *Id.*; Guerra v. State, 492 U.S. 925 (1989); 492 U.S. 938 (1989); Guerra v. Collins, 916 F. Supp. 620 (S.D. Tex. 1995); Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996).

[35] *See* Texas Department of Criminal Justice, *Offenders Permanently Out of Custody*, *at* http://www.tdcj.state.tx.us/stat/permanentout.htm; *Man Who Avoided Execution Is Killed in Auto Accident: Ricardo Aldape Guerra Left Death Row after 15 Years When His Murder Conviction Was Overturned*, AUSTIN AM. STATESMAN, Aug. 22, 1997, at B8.

[36] *V&E's Atlas Halts Guerra Death Train*, TEXAS LAWYER, September 2, 1996, at 24.

[37] Concerning the crisis in representation for death penalty defendants, *see infra*, Chapters Six and Seven.

[38] Cook v. State, 940 S.W.2d 623, 627 (Tex. Crim. App. 1996).

[39] *Id.* at 625; *Former Death Row Convict Seeks Pardon*, FT. WORTH STAR-TELEGRAM, Sept. 13, 1999, at 6.

[40] Cook v. State, 940 S.W.2d at 624-25.

[41] For instance, the prosecution did not inform the defense that Louella Mayfield, whose father had been having an extra-material affair with the victim, had threatened to kill Ms. Edwards on many occasions. *Id.* at 625-26.

[42] *Id.* at 624; *id. at* 631 (J. Baird, concurring and dissenting).

At trial, a jailhouse snitch stated that Cook had confessed to him, testimony that the informant later conceded was a total fabrication.[43] Evidence of the informant's true motive was withheld: although the prosecution implied it had made no deals to procure the informant's testimony, his own pending murder charge was plea bargained to a two-year prison term as a reward for his testimony.[44] Moreover, prosecutors hid evidence corroborating Cook's statement that he knew the victim and had been invited to her apartment some days earlier, which explained his fingerprints on the patio door.[45] And finally, the prosecutors lied to the court, telling the judge that there was no evidence exonerating Mr. Cook.[46]

After his original conviction was reversed on appeal in 1991 because of the erroneous admission of psychiatric testimony,[47] prosecutors once again sought a death sentence. The second trial resulted in a hung jury.[48] Undaunted, the prosecution once again secured a death sentence against Mr. Cook in 1994. That conviction was overturned in 1997.[49]

Despite the crumbling foundation of their tainted case, prosecutors were prepared to re-try Mr. Cook a fourth time. In April 1999, however, DNA testing on semen stains found on the victim's clothing completely eliminated Kerry Max Cook as the assailant.[50] Still unwilling to admit their grievous error, prosecutors insisted that they would try Cook yet again unless he pled "no contest" to the killing, which he ultimately did.[51]

Insisting on his innocence from the outset, Kerry Max Cook endured three trials and 20 years on death row, once coming within 11 days of execution. He currently is seeking a full pardon from the state of Texas.[52]

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[43] *Id.* at 626.

[44] *Id.*

[45] *Id.* In fact, the jury in Mr. Cook's second trial said that they would have acquitted Mr. Cook if he had explained why his fingerprints were on a door to Ms. Edwards's apartment. Todd J. Gillman, *Divided Jury Causes Mistrial in Cook Case: Prosecutors Say They'll Try Him a Third Time*, DALLAS MORNING NEWS, Dec. 19, 1992, at 1A.

[46] Cook v. State, 940 S.W.2d at 631 (J. Baird, concurring and dissenting).

[47] Cook v. State, 821 S.W.2d 600 (Tex. Crim. App. 1991).

[48] Todd J. Gillman, *Divided Jury Causes Mistrial in Cook Case: Prosecutors Say They'll Try Him a Third Time*, DALLAS MORNING NEWS, Dec. 19, 1992, at 1A.

[49] Texas v. Cook, 522 U.S. 821 (1997).

[50] *Former Death Row Convict Seeks Pardon*, FT. WORTH STAR-TELEGRAM, Sept. 13, 1999, at 6

[51] *Plea Deal Halts Man's Fourth Trial in Slaying*, AUSTIN AM. STATESMAN, Feb. 17, 1999, at A-1.

[52] *Former Death Row Convict Seeks Pardon*, FT. WORTH STAR-TELEGRAM, Sept. 13, 1999, at 6; Texas Department of Criminal Justice, *Offenders Permanently Out of Custody, at* http://www.tdcj.state.tx.us/stat/permanentout.htm. *See also* Evan Moore, *Justice Under Fire: 'Win at All Costs is Smith County's Rule, Critics Claim*, HOUSTON CHRONICLE. June 11, 2000, at 1.

> *[A]t the time of eliciting the Defendant's confession, Det. Medrano . . . did have information that the Defendant's mother and step-father had been taken into custody by the Juarez police with the intent of holding them in order to coerce a confession from the Defendant, contrary to the said Det. Medrano's testimony at the pre-trial Suppression hearing.*[53]

No evidence of guilt is more compelling to a jury than a confession.[54] Based almost entirely on his confession, Cesar Fierro was convicted in El Paso of the 1979 murder of Nicolas Castanon and sentenced to die.[55] What the jury never learned was that his pivotal confession was coerced by the threats and violence of police officers on both sides of the border.[56]

The case against Cesar Fierro began with an accusation by Geraldo Olague, a 16-year-old who came forward five months after the killing, claiming to have been with Fierro at the time of the shooting. Olague was far from an ideal witness. He admitted to participating in over forty car burglaries[57] and to having "psychological problems,"[58] and he behaved bizarrely on the witness stand, at one point accusing a juror of having bought stolen property from him.[59] Even the prosecutor discounted Olague's testimony, arguing "[e]ven if you don't believe the boy, believe the confession."[60] The case against Cesar Fierro rested only on the testimony of Geraldo Olague, and Fierro's confession.[61]

No physical evidence linked Fierro to the crime, nor was he a suspect until Olague accused him of the murder. Both before and during his trial, Fierro insisted that he confessed only because the Mexican police had arrested and threatened to torture his family unless he confessed. Mr. Fierro testified that his interrogators told him his parents were being held

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[53] Ex parte Fierro, No. 71, 899 (171st Judicial District, El Paso Cty. Tex., May 1, 1995) (unpub.) (Findings of Fact and Conclusions of Law).

[54] The United States Supreme Court has recognized that "[c]onfessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." For this reason, and just as importantly, because of the risk that coerced confessions are "unreliable," the Supreme Court has ordered the lower courts to "exercise extreme caution before determining that the admission of the confession at trial was harmless." Arizona v. Fulminante, 499 U.S. 279, 296 (1991).

[55] Fierro v. State, 706 S.W.2d 310, 311-12 (Tex. Crim. App. 1986).

[56] Ex parte Fierro, 934 S.W.2d 370, 371-72 (Tex. Crim. App. 1996).

[57] S.F. Vol. II at 1234, State v. Fierro (CCA No. 68,383).

[58] S.F. Vol. II at 1269-71.

[59] S.F. Vol. II at 1245-46.

[60] *Id.* at Vol. II at 1240, 1234, 1246 1269-1271; *Profile: Texas Criminal Appeals Court Denying a New Trial of a Convicted Murderer, Even Though His Confession was Admittedly Coerced*, ALL THINGS CONSIDERED, July 6, 2000, 2000 WL 21471112. Thus, it is difficult to believe that the jury relied on any evidence other than Mr. Fierro's confession.

[61] *See* Fierro v. State, 706 S.W.2d 310, 311-12 (Tex. Crim. App. 1986).

hostage in Mexico by Juarez police.[62] Faced with the imminent danger confronting his parents, Fierro signed a confession – and his parents were released from the Juarez jail. His stepfather testified that Juarez police "said Cesar had confessed, and we were free."[63] Detective Medrano, the El Paso police officer who took Fierro's confession, testified before and during trial that he had not been aware that Fierro's parents had been detained in Mexico, and thus could not have used that information to coerce Fierro's confession.[64] The jury rejected Fierro's uncorroborated account of extraordinary misconduct, convicted him of capital murder, and sentenced him to die.

More than a decade after his conviction, new attorneys for Mr. Fierro uncovered previously hidden evidence that confirmed Fierro's account of his interrogation.[65] Following a lengthy hearing on this evidence, the trial court concluded that Detective Medrano went to Mexico for a series of meetings with Juarez Police Commandante Jorge Palacios after Fierro had been implicated in the crime.[66] Early the next morning, Palacios took Fierro's parents captive and threatened to torture Fierro's stepfather with an electrical current to his genitals unless his step-son confessed to the El Paso police. The post conviction judge determined that Detective Medrano was aware that Fierro's parents were being held hostage and that his pretrial and trial testimony to the contrary was a deliberate lie.[67]

Confronted with overwhelming evidence of Medrano's efforts to coerce a confession and his false testimony denying knowledge of such efforts, the post-conviction judge ruled that there should be a new trial. The State of Texas appealed that recommendation to the Court of Criminal Appeals. While unanimously adopting the findings of fact of the trial court, a bare majority of the appellate judges refused to grant a new trial. The majority concluded that the admittedly coerced confession was "harmless error" and that the jury would likely still have convicted Fierro on the remaining evidence.[68] What their decision neglected to note was that there *probably would have been no trial at all*, if the police had not conspired to extract a suspect confession under psychological torture. As the prosecutor himself explained in a sworn statement, "Had I known at the time of Fierro's suppression hearing what I have since learned about the family's arrest, I would have joined in a motion to suppress the confession. Had the confession been suppressed, I would have moved to dismiss the case unless I could have corroborated Olague's testimony."[69]

The U.S. Supreme Court refused to review this ruling. All subsequent appeals to the federal courts have failed to secure a new trial, despite the misgivings of the prosecutor who tried Cesar Fierro and the findings of the trial court. Because of limits placed on an inmate's

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[62] At that time, Juarez police were notorious for their widespread use of torture against detainees.

[63] S.F. Vol I, 137.

[64] Ex parte Fierro, at 371.

[65] Ex parte Fierro, at 371.

[66] S.R. Vol. I, 100, Fierro v. Johnson.

[67] Ex parte Fierro, No. 71,899 (171st Judicial District, El Paso, May 1, 1995) (Findings of Fact and Conclusions of Law) October 8, 2000.

[68] Ex parte Fierro, 934 S.W. 2d 370 (Tex. Crim. App. 1996), *cert. denied,* 521 U.S. 1122 (1997).

[69] *Id.* at 385 (sworn statement of trial prosecutor Gary Weiser).

ability to obtain a second round of appeals, federal courts may not have the power to remedy the fatal flaws in Fierro's prosecution and trial.

Although the courts have found that Cesar Fierro's confession was the product of official misconduct, he has spent 20 years on death row and remains there still, awaiting his execution.[70]

III. Double Vision: Conflicting Prosecutions for the Same Crime

The State is obliged to pursue just convictions – to seek out and report not the story that is most likely to result in conviction, but the version of events that is the whole truth. In certain Texas death penalty cases, however, prosecutors supposedly ferret out the "truth" about the facts in one case, and then rearrange those facts in a companion case in a way that squarely contradicts the first version. Prosecutors therefore re-write the truth in related cases to suit their prosecutorial goals. The following examples illustrate the injustice of such tactics.

A. The Truth Was No Barrier: Inconsistent Prosecutions in Texas

James Lee Beathard and Gene Hathorn

On the night of October 9, 1984, Gene Hathorn Sr., Linda Hathorn, and Marcus Hathorn were shot and killed in their trailer home.[71] James Beathard and Gene Hathorn, Jr. later were charged with their murders. Mr. Beathard was prosecuted first. At his trial, the prosecution presented a straightforward theory: Gene Hathorn, Jr. fired once through the back window of the trailer, while Beathard burst through the back door and shot everyone inside.[72] Hathorn's testimony was the only evidence presented that supported the State's assertion that Beathard, and

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[70] In another Texas death penalty case, the defendant himself was tortured to obtain a confession. Zimmermann v. State, 750 S.W.2d 194 (Tex. Crim. App. 1988). In an investigation for a 1977 murder, John Charles Zimmerman was beaten, threatened, and shocked with a cattleprod on his chin, chest, nipples and genitals. *Id.* at 206-09 When police promised that they would put his wife through "hell and misery" and would continue to torture him unless he confessed, Charles Zimmerman gave in, asking "There ain't going to be no more beating is there?" *Id.* at 206. *See also* Gary Taylor, *Zimmerman to Get Retrial*, HOUSTON POST, February 16, 1979, at A1. At least five state officials witnessed violence or threats against Zimmerman but each remained silent about the abuse. Zimmermann, at 206-09. When one witness attempted to complain about the incident, she was harassed by the police until she sold her home and moved away. Gary Taylor, *Zimmerman to Get Retrial*, HOUSTON POST, February 16, 1979, at A1. Through their inhuman tactics, the police succeeded in sending Mr. Zimmerman to death row for more than a decade. Texas Department of Criminal Justice, *Offenders Permanently Out of Custody*, at http://www.tdcj.state.tx.us/stat/permanentout.htm. In 1989, he plead guilty to a lesser offense and, after 12 years of incarceration, became eligible for parole. *Death Row Inmate Accepts Plea Bargain*, DALLAS MORNING NEWS, October 18, 1989, at 16A.

[71] Beathard v. State, 767 S.W.2d 423, 425 (Tex. Crim. App. 1989).

[72] Beathard v. Johnson, 177 F.3d 340, 342-43 (5th Cir. 1999).

not Hathorn, had gone inside the trailer and shot its occupants.[73] James Beathard was convicted and sentenced to die.[74]

Gene Hathorn was then prosecuted for the same crime. The prosecution's theory at his trial was equally straightforward, but directly contradicted the one presented at Mr. Beathard's trial. The same prosecutors now argued that it was James Beathard who fired once through the back window of the trailer, while Gene Hathorn burst through the back door and shot and killed everyone inside.[75] Based on this completely opposite version of the events, Gene Hathorn was convicted and sentenced to death.[76]

At Beathard's trial, Hathorn's testimony was the centerpiece of the State's case. "[H]e is telling the truth," the prosecutor assured the jury. "He told the truth before and he is telling it again, and he told it again in here."[77] Yet at Hathorn's trial, when it no longer suited the State to present Hathorn as less culpable, the prosecutor attacked this same testimony as a lie. "And if he told the truth," the prosecutor argued, "I'm a one-eyed hunting dog. . . . It ain't in him."[78]

The prosecutor has since determined that the testimony used to convict and condemn James Beathard was false, and has concluded that Beathard did not enter the Hathorn trailer and did not kill the victims.[79] In sworn testimony, Gene Hathorn has since admitted that he shot and killed his family on the evening of October 9, 1984. He now concedes that Beathard's trial testimony was correct in all respects. Hathorn also admits that he testified as he did only because prosecutors promised that, in exchange for his testimony against Beathard, he would not be prosecuted for capital murder. After the State reneged on its promise, he explained, he recanted his trial testimony.[80]

The courts were unswayed by the knowledge that at least one of the two men was convicted based on a false theory. Although it acknowledged that the prosecutor "knew that both of the stories [presented at Hathorn's and Beathard's trial] could not be true," the Fifth Circuit found that a defendant's due process rights do not prohibit the State's use of a theory that it does not believe to be true.[81] Although apparently no one (not even the prosecutor) believed

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[73] Beathard v. State, 767 S.W. 2d at 427-30 (analyzing the evidence that corroborated Mr. Hathorn's testimony and determining only that they created "suspicious circumstances" that tended to connect Mr. Beathard to the crime).

[74] *Id.*

[75] Beathard v. Johnson, 177 F.3d at 344.

[76] Hathorn v. State, 848 S.W.2d 101, 105-06 (Tex. Crim. App. 1992).

[77] Tr., Vol. VIII at 1554-55, State v. Beathard (CCA No. 69,474).

[78] *Id.*, Tr., Vol. X at 1395

[79] David Hanners, *Deadly Deceits*, DALLAS MORNING NEWS, Sept. 10, 1989, at 1A ("The prosecutor said that contrary to what Mr. Hathorn swore under oath, he believes Mr. Beathard fired the shotgun blast while Mr. Hathorn went inside.").

[80] Petition for Writ of Habeas Corpus at 2, Beathard v. Johnson, 177 F.3d 340 (5th Cir. No. 96-40760).

[81] Beathard v. Johnson, 177 F.3d at 348 ("a prosecutor can make inconsistent arguments at the separate trials without violating the due process clause.")

that James Beathard shot the victims, Mr. Beathard was executed by the State of Texas on December 9, 1999.[82]

Joseph Nichols and Willie Williams

Willie Williams and Joseph Nichols, attempted to rob a delicatessen in Houston, Texas. During the course of the robbery, Claude Shaffer was shot and killed.[83] The evidence established that Shaffer died from a single gunshot wound, but the police were unable to determine whether Nichols or Williams fired the fatal shot.[84] At the punishment phase of Williams's trial, the prosecutor asserted that "Willie Williams is the individual who shot and killed Claude Shaffer. . . . [T]here is only one bullet that could possibly have done it and that was Willie Williams' [bullet]."[85] A jury sentenced Mr. Williams to death.[86]

Mr. Nichols was subsequently tried for the same murder, a trial ending in a hung jury.[87] After learning from the jurors that the uncertain identity of the triggerman had caused concerns,[88] the prosecutor, in Nichols's second trial, contradicted the facts his own office had established at Williams's trial, arguing, "Willie could not have shot [Shaffer].... [Nichols] fired the fatal bullet and killed the man in cold blood and he should answer for that."[89] The second jury convicted Nichols of capital murder and sentenced him to die.[90]

A federal district court judge found that, because Williams' trial had previously established that Williams fired the fatal shot, the evidence presented in Nichols' trial that Nichols had fired the fatal shot was "necessarily false."[91] The district court also explained that, because only one bullet killed the victim, due process permitted only one person to be charged with firing the fatal shot.[92] Otherwise the State could convict an unlimited number of individuals for the very same act.[93] The Fifth Circuit, however, reversed the district court, finding that the prosecution's inconsistencies "did not affect the reliability or fairness of the fact finding process

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[82] *See* Texas Department of Criminal Justice, *Statistics and Death Row, at* http://www.tdcj.state.tx.us/statistics/stats-home.htm.

[83] Nichols v. Collins, 802 F. Supp. 66 (S.D. Tex 1992), *rev'd sub nom.* Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995).

[84] Nichols v. Scott, 69 F.3d 1255, 1260 (5th Cir. 1995).

[85] Nichols v. Collins, 802 F. Supp. at 802 F. Supp. at 73 (alteration in original) (internal quotations omitted).

[86] *Id.* at 72.

[87] *Id.* at 75.

[88] *Id.*

[89] *Id.* at 73 (alteration in original) (internal quotations omitted).

[90] *Id.* at 68.

[91] *See Id.* at 72-75.

[92] *Id.* at 74 (finding that the prosecution was collaterally estopped from taking a different position in Nichols' subsequent trial).

[93] *Id.*

in . . . Nichols' trial."[94]

One bullet killed Claude Shaffer. But the State, knowing that it was wrong in at least one case, argued that two different men committed the same shooting. Only one of these men committed the murder for which he was sentenced to die; the other was condemned to death on the basis of false evidence. Mr. Nichols sits on death row, awaiting execution. Willie Williams was executed in January 1995, one of the first two men put to death after George W. Bush became governor.[95]

Jesse Jacobs

Both Jesse Jacobs and his sister, Bobbie Hogan, were charged with the murder of Etta Urdiales.[96] At Mr. Jacobs's trial, the prosecutor argued that "[t]he simple fact of the matter is that Jesse Jacobs and Jesse Jacobs alone killed Etta Ann Urdiales."[97] The jury found Jacobs guilty of capital murder and sentenced him to death.[98]

During Bobbie Hogan's trial, however, the same prosecutor advanced a dramatically different story. He admitted that he had been wrong in Mr. Jacobs's trial and was certain that Hogan, not Jacobs, shot Ms. Urdiales.[99] The prosecutor called Mr. Jacobs to testify that Hogan had killed Urdiales and then argued that "I changed my mind about what actually happened. And I'm convinced that Bobbie Hogan is the one who pulled the trigger. And I'm convinced that Jesse Jacobs is telling the truth when he says that Bobbie Hogan is the one that pulled the trigger."[100]

Even the prosecutor acknowledged that Jacobs was sentenced to die based on the jury's acceptance of an abject falsehood. But the Fifth Circuit deemed this admission irrelevant, explaining that, even if the admission constituted evidence of Jacobs's innocence, "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."[101] As United States Supreme Court Justice John Paul Stevens highlighted in his dissent to the denial of a stay of Jacob's execution, however, "[i]f the prosecutor's statements at the Hogan trial were correct, then Jacobs is innocent of capital

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[94] Nichols v. Scott, 69 F.3d 1255, 1269-74 (5th Cir. 1995).

[95] *See* Texas Department of Criminal Justice, *Executed Offenders*, http://www.tdcj.state.tx.us/stat/executedoffenders.htm; Jim Yardley, *Texas's Busy Death Chamber Helps Define Bush's Tenure*, NEW YORK TIMES, Jan. 7, 2000, at A1, 2000 WL 12392119.

[96] Jacobs v. Scott, 31 F.3d 1319 (5th Cir. 1994); *see also* Jacobs v. Scott, 513 U.S. 1067 (1995) (denying Mr. Jacob's application for a stay of sentence of death).

[97] Jacobs v. Scott, 31 F.3d at 1322 n.6 (alteration in original) (internal quotations omitted).

[98] *Id.* at 1322.

[99] *Id.* at 1322 n. 6.

[100] *Id.*

[101] Jacobs v. Scott, 31 F.3d at 1324 (internal quotations omitted).

murder."[102]

In this case, innocence was no barrier to execution. Jesse Jacobs was executed on January 4, 1995.[103] Hogan, whom the prosecutor believed pulled the trigger, received a sentence of ten years imprisonment.

James Lee Clark

Shari Catherine Crews and Jesus Garza were murdered in 1993, each killed by a single shotgun wound. James Lee Clark and James Brown were arrested for the murders.[104]

Clark was tried, convicted, and sentenced to die. Brown then became the target. Not only did the prosecutor's arguments change, but essential evidence was modified from one trial to the next. In Clark's trial, the autopsy physician testified that one of the victims was shot from "a couple of feet." At Brown's trial, the same physician swore that the same victim was shot from "just a few inches." This remarkable transformation of scientific evidence allowed the prosecutor to first insist at Clark's trial that it was impossible that Brown had fired the shot, and then to turn around at Brown's trial and argue that Brown alone *did* fire the shot.[105]

Even though the prosecutor argued that James Lee Clark was not the shooter,[106] the United States Fifth Circuit Court, relying on Mr. Beathard's case, has just turned down what will probably be Mr. Clark's last appeal.[107]

B. The Accident of Geography: Other Jurisdictions That Prohibit Inconsistent Prosecutions

The unfairness of the inconsistent arguments advanced by the prosecutors in the Beathard, Williams, Nichols, Jacobs, and Clark cases is obvious. Compounding this injustice is the fact that these tactics would not be tolerated in several jurisdictions outside of Texas. If Joseph Nichols had been tried in New York, rather than Texas, the prosecutor would not have been allowed to change his theory that Nichols, rather than Williams, was the actual shooter. If Willie Williams had been convicted in California, in all probability he would not have been executed. And if Jessie Jacobs had been tried in Mississippi, his conviction may well have been

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[102] Jacobs v. Scott, 513 U.S. 1067, 115 S.Ct. 711, 712 (1995) (Stevens, J., joined by Ginsburg, J., dissenting).

[103] *See* Texas Department of Criminal Justice, *Executed Offenders, at* http://www.tdcj.state.tx.us/stat/executedoffenders.htm.

[104] Clark v. Johnson, __ F.3d __, No. 00-40061 (5th Cir. Sept. 12, 2000).

[105] *Id.*

[106] *Id.* (describing the prosecutor's argument that Brown shot Mr. Garza).

[107] *Id.*

reversed, and he likely would be alive today.[108]

Several courts have found that due process is violated when a prosecutor "pursue[s] wholly inconsistent theories of a case at separate trials."[109] In the plurality decision in Thompson v. Calderon, for example, the Ninth Circuit explained that "it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime."[110] In reaching its conclusion, the court relied both on the prosecutor's duty to administer justice and the prohibition against knowingly presenting false evidence at trial.[111]

Other courts have prevented a prosecutor's use of inconsistent factual theories in successive trials by using evidentiary standards. In United States v. GAF Corp.,[112] the Second Circuit ruled that the defense should be permitted to introduce evidence of the prosecution's actions in previous trials that were inconsistent with its actions in the current trial.[113] The court reasoned that "if the government chooses to change its strategy at successive trials, and contradict its previous theories of the case and version of the historical facts, the jury is entitled to be aware of what the government has previously claimed, and accord whatever weight it deems appropriate to such information."[114]

Texas' state and federal courts have not been swayed by this logic. They continue to condone executions obtained through prosecutorial sleight of hand.[115]

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[108] *See infra,* notes 107-112 and accompanying text.

[109] Thompson v. Calderon, 120 F. 3d 1045, 1054-60, 1063-64 (9th Cir. 1997), *rev'd on other grounds by* Calderon v. Thompson, 521 U.S. 1140 (1997).

[110] *Id.* at 1058.

[111] *See id.* Even Judges Kozinski and Nelson, in their dissent to the plurality opinion, agreed that, when it is clear that a crime was committed by either defendant A or defendant B, we "[m]ust be troubled . . . where A and B get convicted. . . . In the case of mutually inconsistent verdicts . . . I believe that the state is required to take the necessary steps to set aside or modify at least one of the verdicts." *Id.* at 1072 (Kozinski, J., dissenting). *See also* Drake v. Kemp, 762 F.2d 1449, 1470 (11th Cir.1985) (en banc) (Clark, J. concurring) ("the prosecution's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice. . . . The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for truth."); Smith v. Groose, 205 F.3d 1045 (8th Cir., 2000) (holding that the prosecutor's use of one of co-defendant's two factually contradictory versions of events surrounding murders to convict defendant and subsequent use of other version to convict someone else of the same murders was a violation of the defendant's right to due process).

[112] 928 F.2d 1253 (2d Cir. 1991).

[113] *See id.* at 1257-62.

[114] *Id.* at 1262. Likewise, in Hoover v. State, 552 So. 2d 834 (Miss. 1989), the Supreme Court of Mississippi found that the arguments of a prosecutor in the previous trial of a co-indictee were admissible in the trial of another co-indictee, where the prosecutor has argued inconsistent factual theories in the two trials.

[115] For a more detailed analysis of the legal issues involved in inconsistent prosecutions and the related case law, see Michael Q. English, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?* 68 FORDHAM L. REV. 525 (Nov. 1999).

IV. Violating the Duty to Disclose the Truth

The U.S. Supreme Court has stressed that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," and to provide that evidence to the defendant.[116] This duty to disclose evidence is one of the foundations of the adversarial process. Without it, there can be no guarantee that evidence of innocence is fully explored and blameless persons are not convicted and sentenced to die. But, as the following cases demonstrate, this critical safeguard is all too often ignored by Texas prosecutors.[117]

Andrew Lee Mitchell

In 1981, Andrew Mitchell was convicted and sentenced to death for the 1979 murder of Keith Wills. The only direct evidence linking Mitchell to the murder was the testimony of two alleged accomplices.[118] They testified that they had gone with Mitchell to Mr. Wills's workplace at around 8:30 p.m. on the night of December 26, and that Mitchell shot Wills at around 9:00 p.m..

After trial, Mitchell's attorneys learned that the police had covered up the testimony of two law enforcement officers – evidence that proved that the case presented by the prosecution, and the entire sequence of events described by their witnesses, was false. Kelly Stroud, a deputy sheriff, and Ralph East, a game warden, had both seen the victim *alive* after 10 p.m.. By that time, as the prosecution had proven, Mitchell could not have been at the place where Wills was murdered.[119]

On the day Wills' body was found, both law enforcement officers told the sheriff's department what they had seen.[120] Perhaps because they knew that it had the potential to destroy their entire case against Mitchell, the sheriff's department hid this exculpatory testimony from

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[116] Kyles v. Whitley, 514 U.S. 419, 432-38 (1995).

[117] In order to determine whether the failure of a prosecutor to disclose exculpatory evidence has violated the due process rights of a defendant, the courts employ a three part test: (1) Has there been a failure to disclose evidence? (2) Is the evidence favorable to the accused? and, (3) Does the evidence create a probability sufficient to undermine the confidence in the outcome of the proceeding? Ex parte Mitchell, 853 S.W.2d 1, 4 (Tex. Crim. App. 1993) (citing Thomas v. State, 841 S.W.2d 399, 403-04 (Tex. Crim. App.1992)). Courts determine whether or not to grant relief based not only on whether the State has withheld evidence, but also on the court's evaluation of the damage to the defendant's case that was caused by the State's failure to disclose evidence. We are concerned with whether the State has acted contrary to the full revelation of the truth. Thus, we include in the category of state misconduct those cases in which the courts have found that the prosecutor withheld evidence from the defendant, even when the court found that the second or third prong of the test was not satisfied.

[118] One accomplice received immunity in exchange for his testimony and the other received a promise of ten years of probation. *Id.* at 2 n.1.

[119] *Id.* at 2-4.

[120] *Id.* at 2-3.

the defense.[121] Many years later, the discovery of this crucial evidence *did* destroy the case against Mitchell. However, because of the duplicity of the sheriff's department, Andrew Mitchell spent more than a decade under sentence of death and once came within five days of execution. He was released from death row in 1993.[122]

Ernest Willis

When Ernest Willis was convicted and sentenced to death for setting a house fire that killed two young women, even the prosecutor was shocked. "We were very surprised even winning the trial," he said. "Our chances were about 10 percent even going into it. . . . We didn't have any eyewitnesses. We didn't know what type of flammable material was used. It was all circumstantial. . . ."[123]

In Texas, the death penalty may not be imposed in any case unless the jury unanimously finds that there is "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[124] In Mr. Willis's case, the prosecution concealed from the jury (and the defense) the findings of the psychologist they hired to examine Willis. This psychologist, Jarvis Wright, determined that he could not justify saying that Willis would be dangerous in the future, explaining that he "didn't think this was a good death penalty case."[125] The State nevertheless proceeded with a death penalty case against Willis and did not disclose these findings.

The State's cover-up of its own expert's diagnosis sent Ernest Willis to death row in 1987.[126] He is still awaiting the outcome of his appeals thirteen years later.[127]

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[121] *Id.* at 4.

[122] *See* Texas Department of Criminal Justice, *Offenders Permanently Out of Custody, at* http://www.tdcj.state.tx.us/stat/permanentout.htm.

[123] Howard Swindle and Dan Malone, *Judge Says Inmate Wrongly Convicted*, DALLAS MORNING NEWS, Sept. 11, 2000, at 1A.

[124] TEX. CODE CRIM. PROC. art. 37.071(2)(b)(1). *See supra*, Chapter One.

[125] Findings of Fact and Conclusions of Law, Ex parte Willis, No-1455-A, p. 2-5 (Tex. Dis. Ct., Pecos Cty. June 6, 2000) (unpub.).

[126] *See* Texas Department of Criminal Justice, *Offenders on Death Row, at* http://www.tdcj.state.tx.us/statistics/stats-home.htm

[127] Howard Swindle and Dan Malone, *Judge Says Inmate Wrongly Convicted*, DALLAS MORNING NEWS, Sept. 11, 2000, at 1A. In the interim, direct evidence of Willis's actual innocence has come to light. David Martin Long has confessed to setting the fire for which Willis' was convicted, giving details about the murder scene, the way he set the fire, and his motive for doing so. *Id.*

V. Bearing False Witness: The Testimony of Jailhouse Informants

Prosecutors in Texas frequently introduce the testimony of jailhouse informants to support their cases. These witnesses claim that capital defendants, whom they had often never before met, confessed to them important details of the crime. Such jailhouse snitches usually testify because they expect rewards, which may include a reduced charge, early release, better conditions of confinement, or even cash.[128] Despite the obvious risk that inmates will fabricate testimony to curry favor with authorities, Texas imposes no restrictions on its use.[129]

A high profile debacle in Los Angeles demonstrated just how easily informants can fabricate confessions in serious cases. In 1988, jailhouse informant Leslie Vernon White demonstrated to a sheriff's deputy how, in 20 minutes, an informant could fabricate a convincing confession from a defendant he had never met. White was provided only the last name of a murder suspect and access to the pay telephone used by inmates. During three telephone conversations, White posed as a deputy district attorney and a police sergeant and called the homicide squad and the deputy district attorney handling the case. He was able to learn details of the case that would corroborate the "confession" that White could then manufacture. White was also able to arrange a meeting with the defendant, so he could show he had been in contact with the inmate who purportedly confessed.[130]

A Los Angeles Times investigation later revealed a variety of other techniques that informants use to manufacture confessions. Informants maintain files on sensational criminal cases and steal legal documents from other inmates. If one "confession" did not result in sufficient benefits, informants fabricate additional confessions until they receive bigger rewards.[131]

Johnny Dean Pyles

On June 20, 1982, Officer Ray Kovar encountered Johnny Dean Pyles in an empty parking lot and, apparently believing that he had interrupted a crime, fired six shots at him.

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[128] Clifford Zimmerman, *Toward A New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 100 (1994).

[129] Observers have widely recognized the unreliability of snitch testimony. *E.g.* Gordon Van Kessel, Report of the 1989-90 Los Angeles County Grand Jury, Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County (June 26, 1990); Clifford Zimmerman, *Toward A New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 93-97 (1994); Mark Curriden, *No Honor Among Thieves*, 75 A.B.A. J. 52, 54-56 (1989); Robert H. Robinson, Jr., *Improving Process in Virginia Capital Cases*, 12 CAP. DEFENDANT. J. 363, Spring 2000; Evan Haglund, *Impeaching the Underworld Informant*, 63 S. CAL. L. REV. 1405, July 1990.

[130] Ted Rohrlich, *Los Angeles Times Review of Murder Cases Is Ordered: Jail-House Informant Casts Doubt on Convictions Based on Confessions*, LOS ANGELES TIMES, Oct. 29, 1988, at 1.

[131] Ted Rohrlich, Robert Stewart, *Jailhouse Snitches Trading Lies for Freedom*, LOS ANGELES TIMES, April 16, 1989, at 1.

Pyles returned the fire, killing Kovar.[132] Shortly thereafter, Pyles was arrested. He quickly acknowledged that he had shot the officer, but explained that he shot only because he saw a flashlight and a gun pointed at him. He said he did not see the person he shot.[133] This created a problem for the State – if they could not prove that Pyles knew or should have known that Kovar was a police officer, then Pyles could not be found guilty of capital murder. But there was no evidence that Pyles had such knowledge.

On August 10, 1982, for no apparent reason, officials with the Dallas County Jail transferred Johnny Pyles from solitary confinement to a five man tank.[134] Pyles was housed with two known jailhouse snitches.[135] Both snitches later admitted they were instructed by police to elicit from Pyles the fact that he knew he was shooting at a police officer.[136] "They told us what they wanted to hear from Johnny, . . . saying they wanted him to say he knew the man was a police officer, and that Johnny had bragged about the killing."[137] Pyles, however, made no such confession. Not to be denied, the informants simply manufactured a confession. Both snitches have since admitted that their testimony was untrue and that the State presented it knowing that it was false. At a hearing in federal court, a magistrate found that both snitches had testified falsely.[138]

In fact, the five man tank into which Pyles was placed could aptly be described as "the snitch tank." Five months after Pyles was tried and convicted based on the testimony of jailhouse informants, the Dallas County District Attorney prosecuted Harold Joe Lane for an unrelated capital murder.[139] Lane, like Pyles, was transferred from his cell to the snitch tank where he, like Pyles, was housed with a known snitch.[140] Like the snitches in Pyles's case, the snitch in Lane's case promptly told police that Lane had confessed to him the critical issue in his case.[141] Both Harold Joe Lane and Johnny Dean Pyles have been executed.[142]

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[132] Tr., Vol. II at 92-94, 170; Vol. III at 449, 515-19, 634-37, 660, State v. Pyles (CCA No. 69,091).

[133] *Id.*, Pretrial Vol. II at 151-52.

[134] *Id.*, Pretrial Vol. II at 305-06.

[135] *Id.*, Vol. III at 761, 782, 805-13; Petition for Writ of Habeas Corpus, Exhibits J, L, Y, Pyles v. Johnson, 136 F.3d 986 (5th Cir. No. 97-10809).

[136] Pyles, Petition for Writ of Habeas Corpus, Exhibit J, Affidavit of Gary LaCour; Exhibit L, Affidavit of Robert Banschenbach.

[137] *Id.* at Exhibit J; Exhibit L.

[138] Pyles v. Johnson, 136 F.3d 986, 996-1000 (5th Cir. 1998).

[139] Pyles, Petition for Writ of Habeas Corpus, Affidavit of Robert Banschenbach at Exhibit V.

[140] Pyles and Lane were both put in tank 12-S-13 at the Dallas County Jail. *Id.* Pretrial Vol. II at 305-06; Tr. Vol. III at 761, 782, Pyles v. State.

[141] *Id.*

[142] Our research has uncovered 43 capital cases involving jailhouse snitches. *See infra,* Appendix Two. Because the judicial decisions which were our primary source of information may not discuss snitch testimony in every case, our review likely has missed a number of cases. In the final chapter of this report, we profile the cases of two men – David Wayne Spence and David Wayne Stoker – convicted and sentenced to die by the State of Texas largely on snitch testimony that has since been discredited. Both men were executed despite substantial doubt about their guilt. *See also* Steve Mills, Ken Armstrong & Douglas Holt, *Flawed Trials Lead to Death Chamber Bush Confident in System Rife with Problems*, CHICAGO TRIB., June 11, 2000, at 1 (identifying 23 defendant's executed

VI. Conclusion: The Erosion of Confidence in the Integrity of Capital Prosecutions

Since 1976, in at least 41 cases, some form of official misconduct has been exposed in subsequent legal proceedings and found to have occurred. By its nature, official misconduct is hidden from the defense and the court. Because it is hidden, official misconduct is not always discovered after trial. Without exhaustive investigation – through the defense gaining access in the post-conviction process to new police and prosecutorial files, through witnesses recanting their trial testimony and acknowledging they testified falsely, or through police or prosecutors acknowledging misconduct at trial – official misconduct will remain hidden. In some cases, therefore, official misconduct will have occurred but will not be exposed. In Texas, the risk of misconduct remaining hidden, even through post-conviction proceedings, is high because, as we document in Chapter Five, many lawyers who represent condemned inmates in post-conviction proceedings conduct *no investigation*. Thus, the 41 cases in which official misconduct has been exposed after trial and found to have occurred surely represents only a portion of the cases in which official misconduct in fact occurred. No one can know what portion these cases represent.

What can be said with confidence about the number of cases in which this hidden unfairness has been exposed is that it is too many to conclude that such instances of misconduct are an aberration in a system that otherwise functions with integrity. Official misconduct has been exposed in enough cases that we should be worried whether such behavior is endemic in capital prosecutions in Texas.

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under Governor Bush's tenure which involve jailhouse informants).

CHAPTER THREE

A Danger to Society: Fooling the Jury with Phony Experts

What separates the executioner from the murderer is the legal process by which the state ascertains and condemns those guilty of heinous crimes. If that process is flawed because it allows evidence without any scientific validity to push the jury toward condemning the accused, the legitimacy of our legal process is threatened.

Fifth Circuit Court Judge Emilio Garza[1]

I. Introduction: Death By "Junk Science"

A completely innocent man is condemned to death in Texas, based on the testimony of an outcast psychiatrist who assures the jury the defendant will kill again. Crucial forensic evidence is misinterpreted or simply fabricated to secure wrongful convictions by "expert" witnesses with no valid expertise. Juries are seduced into error by self-proclaimed medical authorities, who base their damning testimony on outdated or discredited scientific techniques.

More than in any other death penalty state, capital juries in Texas are vulnerable to reaching the wrong conclusions about the guilt of and appropriate sentence for defendants based on misleading or false expert testimony. This perversion of the truth-seeking process is neither rare nor accidental. Fatal miscarriages of justice are the inevitable consequence of a potent mixture of deadly factors: the provisions of the Texas death penalty statute, the careless assessment of experts' credentials or methods and the effect of their testimony on impressionable jurors, and the win-at-all-costs attitude of law enforcement agencies.

A. Predicting the Unpredictable: Relying on "Dr. Death"

The most widespread symptom of false expert testimony in the Texas death penalty system is the use of so-called "killer shrinks" to justify death sentences by claiming to assess an individual's potential for committing violent crimes in the future. At least 121 Texas death row inmates were sentenced to death based on psychiatric testimony universally condemned as unreliable.[2] Although the courts have refused to bar the use of this testimony, predictions of "future dangerousness" have proven no more reliable than the toss of a coin.

In 1972, the United States Supreme Court struck down all existing state death penalty statutes, finding that their provisions failed to meet constitutional safeguards against arbitrary and discriminatory death sentences. As one Justice noted, state procedures at the time failed to

[1] Flores v. Johnson, 210 F.3d 456, 469 (Cir. 5th 2000) (Garza, J., concurring).

[2] *See* Appendix Three.

provide any "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[3] Consistent with this view, the Court would later hold that the death penalty could not be made mandatory for any crime; the ultimate punishment must be reserved only for the very worst offenders, justly convicted of the worst offenses.[4]

Almost immediately, Texas and other states began drafting new death penalty statutes intended to provide the safeguards required by the 1972 Supreme Court decision. Texas lawmakers approved a two-part trial process in which juries would first determine the guilt or innocence of the defendant. After guilt was established, a second phase of the trial would commence in which jurors could impose death only on those defendants that they unanimously determined would commit violent acts in the future.[5] The purpose of the Texas statute was to distinguish those individual defendants whose prior behavior and propensity for violence merited the death penalty, when viewed in the context of the crime itself. Interestingly, however, many defendants charged with capital murder have no prior history of violence, or even a criminal record. It is in those cases where Texas prosecutors most frequently have resorted to the use of psychiatric testimony to meet the statutory requirement for the penalty of death.

For nearly thirty years, prosecutors in Texas have relied on the testimony of paid psychiatrists to establish "future dangerousness." On closer examination, however, the process of predicting future dangerousness is unreliable and fails to rationally distinguish one offender from another. Even under the most carefully controlled conditions, predictions of this type when applied to a specific individual are alarmingly inaccurate. A number of death row inmates who once were labeled as posing a future danger have gone on to lead productive, law-abiding lives after their sentences were reversed and they were released from prison.

An equally disturbing realization is that psychiatric testimony of this nature is permitted at all. In 1983, the Supreme Court upheld the use of such testimony[6] over the strong objections of the American Psychiatric Association, which warned that accurate predictions of future dangerousness were beyond a psychiatrist's ability.[7] Given the green light by the courts, Texas prosecutors have made tremendous use of the testimony of James Grigson, the notorious "Dr. Death," and a small cadre of others like him. In the process, at least 121 men have been condemned to die, and many have been executed, based on evidence that is just as likely to be wrong as it is to be right. The current procedure for determining who will be sentenced to death therefore is just as capricious as the flawed process that it replaced.

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[3] Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

[4] Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976).

[5] TEX. CODE CRIM. PROC. art. 37.071 (1981).

[6] Barefoot v. Estelle, 463 U.S. 880, 896-906 (1983).

[7] Brief of Amicus Curiae American Psychiatric Association, Barefoot v. Estelle.

B. False from the Outset: The Unreliability of Predicting Dangerousness

Psychiatric testimony of future dangerousness impermissibly distorts the fact-finding process in capital cases.

American Psychiatric Association[8]

At the time Texas lawmakers were drafting the new death penalty statute, the scientific community was deeply skeptical of methods used to predict future behavior. As interest in the field increased, psychiatrists and psychologists developed two general techniques for attempting to predict future violence: clinical predictions and actuarial methods. Clinical predictions are individual assessments based on evaluations of the subject, sometimes including considerations of "predictive criteria" in the person's life history.[9] Since the 1970s, studies have demonstrated that psychiatrists and psychologists who used this method were wrong two-thirds of the time, despite their training and experience.[10] Further, even under the most controlled settings, clinical predictions of future dangerousness were wrong 50% of the time.[11]

Actuarial predictions are based on statistically derived probabilities, comparing an individual with certain traits to a group of persons with similar traits. Aside from the moral questions that arise from decisions based solely on probability,[12] using this type of prediction to make accurate life-or-death sentencing decisions remains problematic. Because such predictions rely on gathered data, actuarial predictions are only as accurate as the underlying statistics. Studies have demonstrated that the rate of recidivism of capital offenders, both in Texas and nationally, is too small to establish reliable data for use in predicting future dangerousness.[13] Predictions of future violence cannot be accurately made where there are no reliable statistics on

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[8] *Id.*

[9] *See, e.g.*, R. Hartogs, *Who Will Act Violently; The Predictive Criteria*, in VIOLENCE: THE CAUSES AND SOLUTION (R. Hartogs & E. Artzt, eds.) (1970) (listing 48 alleged predictors of violence).

[10] Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 111-17 (1984) (citing results of the major studies: Baxstrom study: 20% accuracy; Thornberry Study: 20% accuracy; New York study 14% accuracy: Kozol study: 34.7% accuracy; Paxtuxent study: 41.3% accuracy; Wenk study: 8% accuracy).

[11] Randy K. Otto, *On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature*, 18 L. & PSYCHOLOG. REV. 43, 63 (1994).

[12] For example, if it could be accurately established that 75 out of a hundred people in a class would commit another violent act and the individual subject is in that class, is it appropriate to execute the individual even knowing full well that he could be one of the 25 persons who never recidivate? In the legal framework, the question becomes: is 75% accuracy "beyond a reasonable doubt"?

[13] James W. Marquart & Jonathon R. Sorensen, *Institutional and Postrelease Behavior of Furman-commuted Inmates in Texas*, 26 CRIMINOLOGY 677, 677-93 (1988); James W. Marquart, Sheldon Ekland-Olson & Jonathan R. Sorensen, *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 L. & SOC. REV. 449, 452-56 (1989); Mark D. Cunningham & Thomas J. Reidy, *Integrating Base Rate Data in Violence Risk Assessments at Capital Sentencing*, 16 BEHAV. SCI. & L. 71, 80-81 (1998); Hugo A. Bedau, *Death Sentences in New Jersey, 1907-1960*, 19 RUTGERS L. REV. 1, 1-64 (1964) (finding no problems of violence among 55 inmates who were released from death row); Jonathan R. Sorensen & R.D. Wrinkle, *No Hope for Parole: Disciplinary Infractions Among Death-sentenced and Life-without-parole Inmates*, 23 CRIM. JUST. & BEHAV. 542, 542-55 (1996) (finding prevalence rate of approximately 1.2%).

the likelihood that a given category of prisoners will re-offend.

In summary, neither clinical nor actuarial predictions have proven accurate in assessing the likelihood that a given murderer will be violent in the future. Psychiatric predictions in a Texas death penalty trial are even less reliable than those made under ideal clinical conditions. The psychiatrists who testify for the State rarely collect or review information about the background or mental health of a defendant. Instead, they rely primarily on information provided by the prosecutors at trial, in a hypothetical question relating selective facts of the crime. Such hypothetical testimony is clearly suspect, since it fails to provide the jury with any reasonably accurate way to meet the requirements of the law: distinguishing one individual defendant from another, based on the person's probable future behavior.

C. The "White Coat" Phenomenon: How Expert Medical Testimony Influences Jurors

For nearly three decades, Dr. James Grigson and others like him have testified in Texas courts that certain defendants are "at the highest end of the scale of psychopaths." Incredibly, Dr. Grigson and others have further claimed that they are 100% certain the same defendants will kill again. Several explanations have been offered for Grigson's remarkable longevity. First, the adversarial system tends inevitably to favor experts who will stake out the most extreme position. As one commentator observed:

> Why would you, the diligent lawyer, settle for a scientist . . . who will say that 60-cycle electromagnetic fields probably don't injure human health, though one must concede certain small pieces of disquieting evidence to the contrary, if you can find one who will take the Federal Express pledge, and absolutely, positively promise that the fields do no harm, no how? The middle of the road, in law even more so than in politics, belongs to the yellow stripe and the dead armadillos. It is the strength of the expert's support for your position that comes first.[14]

Second, Grigson's testimony has proven effective. His personality and his vast experience addressing juries[15] account for some of that effectiveness, but the title of "doctor" has significant impact of its own.[16] When faced with the awesome task of deciding whether another

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[14] PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 17-18 (1991).

[15] In one case, Grigson felt a juror was not going to believe his testimony. Grigson researched the woman's background, found out she had a 14-year-old daughter, and then testified that the defendant was the kind of man who, if released, would rape and kill a 14-year-old girl. Ron Rosenbaum, *Travels With Dr. Death*, VANITY FAIR, May 1990, at 141.

[16] In a well-known study conducted at Yale, for example, persons posing as scientists were able to verbally persuade two-thirds of lay subjects to administer what they believed to be high voltage shocks to subjects who outwardly showed signs of discomfort and pain. In stark contrast, only 20% were convinced to do so by persons acting as fellow lay-people. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974). *See also* White v. Estelle, 554 F. Supp. 851, 858 (S.D. Tex. 1982) (When an opinion "is proffered by a witness bearing the title of 'Doctor,' its impact on the jury is much greater[.]").

human being should live or die, jurors may rely heavily on the testimony of a medical doctor – even if they are made aware of the untested content of his testimony.[17] As Supreme Court Justice Harry Blackmun stated, "In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself."[18]

Under the Texas sentencing scheme, undue submission by the jury to perceived authority becomes a significant risk factor. One expert noted that "by making dangerousness the key factor in our decision to inflict death, we appoint doctors as the chief decision makers, thus relieving ourselves of the burden of responsibility and of the obligation to continue the painful and endless discussion of values."[19] Even Dr. Grigson has admitted this disturbing truth: "Just take any man off the street, show him what [the defendant has done], and most of them would say the same things I do. But I think the jurors feel a little better when a psychiatrist says it – somebody that's supposed to know more than they know."[20]

Grigson's effect on jurors has not gone unnoticed by the appellate courts. A former judge of the Texas Court of Criminal Appeals once remarked:

> It seems to me that when Dr. Grigson testifies at the punishment stage of a capital murder trial he appears to the average lay juror, and the uninformed juror, to be the second coming of the Almighty. After having read many records of capital murder cases in which Dr. Grigson testified at the punishment stage of the trial, I have concluded that, as a general proposition, when Dr. Grigson speaks to a lay jury, or an uninformed jury, about a person who he characterizes as a "severe" sociopath, which a defendant who has been convicted of a capital murder always is in the eyes of Dr. Grigson, the defendant should stop what he is then doing and commence writing out his last will and testament – because he will in all probability soon be ordered by the trial judge to suffer a premature death.[21]

On July 9, 1995, the American Psychiatric Association (APA) expelled Grigson from its ranks "for arriving at a psychiatric diagnosis without first having examined the individuals in question, and for indicating, while testifying in court as an expert witness, he could predict with 100% certainty that the individuals would engage in future violent acts."[22] The APA concluded that the hypothetical questions on which Grigson based his diagnosis were "grossly inadequate

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[17] "The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny." Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 COLUM L. REV. 1197, 1237 (1980).

[18] Barefoot v. Estelle, 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting).

[19] Claudia M. Worrell, *Psychiatric Prediction of Dangerousness in Capital Sentencing: The Quest for Innocent Authority*, 5 BEHAV. SCI. & L. 433, 437-38 (1987).

[20] Bloom, *Doctor for the Prosecution*, AM. LAW. 25, 26 (Nov. 1979).

[21] Bennett v. State, 766 S.W.2d 227, 232 (Tex. Crim. App. 1989) (Teague, J., dissenting).

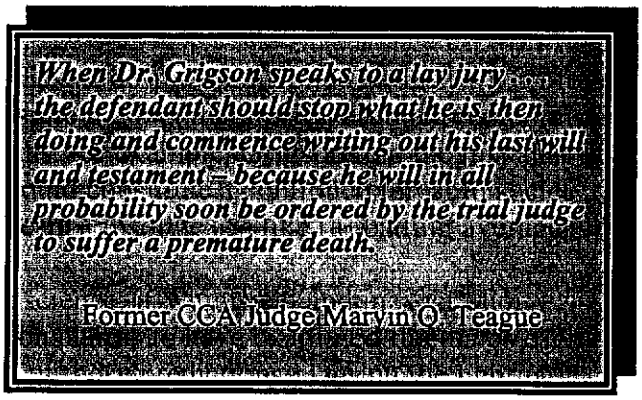
[22] News Release from the American Psychiatric Association, July 20, 1995.

to elucidate a competent medical, psychiatric differential diagnostic understanding adequate for diagnosing a mental illness according to current standards."[23] Rather than attempt to defend or explain his methodology, Grigson attacked the decision and the APA, calling the organization "a bunch of liberals who think queers are normal."[24]

Dr. Grigson still testifies for the State of Texas, despite being cited by his own profession for his unreliable and unethical practices, and despite the fact that his hyperbolic predictions are preposterous. In the case of Michael Wayne Evans, for example, Grigson told the jury that there was "about a one thousand percent" chance he would constitute a continued threat to society.[25] In another case, he later explained that 1000% meant "absolute . . . like [a] batting average[]."[26]

Grigson's use of numbers, like his use of science, is whimsical and inexact. For example, the number of capital defendants Grigson claims to have examined fluctuates each time he testifies, as does the self-proclaimed accuracy of those predictions. During the February 1990 trial of Adolph Gil Hernandez, Grigson testified that he had examined 391 capital defendants and had predicted that 80 to 82% would be dangerous.[27] Later that year, however, in the Colorado trial of Frank Michael Orona, Grigson testified that he had conducted 396 examinations of capital defendants and found only 66% to pose a danger in the future.[28] Ironically, Grigson's predictions of dangerousness often veer to the opposite end of the scale when he appears as a paid witness for the defense. For example, when Grigson testified on behalf of Gustavo Julian Garcia in 1991, he told the jury that he had never seen so much remorse in a defendant.[29]

Despite widespread criticism of his methods, Texas prosecutors still rely on Grigson. On August 9, 2000, for instance, Grigson was appointed to determine whether Jeffrey Caldwell was competent to be executed, as required under a Supreme Court decision prohibiting the execution of the insane.[30] Caldwell had been described as having a "serious mental illness" when examined by another psychiatrist, Phillip Murphy. Dr. Murphy found that Caldwell "suffer[ed] from organic brain damage" and



[23] *Id.*.

[24] S.F. at 177, Fuller v. State (CCA No. 71,046).

[25] S.F. at 1848, Evans v. State (CCA No. 60,016).

[26] Deposition of James Grigson, at 51, Oct. 31, 1994, State v. Moody (CCA No. 70,883).

[27] S.F. at 150, Hernandez v. State (CCA No. 71,083).

[28] Tr. at 372-73, Colorado v. Orona (Colo. Ct. App. No. 91CA0121).

[29] S.F. at 1304, Garcia v. State, (CCA No. 71,417).

[30] Ford v. Wainwright, 477 U.S. 399 (1986).

that Caldwell's "reality could best be described as psychotic."[31] Caldwell's lawyer objected to the use of Grigson because of his notorious history, but the Court refused to appoint a different psychiatrist.[32] Caldwell refused to talk with Grigson. No psychiatric evaluation was completed, and Caldwell was executed on August 30, 2000.

While the media and some judges have focused attention on Grigson and other notorious "killer shrinks," Texas prosecutors also have found other self-styled experts.[33] At Phillip Tompkins's trial, the prosecutors relied on Jean Matthews as their expert witness. She testified that she had received a doctorate in psychology from Florida State, done postdoctoral work at Harvard and M.I.T., and spent two years with the police department in Virginia. She told the jury that, based on her expertise, Tompkins was so violent and emotionally unstable he would continue to be a future threat. After Tompkins was sentenced to death, investigation revealed that Matthews had never attended Harvard or M.I.T., had never been licensed to practice psychology, and had never worked in Virginia.[34] She did, however, have a degree from Florida State – in music and English.[35]

D. Getting it Wrong: Three Case Studies of Psychiatric Predictions

Randall Dale Adams

> *The State was guilty of suppressing evidence favorable to the accused, deceiving the trial court during [Adams's] trial, and knowingly using perjured testimony.*
>
> Judge M. P. Duncan[36]

Randall Dale Adams was arrested and charged with capital murder for the 1976 killing of a Dallas police officer. Like many other defendants, however, Adams had no serious criminal past. In fact, his only prior contact with the criminal justice system was a conviction for driving while under the influence.

Before trial, Mr. Adams was interviewed by Dr. Grigson. As Mr. Adams recalled:

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[31] Caldwell v. Johnson, ___ F.3d ___ , No. 00-10934 (5th Cir. Aug. 30, 2000).

[32] *Id.*

[33] *See also* Chapter Four, Section IV (discussion of expert testimony on future dangerousness based on the race of the defendant).

[34] Kathy Fair, *Murderer's Commutation Urged/Evidence Indicates Witness Lied; DA Seeks Life Sentence*, HOUSTON CHRON., June 9, 1990, at 29.

[35] Kathy Fair, *DA, Defense Lawyers Agree to Look into Witness' Credentials*, HOUSTON CHRON., Feb. 10, 1990, at 32.

[36] M. RADELET, H. BEDAU, & C. PUTNAM, IN SPITE OF INNOCENCE 71-72 (1992).

> Dr. Grigson interviewed me for 15 minutes. He did not ask about the crime, only about my family. The only other thing he wanted to know was my interpretation of: a rolling stone gathers no moss and of a bird in the hand is worth two in the bush. At trial he testified for 2 hours – 1 ½ hours about his background, awards, expertise, etc.; ½ hour about our interview.[37]

In his testimony before the jury, Dr. Grigson announced that he had "diagnosed [Adams] as being a (sic) sociopathic personality disorder[.]"[38] On the scale of sociopathy, Grigson stated, "I would place Mr. Adams at the very extreme, worse or severe end of the scale. You can't get beyond that."[39] Grigson further claimed that "[t]here is nothing known in the world today that is going to change this man, we don't have anything."[40] He also emphatically announced that Adams would continue to be a "threat to society,"[41] after asserting that Mr. Adams would have no regard for the lives or property of others, wherever they might be: "It wouldn't matter where it was [or whose life], you or a guard or a janitor or whoever it might be."[42] Not surprisingly, the jury found that Adams represented a danger to society and sentenced him to death.

The court judge stated at my death sentencing hearing "may God have mercy on your soul." I will leave it to God to judge Dr. Grigson and the State of Texas.

Randall Dale Adams, Oct. 4, 2000

Randall Dale Adams was an innocent man. The epic documentary about his case, *The Thin Blue Line*, exposed the prosecutor's official misconduct and the Texas Court of Criminal Appeals reversed his conviction in 1989. After 12 years in prison, Adams was finally released. He returned to Ohio to be with his family and to "pick up the threads of [his] life and move on."[43] As Mr. Adams describes:

> I never received monetary compensation from the State of Texas nor even an apology. For the past ten years, I have spoken out about the death penalty across America and overseas. I have testified before Congress, spoken on behalf of many death row inmates and authored a book, Adams v. Texas. In 1998 I returned to Texas for the *Journey of Hope. . . From Violence to Healing* where I met my future wife. I currently reside in Texas and continue to speak out against the death penalty and our gravely flawed criminal justice system. I am employed

[37] Statement of Randall Dale Adams (Oct. 4, 2000) (on file with author).

[38] Tr. at 1407, Adams v. State (CCA No. 60,037).

[39] *Id.* at 1409.

[40] *Id.* at 1410.

[41] *Id.* at 1411.

[42] *Id.* at 1410.

[43] Statement of Randall Dale Adams (Oct. 4, 2000) (on file with author).

and happily married and have had no added arrests or violence in my life since my release. It appears Dr. Grigson's analysis of me was grossly incorrect. I wonder how many others he "misdiagnosed"? The court judge stated at my death sentencing hearing "may God have mercy on your soul." I will leave it to God to judge Dr. Grigson and the State of Texas.[44]

Joe Lee Guy

In March 1993, Joe Lee Guy, Thomas Howard, and Richard Springer planned to rob a grocery store in Plainview, Texas. Guy remained outside during the shooting. When the cash registers would not open, Springer grabbed one of the registers and fled. Howard, meanwhile, shot the owners of the store, killing one and wounding the other.

Guy's defense was an embarrassment to the legal profession. The defense investigator developed a secret relationship with the surviving victim, a wealthy widow. After the woman died, it was discovered that she had made Guy's investigator her primary beneficiary. Guy's lawyer, who has been suspended from the practice of law at least five times, reportedly took cocaine to prepare himself for court.[45] In April 1994, Guy was convicted of capital murder.

Like Randall Adams, Guy had no history of violent criminal behavior. To overcome this deficiency in its case, the State called two hired guns: Dr. Clay Griffith and Dr. Richard Coons.[46] Griffith (who once testified that examining a person was "a hindrance in comparison to a hypothetical question")[47] did not hesitate in condemning Guy, even though he had never spoken with him. Griffith told the jury that "[Guy's] type of people" have been called "psychopath[s]" and "moral imbeciles" who cannot be changed.[48] Even though Guy had no violent history and was not in the store during the killing, Griffith told the jury that the probability that he would be violent in the future was "ninety-nine, a hundred percent."[49] Dr. Coons agreed with Griffith. He added that "there is a lot of violence in the penitentiary" and implied that Guy would be "conscripted into some gang-type activity."[50] In closing argument, the prosecutor, realizing the power of the title "doctor," appealed to the jury for a death sentence, asking "Will you do what the doctor says?"[51]

Richard Springer, who took the cash register, and Thomas Howard, who shot both

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[44] *Id.*.

[45] Dan Malone & Steve McGonigle, *Questions of Competence Arise in Death Row Appeal*, DALLAS MORNING NEWS, Sept. 11, 2000, at 12A.

[46] The State also called witnesses who claimed Guy had a "bad reputation." Guy v. State, CCA No. 71, 913, at 3 (Tex. Crim. App. Dec. 18, 1996) (unpub.).

[47] Flores v. Johnson, 210 F.3d 456, 467 (5th Cir. 2000).

[48] S.F. Vol. 19 at 174, Guy v. State (CCA No. 71,913).

[49] *Id.* at 175.

[50] *Id.* at 196.

[51] *Id.* at 38.

victims, are both serving life sentences. Joe Lee Guy was sentenced to death and remains on death row.

Stanley Faulder

In October 1977, Canadian national Joseph Stanley Faulder was convicted and sentenced to die for the robbery and murder of Inez Phillips, a wealthy oil baroness.[52] After his conviction was reversed on appeal because his confession had been obtained illegally, special prosecutors hired by the victim's son once again sought the death penalty.

Faulder had no violent criminal history and no record of disciplinary problems during his incarceration prior to the second trial. However, the prosecution hired three psychiatrists to testify that Faulder posed a grave danger, even in custody. Without interviewing Faulder, Drs. Griffith, Grigson, and James Hunter told the jury that he would commit violent acts in the future. Griffith described Faulder as a "sociopathic personality criminal"[53] and suggested he would be unable to learn from punishment.[54]

Grigson also branded Faulder a sociopath: "Faulder is at the very extreme of your extremely severe sociopath. He can't become any more severe except in terms of numbers."[55] Continuing his formulaic testimony, Grigson stated there was no cure for Faulder's condition. "There is absolutely nothing we have in medicine or psychiatry, nothing that is known in terms of rehabilitation that has ever worked. We don't have anything."[56]

In response to this damning portrayal, the jury heard nothing from the defense. Faulder's court-appointed attorney called no witnesses on his behalf during the penalty phase of the trial and presented no mitigating evidence of any kind. In the minds of the jurors who sentenced him to die, there seemingly was little doubt that Stanley Faulder was a remorseless and dangerous sociopath.

However, a very different picture of Faulder would later emerge. At an evidentiary hearing eleven years after the trial, the testimony of more than a dozen friends and family members from Canada revealed that Faulder was a gentle and well-respected man who had never displayed a capacity for violence. After suffering a massive head injury as a young child, Faulder had experienced bouts of memory loss and blackouts during his youth and displayed other symptoms of brain damage – well documented medical evidence that was inconsistent with

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[52] Jim Henderson, *Albright Joins Effort to Spare Canadian's Life/Texas inmate's execution scheduled for next week*, HOUSTON CHRON., Dec. 2, 1998, at 1.

[53] S.F. Vol. 5 at 893, Faulder v. State (CCA No. 69,077).

[54] *Id.* at 884.

[55] *Id.* at 1126-27.

[56] *Id.* at 1127-28.

Grigson's diagnosis of sociopathy.[57]

One affidavit described how Faulder had stopped to rescue a motorist injured in a car accident, risking his own life by driving her to a hospital through a blinding blizzard: "I believe that I would have bled to death on the highway that night if Stanley hadn't stopped. Since that incident, I've always felt that I owed Stanley my life."[58]

A skilled mechanic, Faulder had spent his time on death row repairing typewriters and fans for the other inmates, often free of charge. One former death row inmate who had been released on grounds of innocence described Faulder as "one of the most respected individuals [on death row]. . .everyone liked Stanley."[59]

The Fifth Circuit Court did not find error with the abject failure of Faulder's attorney to present this testimony to the jury.[60] On June 17, 1999, after 22 peaceable and uneventful years on death row, Stanley Faulder was executed.

E. The U.S. Supreme Court: Changing Course on Expert Testimony

Over strenuous objections from the psychiatric profession, the United States Supreme Court upheld the use of predictions of dangerousness in 1983.[61] According to the Court, juries should be the ultimate safeguard against unreliable and untrustworthy evidence. If the testimony is unreliable, the defense could always discredit that testimony through its own experts.[62]

In the decade that followed, judges became increasingly skeptical of the multitude of proclaimed "experts" testifying for both sides in the lower courts. The Chief Judge of the Seventh Circuit, for instance, complained that there is "hardly anything, not palpably absurd on its face, that cannot be proved by some so-called 'experts.'"[63] Large corporations began to fear liability based on the admitted testimony of an unscrupulous "expert."[64] Under the oversight of Vice President Quayle, the Bush administration sought to reduce untrustworthy expert testimony and "exclude fringe theories," by recommending that courts mandate a judicial finding of reliability before allowing the testimony.[65]

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[57] The hearing testimony is summarized in Faulder's clemency application to the Texas Board of Pardons and Paroles. In re Joseph Stanley Faulder, Application for Reprieve and Petition for Commutation of Death Sentence (1998).

[58] *Id.* (Affidavit of Jeannine Janusz).

[59] *Id.* (Affidavit of John Clifford Skelton).

[60] Faulder v. Johnson, 81 F.3d 515, 519 (5th Cir. 1996).

[61] Barefoot v. Estelle, 463 U.S. 880 (1983).

[62] *Id.* at 900-01.

[63] Caulk v. Volkswagen of Am., Inc., 808 F.2d 639, 644 (7th Cir. 1986) (Posner, J., dissenting).

[64] *See* HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991).

[65] Dan Quayle, *Agenda for Civil Justice Reform in America*, 60 U. CIN. L. REV. 979 (1992).

In 1993, the Supreme Court revisited the admissibility of expert testimony. In Daubert v. Merrell-Dow Pharmaceuticals, Inc., the Court held that expert testimony should not be admitted unless it is both relevant and reliable.[66] To evaluate reliability, the Court requires judges to act as "gatekeepers," preventing juries from hearing expert testimony not grounded "in the methods and procedures of science."[67]

Many types of expert testimony previously common are now subject to exclusion by trial judges.[68] The testimony of psychiatrists like Dr. Grigson is not among them. Although Texas courts officially have embraced the standards of Daubert,[69] nothing has changed in the state's capital sentencing proceedings. Nevertheless, one Fifth Circuit judge recently noted that "it appears that the use of psychiatric evidence to predict a murderer's 'future dangerousness' fails all five Daubert factors."[70]

II. Other Forms of Dubious Expertise in Texas Trials

Psychiatric predictions of future violence are not the only examples of questionable scientific testimony in capital cases. Prosecutors in the Lone Star State frequently have relied on other kinds of suspect science, including shoe print comparison, experts claiming the ability to identify bullets by metal composition, and hypnosis.

Moreover, even results based on scientifically accepted methods are of little use if the person testing the evidence is unqualified or unreliable. In this regard, the use of two types of suspect evidence in Texas death penalty trials is particularly notable: hair comparison and bite mark analysis.

A. Hair Comparison

Texas prosecutors have relied on hair comparison testimony to provide the jury with a crucial link to an accused. Hair evidence, although highly subjective, is presented with the weight of science behind it and can have a powerful effect on juries. After hearing hair comparison testimony, one juror described it as "kind of like [the defendant's] hair was his

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[66] 509 U.S. 579 (1993).

[67] *Id.* at 590-94 (according to the Court four "flexible" guidelines should be examined: testability, error rate, peer review and publication, and general acceptance).

[68] In Williamson v. Reynolds, 904 F. Supp. 1529 (E.D. Okla. 1995), for example, the District Court refused to admit expert testimony about hair comparison. Even recognizing the longstanding history of admitting such evidence, the District Court found that hair comparison testimony was "imprecise and speculative, and its probative value was substantially outweighed by its prejudicial effect." *Id.* at 1158.

[69] E.I. Dupont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995); Hartman v. State, 946 S.W. 2d 60 (Tex. Crim. App. 1997).

[70] Flores v. Johnson, 210 F.3d 456, 464 (5th Cir. 2000) (Garza, J., concurring)..

fingerprints . . . he wore his fingerprints in his hair."[71] Unfortunately, hair comparison evidence has little in common with fingerprints and is far less reliable and accurate.[72] In fact, some courts refuse to allow a conviction to stand on hair comparison evidence alone.[73]

As practiced by most law enforcement agencies, hair identification is based on visual comparison with the aid of a microscope. The analyst is given a hair from the suspect, called the "known standard," and is asked to compare it to a hair recovered from the crime scene. Some crime labs purport to obtain detailed information from such visual observation, including not only the identification of the suspect, but also the person's sex, race, and general age.[74]

Despite such assurances, visual hair comparison remains an inexact procedure. Unlike fingerprints, human hair is not individualized and varies within each person. Because the characteristics of a particular hair may differ from another hair taken from the same head, results of a comparison rely heavily on the judgment of the examiner.[75] Ronald Singer, Chief Criminalist of the Tarrant County Medical Examiner's Office and private consultant in forensic science, describes the correct use of hair evidence as follows:

> Recent advances in technology have shown that many "experts" wandered far beyond what could reasonably be concluded when comparing hairs microscopically. The rightful place of the microscopic evaluation of hairs is as a screening tool, from which only preliminary conclusions can be drawn.[76]

Hair comparison is an extremely subjective procedure, as a number of studies have shown. The Law Enforcement Assistance Administration, for instance, created a testing program in various forensic sciences, including hair comparison. The results showed that hair analysis was the least reliable of all techniques, with error rates as high as 67%. The majority of the surveyed crime laboratories nationwide made mistakes in four of five hair samples examined.[77]

Despite this level of inaccuracy, hair comparison testimony has played a key role in

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[71] Holly Becka & Howard Swindle, *Forensics Put under the Microscope*, DALLAS MORNING NEWS, Aug. 20, 2000, at 1J.

[72] Clive Stafford Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil*, 27 COLUM. HUM. RIGHTS L. REV. 227 (1996) (general discussion).

[73] *See, e.g.*, State v. Faircloth, 394 S.E.2d 198 (N.C. Ct. App. 1990); State v. Stallings, 334 S.E.2d 485, 486 (N.C. Ct. App. 1985).

[74] *See* discussion in PAUL C. GIANNELLI & EDWARD J. IMWINKLERIED, SCIENTIFIC EVIDENCE §24 (3d ed. 1999).

[75] Larry Miller, *Procedural Bias in Forensic Hair Examinations of Human Hair*, 2 L. & Human Behav. 157, 158 (1987).

[76] Statement of Ronald L. Singer, Chief Criminalist, Tarrant County Medical Examiner's Office and private consultant in forensic science (Oct. 3, 2000) (on file with author).

[77] *See* Edward J. Imwinkelried, *Forensic Hair Analysis: the Case Against Underemployment of Scientific Evidence*, 39 WASH. & LEE L. REV. 41, 44 (1982); Williamson v. Reynolds, 904 F. Supp. 1529, 1556 (E.D. Okla. 1995).

many Texas capital trials. One such case is that of Michael Blair. On September 4, 1993, seven-year-old Ashley Estell went to a playground near where her brother was playing soccer.[78] She was found the next day in a ditch several miles away, apparently strangled. Josh Foster immediately became a suspect. He had refereed one of the soccer games and disappeared at approximately the same time as Ashley. Police later discovered that he was known by at least ten aliases and had pending charges for sexual offenses against children.[79] Police excluded Foster as a suspect, however, because his prior offenses were against young boys.[80] Michael Blair, who also previously had been convicted of a sexual offense, was charged with the murder.

At Mr. Blair's trial, forensic examiner Charles Linch (whose questionable qualifications are discussed *infra*) took the stand and told the jury that hair taken from Blair's car had a "strong association" with the hair of the deceased, although he could not make an absolute identification.[81] He also testified that a clump of hair found in the park contained two hairs "similar" to Blair's, and 15-20 "similar" to the victim's.[82] In closing argument, the prosecutor emphatically described Linch's results as proof the hairs were "a match":[83] "Mr. Linch . . . told you that those hairs in all fine microscopic characteristics are identical to Ashley Estell."[84] No other evidence directly linked Blair to the crime. He was convicted and sentenced to death.

In June 2000, an independent laboratory tested the DNA of several of the hairs described by the prosecution as "identical" to the victim's and Blair's.[85] These tests established that, contrary to Linch's testimony, hair discovered in Blair's car did *not* belong to the victim. A test of a second hair showed that it "could not have originated from Ashley Estelle, Michael Blair or any of their maternal relatives."[86] Michael Blair remains on death row.

B. Bite Marks

Bite mark evidence also has been used to secure convictions in Texas capital cases. The practice of comparing bite marks, known as forensic odontology, relies upon the theory that dental characteristics are unique and identifiable among individuals.[87] This principle undergirds the familiar and accepted practice of identifying the corpses of accident victims and war

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[78] Blair v. State, CCA No. 72,009 (Tex. Crim. App. Sept. 25, 1996) (unpub.).

[79] S.F. at 1811, Blair v. State (CCA No. 72,009); Holly Becka & Howard Swindle, *Tests Casting Doubt on Girl's Death*, DALLAS MORNING NEWS, June 17, 2000, at 1A.

[80] *Id.*

[81] S.F. at 771-73, Blair v. State (CCA No. 72,009).

[82] *Id.* at 747.

[83] *Id.*

[84] *Id.*

[85] Holly Becka & Howard Swindle, *DNA Test Doesn't Link Condemned Man to Girl*, DALLAS MORNING NEWS, June 21, 2000, at 1A.

[86] *Id.*

[87] Sweet, *Human Bitemarks: Examination, Recovery, and Analysis*, in MANUAL OF FORENSIC ODONTOLOGY 148 (3d ed. 1997) (C. Bowers & G. Bell eds.).

casualties. In the context of a criminal investigation, however, the accuracy of bite mark comparison fails to carry the same measure of reliability. In a criminal investigation, the evidence sought comes not from an examination of the victim's teeth, but rather from bite marks on the victim's body.

The accuracy of a comparison depends upon the clarity of the bite mark. Because it is rarely possible to retrieve a complete, clean bite mark from a victim's body, reliable comparisons are difficult to make.[88] Moreover, bite marks made by a single individual vary greatly depending on the angle of the bite, what part of the mouth (lips, tongue, cheek) was involved in the bite, and the surface from which the bite mark is retrieved.[89] Although attempts have been made to create standards for examining bite marks,[90] accurate comparison remains elusive. Not only do opposing experts consistently disagree about the source of questioned bite marks, but experts frequently disagree about whether the disputed marks are even caused by teeth.[91] In one case, after the prosecution's experts testified to a definitive match with the defendant's teeth, a pathologist and a dental consultant created an indistinguishable injury using a small pocket-knife.[92]

Notwithstanding the defects in bite mark comparison, this type of evidence has been admitted and upheld almost uniformly in Texas, based on the authority of a case decided in 1954.[93] That case, however, hardly establishes a foundation of scientific reliability: the court allowed a firearms examiner to testify about matching bite marks on a piece of cheese.[94]

In contrast to other forensic fields, little research has been done to improve or authenticate bite mark analysis. As Ronald Singer observed:

> When there are regular disagreements regarding not only whether a bitemark was made by a particular individual but also whether the impression in question is a bitemark at all, it's time to step back and reevaluate the entire technique. To my knowledge, the "science" of bitemarks has never been validated through a large scale systematic study to determine if, in fact, the people performing this type of

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[88] Allen P. Wilkinson & Ronald M. Gerughty, *Bite Mark Evidence: Its Admissibility is Hard to Swallow*, 12 W. ST. U. L. REV. 519, 541-42 (1985).

[89] Steven Weigler, *Bite Mark Evidence: Forensic Odontology and the Law*, 2 HEALTH MATRIX: J. L. & MED. 303, 307 (1992).

[90] *See, e.g.*, Am. Bd. of Forensic Odontology, *Guidelines For Bite Mark Analysis*, 112 J. AM. DENTAL ASS'N 383 (1986).

[91] *See, e.g.*, People v. Smith, 468 N.E.2d 879, 886 (N.Y. 1984) (four experts identified marks as bite marks, three others testified the marks were not made by teeth).

[92] Kris Sperry & Homer R. Campbell, *An Elliptical Incised Wound of the Breast Misinterpreted as a Bite Injury*, 35 J. FORENSIC SCI. 1226, 1231 (1990).

[93] *See, e.g.*, Spence v. State, 795 S.W.2d 743, 751 (Tex. Crim. App. 1990); Patterson v. State, 509 S.W.2d 857, 863 (Tex. Crim. App. 1974).

[94] Doyle v. State, 263 S.W.2d 779, 779 (Tex. Crim. App. 1954).

testing have a common ground at all.[95]

One review of the available studies led its authors to conclude that "what little scientific evidence that does exist clearly supports the conclusion that crime-related bite marks are grossly distorted, inaccurate, and therefore unreliable as a method of identification."[96]

David Wayne Spence

David Wayne Spence was executed on April 3, 1997, after being convicted in connection with the brutal rapes and murders of three teenagers. He was implicated in the crime by suspect testimony and bite mark evidence. The bites were attributed to Spence by the prosecution's forensic odontologist, Dr. Homer Campbell, who told the jury he had examined impressions of Spence's teeth and compared them to photographs of the female victims.[97] Based on his comparison with the photographs, Campbell concluded to "a reasonable degree of medical certainty" that the marks on the victims were made by David Spence.[98]

No sooner was Spence convicted than the State's proof evaporated. Snitches who were instrumental in convicting Spence admitted that they had "fabricated [their] accounts of Mr. Spence confessing in order to try to get a break from the state on [their] cases."[99] Spence's attorneys also discovered that Dr. Campbell had claimed to identify "to a medical certainty" the body of "Melody Cutlip," who apparently was buried before the real Melody Cutlip was found alive and well in Florida.[100]

Spence's appellate attorneys assembled a panel of five forensic odontologists for a blind study of the purported bite mark evidence. None of the five agreed with Dr. Campbell's results. Indeed, one nationally respected expert found that it was not medically possible to demonstrate that the marks were bite marks at all, much less that they belonged to David Spence. He characterized Dr. Campbell's testimony as "border[ing] on the unbelievable."[101]

By the time Spence was executed, even some law enforcement officers involved in the investigation doubted his guilt. Marvin Horton, the lieutenant who supervised the police investigation, gave a sworn statement that he "[did] not think David Spence committed this crime."[102] Ramon Salinas, the homicide detective who investigated the murders agreed: "My

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[95] Statement of Ronald L. Singer, Chief Criminalist, Tarrant County Medical Examiner's Office and private consultant in forensic science (Oct. 3, 2000) (on file with author).

[96] Allen P. Wilkinson & Ronald M. Gerughty, *Bite Mark Evidence: Its Admissibility is Hard to Swallow*, 12 W. ST. U. L. REV. 519, 560 (1985).

[97] S.F. at 5031-35, Spence v. State (CCA No. 69,341).

[98] *Id.* at 5042-44.

[99] Bob Herbert, *Was an Innocent Man Executed*, N.Y. TIMES, July 28, 1997.

[100] Petition for Writ of Habeas Corpus, Exhibit M, Spence v. Scott (W.D. Tex. No. 94-20212).

[101] *Id.*, Exhibit A (Report of Dr. Souviron) at 2.

[102] Bob Herbert, *Was an Innocent Man Executed*, N.Y. TIMES, July 28, 1997.

opinion is that David Spence was innocent."[103]

C. Deadly Lies: The False Testimony of Ralph Erdmann

Former Lubbock County pathologist Ralph Erdmann was a frequent witness in Texas capital trials. At least 40 Texas counties relied upon his work[104] and Erdmann earned $171,000 conducting as many as 400 autopsies per year.[105] Erdmann testified in numerous cases in which the defendants were sentenced to death. At least four of those defendants have been executed.[106]

In 1992, the reliability of Erdmann's procedures was questioned. After reading an autopsy report, the family of one deceased man was surprised to learn that Erdmann claimed to have examined and weighed the spleen, even though that organ had been surgically removed years before. During the subsequent inquiry, the man's body was exhumed and no autopsy incisions were discovered.[107]

Tommy Turner, an attorney from Lubbock, was appointed as a special prosecutor to examine Erdmann's work. The resulting investigation uncovered a nightmare of bungled investigations and falsified evidence. Turner concluded that Erdmann's results were significantly unreliable: "Out of 100 autopsies we sampled, we have good reason to believe at least 30 were false."[108] Erdmann had mixed up tissue samples, placed body parts with the wrong bodies, and changed numbers on tissue slides to aid the prosecution's theories.[109] He permitted his 13-year-old son to probe wounds during autopsies[110] and allowed his wife to sell bones from the corpses.[111]

In case after case, Erdmann simply told the jurors what the prosecutors wanted them to hear. As a local judge remarked, even the police were no longer sending bodies to Erdmann because "he wouldn't do the autopsy. He would ask what was the police theory and recite results to coincide with their theories."[112] Special prosecutor Turner concluded that if "the prosecution theory was that death was caused by a Martian death ray then that was what Dr.

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[103] *Id.*

[104] *Lawyer Testifies in Erdmann Case*, DALLAS MORNING NEWS, Feb. 18, 1993, at 14D.

[105] Wood, *Justice – Texas Style: a Texas Coroner Mishandles Vital Evidence*, MACLEAN'S, Jan. 18, 1993.

[106] *See* Boyle v. State, 820 S.W.2d 122 (Tex. Crim. App. 1989); Stoker v. State, 788 S.W.2d 1 (Tex. Crim. App. 1989); Garrett v. State, 682 S.W.2d 301 (Tex. Crim. App. 1984); and Fuller v. State, (CCA No. 71,046). Because such testimony might not be reported in a judicial opinion, it is not within the scope of this study to identify the total number of cases in which Erdmann testified and the outcomes in those cases.

[107] Roy Bragg, *Doubts Arise About Autopsy Cases*, HOUSTON CHRON., Feb. 29, 1992, at 1.

[108] Wood, *Justice – Texas Style: a Texas Coroner Mishandles Vital Evidence*, MACLEAN'S, Jan. 18, 1993.

[109] *Id.*

[110] *Lawyer Testifies in Erdmann Case*, DALLAS MORNING NEWS, Feb. 18, 1993, at 14D.

[111] Lee Hancock, *Lubbock Sets up Shop for Medical Examiner*, DALLAS MORNING NEWS, Sept. 11, 1994, at 48A.

[112] *Id.*

Erdmann reported."[113]

Erdmann pled guilty to seven felonies relating to the faked autopsies and was stripped of his medical license in 1992.[114] Prosecutors, defense attorneys, and courts have yet to completely uncover the effects of Erdmann's lies.

D. A Trail of Incompetence: The Testimony of Fred Zain

Fred Zain came to Texas with glowing recommendations from both law enforcement agencies and the governor of West Virginia.[115] Between 1989 and 1993, he was the head of serology at the Bexar County Medical Examiner's Office in San Antonio. As chief serologist, he was called to testify about blood sample evidence in hundreds of cases, including numerous capital trials.

However, back in West Virginia, a judicially mandated investigation revealed that his test results frequently were unreliable. The West Virginia Supreme Court wrote that Zain had fabricated or lied about evidence in at least 134 criminal cases and concluded that "as a matter of law, any testimonial or documentary evidence offered by Zain at any time in any criminal prosecution should be deemed invalid, unreliable, and inadmissible[.]"[116]

After Zain's arrival in Texas, his co-workers began to express concerns over Zain's work. One former assistant stated that Zain rarely kept adequate work records and at least 50% of the time would fill in results on reports without having done the actual tests.[117] An independent serologist from the Southwestern Institute of Forensic Sciences reviewed a random sampling of Zain's work and found errors in every single case.[118]

Zain's negligence nearly cost Jack Davis his life. In November 1989, while investigating odd noises in the apartment complex where he served as caretaker, Davis discovered a mortally wounded woman and summoned help.[119] When officers arrived, they arrested Davis and charged him with the murder. At trial, Zain told the jury that DNA testing had proven that blood on Davis's pant leg came from the victim and that blood on the victim's carpet came from Davis. The jury convicted Davis of capital murder, but because the jury could not agree on a death

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[113] Richard L. Fricker, *Pathologist's Plea Adds to Turmoil*, AM. BAR ASS'N J., Mar. 1993, at 24.

[114] Lee Hancock, *Erdmann Pleads No Contest; He Receives Probation in 6 Faked Autopsies*, DALLAS MORNING NEWS, Sept. 22, 1992, at 1A.

[115] Laura Frank & John Hanchette, *Wrongful Prosecution Hides Behind the Mask of Science*, DETROIT NEWS, July, 24, 1994, at 8.

[116] Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Division, 438 S.E.2d 501, 506 (W. Va. 1993).

[117] Audrey Duff, *Trial and Error*, TEXAS MONTHLY, October 1994, at 39.

[118] Stanley Schneider, *Falsified Lab Tests Affect Alarming Number of Convictions*, VOICE FOR THE DEFENSE, Vol. 23, no. 5, June 1994, at 20.

[119] Davis v. State, 831 S.W.2d 426, 429-30 (Tex. Crim. App. 1992).

sentence, the Court sentenced him to life imprisonment. Davis's conviction later was reversed because of prosecutorial misconduct and a Fourth Amendment violation.[120]

Zain eventually acknowledged that his testimony at Davis's trial was a lie. After the victim's family sued the apartment complex where she lived, Zain admitted he did not do a DNA test on the carpet sample and that the blood on the carpet was from the victim and not Davis.[121]

Davis petitioned the Court to prevent the State from re-prosecuting him. The Court made specific findings that Zain was unreliable and not credible.[122] Moreover, the judge stated that it was "highly probable that Zain committed aggravated perjury" by claiming he conducted DNA tests when he did no such testing and when he testified that Davis's blood matched recovered samples.[123] The Court concluded that "Zain's conduct was intentional and outrageous and shocked the conscience of the Court," but declined to prohibit re-prosecution.[124]

Fred Zain was fired in July 1993, but the lethal effects of his years as a witness still linger. As many as 5,000 cases could have been tainted by his unreliable testimony.[125] The total number of convictions supported by Zain's testimony, like those based on Erdmann's, is unknown, since judicial opinions do not always name witnesses and discuss such testimony. The full extent of the impact of their testimony remains unknown.

E. Hanging by a Hair: The Dubious Testimony of Charles Linch

Charles Linch, a hair and fiber analyst for Dallas County's Southwestern Institute of Forensics Sciences (SWIFS), was relied upon by the State to provide evidence of guilt in numerous criminal trials. In 1994, he testified in the case of Kenneth McDuff, a capital defendant charged with raping and murdering a woman abducted from an Austin car wash. Although no one saw McDuff with the woman and her body was never found, McDuff and another man, Worley, had been seen at the car wash at the approximate time she disappeared. At trial, Worley testified against McDuff. Worley admitted that he raped the victim but claimed he was dropped off at home before McDuff killed her.[126]

Small drops of blood and five hairs were recovered from McDuff's car. The results of the blood tests were inconclusive and could not establish that the woman had been in McDuff's

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[120] The appellate Court found that the prosecutors in Davis's trial had suborned the perjury of another witness. *Id.* at 434-41.

[121] Debbie Hiott, *Examiner Expected to Recount Role in Murder Case*, AUSTIN AM. STATESMAN, Aug. 3, 1993, at B1.

[122] Ex parte Davis, 893 S.W.2d 252, 258 (Tex. Crim. App. 1995).

[123] *Id.* at 258.

[124] *Id.*

[125] Stanley Schneider, *Falsified Lab Tests Affect Alarming Number of Convictions*, VOICE FOR THE DEFENSE, Vol. 23, no. 5, June 1994, at 20.

[126] McDuff v. State, 939 S.W.2d 607, 611 (Tex. Crim. App. 1997).

car. The hair, therefore, was the sole physical evidence linking McDuff to the crime. A state serologist testified he had examined the hair and found it to have the same "microscopic characteristics" as that of the missing victim.[127] To secure a death sentence, the prosecution called Linch to testify in the punishment phase. He told the jury McDuff's hair matched that found on another murder victim in Waco.[128]

Despite the critical importance of Linch's testimony, the State failed to reveal a crucial fact: at the time of his testimony, Linch was under committal to a Dallas mental hospital for psychiatric problems. Linch later described the effects of his medication. He recounted that one drug "made me run around like a rabbit."[129] Another drug affected his memory, causing a lack of recall of events.[130]

On the day of McDuff's trial, however, Linch was permitted to fly to San Antonio, rent a car, and drive to the courthouse to testify as a forensic expert.[131] After giving his testimony, Linch returned to the mental hospital.[132]

Kenneth McDuff was convicted, sentenced to death, and executed.

III. Conclusion: No Justice Without Truth

Should a jury have erred by believing a lying witness, or by drawing an attractive but misleading inference, there is nothing to appeal.

F. Lee Bailey[133]

Reliability, accuracy, and fairness are cornerstones of the criminal justice system. In death penalty cases, these prerequisites are even more essential; the United States Supreme Court has long recognized that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."[134]

The current imposition of the death penalty in Texas permits a conviction and death

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[127] *Id.* at 612.

[128] Holly Becka & Howard Swindle, *Analyst Left Psych Ward to Testify: County Forensic Expert Crucial in Murder Trials*, DALLAS MORNING NEWS, June 18, 2000, at 1A

[129] Holly Becka & Howard Swindle, *Analyst Left Psych Ward to Testify: County Forensic Expert Crucial in Murder Trials*, DALLAS MORNING NEWS, May 7, 2000, at 1A.

[130] *Id.*

[131] *Id.*

[132] Holly Becka & Howard Swindle, *Tests Casting Doubt on Girl's Death*, DALLAS MORNING NEWS, June 18, 2000, at 1A.

[133] James McCleskey, *Buried and Forgotten*, ANGOLITE, July/August 1990.

[134] Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion).

sentence based on allegedly scientific information that has no real foundation. Psychiatrists are allowed to give absolute assurances about defendants they have never met, contrary to their professional code of ethics and the overwhelming scientific evidence contradicting those assurances. Sentences of death hang in the balance by a single hair. Prosecutors rely on the perjured testimony of so-called experts, who falsify reports to secure convictions.

The burden of creating and enforcing standards to ensure that only reliable evidence is presented to the jury does not lie solely in the hands of trial judges. Prosecutors must strive to embody the oath of their office – to seek the truth rather than merely a conviction – by refusing to use evidence and experts they know to be untruthful and unreliable. The higher courts must provide critical and thoughtful appellate review of expert testimony, if the fair administration of justice is to be more than an empty phrase. The State of Texas must provide adequate resources to defend capital cases and qualified defense attorneys must thoroughly investigate and vigorously attack questionable scientific evidence. Lastly, Texas lawmakers must critically re-examine the entire concept of determining future dangerousness as a reliable method for guiding the discretion of death penalty jurors.

The State of Texas must guarantee that the scientific facts and expert testimony that underlie every capital conviction are subjected to the heightened scrutiny required by the Supreme Court. The evolving evidentiary standards reflected in the Daubert decision demand the best that contemporary science can offer. These standards must be applied in Texas capital cases, where hair comparison, bite mark evidence, and psychiatric predictions based on hypothetical situations sometimes bear more resemblance to medieval fortune-telling than to modern scientific techniques.

CHAPTER FOUR

Race and the Death Penalty: The Inescapable Conclusion

I. Introduction

Capital punishment in the pre-Furman era was disproportionately visited upon black men. Not only were black men disproportionately sentenced to die, but among the community of the condemned, black men were far more likely actually to be executed,[1] and defendants of any race convicted of killing whites were the most likely to be executed.[2] In fact, taking into account age, race, location, occupation, prior arrests, education of the defendant, age of the victim, and whether a weapon was used, the combined races of victim and offender were the strongest predictors of a death sentence in Texas.[3]

Though new "guided discretion"[4] statutes were enacted after Furman v. Georgia,[5] racial disparities continue to exist both nationally[6] and in Texas.[7] Thus, the question that remains

[1] Of the 510 death sentences handed down from 1923 to 1972, 56% of the defendants were black, 34% white, and 9% Latino. While only 61% of those whites were actually executed, 82% of condemned blacks met their fate in the electric chair. JAMES W. MARQUART, THE ROPE, THE CHAIR AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS 1923-1990, 20-23 (1994). There were 361 executions in Texas from 1924 to 1964. Sixty-three percent of those killed were black (the black population during this time period rose from 10% to 12%), 30% were white, 6% Latino, and one (.27%) was Native American. WILLIAM J. BOWERS, EXECUTIONS IN AMERICA (1974).

[2] Eighty percent of Texans executed prior to 1972 were convicted of offenses against whites, 15% involved black victims, and 5% Latino victims. The defendant was actually executed in 73% of the cases where the victim was white, but in only 62% of the cases where the victim was black and 46% of cases involving a Latino victim. JAMES W. MARQUART, THE ROPE, THE CHAIR AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990, 24 (1994).

[3] *Id.* at 39-57.

[4] When reinstating the death penalty, the Court rejected mandatory sentencing in favor of statutes that provide the sentencer with guidelines for considering the defendant "as an uniquely individual human being." *Woodson v. South Carolina*, 428 U.S. 280, 304 (1976).

[5] Furman v. Georgia, 408 U.S. 238 (1972).

[6] *See, e.g.*, United States General Accounting Office, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990); DAVID C. BALDUS, GEORGE WOODWORTH AND CHARLES A. PULASKI, EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990); David C. Baldus, George Woodworth and Charles A. Pulaski, *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 STETSON L. REV. 133 (1986); Samuel R. Gross, *Race and the Judicial Evaluation of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275 (1985); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); William Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Raymond Peternoster, *Race of the Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983); Michael Radelet and Glenn Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLORIDA L. R. 1 (January 1991).

[7] *See e.g.*, TEXAS JUDICIAL COUNCIL, CAPITAL MURDER STUDY: JUNE 14, 1973-FEBRUARY 4, 1976 (1976)

today is not *whether* discrimination exists, but *how* it is made manifest and by whom.[8] In this report, we examine three discretionary aspects of the criminal justice system that produce disturbing racial disparities: the prosecutor's decision to seek the death penalty; the prosecutor's decision to remove black jurors from capital trials; and the jury's decision to sentence a defendant to die.

II. "Misdemeanor Murders:" The Decision to Seek Death

At one point, with a black-on-black murder, you could get it dismissed if the defendant would pay funeral expenses.

Fred Tinsley, veteran defense attorney in Dallas.[9]

Racial disparity in the Texas death penalty surfaces in the discretionary charging decisions of District Attorneys. Because prosecutors are invested with the authority to decide

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(unpub., on file with University of Texas Library) (capital murder data on race of defendants, victims, and jurors for the first 74 post-Furman capital murder indictments); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 596 (1980) (study based on Texas homicide data from 1973-78); Jim Henderson, & Jack Taylor, *Killers of Dallas Blacks Escape the Death Penalty*, DALLAS TIMES HERALD, November 17, 1985, at A1; Ronnie Dugger, *The Numbers on Death Row Prove that Blacks Who Kill Whites Receive the Harshest Judgment*, TIME, Spring 1988, Special Issue, at 88 (discussing University of Texas Law Professor Ed Sherman's analysis of Harris and Dallas County, Texas death penalty data from 1978-80); Sheldon Eckland-Olson, *Structured Discretion, Racial Bias, and the Texas Death Penalty*, 69 POL. SCI. Q. 853 (1988) (study based on Texas capital murder statistics from 1974-88); Jonathan R. Sorenson, *The Effects of Legal and Extra-legal Factors on Prosecutorial and Jury Decision Making in Post-Furman Texas Capital Cases,* (1990) (unpublished Ph.D. dissertation, Sam Houston State University, (Huntsville)) (study based on Texas capital murder statistics from 1974-88); Jonathen R. Sorensen & James Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CH. 743 (1990-91) (study based on Texas capital murder statistics from 1980-86); Alan Widmayer & James Marquart, *Capital Punishment and Structured Discretion: Arbitrariness and Discrimination After Furman*, CORRECTIONAL THEORY AND PRACTICE 178-96 (1992) (capital murder statistics from Harris County, Texas, from 1980-88).

[8] Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13; Joseph F. Sheley, *Structural Influences on the Problem of Race, Crime, and Criminal Justice Discrimination*, 67 TUL. L. REV. 2273, 2275-76 (1993); Alan J. Tomkins, *Subtle Discrimination in Juvenile Justice Decisionmaking: Social Scientific Perspectives and Explanations*, 29 CREIGHTON L. REV. 1619, 1632 (1996); Douglas Smith, et. al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234 (1983) (Race discrimination found in "the police's differential responsiveness to victims. In general, police arrest more often in encounters in which whites have been victimized."); Michael Radelet & Glenn Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 10 L. & SOC'Y R. 587 (1985) (In selecting homicide defendants for death, "race, in effect, functions as an implicit aggravating factor."); Jonathan R. Sorenson, *The Effects of Legal and Extra-legal Factors on Prosecutorial and Jury Decision Making in Post-Furman Texas Capital Cases,* (1990) (unpublished Ph.D. dissertation at 6, Sam Houston State University (Huntsville)) ("Prosecutors seek capital punishment in cases where they are most likely to win . . . cases involving the killing of whites, especially by blacks, because these cases fit the category of crimes that elicits the most fear from white jurors who identify with the victims."); Ray F. Herndon, *Race Tilts the Scales of Justice*, DALLAS TIMES-HERALD, August 19, 1990, at A1 (former Dallas District Attorney John Vance openly admitted that such case typification occurs in Texas).

[9] Telephone Interview with Fred Tinsley, private defense attorney (Sept. 30, 2000).

how to charge cases and when to seek the death penalty, they alone determine which cases are charged as capital crimes. In practice, far more African-Americans are charged with capital murder, and far more individuals (of all races) are charged with capital murder when the victim is white. Dallas defense attorneys Larry Mitchell and Fred Tinsley both remember that until the mid-1980s, black-on-black murders were known around the courthouse as "misdemeanor murder."[10] As Mr. Tinsley recalled, "At one point, with a black-on-black murder, you could get it dismissed if the defendant would pay funeral expenses."[11] Mr. Mitchell noted that "[m]urder cases are still tried differently. If there is a black victim in a dope deal, they won't go capital. A white in the same situation and they would."[12] Attorney Peter Lesser agrees: "I'd be surprised to see a black-on-black crime go capital. I can't remember one in 26 years; you never see it."[13] To test whether this remains the case, we conducted a detailed study of all murders in Montgomery County, Texas during the five years preceding our study: January 1, 1995 through December 31, 1999.

A. Montgomery County

The total population of Montgomery County is 287,644, approximately 85% of which is white.[14] There were 55 murders in Montgomery County during the five-year period of our study.[15] Twelve people have been condemned to die by Montgomery County juries since the reinstatement of the death penalty, all of them white men. At first glance, this might indicate that murder in Montgomery County is confined to the white community. On closer examination, however, it becomes clear that murder is actually most likely to befall black males. Why, then, the all-white death row population?

To answer this question, we examined the disposition of every murder case in Montgomery County in the five-year period from January 1, 1995 to December 31, 1999. In that period, there were 55 such cases, 31% of which involved non-white victims. This initial finding is significant in at least two respects. First, the non-white population in Montgomery County is just under 15% of the total population of the county. Proportionally, therefore, the number of non-white murder victims is more than double the number one would expect if homicidal violence were distributed evenly throughout the population. Second, and more important for this study, 31% of the homicides involved only non-white victims, but none of those cases led to a death sentence.[16]

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[10] Telephone Interviews with Larry Mitchell and Fred Tinsley, private defense attorneys (Sept. 30, 2000).

[11] Telephone Interview with Fred Tinsley, private defense attorney (Sept. 30, 2000).

[12] Telephone Interview with Larry Mitchell, private defense attorney (Sept. 30, 2000).

[13] Telephone Interview with Peter Lesser, private defense attorney (Sept. 30, 2000).

[14] DEPARTMENT OF RURAL SOCIOLOGY, TEXAS A&M UNIV. SYS., PROJECTIONS OF POPULATION OF TEXAS BY AGE, SEX, AND RACE/ETHNICITY FOR 1990-2025 (1988).

[15] There were actually 60 total homicides but, because we are focusing on prosecutorial discretion, five have been eliminated from our study because the purported killer also died at the scene. Thus, no law enforcement agency was ever given an opportunity to exercise discretion in those cases.

[16] Larry Allen Hayes was sentenced to die for killing his wife, a white female, in front of his nine year old

We also discovered that the murders of non-whites generally were statistically less likely to lead to arrest. There were arrests in 92% of the cases in which victims were white, but only in 58% of the cases in which victims were non-white.[17] There was only one unsolved homicide involving a white woman, who was killed along with her husband during the robbery of their home.[18] The slaying generated tremendous public concern; front-page newspaper articles tracked the investigation, which included a search of the countryside on horseback. As the Conroe Courier noted, the couple's family demanded that "no stones [be] left unturned," and the feeling of the community was that "good people are deserving of no less."[19] The couple's daughter, Marcille Lawless, was grateful when the homicide detective promised to pursue the case until "the day he retired."[20]

The families of several black male murder victims, on the other hand, did not receive such community support. Woody Arnsworth was also killed in a home-invasion murder, but his daughter said that the District Attorney's Office treated her rudely, never even acknowledging her loss. Though she was told the police had a suspect, no search warrant had been issued as of three months after the crime.[21] And though seven Latinos were murdered during the period of the study, only one arrest was made.[22]

Furthermore, when arrests were made in cases involving white victims, the cases were far more likely to proceed to trial. During the five-year period we studied, Montgomery County prosecutors tried only two cases with non-white victims. By contrast, a full 90% of the cases involving white victims went to trial. In every case in which the murder of a white woman led to an arrest, the case went to trial; three resulted in death sentences. In fact, all of the death sentences handed down in Montgomery County from 1995 through 1999 involved white female victims except one.[23] Overall, 67% of the cases resulting in death sentences coming from Montgomery County have involved white female victims.[24]

The murders of non-whites in Montgomery County, by contrast, generally have been resolved by plea, often resulting in remarkably lenient sentences. In the summer of 1995, Jonathan Williams and Felipe Martinez, Jr. were attacked and abducted by a gang of armed men.

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daughter, then killing a black female convenience store clerk in the course of his escape. Laura Christian, *Husband Found Guilty of Double Murder,* CONROE COURIER, Sept. 14, 2000.

[17] Appendix Four, at Table A.

[18] There is only one other unsolved case with white victims, that of William Gregory Odstreil. Of the cases involving white victims that were presented to the grand jury, only one was no-billed, in which Paul Dickson Vancalditz was shot by the police. *See* Appendix Four.

[19] Jonathan Carter, CONROE COURIER, Aug. 29, 1995, at A1.

[20] Tracey, Lee, *Deadly Mysteries: Survivors of Murdered Loved Ones Try to Cope with Their Loss.* CONROE COURIER, September 15,1996, at 16-A.

[21] *Id.*

[22] *See* Appendix Four.

[23] *See* Appendix Four.

[24] *See* Appendix Four.

The men mercilessly kicked and beat the two victims, demanding money.[25] Williams and Martinez were shot repeatedly in the back.[26] Williams, a black man, was killed, but Martinez survived. The grand jury indicted twelve people for capital murder. Though the severity of the crime would appear to merit capital prosecution, the Montgomery County District Attorney's Office reduced the charges against all twelve co-defendants to attempted murder, aggravated kidnaping, or attempted capital murder. Two of the defendants were sentenced to probation, one was sentenced to life, and the rest were sentenced to prison terms ranging from five to 20 years.[27] Five Asian males were murdered during the period studied, and only one case proceeded to trial. The defendant was sentenced to life. Two cases were pled, for 40 and 45 years, one was not indicted, and one remains unsolved.[28]

While more information is certainly needed, the statistics seem to indicate that more cases in Montgomery County go to trial when the victims are white. Without further research it is impossible to learn whether this is because the prosecution refuses to settle for less than the death penalty in white-victim cases, or other reasons. Nonetheless, the statistics are cause for concern.

B. Statewide

A systematic study of all Texas murders, comparable to the study we conducted in Montgomery County, is beyond the scope of this report. Interestingly, however, the available data from other parts of the state suggests that the results in Montgomery County are not an aberration. Across the state, the loss of non-white lives is treated less seriously than the loss of white lives. Studies demonstrate that racial discrimination is considerably more pronounced in the exercise of prosecutorial (as opposed to jury) discretion, and that it is manifested more in the race of the victim than that of the defendant.[29]

University of Texas Professors Sorenson and Marquart have concluded that, all other things being equal, a Texan who commits the capital murder of a white person is more than five times more likely to be sentenced to death than a Texan who commits the capital murder of an

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[25] Indictment of Oscar Andres Vasquez (No. 96-1001462) (Montgomery Cty. Oct. 9, 1996).

[26] Indictment of Ernest Olivos (No. 96-1001458) (Montgomery Cty. Oct. 9, 1996).

[27] Indictment of Jesse Gilbert Gonzales (No. 96-1001456) (Montgomery Cty. 1996); Indictment of Quinton Leo Burford (No. 96-1001457) (Montgomery Cty. 1996); Indictment of Ernest Olivos, Jr. (No. 96-1001458) (Montgomery Cty. 1996); Indictment of Nick Ortiz (No. 96-1001459) (Montgomery Cty. 1996); Indictment of Ruben Esparza (No. 96-1001460) (Montgomery Cty. 1996); Indictment of Andrew Sanchez Selph (No. 96-1001461) (Montgomery Cty. 1996); Indictment of Oscar Andres Vazquez (No. 96-1001462) (Montgomery Cty); Indictment of John Chris Hernandez (No. 96-1001463); Indictment of Gustavo Pena (No. 96-1001464) (Montgomery Cty. 1996); Indictment of Joseph Roger Valentine (No. 96-1001465) (Montgomery Cty. 1996); Indictment of Artemio Amado Aldivar (No. 96-1001466) (Montgomery Cty. 1996); Indictment of Lionel Pena, Jr. (No. 95-0800826) (Montgomery Cty. 1996); Indictment of Jose Luis Longoria (No. 98-1101277) (Montgomery Cty. 1996).

[28] *See* Appendix Four.

[29] Sheldon Eckland-Olson, *Structured Discretion, Racial Bias, and the Texas Death Penalty*, 69 POL. SCI. Q. 853, 858-61, 871 (1988), *see also* note 6, *supra.*

African-American.[30] Furthermore, with the rarest of exceptions, whites in Texas do not receive death sentences for the capital murder of blacks.[31] Texas has never executed a white person for the murder of a black person. Only one white has ever been condemned for the rape-murder of a black woman.[32] Ironically, the only whites currently on death row for crimes that did not involve white victims were convicted of racist hate crimes, including the two men convicted of the gruesome dragging murder of James Byrd,[33] and a member of the Aryan Brotherhood convicted of a racially-motivated stabbing in prison.[34] On the other hand, 23% of those executed in Texas were black men convicted of murdering whites.[35] The significance of these numbers is underscored by the fact that murder generally is committed within racial categories. From 1976 to 1998, for example, 86% of white victims were killed by whites and 94% of black victims were killed by blacks. In contrast, only 7.5% of homicides nationwide in 1998 were black on white.[36]

Young black males continue to be the fastest growing group of murder victims. As of 1998, African-Americans were six times more likely than whites to be murdered.[37] Homicide is the eighth leading cause of death among both black Texans (18.7 in 100,000), and Latino Texans (9.6 in 100,000), but it is not even among the top ten causes of death for white Texans (4 in 100,000) or Asian Texans (6 in 100,000).[38] Yet a startling 80% of people executed in Texas since Furman were condemned for killing whites.[39]

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[30] *See* Jonathen R. Sorensen & James Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CH. 743, 765-72 (1990-91); Alan Widmayer & James Marquart, *Capital Punishment and Structured Discretion: Arbitrariness and Discrimination After Furman*, CORRECTIONAL THEORY AND PRACTICE 187 (1992) (capital murder statistics from Harris County, Texas, from 1980-88).

[31] Sorenson and Marquart's data covering Texas capital murders from 1980-86 show that the a white who committed the capital murder of a black during those years had, statistically speaking, *no* chance of receiving the death penalty; while a black who committed a capital murder of a white stood a 25% chance of receiving the death penalty. *See* Sorenson & Marquart, 18 N.Y.U. REV. L. & SOC. CH. 743 at 765.

[32] *See, e.g.*, Rubert C. Koeninger, *Capital Punishment in Texas, 1924-68*, 15 CRIME & DELINQ. 132, 138-39 (1969). There is only one post-Furman Texas capital case involving a white-on-black rape; however, in that case, the prosecutors did not charge the defendant with murder in the course of a rape, but instead charged him with murder in the course of a robbery. Vigneault v. State, 600 S.W.2d 318 (Tex. Crim. App. 1979). Mr. Vigneault died of natural causes on death row.

[33] *See infra*, Appendix Four.

[34] *See id.* There is one white man on death row for killing his wife (a white female), and subsequently killing a convenience store clerk (a black female).

[35] *See* Death Penalty Information Center, *Death Row U.S.A.*, (July 1, 200), *at* http://www.deathpenaltyinfo.org/DRUSA-ExecBreakDwn.html.

[36] United States Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the U.S.: Trends by Race, at* http://www.ojp.usdoj.gov/bjs/homicide/race.htm.

[37] United States Department of Justice, Bureau of Justice Statistics, *Violent Crime Trends* (1987) and *Homicide Trends in the U.S.: Age, Gender, and Race* (1998), *at* http://www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm.

[38] Calculated using Population estimate for Texas, U.S. Census Bureau, *USA Counties 1998 General Profile*, *at* http://txsdc.tamu.edu/; Texas Department of Health, Bureau of Vital Statistics *1998 Annual Report*, Table 18: Texas Resident Mortality From Selected Causes 1994-1998 & Table 16: Leading Causes of Death by Race/Ethnicity, *at* http://www.tdh.state.tx.us/bvs/stats98/annrpt.htm.

[39] *See* Appendix Four.

Indexing race and gender together paints an even clearer picture. While most recent statistics indicate that 23% of all Texas murder victims are black men, only 0.4% of those executed since the reinstatement of the death penalty were condemned to die for killing a black man. Conversely, white women represent 0.8% of murder victims statewide (based upon 1998 figures), but 34.2% of those executed since reinstatement were sentenced to die for killing a white woman.[40]

Some might suggest this problem is being solved; that treating all post-Furman cases as a group provides a distorting picture. To be clear that racial disparity in the charging of potentially capital cases is alive and well, we calculated the rates of race/gender combinations for those arriving on death row in the five years between January 1, 1995, and December 31, 1999. As discussed above, as of 1998, only .8% of murder victims were white women. In the five years of our study, however, 19.3% of those arriving on Texas's death row were convicted of killing white women. Similarly, 11% of the newly condemned were convicted of killing black men, half of what one would expect in light of the fact that black men represent 23% of all murdered Texans.

III. Jury Selection: The Decision to Remove Black Jurors

If you ever put another nigger on a jury, you're fired.

> Dallas County District Attorney Henry Wade reprimanding Assistant District Attorney Hampton for seating a black man on a jury.[41]

The U.S. Supreme Court twice found Dallas County's method of selecting jury pools unconstitutional, forcing the county to include minorities in the venire.[42] In response, Dallas County, under the direction of the legendary Henry Wade, developed a system of training prosecutors to excuse minorities, women, Jews, and the physically challenged from criminal juries. In 1963, Bill Alexander, one of Henry Wade's top aides, wrote a treatise on jury selection in criminal cases. That treatise instructed prosecutors as follows: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well

[40] Murder rates from Texas Department of Health, Bureau of Vital Statistics *1998 Annual Report,* Table 20C: Deaths from Selected Causes, Texas residents by Race/Ethnicity, Sex and Age, Homicide and Legal Intervention *at* http://www.tdh.state.tx.us/bvs/stats98/annrpt.htm. The race and gender of the victims of defendants on death row are nowhere available in a single source, and were compiled through a combination of Texas Department of Corrections records; trial transcripts; newspaper articles; attorney interviews; and appellate opinions.

[41] Andrew Hammel, *Discrimination and Death in Dallas: A Case Study in Systemic Racial Exclusion*, 3 TEX. F. ON C.L. & C.R. 187, at 191 (Summer 1998). Jack Hampton, who later became the Presiding Judge of the 283rd District Court of Dallas County, remembers an incident in the late 1950s when, as a prosecutor, he allowed an African-American woman to serve on a jury hearing a DWI case. When the jury hung because of the woman's reluctance to find the defendant guilty, Henry Wade personally reprimanded Hampton, warning him: "If you ever put another nigger on a jury, you're fired." *Id.*

[42] Hill v. Texas, 316 U.S. 400, 403 (1942); Cassell v. Texas, 339 U.S. 282, 286 (1950).

educated."[43] Soon after the Alexander memo was written, then-Assistant District Attorney Jon Sparling wrote the now-infamous Sparling memorandum, entitled "Jury Selection in a Criminal Case." This memo advised prosecutors to exclude from juries "any member of a minority group which may subject him to oppression – they almost always empathize with the accused." Sparling instructed prosecutors to avoid women ("I don't like women jurors because I can't trust them"); Jews ("Jewish veniremen generally make poor State's jurors...Jews have a history of oppression and generally empathize with the accused."); and the physically challenged ("Look for physical afflictions...These people usually sympathize with the accused.").[44]

The Sparling memo was incorporated into a training manual distributed to all Dallas County District Attorney's Office personnel. Throughout the 1970s, this manual was used in a training program that became progressively more popular, eventually drawing prosecutors from as many as 220 different Texas counties.[45] Former prosecutors[46] and defense attorneys alike agree that the Dallas County District Attorney's Office has long practiced a policy of systemic racial discrimination in jury selection. In hearings on the jury selection practices of the county, defense attorneys have testified that they never "wasted" a defense strike on minority jurors, no matter how undesirable to the defense, because they could rely on the "assumption that the State would strike the black and Latino jurors."[47] Dallas County judges also have publically acknowledged discrimination they observed in their courtrooms. Harold Entz, Judge in County Criminal Court No. 4, testified that he had granted a prosecutor's request to shuffle a jury in his Court, and as the jurors were reseating themselves in accordance with the shuffle, "the State volunteered the information that they requested a shuffle because a predominant number of the first six, eight or ten jurors were blacks."[48]

In 1985, the *Dallas Morning News* published a lengthy front-page exposé of the jury selection tactics of the Dallas County District Attorney's Office, which revealed the results of a study of 4,434 jurors called for service in 100 randomly-selected felony trials in Dallas County

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[43] Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, March 9, 1986, at 28A. *See also* Batson,v. Kentucky, 476 U.S. 79, 104 n.3 (1986) (Marshall, J., concurring) (quoting newspaper article).

[44] *See* Memo reprinted in: J.D. Arnold, *Wretched Excess in Dallas*, TEXAS OBSERVER, May 11, 1973, at 9; *Women, Gimps, Blacks, Hippies Need Not Apply*, TIME, June 4, 1973, at 67.

[45] Hammel, 3 TEX. F. ON C.L. & C.R. 187at 194-201 (citing, *inter alia,* testimony of Larry Mitchell and Ron Wells). *See also* Ex Parte Clarence Lee Brandley, 781 S.W.2d 886, 926 (Tex. Crim. App. 1989) (Trial Court findings of fact include: "At the time of Petitioners first and second trials, the District Attorney's Office in Montgomery County utilized several prosecution manuals. The manuals were resource or reference books which instructed the prosecutors on all aspects of how to try a criminal case. The manual recommended that black persons not be allowed to serve on any criminal jury").

[46] Hammel, 3 TEX. F. ON C.L. & C.R. 187 at 194-201.

[47] *Id.* at 192-97 (describing testimony of Ralph Tait, Ron Goranson, and Richard Anderson); Ex parte Haliburton, 755 S.W.2d 131, 133 n.4 (Tex.Crim.App. 1988). *See also* Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, March 9, 1986, at 28A ("The practice of prosecutors excluding blacks is so commonplace that defense lawyers say they routinely incorporate it into their trial strategy, rarely dismissing even prosecution-minded blacks, anticipating that prosecutors will use one of their peremptory challenges to do the job for them.").

[48] Hammel, 3 TEX. F. ON C.L. & C.R. 187 at 203.

from 1983-84.[49] The study found that the prosecution used peremptory challenges to strike 405 of the 467 African-American jurors qualified to serve in these trials.[50] Although the population of Dallas County was 18% African-American at the time of the study, only 4% of the jurors on Dallas County criminal jurors were of that race. Seventy-two percent of the trials, including over 96% of those involving black defendants, were tried by all-white juries.[51] The study further found that prosecutors used peremptory challenges to strike 92% of the total number of blacks stricken from juries. Blacks were excluded from juries at almost five times the rate of white jury candidates and twice as often as Latino candidates.[52]

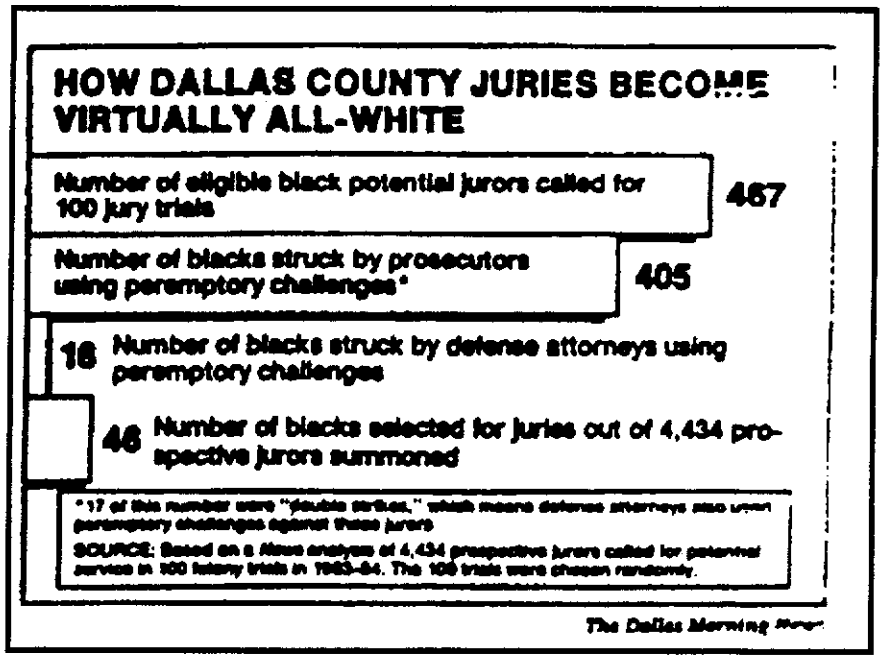

Figure 1: Dallas Morning News Graph

On December 21, 1986, the *Dallas Morning News* published a similar study of the fifteen capital murder cases tried in Dallas County between 1980 and December 1986.[53] Only 2.8% of the jurors were of African-American descent. Moreover, of the 62 African-American jurors qualified to serve, the prosecution struck 56, or *90.3%*, with peremptory challenges. Five of the 15 cases involved an African-American defendant, and four of those were tried by all-white juries. African-Americans had a 1 in 12 chance of being selected to serve on a death penalty

[49] Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, March 9, 1986.

[50] *Id.* The article notes that 17 of these challenges were "double strikes," meaning that defense attorneys used peremptory challenges against these jurors as well – suggesting that, but for their race, these were prospective jurors the State might have welcomed.

[51] *Id.*

[52] *Id.* The series of articles written by Steve McGonigle and Ed Timms concerning race bias in Dallas County criminal jury selection won the Gavel Award from the State Bar Association of Texas, the Headliners Club of Austin award for investigative journalism, the Katie Award for investigative journalism from the Press Club of Dallas, and the Emery A. Brownell Award from the National Legal Aid and Defender Association. *See Three News Reporters Receive Awards from Bar Association*, DALLAS MORNING NEWS, Nov. 15, 1986, at 42A; *Ten News Staffers Win Headliners Journalism Awards*, DALLAS MORNING NEWS, Feb. 8, 1987, at 34A; *The News Takes 17 Awards in Dallas Press Club Contest*, DALLAS MORNING NEWS, Nov. 16, 1986, at 33A; *2 News Reporters to Get Award for Series on Juries*, DALLAS MORNING NEWS, Oct. 24, 1986, at 31A.

[53] Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986, at A1.

case, while Latino jurors had a 1 in 4 chance, and whites had a 1 in 3 chance. Frank Williams, a criminologist at Sam Houston State University, estimated that the probability that the pattern of exclusion arose by chance was one in 10,000.[54]

The use of racially discriminatory strikes is not limited to Dallas County.[55] The Montgomery County (Conroe) District Attorney's Office also had a firm policy excluding blacks from all criminal juries. As the trial court found in Ex parte Brandley:

> At the time of Petitioner's first and second trials, a routine or practice existed in the Montgomery County District Attorney's office that all black persons were to be stricken from the jury panel when there was a black defendant. Had any Assistant District Attorney allowed a black person to serve as a juror, the District Attorney, James Keshan, would have required that assistant to explain why he departed from standard practice by allowing a black person to serve on a criminal jury. No lawyer having practiced in Montgomery County can recall a black person ever being permitted to serve on a jury when there was a black defendant except one instance in 1978 when a black Conroe police officer was allowed to serve on a jury.[56]

The Bowie County (Texarkana) prosecutor's office also excluded almost all blacks from jury service. Capital defendant Delma Banks presented the state and federal courts with overwhelming statistical proof establishing that in scores of Bowie County criminal cases tried between the mid-1970s and the mid-1980s, black citizens regularly qualified for jury service, but rarely sat on criminal juries.[57] The numerical data demonstrated that from January 1, 1975 to September 30, 1980, the prosecutor's office (under the direction of two different District Attorneys) had used peremptory strikes to exclude exactly 94% of blacks eligible to sit on juries.[58] As a result of this discriminatory practice, 1.8% of eligible blacks served on juries in the 37 felony cases tried, while they comprised over 21% of the county population.[59]

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[54] *Id.*

[55] *See* Tompkins v. State, 774 S.W.2d 195, 203 (Tex.Crim.App. 1987) ("[B]lack jurors have been relatively uncommon on capital murder juries in Harris County during the past several years."); *Black Killers Overwhelmingly Face White Jurors, Study Finds*, UPI WIRE, December 21, 1986 (two-thirds of blacks from Harris County on Texas's death row had all-white juries; four-fifths of blacks from Dallas County on Texas's death row had all-white juries).

[56] Ex parte Brandley, 781 S.W.2d 886, 926 (Tex. Crim. App. 1989).

[57] Banks v. Johnson, No. 5:96-CV-353 (E.D. Tex).

[58] *Id.*, at Exh. 7.

[59] *See* Appendix Four, Table D. Dr. Kent Tedin of the University of Houston, an expert on statistics, conducted four different tests on the available data. He analyzed percentage differences between blacks in the jury pools and in the adult county population, the registered voter population and the pre-peremptory strike pool population. He also analyzed the percentage differences between blacks and whites struck by the State. In each instance, Dr. Tedin asked how likely was it that the differences in percentages could be the result of chance alone. He concluded that the odds of these differences happening by chance alone were less than 1 in 10 million. It was Dr. Tedin's expert opinion that this disparity could only be the product of race discrimination. Banks v. Johnson, Exh. 8.

Both Bowie County prosecutors used race-coding markers – for example, "C," "N," or "B" – to identify the names of blacks who were on venire lists. These codes became markers for the prosecution's use of peremptory strikes, for no similar race-identification markers were placed above or next to the names of whites. Former Assistant District Attorney Rick Rogers explained that once a prosecutor had race-coded a black person, he would not normally care to learn any other information about that person, since it was already determined that the person would be struck from the jury.[60]

Mr. Banks' statistical showing is corroborated by affidavits from six defense attorneys – including a former prosecutor – who tried cases in Bowie County during the relevant time period and who were familiar with the prosecutor's systematic and intentional practice of excluding blacks citizens from jury service through the use of peremptory challenges.

Mark Lesher, a twenty-year member of the Texas Bar and a former Assistant District Attorney, stated that "from 1975 to 1980, it was the obvious practice of the District Attorney's office to use its peremptory strikes to remove otherwise qualified blacks from the jury venire." Mr. Lesher further commented that the prosecutor's use of peremptory challenges to remove blacks from juries "was simply the way things were done in the criminal justice system in Bowie County, and was the accepted practice at that time."[61]

Five other senior Bowie County defense attorneys agreed with Mr. Lesher's assessment.[62] Attorney Jim Davis further noted that District Attorney Cooksey's office was open and nonchalant about its practice of excluding blacks through peremptory strikes:

> While Lynn Cooksey was District Attorney, he invariably struck black prospective jurors from the panel. In fact, he usually noted the race of the black jurors on his copy of the jury list (placing an "N" beside the name of each black venireman) to facilitate the use of his peremptories in removing them.[63]

Joan Fisher, a former Harris County (Houston) Assistant District Attorney who prosecuted serious felonies, including a capital trial, recalls that she was "trained to the effect that you avoid young people, blacks, postal employees, and elderly women because they were

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[60] Petition for Writ of Habeas Corpus, Banks v. Johnson, No. 5:96-CV-353 (E.D. Tex), at Exh. 9, 10 & 20.

[61] *Id.*, Exh. 11.

[62] *See* affidavits of Jim Hooper, Tom Newman, ("[t]he striking of every otherwise qualified black venireperson by the district attorney's office through peremptory challenges ... was simply the unwritten rule governing such trials in Bowie County, Texas during this time."); Sherman Kusin, (he could not "remember trying a murder case in Bowie County in which a black person was allowed to sit on the jury. Every otherwise qualified black venireperson was stricken by the State through the use of peremptory challenges."); James Davis, (during the period 1975 to 1980, "it was the evident practice of the District Attorney's office in Bowie County to exercise peremptory strikes against otherwise qualified black prospective jurors."); Clyde Lee, (it was no secret that at the time of Mr. Banks' trial, "the district attorney's office had an ironclad policy of using its peremptory strikes to remove all black prospective jurors from the jury pool.") *Id.*, Exhibits 12-16, respectively.

[63] *Id.*, Exh. 15.

supposed to be more sympathetic to the defendant."[64] Fisher specifically remembers that when Felony Section Chief Keno Henderson selected a black man to sit on a murder trial and the jury could not reach a unanimous verdict, Henderson immediately assumed it was that man who prevented the jury from reaching a verdict, exclaiming that he "should have known you should never put them on the jury."[65] Though Fisher left the Harris County office before the Sparling memo was in use around the state, she remembers the policy was already in place because "I know I did it and I'm not a racist. Somebody told me to do it."[66]

Though the Sparling memo is long gone, the practice remains. "Sparling didn't put anything in there that's different from what people think; only now they don't say it out loud."[67] Defense attorneys still plan their jury selection strategy assuming that the State will strike all the black venire-members. "Everybody knows what is going to happen."[68] "When I pick juries, I assume they will strike black jurors except where there is a black victim of a black-on-black murder, there might be a tendency to exercise a little more discretion."[69] "They got a little gun-shy [about putting blacks on juries] after O.J."[70]

To be sure, the Supreme Court in 1986 held that prosecutors cannot remove a black juror without articulating a "race neutral" explanation.[71] That protection, however, has proven illusory. Attorneys practicing in Dallas County before and after Batson say that the decision has had little impact. "Nothing has changed," says Larry Mitchell, a criminal defense attorney in Dallas County for twenty-seven years. Mr. Mitchell described the current situation as follows: "Now that we have lists from driver's licenses, the State has to work harder to keep blacks off. They may use eight or nine strikes now when they used to use two or three, but they keep them off. Blacks simply do not serve on juries in Dallas County except where there is a black victim. Even then, it's one or two black jurors at most."[72]

Prosecutors also know they will not be reprimanded for striking African-American jurors. As veteran attorney Peter Lesser reported: "The State knows they can get away with it. We all know the appellate courts won't do anything anymore on this issue. . . . Batson challenges are rarely sustained because the State has gotten better at hiding what they are doing."[73]

Defense attorney Fred Tinsley recently explained that "[a]t the present time, Batson is no longer recognized. When issues are raised, the CCA [Texas Court of Criminal Appeals] just

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[64] Telephone Interview with Joan Fisher (Sept. 25, 2000).

[65] *Id.*

[66] *Id.*

[67] Telephone Interview with Larry Mitchell, private defense attorney (Sept. 30, 2000).

[68] *Id.*

[69] Telephone Interview with Peter Lesser, private defense attorney (Sept. 30, 2000).

[70] *Id.*

[71] Batson v. Kentucky, 476 U.S. 79 (1986).

[72] Telephone Interview with Larry Mitchell, private defense attorney (Sept. 30, 2000).

[73] Telephone Interview with Peter Lesser, private defense attorney (Sept. 30, 2000).

looks the other way, so the State is free to do whatever they want and they know it. There is no question they are still striking blacks off juries just like before."[74] As Larry Mitchell has observed, "Nobody wins on Batson and the prosecutors know that. I always thought that if you were any kind of lawyer you could get around Batson. All you have to do is say anything that sounds race neutral."[75]

The consensus on Batson claims is clear: the exception swallows the rule. The race-neutral explanations offered by prosecutors almost always succeed in fending off an assertion of racial discrimination. For example, attorney Ron Goranson recalls one case in which the State struck a Hispanic juror by saying she "paid too much attention."[76] And Larry Mitchell described one of his cases in which the prosecution removed a prospective juror "because she looked at the defendant in a sympathetic way." Another time, Mitchell recalled, "they kicked a minister off because they said he might be too forgiving."[77]

Attorney Fred Tinsley aptly summarized the current situation as follows:

> The State doesn't even have to worry about coming up with Batson excuses anymore because it is not politically popular to do anything for a defendant, so the objection is never going to be sustained. In Dallas, where all the judges are Republicans, we still had a judge defeated because he lowered the bond on a defendant where the victim was a well-known person. He's no longer a judge because he did the right thing. And, if the appeals courts do anything to uphold the law, they know the CCA will overturn them, so why should they risk their political careers if the ruling isn't even going to stick?[78]

To test the anecdotal experience of these Dallas County practitioner, we examined every Batson decision in a published capital case in Texas. Only one capital case has been overturned by the Texas Court of Criminal Appeals on Batson grounds in the last fifteen years.[79] The CCA has found racial discrimination in at least five additional cases but declined to grant relief for various technical reasons.[80] In other cases, courts have endorsed the prosecutors' reasons for

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[74] Telephone Interview with Fred Tinsley, private defense attorney (Sept. 29, 2000).

[75] Telephone Interview with Larry Mitchell, private defense attorney (Sept. 30, 2000).

[76] Telephone Interview with Ron Goranson, private defense attorney (Sept. 28, 2000).

[77] Telephone Interview with Larry Mitchell, private defense attorney (Sept. 30, 2000).

[78] Telephone Interview with Fred Tinsley, private defense attorney (Sept. 30, 2000).

[79] Chambers v. State, 742 S.W.2d 695 (Tex. Crim. App. 1988); Chambers v. State, 784 S.W.2d 29, 32 (Tex. Crim. App. 1989).

[80] Alexander v. State, 866 S.W.2d 1 (Tex. Crim. App. 1993) (trial Court overruled Batson challenge on timeliness issue; CCA reversed on timeliness, but found trial court's ruling was not clearly erroneous even though it had not ruled on the merits); Adanadus v. State, 866 S.W.2d 210 (Tex. Crim. App. 1993) (although the appellate court found that the State's removal of the only remaining black on the venire was "clearly disparate treatment by the State," it held that the trial court's actions were not clearly erroneous since not all of the traits cited by the State to exclude her were also shared by whites seated on the jury); Cantu v. State, 842 S.W.2d 667 (Tex. Crim. App. 1992) (despite the fact that white jurors had the same traits cited by the State for striking a Latino venire woman, trial court's denial of Batson challenge was not clearly erroneous); Jones v. State, 833 S.W.2d 118 (Tex. Crim. App. 1992); Hernandez v. State, 819 S.W.2d 806 (Tex. Crim. App. 1991).

removing black jurors at face value,[81] even when it was clear that the prosecutors accepted similarly situated whites.[82]

IV. Future Dangerousness: The Decision to Vote for Death

Under the post-Furman Texas capital sentencing statute, the pivotal question posed to capital sentencing juries – whether a convicted capital defendant poses a future danger to society – has been inherently biased against minority defendants, particularly African-Americans who face predominantly white juries. The future dangerousness question creates a situation in which a white juror's racism is particularly likely to influence his sentencing decision. Studies indicate that, all other things being equal, an all-white jury is more likely to perceive a black defendant as a "future danger to society."[83]

Some prosecutors in Texas, however, have resorted to active racial stereotyping to increase the likelihood that minority defendants will be sentenced to die. During the punishment phase of Victor Hugo Saldaño's trial, the prosecution called Walter Quijano, a clinical psychologist, to testify regarding Saldaño's future dangerousness. Dr. Quijano testified that one of the twenty-four factors used to establish future dangerousness was Saldaño's race. The Texas Court of Criminal Appeals apparently was untroubled by this appeal to race as a factor in assessing future dangerousness, and affirmed Mr. Saldaño's sentence without addressing the issue.[84] After Mr. Saldaño sought review in the U.S. Supreme Court, however, the Texas Attorney General conceded error.[85] Quijano offered this opinion in seven capital cases.[86]

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[81] Satterwhite v. State, 858 S.W.2d 412 (Tex. Crim. App., 1993) (prosecutor used two of six strikes to remove two of only three blacks on the venire; both were "unsure" of themselves according to the prosecutor); Camacho v. State, 864 S.W.2d 524 (Tex. Crim. App. 1993) (juror apparently struck because he was too qualified; prosecutor cited the venireman's repeated answer that his vote would depend on the facts and circumstances to argue that the man was too eager); Fuentes v. State, 991 S.W. 2d 267 (Tex. Crim. App. 1999) (all minorities struck from the pool by the State, reasons were not offered for all strikes, but reasons offered included that venirewoman would require premeditation before voting for death); Harris v. State of Texas, 827 S.W.2d 949 (Tex, Crim. App. 1992); Morris v. State, 940 S.W.2d 610 (Tex. Crim. App. 1996); Earhart v. State, 823 S.W.2d 607 (Tex. Crim. App. 1991); Pondexter v. State, 942 S.W.2d 577 (Tex. Crim. App. 1996); Chambers v. State, 866 S.W. 2d 9 (Tex. Crim. App. 1993); Kemp v. State, 846 S.W.2d 289 (Tex. Crim. App. 1992); Trevino v. State, 864 S. W. 2d 499 (Tex. Crim. App., 1993).

[82] Mines v. State, 852 S.W.2d 941 (Tex. Crim. App. 1992); Fuentes v. State, 991 S.W.2d 267 (Tex. Crim. App. 1999)

[83] *See* H. BLALOCK, RACE AND ETHNIC RELATIONS, 21 (1982); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1645-47 (1985) (discussing numerous studies which support the characterization of white attitudes towards blacks as "overwhelmingly negative").

[84] Saldaño v. Texas, No. 72,556 (Tex. Crim. App. Sept. 15, 1999) (en banc) (unpub.) (The Court failed to reach the issue for "technical reasons," although the Court can, in its discretion, reach such claims when "the interests of justice" require).

[85] On June 5, 2000, the U.S. Supreme Court vacated Mr. Saldaño's death sentence after the Texas Attorney General made the unprecedented move of conceding that the use of race in Mr. Saldaño's punishment phase seriously undermined the fairness and integrity of the judicial process. Saldaño v. Texas, 120 S. Ct. 2214 (2000).

[86] TEXAS LAWYER, Vol. 16, NO. 14, pg. 1, June 12, 2000.

Rather than appealing to explicitly racist stereotypes, the State has also relied on coded language. For example, the prosecution argued the following to a Jefferson County jury in the case of Walter Bell, a mentally retarded black man:

> We've lost the streets to them. We're losing the battle. . . . The whole community is in fear of them. Everyone of us, who put bars on or windows and loaded our guns and everyone of you ladies who has refused to go to the convenience store at night after dark, and everyone of you men who refuse to let your wife go out at night, you're a hostage. People like him are holding you and I in abeyance. No one is untouched by fear of being a victim today. It's no longer something that happens in the ghettos or in the impoverished areas. The curse of violent crime reaches the city and the bedroom of 1920 Las Palmas, a quiet suburban addition, and the curse of violent crime reaches 1806 Franklin, and in Port Neches, and in the northern parts of Beaumont. It doesn't have to be that way. We don't have to stand in fear. It's not their world. It's my world, and it's your world, and. . . . Now is the time to reassert the proper order of things in society, and I believe, and I hope you share my view, that swift and certain punishment that fits the crime is a part of the answer.[87]

Finally, prosecutors can often rely on the fact that a black defendant is more likely to have a criminal history than a white defendant. Black men have four times the incarceration rate of white men.[88] Thus, the use of prior convictions as a standard for moving the jury toward death will necessarily have a racially disparate impact. Though a criminal history might seem to be an objective indication of likely future behavior, because a conviction is the end product of a series of discretionary acts, each of which presents an opportunity for racially discriminatory decision-making,[89] the use of prior convictions to justify a death sentence presents an unacceptably great risk of racial discrimination in that decision.

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[87] Trial Record, Vol. 18, pp. 4536-4539, State v. Bell (CCA No. 71,843).

[88] United States Department of Justice, *Bureau of Justice Statistics, Race of Prisoners Admitted to State and Federal Institutions, 1926-86* (1991).

[89] *See supra* notes 6-8, and William T. Pizzi, *Understanding Prosecutorial Discretion in the Untied States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 Ohio St. L. J. 1325, 1344 (1993); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. Miami L. Rev. 425, 427 (1997); David A. Harris, *"Driving While Black" and All Other Traffic Offense: The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim. L. & Criminology 544, 546 (1997); Tracy L. McCain, Note, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 Colum. J. L. & Soc. Probs. 601, 639 (1992).

V. Conclusion: Racism

You're the nigger, so you're elected.

> Conroe police officer, to Clarence Brandley, who ultimately served nine years, four months, and 25 days on Texas's death row for a crime he did not commit[90]

The unjust conviction and sentence of Clarence Brandley is but one example of the distorting effect of race on the fairness and reliability of our criminal justice system. Because, as Professor Charles Lawrence has noted,[91] racism is imbedded in the very fabric of our social relations, informing both consciously and unconsciously all interaction between the races, racial bias pollutes our justice system at every juncture where discretion is exercised.

Like any human endeavor, the effort to identify and punish those responsible for the most heinous crimes is subject to all our human frailties, biases and limitations. And, like any human endeavor, some risk of error must be tolerated. But, there comes a point at which our collective vision is so profoundly impaired – as it is by race – and the consequences of failure are so grave and irreversible – as with the use of the death penalty – that the probability of error becomes intolerable. The question is not whether racial disparity plagues the imposition of the death penalty in Texas, but whether we will continue to allow it to do so.

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[90] NICK DAVIES, WHITE LIES: RAPE, MURDER, AND JUSTICE TEXAS STYLE 23 (1991). For further information about the unjust prosecution of Clarence Lee Brandley, see Chapter Two.

[91] LAWRENCE, CHARLES R. III. THE ID, THE EGO, AND EQUAL PROTECTION: RECKONING WITH UNCONSCIOUS RACISM, pp. 696-700; Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 Cornell L. Rev. 1016 (1988).

CHAPTER FIVE

Executing the Mentally Retarded

I like to clore (color) in my clorel (coloring) book but you all tuck (took) away my clores when you can not hurt no one with a box 24 clores, just in my book.

Doil Lane, 39-year-old death row inmate, writing to prison administrators[1]

I. Introduction

The laws that permit the death penalty require that punishment by death be reserved for the select few individuals who are the most culpable, the most deserving of such ultimate and irreversible punishment. Indeed, the United States Supreme Court has made clear that the decision to impose the death penalty must be "directly related to the personal culpability of the criminal defendant."[2] In practice, identifying the most culpable offenders is fraught with peril: first, it necessarily involves a subjective assessment of "blameworthiness;" and second, the criminal justice system itself is open to influence by outside factors such as politics, corruption, and racial discrimination, and is further compromised by a lack of expertise in understanding the effects of disease, poverty, and social environments. In short, our society faces severe problems measuring culpability accurately and as a result, we often have failed to reliably identify the most culpable offenders. Nowhere are these systemic failures more obvious than in the capital prosecution of mentally retarded people.

II. Mental Retardation and Moral Culpability

I was never able to discuss the specifics of his legal case with him, but instead we talked a lot about his favorite animals, things he liked to draw, and how he missed being able to see his brothers and sisters.[3]

Attorney for Mario Marquez,
executed January 17, 1995

Two essential ingredients of any defendant's moral culpability are his level of intellectual functioning and his capacity to control and appreciate the wrongfulness of his behavior. In both

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[1] Raymond Bonner and Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift,* NEW YORK TIMES, August 7, 2000, at A1.

[2] California v. Brown, 479 U.S. 538, 543 (1987).

[3] Telephone Interview with Robert McGlasson, defense attorney (October 4, 2000).

respects, the mentally retarded defendant is inherently less culpable than his unimpaired counterparts. Mental retardation is a severe and permanent mental impairment that affects almost every aspect of a mentally retarded person's life. A diagnosis of mental retardation requires three findings: "significantly sub-average general intellectual functioning existing concurrently with impairments in adaptive behavior and manifested during the developmental period."[4] Because of the diminished mental capacity and impaired moral reasoning caused by mental retardation, mentally retarded individuals can never fully be in the class of "most culpable" and therefore deserving of the death penalty. As Steve J. Martin, former general counsel of the Texas prison system, has observed:

> How can an individual who by definition has been intellectually impaired since birth ever meet the highest standard of blame required for imposition of the death penalty? It is not a simple question of knowing right from wrong. It is rather an issue of proportionality and equity. Extreme punishments should be reserved for extremely blameworthy acts. . . . [T]he question is not whether the offender knows he did wrong, but whether he knows how wrong he acted.[5]

The second ingredient of moral culpability – the capacity to appreciate the wrongfulness of and control one's behavior – is sorely compromised in mentally retarded defendants. Mentally retarded individuals often cannot foresee the consequences of their actions or adequately comprehend the parallels between the imposition of a penalty on another person and the result that would occur if they committed a similar crime.[6] It is therefore difficult to justify the execution of a mentally retarded person based upon a deterrence rationale.[7]

Retribution is another purported purpose for the death penalty, but this theory assumes that the person punished had full culpability for his actions.[8] A mentally retarded person's ability to control impulsive behavior and to develop moral reasoning is impaired.[9] Such people may commit crimes on impulse without the ability to weigh the consequences of the act or to correct behaviors that have proven harmful in the past.[10] Mentally retarded persons often are

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[4] American Association on Mental Deficiency (now Retardation) (AAMR) CLASSIFICATION IN MENTAL RETARDATION, at 11 (H. Grossman ed. 1983).

[5] Steve J. Martin, *Executing the Mentally Disabled is Wrong*, AUSTIN AM. STATESMAN, May 21, 1999, at A15.

[6] Juliet L. Ream, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 S.W. U. L. REV. 89, 108 (1990). *See* John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 ARK. L. REV. 725, 742 (1988) (stating that the mentally retarded do not have the capacity to premeditate murder in the true sense of the word).

[7] MARY BEIRNE-SMITH, JAMES PATTON & RICHARD ITTENBACH, MENTAL RETARDATION 490 (4th ed. 1994) (reprint of Division on Mental Retardation and Developmental Disabilities of the Council for Exceptional Children's Position Statement) (October 3, 1992) ("If the fact that the commission of a certain act may forfeit life cannot be understood, the death penalty as a deterrent loses meaning.").

[8] *See* Justice O'Connor's discussion in Penry v. Lynaugh, 492 U.S. 302, 335-37 (1989).

[9] Brief for Petitioner by the American Association on Mental Retardation *et al*, at 7, Penry v. Lynaugh, 492 U.S. 302 (1989).

[10] James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV.

unable to distinguish between incidents that are their fault and situations beyond their control.[11] Because mentally retarded defendants cannot understand or control their behavior in the same way that others can, they are far less culpable than others. The retributive value of executing the mentally retarded therefore is greatly diminished.

The life and death of Mario Marquez dramatically illustrate these points. Abandoned by his family and by the same State that would later execute him, Mario Marquez was never able to develop normally either mentally or emotionally. Mario had an I.Q. of between 62 and 66.[12] Doctors explained that because of his mental retardation, Mr. Marquez had a very limited ability to adapt, to think abstractly, to reason, to control impulses, to learn from experience, or to understand the consequences of his behavior.[13] Dr. Sparks Veasey, Medical Director of the Bexar County Jail, found that Mario responded to questions just as "a child would probably answer them."[14] These problems demonstrate the very real possibility that a mentally retarded person may be convicted of a criminal offense, and sentenced to death, in a proceeding in which he or she is a virtual non-participant.

Because of his mental retardation, Mario was a target of abuse. His father would beat him because he was slow tying his shoes, because he was not able to read or do his school lessons well, and because he could not respond to his father's call as quickly as the other children.[15] Mario was beaten on his head and face with sticks, whips, and two-by-fours.[16] Mario's father would even tie Mario's hands to a tree and beat him with a horse whip until he passed out; his mother would then revive him by wiping his face and nose with a rag soaked in alcohol.[17]

Mario received no assistance from the education system or from social services despite the fact that school testing at age nine showed he had an I.Q. of 62 and a mental age of five years.[18] During his schooling, he was placed on the side of the room with those who could not read - these children were given books to color and no attempt was made to teach them.[19]

414, 429-30 (1985) (arguing that some mentally retarded persons have incomplete or immature concepts of blameworthiness and causation).

[11] *Id.*

[12] Clemency Petition for Mario Marquez, Exhibit 28, Pretrial Mental Status Examination.

[13] *Id.*, Exhibit 25, Testimony of Dr. John R. Bateman, at 41-54, 70-72.

[14] *Id.*, Exhibit 28, Pretrial Mental Status Exam, at 20.

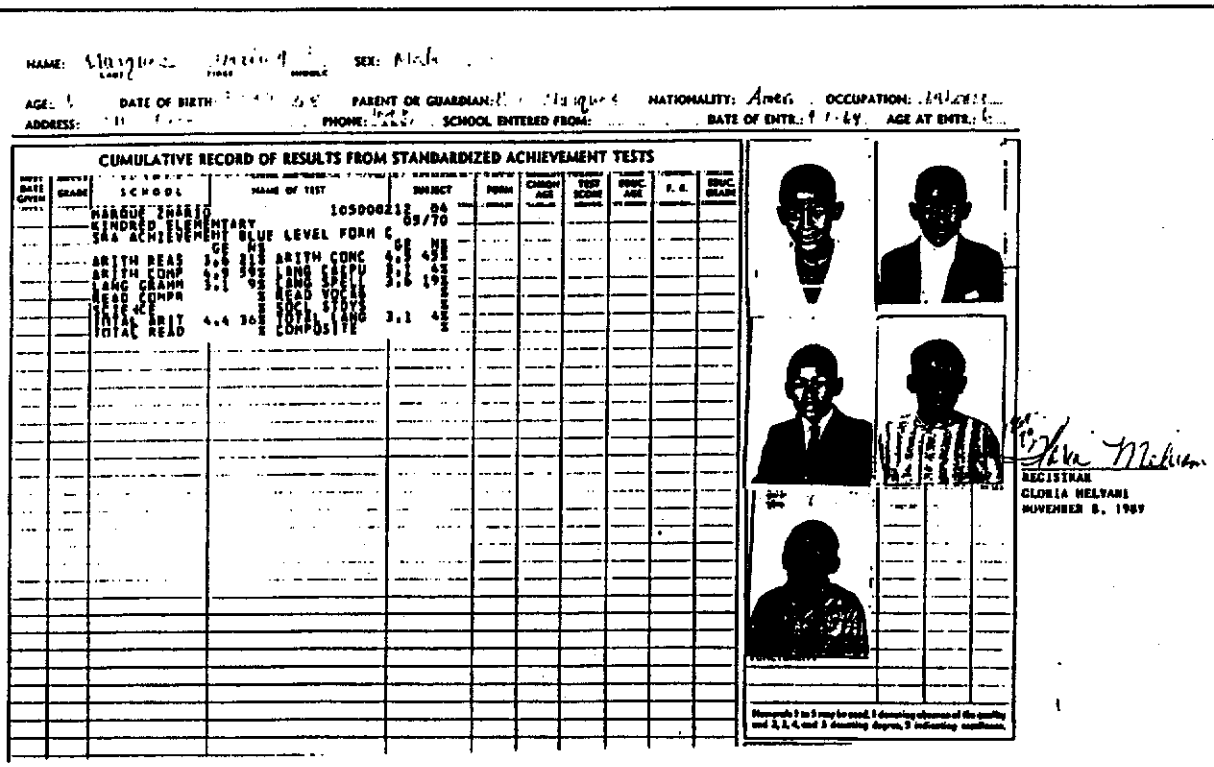
[15] *Id.*, Exhibit 32, Testimony of neighbor Gonzales, at 38.

[16] *Id.*, Exhibit 31, Testimony of Mario Marquez's mother, Virginia Marquez, post-trial state court evidentiary hearing, at 91-93.

[17] *Id.*

[18] *Id.*, Exhibit B (citing summary of records for 1964-1975 from Wichita Public School Division of Public Services dated July 23, 1975).

[19] *Id.*, Exhibit 31, Testimony of Mario Marquez's mother, Virginia Marquez, post-trial state court evidentiary hearing, at 4.



CUMULATIVE RECORD OF RESULTS FROM STANDARDIZED ACHIEVEMENT TESTS

REGISTRAR
GLORIA HELVANI
NOVEMBER 8, 1989

Mario Marquez's 1964 school records, noting that he has an I.Q. of 62; a chronological age of nine years, three months; and a mental age of five years, ten months.

CUMULATIVE RECORD OF RESULTS FROM INTELLIGENCE TESTS

DATE GIVEN	GRADE	SCHOOL	NAME OF TEST	FORM	CHRON. AGE	TEST SCORE	MENTAL AGE	%ILE RANK	I.Q.	
3-16-64	1	Kindred	Binet	L-M	9-3		5-10		62	Yuma

EXTRA-CURRICULAR ACHIEVEMENTS

ORGANIZATION	HONOR CONFERRED OR WON	OFFICE HELD	CLASS	DATE

Figure 1: School records of Mario Marquez, executed January 17, 1995.

When Mario was 12, both parents abandoned him and his younger siblings, leaving Mario as the oldest person in the home. One year later, local authorities came to the household and took the younger children away. Mario was left behind, and from the age of 12 on, he was completely without parental supervision.[20] By the time he became an adult, Mario Marquez was a grown man who functioned as a damaged child.

None of the information about Mr. Marquez's mental retardation or abuse as a child was provided to the jury that sentenced him to death. But after his trial – and after new attorneys had uncovered the evidence of Mario's mental retardation – both the trial judge and the prosecutor said that Mario should not be executed.[21] Mario's appeals attorney, Robert McGlasson, has described the peculiar difficulties representing a person with mental retardation:

> At first my interviews with Mr. Marquez were short, fairly one-sided, and not at all interactive in any meaningful sense. Then we had Mario tested and evaluated by various experts in the field of mental health and mental retardation, and I came to understand just how impaired Mario really was. Once I recognized that I needed to approach Mario as I would a five- to seven-year-old child, our communication completely opened up. And I was never able to discuss the specifics of his legal case, but instead we talked a lot about his favorite animals, things he liked to draw, and how he missed being able to see his brothers and sisters.[22]

Mario Marquez was executed on the day Governor George W. Bush was inaugurated. Journalist Ted Koppel watched as Mario was put to death, while a throng of college students from nearby Sam Houston State University celebrated outside. Mr. Marquez's family stood silently nearby.[23] Mr. McGlasson also related his experience with Mario in the finals hours and minutes before he was executed:

> My experience with Mario's actual execution was probably most akin to that of families of small children who are dying from terminal illnesses. The night of his execution, Mario and I spoke for the last time in a small cell not ten steps from the gurney where he was put to death. Mario's eyes were closed most of the time and he described how he could already see the golden streets and "pearly gates" of Heaven. He said he could hear the angels singing. I asked him what he planned to do when he got to Heaven, and he told me he wanted to be God's gardener and take care of the animals. Minutes later, his body lunging and heaving against the straps holding him down to the gurney, Mario was dead. The unique brutality of the death penalty in Mario's case was devastating for me personally, as I had just witnessed the methodical extermination of someone who

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[20] *Id.*, at Exhibit 32, Testimony of neighbor Gonzales, at 44-46; Exhibit 29, Social History, at 14-15.

[21] Raymond Bonner and Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, NEW YORK TIMES, August 7, 2000, at A1.

[22] Telephone Interview with Robert McGlasson, defense attorney (October 4, 2000).

[23] Interview with Susan Casey, defense attorney (October 1, 2000).

was, in every relevant sense of the word, a mere child.[24]

III. Mental Retardation and the Trial Process

Not only do mentally retarded defendants have less moral culpability than their unimpaired counterparts, they also have a limited capacity to participate intelligently in all aspects of the trial process. For example, mentally retarded defendants are particularly susceptible to coercion, reacting readily to both friendly suggestions and intimidation.[25] As a result, when people who suffer from mental retardation are interrogated, they are much more likely to confess to a crime they did not commit or to exaggerate their role in an offense to gain favor with the interrogator or to hide their disability.[26]

Just as mentally retarded defendants are more likely to confess falsely, they also are less able to understand and validly waive constitutional rights. This point is well illustrated in the case of Jerry Lane Jurek, who had a verbal I.Q. of 66 and was "unable to recite the alphabet, give change for a dollar, or say how many weeks there are in a year or what month comes before November."[27] He was arrested at 1:00 a.m., questioned at his home, and taken to a jail at 2:30 a.m., where he was questioned for at least ten hours about the disappearance of a ten-year-old girl.[28] Mr. Jurek did not appear before a magistrate until some 21 hours after his arrest, and nearly three hours after that, Mr. Jurek gave the first of two written confessions, admitting he had killed the missing girl.[29] He was then transferred 20 miles away, only to be brought back to the same jail 12 hours later. After another five hours, Mr. Jurek signed a second written confession in which he admitted that he had made sexual advances toward the victim, making it significantly more likely he would receive the death penalty.[30]

Because of Mr. Jurek's limited intelligence, the articulate nature of the two confessions, and the circumstances surrounding his arrest and interrogation, both of his written confessions initially were found to be involuntary.[31] The Fifth Circuit specifically determined that even though Mr. Jurek might have been advised of his rights, "it is not clear that Jurek would be able to understand the warnings unless they were couched in the simplest language. In the case of a mentally handicapped defendant like Jurek, the actions of the police speak louder than their words, and their actions surely did not suggest that Jurek was entitled to remain silent and to

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[24] Telephone Interview with Robert McGlasson, defense attorney (October 4, 2000).

[25] Miles Santamour & Bernadette West, *The Mentally Retarded Offender: Presentation of the Facts and a Discussion of the Issues*, in THE RETARDED OFFENDER, (M. Santamour & D. Watson eds. 1982).

[26] PRESIDENT'S PANEL ON MENTAL RETARDATION REPORT OF THE TASK FORCE ON LAW 33 (1963).

[27] Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979), modified by 623 F.2d 929 (5th Cir. 1980) (en banc).

[28] *Id.* at 674.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 675-79. On rehearing en banc, however, the Fifth Circuit agreed that the second confession was involuntary, but held that the first confession was voluntary. Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980) (en banc).

consult with an attorney."[32]

Mentally retarded defendants also are substantially more likely than their unimpaired counterparts to misjudge the seriousness of their circumstances. With an I.Q. of only 64 or 76 (depending on which test was used), Oliver Cruz could barely read or write. As a child, Oliver failed the seventh grade three times; when he was an adult, he was rejected by the Army after failing the entrance exam three times. Because Mr. Cruz could not understand how to fill out a job application, he earned money however he could – mowing lawns, cleaning houses, and even taking tickets for a traveling carnival. Twelve years ago, he was convicted of rape and murder and sentenced to die.[33] Mr. Cruz's accomplice, who had the mental skills to understand the precariousness of his situation, accepted a plea bargain and testified against Mr. Cruz. In exchange for his testimony against Mr. Cruz, this accomplice was sentenced to 65 years imprisonment, with a chance at parole in 17 years.[34] Mr. Cruz, on the other hand, was executed on August 9, 2000.

Finally, mentally retarded defendants may fail to understand the legal proceedings against them and to adequately participate in their own defense, not just because of their limited reasoning capacity, but also because their lawyers do not take the time to explain the different stages of the trial in a manner they can comprehend. For example, because of faulty memory and limited emotional capacity, mentally retarded individuals often cannot recognize or supply their own counsel with the most relevant mitigating information.[35] In addition, few lawyers have received special training regarding issues that may arise with mentally retarded clients,[36] and they often face serious problems communicating with them. As a result, attorneys too often remain ignorant of vital mitigating information and are therefore unable to tell the client's life story in a compelling way. Such a scenario is not merely unfair, but also presents a serious risk of error.[37]

Like all mentally retarded capital defendants, Doil Lane's impairment placed him at an insurmountable disadvantage from the time he first became a suspect. Mr. Lane's I.Q. has been

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[32] Jurek v. Estelle, 593 F.2d 672, 678 (5th Cir. 1979).

[33] Raymond Bonner and Sara Rimer, *Oliver Cruz Can Barely Read and Write. He Has an I.Q. of Either 64 or 76*, PITTSBURGH POST-GAZETTE, Aug. 7, 2000, at A3.

[34] *Executing the Retarded*, (editorial) BUFFALO NEWS, Aug. 12, 2000, at C2.

[35] Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 550 (1988) (mentally retarded inmates are often unable to recall details and unable to communicate a complex chain of events).

[36] Joseph P. Shapiro, *Innocent, and Free at Last*, U.S. NEWS, Oct. 9, 1995, at 41 ("Police and defense lawyers are rarely trained to spot mild retardation or the behavior that can produce false confessions."); Middleton v. Evatt, 855 F. Supp. 837, 842 (D.S.C. 1994) (holding that counsel's reference to the mentally retarded defendant as "dumb" during closing argument did not constitute ineffective assistance of counsel).

[37] M. SANTAMOUR & D. WATSON, THE RETARDED OFFENDER (1982); James Ellis and Ruth Luckasson believe many mentally retarded defendants are convicted of crimes they did not commit. *See* Reid, *Unknowing Punishment*, STUDENT LAWYER 18, 20 (May 1987).

Figure 2: Crayon drawing by death row inmate Doil Lane.

tested at between 62 and 70, and an early psychological test measured his I.Q. at 64.[38] His emotional and intellectual development is that of an eight-year-old.[39] He was convicted of the rape and murder of an eight-year-old girl, with the case against him consisting largely of his own confession.[40]

Doil's childhood was devastating. His mother is a chronic paranoid schizophrenic who "was absolutely filthy . . . [and] almost always had head lice."[41] Doil was sexually abused and forced by his mother and step-father to wear little girls' panties and parade around for them.[42] As Doil's sister explained, Doil was blamed for anything that went wrong at home – a role he came to accept: "He even took the blame for things that I did. He even got blamed for burning down the house. I was playing with matches and started a fire once and he got blamed for it. . . . The firemen were there, and asked Doil if he did it. He said no, but after they kept talking to him for a while, he was saying yes. Later, he actually believed he did it."[43]

Because of his mental retardation and horrific home life, Doil had difficulty making friends. One of his teachers described that "other children thought he was creepy because he was dirty, didn't smell good. . . . Doil had [a] difficult time getting other kids to engage him. He was awkward in his approach and would get excited if he was included. This would inevitably lead to his acting giddy and silly. . . . The children would then expel him from the activity or just shun him, making cruel jokes about him."[44] As a result, Doil became desperate to please those around him. "Anything you would say, he would try to agree with you."[45] This tendency makes him particularly susceptible to suggestion. As Windell Dickerson, a psychologist who examined Doil, explained, "The interrogation of a mentally retarded person like Lane . . . requires care to assure that information obtained from him, truly comes from him, and not through him."[46] Dr. Dickerson elaborated that Doil's limited cognitive abilities prevent him from truly understanding his rights: "In regard to the waiver of his rights under 'Miranda,' an individual like Lane, who is trying to pass [as non-mentally retarded] and cover, could be expected to indicate that they understood something . . . whether this was true or not."[47]

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[38] Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22nd Dis. Ct. for Hays Cnty.) Exhibit B, Mitigation Report, at 3.

[39] Raymond Bonner and Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, NEW YORK TIMES, August 7, 2000, at A1.

[40] *Id.*

[41] Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22nd Dis. Ct. for Hays Cnty.) Exhibit B, Mitigation Report, at 6.

[42] *Id.*

[43] *Id.*, at 5.

[44] Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22nd Dis. Ct. for Hays Cnty.) Exhibit F, Affidavit of Special Education teacher at Doil Lane's school, at 2.

[45] Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22nd Dis. Ct. for Hays Cnty.) Exhibit I, Affidavit of Doil Lane's former landlord and employer, at 2.

[46] Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22nd Dis. Ct. for Hays Cnty.) Exhibit C, at 6.

[47] Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22nd Dis. Ct. for Hays Cnty.) Exhibit C, affidavit of Windell L. Dickerson, Ph.D., M.D., at 6.

Doil's eagerness to please and lack of real understanding of his rights may help explain why he confessed to the rape and murder of an eight-year-old girl. After he confessed, he climbed into the lap of the Texas Ranger who was interrogating him.[48] Dr. Dickerson "was quite amazed . . . that Lane was sitting in his interrogator[']s lap during at least the final part of his confession. In my experience, even with a mentally retarded defendant, it is all but unheard of for an adult defendant to sit in his interrogator[']s lap. Such behavior is strong evidence of powerful emotional activity inherent in the situation. . . . Powerful emotion is a principal ingredient of individuals being easily led. Mr. Lane is a person who is easily led."[49]

As a result of his mental retardation, Doil's trial attorney described how he "was of little or no help in his defense. He has a very confused thought process when he tries to tell you a story or answer all but the most basic questions."[50] Doil's communication is very difficult to follow, he is unable to speak in complete sentences or string together a sequential narrative.[51] At trial, Mr. Lane asked for a crayon so that he could color pictures. The judge refused to let him have one.[52]

Aware of Doil's confession, and uninformed of the many handicaps Doil faced within the criminal justice system and in life, the jury convicted him of capital murder. Now age 39, Doil still asks for crayons: "I like to clore (color) in my clorel (coloring) book but you all tuck (took) away my clores when you can not hurt no one with a box 24 clores, just in my book."[53] Doil Lane still sits on Texas's death row.

IV. An Emerging Consensus on Sparing the Mentally Retarded

For all these reasons, even ardent supporters of the death penalty overwhelmingly oppose its use on the mentally retarded.[54] A 1989 national poll by Louis Harris showed that overall,

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[48] *Id.*

[49] *Id.*

[50] Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22nd Dis. Ct. for Hays Cnty.) Exhibit 2A (affidavit of John Curtis).

[51] Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22nd Dis. Ct. for Hays Cnty.) Exhibit C (affidavit of Windell L. Dickerson, Ph.D., M.D.), at 4.

[52] Raymond Bonner and Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift,* NEW YORK TIMES, August 7, 2000, at A1.

[53] *Id.*

[54] *For the Record* (Op/Ed), WASHINGTON POST, Oct. 29, 1992, at A30. Although, 86% of Texans polled said Texas should have capital punishment, 73% of the respondents said it should not be used "in cases where the person is mentally retarded." Kathy Fair, *86% of Polled Texans Favor Death Penalty*, HOUSTON CHRON., Nov. 16, 1988. In California, where 75% favor the death penalty, 71% opposed its use on the mentally retarded, according to a 1997 field poll. *See* Paul Van Slambrouck, *Execution and a Convict's Mental State Testimony Continues this Week as California Weighs Competency of a Death-row Inmate,* CHRISTIAN SCIENCE MONITOR, April 27, 1998, at 1. A Virginia Commonwealth University study found that Virginians favor the death penalty by 64% to 18%. Only 10% of the respondents favored the death penalty for the mentally retarded. *See Cracks Found In Support for Death Penalty; Virginia Study Cites Options for Parole,* WASHINGTON POST, June 30, 1989, at C3.

70% of Americans opposed the execution of persons with mental retardation.[55] Since 1989, 13 states and the federal government have passed laws prohibiting the execution of the mentally retarded.[56] During the federal debate on this topic, sentiment against execution of persons with mental retardation was pronounced. Senator Arlen Specter, a former district attorney, spoke in favor of banning executions of mentally retarded persons.[57] Former President Bush's Committee on Mental Retardation, which included members such as Attorney General Dick Thornburgh, recommended to him that the mentally retarded should not be subject to execution.[58]

All major advocacy organizations in the United States and in Texas that address the special problems and concerns of the mentally retarded unanimously decry the execution of such persons. Perhaps the best formulation of this position is the statement by the American Association on Mental Retardation, the nation's oldest and largest interdisciplinary organization of mental retardation professionals.[59] In this statement, the AAMR outlines how persons with mental retardation are "often treated unfairly by [the criminal justice] system," and notes the system's shortcomings in determining pretrial competence and similar issues because of "the failure of many criminal justice professionals to recognize and understand the nature of mental retardation."[60] For these reasons, the AAMR's position is clear: "[N]o person who is mentally retarded should be sentenced to death or executed."[61]

The Texas Association for Retarded Citizens (ARC) similarly condemns the execution of the mentally retarded. In its 1993 position statement, the Texas ARC noted that "people with mental retardation have cognitive impairments and deficits in adaptive behavior which may limit meaningful interactions with the criminal justice system," creating problems that include an "inability to assist the defense lawyer or . . . to assist in the defense."[62] The Texas ARC further concluded that these problems are "aggravated by ignorance and stereotyped views of mental

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[55] Saundra Torry, *High Court to Hear Case on Retarded Slayer; Ruling Could Decide Whether Mentally Deficient Criminals Can Get the Death Sentence,* WASHINGTON POST, Jan. 11, 1989, at A6.

[56] Chet Brokaw, *Legislature Approves Restriction on Death Penalty*, ASSOCIATED PRESS NEWSWIRES, March 3, 1999. The thirteen states are: Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York (except in cases of murder by a prisoner), South Dakota, Tennessee, and Washington. Death Penalty Information Center, *Mental Retardation and the Death Penalty, at* http://www.deathpenalytinfo.org/dpicmr.html (last visited Oct. 1, 2000).

[57] Congressional testimony by Senator Arlen Specter on June 20, 1991 (noting support for ban on execution of persons with mental retardation); *see also* Congressional testimony by Senator Joseph Biden on May 24, 1990 (in favor of banning federal execution of persons with mental retardation and in opposition to an amendment allowing federal execution of persons with mental retardation).

[58] Report by the President's Committee on Mental Retardation *Citizens with Mental Retardation and the Criminal Justice System*, delivered to President George Bush on Aug. 19, 1992 (recommending legislation banning the execution of persons with mental retardation).

[59] American Association on Mental Retardation Resolution on Mental Retardation and the Death Penalty (May 31, 1999) (opposing the execution of persons with mental retardation).

[60] *Id.*

[61] *Id.*

[62] THE ASSOCIATION FOR RETARDED CITIZENS OF TEXAS POSITION PAPER ON TREATMENT UNDER THE CRIMINAL LAW OF PERSONS WITH MENTAL RETARDATION (1993) (condemning the execution of persons with mental retardation).

retardation held by many professionals in the criminal justice system, as well as citizens called to serve on juries."[63]

The positions of the AAMR, the national ARC, and the Texas ARC are supported by at least nine other disability organizations throughout the country.[64] These professional and voluntary organizations represent the broadest possible spectrum of viewpoints within the field of mental retardation. The American Bar Association also has adopted a position against executing mentally retarded individuals.[65]

Sadly, the growing national consensus against the execution of mentally retarded people was not sufficiently apparent to help Texas death row inmate Johnny Penry. Johnny Penry's I.Q. has been measured at between 50 and 63 and he has the reasoning capacity of a 7-year-old.[66] He never got past the first grade, and it took him one year to learn to write his name. He learned to read a few words while in prison, but still is unable to write.[67] Mr. Penry endured horrifying abuse as a child, including suffering torture at the hands of his own mother, who punched him in the mouth as he sat in his highchair, forced him to eat his own bodily wastes, beat him with electrical cords, and locked him in closets.[68]

This appalling evidence aside, the United States Supreme Court in 1989 found insufficient evidence of "a national consensus against execution of the mentally retarded,"[69] and concluded that executing Penry would not violate the Eighth Amendment's provision against cruel and unusual punishment.[70] At that time, only two of 36 death penalty states prohibited execution of the mentally retarded. Since then, 13 states and the federal government have banned the execution of the mentally retarded.[71]

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[63] *Id.*

[64] They include: the American Psychological Association, the Association for Persons with Severe Handicaps, the American Association of University Affiliated Programs for the Developmentally Disabled, the American Orthopsychiatric Association, the National Association of Private Residential Resources, the New York Association for Retarded Children, the National Association of Superintendents of Public Residential Facilities for the Mentally Retarded, the Mental Health Law Project, and the National Association of Protection and Advocacy Systems. Amicus brief in Support of Petitioner in Penry v. Lynaugh, 492 U.S. 302 (1989) (opposing the execution of persons with mental retardation joined by all named organizations).

[65] American Bar Association Resolution and Report, adopted by the A.B.A. House of Delegates on February 7, 1989 (finding that execution of persons with mental retardation violates contemporary standards of decency).

[66] Mike Ward, *For Third Time, Killer Avoids Execution; Court Will Hear Case of Johnny Paul Penry, Who Suffers From Mental Retardation*, AUSTIN AM. STATESMAN, Dec. 31, 1999, at B3.

[67] Ed Housewrite, *Texas Weighs Retardation as a Factor in Execution*, DALLAS MORNING NEWS, Aug. 10, 1998, at 1A.

[68] Kathy Walt, *Judges Hear Arguments in Penry Case / Mentally Retarded Man Appeals Death*, HOUSTON CHRONICLE, Feb. 11, 2000, at 33.

[69] Penry, 492 U.S. at 340. The Court came to this conclusion despite public opinion evidence presented by Mr. Penry that 73% of Texans, 71% of Floridians, and 66% of Georgians opposed the death penalty for the mentally retarded. *Id.* at 334.

[70] *Id.*, at 331.

[71] *See supra*, at n. 56.

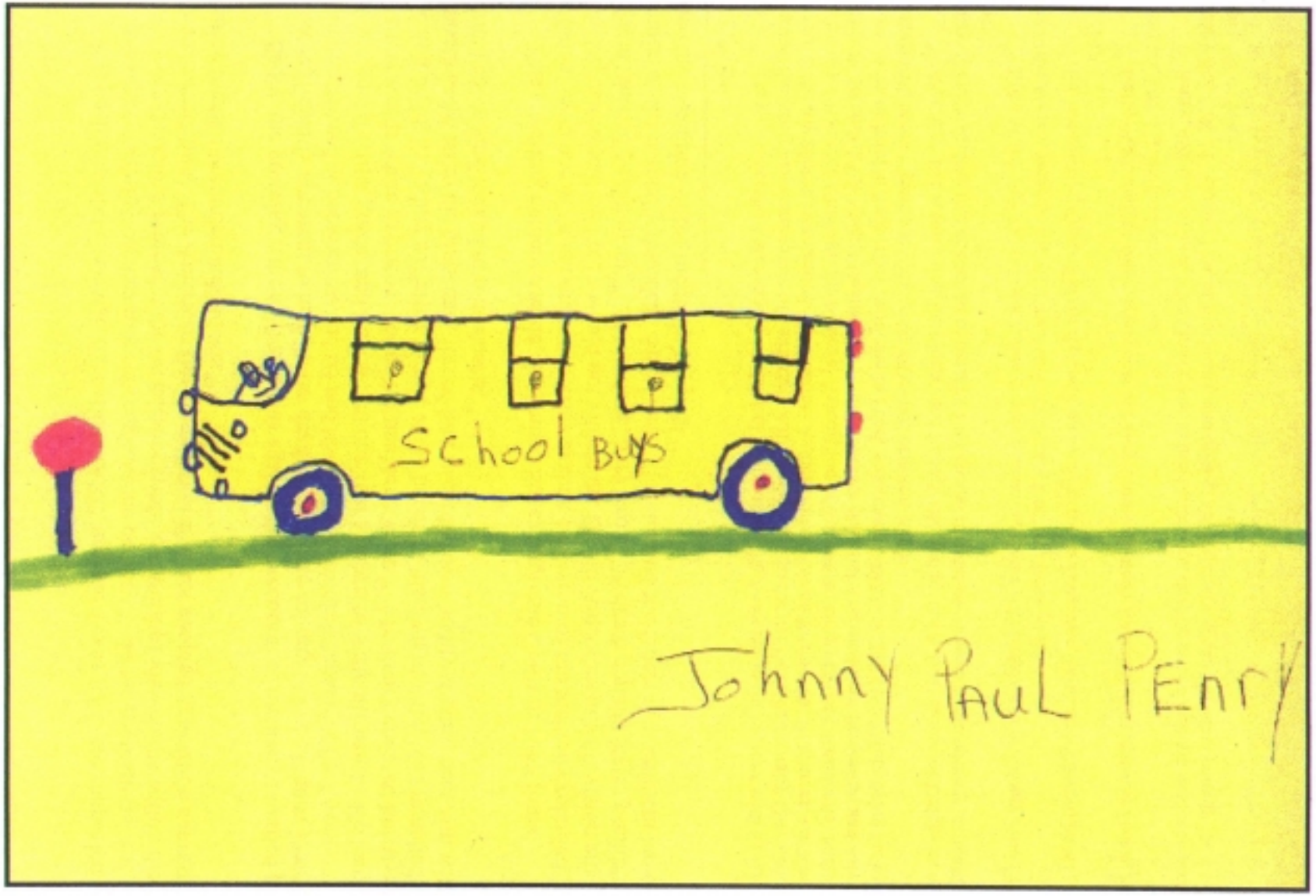

Figure 3: Crayon drawing by death row inmate Johnny Paul Penry.

V. Execution of Mentally Retarded Defendants in Texas

Since the death penalty was reinstated in 1976, Texas has executed six men who were mentally retarded and has sentenced numerous others to die.[72] Astonishingly, however, Texas Governor George W. Bush claimed on August 9, 2000 that Texas does *not* execute mentally retarded people.[73] He made this statement even though he had opposed the bill that would have ended the practice.[74] In the most recent legislative session, a bill banning the execution of the mentally retarded passed the Texas Senate. Despite significant bi-partisan support, the House failed to act on it.[75] The bill was killed, in part, by the last minute maneuvering of Texas Court of Criminal Appeals Chief Judge Mike McCormick. Although Judge McCormick denied that he lobbied against the bill, he acknowledged that he "talk[ed] to some law makers about a 'bad provision' in the bill." He also personally called on Governor Bush to urge him to oppose the bill.[76]

Interestingly, Judge McCormick expressed concern that defendants would be able to fake retardation, which serves to highlight how mental retardation is misunderstood by the judiciary. Because Judge McCormick aired his beliefs behind closed doors, rather than participating in the extensive public committee hearings that preceded the passage of the bill in the Texas Senate, there was no opportunity for proponents of the law to explain that mentally retarded individuals cannot, and do not, fake or exaggerate their disability. On the contrary, these men and women routinely try to overcompensate for or conceal their limited cognitive abilities.[77] Even within hours of being executed, one mentally retarded inmate in Georgia regretted that he could not score better on his I.Q. test.[78] In addition, because a diagnosis of mental retardation requires that the impairment be manifested during the developmental period of a person's childhood, a defendant who had no documented history of developmental impairment could not be diagnosed as mentally retarded.[79] Finally, the other death penalty states which prohibit the execution of

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[72] John W. Gonzalez, Polly Ross Hughes, *Despite Records, Bush Denies Mentally Retarded Executed*, HOUSTON CHRONICLE, August 10, 2000, at 1.

[73] *Id.*

[74] *Dozens of Bills Run Out of Time*, THE FORT WORTH STAR-TELEGRAM, May, 27, 1999, at 3.

[75] Terrence Stutz, *Senate Backs Execution Restriction: Bush Opposes Bill to Ban Death Penalty for Mentally Retarded*, DALLAS MORNING NEWS, May 19, 1999, at 23A; *Dozens of Bills Run Out of Time*, THE FORT WORTH STAR-TELEGRAM, May 27, 1999, at 3.

[76] Janet Elliot, *McCormick Critical of Ban on Death Sentences for Retarded*, TEXAS LAWYER, May 31, 1999, at 4. Judge McCormick was also critical of a bill that required that an inmate be mentally competent to be executed, which the U.S. Supreme Court has held to be required by the Constitution. *See id.*

[77] DAVID L. WESTLING, INTRODUCTION TO MENTAL RETARDATION 57 (1986).

[78] ROBERT PERSKE, UNEQUAL JUSTICE: WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM 33 (1991) (reporting that Jerome Bowden, the man whose execution prompted Georgia to ban capital punishment of the mentally retarded, told his lawyers a few hours before his death that, when taking his I.Q. test, "I tried real hard. I did the best that I could.").

[79] Jonathan Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59 (1996); Robert C. Owen, Meredith Martin Rountree & Raoul Schonemann, *Judge's Concerns Over Bill Unwarranted*, TEXAS LAWYER, May 31, 1999 ("By incorporating the definition that Texas law presently employs for other purposes, [the bill] would have precluded a finding of 'mental retardation' unless the defendant showed that he suffered from a profound adaptive

mentally retarded defendants have reported no undue interference by those laws with their ability to seek and enforce death sentences in otherwise appropriate cases.

VI. Conclusion

Executing mentally retarded people does not serve the purposes of the criminal justice system and violates society's standards of decency. Because of their unique cognitive, developmental, and moral impairments, mentally retarded individuals can never attain the level of culpability for which the punishment of death is warranted. Moreover, because of their handicaps, mentally retarded persons are extremely ill-equipped to navigate the criminal justice system. The result is an especially serious risk of unjust convictions, death sentences, and executions.

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dysfunction and cognitive impairment (as evidenced, but not conclusively demonstrated, by very low I.Q. test scores) long before his capital offense.").

CHAPTER SIX

The Right to Counsel in Texas: You Get What You Pay For

I. Introduction

For decades, the Sixth Amendment to the United States Constitution has been held to guarantee to every criminal defendant the "assistance of counsel." In the landmark case of Gideon v. Wainwright, the U.S. Supreme Court observed that the "right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[1] Mere formal appointment of a lawyer to assist the accused is not sufficient; the lawyer must possess the skill, training, and resources to "play the role necessary to ensure that the trial is fair;"[2] that is, to subject the State's evidence to the "crucible of meaningful adversarial testing."[3] The right to counsel is by far the most important right guaranteed to criminal defendants by the Constitution, because it "it affects [the defendant's] ability to assert any other rights [the defendant] may have."[4] An incompetent lawyer can render meaningless constitutional guarantees of fairness and turn a trial into "a sacrifice of unarmed prisoners to gladiators."[5]

In many Texas capital trials, this is precisely what happens. Unlike other death penalty states, Texas has no central agency responsible for providing specialized representation of defendants in death penalty cases. Moreover, unlike other states, few Texas counties have public defender agencies to provide fair and cost-effective representation. The vast majority of Texas death-row inmates were represented at trial by lawyers in private practice who were appointed by an elected State district judge. Furthermore, once appointed, many judges deny the lawyers they appoint the resources necessary to adequately test the reliability of the State's case, even when the lawyer knows or cares to exert the effort required to competently defend a poor person accused of a capital crime.

II. The Unique Demands of Death Penalty Representation

Lawyers, scholars, and courts have long recognized that cases in which the State seeks the death penalty differ fundamentally from even the most serious non-capital criminal trial. After extensive study, the American Bar Association in 1989 promulgated Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. These guidelines set out a

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[1] 372 U.S. 335, 344 (1963).

[2] Strickland v. Washington, 466 U.S. 668, 685 (1984).

[3] United States v. Cronic, 466 U.S. 648, 656 (1984).

[4] Kimmelman v. Morrison, 477 U.S. 365, 377 (1986) (citing Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

[5] Cronic, 466 U.S. at 657.

framework for ensuring that defendants facing execution receive the best possible representation. Because capital cases are uniquely complex and because of the "harsh and irrevocable nature of the potential penalty," the ABA recommends that a minimum of two experienced lawyers be appointed to represent every capital defendant.[6]

Recognizing the unique complexity of capital cases, many death penalty states have created specialized public defender offices exclusively to handle such cases. In Colorado and New York, for example, capital defendants are represented by experienced death penalty defense attorneys who oversee an entire team of investigators, experts, and social workers. As soon as they begin representing a death-eligible defendant, they begin working to piece together the client's life story. They collect records from schools, hospitals, mental health facilities, the military, and employers, and interview the defendant's family to obtain sensitive information about his childhood and early life. Members of the mitigation team visit every neighborhood in which the defendant lived, interviewing neighbors, teachers, friends, and co-workers. By gathering this evidence, defense teams are able to begin the complex task of providing the necessary representation for their clients. In Texas, however, there is no specialized agency to conduct this type of detailed investigation, or to provide the level of experienced legal representation that is crucial to the full and fair representation of a defendant on trial for his life.

III. Texas's Approach: Decentralized and Arbitrary

> *Poor defendants get a poor defense in our current system. It is scattershot, inefficient and not accountable to anyone. If we are going to lead the world in incarcerations and executions, then we should at least make sure that defendants are guaranteed effective legal representation.*
>
> Texas State Senator, Rodney Ellis[7]

The policies of Colorado and New York, and dozens of other death penalty states, demonstrate that a state which has chosen to adopt the death penalty as a potential punishment can simultaneously recognize that fairness – and public respect for the criminal justice system – requires a serious commitment to providing highly qualified counsel and adequate resources to every defendant on trial for his life.

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[6] Commentary to Guideline 1.21 *at* http://www.capdefnet.org/ABA_appoint_guide.htm. The ABA observed that in a death penalty case, "counsel must be an advocate for life as well as a defensive tactician." *Id.* Specifically, trial attorneys must "obtain the investigative resources necessary to prepare thoroughly for both the guilt and penalty phases of trial, . . . ; conduct extensive research in search of precedent helpful to the client; conduct thorough crime and life-history investigations in preparation for both phases of trial, . . .; integrate the defense theory and strategy used during the guilt phase with the projected affirmative case for life at the penalty phase, . . .; prepare witnesses for both phases of trial; and present all reasonably available mitigating evidence helpful to the defendant for the purpose of convincing the judge or jury not to impose a sentence of death." *Id.* Finally, the ABA recommends that preparation for the sentencing phase, "must begin immediately after counsel has been appointed to represent the defendant." *Id.*

[7] Christopher Lee, *Public Defender Bill Among 31 to Get Bush Veto*, AUSTIN AM. STATESMAN, June 22, 1999, at 15A.

Texas has refused to make such a commitment. To this day, Texas courts find lawyers for poor capital defendants primarily by tapping local criminal defense attorneys in private practice. Until 1995, courts were virtually unconstrained in these choices. A capital defendant's fate often turned on the preference of the judge who happened to be assigned to preside in his case. While some judges chose competent, well-respected lawyers, others appointed law school friends,[8] campaign contributors,[9] or lawyers who promised to free crowded dockets by trying cases quickly.[10]

A recent and groundbreaking study of indigent defense in Texas questioned judges, prosecutors, and defense counsel about the factors relevant to appointment decisions. The results were disquieting: 67.8% of judges reported that their court coordinators – a case manager position which requires no legal training – sometimes influenced their appointment decisions in criminal cases;[11] and 32% of prosecutors reported having advised judges about whom to appoint in a particular defendant's case.[12] Nearly half the judges reported that their peers "sometimes appoint counsel because they have a reputation for moving cases, *regardless of the quality of defense they provide*," and over half indicated that the attorney's need for income influenced the appointment decision.[13] Similarly, significant numbers of judges reported that their appointment decisions were affected by whether a defense attorney was a personal friend (39.5%), a political supporter (35.1%), or a contributor to the judge's re-election campaign (30.3%).[14]

The study further found that 66% of the appointed lawyers were solo practitioners, and the vast majority of the remainder practiced in small firms, most of which were merely clusters of lawyers sharing office expenses. "In short, criminal defense attorneys are largely isolated entrepreneurs."[15] Most of the attorneys reported that only half of their practice involved criminal cases, while the remainder involved civil matters.[16] Prosecutors, by contrast, are by definition full-time criminal law specialists who usually work with dozens of like-minded colleagues in offices with support staff, law libraries and reference materials. They generally are offered regular training to hone their skills, and are subject to discipline for poor performance.

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[8] *See* Mary Flood, *What Price Justice? Gary Graham Case Fuels Debate over Appointed Attorneys*, HOUSTON CHRON., July 1, 2000, at A1 (observing that "the late [Harris County, Texas] District Judge George Walker, occasionally known for taking a nap on the bench, frequently appointed his good friend, the late Joe Cannon, who slept through parts of a capital murder trial" and that the career of controversial Houston criminal-defense attorney Ron Mock "bloomed in the period of judicial cronyism in Harris County").

[9] Mark Ballard & Richard Conelley, *Gideon's Broken Promise: Criminal Defendants in Houston are Far More Likely to Serve Time, and More of It, Than Those Who Can Afford Private Counsel*, TEXAS LAWYER, Aug. 28, 1995, at A1 (observing link between frequency of appointments of defense lawyers by judges and those lawyers' contributions to the judges' election campaigns).

[10] See discussion of Joe Frank Cannon, *infra*.

[11] ALLAN K. BUTCHER & MICHAEL K. MOORE, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS 12 (Sept. 22, 2000), *at* http://www.uta.edu/pols/moore/indigent/whitepaper.htm.

[12] *Id.*

[13] *Id.*

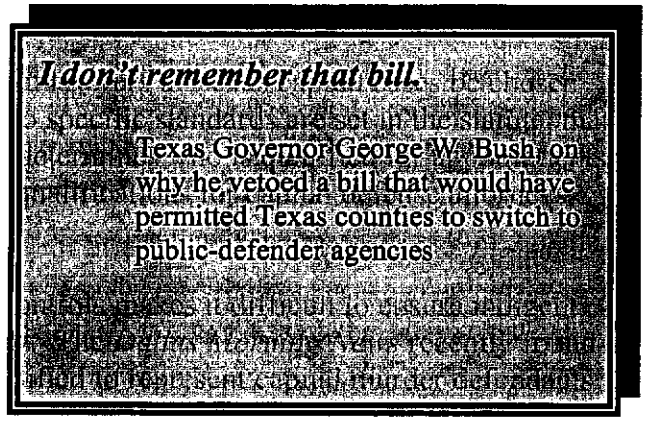
[14] *Id.* at 13.

[15] *Id.* at 5.

[16] *Id.*

Since 1995, a State statute has required that lawyers in Texas capital cases be chosen from a list of "qualified" attorneys.[17] However, no specific standards are set in the statute; that task is reserved for local committees, which also determines who is qualified for appointments. Because each county is entitled to create its own qualifications for capital defense attorneys, standards vary widely from county to county.

The lack of any centralized standards or controls makes it difficult to ensure indigent defense representation of consistently high quality. The *Dallas Morning News* recently found that 24 attorneys who had been designated as qualified to represent capital murder defendants under the 1995 law had been disciplined for misconduct, one having been suspended from practice twice.[18] As the *News* observed: "The judge who ordered the most recent suspension [of this attorney], in 1995, delayed its activation so the attorney could finish a capital murder case he had been appointed to handle. He has since received other death penalty cases – as well as another reprimand from the bar."[19] Finally, the list of attorneys qualified for appointments is not even mandatory. The Court of Criminal Appeals has held that a judge may ignore the new law and appoint attorneys who are not on the list.[20]



The cases recounted below represent a system in desperate need of quality control. Many of these cases could have been prevented if Texas had adopted rules requiring applicants to undergo a rigorous screening process, including a full evaluation of their criminal law experience and any disciplinary records. In addition, adequate funds must be provided to appointed lawyers for investigation and other trial preparation. Reformers have proposed that Texas follow the lead of other states and create public defender agencies to provide indigent representation, but these proposals have faced overwhelming and successful opposition from judges. Judicial opposition led Governor Bush in 1999 to veto a bill removing roadblocks to the creation of public defender agencies in counties attempting to adopt that system.[21] When asked why he had vetoed the measure, Governor Bush merely stated, "I don't remember that bill. . . . I'm for public defenders."[22]

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[17] *See* TEX. CODE CRIM. PROC. art. 26.052(c) & (d).

[18] *Defense Called Lacking for Death Row Indigents, But System Supporters Say Most Attorneys Effective*, DALLAS MORNING NEWS, Sept. 10, 2000, at 1A.

[19] *Id.*

[20] Wright v. State, No. 73,004, 2000 WL 839948 (Tex. Crim. App. June 28, 2000).

[21] Kathy Walt, *Bush Vetoes Public-Defense Bill, OKs Healthcare Fee Negotiations*, HOUSTON CHRON., June 22, 1999, at A1 (noting Texas criminal judges' vocal opposition to measure).

[22] *Meet the Press* (NBC television broadcast, Feb. 13, 2000).

Because Texas has not taken any significant steps to ensure competent trial counsel for indigent defendants, in numerous cases defense counsel has failed to subject the prosecution's evidence to the "crucible of meaningful adversarial testing."[23] Instead, as the following cases illustrate, factors such as under-funding, inexperience, and conflicts of interest have combined to cripple the defense.

IV. Systemic Problems Plaguing Death Penalty Representation in Texas

A. Underfunding

Until 1995, Texas courts were not required to appoint two lawyers to represent a defendant in a capital case, and it was common for a capital defendant to be represented by one attorney. Even today, a judge may still choose to appoint only one lawyer.[24] Until 1995, Texas law also capped the entire amount defense counsel could request for investigative and expert expenses at $500.[25]

In 1980, defense lawyers for Ricardo Aldape Guerra had to "struggle" for payment of $700 by the Court for investigative expenses.[26] By contrast, the State spent $7,000 alone on a pair of mannequins depicting the suspects.[27] Seventeen years later, after $2 million of work by a large private law firm and a now defunct federally funded death penalty defense agency, Guerra was freed from death row based on a finding of pervasive police and prosecutorial misconduct.[28] The misconduct, which included threatening witnesses and tainting identification procedures, was described by a federal district Court as an "intentional, . . . bad faith, and . . . outrageous" attempt by prosecutors to frame an innocent man.[29] Guerra was freed from death row after the Harris County District Attorney's Office declined to reprosecute him.[30]

The Guerra case points to the wasteful paradox created by the minimal compensation paid to trial counsel in capital cases: attorneys know they will not be compensated fully for the

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[23] U.S. v Cronic, 466 U.S. at 656.

[24] *See, e.g.,* TEX. CODE CRIM. PROC. art. 26.052 (in "capital felony" cases, "judge *shall* appoint a second counsel to assist in the defense of the defendant, *unless* reasons against the appointment of two counsel are stated in the record." (emphasis added) (amended 1995)).

[25] *See* Lackey v. State, 638 S.W.2d 439, 441 (Tex. Crim. App. 1982) (discussing TEX. CODE CRIM. PROC. art. 26.05 (1980). That cap has now been lifted by TEX. CODE CRIM. PROC. art. 26.052. However, anecdotal evidence indicates that many judges still apply the old limits.

[26] *See* Nicholas Varchaver, *9mm Away from Death*, AM. LAWYER, Mar. 1995, at 80.

[27] *Id.*

[28] The civil firm lawyer who supervised the later phase of Guerra's appeals estimated that if he had billed for his firm's time and expenses on the case at normal rates, the tally would have exceeded $2.5 million. Jennifer Lenhart, *Houston Lawyer Revels in Winning Fight of a Lifetime*, HOUSTON CHRON., Apr. 20, 1997, at A3.

[29] Guerra v. Collins, 916 F. Supp. 620, 637 (S.D. Tex. 1995), *aff'd*, 90 F.3d 1075 (5th Cir. 1996); *see also supra* Chapter Two for a description of the official misconduct leading to Guerra's conviction.

[30] Jo Ann Zuniga, *Aldape Guerra Goes Home; Mexico Gives him Hero's Welcome*, HOUSTON CHRON., Apr. 17, 1997, at A1.

preparation and investigation necessary in a capital case, so they cut corners and enter trial less than fully prepared. By the time appellate lawyers take over the case, witnesses have dispersed, memories have faded, and the investigation needed is much more expensive. The Fifth Circuit Court of Appeals decried this state of affairs when commenting on the "perverse allocation of resources" represented by the case of John Cockrum.[31] At trial, the Court observed "two court-appointed lawyers and an investigator had six months to prepare . . . [and] were paid $3,500 and $3,200 respectively for their time."[32] It later took appellate attorneys three years, several experts, and hundreds of hours to conduct the trial that "the federal district Court concluded ought to have been conducted in the first place."[33]

The Cockrum case also points to the glaring geographic disparities in compensation for capital defense attorneys. A capital defendant's chance of receiving a reasonably well-funded defense is determined by the county in which the case is tried. In larger metropolitan areas, a first-chair lawyer may now be able to claim up to $25,000 – a fraction of what a privatedly-retained lawyer would charge – to defend a capital case.[34] In rural counties with limited budgets, however, compensation still falls far below what is required even to cover overhead costs. Perhaps such low compensation is the reason some lawyers in these areas put forth little effort, even in capital cases.

In the Kendall County capital murder trial of Douglas Alan Roberts, Roberts's lead court-appointed trial attorney billed for only 85.1 hours of work for the entire case, which included four full days of trial.[35] The brief time spent on the case is reflected in the substandard quality of the work. Trial counsel obtained a brief psychological evaluation of his client, but did not request any neurological testing, even though his client had suffered a severe head injury in 1968 and had a history of depression and substance abuse.[36] Upon being convicted of capital murder, Roberts asked the trial lawyer not to resist a death sentence, and the lawyer obliged. In fact, the trial counsel did not even ask the jury to spare his client's life.[37] When the jury returned a verdict of death, Roberts said, "Thank you."[38]

In another capital case, the same attorney failed to request a neuropsychological evaluation of his client, despite clear indications of seizures and potential symptoms of brain damage in the client's records. A federal judge later declared that the lawyer's "decision not to

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[31] Cockrum v. Johnson, 119 F.3d 297, 298 (5th Cir. 1997).

[32] *Id.*

[33] *Id.*

[34] Mary Flood, *What Price Justice? Gary Graham Case Fuels Debate over Appointed Attorneys*, HOUSTON CHRON., July 1, 2000, at A1 (reporting $25,000 as customary rate for first-chair counsel in a capital case in Harris County, Texas, which includes the city of Houston).

[35] Supplemental Briefing on Ineffective Assistance of Counsel Issues and the Reliability of the State Court Fact Finding Process, Exhibit 6, attorney bill submitted to county auditor's office, Roberts v. Johnson, (W.D. Tex. No. SA-99-CA-1022-EP).

[36] Amended Petition for Writ of Habeas Corpus at 28-38, Roberts v. Johnson, *supra.*

[37] S.F. Vol. 12at 34-35 Roberts v. State (CCA No. 72,706).

[38] *Id.* at 43.

present – or even investigate – evidence of petitioner's potential brain damage [was] not competent."[39]

In Cameron County, the attorney who represented Paul Richard Colella in his 1992 capital murder trial was not reimbursed for an investigator, and was not paid until almost two years after the trial was completed.[40] When he was paid, he received only $9,000 for handling both the trial and the initial appeal of the case. Dividing this payment by the attorney's estimates of the number of hours he worked yields a rate of approximately $20 per hour – or less than one-third the hourly overhead rate in the average Texas criminal defense attorney's practice.[41]

Severely inadequate funding "creates an inherent conflict of interest between the attorney and client because the more hours an attorney spends on the case, the greater the personal cost to the attorney."[42] The Fifth Circuit recognized this link when it reversed the conviction and death sentence of Federico Martinez-Macias. After noting a lower court's exhaustive catalog of the flaws with former Texas death row inmate Martinez-Macias's trial defense, the court observed: "We are left with the firm conviction that Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The State paid defense counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for."[43]

In 1972, the Supreme Court struck down the death penalty as unconstitutionally arbitrary.[44] After the death penalty was reinstated, the Court required states to ensure that death sentences would be meted out consistently.[45] Today, whether a Texas capital defendant's lawyers will receive enough funds to mount a full and vigorous defense depends primarily on the county in which he is tried. These geographical disparities in funding and the resulting disparities in the quality of representation drain practical meaning from the Court's requirement of consistency. Indeed, it is precisely to avoid these disparities that other states have set up schemes to ensure appropriate funding in capital cases. Until Texas follows their lead, cases like those described here are inevitable.

B. Counsel Who Are Crippled by Substance Abuse, Conflicts of Interest, and Disciplinary Problems

In some capital murder cases, the lawyer appointed to represent the defendant is struggling with personal and professional problems which hinder his ability to effectively

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[39] Santellan v. Scott, No. A-98-CA-299-SS, at 35 (W.D. Tex. Mar. 10, 2000) (unpub.).

[40] Application for Writ of Habeas Corpus at 61-62 and Exh. 62, Ex parte Colella (CCA No. 37,418).

[41] Allan K. Butcher & Michael K. Moore, Muting Gideon's Trumpet: The Crisis of Indigent Criminal Defense in Texas 15 (Sept. 22, 2000), *at* http://www.uta.edu/pols/moore/indigent/whitepaper.htm (reporting that Texas criminal defense attorneys report overhead costs of $71/hr).

[42] State ex. rel. Stephan v. Smith, 747 P.2d 816, 831 (Kan. 1987) (striking down arbitrary fee caps for indigent criminal defense costs).

[43] Martinez-Macias v. Collins, 979 F.2d 1067, 1067 (5th Cir. 1992).

[44] Furman v. Georgia, 408 U.S. 238 (1972).

[45] Gregg v. Georgia, 428 U.S. 153, 198-99 (1976).

represent his clients. This all too common scenario is reflected poignantly in the following cases.

Betty Lou Beets

The centerpiece of the circumstantial case against Betty Lou Beets was the State's claim that she killed her husband, Jimmy Don Beets, to collect benefits. However, Beets had made no attempt either to ascertain the existence of, or to recover, any benefits potentially owed to her as a result of her husband's disappearance. Over a year after her husband disappeared, Ms. Beets's trailer home was destroyed by fire in an unrelated incident. Ms. Beets filed a claim with her insurer for the loss of the trailer and its contents, but the insurer refused to pay.[46]

Seeking assistance only with her fire insurance claim, Ms. Beets contacted attorney E. Ray Andrews, who had represented her in the past.[47] But Andrews knew Ms. Beets's husband had worked for the City of Dallas prior to his disappearance and suggested she also might be able to claim death benefits.[48] It is undisputed that Andrews, rather than Beets, first suggested that she might be entitled to benefits. Andrews eventually determined that benefits were available, and asked an attorney with more experience in the area to secure them for Beets.[49]

Before Andrews received payment from the City, Ms. Beets was arrested and charged with the capital murder of her husband, whose body was found buried in her yard. The indictment alleged that Ms. Beets murdered her husband to obtain "the proceeds of retirement benefits from the employment of Jimmy Don Beets with the City of Dallas, insurance policies on the said Jimmy Don Beets in which the defendant is the named beneficiary, and the estate of Jimmy Don Beets."[50] Without the crucial allegation that the murder was committed for the purpose of financial gain, the State could not have sought the death penalty.

After these charges were filed, Andrews agreed to represent Ms. Beets in connection with the capital murder charge. On October 8, 1985, one day after the murder trial had commenced, Andrews presented Ms. Beets with a contract to transfer all literary and media rights in her case to Andrews's son,[51] in exchange for Andrews' representing her in the case.[52] Andrews believed

[46] Petition for Writ of Habeas Corpus, Exhibit 1, (Affidavit of E. Ray Andrews) Beets v. Collins, (5th Cir. No. 91-4606).

[47] *Id.* at ¶3-4.

[48] Andrews's affidavit states: "I knew from my experience that municipalities sometimes provide ... benefits to their employees as a matter of course. Consequently, I suspected that he may have had a pension from the City of Dallas, as well as a life insurance plan. Since they were married at the time of his disappearance, I also suspected that she may have been the beneficiary of these policies." *Id.* at ¶6.

[49] S.F. Vol. 6 at 454, Beets v. State (CCA No. 69,583).

[50] S.F. Vol. 1 at 3. *See also* TEXAS PENAL CODE § 19.03(a)(3).

[51] Petition Exhibit 26, Media Rights Contract.

[52] The existence and terms of the media rights contract were brought to the attention of the judge during trial. At the indigency hearing, the prosecutor questioned Ms. Beets on her available income. At one point, he asked her "did you sign over the book rights to your case to E. Ray Andrews, Jr. ?" Ms. Beets indicated she had. S.F. Vol.

that because of the notoriety surrounding this case, the media rights were worth a great deal of money.[53]

At the guilt phase of Beets' trial, Andrews's strategy was to attack the remuneration element of the State's case. In a later affidavit, he recalled: "I knew the State had to prove Ms. Beets killed her husband for the purpose of receiving benefits. That is, she had to have those benefits in mind at the time she killed her husband. Yet I knew from my discussions with her that this was not the case."[54] As Beets's attorney, however, Andrews could not take the stand to testify that she did not know about the benefits until he told her. The jury that convicted Beets heard only from attorneys that Beets had contacted after Andrews had told her about the benefits.[55] The prosecution used this fact to establish its financial gain allegations and portray Beets as a callous killer. She was convicted and sentenced to death.

A federal court later held that Andrews's fee contract was unethical and that his responsibilities as an attorney required him to "resign [from the case] in order to testify rather than represent [Beets]."[56] The Fifth Circuit reversed, upholding Beets's conviction and sentence. The Court then took the unusual step of convening all of its members to rehear the case, and affirmed Beets's sentence over a lengthy dissent joined by a large fraction of the court.[57] After later being elected District Attorney of the county in which Beets had been convicted, Andrews "was nabbed by the FBI in 1994 for soliciting a $300,000 payoff to drop a death penalty case against a businessman accused of killing his wife. He resigned from the prosecutor's office, gave up his law license, then cried at his sentencing, saying he was a longtime alcoholic, prescription drug abuser and heavy gambler."[58]

Andrews's associates confirmed that, at the time of Beets's trial, Andrews was drinking "between one half and three-quarters"of a bottle of whiskey every night and "two or three doubles [at lunch] before he had to go back to court." Beets was executed on February 24, 2000.

Joe Lee Guy

Joe Lee Guy's case also demonstrates the fatal combination of substance abuse and conflicts of interest. Seven years ago, Guy was the lookout in a bungled robbery at a convenience store in which the store owner, Larry Howell, was killed and his mother was

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9 at 10. Despite the fact that this question was asked in open court, and despite the fact that the book contract was filed in the courthouse the day after the trial started, the trial court never inquired whether Ms. Beets understood that this contract created a conflict of interest, or whether she was willing to waive her right to conflict-free counsel.

[53] Petition Exhibit 3, (Affidavit of Gilbert Hargrave) at ¶ 3, 6.

[54] Petition Exhibit 1, (Affidavit of E. Ray Andrews) at ¶ 14.

[55] S.F. Vol. 6 at 453.

[56] Beets v. Collins, 986 F.2d 1478, 1480 (5th Cir. 1993).

[57] Beets v. Collins, 65 F.3d 1258 (5th Cir. 1995) (en banc).

[58] Paul Duggan, *A Texas-Sized Case of Injustice? Defense Lawyer's Lapses Stir Doubts on Fairness Toward a Woman Facing Execution*, WASH. POST, Feb. 22, 2000, at A3.

wounded. When Judge Marvin Marshall appointed attorney Richard Wardroup to defend Guy, Wardroup already had been disciplined twice by the bar[59] and was deep in the throes of drug and alcohol addiction.[60] The year after Guy was sentenced to death, the Texas Commission for Lawyer Discipline confirmed several pending complaints against him and ordered him to undergo monthly psychological testing, to attend Alcoholics and/or Narcotics Anonymous, and to submit to random drug screening. Wardroup also was suspended from the practice of law for three years, but again his sentence was probated.[61]

Although Wardroup has acknowledged drinking "alcoholically" for up to 15 years and periodically using cocaine and methamphetamine around the time of Guy's trial,[62] he maintained that he refrained from drug and alcohol abuse during the trial itself. However, many of the people who worked with Wardroup on Guy's case have sworn under oath that they personally witnessed him abusing both drugs and alcohol during the trial.[63] Indeed, Wardroup's then secretary declared in an affidavit that "[d]uring the Joe Lee Guy trial, I personally participated in cocaine use [with Wardroup] while in transit to [the trial]" and that Wardroup's "drug and alcohol use was so pervasive throughout the period of my employment and his representation of . . . Mr. Guy, that I felt compelled to report his conduct to the State Bar of Texas, and testified at a Grievance Hearing regarding those matters."[64] An investigator affiliated with Wardroup who sat with him throughout much of Guy's trial and later confirmed that during the trial, Wardroup drank in the evenings on "more than one occasion" and got "very drunk" in the middle of the punishment phase.[65]

Even more bizarre was the role of Frank SoRelle, who occasionally helped Wardroup with investigative tasks. He was recruited to help prepare for Guy's case even though he had no training as an investigator and had never held or applied for an investigator's license.[66] SoRelle quickly developed a close relationship with the surviving victim of the crime, French Howell, a wealthy widow. Indeed, near the time of Guy's trial, Howell assured family members that SoRelle was *against* Guy's interests. According to transcripts of taped conversations between Howell and her brother, Howell said that SoRelle "works hard to keep . . . those murderers from

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[59] In 1985, Waldrup was placed on one year of probation for making misrepresentations to a client and to a bar committee that heard the client's complaint. The following year, while still on probation, he was publicly reprimanded for failing to "act competently as a lawyer". Dan Malone and Steve McGonigle, *Questions of Competence Arise in Death Row Appeal: Lawyer with History of Problems Defends Handling of Case*, DALLAS MORNING NEWS, Sept. 11, 2000, at A1.

[60] *Id.*; *see also* Linda Kane, *Death Row Inmate's Lubbock Attorney Used Drugs, Alcohol*, LUBBOCK AVALANCHE-JOURNAL, Sept. 10, 2000, at 12A.

[61] Petition for Habeas Corpus, Appendix at 239-273, Guy v. Johnson (N.D. Tex. No. 5:00-CV-027).

[62] Petition, Supplemental Appendix 16A, Guy v. Johnson (N.D. Tex. No. 5:00-CV-027) Deposition of Richard Wardroup at 45-52. Wardroup admitted that he was "impaired" as a result of his extensive alcohol and drug abuse, and defined "impairment" as "just not caring the way that something was done right and completed the way I generally do." *Id.* at 53.

[63] *Id.*

[64] Supplemental Appendix 7a.

[65] Supplemental Appendix 6a.

[66] Appendix at 203, SoRelle Dep. at 50.

getting . . . whatever you call it a transfer of their trial to Tulia,"[67] and at another point said that SoRelle was "trying to get them from getting another trial. . . . He says they need to be put on death row."[68]

SoRelle described how he perceived his role: "I knew Joe Lee Guy was guilty. I knew that getting Joe Lee Guy acquitted was not the right thing morally and I do believe that the death penalty is just, an appropriate sentence."[69] SoRelle billed the Court for time spent cultivating a relationship with Howell,[70] directed police to the murder weapon used in the crime,[71] and, after Howell's death, urged police to remind the medical examiner before he performed the autopsy that Howell had also been shot during the robbery.[72] Outside observers were hard-pressed to discover how these actions – especially the last two – advanced Guy's interests. However, Wardroup tolerated and allowed SoRelle's involvement with French Howell. As an associate of Wardroup's described: "I know that Richard was aware of French Howell's dependence on Frank SoRelle. I discussed it with Richard occasionally and that relationship was something of an office joke."[73] Shortly after French Howell died on April 21, 1995, SoRelle produced a will executed by her naming him as the executor and the sole beneficiary of her considerable estate.[74]

Joe Lee Guy, who participated only as a lookout during the robbery, went to Texas's death row. His two co-defendants in the crime – including the person who actually shot the victims – received life sentences.

Pamela Perillo

The lead trial attorney representing Pamela Perillo at her 1984 capital murder trial, Jim Skelton, had close ties to Perillo's co-defendant and the prosecution's key witness, Linda Fletcher. Not only had Skelton represented Fletcher at a trial stemming from the same incident, he had also befriended her and even attended her wedding.[75] Skelton did not fully inform Perillo of his ties. When Fletcher took the stand and gave damaging testimony against Perillo, Skelton "failed to ask questions that might have impugned Fletcher's credibility or exposed any ulterior motives for her testimony, although he could have fruitfully pursued both avenues."[76] Perillo's state habeas petition set out these facts but was rejected in Texas's state courts, which denied her

[67] Transcript of conversation between French Howell and Floyde Heathington, (July 7, 1994) at 7.

[68] *Id.* at 8.

[69] Supplemental Appendix 1.

[70] Supplemental Appendix 20a.

[71] Supplemental Appendix 1a.

[72] Appendix at 205, SoRelle Dep. at 289. Howell's death was not found to have been related to injuries she suffered from the gunshot wound.

[73] Supplemental Appendix 3a (Affidavit of Dena Lauderdale).

[74] Appendix at 226-229.

[75] Perillo v. Johnson, 205 F.3d 775, 784 (5th Cir. 2000).

[76] *Id.* at 790.

a hearing on whether Skelton's loyalties to Fletcher had compromised his representation.[77] After finding that the state courts had denied Perillo a "full and fair" appeal, a federal court held a hearing during which Skelton downplayed his ties to Fletcher and denied that his representation of Perillo had been compromised.[78] The federal court denied Perillo relief.[79]

Shortly after the judge issued his original opinion, Skelton was disbarred by the State of Texas for lying to an indigent client about an appeal he had been appointed to handle. When the client called to ask about the case, Skelton told him that the court had heard oral argument on the appeal and denied relief. In fact, the appeal had been dismissed "for lack of prosecution" because Skelton had not filed it on time. The client tape-recorded Skelton's false statements and sent them to the disciplinary board. Skelton admitted the lies, and said: "[T]here are times when you cannot be truthful with a client."[80] This new information led the federal court to reopen Perillo's appeal and reassess Skelton's credibility. Because the other evidence in the record pointed to a clear conflict of interest between Skelton and his client, the court granted Perillo relief.[81] The Harris County District Attorney's Office elected not to re-try her for capital murder, and she pled guilty to lesser charges which did not carry a death sentence.[82] Skelton's law license was reinstated, but he was later "permanently and finally disbarred" for several ethical lapses, including seeking "the payment of fees from an indigent client that he was appointed to represent."[83]

Summary

A recent study by the Dallas Morning News confirmed that the trial lawyers who had represented Texas death row inmates had been disciplined at approximately eight times the rate of lawyers as a whole.[84] Ron Mock, the controversial Houston attorney with one of the largest number of former clients on death row, has been reprimanded so many times that he jokingly says he has "a permanent parking spot at the grievance committee."[85] When confronted about the large number of capital defense attorneys with disciplinary problems, CCA Presiding Judge Michael McCormick admitted that it "doesn't pass the smell test," but also noted that "there are

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[77] *Id.* at 793.

[78] *Id.* During the State habeas appeal, Skelton had submitted an affidavit defending his trial performance, which the State Court accepted as the basis for denying Perillo relief. The federal Court noted that Skelton had been hostile and uncooperative toward his former client, and characterized the language in Skelton's affidavit as "vitriolic and unprofessional," "crude," and "callous." *Id.* at 794 & n.7.

[79] *Id.* at 795.

[80] *Id.*

[81] *Id.* at 796.

[82] Steve Brewer, *Deal Takes Woman off Death Row; Perillo Agrees to Life for Role in Murders*, HOUSTON CHRON., July 14, 2000, at A1.

[83] Perillo, 205 F.3d at 795 n.8.

[84] *Defense Called Lacking for Death Row Indigents*, DALLAS MORNING NEWS, Fri., Sept. 10, 2000, at 1A.

[85] Sara Rimer & Raymond Bonner, *Texas Lawyer's Death Row Record a Concern*, N.Y. TIMES, June 11, 2000, at 1.

many, many, very, very competent attorneys who have had grievances and have had disciplinary sanctions that in no way impact or reflect upon their ability to try a lawsuit."[86] What Judge McCormick does not mention is that the entry of a public reprimand against an attorney is the rare culmination of a thorough fact-finding process that discloses serious misconduct, usually involving dishonesty or incompetence. Indeed, Illinois Governor George Ryan cited the fact that many Illinois death row inmates had been represented by lawyers with disciplinary records as one of the principal reasons he declared a moratorium on executions earlier this year.[87] Because of their central role in the criminal justice process, attorneys have a singular responsibility for both behaving ethically and working diligently on behalf of those they represent. When they do not take that responsibility seriously, the miscarriages of justice that can result are grave.

C. Another Kind of a "Dream Team:" Sleeping Lawyers

The Constitution says everyone's entitled to the attorney of their choice . . . The Constitution doesn't say the lawyer has to be awake.

Harris County District Judge Doug Shaver, reacting to a capital defendant's lawyer sleeping during trial in his court[88]

John Benn

When George McFarland was indicted on capital murder charges in Houston, Texas, he hired local criminal defense attorney John Benn to represent him at his 1992 trial. Benn, who spent four hours preparing for trial, "did not examine the crime scene, interviewed no witnesses, prepared no motions, did not request that any subpoenas be issued, relied solely on what was in the prosecutor's file, and visited his client only twice."[89] As one reporter wrote:

> Benn spent much of the trial in apparent deep sleep. His mouth kept falling open and his head lolled back on his shoulders and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again. Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the November 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan. When State District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during

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[86] *Id.*

[87] Ken Armstrong & Steve Mills, *Ryan: 'Until I can be sure' Illinois is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1.

[88] Quoted in John Makeig, *Asleep on the Job; Slaying Trial Boring, Lawyer Said*, HOUSTON CHRON., August 14, 1992, at 35A.

[89] Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. TIMES, July 15, 2000, at A1. The testimony of McFarland's lawyers describing their preparation for trial is discussed at McFarland v. Johnson, 928 S.W.2d 482, 526-27 (Tex. Crim. App. 1996) (Baird, J., dissenting).

> a capital murder trial. 'It's boring', the 72 year old longtime Houston lawyer explained . . . . Court observers said Benn seems to have slept his way through virtually the entire trial.[90]

The judge who presided over McFarland's trial, Doug Shaver, later recalled that he knew Benn "wasn't competent," and observed that Benn looked like "a heavy drinker" because of his rumpled clothes and watery red eyes.[91] Indeed, Shaver went so far as to appoint a second attorney, Sandy Melamed, to assist Benn. However, Melamed had never before tried a capital case, had performed little investigation into the circumstances of McFarland's case, and recalled that he felt he "couldn't take responsibility for trial strategy."[92]

When State District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial. 'It's boring', the 72 year old longtime Houston lawyer explained.

John Makeig, *Asleep on the Job; Slaying Trial Boring, Lawyer Said*, HOUSTON CHRONICLE, August 14, 1992

The striking revelation in McFarland's case is that even this complete breakdown in the adversarial process was not enough to produce a reversal on appeal. The trial Court appointed yet another inexperienced attorney, Marcelyn Curry, to represent McFarland. It was Curry's first capital appeal, and at the time, she was struggling with severe health problems, including anemia, Hepatitis A and B, and dizzy spells.[93] As Curry later recalled: "The Court of appeals was informed of the fact that during this [appeals] process I was sick, I was in need of surgery and still they demanded a brief. All they wanted was a brief so that they could get th[e] appeal behind them."[94] Curry missed several deadlines, and was cited repeatedly in the CCA's opinion for errors in her brief.[95]

Nevertheless, a majority of the CCA's judges eventually denied relief, finding that McFarland had not met the burden of proving that his defense team's lack of preparation and Benn's in-court sleeping actually affected the outcome of the trial.[96] Indeed, in a footnote that

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[90] John Makeig, *Asleep on the Job; Slaying Trial Boring, Lawyer Said*, HOUSTON CHRON., August 14, 1992. Sandy Melamed, Benn's co-counsel, later testified that he tried to keep Benn awake, but the task was too onerous and he actually thought the jury "would feel sorry for [them]" because of Benn's extensive slumber. S.F. Vol. 20 at 56, State v. McFarland (CCA No. 71,557).

[91] Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. TIMES, July 15, 2000, at A1.

[92] *Id.*

[93] *Id.*

[94] Interview with Marcelyn Curry, Nightline (ABC television broadcast, September 15, 2000). Mr. McFarland's case is not the only one in which the Court of Criminal Appeals has ignored an attorney's own doubts about his competence to handle a capital appeal. *See* discussion of Ricky Kerr and Johnny Joe Martinez, Chapter Seven, *supra*.

[95] Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. TIMES, July 15, 2000, at A1.

[96] McFarland v. State, 928 S.W.2d 482, 500-505 (Tex. Crim. App. 1996).

has since become infamous, the Court suggested that Benn's sleeping in court could have been sound trial strategy: "We might also view Melamed's decision to allow Benn to sleep as a strategic move on his part. At the new trial hearing, Melamed stated that he believed that the jury might have sympathy for appellant because of Benn's 'naps.'"[97]

Only two of the nine judges on the CCA dissented. They observed that at trial, both lawyers were completely unprepared to even cross examine witnesses, let alone present evidence: "Benn decided which witness he would cross-examine and he informed [co-counsel] of his decision only after the State's examination. Thus, [co-counsel's] preparation for cross-examination of his witnesses could not have been effective because he did not know which witnesses he was to question. . . . Even more disturbing, Benn could sleep during the direct examination and still elect to conduct cross-examination."[98] Mr. McFarland, they maintained, had proved that "sleeping counsel is equivalent to no counsel at all."[99] Since that opinion, new counsel have been appointed for Mr. McFarland and they have conducted the first serious investigation of the case. McFarland's new attorneys stress that no physical evidence linked McFarland to the offense, and maintain that if McFarland's defense attorneys had bothered to investigate that case, they would have discovered serious inconsistencies in the testimony presented by the State's witnesses.[100]

Joe Frank Cannon

George McFarland's case is not the only one in which the CCA has tolerated a lawyer who slept through trial. In the case of Calvin Jerold Burdine, the CCA upheld the result of a trial during which Joe Frank Cannon, the defendant's court appointed defense attorney, slept. The Court apparently was unmoved by the fact that in Burdine's case, unlike McFarland's, there was no appointed co-counsel who theoretically could have monitored the proceedings.[101]

In addition to his habit of sleeping at capital trials, Mr. Cannon used to "boast[] of hurrying through trials like 'greased lightning.'"[102] Indeed, a former Harris County prosecutor swore in a 1988 affidavit that he overheard Cannon promising a State district judge that if he was appointed to represent capital defendant Jeffrey Motley, he would finish the case in two

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[97] *Id.* at 505 n.20.

[98] *Id.* at 527-528.

[99] *Id.* at 527.

[100] *See* Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. TIMES, July 15, 2000, at A1 (summarizing claims).

[101] Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. LAW REV. 1806, 1811 (2000), referring to McFarland v. State, 928 S.W.2d 482 (Tex. Crim. App. 1996); Ex Parte Burdine, 901 S.W.2d 456, 456 (Tex. Crim. App. 1995), *rev'd* by Burdine v. Johnson, 66 F.Supp. 2d 854, 866 (S.D. Tex. 1999).

[102] Paul M. Barrett, *On the Defense: Lawyer's Fast Work on Death Cases Raises Doubts About System,* WALL ST. J., Sept. 7, 1994, at A1.

weeks.[103] Cannon and the judge denied that such a conversation took place, but Cannon was appointed to the case, and finished it in nineteen days.[104] Mr. Motley's case was initially reversed by the Fifth Circuit Court of Appeals in 1994, but that court later reversed itself, and Motley was put to death in 1995.[105]

Among Cannon's notable attributes was his reluctance to object to legal errors during trial. Cannon declared that juries don't like a bunch of "jack-in-the-box" objections, and that "[c]apital cases come down to split second decisions made on your feet – something these second-guessers and nitpickers don't understand."[106] Unfortunately for Cannon's clients, the law is strict in this area: if trial attorneys do not object to legal errors and prosecutorial misconduct at trial, they forfeit their client's right to complain of those errors on appeal.[107] Ten of Cannon's twelve capital clients went to death row,[108] one of the largest number of cases among active lawyers.[109] At one point in the early 1990s, almost 1 in 5 death row inmates whose cases had come from Harris County had been represented by Joe Cannon.[110] What follows are extended discussions of two of Cannon's cases, although his performance has been questioned in many others.[111]

Calvin Jerold Burdine

Calvin Jerold Burdine was convicted of the murder of his former housemate and companion, W.T. "Dub" Wise. Wise was killed on April 17, 1983, during the course of a robbery committed by Burdine and another man, Douglas McCreight. The State did not prosecute McCreight for capital murder, despite evidence indicating that McCreight was the primary actor. Instead, the State offered McCreight an eight-year prison sentence in exchange for his testimony at Calvin Burdine's death penalty trial.[112] McCreight has since been paroled.[113]

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[103] *Id.* (quoting Petition for Writ of Habeas Corpus, Exhibit 1, Anderson v. Lynaugh, (S.D. Tex)(No. H-87-1318)).

[104] *Id.*

[105] *See* Motley v. Collins, 18 F.3d 1223 (5th Cir. 1994), *reversing* Motley v. Collins, 3 F.3d 781 (1993).

[106] *Id.*

[107] Wainwright v. Sykes, 433 U.S. 72 (1977).

[108] Barrett, *On the Defense: Lawyer's Fast Work on Death Cases Raises Doubts About System,* WALL ST. J., Sept. 7, 1994, at A1.

[109] *Id.*

[110] David R. Dow, *The State, The Death Penalty, and Carl Johnson,* 37 BOSTON COLLEGE L. R. 691, 696 (1996).

[111] *See, e.g.* Anderson v. Collins, 18 F.3d 1208, 1215-21 (5th Cir. 1994) (discussing challenges to Cannon's conduct during every phase of trial); Williams v. Collins, 35 F.3d 159 (5th Cir. 1994) (discussing ineffectiveness challenges and holding that Williams could not claim the State had concealed exculpatory evidence from him because Cannon could have discovered the evidence by investigating the case with "due diligence" but did not do so).

[112] Burdine v. Johnson, 87 F. Supp.2d 711, 712 n1 (S.D. Tex. 2000).

[113] *Id.*

Burdine was sentenced to die.

At the time of Burdine's trial, his poor reputation and habit of sleeping through trials were well-known in the legal community. The Court clerk testified that she had seen Cannon sleep in court before Burdine's trial: "I know Joe Cannon. I had seen him before. I knew that he had this problem."[114] A Court coordinator for Burdine's trial Court testified that the chief felony prosecutor for that Court (and the lead prosecutor in Burdine's capital trial) told him that Joe Cannon was incompetent and had "asked [him] not to appoint Cannon to any more capital cases" for that reason.[115] Although the coordinator could not recall whether the conversation took place before or after Burdine's trial, the prosecutor's concern demonstrates how clear Cannon's inadequacies were.

Cannon's behavior did not change after he was appointed to represent Burdine. Court clerk Rose Marie Berry declared, "I do know that he fell asleep and was asleep for long periods of time during the questioning of witnesses."[116] The jury foreperson saw Cannon "nod off or perhaps doze . . . for a few minutes."[117] Cannon's sleeping was so obvious that members of the jury discussed it during breaks in the trial.[118] Two other jurors testified that they observed Cannon "nodding," with his head down, his chin on his chest, and his eyes closed.[119] One juror recalled seeing Cannon, red-eyed, suddenly awaken from a ten-minute nap when a clerk dropped a book. These naps occurred "five to ten times" during the trial.[120]

Not surprisingly, Cannon's representation of Burdine was compromised. He failed to investigate or present mitigating evidence concerning Burdine's background, even though the information was available and known to him. Cannon's presentation to the jury at the punishment phase of Burdine's case was, in its entirety, as follows:

Q.:	Calvin, do you want to take the stand and plead for your life?
A:	No, sir, they didn't listen to me the first time, I don't see --
The Court:	What says the Defense, gentlemen?
Mr. Cannon:	We close, your honor.[121]

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[114] *Id.*

[115] *Id.* at 10.

[116] *Id.* at 126.

[117] *Id.*

[118] Petition for Writ of Habeas Corpus, Appendix G (Affidavit) at ¶ 4, Burdine v. Scott (No. H-94-4190) (S.D. Tex.).

[119] Order at 7. Burdine v. Scott (No. H-94-4190)(S.D. Tex.).

[120] *Id.*

[121] S.F. Vol. 16 at 641, State v. Burdine (CCA No. 69,271). Cannon later admitted that a competent defense lawyer would never conduct such an inquiry in front of the jury because "it would be prejudicial. And they [the jury] don't need to know that he refused [to testify]." S.H. Vol. 1 at 225, Ex parte Burdine (CCA No. 16,725). A legal expert who testified for Burdine at the State habeas hearing stated even more emphatically that "there is absolutely no logical, legal, fundamental common sense reason for ever placing someone before a jury and saying, 'I'm not going to testify.'" *Id.* Vol. 4 at 655.

In closing argument at the punishment hearing, Cannon did little more than provide a rambling discourse on the history of torture in medieval England, ending with a plea for mercy based upon the Biblical account of Cain and Abel.[122] He did not object when the prosecutor argued during his punishment phase summation that sentencing Burdine, who is gay, to life in prison "isn't a very bad punishment for a homosexual."[123] During a later hearing which examined his performance at trial, Cannon referred to gay men as "queers," "fairies," "tush hogs," and people who have a medical "problem which they can't help" that causes him to "pit[y]" them.[124]

A trial judge later convened a hearing into Burdine's allegation that Cannon had slept through his trial. The judge heard days of evidence from clerks, jurors, and other trial participants establishing that Cannon slept through large portions of Burdine's trial. The Court found that Cannon had indeed slept through the trial, and recommended that Burdine receive a new trial, as it was impossible for Cannon to have provided "effective assistance of counsel" while he was sleeping. The Texas Court of Criminal Appeals disagreed. Although it is extremely rare for the CCA to reject the recommendation of an experienced trial judge who has held an extensive hearing in a habeas matter, the CCA did so in Burdine's case and affirmed his death sentence.[125] On March 1, 2000, the federal district court rejected the CCA's "one page, unsigned" order, which "altogether failed to provide any justification for its rejection of the trial court's conclusions," and granted Mr. Burdine habeas corpus relief.[126] The district court held unambiguously that "sleeping counsel is equivalent to no counsel at all."[127]

Governor Bush, when asked about the Burdine case in a March 2, 2000 presidential primary debate, pointed to the fact that Burdine received relief from a federal court as evidence that "the system worked" in his case, and said he hoped Burdine would be "retried soon."[128] Nevertheless, at that very time, the State's lawyers were actively appealing the grant of relief to Burdine to the United States Court of Appeals for the Fifth Circuit. Assistant Solicitor General Julie Parsley urged that court to permit Burdine's execution despite the fact that Cannon had slept through trial. Parsley reminded the justices that they had, in other cases, denied relief to defendants whose lawyers were intoxicated or were suffering a "psychotic episode" during a defendant's trial, and argued that Burdine's situation was analogous.[129] Texas Attorney General

[122] S.F. Vol. 17 at 683, 689-90, Burdine v. State (CCA No. 69,271).

[123] S.H. at 64-65, Ex Parte Burdine, (183rd Dist. Ct., Harris County, Tex. No. 379444-A). Mitchell Katine, a Houston lawyer and gay rights advocate, attacked this comment in a February 21, 1995 press conference, pointing out that "it is ludicrous to think any homosexual might be pleased about getting sent to a prison." John Makeig, *Lawyers in Murder Trial Accused of Anti-Gay Bias*, HOUSTON CHRON., February 22, 1995, at A13 (paraphrasing Katine).

[124] *Id.* at 80-84.

[125] Ex Parte Burdine, 901 S.W.2d 456, 456 (Tex. Crim. App. 1995).

[126] Burdine v. Johnson, 66 F. Supp.2d 854, 856 (S.D. Tex. 1999).

[127] *Id.* at 866.

[128] Transcript, CAN/Los Angeles Times Election 2000 Republican Presidential Debate, Federal News Service, March 2, 2000.

[129] Henry Weinstein, *Condemned Man Awaits Fate in Dozing Lawyer Case*, L.A. TIMES, June 6, 2000, at A1 (describing oral argument).

John Cornyn admitted to being "troubled" by some of Parsley's arguments, but still presses for Burdine's execution.[130]

Carl Johnson

Carl Johnson was convicted of shooting and killing a security guard during a robbery in Houston, Texas, in October of 1978. As in Burdine's case, Johnson's defense was handicapped by Cannon's failure to stay awake:

> In Carl Johnson's case, the ineptitude of the lawyer who represented him jumps off the printed page. During long periods of jury voir dire, while the State was asking questions of individual jurors, the transcripts give one the impression that Johnson's lawyer was not even present in the courtroom. Upon investigation, it turned out that he was in fact present; it's just that he was asleep.[131]

This fact was confirmed in the 1989 affidavit of Philip Scardino, Cannon's co-counsel in the case, who stated that Cannon slept through "significant periods on numerous occasions" during jury selection.[132] Scardino was "an attorney less than a year out of law school who had never previously tried a capital case. He did not fall asleep. His burden was not incompetence but inexperience."[133]

Mr. Johnson's appeal, which detailed numerous errors by the defense, was denied in 1995 in an unpublished opinion of the Fifth Circuit. He was executed in 1995.

D. Inexperienced Counsel

Many Texas death row inmates are represented by defense lawyers who have never tried a capital case. Unfamiliar with the unique demands of such cases, these lawyers routinely commit elementary blunders: they misunderstand the specialized rules of evidence applicable to capital trials, fail to perform the necessary investigation of the defendant's background, and are unaware of the need for experts to address a particular area of the case. Neither of the lawyers who represented Ernest Willis at his 1987 capital murder trial in Iraan, Texas, had any capital experience.[134] In fact, one of these lawyers recently had stopped working for the District

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[130] *Cornyn's Dilemma: Recent Actions by the State Attorney General's Office Merit both Praise and Criticism*, FORT WORTH STAR-TELEGRAM, June 12, 2000, at 8.

[131] David R. Dow, *The State, The Death Penalty, and Carl Johnson*, 37 BOSTON COLLEGE L. R. 691, 694-95 (1996).

[132] *Id.*

[133] *Id.* at 694-95.

[134] Howard Swindle & Dan Malone, *Judge Says Inmate Wrongly Convicted; Man Has Spent 13 Years on Death Row*, DALLAS MORNING NEWS, Sept. 10, 2000, at A1. For further discussion of the misconduct in this case, see Chapter Three, *supra*.

Attorney who prosecuted Willis. The State had a weak circumstantial case with no motive, no eyewitnesses, and no physical evidence linking Willis to the fire which killed the victims. The District Attorney himself estimated his chances of a conviction before trial at 10 percent. Mr. Willis's lawyers spent fewer than three hours consulting with him before trial, conducted minimal cross-examination of the State's witnesses, and called no character witnesses on Willis's behalf, even though many would have been willing to testify. Not surprisingly, he was convicted and sentenced to death.[135]

Willis's lead trial lawyer surrendered his law license in 1997 after being convicted of a cocaine charge, and now works as a legal assistant for the former District Attorney (now in private practice) who prosecuted Willis. After reviewing the case in state habeas proceedings, a Texas state trial judge took the extremely rare step of recommending a new trial for Willis.[136] Willis's fate now rests with the Texas Court of Criminal Appeals.

Similarly, the lawyer appointed to represent Paul Richard Colella in his 1992 Cameron County capital murder trial also had never before represented a capital defendant. He was paid only a minimal sum for his work and was denied co-counsel. Defense counsel's inexperience became painfully apparent during the punishment phase of the trial, when he repeatedly invoked evidence rules inapplicable to capital cases, apparently unaware of the governing law.[137] Although he admitted in a later hearing that he knew about his client's history of mental illness, defense counsel did nothing to investigate this history and never asked the court to appoint a mental health expert. The only testimony about Colella's background was a brief plea from his mother, whom the lawyer had not prepared before he put her on the witness stand. Counsel appointed after the conviction discovered that Colella had grown up in dire poverty, had been in classes for the emotionally handicapped since the beginning of his education, and had attempted suicide several times before he was ten years old. Following up on repeated suggestions of neurological injury in Colella's extensive mental health records, counsel retained a neuropsychologist who confirmed that Colella was brain-damaged.[138]

The Colella case is by no means isolated. In dozens of Texas cases, appointed lawyers have utterly failed to perform the meticulous investigation of the defendant's background essential to proper representation at the punishment phase. The attorney responsible for Kenneth Ransom's defense offered no evidence on his client's behalf at the punishment phase.[139] Had the attorney mailed a single letter requesting it, he would have received a 500-page child welfare case file. In that file were descriptions of how Ransom had been taken from his mother and placed in foster care because of his mother's constant physical abuse, which included whipping Ransom with extension cords that left permanent U-shaped bruises over his back and limbs.[140]

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[135] *Id.*

[136] *Id.*

[137] Original Application for Writ of Habeas Corpus at 199-201, Ex Parte Colella (357th Dist. Ct. of Cameron County, Texas No. 92-CR-173-E).

[138] *Id.* at 162-185.

[139] Ransom v. Johnson, 126 F.3d 716, 722 (5th Cir. 1997).

[140] *Id.* at 721-22 & n.3.

The attorney claimed that Ransom had not informed him that he been abused as a child.[141] The court found this argument hard to accept, however, given that the attorney himself had represented Ransom's mother a few years earlier in the lawsuit which terminated her parental rights over Ransom's brother.[142]

If Joseph Stanley Faulder's trial counsel had researched his background before his trial, he could have found much evidence to present in favor of a life sentence, including: brain damage stemming from a childhood incident in which Faulder's head was "split open on both sides" after he fell out of a moving car, a good prison record, his performance as a "loyal friend, trusted employee and father of two girls," and the fact that he had "once saved the life of an accident victim when he drove the woman to the hospital in a blizzard."[143] None of this evidence was presented. Explaining his decision during a hearing into his competence, the lawyer testified that he introduced no mitigating evidence on Faulder's behalf because, incredibly, "he did not know that presentation of evidence at sentencing was allowed under Texas procedure."[144]

Jon Wood, Jesus Romero's lawyer, similarly offered no mitigating evidence during the punishment phase and gave the following closing argument: "You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say."[145]

> ***You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say.***
>
> Entire defense closing argument during the sentencing phase of Jesus Romero's capital trial

During appeals, two expert witnesses testified that Wood's preparation for the punishment phase was deficient, noting that the defense could have introduced evidence of Romero's youth, intoxication at the time of the crime, and violently abusive upbringing.[146] The federal district court granted a new sentencing hearing, noting that Wood's decision to deliver a closing argument in which he did not even ask the jury to spare his client's life or explain any reasons why they should do so was "patently unreasonable."[147] The Fifth Circuit disagreed, concluding that is was not "outside the range of reasonable professional assistance" because, *had it worked*, the Court speculated, it "might well have been seen as a brilliant move."[148]

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[141] *Id.* at 722.

[142] *Id.* at 723.

[143] Faulder v. Johnson, 81 F.3d 515, 519 (5th Cir. 1996).

[144] *Id.*

[145] Romero v. Lynaugh, 884 F.2d 871, 875 (5th Cir. 1989).

[146] *Id.* at 876.

[147] *Id.*

[148] *Id.* at 877.

Ron Mock

No discussion of ineffective assistance of counsel in Texas death penalty trials would be complete without mention of Harris County attorney Ron Mock, if only because so many clients on Texas's death row were represented by him. Mock is a colorful figure who admits to "drink[ing] a lot of whiskey"[149] and who owned a bar for a time.[150] He was arrested during jury selection in the capital murder trial of Anthony Ray Westley for ignoring an order from the CCA asking him to show cause for delays in filing another condemned client's appeal.[151] When questioned during Westley's appeal about his apparent ignorance concerning the law applicable to capital cases, Mock asserted that he kept abreast of rapidly evolving developments in death penalty law by staying up late and reading cases in the "wee hours of the morning."[152] A Houston attorney designated to review Mock's performance in the Westley case concluded that Mock's representation fell below reasonable professional standards in many areas.[153] Mock later called that attorney a "little lying, no good, rotten son of a bitch."[154] Reviewing Mock's performance at Westley's trial, the United States Court of Appeals for the Fifth Circuit found several deficiencies,[155] but the majority held that the errors did not affect the outcome of the case. Judge Harold DeMoss dissented, observing that his confidence in Westley's guilt was "completely undermined," and that if Mock's performance did not satisfy the relevant legal test, "there is no such animal as an 'ineffective counsel' and we should quit talking as if there is."[156] In 1986, shortly after Westley's trial, State District Judge Thomas Routt ordered respected Houston civil rights attorney Anthony Griffin to accept Routt's friend Mock as second-chair counsel in the capital murder trial of Anthony Pierce. Griffin "objected and used his money to pay another attorney to sit with them."[157]

Although Mock claims to fight "like shit" for his clients,[158] others have questioned his commitment.[159] Mervyn West, an investigator who assisted Mock during Gary Graham's 1981

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[149] John Makeig, *Criminal Lawyer Wins One, Loses Another*, HOUSTON CHRON., April 19, 1986, at A33.

[150] Steve McVicker, *Defending the Indefensible: Do Court-Appointed Attorneys Serve Their Clients or the Courts?*, TEX. OBSERVER, April 22, 1994, at 8.

[151] *Defense Attorney Surrenders to Jail Officials*, HOUSTON CHRON., March 26, 1985, at A13. A year later, the client whose appeal Mock had been ordered to file was facing imminent execution without counsel. *TDC Attorneys May Represent Prisoner as Execution Nears*, HOUSTON CHRON., Mar. 29, 1986, at A21.

[152] Steve McVicker, *Defending the Indefensible: Do Court-Appointed Attorneys Serve Their Clients or the Courts?*, TEX. OBSERVER, April 22, 1994, at 8.

[153] *Dateline*, (NBC television broadcast, Aug. 30, 2000).

[154] *Id.*

[155] Westley v. Johnson, 83 F.3d 714 (5th Cir. 1996), *cert. denied*, 519 U.S. 1094 (1997). The entire Court agreed that Mock was deficient for not objecting to inadmissible victim-impact testimony and for failing to request transcripts of Westley's co-defendant, who had been tried earlier. *Id.* at 721, 723.

[156] *Id.* at 729 (DeMoss, J., dissenting).

[157] *See* Mary Flood, *What Price Justice? Gary Graham Case Fuels Debate over Appointed Attorneys*, HOUSTON CHRON., July 1, 2000, at A1.

[158] Steve McVicker, *Defending the Indefensible: Do Court-Appointed Attorneys Serve Their Clients or the Courts?*, TEX. OBSERVER, April 22, 1994, at 8.

[159] *Id.* at 11 (reprinting one lawyer's comment that Mock "really doesn't care" about the fate of his clients

capital trial, swore in an affidavit that he and Mock devoted little attention to the case because they thought Graham was guilty.[160] Through routine investigation, counsel appointed after his conviction developed considerable evidence casting doubt on Graham's guilt: crime-scene witness descriptions of the shooter that did not match Graham and leads to other suspects which had not been pursued.[161]

Despite many questions about his performance, Mock has been appointed to represent over a dozen capital clients, all but a few of whom were convicted and sentenced to death.[162] So far, seven have been executed. Indeed, he was for a time the highest-paid appointed lawyer in Harris County; he still receives appointments, and now drives a Rolls-Royce and a Harley Davidson.[163] He claims that he stopped taking capital cases a decade ago because "there was not enough money in them."[164] When Mock, in 1995, took the newly required certification exam to become eligible for appointment to capital murder cases in 1995, he did not pass.[165]

V. Conclusion

Whether from inexperience, personal disabilities, or a reluctance to undertake a crushing task for which they will not be compensated fairly, appointed attorneys in Texas have ignored their clients' concerns and the gravity of the charges they face. Courts have been unacceptably tolerant of such behavior, failing to correct what appear to be obvious problems: a complete dearth of training, funding, and oversight for appointed lawyers in capital cases; defense team members who put their own financial gain before competent representation of their clients; and

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and another's comment that he has heard Mock say things that make him question Mock's commitment to zealous representation).

[160] Graham v. Johnson, 168 F.3d 762, 767 (5th Cir. 1999).

[161] *Id.* at 767-78, 770-71. The one prosecution eyewitness who identified Graham as the shooter, Bernadine Skillern, testified that she obtained a clear view of Graham by slowly following him in her car for a substantial distance. However, another crime scene witness–who testified at trial but was never contacted by the defense–swore that she watched the shooter run away from the crime, and that he was not followed by any car. Graham, 168 F.3d at 767 (affidavit of Wilma Amos). Her account was confirmed by other witnesses. *Id.* (affidavit of Malcolm and Lorna Stephens). Mock, while conceding that the Graham case still troubled him, pointed to Ms. Skillern's testimony as being "strong as an acre of garlic." Steve McVicker, *Defending the Indefensible: Do Court-Appointed Attorneys Serve Their Clients or the Courts?*, TEX. OBSERVER, April 22, 1994, at 9. However, two experts on eyewitness identification who reviewed the case stated that the identification techniques used in Graham's case were suggestive and observed that studies have shown that "an eyewitness's confidence in the identification and the reliability of an identification bear no relationship to one another." Ex Parte Graham, No. 17,568-05 (179th Dist. Ct., Harris County, Tex. Apr. 27, 1998) (unpub.)(citing affidavits of Dr. Elizabeth Loftus and Dr. Curtis Wills).

[162] Steve McVicker, *Defending the Indefensible: Do Court-Appointed Attorneys Serve Their Clients or the Courts?*, TEX. OBSERVER, April 22, 1994, at 8 (Mock estimates that he has tried more capital murder cases than any attorney in Texas).

[163] *Lawyer Ron Mock County's Best-Paid Public Defender*, HOUSTON CHRON., Jan. 26, 1988, at A19; Sara Rimer & Raymond Bonner, *Texas Lawyer's Death Row Record a Concern*, N.Y. TIMES, June 11, 2000, at 1.

[164] Rimer & Bonner, *Texas Lawyer's Death Row Record a Concern*, N.Y. TIMES, June 11, 2000, at 1.

[165] Mary Flood, *What Price Justice? Gary Graham Case Fuels Debate over Appointed Attorneys*, HOUSTON CHRON., July 1, 2000 at 1.

attorneys who – for whatever reason – simply fail to undertake the zealous representation required in the all-or-nothing arena of the death penalty.

When the State proposes to take a human life, it must provide to each defendant experienced lawyers dedicated solely to that person's interests. Texas's current disparate "system" for providing counsel falls woefully short of this goal.

CHAPTER SEVEN

Sham Appeals: The Appearance of Representation in State Habeas Corpus

We've appointed some absolutely terrible lawyers. I mean lawyers that nobody should have, much less somebody on death row on his last appeal.

Former Court of Criminal Appeals
Judge Charles Baird[1]

I. Background - Article 11.071

In 1995, the Texas Legislature enacted Article 11.071 of the Texas Code of Criminal Procedure. Article 11.071 was intended to be a major reform of the death penalty review process in Texas. For the first time, the State agreed to appoint lawyers to represent death row inmates in their state habeas corpus appeals. The State also promised to pay them for their work, and to provide funds for both investigators and expert witnesses to help them build their cases. The statute specifically requires that the counsel appointed must be "competent," and requires the Court of Criminal Appeals ("CCA") to enforce this guarantee.[2]

From the beginning, the system was plagued with problems. First, the Legislature refused to appropriate enough money for lawyers to represent each prisoner on Texas's enormous death row. This decision in turn led the CCA to impose strict funding caps limiting compensation to an amount far below what was necessary to fairly compensate lawyers for these complex and time-consuming cases.[3] The CCA circulated a questionnaire to attorneys interested

[1] Staff writers, *Defense Called Lacking for Death Row Indigents: but System Supporters Say Most Attorneys Effective*, DALLAS MORNING NEWS, Sept. 10, 2000, at 1A.

[2] *See* TEX. CODE CRIM. PROC. art. 11.071, Sec. 2(a) ("An applicant [under sentence of death] shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary"); Sec. 2(c) ("the convicting court shall appoint competent counsel"); Sec. 2(d) (CCA must "adopt rules for the appointment of attorneys as counsel under this section and the convicting court may appoint an attorney as counsel under this section only if the appointment is approved by the [CCA] in any manner provided by those rules").

[3] Although lack of adequate funding alone cannot explain the disastrous performance of many of the attorneys appointed by the CCA, the history of funding for state habeas representation also deserves at least brief mention. When Article 11.071 was enacted in 1995, the Texas Legislature provided $2 million per year for the program – half the amount requested by the Court of Criminal Appeals. *See* John Makeig, *The Buck Stops Here on Costs to Represent Death Appeals*, HOUSTON CHRON., June 28, 1996, at 16A (noting that Legislature had appropriate less than half the amount estimated as necessary and noting CCA judge's comment that "[y]ou can't appoint lawyers if you can't pay them."); *Defense Called Lacking for Death Row's Poor*, DALLAS MORNING NEWS, Sept. 10, 2000. Faced with hundreds of prisoners asking for appointed counsel, the CCA first announced its intention to cap the amount post-conviction counsel could be paid at $7,500. *Id.* Such a low figure guaranteed that

in 11.071 appeals asking about the attorneys' experience. However, to this day, the Court has never explained what minimum standards, if any, it uses to guide the selection process. As inexperienced appointed lawyers began to wade into the extremely complex area of death penalty appeals, one Austin attorney reported being deluged with last-minute calls from these attorneys, and remarked that "80 percent" of them were "in over their heads."[4] Another observer commented that Texas lawmakers and judges "by ignorance, delay, and arrogance, created a textbook case on how not to deal with habeas reforms."[5]

The current list of "approved" attorneys for 11.071 appeals, which was revised in late August 2000, still contains the name of at least one attorney who currently works for a state prosecuting agency.[6] Also on the list is an attorney who, in one of his earlier 11.071 cases, asked to be removed from the case while it was still under consideration by the CCA, and asked for a hearing into whether he had provided effective assistance of counsel.[7]

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many of the State's most respected appellate attorneys would refuse to apply for the work. Indeed, records from the Court show that some attorneys who had been licensed less than two years received habeas appointments. *Id.* In an effort to attract better attorneys, the Court removed the $7,500 cap, but set no minimum qualifications. The result, according to former CCA Judge Charles Baird, was that the Court "appointed some absolutely terrible lawyers." *Id.* With the cap on payment lifted, the CCA soon ran out of money. Additional funds have been appropriated, but a new cap of $25,000 per attorney may still not suffice, given the complexity of most cases. In 1993, a Report commissioned by the State Bar of Texas Committee on Representation for Those on Death Row analyzed time commitments in Texas post-conviction cases in the 1980s and found that the average lawyer spent approximately 350 hours representing a death-sentenced inmate in Texas state post-conviction proceedings. The Spangenberg Group, *A Study of Representation in Capital Cases in Texas* (March 1993), at 90; Addendum at 7. The Administrative Office of the United States Courts studied the amount of time required to properly represent a death row inmate in habeas proceedings and concluded that available data concerning federal capital habeas corpus representation point overwhelmingly to time commitments in the "several hundreds to several thousands of hours." Administrative Office of the United States Courts, *Capital Habeas Corpus: Approaches to Case Budgeting and Case Management*, at 9 (1997).

[4] Christy Hoppe, *Death Row Inmates Get Lawyers Before Deadline, But Attorneys Lack Expertise, Some Say*, DALLAS MORNING NEWS, April 24, 1997, at 17A.

[5] Robert Elder, Jr., *Uncle Mike Wants You for the Habeas Wars*, TEXAS LAWYER, Oct. 28, 1996, at 2.

[6] The list of attorneys who have been approved for appointment to 11.071 death penalty appeals by the CCA is available online *at* http://www.cca.courts.state.tx.us/11071A08252000.htm. See discussion of the Joe Lee Guy case, *infra*, Chapter Six, for information about the attorney.

[7] *See* discussion of Ex parte Martinez, *infra*, at Chapter Six.

II. The Ideal: Basics of Competent Representation

To perform competently, a lawyer representing a defendant inmate in habeas corpus proceedings must do the following:

A. **Perform a thorough investigation of the case.**[8] The lawyer's first task is to carefully read the written record of the trial, but that is only the beginning. She must then contact and interview all important state witnesses; examine the files of all previous defense attorneys, looking for areas of the case which were not adequately developed; review the State's case file looking for indications that state witnesses may have given misleading testimony or that information may have been withheld from the defense lawyer; and assemble all available information about the defendant's background, including any history of mental health problems, brain damage, genetic disorders, or physical or sexual abuse. Of course, in some cases, the habeas attorney may find that the trial defense attorney has already thoroughly investigated all of these areas. However, as the previous section makes clear, it would be foolhardy to assume in any Texas case that the trial lawyer exhausted all possible avenues of investigation. The very purpose of habeas corpus appeals is to permit a vital final "safety check" of the previous work done on the case.

B. **Bring in new evidence to show violations of her client's rights.** Once a defendant is convicted, he is presumed guilty, and the jury's verdict is presumed correct. The inmate bears the burden of demonstrating that his conviction or sentence was tainted by error. The defendant must therefore develop new information, never heard by the jury, which demonstrates a serious violation of his constitutional rights. Claims based on evidence already presented at trial are reserved for the direct appeal, and are not appropriate for habeas corpus appeals.

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[8] The authorities are unanimous on the importance of thorough investigation to competent habeas representation:

> [Habeas] counsel should request that the state postconviction case be conducted, and should be prepared to conduct it, as a civil trial proceeding, initiated by her on behalf of the client, complete with frequent and productive interaction with the client; comprehensive prefiling and pretrial documentary, field, and legal investigation to identify and prepare to litigate the appropriate causes of action; careful pleadings; motions practice; evidentiary hearings; briefing; and any other procedures that counsel might use in civil litigation on a plaintiff's behalf.

1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRAC. & PROC. § 7.1a, at 274-75 (3rd ed. 1998) (LIEBMAN & HERTZ) (footnotes omitted); *see also* Clive A. Stafford-Smith & Rémy Voisin Starns, *Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOYOLA L. REV. 55, 90 (1999) ("If trial counsel did not prepare, then the [habeas] advocate must not only prove this . . . [but also] show the difference that the proper investigation would have made to the outcome of the trial. Obviously, the only way this can be done is to *perform the investigation himself*.") (emphasis added).

C. **Plead every possible claim**. As we have seen, the law gives death row inmates only one "bite at the apple," and every possible claim must be presented to the state court in order to obtain later review by the federal court system. A habeas attorney must err on the side of thoroughness. Every possible piece of evidence must be collected, and every possible legal argument must be made, in the state habeas proceeding. If it is not made there, any opportunity to make the argument very likely has vanished forever. As the American Bar Association advises, a habeas lawyer in a death penalty case must "seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing postconviction proceedings."[9]

III. The Study

Because the CCA was appointing inexperienced and unqualified attorneys to represent death row inmates, it was only a matter of time before stories emerged of lawyers who had made grievous errors in their handling of the appeals. Many such stories are examined in this Report. While the anecdotal evidence in itself is significant, the authors of this Report also conducted a systematic study of the quality of representation being provided by attorneys appointed under Article 11.071.[10] The study intended to evaluate whether Article 11.071 has improved the death penalty appeals process as promised. The initial findings are clear: it has not.

The quality of the work done by attorneys appointed to file 11.071 applications varies greatly. In a handful of cases (often when an inmate is represented by a large civil law firm), the habeas application is comprehensive and detailed, and is bolstered by several volumes of exhibits. However, in a substantial portion of cases, the habeas applications are sketchy, and the issues raised are stale record-based claims inappropriate for habeas applications. In many cases, appointed attorneys apparently performed little or no work at all and simply cribbed already rejected pleadings from prior appeals and filed them – almost verbatim – with the same court.

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[9] ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, at 98. Available at http://www.capdefnet.org/ABA_appoint_guide.htm.

[10] The methodology of this study is described in Appendix One; a summary of the study results are reflected in Appendix Five.

A. Extremely Brief Habeas Petitions

And I'll look through a [habeas] writ, and I'll just think, 'Is this all I'm getting because there wasn't anything else, or is this all I'm getting because someone wasn't putting a lot of time into it?'

D. Hendrix, Law Clerk, Court of Criminal Appeals, commenting on the quality of Article 11.071 appeals[11]

Of the 103 applications reviewed for the study, 18 applications (17.5%) were 15 pages long or less, and 36 applications (35%) were 30 pages or less. Eight applications were each under *ten* pages long[12] – an astonishing feat, as it is difficult to fit even the most rudimentary procedural matters into five pages. Habeas corpus applications filed by adequately funded, experienced counsel routinely run over 150 pages, because that amount of space is necessary to address both the factual issues in the case and the extraordinarily complex law applicable to habeas litigation.

One of the two shortest petitions – a mere three pages long – was filed on behalf of Robert Earl Carter on October 6, 1997.[13] The lawyer advised the court that he was relying on the arguments made in the direct appeal brief in the case, and further advised the court that both of his arguments had recently been "rejected" by the CCA.[14] The lawyer denied the need for an evidentiary hearing[15]– a request so routine and essential to protecting the client's rights that even the most inexperienced habeas corpus attorneys usually file one.

The lawyer who filed Mr. Carter's habeas petition *did not even sign it.*[16] Not only did the State decline to reply to the petition, the trial court did not issue fact findings denying it, even

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[11] ABC News Nightline (Sept. 15, 2000).

[12] *See* state habeas corpus applications filed on behalf of James Rexford Powell, Gustavo Julian Garcia, Johnny Joe Martinez, Ricky Eugene Kerr, Robert Earl Carter, Paul Richard Colella, Bryan Eric Wolfe, and Joe Lee Guy.

[13] *See* Application for Habeas Corpus to the Court of Criminal Appeals, Ex parte Robert Earl Carter, Trial Court No. 8003A, Writ No. 35,746 (Tex. Crim. App. 1997).

[14] *Id.* at 1-2.

[15] *Id.* at 2.

[16] *Id.* at 3.

though both steps are clearly required by Article 11.071.[17] The clerk transferred the appeal to the CCA on October 16, 1997 – ten days after the petition was filed. The CCA overlooked the fact that it did not even have a lower court decision to review, and denied Carter relief in a two-page order issued on November 19, 1997.[18] The entire file of Robert Earl Carter's state habeas appeals is fewer than ten pages long. In federal court, Mr. Carter's new counsel tried to flesh out the minuscule three-page petition which had been filed on his behalf in state court. That task proved impossible, and Carter was executed on May 31, 2000.[19]

Ricky Kerr also had a three-page habeas petition filed on his behalf. His lawyer later submitted a sworn affidavit admitting that filing such a brief and superficial appeal was a "gross error in judgment."[20] The CCA also denied relief in his case.

Q. 11.071 writs in some cases have some lawyers filing basically very small, very insignificant writs when they haven't interviewed the witnesses, haven't done an investigation. The court has approved those. It hasn't found ineffective assistance of counsel. I wonder what your thinking on that is.

A. Oh, there have been some, that if I had been an attorney, I would have been ashamed to file. We see those that were caught in the trap.

Interview with CCA Presiding Judge Michael J. McCormick, Voice for the Defense, January/February 1999, at 17.

B. Absence of Extra-Record Claims

Although extremely short habeas petitions are a clear indicator of ineffective performance by counsel, longer ones may prove no better. The most pervasive problem in the representation provided to state habeas applicants is the failure of appointed counsel to raise

[17] Article 11.071 specifies that the state "shall" respond to a habeas corpus application and that the district court "shall" enter an order recommending the grant or denial of the application. TEX. CODE CRIM. PROC. art. 11.071 §§ 7(a) & 8(b).

[18] Order, Ex parte Carter, Writ No. 35,746.

[19] *See* Carter v. Johnson, No. 99-50392 (5th Cir. Nov. 2, 1999) (unpub.).

[20] Application for Writ of Habeas Corpus Filed Pursuant to Art. V, sec. 5, Exhibit 1, Ex parte Kerr (CCA No. 35,065).

extra-record claims. Appointed state habeas counsel is under a statutory obligation, as well as an ethical duty, to "investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus."[21] Our study reveals that in 44 of 103 cases reviewed, counsel's application failed to include any extra-record evidence.[22] In other words, 42.7% of these applications indicated *on their face* that appointed counsel had not conducted the meaningful investigation mandated by statute. In only 15 of the 103 files examined (14.5%) did the state habeas lawyer ask the court for discovery – a process which permits the court to order factual development relevant to an inmate's claims. If discovery is not requested in state court, it is not available later in federal habeas corpus proceedings.[23]

Simply put, almost 43% of the writ applications we reviewed contained only record-based claims, which the CCA will not address in habeas corpus proceedings. In each of these cases, therefore, there was absolutely nothing for the courts to consider.

C. Verbatim Copies and Boilerplate Claims

The errors described above, as egregious as they are, all seem to be the product of ignorance. However, another class of faulty habeas applications may fit into a different category. Many attorneys appointed under Article 11.071 simply rehash – or even copy verbatim – claims already presented in the direct appeal and rejected by the courts. Not only does this approach deny the inmate the investigation which is critical to proper habeas representation, it also completely ignores the strict distinction between record-based and extra-record claims, and guarantees that the inmate will lose. For these inmates, the habeas appeal is literally over before it begins.

The study found a startling number of cases in which it was evident that the attorney had merely copied the direct appeal and re-submitted it as a habeas application. In Ex parte Crawford,[24] for instance, the appointed habeas lawyer filed a 44-page application raising 12 claims. All 12 claims were identical to the claims raised in the already-rejected direct appeal.[25]

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[21] TEX. CODE CRIM. PROC. art. 11.071 § 3(a).

[22] Indeed, in a number of cases, habeas counsel simply repeated the unsuccessful arguments that were raised and rejected on direct appeal. For example, in Ex parte Crawford, Writ. No. 40,439-01 (Tex. Crim. App. 1998), habeas counsel raised 12 claims, all of which were identical to issues that had already been raised and rejected on direct appeal. Relief was denied on this basis. Similarly, in Ex parte Gribble, Writ. No. 34,968 (Tex. Crim. App. 1997), habeas counsel filed a 15-page application raising only two claims, both of which had been raised and rejected on direct appeal.

[23] *See* 28 U.S.C. § 2254(e) (prohibiting a hearing in federal court if the petitioner failed to develop the factual basis of the claims in state court).

[24] No. 40,439-01 (Tex. Crim. App. 1998).

[25] Given that almost 43% of the applications which we reviewed contain only record-based claims, it is quite probable that there are more habeas applications which mirror the direct appeal, at least in part.

A veteran Texas death penalty lawyer then intervened in the case. He informed the CCA that he had compared the direct appeal brief previously filed on Crawford's behalf with the habeas corpus application and found that the latter was "verbatim and exactly" copied from the earlier appeal.[26] Seeking permission to intervene, the lawyer declared that he was "shocked and amazed" by this conduct:

> Where an attorney appointed by the Texas Court of Criminal Appeals to represent a defendant on death row in the *crucial* habeas corpus proceedings, available on only a single occasion to these death row defendants, would file an *exact* "*carbon copy*" writ of habeas corpus based upon *another* attorney's brief on appeal, without apparently doing any other work, . . . such action by the attorney is a *clear violation* of the lawyer's responsibility to the habeas Petitioner.[27]

The new attorney volunteered to assist Crawford "pro bono"– that is, at no further expense to the State of Texas. Furthermore, he advised the CCA that Crawford's current attorneys consented to his involvement.[28] The CCA ignored the new attorney's arguments. On May 5, 1999, in a cursory two-page order, the Court denied permission to intervene, without addressing whether the original habeas attorney had performed effectively. Five days later, again without comment, the Court denied the original "carbon copy" appeal.[29]

Similarly, in Ex parte Gribble,[30] the appointed attorney filed a 15-page application raising four claims.[31] Each claim had already been raised and rejected by the CCA on direct appeal. The trial court found that "the Court of Criminal Appeals addressed the applicant's claims . . . in its opinion on direct appeal."[32] Mr. Gribble complained that his lawyer had violated the CCA's clear rule that "issues raised and rejected on direct appeal may not form the basis of state habeas relief," and asked for a copy of the court record so he could file his own appeal.[33] The CCA rejected both the habeas petition and Gribble's claim of ineffective assistance of counsel in an unsigned two-page order on October 29, 1997.[34]

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[26] Motion of *Pro Bono* Counsel for Leave to Intervene in Article 11.071 Review at 3, Ex parte Crawford, *supra* (filed Dec. 15, 1998).

[27] *Id.*

[28] *Id.* at 2.

[29] *See* Ex parte Crawford, No. 40,439-02 (Tex. Crim. App. May 10, 1999).

[30] No. 34,968 (Tex. Crim App. 1997).

[31] *See* Application for Writ of Habeas Corpus (Post-conviction), Ex parte Gribble, No. 87 CR0828-83, at 2-3 (122nd Dist. Ct. of Galveston County, Apr. 29, 1997).

[32] Order on Writ of Habeas Corpus at 2 (June 29, 1997). Later in its order, the court denied two more of Gribble's claims without noting that they had been addressed on direct appeal, but Gribble's petition reveals that they were previously raised on direct appeal. *Compare* Order at 3 *with* Application, *supra*, at 2.

[33] Motion to File an Out of Time Petition for Writ of Habeas Corpus, Ex parte Gribble, *supra*, at 2 (filed January 14, 1998).

[34] Order, Ex parte Gribble, *supra*.

of the story she narrates was an independent recollection of the memory of observation, and how much had been refracted through the prism of discussions with Ricky McGinn's antagonist, her mother, during the past eight or nine years?

Tex.R.Crim.Evid. 601(a)(2) places the power to determine a witness' competency into the hands of the trial judge. A ruling by the trial court will not be disturbed upon review unless an abuse of discretion is shown. Broussard v. State, 910 S.W.2d 952, 960 (Tex. Crim. App. 1995).

But in the instant case, the court did not exercise its discretion after inquiry, as it is implicit from Watson, supra, that it must. The court made its ruling instantly, without any inquiry whatsoever. The factors recited in Watson could not have been considered.

The court's failure to inquire into competency placed defense counsel in an untenable position. The testimony given was clearly devastating. For the defense to inquire further at that point, to seek the kind of details that would establish where the recollections came from before the jury, after they had already heard the gravamen of her testimony, would risk twisting the knife.

The State, on the other hand, which sponsored the witness, had every reason to seek the kind of corroborative detail which might, taken as a whole, vindicate the admission of the testimony as competent. But the State did

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not do so, and the court made no inquiry of its own. The testimony, taken as a whole, gives no indication of the capacity of the then three- or four-year-old Natasha to observe and understand the alleged events. Neither does it demonstrate her present ability to recall and narrate accurately a story from three-quarters of her life ago.

This Court, in reviewing the trial court's decision on the competency of a witness, takes into consideration the whole of the testimony of the witness, and not just the answers given on an initial inquiry into competency. Clark v. State, 558 S.W.2d 887, 890 (Tex. Crim. App. 1977); Fields v. State, 500 S.W.2d 500, 503 (Tex. Crim. App. 1973). Applicant asks that, in doing so, the Court also take into consideration the trial court's failure to exercise its discretion, and remand the case for a new punishment hearing pursuant to Arts. 44.251(c) and 44.29(c), V.A.C.C.P., or reform the sentence to imprisonment for life pursuant to Art. 44.251(b), V.A.C.C.P., as appropriate.

POINT OF ERROR NUMBER FOUR:

THIS CONVICTION IS INVALID AND THE APPLICANT WAS DENIED DUE PROCESS OF LAW HEREIN BECAUSE THE CONVICTION IS BASED ON ARTICLE 37.071, §2(f)(1), V.A.C.C.P., WHICH DIMINISHES THE STATE'S BURDEN OF PROOF FROM BEYOND A REASONABLE DOUBT TO THAT OF ONLY "PROBABLE."

Arguments

At the punishment phase of this trial jurors were given a charge that included questions and instructions required by Art. 37.071, §2(b), V.A.C.C.P. Specifically, jurors were

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Above are two pages from the direct appeal of a defendant who had been sentenced by a Texas court to death. Below are two pages from the same defendant's state habeas petition. Although the format and a few words have been modified, the habeas petition is otherwise identical to the direct appeal. This defendant's attorney at state habeas did almost no original work – he merely copied the claims that had already been written by another attorney, and rejected by the Texas courts.

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abuse of discretion is shown. *Broussard v. State*, 910 S.W.2d 952, 960 (Tex.Cr.App. 1996).

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whole, gives no indication of the capacity of the then three- or four-year-old Latasha to observe and understand the alleged events. Neither does it demonstrate her present ability to recall and narrate accurately a story from three-quarters of her life ago.

This Court, in reviewing the trial court's decision on the competency of a witness, takes into consideration the whole of the testimony of the witness, and not just the answers given on an initial inquiry into competency. *Clark v. State*, 558 S.W.2d 887, 890 (Tex.Crim.App.1977); *Fields v. State*, 500 S.W.2d 500, 503 (Tex.Crim.App.1973). Appellant asks that, in doing so, the Court also take into consideration the trial court's failure to exercise its discretion, and remand the case for a new punishment hearing pursuant to Arts. 44.251(c) and 44.29(c), V.A.C.C.P., or reform the sentence to imprisonment for life pursuant to Art. 44.251(b), V.A.C.C.P., as appropriate.

Figure 1: Comparison of two pages from Ricky McGinn's direct appeal brief with the same claim in his state habeas application.

In Ex parte Anderson,[35] the appointed counsel filed an 18-page application which raised three claims. The trial court did not make findings of fact and conclusions of law denying relief. The CCA saw no need for them either. Noting that all three claims had been raised and rejected on direct appeal, the Court wrote, "we remain convinced of the correctness of our decision."[36]

In yet another case, the state habeas application was nearly a word-for-word copy of the direct appeal brief (there were minor changes – for example, the term "Appellant," which is used on direct appeal to refer to the convicted defendant, was changed to "Applicant" or "Petitioner"). *See Figure 1, infra.* At the end of this reprocessed direct appeal brief, the lawyer added a short boilerplate argument. The fact that the pleadings were identical did not elicit any comment from the CCA.[37]

On other occasions, appointed lawyers have simply reiterated "boilerplate" claims without attempting to tailor them to the specifics of the case at hand. The law requires, for example, that when alleging a trial lawyer's ineffectiveness for failing to investigate a certain issue, a habeas lawyer must provide the court with specific factual information which could have been located by the trial attorney and probably would have changed the outcome of the trial: "[I]t is not sufficient that a habeas petitioner merely alleges a deficiency on the part of counsel. He must affirmatively plead the resulting prejudice in his habeas petition."[38] To adequately plead prejudice stemming from ineffective assistance of counsel at punishment, for example, a petitioner must "present[] . . . specific evidence of . . . potentially mitigating circumstances."[39]

One lawyer filed essentially the same claim of ineffective assistance of counsel in four different cases without once providing "specific evidence" relevant to the claim.[40] On April, 18, 1997, the attorney filed a habeas application in Roy Gene Smith's case that raised only a single claim alleging that trial counsel was ineffective for failing to investigate the defendant's background and present mitigation evidence in support of a life sentence at the punishment phase of the trial.[41] This claim was completely unsupported by any allegation of mitigating evidence which could have been discovered.

Indeed, there is no indication that appointed counsel even made an attempt to discover any mitigation evidence. On April 23, 1997, the same attorney filed an application in Robert Campbell's case. This application consisted of two claims. One complained of a record-based

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[35] No. 43,459 (Tex. Crim. App. 1999).

[36] *Id.*

[37] Filing a brief which merely recycles an existing pleading is clearly not a time-consuming endeavor. However, there is no way to know how much time appointed counsel bill for this activity. The CCA refuses to release attorney payment information in Article 11.071 cases, even after relief has been denied in state court.

[38] Bridge v. Lynaugh, 838 S.W.2d 770, 773 (5th Cir. 1988).

[39] Rector v. Johnson, 120 F.3d 551, 564 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1061 (1998).

[40] The cases are Ex parte Smith, 977 S.W.2d 610 (Tex. Crim. App. 1998), Ex parte Campbell, No. 44,551 (Tex. Crim. App.) (unpub.), Ex parte McGowen, No. 63,222 (Tex. Crim. App.) (unpub.), and Ex parte Ogan, No. 54,893-A (Tex. Crim. App.) (unpub.).

[41] Ex parte Smith, *supra*, at 9-13.

error regarding jury instructions. The other claim was a virtually identical copy of the ineffective assistance claim raised in Smith.[42] The applications in Ex parte Ogan and Ex parte McGowen reprint the same claim almost verbatim.[43] None of the applications was over 30 pages long, none cited any extra-record material, and none contained any of the specific proof necessary to satisfy the applicable legal standard for gaining relief. The CCA, which appointed this lawyer, never inquired why he filed these boilerplate claims. Indeed, the Court has appointed him to five cases, and he remains on the list of "approved" 11.071 attorneys.

1. Are the Appeals Short Because the Trial Was Fair?

CCA Presiding Judge Michael McCormick was asked about some of these cases during a recent episode of *Nightline*. Without providing any specifics, he declared that he assumed the lawyers in these cases had diligently investigated them but found nothing to brief: "You can't make a silk purse out of a sow's ear."[44]

However, in at least four cases mentioned in this study, counsel appointed after state habeas counsel withdrew found, after thoroughly investigating the case for the first time, evidence of numerous serious constitutional violations. One case reviewed was Ex parte Guy.[45] Guy's appointed lawyer filed a state habeas application that was less than ten pages long and raised four record-based claims.[46] The trial court entered findings of fact and conclusions of law which were nearly identical to those submitted by the district attorney. The CCA affirmed the findings authored by the district attorney with no changes.

New counsel, a large law firm willing to represent Guy free of charge, was appointed in federal court. After completing an extensive investigation, Guy's new lawyers submitted a petition that was over one hundred pages long.[47] Federal habeas counsel discovered that Mr. Guy's trial counsel had his license to practice suspended five times in the past 15 years and was addicted to alcohol and cocaine during the time of Guy's capital murder trial. They also found that the investigator appointed to assist in Guy's defense at trial was simultaneously currying favor with the elderly and wealthy surviving victim, and was eventually named the executor of her estate. Not surprisingly, it was the defense investigator who developed some of the most damning evidence against Guy. Much of this information could easily have been discovered by state habeas counsel if she had simply reviewed the record on file with the CCA.

Not only did state habeas counsel fail to investigate the case, she also was not able to arrange for Guy's federal habeas appeal to be filed on time after he was denied relief in state

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[42] Ex parte Campbell, *supra*, at 22-26.

[43] Ex parte Ogan, *supra*, at 4-9; Ex parte McGowen, *supra*, at 13-17. In Ogan, this boilerplate claim was the only one raised.

[44] ABC News Nightline (Sept. 15, 2000).

[45] No. 40,437 (Tex. Crim. App.).

[46] *See id.*

[47] Application for Writ of Habeas Corpus, Guy v. Johnson, No. 00-CV-191 (N.D. Tex.)

court.[48] Mr. Guy's appeal had been dismissed, and his execution scheduled, when new lawyers stepped in and won the right to file a proper appeal in federal court.[49] The lawyer who handled Guy's case is still on the recently revised list of attorneys approved to handle 11.071 cases, even though she is now a prosecutor and has held that post for over eight months.

He was abandoned. My concern with Joe Lee Guy was that he get the process he deserved. He was getting robbed, getting robbed of federal habeas.
Former Assistant Attorney General Matthew Wymer

Dan Malone and Steve McGonigle, Questions of Competence Arise in Death Row Appeal: Lawyer with History of Problems Defends Handling of Case, Dallas Morning News, September 11, 2000, at A1.

In Ex parte Rousseau,[50] appointed counsel filed an 11-page state habeas application raising two record-based claims. The trial court signed the proposed findings of fact and conclusions of law filed by the district attorney, and the CCA affirmed those findings without change. After investigation, subsequent counsel filed a 120-page petition with 16 exhibits in federal court.[51] Among the 24 errors raised by federal counsel were the presentation of false evidence by the district attorney at trial; the suggestive nature of the identification procedures used with the only eyewitness in the case; and the claim that Mr. Rousseau is actually innocent of the crime. This evidence was readily available to state habeas counsel had he only investigated the case. The state habeas counsel who failed to discover these issues in Mr. Rousseau's case has filed at least three other Article 11.071 applications. *All three applications are under 15 pages long and not one raises any extra-record claims.* The lawyer is still on the appointment list.

A similar story unfolds in Ex parte Colella.[52] When Mr. Colella's conviction was affirmed on direct appeal, two judges dissented, stating their belief that the case against Colella was so weak that the record suggested he was actually *innocent of the crime*.[53] Nevertheless, Mr. Colella's appointed 11.071 attorney did not perform any meaningful investigation, and filed a

[48] *See* Response to Respondent Johnson's Motion to Dismiss and Petitioner's Motion for Equitable Tolling, Guy v. Johnson, No. 00-CV-27 (N.D. Tex. Mar. 7, 2000).

[49] *See* Order, Guy v. Johnson, No. 00-CV-27 (N.D. Tex. Mar. 8, 2000).

[50] Rousseau v. State, No. 43,534 (Tex. Crim. App. 1999).

[51] Rousseau v. Johnson, No. 00-CV-2588 (S.D. Tex).

[52] Ex parte Colella, No. 37,418-01 (Tex. Crim. App. 1998).

[53] Colella v. State, 915 S.W.2d 834, 859 (Tex. Crim. App. 1995) (Baird, J., dissenting, joined by Overstreet, J.) ("In conclusion, after a painstaking review of the entire record, I am convinced the non-accomplice evidence is insufficient to corroborate the accomplice witness testimony. I would reverse the judgment of the trial court and order an acquittal. Judge Learned Hand once wrote that 'our procedure has always been haunted by the ghost of an innocent man convicted. It is an unreal dream.' I fear, in the instant case, that unreal dream is a reality. I respectfully dissent.").

nine-page habeas application on his behalf. As noted earlier, this application was dismissed for late filing. Subsequent counsel, after an appropriate investigation, later filed a habeas application over 250 pages long, accompanied by five volumes of exhibits.[54] Investigation revealed that the court-appointed trial lawyer was denied co-counsel, was underpaid, had no previous death penalty experience, and was not provided with an investigator. The client, unbeknownst to his lawyer, was brain-damaged and had a long history of mental illness, including several suicide attempts by his tenth birthday. Investigation also supported claims that the prosecution had knowingly sponsored perjured testimony and knowingly misled the jury repeatedly throughout the trial. Each of these claims would have been discovered if state habeas counsel had conducted a thorough investigation.

In Article 11.071 proceedings, Johnny Joe Martinez was represented by a court-appointed attorney who filed a six-page habeas petition. When new lawyers were appointed in federal court, they discovered substantial additional mitigating evidence about his background that had not been discovered or presented to the jury by Mr. Martinez's trial lawyer. At a hearing into the adequacy of Mr. Martinez's representation in state habeas proceedings, the federal judge expressed his frustration with the poor representation Texas death row inmates were receiving: "I don't know what's holding up the State of Texas giving competent counsel to persons who have been sentenced to die."[55] Nevertheless, the judge later concluded that he was required by precedent to ignore all of Mr. Martinez's claims which had not been presented to the state court system (although it called that result "harsh"), and denied Mr. Martinez all relief.[56]

Mr. Martinez's case illustrates an additional dimension to the problem. The exhaustion requirement discussed earlier requires federal judges to ignore any fact or claim that was not previously introduced in state court. In 1991, the Supreme Court held, in a five-to-four decision, that the federal constitution does not entitle death row inmates to representation by competent lawyers in their state habeas corpus appeals.[57] Thus, even if a federal court agrees that the state habeas lawyer was abysmally incompetent, it is not entitled to review claims that lawyer missed in state court. For defendants like Martinez and Guy, therefore, the assistance of a competent lawyer may come too late, even if they are innocent or wrongly sentenced to die.

2. Incompetence, or Worse

In many Article 11.071 applications, the defendant's chances were dashed because his lawyer was so unfamiliar with the complexities of death penalty law that he inadvertently broke basic rules. In 1998, two death row inmates had their entire appeals dismissed because their lawyers filed them late, despite Article 11.071's clear warning that an attorney's failure to obey

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[54] *See* Original Application for Writ of Habeas Corpus Pursuant to Art. 11.071 § 4A, Ex parte Colella, No. 37,418-01 (357th Dist. Ct. of Cameron County, Aug. 18, 2000).

[55] Hearing Transcript at 19, Martinez v. Johnson, No. C-98-300 (S.D. Tex. April 16, 1999).

[56] *See* Order, Martinez v. Johnson No. C-98-300 (S.D. Tex.) (filed Aug. 18, 1999).

[57] Coleman v. Thompson, 501 U.S. 722 (1991).

the deadline would forfeit his client's entire appeal.[58] Two members of the CCA, in dissent, declared that "[t]o dismiss Smith and Colella as abuse of writ because their lawyers untimely filed writ applications borders on barbarism because such action punishes the applicant for his lawyer's tardiness."[59] The dissenters also questioned why the majority chose to strictly interpret the statutory filing deadline while at the same time loosely interpreting the requirement of competent performance to condone the behavior of an attorney whose avoidable mistake destroyed his client's only habeas appeal.[60] The Texas Legislature, under fire from observers both in Texas and nationally, later revised Article 11.071 to give these inmates a second chance at review.[61]

Other attorneys simply appeared unsure of what was expected of them, and therefore filed applications that were unclear even to the CCA:

> Applicant is represented by counsel appointed by this Court. The instant application appears to allege ineffective assistance of trial counsel, but also includes a wish list of discovery, research, and hearings necessary to represent applicant. No cases are cited. No analysis of the law is presented. Indeed, even the State recognizes this "application" appears to be a motion for discovery.[62]

In another case, a CCA judge observed:

> Applicant is represented by counsel appointed by this Court. The instant application is five and one half pages long and raises four challenges to the conviction. The trial record is never quoted. Only three cases are cited in the entire application, and no cases are cited for the remaining two claims for relief. Those claims comprise only 17 lines with three inches of margin.[63]

In dissent, Judge Baird declared that he would have ordered a hearing into whether Mr. Martinez had received competent representation. Just over one week later, the lawyer for Mr. Martinez submitted a "Motion for Reconsideration," which read as follows:

> Petitioner [sic] attorney . . . has handled many direct appeals but has never handled a post-conviction writ of a death penalty case and therefore must humbly agree with the dissenting opinion in this case (without joining in its reasoning) that merits of this application should not be reached. Also Petitioners [sic] attorney requests that he be allowed to withdraw from the case and another

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[58] Ex parte Smith, 977 S.W.2d 610 (Tex. Crim. App. 1998) (writ dismissed because counsel filed application nine days late); Ex parte Colella, Writ No. 37,418-01 (Tex. Crim. App. Jul. 15, 1998) (entire writ dismissed due to untimeliness).

[59] Ex parte Smith, 977 S.W.2d 610 (Tex. Crim. App. 1998) (Baird, J., dissenting).

[60] *See id.* at *4.

[61] *See* Art. 11.071 § 4A (amended 1999).

[62] Ex parte Wolfe, 1998 WL 278960, at *1 (Tex. Crim. App. May 20, 1998) (Baird, J., dissenting).

[63] Ex parte Martinez, 1998 WL 211569, at *1 (Tex. Crim. App. Apr. 29, 1998) (Baird, J., dissenting).

lawyer be appointed to represent Petitioner in this cause.[64]

The CCA, far from dismissing the lawyer and ordering the hearing to which the attorney himself had consented, instead sent him a letter informing him that the Rules of Appellate Procedure clearly forbade "motions for reconsideration" in habeas cases, and ordered him to continue representing Mr. Martinez. This attorney is still on the list of approved counsel for Article 11.071 cases.

The clearest example of the CCA's lack of concern about the competence of the habeas attorneys it appoints is the notorious case of death row prisoner Ricky Kerr.[65] Kerr's CCA-appointed habeas lawyer – who had no capital post-conviction experience and had been licensed to practice law for less than three years[66] – failed to file *any* cognizable challenge to Kerr's conviction or sentence. Instead, he lodged a single generic attack on the 1995 amendments to the Texas state habeas statute.[67] The trial court – noting that Mr. Kerr's counsel had not raised a single specific challenge to his conviction or death sentence – denied the application and scheduled Mr. Kerr's execution.[68] When the case arrived at the CCA for review, it was clear that Kerr's attorney had failed to investigate the case or raise any challenges that could be properly heard in a habeas corpus proceeding. Yet the Court accepted the pleading filed by Kerr's lawyer and denied relief.

> ***If applicant is executed as scheduled, this Court is going to have blood on its hands for allowing [it]. By this dissent, I wash my hands of such repugnance.***
>
> Former CCA Judge Morris Overstreet, dissenting to the Court's denial of Ricky Kerr's Petition

Kerr, represented later by appropriately qualified volunteer counsel, returned to the CCA to request an opportunity to prepare and file a proper application for habeas relief. The Court dismissed Kerr's request without further comment as an "abuse of the writ." Judge Overstreet condemned the majority's action in the strongest terms:

> Must applicant suffer the ultimate punishment, death, because of his attorney's mistake? According to a majority of this Court, yes, he must. . . . For this Court [to] refuse to stay this scheduled execution is a farce and travesty of applicant's legal right to apply for habeas relief. It appears that this Court, in approving such

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[64] Motion for Reconsideration, Ex parte Martinez (CCA No. 36,840).

[65] Ex parte Kerr, 977 S.W.2d 585 (Tex. Crim. App. 1998) (Overstreet, J., dissenting).

[66] Janet Elliott, *Habeas System Fails Death Row Appellant*, TEXAS LAWYER, Mar. 9, 1998, at 1, 25.

[67] The attorney subsequently conceded that his "decision concerning how to protect Mr. Kerr's rights under 11.071 may have been a gross error in judgment" and that "[i]t may be that I was not competent to represent Mr. Kerr in a death penalty cause." *Id.* He also described meritorious claims of error he had not asserted owing to his misunderstanding of Texas law. *Id.*

[68] *Id.*

> a charade, is punishing applicant, rewarding the State, and perhaps even encouraging other attorneys to file perfunctory "non-applications." Such a "non-application" certainly makes it easier on everyone – no need for the attorney, the State, or this Court to consider any potential challenges to anything that happened at trial. . . . I do not know what the majority thinks is going to happen to applicant, but he does have an imminent execution date set. If applicant is executed as scheduled, this Court is going to have blood on its hands for allowing [it]. By this dissent, I wash my hands of such repugnance.[69]

A federal district judge stayed Mr. Kerr's execution the same day, two days before it was scheduled to occur. After reviewing the course of events in state court, the federal judge concluded that the State's decision to appoint a woefully inexperienced lawyer to represent a death row inmate "constituted a cynical and reprehensible attempt to expedite [Kerr's] execution at the expense of all semblance of fairness and integrity."[70]

Kerr is only the most widely known case in which state habeas counsel appointed by the CCA failed to perform basic tasks associated with representation. In a number of other cases, the attorney appointed by the CCA simply failed to file his client's habeas application by the applicable deadline.[71] The CCA reacted by dismissing each such filing as an "abuse of the writ," on one occasion remarking that if the result of such a harsh interpretation of the habeas statute were "barbarous," it was the Legislature's job to correct it.[72] Remarkably, the majority in Smith acknowledged that the appointed counsel in that case had filed Smith's habeas application late even after having been warned by the CCA's Executive Administrator that by doing so she ran

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[69] Ex parte Kerr, 977 S.W.2d 585, 585 (Tex. Crim. App. 1998) (Overstreet, J., dissenting).

[70] Memorandum Opinion and Order, Kerr v. Johnson, Civ. No. SA-98-CA-151-OG, at 18-20 (W.D. Tex. Feb 24, 1999) (emphasis added).

[71] *See* Ex parte Smith, 977 S.W.2d 610 (Tex. Crim. App. 1998) (dismissing late-filed initial application as an "abuse of the writ"); Ex parte Colella, 977 S.W.2d 621 (Tex. Crim. App.1998) (same).

[72] *Id.*

the risk of having the application dismissed outright.[73] As Judge Baird pointed out in dissent:

> The majority alleges applicant's counsel disregarded information from this Court's Executive Administrator regarding the time to file this writ. . . . If this is true, then CLEARLY counsel was incompetent and her continued representation of applicant violated Tex. Code Crim. Proc. Ann. art. 11.071, Sec. 2(a). Why the majority fails to acknowledge [that] applicant did not receive the statutorily mandated assistance of competent counsel is frustrating, especially when it appears our staff was on notice regarding counsel's failings. . . . In [dismissing the instant application as untimely filed], the majority wholly ignores that WE failed in our duty to appoint competent counsel. By choosing this selective construction of the statute, the majority willfully violates the intent of article 11.071. Applicant has not had his "one bite at the apple" through no fault of his own. Indeed, the fault lies with this Court by appointing less than competent counsel.[74]

These cases represent only the tip of the iceberg. The Court of Criminal Appeals is frequently confronted with stark evidence that the attorneys it has appointed in other state habeas cases are failing to perform basic and necessary tasks; yet the court stubbornly refuses to intervene to correct the situation. In the case of Joe Lee Guy, discussed *supra*, the fact that Guy's trial counsel was undergoing treatment for drug and alcohol addiction, and the fact that the defense investigator at trial had become the beneficiary of the surviving victim's will, were all readily apparent from a cursory review of the CCA's files in the case. Also readily available was the nine-page state habeas application, which failed to mention either the addiction of counsel or the bias of the investigator. The conclusion is unavoidable: either the judges and/or their staff fail to read the file, or they do read it, but ignore such egregious examples of incompetence and constitutional error. At best, one or two judges out of nine may express concern, focusing on the inadequacy of counsel's representation.[75] Despite being fully aware of this far-reaching problem, the Court of Criminal Appeals has never, in any case, removed appointed habeas counsel because of incompetence.[76]

A relatively recent CCA decision suggests that more severe consequences may flow from

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[73] Smith, 977 S.W.2d at 610.

[74] *Id.* at 614 (Baird, J., dissenting) (emphases in original).

[75] *See, e.g.*, Ex parte Wolfe, 977 S.W.2d 603 (Tex. Crim. App. 1998) (Baird, J., dissenting) (pointing out that the only pleading filed by "counsel appointed by this Court" is not an application for habeas relief, but apparently "a motion for discovery," and urging that court remand for an inquiry into whether the defendant had received the assistance of "competent counsel" as required by statute).

[76] Indeed, when inmates who have become aware that their attorneys are conducting no investigation have asked the CCA *pro se* for appointment of new, competent counsel, the CCA has denied those requests without comment. *See, e.g.*, Ex parte Gribble, Writ No. 34,966 (Tex. Crim. App. 1997) (denying defendant's request that the Court strike the four-claim, 15-page writ filed by appointed counsel and replace it with the defendant's own *pro se* application); Ex parte Bigby, Writ No. 34,970 (Tex. Crim. App.) (denying *pro se* motion for substitution of counsel).

counsel's failure to investigate facts outside the trial record as the basis for claiming a violation of the defendant's rights.[77] Prior to 1998, a Texas defendant seeking habeas corpus relief could raise constitutional claims based on events reflected in the trial record, as well as those based on "extra-record" facts.[78] In late 1998, however, the CCA for the first time refused to review the merits of a claim that was part of the trial record and therefore could have been, but was not, raised on direct appeal. At least one judge subsequently expressed the opinion that in the wake of this apparent change in the law, "every record claim not raised on direct appeal [is] procedurally defaulted."[79] If that is correct, then in nearly 43 % of the cases we have examined, *see supra*, the lawyer appointed by the CCA filed *no claims which could even be reviewed.* This is a staggering rate of non-performance, because under the strictly enforced technical rules that govern federal habeas proceedings, defendants in those cases will receive *no federal review whatsoever* of the claims presented in their state habeas applications.[80] As a practical matter, those defendants' right to post-conviction review ended when the CCA appointed counsel.

IV. Conclusion

The results of this study confirmed our worst fears. Attorneys without the necessary experience are being appointed to capital post-conviction cases, and are committing the grossest blunders imaginable – such as failing to perform any investigation, pleading only stale record-based claims, or submitting skeletal habeas petitions under ten pages in length. The CCA, charged with ensuring that death row inmates receive "competent" representation, has turned a blind eye to cases of inadequate habeas representation – even when the habeas attorney himself questions his own effectiveness. The end result is a system in crisis which is producing unreliable results.

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[77] Ex parte Gardner, 959 S.W.2d 189, 199 (Tex. Crim. App. 1998).

[78] Previous Texas cases had held that any claim of federal constitutional dimension could be raised for the first time by application for habeas corpus relief, even if not raised on direct appeal. *See* Ex parte Dutchover, 779 S.W.2d 76, 78 (Tex. Crim. App. 1989) (Clinton, J., concurring) (noting Texas rule that any federal constitutional claim could be raised for the first time in an application for habeas corpus relief); Ex parte Banks, 769 S.W.2d 539 (Tex. Crim. App. 1989) (same); Ex parte McLain, 869 S.W.2d 349, 350 (Tex. Crim. App. 1994) (same).

[79] Ex parte Rojas, 981 S.W.2d 690 (Tex. Crim. App. 1998) (Baird, J., dissenting on other grounds).

[80] The Gardner rule makes it essential for direct appeal counsel to raise every conceivable record-based claim to preserve it for later federal review. See Chapter Eight, *infra*.

CHAPTER EIGHT

The Myth of Meaningful Appellate Review

I. Introduction

In the quarter-century since the Supreme Court reauthorized the death penalty in 1976, it has become commonplace to assume that a wrongful execution is unlikely because death penalty cases receive seemingly endless rounds of careful appellate and post-conviction review. During those appeals, it is widely believed, both the procedural fairness of the original trial and the factual accuracy of the underlying verdict are carefully scrutinized by successive waves of conscientious state and federal judges. Politicians of every stripe, at every level of government, have encouraged this view – even decrying some appeals as "frivolous" given the existing level of protection. As a result, many people assert confidently that redundant post-trial safeguards ensure that no one will be put to death in the face of doubt about either his guilt or the fairness of his trial.

In Texas, nothing could be further from the truth. While the system of appellate and post-conviction review in state and federal court may once have permitted a tolerable level of confidence in the accuracy and integrity of the death verdicts imposed by Texas juries, that is no longer the case. In recent years, changes in appeal procedures have limited both the opportunities for review and the depth of scrutiny traditionally applied to such judgments by the courts, both at the state and federal level. At the same time, many of the judges responsible for enforcing the most basic constitutional protections for Texas defendants have either abandoned that duty or actively worked to expedite the pace of executions at the cost of thoughtful, searching review.

Thus, the popular perception that prisoners on Texas's Death Row receive extensive and meaningful post-trial review of their cases is a myth. Unlike some myths, however, this one is pernicious for at least two reasons. First, it creates a false and unjustified level of comfort with Texas's death penalty juggernaut. Second, it undermines the possibility of fundamental reform by effectively "covering up" precisely the type of injustices that would otherwise inspire demands for change.

II. Gary Graham: A Case Study of the Myth in Action

The case of Gary Graham is one of the clearest, and certainly one of the most recent, examples of the myth of appellate review in action.[1] Graham was convicted of shooting a man in the parking lot of a Houston supermarket. The prosecution's entire case rested on the testimony of a single eyewitness; no other evidence linked Graham to the crime. Graham's

[1] Gary Graham, by the time he was executed, had taken the name Shaka Sankofa. We refer to him as Gary Graham simply because it is by that name that he was most widely known.

initial post-conviction proceedings in state and federal court – which were handled by a volunteer lawyer at a time when Texas courts did not appoint or pay attorneys to handle habeas appeals – focused largely on technical questions about the jury's sentencing instructions.[2]

After Graham's initial habeas proceedings proved unsuccessful and an execution date was set, his new post-conviction attorneys launched an investigation into Graham's longstanding claim of innocence. They discovered other witnesses from the parking lot who were certain that Graham was not the person they had seen commit the murder, as well as other information undermining the reliability of the sole eyewitness's account.

These discoveries and the development of this supporting evidence took place, for the most part, in 1993-94. Gary Graham spent the next six years trying to obtain an evidentiary hearing, in some court, somewhere, at which the strength of his newly developed evidence of innocence could be measured against the prosecution's single claimed eyewitness. Graham filed at least three separate state habeas petitions and three separate federal habeas petitions, as well as a civil lawsuit against the Texas Board of Pardons and Paroles, all asking for one thing: a live, fair hearing. He never got it. The state courts, employing a procedure discussed in detail *infra*, initially denied relief by adopting "findings" authored by the prosecutor.

The federal courts thereafter refused to consider Graham's evidence of innocence because it had not been fully presented to the state courts – although that was due to the prosecutors' failure to disclose certain evidence until after the state proceedings were, for all practical purposes, concluded.[3] Emphasizing that "[t]he issues in this case are almost exclusively factual, and the relevant factual scenario is complex, highly controverted, and in many respects unresolved," the Fifth Circuit sent Graham back to try again in state court.[4] After he filed another state habeas application, the Court of Criminal Appeals rejected it on technical procedural grounds without reviewing the merits of his claims. This time, the Fifth Circuit dismissed his case under the authority of procedural provisions of the 1996 amendments to the federal habeas statutes – again, without conducting *any* review of the merits of Graham's claims.[5]

Thus, the record of Gary Graham's post-conviction proceedings based on his evidence of innocence reveals two things: First, the state courts, which purported to review the merits of his claims (at least initially), never conducted any sort of hearing despite the existence of hotly

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[2] Graham's first lawyers challenged whether the Texas capital sentencing statute permitted appropriate consideration of mitigating factors such as his youth (Graham was 17 years old at the time of the crime). This legal issue – which involved no questions about Graham's guilt or innocence – eventually produced five opinions, three in the Fifth Circuit and two in the United States Supreme Court. *See* Graham v. Lynaugh, 854 F.2d 715 (5th Cir. 1988) (denying relief), *vacated and remanded*, Graham v. Lynaugh, 492 U.S. 915 (1989); *on remand,* Graham v. Collins, 896 F.2d 893 (5th Cir. 1990) (granting relief), *superseded on rehearing en banc*, Graham v. Collins, 950 F.2d 1009 (5th Cir 1992) (en banc) (denying relief), *cert. granted and aff'd on other grounds*, Graham v. Collins, 506 U.S. 461 (1993).

[3] *See* Graham v. Johnson, 94 F.3d 958 (5th Cir. 1996).

[4] *Id.*at 970-971.

[5] Graham v. Johnson, 168 F.3d 762 (5th Cir. 1999).

disputed factual allegations directly relevant to whether Gary Graham was innocent or guilty. Second, the federal courts never reviewed the merits of these particular claims *at all.*

Nevertheless, Texas officials repeatedly declared that Graham's case received "super due process" because his case was reviewed by "33 different judges" in separate proceedings. This colorful description was echoed by everyone from local prosecutors to the state Attorney General to Governor George W. Bush. It appears to have taken hold of the popular imagination as well; many people now accept the outcome in Graham precisely because they believe that the question of his innocence was repeatedly and carefully examined by judges at every level. This is simply not so.

To appreciate the growing inadequacy of appellate and post-conviction review of Texas death penalty cases, and how that system can produce a result like the one in Gary Graham's case, it is first necessary to understand the legal and political context in which that review takes place.

III. Legal Context

An overview of the three stages of review – direct appeal, state habeas, and federal habeas – which take place in Texas death penalty cases is set forth in Chapter One. Further details regarding its intricacies, and the invidious manner in which it provides the appearance, but not the substance of meaningful review, are set forth below.

IV. Political Context

The political context in which appellate and post-conviction review of Texas death penalty cases unfolds is at least as important as the legal context. Judges at both the trial and appellate level are elected, and the elections are partisan. Thus, Texas has Republican and Democratic judges, and the elections for judicial office are fiercer and more tendentious than those in non-partisan systems.

Equally important, Texas shares with only a handful of other states the distinction of having separate high courts for civil and criminal matters. The Texas Supreme Court hears no criminal cases; those cases, instead, are finally decided by the nine judges of the Texas Court of Criminal Appeals ("CCA"). Because the Court of Criminal Appeals deals only with criminal cases,[6] election campaigns for seats on the CCA frequently resemble local prosecutors' races, with each candidate vying for the mantle of "toughest on crime." In Texas, appearing "tough on crime" means expressing unqualified enthusiasm for the death penalty, denying or minimizing

[6] By virtue of its limited jurisdiction, open seats on the CCA tend to attract criminal law specialists who are experienced at politics and have a pre-existing institutional political base. As a practical matter, this means former county and district attorneys are better positioned than criminal defense lawyers to run and win such races. This may explain why five of the nine judges on the Court of Criminal Appeals today are former felony prosecutors, while only one is a former criminal defense attorney.

systemic problems with its administration, and resisting many reforms which might reduce death sentences or executions.[7] United States Supreme Court Justice John Paul Stevens has correctly pointed out that "present-day capital judges [face] a political climate in which judges who covet higher office – or who merely wish to remain judges – must constantly profess their fealty to the death penalty."[8]

The recent political history of the CCA confirms that even traditionally conservative judges may find themselves out of a job if they enforce the rights of unpopular defendants. After the CCA reversed a death penalty conviction in a notorious Houston murder case by enforcing a mandatory statute governing jury selection practices,[9] a former chairman of the state Republican Party called for Republicans to take over the Court in the 1994 election.[10] In the heated race that followed, an unknown attorney from Houston, Stephen W. Mansfield, unseated a long-time conservative incumbent on the CCA by emphasizing his own enthusiasm for capital punishment, promising increased use of the "harmless error" rule to affirm convictions and death sentences, and threatening sanctions for defense attorneys who file "frivolous appeals."[11]

The judges' fear of looking soft on the death penalty may help explain the CCA's refusal to correct its own previous incorrect rulings in capital cases. On at least two occasions, the Court has squarely acknowledged in a published opinion that its earlier decision to affirm a particular death sentence was mistaken, only to shrink from correcting that error when given an opportunity to do so at a later date when execution was imminent. For example, prior to his capital murder trial, Kenneth Granviel's attorneys had sought funds to hire a mental health expert to assist in presenting his insanity defense. The trial court instead ordered a "neutral" expert to examine Granviel and give his report to both Granviel's attorney and the prosecutor. Shortly thereafter, however, the CCA reversed its position and held in DeFreece v. State that the defendant – like the State – is indeed entitled to hire an independent expert.[12] But when Granviel returned to the CCA and asked for a new trial based on its conclusion in DeFreece, he was turned down in a one-page order saying that he had "abused the writ," without further explanation.[13] Granviel was then executed.

Troy Farris fared no better. Farris argued on direct appeal that the trial judge's rulings resulted in his being tried by a biased jury in violation of his Sixth Amendment rights. The CCA

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[7] *See generally* Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805 (June 2000).

[8] Harris v. Alabama, 513 U.S. 504, 519 (1995) (Stevens, J., dissenting).

[9] Rodriguez v. State, 848 S.W.2d 141 (Tex. Crim. App. 1993).

[10] *See* Stephen P. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 761-62 (1995) (hereafter Bright, *Politics of Death*).

[11] *Id.*

[12] 848 S.W.2d 150, 154 (Tex. Crim. App. 1993) (specifically criticizing the outcome in Granviel's trial).

[13] Ex parte Granviel (CCA No. 71,097).

disagreed and affirmed Farris's death sentence.[14] Three years later, however, faced with what it called a "factually indistinguishable" issue in a subsequent capital appeal, the Court realized its error and overruled Farris as "wrongly decided."[15] Farris then returned to the CCA and asked it to apply the same rule in his case, relying on an exception to the rule against repeated habeas appeals which allowed inmates to file additional writs when the "legal basis for [their] claim was unavailable" during their first trip through the appeals process.[16] The Court instead issued a one-page form order calling Farris's subsequent application for relief an "abuse of the writ," and allowed his execution to go forward without further explanation. When asked why the CCA had not explained its decision, Presiding Judge Michael McCormick said, "[T]hey should know they didn't satisfy the requirements [to file a second writ]. I don't know that we have to tell them why they didn't satisfy it."[17]

Troy Farris is believed to be the only defendant in the United States since Furman to be executed notwithstanding the existence of a formal court opinion expressly declaring his death sentence unconstitutional.

Some members of the court have played a role in proposed legislative reforms. For example, it was reported that CCA Presiding Judge McCormick worked behind the scenes in 1999 to defeat passage of a law which would have prohibited executing persons with mental retardation.[18] Ultimately the bill was scuttled in the Texas House of Representatives.

The effect of political pressures also appears obvious in cases where the Court actually *changed the law* to deny relief in some cases. Cesar Fierro's case is exemplary. Under interrogation after his arrest in El Paso, Fierro confessed to having killed a taxi driver. El Paso police officers had told Fierro, however, that his parents were being held across the border in a prison notorious for brutality and torture. They would be released, Fierro was told, only after he confessed. During the pretrial hearing, the chief investigating officer testified falsely that the El Paso police had not known, while they questioned Fierro, that his family was being held in Mexico. Lawyers for Fierro later discovered the truth and sought habeas relief based on the prosecution's knowing use of false testimony. The Court of Criminal Appeals denied relief by a five-to-four vote, but only by adopting a new standard for harmless error in habeas corpus proceedings.[19] Under previous law, it is clear Fierro would have received a new trial – indeed, at his state habeas hearing, the trial prosecutor himself urged that result.[20] But the CCA's majority

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[14] Farris v. State, 819 S.W.2d 490, 501 (Tex. Crim. App. 1990).

[15] Riley v. State, 889 S.W.2d 290, *aff'd on reh'g*, 889 S.W.2d 297, 298 (Tex. Crim. App. 1993).

[16] TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(1).

[17] John Council, *Writs and Wrongs; Farris Case Bolsters Concerns Over Subsequent Habeas Petitions*, TEXAS LAWYER, Feb. 15, 1999, at 1.

[18] Janet Elliot, *McCormick Critical of Ban on Death Sentences for Retarded*, TEXAS LAWYER, May 31, 1999, at 4. *See also* discussion in Chapter Five.

[19] Ex parte Fierro, 934 S.W.2d 370 (Tex. Crim. App. 1996). For further information about Fierro's case, see Chapter Two, supra.

[20] It is also noteworthy that the CCA justified its adoption of a new standard in Fierro by reference to United States Supreme Court decisions requiring a greater showing of harm to warrant reversal in habeas corpus

decided to change the law rather than grant relief.

Perhaps it is discomfort at this very public consequence of its decision-making that causes some of the judges to protest that their "hands are tied" by the law. Asked in an interview why the court did not simply grant Fierro a new trial, Presiding Judge McCormick responded:

> That arguably is the equitable thing to be done. But criminal law and equity law are two different matters. We have a set of rules that we have to follow. And in following those rules, sometimes the decision that is made is not the one that you and I and common sense would make.[21]

The CCA's written opinions sometimes suggest that the court is not reviewing cases with care in death penalty appeals. For example, in 1997 the CCA affirmed the conviction and death sentence of Jesus Ledesma Aguilar.[22] The Court's opinion, by Judge Sue Holland, described testimony that a man named Albino Garcia saw Aguilar with the murder weapon. Although such claims were asserted in the prosecutor's opening statement, they were never proved at trial. After defense counsel protested in a motion for rehearing, the CCA simply re-issued its opinion a few months later, omitting the reference to the never-presented testimony, but offering no explanation for its mistake.

In another instance, the Court botched its review of the case of condemned defendant Danny Lee Barber, who argued on direct appeal that the testimony of prosecution psychiatrist Clay Griffith, M.D., had been erroneously admitted at the punishment phase. The Court of Criminal Appeals held that Barber's rights were not violated because Griffith "did not testify [at trial] on the issue of future dangerousness."[23] That conclusion, however, was directly at odds with the trial record – because Griffith *did* testify at trial that Barber was a "future danger." When Barber sought habeas corpus relief, urging that the Court had made a serious mistake, the Court denied relief and refused to acknowledge its error. Had the CCA not misread the record when Barber originally raised this argument, he would likely have been awarded a new sentencing hearing. Despite the fact that the mistake was made by the *Court*, and not Barber, he was denied relief and eventually executed.

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proceedings. Although two leading United States Supreme Court cases on the prosecution's use of perjured testimony, Napue v. Illinois, 360 U.S. 264 (1959), and United States v. Bagley, 473 U.S. 667 (1985), clearly applied a more lenient harm standard than the CCA wanted to impose, the Fierro majority dismissed those opinions as irrelevant because "Napue and Bagley both involved direct [appeals] rather than collateral attacks." Fierro, 934 S.W.2d at 372. The majority was flatly mistaken – both Napue and Bagley involved post-conviction [collateral] attacks, and thus were directly relevant to the circumstances presented by Fierro. *See* Bagley, 473 U.S. at 671 (case arose when Bagley "moved under 28 U.S.C. § 2255 [the post-conviction statute for federal prisoners] to vacate his sentence"); Napue, 360 U.S. at 264 (noting that Napue brought his claim of perjured testimony via "a petition for a post-conviction hearing"). The Court's argument was thus based on an elementary legal mistake.

[21] Interview on ABC News Nightline (Sept. 15, 2000).

[22] Aguilar v. State, No. 72,470 (Tex. Crim. App. 1997) (unpub.).

[23] Barber v. State, 757 S.W.2d 359, 363-367 (Tex. Crim. App. 1988).

V. The Two Worst Flaws in the State Habeas Process

As we have seen above, there are significant problems with the CCA's review of capital cases on direct appeal. The flaws in the Court's review of death penalty habeas corpus matters, however, are more serious. Two features of the system in particular, however, deserve extended comment, because their consequences reach far beyond the state habeas proceeding itself: (1) the procedure by which most trial courts resolve the factual disputes that underlie capital habeas claims; and (2) the performance of appointed capital habeas counsel.

A. Manufacturing the "Facts"

As noted above, habeas corpus proceedings typically involve claims about the fairness of the original trial, which are based on facts outside the written record of that trial. Because the parties generally disagree about the accuracy of such allegations, it is almost always necessary during the habeas corpus process for some court to hear evidence and make findings about what *did* happen. In Texas, as in many states, that duty falls to the trial court.[24]

Most people, lawyers and laypersons alike, assume that a "hearing" is just what it says: a decision-maker hears testimony in court from live witnesses who are subject to questioning from both parties, and then makes up her mind based both on what the witnesses said and their demeanor while they testified. In Texas death penalty appeals, however, most trial courts resolve disputes of fact by means of a practice called a "paper hearing."[25]

In Texas capital cases, instead of having each party bring its witnesses to court, the trial judge simply allows the parties to file pieces of paper – documents, affidavits, reports by experts, and so on. Nobody testifies; no one is cross-examined, confronted, or impeached; and none of the traditional gauges of credibility (eye contact, vocal tone, body language) are available to assist the judge in deciding whom to believe and whom to disbelieve.

This practice runs contrary to the Anglo-American legal tradition, which regards cross-examination of live witnesses as essential to the accurate resolution of factual disputes. Moreover, the "paper hearing" is especially questionable when combined with the pervasive practice, followed by the vast majority of Texas trial courts reviewing capital cases in state habeas proceedings, of resolving the disputed facts by adopting the prosecutor's legal arguments and characterizations of the evidence wholesale.

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[24] Texas's state habeas statute for capital cases, TEX. CODE CRIM. PROC. art. 11.071, uses the term "convicting" court.

[25] In Texas, the ultimate power to grant a new trial or sentencing hearing in habeas corpus proceedings belongs solely to the Court of Criminal Appeals. Proceedings in the trial court are intended to identify an undisputed set of facts, upon which the CCA may rely in deciding whether to grant a new trial. Other states, by contrast, give trial courts themselves the power to grant a new trial on habeas corpus review, limiting the state's appellate courts to reviewing that decision. Because Texas law places this ultimate power in the hands of the Court of Criminal Appeals alone, that Court has an immediate and primary responsibility for ensuring the fairness and reliability of proceedings in the trial court, as well as in the CCA itself.

The scenario typically works this way: the defendant initiates the proceeding by filing a habeas application, which states why he believes his trial was unfair, supported by as much documentary evidence as he has to support the facts alleged in the application.[26] The prosecution files a written response, which may include comparable documentary evidence disputing the defendant's claims. At this point, Texas law obliges the trial judge to "determine whether [there exist] controverted, previously unresolved factual issues material to the legality of the applicant's confinement."[27] In other words, the judge must examine the pleadings and decide whether there are relevant facts about which the parties disagree.

If the trial judge decides that the written pleadings raise no such disputes, the parties must then file "proposed findings of fact and conclusions of law"[28] for the court to consider. If the court decides such issues do exist, it must decide how to resolve them. To that end, the court "may require affidavits, depositions, interrogatories, and evidentiary hearings," but it also can rely on its own "personal recollection."[29] After the court takes such evidence (frequently by the paper hearing method described *supra*), the parties must file proposed findings and conclusions.

Whether or not a hearing is held, the parties must submit "proposed findings" for the court to consider before it creates its own written findings of fact recommending that the Court of Criminal Appeals grant or deny relief. Each party proposes "findings" which reflect its view of the disputed evidence. In a dispute about the competency of trial counsel, for example, the defendant might submit a finding that said, "Trial counsel failed to contact any potential defense witnesses until the week immediately preceding trial." The prosecutor might respond with a proposed finding that "trial counsel conducted a timely investigation, including making phone contact with potential witnesses months before trial."

At this point one would expect the trial court to synthesize its own "findings of fact" from the evidence. A fair-minded observer might expect the court to approach this task by selectively choosing from among the parties' proposed findings where appropriate, but primarily by drafting its own findings to reflect its own view of the evidence. Given the adversarial nature of our legal system, one would naturally expect the parties' proposed findings to represent diametrically opposed views of the facts. Given human experience, however, we would expect that the truth underlying any such complex dispute might well lie somewhere in the middle.

Few Texas trial courts, however, write their own findings. Instead, they simply endorse the findings proposed by the prosecutor, then forward the case to the Court of Criminal Appeals for its decision. This practice – adopting wholesale the prosecutor's partisan claims about disputed facts – is pervasive in Texas capital habeas cases.[30]

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[26] *See generally* TEX. CODE CRIM. PROC. art. 11.071.

[27] *See* TEX. CODE CRIM. PROC. art. 11.071 § 8.

[28] *See* TEX. CODE CRIM. PROC. art. 11.071 § 8.

[29] *See* Article 11.071 §§ 8, 9.

[30] There is no capital case of which we are aware in which a Texas trial court has ever adopted the findings proposed by the defendant seeking a new trial. Indeed, there are only a handful of cases in which a trial court has ever adopted *any* of the findings urged by the defendant.

A recent study conducted by the Texas Defender Service of the pleadings and orders in over one hundred post-1995 state habeas proceedings revealed that the trial court's findings were identical or virtually identical to those submitted by the prosecutor *in 83.7% of the cases* examined.[31] It strains credulity to suppose that well over *three-quarters* of the time, the entirety of the prosecutor's version of the disputed facts (and no fact whatsoever urged by the defendant) was true.

What this record actually demonstrates is that in Texas capital habeas cases, the judge is not applying any independent review of the evidence to reach the "findings" which often will dictate the outcome of the case at every subsequent stage of the process. Instead, the vast majority of trial judges are simply acting as a rubber stamp for the prosecutor's version of events.[32]

Our review of over one hundred post-1995 state habeas proceedings revealed that the trial court's findings were identical or virtually identical to those submitted by the prosecutor in 83.7% of the cases examined.

It is difficult to exaggerate the significance of this feature of the Texas state habeas procedure in death penalty cases.[33] Under current law, the facts which are found by the state trial court will guide – and often

[31] Out of the 103 randomly selected state habeas case files reviewed, 92 contained findings available for examination. Of those 92 sets of trial court findings, 77, or 83.7%, were identical or virtually identical to the findings proposed by the prosecutor.

[32] Prior to the enactment of TEX. CODE CRIM. PROC. art. 11.071, which formalized the submission of proposed findings by both parties, the fundamentally one-sided and summary character of state habeas proceedings in Texas trial courts was often illustrated by the speed with which trial courts adopted the prosecutor's "findings." For example, in the case of Texas death row inmate David Spence, the state habeas trial court issued a one-page order adopting the prosecutor's answer to Mr. Spence's habeas petition as its "findings," and did so *before* Spence's lawyers had even seen the document. Thus, by the time Mr. Spence learned the content of the prosecutor's answer, it had already become the final order of the trial court. In light of the substantial evidence that Mr. Spence did not commit the crime for which he was ultimately executed, *see* Chapter Nine, this breakdown of the adversarial process in his case is particularly unsettling.

[33] Countless courts have strongly criticized the practice of adopting verbatim the findings of fact and conclusions of law proposed by one litigant. *See, e.g.*, United States v. El Paso Natural Gas Co., 376 U.S. 651, 656-657 (1964); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 615 n.13 (1974); FMC Corp. v. Varco Internat'l, 677 F.2d 500, 501 n.2 (5th Cir. 1982) ("We have consistently expressed our disapproval of the practice of unconditionally adopting findings submitted by one of the parties to a litigation."); Cuthbertson v. Biggers Bros., Inc., 702 F.2d 454, 458-59 (4th Cir. 1984) (and cases cited therein); Ramey Construction Co. v. Apache Tribe, 616 F.2d 464, 466-69 (10th Cir. 1980); Tyler v. Swenson, 427 F.2d 412 (8th Cir. 1970); Holbrook v. Institutional Insur. Co., 369 F.2d 236 (7th Cir. 1966); Roberts v. Ross, 344 F.2d 747, 750-752 (3rd Cir. 1965); Huff v. State, 622 So. 2d 982 (Fla. 1993); Rose v. State, 601 So. 2d 1181 (Fla. 1992); Phillips v. Phillips, 464 P.2d 876, 878 (Colo. 1970); Kentucky Milk Marketing & Anti-Monopoly Com. v. Borden Co., 456 S.W.2d 831, 834-35 (Ky. 1969); Krupp v. Krupp, 236 A.2d 653 (Vt. 1967); Nashville , C. & S. L. Ry. v. Price, 148 S.W. 219 (Tenn. 1911); *see generally* Judge Skelly Wright, *The Non-Jury Trial – Preparing Findings of Facts, Conclusions of Law and Opinions*, Seminars for Newly Appointed United States District Judges, at 166 (1963); Judge Gunnar Norbye, *Improvements in Statements of Findings of Fact and Conclusions of Law*, 1 F.R.D. 25, 30 (1940); Henry Monaghan, *Constitutional Fact Review*, 86 COLUM. L. REV. 229, 272 (1986); Annotation, *Propriety and Effect of Trial Court's Adoption of Findings Prepared by Prevailing Party*, 54 A.L.R.3rd 868 (& Supp.) (collecting state cases). Texas, however, remains indifferent to this chorus of condemnation.

determine – the decision of every subsequent court in the entire process, from the CCA to the federal district court to the Fifth Circuit to the United States Supreme Court. Once the trial court "decides" an important factual dispute, that decision will almost invariably bind any judge who examines the case in the future (*e.g.*, in federal habeas proceedings). The evidence shows that most Texas trial judges are making these pivotal decisions reflexively, simply by signing whatever the prosecutors hand them. As one respected commentator concluded, "the adoption of such orders has the appearance of impropriety and shows, at the very least, not only lack of independence, but also complete indifference on the part of many judges to what should be the most important work of the judiciary."[34]

In 72 of the 92 (78.2%) cases with findings of fact, the final product of the state habeas process was authored by the district attorney.

After the trial court makes its findings of fact and conclusions of law, its recommendations are sent to the CCA for review.[35] The results of the our study, however, do not reveal a very thorough examination by the Court. An order from the CCA disposing of the case was present in 97 of the cases reviewed. *Of these 97 orders, in 90 cases (92.7%) the CCA made no changes and adopted the trial court's fact findings in their entirety.* Changes were made to the lower court's findings in only five of the cases.[36] Not one case granted relief.[37] Of those cases studied in which the district attorney authored the findings of fact and conclusions of law, the CCA modified the lower court's conclusions in only 5 of 77 cases (6.4%). Therefore, in 72 of 92 (78.2%) cases reviewed which contained findings of fact to compare, the final product of the state habeas process was authored by the district attorney.

To be sure, the CCA is not bound by the findings of the trial court.[38] As a practical matter, however, the CCA has abdicated any role in monitoring the integrity of the fact-finding process in the trial courts or scrutinizing the extent to which the facts "found" are genuinely

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[34] Bright, *Politics of Death*, at 811.

[35] *See* TEX. CODE CRIM. PROC. art. 11.071 §§ 8, 9.

[36] Although the CCA did not adopt the trial court's findings in these cases, *only one of these orders was more than a summary two-page order*. Furthermore, when the Court declined to adopt the trial court's findings, it failed to make its own and merely stated in its denial that it did not adopt the findings justifying the denial. *See* Ex parte Willingham (CCA No. 35,162).

[37] One order did file the case and set it for submission. No further pleadings and orders were present in the file. *See* Ex parte Varelas (CCA No. 42,722). The absence of any reversals in the sample is also of concern. According to a recent study of reversal rates in capital cases from 1973-1995, Texas reversed 6% of state post-conviction cases prior to the enactment of Article 11.071. *See* James S. Liebman, Simon H. Rifkind, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases*, 1973-1995, *at* http://justice.policy.net/proactive/newsroom/release.vtml?id=18200.

[38] *See* Ex parte Adams, 768 S.W.2d 281, 287 (Tex. Crim. App. 1989) (while trial court findings should be "considered" if supported by the record, "[i]t is a fundamental principle of our habeas corpus law and regularly stated that under the procedure authorized by [statute], if the trial court convenes a hearing, elicits testimony and thereby develops facts, the Court of Criminal Appeals is not bound by the trial court's findings and conclusions of law") (citation omitted); Ex parte Turner, 545 S.W.2d 470, 473 (Tex. Crim. App. 1977) (while trial court findings should "generally" be accepted if supported by the record, "this Court has the ultimate power to decide matters of fact in habeas corpus proceedings").

supported by the evidentiary record in the case. In a handful of cases, the CCA has refused to adopt certain findings of the trial court, but the Court has never written an opinion explaining why. On the rare occasions in recent years in which the CCA has received trial court findings in favor of the defendant, the Court has rejected them outright and denied relief with little or no explanation.[39]

For example, in Ex parte Westley, a special master appointed by the trial court held a hearing at which ten live witnesses testified and roughly one hundred exhibits were introduced, generating a nine-volume record spanning 1,500 pages.[39] The special master made 230 separate findings of fact relating to Westley's claim that his lawyers had failed to provide him reasonably effective assistance.[40] Upon reviewing this formidable record, the CCA simply denied relief (over four dissents) in an unsigned opinion.[41] It ordered no further hearing of any kind; did not make any new or additional findings of fact; did not identify which, if any, of the findings in the state trial judge's report were wrong; and did not divine any errors of law in the state trial judge's report.[42] Westley's case does not inspire confidence that the CCA is taking seriously its responsibilities as ultimate fact-finder. Anthony Westley was executed on May 13, 1997.

B. The Court of Criminal Appeals's Failure to Ensure Adequate Performance By Appointed Counsel in State Habeas Cases

One of the most profoundly troubling aspects of the Texas state habeas procedure is the CCA's utter failure to enforce the right to "competent counsel" guaranteed by state statute since 1995. This is detailed fully in the previous chapter. In a number of high-profile cases, and several more which have not received such public attention, the CCA has ignored incontrovertible evidence that the attorneys it has appointed have failed to perform at a level of even minimal competence. Given the lethal consequences of counsel's errors and omissions in later appeals, it is no exaggeration to say that the Court of Criminal Appeals, by tolerating cases of grossly incompetent state habeas representation, is robbing indigent condemned defendants of *any* meaningful post-conviction review.

VI. Federal Habeas Review: The Ultimate Triumph of Form Over Substance

The belief that federal habeas corpus review will "catch" fundamental errors before a state defendant can be executed is another myth of meaningful appellate review. Because federal judges are insulated from some of the political pressures that influence state court judges, it is thought that they can closely and thoroughly examine each case before permitting the state to proceed with an execution. To understand why that promise is broken with increasing frequency in the federal courts of the Fifth Circuit, it is necessary to review how the legal

[39] Ex parte Westley, Writ No. 22,911-01 (Tex. Crim. App. May 6, 1992) (unpub.).

[40] *Id.*

[41] *Id.*

[42] *Id.*

protections afforded by the federal habeas statutes have eroded in recent years.

Prior to 1996, the federal habeas scheme instructed federal courts to provide independent review of a state defendant's claims that he received an unfair trial. While findings of fact made by the state courts generally were binding on the federal courts, the federal court was duty-bound to determine for itself whether the defendant had received a fair trial. Since the late 1970s, however, the exercise of this core federal power had become increasingly conditioned on the defendant's strict compliance with a complex tangle of technical procedural requirements. As more defendants were sent to Death Row, habeas law grew increasingly arcane and esoteric.[43] By the early 1990s, the regime the Court had created for habeas cases was "a narrow treacherous roadway full of holes and tortuous turns."[44]

Notwithstanding the morass of procedural technicalities that faced death-sentenced defendants in federal court, it was still possible to maintain some confidence in federal habeas review as a meaningful safeguard – that is, until Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA turned federal habeas corpus upside down. Under this legislation, a federal court considering a defendant's claims is not permitted simply to ask whether the defendant received a fundamentally fair trial – even if the defendant has diligently complied with all the complex technical prerequisites to obtain review. Instead, the federal court must focus its attention on the state court's decision denying relief. The question is no longer, "Did this defendant get a fair trial? but "Did the state court, in denying relief, act *unreasonably*?"[45]

The AEDPA's standard of "unreasonableness" is, to put it mildly, difficult to satisfy. As an initial matter, this standard creates an imposing psychological barrier. It is much more difficult for a federal judge to declare a previous decision "unreasonable," rather than simply

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[43] *See*, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977) (no federal habeas review of claim not properly objected to at trial); Smith v. Murray, 477 U.S. 527 (1986) (no federal habeas review of claim not properly raised on direct appeal; appellate counsel should have known that similar claims were "percolating" in intermediate courts of appeal in other states); Coleman v. Thompson, 501 U.S. 722 (1991) (no federal habeas review where defendant's counsel was three days late in filing state court appeal of denial of post-conviction relief; counsel's error cannot excuse this default because there is no right to effective counsel in state post-conviction proceedings); Barefoot v. Estelle, 463 U.S. 880 (1983) (approving Fifth Circuit's expedited treatment of federal habeas petition by condemned defendant; no right to "automatic" stay of execution for purposes of seeking review of denial of initial habeas petition); Penry v. Lynaugh, 492 U.S. 302, 313-14 (1989) (anti-retroactivity rule of Teague v. Lane applies to death penalty cases; federal court may not announce or apply "new rule of law" on habeas review of state court judgment); Sawyer v. Whitley, 505 U.S. 333 (1992) (condemned defendant attempting to avoid default of sentencing-phase issue must demonstrate conceptually complex "innocence of the death penalty"); Brecht v. Abrahamson, 507 U.S. 619 (1992) (stricter "harmless error" standard to be applied in federal habeas proceedings, requiring much greater showing of harm to warrant relief).

[44] Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 625 (1994); *see also, e.g.*, Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 54 (1991) (habeas under the Burger/Rehnquist Court was characterized by "an immensely complex morass of procedural rules and legal obstacles").

[45] 28 U.S.C. §2254(d).

"mistaken." Many cases equate "unreasonableness" with irrationality.[46] Federal judges are thus reluctant to grant relief under the AEDPA. At the same time, the AEDPA creates a "path of least resistance" for federal judges who are hostile to death-sentenced defendants or simply weary of spending time on their appeals. The prevailing view is that Congress intended the "reasonableness" standard to limit grants of federal habeas relief to a very small number of cases. Hostile judges can accordingly regard their review of state death penalty cases largely as a formality.

A second feature of the AEDPA which often renders federal review essentially meaningless is the presumption it requires that state court findings of fact are correct, unless the defendant proves otherwise by "clear and convincing" evidence.[47] The former qualification that such findings cannot bind the federal court unless they resulted from a fair and reliable process has been eliminated from the statute entirely. Under the AEDPA, findings which were the result of an unreliable and unfair process, like the paper hearing so frequently seen in Texas state habeas cases, nevertheless form the backdrop against which the federal court measures the "reasonableness" of the state court's decision denying relief.[48] Moreover, it will frequently be impossible for the defendant to show "clearly and convincingly" that the state court's "findings" are mistaken, unless the federal court gives him the power to develop additional facts through discovery (issuing subpoenas, deposing witnesses, and so on). Few Texas district courts do so. Thus, although the AEDPA contemplates that the defendant may have a fair chance to rebut the state court's findings, in practice the federal courts simply reaffirm the result reached in the previous state habeas proceeding.[49]

The formal constraints imposed by the AEDPA and other complex federal procedural law notwithstanding, the practical reality is that the federal courts in the Fifth Circuit often subject the cases passing before them to relatively little scrutiny.

In the past, Texas federal courts have foreshortened their consideration of death penalty cases to accommodate pending execution dates. In other Circuits, federal courts routinely stay execution dates to permit reasoned examination of capital cases, which are inevitably factually and legally complex.[50] In the Fifth Circuit, however, habeas review frequently has been compressed to meet the State's execution schedule.

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[46] It is this conception of "reasonableness" which animates statements like the Seventh Circuit's explanation in Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997), that "[a] state court's application of Supreme Court precedent is reasonable if it is at least minimally consistent with the facts and circumstances of the case."

[47] 28 U.S.C. §2254(e).

[48] Even before the AEDPA, the Fifth Circuit had staked out an extreme position by declaring that the former federal habeas statute's requirement that findings must result from a "hearing" was satisfied by Texas's "paper hearing" practice. *See*, e.g., May v. Collins, 955 F.2d 299 (5th Cir. 1992); James v. Collins, 987 F.2d 1116 (5th Cir. 1993); Spence v. Johnson, 80 F.3d 989 (5th Cir. 1996). No other federal Circuit ever followed suit.

[49] *See, e.g.*, Clark v. Johnson, 202 F.3d 760, 768 (5th Cir. 2000), *cert. denied*. 513 U.S. 1156 (2000) (upholding state court findings based on "paper hearing" and finding that "the district court did not abuse its discretion in denying [Clark] additional discovery, a continuance, or an evidentiary hearing."); Soria v. Johnson, 207 F.3d 232 (5th Cir. 2000), *cert. denied*, 520 U.S. 1253 (2000) (same).

[50] *See* 28 U.S.C. § 225.

Take the case of Texas death row inmate Robert V. Black, a decorated Vietnam veteran who faced execution on May 22, 1992, for having hired someone to kill his wife. On May 8th, while Mr. Black's case was still pending before the CCA, his attorneys received an order from a federal judge in Houston, ordering Mr. Black to file his federal habeas petition within 48 hours after the CCA ruled. The order startled Mr. Black's attorneys, since they had never filed any documents in federal court and thus had never had a judge assigned to the case. Their protests were unavailing, and so Mr. Black's attorneys filed his federal habeas petition on Friday, May 15, 1992. Rather than stay the execution, the federal district judge labored through the weekend to produce an opinion denying all relief on Tuesday, May 19th. Mr. Black's attorneys appealed to the Fifth Circuit, filing a lengthy brief on May 20th. Without oral argument (even by telephone), the Fifth Circuit issued a 34-page opinion denying all relief on Thursday, May 21st. A few hours later, just after midnight on Friday morning, May 22nd, Mr. Black was executed.

It is likely that this headlong rush to execution, with federal courts working around the clock to accommodate a deadline arbitrarily set by the State, is not what most people have in mind when they picture federal judges giving dispassionate, thorough review to state imposed death sentences. On the contrary, given how rapidly the federal courts ruled, it is doubtful that the judges involved even had an opportunity to read the entire record of Mr. Black's trial and post-conviction proceedings, much less give reasoned consideration to the arguments on his behalf.

In some cases it is not even necessary to wonder whether the judges reviewed the record – because it is apparent they did not. When Texas death row prisoner David Clark sought habeas review in 1992, his entire post-conviction process, from initial filing in the state trial court to denial by the United States Supreme Court, took less than 72 hours. In October 1991, the trial court set Mr. Clark's execution for January 17, 1992. On January 3, 1992, two Houston attorneys who had no previous involvement with Mr. Clark's case agreed to represent him and asked for time to prepare the case. Their request was denied on January 11th. Four days later, without having completed a review of the record or performing any investigation, Mr. Clark's volunteer lawyers filed a habeas application in the trial court and asked for a stay of execution. On January 16th, four separate courts purported to consider and deny Mr. Clark's claims: the State trial court, the Court of Criminal Appeals, the federal district court, and the Fifth Circuit. The CCA and the federal district court each took *less than an hour* to decide the case, the latter refusing to grant a stay even though the state did not oppose one and filed no answer to the petition. The lone dissenting voice came from Judge Davis of the Fifth Circuit, who protested that court's refusal to stay Mr. Clark's execution. His reason? "I am unable to adequately assess Clark's claim of ineffective assistance of counsel without reviewing the pertinent portions of the trial record, *which are not now available to me.*"[51]

[51] Clark v. Collins, No. 92-2036 (5th Cir. Jan. 16, 1992) (unpub. slip op. at 7) (Davis, J., dissenting) (emphasis added). After the Fifth Circuit had denied relief without even examining the trial record, Mr. Clark asked the United States Supreme Court to intervene. In the early morning hours of January 17th, Justice Scalia entered a stay of execution. Later the same day, however, the full Court vacated the stay and denied review, bringing to an end Mr. Clark's 72 hour journey through state and federal habeas corpus proceedings. No evidentiary hearing of any kind was conducted in any court. Justice Stevens noted his dissent from the denial of certiorari, calling the case an "extreme example" of why courts should be required to stay pending execution dates in order to review initial

This racetrack review is not limited to older cases. In October 1997, the state trial court scheduled Lesley Lee Gosch's execution for January 15, 1998, before he had received any substantive federal habeas review. On December 30th, Mr. Gosch filed his federal habeas petition with the district court, which denied relief on January 12, 1998, and refused to stay the execution date. Attorneys for Mr. Gosch appealed this decision to the Fifth Circuit the next day. Despite the fact that they had only one day to review the factually complex issues presented, a panel of three judges of the Fifth Circuit decided in less than 24 hours that Mr. Gosch's claims had no merit. According to the dissenting opinion of one judge, none of the panel members had even reviewed the state court record. That judge noted: "This matter, reviewed and decided in less than a day, is a prime example of the tail of a pending execution wagging this panel's dog. . . . [T]his court should be more reticent in deciding any death penalty case so quickly – especially one in which the merits have not been previously reviewed by an appellate court."[52]

Thus, contrary to the popular perception that death penalty appeals invariably drag on for years, many in the Fifth Circuit do not. Some inmates were lucky if the appeals "dragged on" for more than a week, receiving only the most superficial review in the process.

Another indicator of the Fifth Circuit's attitude toward capital habeas cases is the decreasing frequency with which the court hears oral argument in such appeals. Oral argument is "an essential ingredient of appellate decision-making" because it represents "the single opportunity that the advocate has to address the decision-makers face-to-face," where she can dispel "unfounded impressions [and] misconceptions," and "remind[] the judges that real life interests are involved in the case."[53] Since the passage of the AEDPA, the Fifth Circuit has heard oral argument in far fewer death penalty habeas appeals than it did prior to 1996. It currently is not uncommon for the court to decide such cases without ever having given the defendant's counsel an opportunity to be heard. For example, in the past three months the Fifth Circuit has issued eight published opinions in Texas capital habeas cases in which oral argument was not permitted, while handing down fewer than half that number in which oral argument was heard.[54] RJR Nabisco, Caterpillar, Southern Pacific

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federal habeas petitions, and pointing out that "it is doubtful that counsel has had a fair opportunity to discharge his professional obligations." Clark v. Collins, 502 U.S. 1052 (1992). Mr. Clark was executed within a few weeks.

[52] Gosch v. Johnson, 136 F.3d 138 (Table) (5th Cir. Jan. 15, 1998) (Garza, J., dissenting). Minutes before Mr. Gosch was scheduled to be executed the evening of January 15, 1998, he received a stay of execution from the U.S. Supreme Court. His request that the Court review the hasty decision of the Fifth Circuit was eventually denied, and Mr. Gosch was executed on April 24, 1998.

[53] Michael R. Fontham, *Preparing the Oral Argument*, a paper presented to the panel on "Oral Argument: Practicalities, Procedures, Preparation and Presentation" at the 13th Annual Fifth Circuit Appellate Practice and Advocacy Seminar in New Orleans (Feb. 5-6, 1998).

[54] From the information available on the Fifth Circuit's website, www.ca5.uscourts.gov, it appears that the court issued published opinions in the following Texas death penalty habeas cases from late May to mid-September, 2000: Hernandez v. Johnson, No. 99-10446 (May 30, 2000); In re McGinn, No. 00-10367 (June 1, 2000); Penry v. Johnson, No. 99-20868 (June 20, 2000); Chambers v. Johnson, No. 99-40896 (June 20, 2000); Barrientes v. Johnson, No. 98-40348 (August 7, 2000); In re Gibbs, No. 00-20540 (August 15/21, 2000); Goodwin v. Johnson, No. 99-20976 (August 17, 2000); Knox v. Johnson, No. 99-41068 (August 21, 2000); Moore v. Johnson, No. 99-50927 (August 23, 2000); Caldwell v. Johnson, No. 00-10934 (August 30, 2000); and Clark v. Johnson, No. 00-40061 (September 12, 2000). Oral argument was heard in Barrientes, Knox, and Penry. An unknown number of unpublished opinions were issued in Texas death penalty cases during the same period; in at least one of those cases,

Railway, U.S. Fidelity, Morgan Stanley, Southwestern Bell, Metropolitan Life Insurance Co., American Tobacco, Brown & Root, and the National Gypsum Co., to name just a few, were parties to published cases decided in the same period. The Fifth Circuit heard oral argument in *every one* of those appeals.

Recently, some of the judges of the Fifth Circuit have proselytized other appellate courts to join in speeding up the review of death penalty cases. At an Eleventh Circuit[55] judicial conference in the summer of 1999, Fifth Circuit Judge Edith H. Jones – "a death penalty champion who unabashedly favors curtailment of post-conviction review"[56] – was a featured speaker on the topic of death penalty habeas appeals. According to the Southern Center for Human Rights, one of whose representatives attended the conference, the agenda for her presentation "included sessions on how courts could avoid deciding issues on the merits by invocation of procedural bars and refusing to give new decisions retroactive application, and on deference by federal courts to state court fact findings."[57]

VII. Conclusion

The unreliable and unfair process of trial court "fact-finding" and the inadequacies of appointed habeas counsel do not exhaust the substantial flaws in the Texas state habeas system. They do, however, illustrate the gulf between the State's claim that Texas death row inmates receive "super due process," and the frequent reality of superficial, slipshod, politically motivated review. Although a recent careful study of reversal rates in capital cases found the Court of Criminal Appeals in the mainstream of appellate courts reviewing death penalty cases nationwide (indicating that the Court of Criminal Appeals had found reversible error in 35% of the cases it reviewed between 1973 and 1995), that result is misleading because it considered only cases decided prior to 1995.[58] Since 1995, the CCA has reversed only eight of 256 capital cases it has reviewed – at just 3%, the lowest reversal rate in

Since 1995, the CCA has reversed only eight of the 256 capital cases it has reviewed – at just 3%, the lowest reversal rate in the country.

Cruz v. Johnson, No. 00-50027 (July 21, 2000), no oral argument was permitted.

[55] The Eleventh Federal Judicial Circuit consists of the federal courts in Georgia, Florida, and Alabama.

[56] Bob Herbert, *Death Takes a Holiday*, N.Y. TIMES, Aug. 22, 1999.

[57] *See* Southern Center for Human Rights, *Texas Judges Featured at Eleventh Circuit Program On Capital Cases; Center Asks That Conference Be Canceled*, *at* www.schr.org.; *see also* David Firestone, *Judges Criticized Over Death-Penalty Conference*, N.Y. TIMES, Aug. 19, 1999.

[58] *See* Liebman, *A Broken System: Error Rates in Capital Cases*, 1973-1995, at 57 (Table 6) ("State-by-State Comparisons of Rates of Error Detected By All State Courts (State Direct Appeal and State Post-Conviction)"), *at* http://justice.policy.net/proactive/newsroom/release.vtml?id=18200.

the country.[59] If the quality of counsel provided and the integrity of the procedures employed were sufficiently high, it is conceivable that the public could feel confidence in a 97% affirmance rate. Given Texas's miserable record in both those areas, however, the likelihood that profound miscarriages of justice are slipping uncorrected past the CCA is unacceptably great.

State officials routinely claim that death penalty cases are "carefully" reviewed by the state and federal courts as proof that Texas's death penalty process is fair. The facts set forth above reveal that nothing could be further from the truth. However, the paucity of Texas's appellate system and the quality of the legal representation and judicial review provided make it easy for Texas to hide its mistakes. Many inmates are being executed after appeals which are so superficial and poorly done that they might as well not have occurred at all. Inmates are being denied the careful review of their cases required by the Constitution, and those who may be innocent or who have been unconstitutionally convicted or sentenced are being executed, and the truth about their cases is buried with them. Consequently, we are becoming increasingly unable to evaluate the validity of the system by which we convict and sentence people to death. In Texas, the judicial review that we rely upon to reassure ourselves that we do not execute the innocent breaks down more and more frequently. It is disheartening but true that in capital cases, where the need for heightened reliability is so acute, judicial review in Texas is conducted in a manner that practically guarantees that reliability cannot be achieved at all.

[59] Sara Rimer & Raymond Bonner, *Bush Candidacy puts Focus on Executions*, N.Y. TIMES, May 14, 2000 at A1.

CHAPTER NINE

A Bitter Harvest

As far as I'm concerned, there has not been one innocent person executed since I've been governor.

Texas Governor George W. Bush[1]

We've had such an enormous amount of executions that it's difficult to believe that the system worked flawlessly in all of those cases. I don't share Governor Bush's confidence in the judicial system. When I was on the court, I saw a lot of faulty trials from a lot of overzealous prosecutors and police officers. . . .

Former Texas Court of Criminal Appeals Judge Charles Baird[2]

Until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate. Disbarred lawyers, jailhouse informants – those kinds of problems are in the system, and we've got to get them out.

Illinois Governor George Ryan, declaring a moratorium on executions in that state[3]

In this chapter, we profile the cases of six men executed by the State of Texas despite substantial and troubling doubts about their guilt. These cases represent the bitter harvest of the practices examined earlier: the widespread use of fabricated snitch testimony and junk science that led to the execution of David Wayne Spence; the single-mindedness that led police and prosecutors to press their case against Odell Barnes, even as the case against him crumbled and the evidence pointing to other suspects mounted; the failure to disclose exculpatory evidence to the lawyers for Robert Drew and David Stoker; the pathetic spectacle of police extracting a confession from Richard Jones, a borderline mentally retarded man with an I.Q. of 75, interrogated for 21 hours before he finally provided a "confession" at odds with other known proof; and the refusal by the federal courts to consider the evidence of Gary Graham's innocence.

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[1] *See* Christopher Lee, *Majority Think Innocent Have Been Executed*, DALLAS MORNING NEWS, June 22, 2000.

[2] *See id.*

[3] *See* Ken Armstrong and Steve Mills, *Ryan: 'Until I Can Be Sure': Illinois is First State to Suspend Death Penalty*, CHICAGO TRIBUNE, February 1, 2000. In reaching this decision, Governor Ryan pointed to evidence of systemic misconduct, bias, and incompetence.

In these cases, the truth did not emerge until long after the trials were over – long after it had been suppressed by the State, ignored by the defense, or dismissed by the Courts. In these cases, the truth came too late.

David Wayne Spence

I do not think David Spence committed this offense.

Lt. Marvin Horton, supervisor of the Waco Police Department's investigation into the Lake Waco murders, during sworn testimony in 1993.

I have really never been convinced [of David Spence's guilt].

Larry Scott, Waco Chief of Police at the time of the Lake Waco murder investigation, during sworn testimony in 1993.

In separate trials conducted in 1984 and 1985, David Spence was convicted of kidnaping and murdering 16-year-old Jill Montgomery, and Kenneth Franks, age 17. Montgomery and Franks, together with a third teenager, Raylene Rice, were stabbed to death July 13, 1982, in Waco, Texas.

The State's case against Spence was rife with official misconduct. The prosecution failed to disclose exculpatory evidence that contradicted the testimony of its key witnesses, implicated another suspect in the crimes, and exonerated Spence. Several jail inmates, as well as two of Spence's co-defendants, were induced to testify falsely against Spence in exchange for leniency in their own cases and extraordinary jailhouse privileges, including conjugal visits with their wives and girlfriends. Finally, the State relied on suspect "forensic odontology" evidence that has since been discredited.

I. Key Facts

A. The physical evidence failed to link Spence to the murders. The FBI compared pubic hairs and head hairs (found on the victims' clothing and bindings) with samples from Spence and his co-defendants, with negative results. Palm prints and fingerprints taken from the victims' car also did not come from Spence or his co-defendants.

B. The prosecution failed to disclose information that strongly incriminated Terry Harper, a convicted felon with a lengthy history of violence, in the triple homicide. Several independent groups of witnesses told police that Harper had bragged about the crimes *before the bodies had been found or news stories of the crimes had publicly aired on television or radio*. Harper's boasts included highly specific details

about the murders that were unknown even to law enforcement officials at the time, including the fact that one of the victim's nipples had been severed during the attack.

C. According to police reports hidden from Spence's attorneys until after his second trial, as many as 20 witnesses saw either the victims or their car in Koehne Park, where the victims were last seen alive. None of these witnesses saw anyone resembling David Spence or his co-defendants; yet several people *had* seen Harper together with the victims.

D. To counter the evidence implicating Harper, the State later claimed he had an airtight alibi for the night of the murder, but failed to specify what it was. Deposed by Spence's lawyers in 1993, Harper said he had been watching "Dynasty" on television. "Dynasty" did not air that night. The State also said Harper's criminal history did not suggest he could have committed such a brutal murder. In fact, in the eighteen years preceding the Lake Waco murders, Harper had been arrested and charged twenty-five times for assaultive offenses, including assault with intent to murder and assault on a minor child. In sworn post-trial testimony, a local deputy recalled that Harper liked to "cut people," and "had a reputation" for "us[ing] the knife." Harper committed suicide in 1994 when police came to arrest him for the fatal stabbing of an elderly man during a robbery.

II. The Crime

The victims were last seen alive on the evening of July 13, 1982, driving into Koehne Park, a small public park on Lake Waco; Raylene Rice's orange Pinto was found abandoned there the next morning. Later that day, their bodies were found in a brushy, somewhat wooded area of Speegleville Park, another public park located directly across Lake Waco from Koehne Park. The girls apparently had been sexually assaulted; all three victims had been bound and gagged, and had been stabbed repeatedly in the chest and neck.

Despite an early and vigorous investigation that developed substantial evidence implicating several suspects, including Harper, in the murders, the Waco police proved unable to close the case. After the investigation was formally declared "inactive," Truman Simons, a patrol officer who previously had not been involved in the investigation, persuaded the police chief to assign him to the case, boasting that he could solve the murders in a week. Assigned to do a "follow-up investigation" on Friday, September 11, 1982, Simons declared *the next morning* that he had already "developed [a] possible suspect." That "suspect" was Muneer Deeb, a foreign national who owned a local convenience store.

Simons arrested Deeb three days later and charged him with the triple murder. Other police officers were gravely concerned that Simons had acted too quickly, and on too little evidence. Deeb had no prior criminal record and adamantly denied any involvement in the crimes. Six days later, Deeb exhibited "no deception at all" and passed a three-hour polygraph examination administered by police. The Chief of Police ordered Deeb released from custody that same day. The following

week, Simons resigned from the police department.

Within two weeks, Simons had accepted a job as a deputy sheriff and resumed his investigation into the case. Reasoning that Deeb was incapable of committing the triple homicide alone, Simons focused his attention on Deeb's acquaintance David Spence, who, together with Gilbert Melendez, recently had been arrested in connection with another charge. After numerous meetings with Spence's cellmates, Simons eventually secured a series of statements from inmates who claimed Spence had told them he committed the murders.

III. The Trials

McLennan County Trial: June, 1984

In Spence's first trial, the State's case depended on two types of evidence: the testimony of jail inmates, who claimed Spence confessed while in custody awaiting trial; and the testimony of a forensic odontologist, who claimed that Spence's teeth matched marks on the victims' bodies.

The testimony of the jail inmates was vague, internally inconsistent, and inherently incredible. One inmate, for example, testified that Spence chose Speegleville Park as the place to deposit the victims' bodies because he knew the area "like the back of his hand;" a second inmate, however, testified that Speegleville was chosen "because none of them ever went out there, so nobody would suspect them." Yet another inmate claimed to have talked to Spence in jail before Spence had even been taken into custody. After Spence was convicted, three inmates admitted they had fabricated their testimony against Spence with the help and encouragement of Truman Simons, and that they had testified in return for favors or promises of favorable treatment in their own cases.

As for the State's bitemark evidence, after trial, a "blind panel" of five nationally eminent forensic odontologists conducted their own examination of the evidence. To guarantee the credibility of the panel's findings, no member of Spence's legal defense team had any contact with the experts, who were not told the purpose of their study. After reviewing the evidence and comparing it with dental models of five unidentified persons (including Spence), all five experts independently concluded that no reliable identification of any of the dental models could be made and that, most importantly, Spence's teeth were not even minimally consistent with the bite marks on the victims' bodies.

Brazos County Trial: October, 1985

By the time of Spence's second trial, the prosecution had managed to extract cooperation from Gilbert and Tony Melendez, each of whom had other serious felony charges – in addition to the capital murders – pending against him. Taking full advantage of the co-defendants' determination to avoid the death penalty, the prosecution induced each co-defendant to give a self-incriminating statement in exchange for leniency on all pending charges. Both co-defendants' statements, however, were promptly recognized as fabrications, containing accounts of the crimes that were indisputably inconsistent with objective facts. Tony Melendez's brief statement, for

example, claimed that the victims were killed in Koehne Park and that the defendants left them there; it entirely failed to account for the fact that the victims' bodies were found in Speegleville Park. Similarly, Gilbert Melendez's original statement claimed that the victims' bodies had been loaded in the back of Spence's "white old model station wagon," a vehicle that Spence did not own until several weeks after the murders. Rather than reject the Melendezes' statements as outright fabrications, however, Simons simply collaborated with each of them to amend the statements by removing the inconsistencies and transparent factual errors.

Further, the State concealed critical information that would have explained why the co-defendants falsely incriminated themselves, as well as Spence, in the crimes. For example, the State never disclosed the extraordinary fact that Gilbert Melendez originally incriminated himself and Spence in the crimes only because he had been promised complete immunity from prosecution if he did so, a promise the State subsequently retracted after Melendez provided the prosecution with the self-incriminating statement. Similarly, the State concealed a handwritten note on the trial prosecutors' official stationery which indicated that Gilbert Melendez had told another inmate "he did not know anything [about the triple homicide] but was going to make up a story to get off of [the] sexual abuse case."

Both Gilbert and Tony Melendez later recanted their testimony against Spence, even though they knew that by doing so they exposed themselves to prosecution for the death penalty for charges related to the death of Raylene Rice. (In his own post-trial testimony, Truman Simons acknowledged that these charges were intentionally left open by the prosecution as an "insurance policy" against recantations by either of the co-defendants.) As Gilbert Melendez testified, subject to cross-examination by the State: "I didn't commit these crimes and anything I said about anybody else [is] just a lie. I can't say that because I wasn't there." Tony Melendez gave a similar sworn statement renouncing his testimony: "I did not murder Jill Montgomery, Kenneth Franks or Raylene Rice. I do not know who killed them. . . . I was not present during the crimes. The statements and testimony that I gave in the past that implicated me, David Spence, and Gilbert were not true."

IV. The Appeals

Spence's state post-conviction proceedings were conducted under the pressure of an imminent execution date, which the courts refused to modify to permit his new attorneys to review the thousands of pages of relevant documents they recently had obtained. Not only did the state courts refuse to conduct an evidentiary hearing on any of Spence's substantial claims of state misconduct, but each trial court adopted the State's responsive pleading as its own "findings" in the case, without changing so much as a comma. The Court of Criminal Appeals refused to grant Spence a stay of execution and denied habeas corpus relief in a perfunctory, one-page order. The state habeas proceedings in Spence's case lasted fewer than 60 days.

The federal district court initially denied relief without even requiring the State to file a response to Spence's petition. Although it subsequently permitted Spence to depose witnesses and present documentary evidence, it ultimately reaffirmed its original denial of relief in a one-page

order, without addressing the significance of the new evidence Spence had developed. The Fifth Circuit affirmed in an opinion that uncritically accepted the State's evidence at trial. Shortly before Spence's execution, he asked the state courts to consider his extensively documented claim of factual innocence. The state courts refused to do so, dismissing the petition in a summary one-page order.

V. Conclusion

The only credible physical evidence at the crime scene not only failed to link David Spence to the Lake Waco murders, it strongly suggested that someone else was responsible for the crimes. The prosecution concealed extensive evidence of its own misconduct, suppressed extensive evidence that strongly pointed to someone other than Spence, and manufactured evidence against Spence by cultivating jailhouse snitches.

The State of Texas executed David Wayne Spence on April 3, 1997.

For more information about Mr. Spence's case, see Sara Rimer and Raymond Bonner, Bush Candidacy Puts Focus on Executions, New York Times, May 14, 2000, at A1; Alan Berlow, The Hanging Governor, Salon.com, May 11, 2000, at http://www.salon.com/politics2000/feature/2000/05/11/bush/index1.html; and the court files in: Ex parte Spence, (CCA No. 15,346-03); and Spence v. Scott (5th Cir. Nos. 94-20212 & 94-20213).

Robert Nelson Drew

Robert Drew was convicted of robbing and murdering Jeffrey Mays. Of the two other people present when Mays was murdered, one testified at Drew's trial and the other, who also faced capital murder charges, did not. The witness who testified, Bee Landrum, had earlier given a statement to police that was diametrically opposed to his trial testimony. The police, however, hid the existence of this pretrial statement, which did not surface until long after Drew's trial. The other man facing charges, Ernest Puralewski, later pled guilty to Mays's murder; before doing so, however, he admitted to several people that he alone had murdered Mays, and that Drew was simply a terrified bystander.

I. Key Facts

A. When Ernest Puralewski first met Landrum, Mays, and Drew, he bragged that he was an ex-con who had been in prison with Charles Manson, and that he wanted a reputation like Manson's.

B. Ernest Puralewski's buck knife, according to the State's expert, definitely inflicted the stab wounds that killed Jeffery Mays and could have inflicted the non-lethal cuts on Mays's neck.

C. None of Mays's blood was found on Drew's tiny pocketknife.

D. Prior to trial, Bee Landrum told police in an audiotaped statement that he had not seen what happened during the murder, and passed a polygraph exam about that statement. The statement was never turned over to Drew's lawyers; at Drew's trial, Landrum claimed to have seen Drew slashing Mays's neck.

E. Before he pled guilty to murdering Jeffrey Mays, Ernest Puralewski told at least three other people that he acted alone in killing Mays, and that Drew had been present but did not assist him or participate in any way. According to Puralewski, Drew feared for his own life.

F. After he pleaded guilty to murdering Jeffrey Mays, Puralewski admitted in a sworn statement that he alone had killed Mays and that Drew was innocent.

II. The Crime

Robert Drew, then 24, was hitchhiking from Florida to Oklahoma in early 1983 when he was picked up in Louisiana by teenage runaways Jeffrey Mays and Bee Landrum. Mays promised to take Drew to Houston in return for gas money. The trio picked up a second hitchhiker, Ernest

Puralewski, and the four young men drove westward together, drinking heavily and smoking marijuana in what was later described as "a rolling party."

The group continued driving west toward Houston. Everyone but Mays was armed: Puralewski had a large, heavy "buck" knife with a blade longer than three inches; Landrum had a martial arts throwing star; and Drew had a tiny, one-sided pocket knife with a blade less than two inches long and about 1/3 inch wide. At some point, Mays angered the others by deciding he wanted to return to Alabama, and Drew protested that he had paid Mays for a lift to Houston. Some time later, Landrum pulled the car to the shoulder and Mays, Puralewski, and Drew all got out. It was nighttime. Outside the car in the darkness, Mays was stabbed to death. A few minutes after getting out of the car, Puralewski and Drew got back into the car and the trio drove on to Houston. Drew and Landrum were arrested there a day or so later for traffic violations; Puralewski was arrested several days later in Lake Charles, Louisiana, still in possession of the murder weapon.

III. The Trial

At Drew's trial, only Landrum testified about the events immediately surrounding Mays's murder. Puralewski, awaiting trial for capital murder, refused to testify. Landrum testified that Drew held a knife on Mays in the car, calling him a liar and a punk. Landrum further stated that Puralewski then said if they "were going to do it, get everything he has got so he won't have no identification." According to Landrum, Drew then took Mays's wallet and watch. Landrum pulled the car over to the side of the road, and Puralewski, Mays and Drew got out. According to Landrum's trial testimony, he could see all three men after they left the vehicle. Mays stood with Drew behind him, and Puralewski beside him. Landrum testified he saw Drew pull Mays's head back and make slashing motions across his throat. After Mays was down, testified Landrum, he saw both Drew and Puralewski making "up and down" motions with their arms toward Mays.

The medical evidence showed that Mays died from three stab wounds to the chest, all of which were inflicted by Puralewski's buck knife. It was undisputed that Drew's tiny pocketknife could not have caused the fatal wounds. Mays also had six small "superficial" wounds on his neck that could have been caused by either knife, according to the State's expert.

IV. The Appeals

After Puralewski pled guilty, Drew's attorneys learned that before doing so, Puralewski had admitted to two people in different conversations that he alone had murdered Mays. Drew's attorneys obtained an affidavit from Puralewski in which he confirmed that Drew was innocent and had simply stood by, terrified, while Puralewski stabbed Mays. Drew's attorneys sought a new trial in 1984 based on this information, but their motion was denied because it had been filed after the statutory deadline. That decision was affirmed on appeal.

Landrum, interviewed by Drew's lawyers in 1988 after their appeal was denied, admitted he had been "unable to see who did the actual killing," since he was inside the car and "never looked

back" at what was happening outside. He also indicated he had told police the same thing prior to Drew's trial. Confronted with this information, the State produced the tape, which confirmed that Landrum had originally told police he did not actually see the killing take place, because he "shut [his] eyes and turned away." The existence of this tape had never been previously disclosed to Drew's lawyers, nor had the fact that Landrum passed a polygraph concerning his account shortly after making the tape-recorded statement.

Although Landrum later disavowed these admissions in yet *another* affidavit, signed in 1993 at the request of the prosecutors seeking Drew's execution, no court ever conducted a live evidentiary hearing at which Drew's attorneys could confront and impeach Landrum on his widely disparate statements and meaningfully test Puralewski's claim that Drew was innocent.

V. Conclusion

Bee Landrum gave multiple, impossibly inconsistent stories about what, if anything, he saw on the night of Jeffrey Mays's murder. In jail prior to pleading guilty to murder, Ernest Puralewski, whose knife indisputably inflicted the fatal stab wounds, told several people and signed an affidavit confirming that he acted alone in killing Mays. Robert Drew, Puralewski confirmed, had simply been a terrified bystander who feared for his own life. No court ever conducted an evidentiary hearing on these allegations. Puralewski received a 60-year sentence for his role in the murder, while Drew was put to death.

The State of Texas executed Robert Nelson Drew on August 2, 1994.

For further information about Mr. Drew's case, see the court files in: Ex parte Drew, (CCA No. 374913-C); Drew v. Scott, (S.D. Tex. 94-2607); Drew v. Scott (5th Cir. 94-20553).

Gary Graham (Shaka Sankofa)

Over the two decades since his 1981 conviction for the murder of Bobby Lambert, grave doubts have surfaced and grown over the guilt of Gary Graham. No court held an evidentiary hearing to consider the most compelling evidence of his innocence – even though Graham and his attorneys repeatedly requested a hearing on this disturbing new material in state and federal habeas proceedings beginning in 1993.

I. Key Facts

A. The .22 caliber pistol taken from Gary Graham at the time of his arrest was tested by the police crime lab and was determined *not* to have been the weapon that fired the fatal bullet. This evidence was not presented at trial.

B. The State's primary evidence against Mr. Graham was the testimony of a single eyewitness. Defense counsel failed to cross-examine this witness, or any other witness, to bring out the extremely suggestive police identification techniques used with the sole identifying witness. The jury never learned that the police used a photo array in which Graham's photo was the only one that came close to meeting the description of the shooter. The jury also was not told that, even after viewing this suggestive photospread, the sole eyewitness did not positively identify Graham as the perpetrator. That identification came only after the eyewitness was given a second chance to identify Graham, in a live lineup. After making this identification, the eyewitness commented to a police officer that she recognized Graham from the photo lineup she viewed the night before.

C. Defense counsel failed to interview any of the other eyewitnesses to the crime, all of whom had made observations of the shooter that were more reliable than the identifying eyewitness: two of these eyewitnesses, both grocery store employees, saw the shooter prior to the shooting in a well-lit area just outside the store and both were certain the shooter was someone other than Graham.

II. The Crime

In May 1981, Bobby Lambert was fatally shot in a grocery store parking lot. He was killed with a .22 caliber pistol by a lone assailant. Several eyewitnesses saw the shooter in well-lit areas before the crime. A single eyewitness claimed to have seen the actual shooting.

III. The Trial

The question of Graham's innocence was raised by the very evidence used to convict him. The *only* evidence that he was involved in the murder was a single witness who identified him. The trial lawyers failed to present forensic evidence that exonerated Graham, failed to investigate the reliability of the identification made by the key witness, and failed to interview other witnesses to the crime – none of whom identified Graham as the gunman.

Prosecutors bolstered their case in the penalty phase by presenting two unrelated pieces of evidence to suggest that Mr. Graham was in possession of the murder weapon at the time of his arrest. During the guilt phase of the trial, the medical examiner testified that the fatal bullet was consistent with a .22 caliber slug. In the penalty phase, the state established that Mr. Graham had a .22 caliber revolver in his possession at the time of his arrest. The misleading inference created by this information went unchallenged despite the fact that shortly after Mr. Graham's arrest, a firearms examiner concluded that the fatal bullet "was not fired" by Mr. Graham's gun. This evidence was never presented to the jury at trial. Mr. Graham was sentenced to death in October 1981.

IV. The Aftermath

In 1993, Mr. Graham's attorneys uncovered existing evidence that called the eyewitness's identification into serious question. The only witness to the shooting had made her identification of Graham based on highly suggestive and improper police techniques. The police first showed the witness a photo array in which Graham's photo was the only one that came close to meeting the description of the shooter. In her pre-lineup statement, the eyewitness told police that the perpetrator had no facial hair and a "short compact afro." The police photo lineup that included Gary Graham's picture consisted of five photographs; three depicted persons with facial hair and of the remaining two, only Mr. Graham had a "short compact afro." The other person without facial hair had an extremely loose, bushy afro. Thus composed, the photo arrays inevitably directed the state's witness toward Graham's photograph. Nevertheless, this witness *could not identify him* as the gunman because of some other differences between Graham and the gunman: She told police that Graham looked like the suspect except the complexion of the assailant was darker and his face was thinner. The next day, the eyewitness viewed a live lineup in which Graham was the only person repeated from the photo array. Not surprisingly, she picked Graham out of the lineup, commenting to a police officer that she recognized Graham as being in the photo lineup the night before.

The additional evidence that would have pointed to a suspect who bore no physical resemblance to Mr. Graham was never presented at trial, not because it was unavailable, but because of the incompetence of his trial attorneys. The defense investigator later summed up the problem in an affidavit: "because we assumed Gary was guilty from the start we did not give the case the same attention we would routinely give a case."

Two of these other eyewitnesses, both grocery store employees, saw the assailant prior to the shooting in a well-lit area just outside the store – one face-to-face as he walked by him and spoke, the other for nearly twenty minutes as she eyed him with interest from about 10-15 feet away. Both

witnesses determined the shooter was approximately 5'3"to 5'5" tall, based on their experience with family members whose height was similar. Graham was 5'10" at the time. They were certain Graham was not the shooter. Indeed, one of these witnesses saw the same lineup as the identifying eyewitness and told the police the shooter was not there.

By contrast, the single identifying witness saw the face of the shooter nearly 40 feet away in a dimly lit parking lot, for only two to three seconds during the 90-second shooting incident. She estimated the shooter's height at 5'10" to 6'0", without being asked to compare his height to someone whose height she knew. Neither of the more reliable eyewitnesses was called to testify.

The federal district court refused to consider this evidence in 1993. The United States Court of Appeals for the Fifth Circuit said this was improper, and returned the case to the state courts for a hearing. Yet when Mr. Graham returned to federal court after again being denied a hearing by the state courts, the federal courts found themselves barred from hearing his claims by the added provisions of the 1996 Antiterrorism and Effective Death Penalty Act. Under this new federal law, evidence of actual innocence had to be "newly discovered" in order to be considered in federal court. Mr. Graham's evidence of innocence did not meet the criteria for being newly discovered – because it should have been discovered by his attorneys before 1993.

V. Conclusion

Graham's case demonstrates convincingly that the appellate courts care first and last about finality. Shortly before Graham's final appeal was denied, several of the original trial jurors came forward to state they would not have convicted him had they heard the testimony of the other witnesses. In the face of worldwide protests and growing concerns that Texas was poised to execute an innocent man, officials with the State of Texas simply tallied the number of courts that had reviewed the case, rather than considering the substance of that review.

The State of Texas executed Gary Graham (Shaka Sankofa) on June 22, 2000.

For further information concerning Mr. Graham's case, see Steven Mills, Texas Case Highlights Defense Gap: for Many on Death Row, Skilled Lawyers Arrive Only after Conviction, Chicago, Tribune, June 19, 2000; Alan Berlow, The Hanging Govenor, Salon.com, May 11, 2000, at http://www.salon.com/politics2000/feature/2000/05/11/bush/index1.html; and the court files in: Graham v. State (CCA No. 68,916); Ex Parte Graham (CCA No. 17,568); Graham v. Lynaugh (5th Cir. No. 88-2168).

Odell Barnes, Jr.

Odell Barnes was convicted and sentenced to death for the 1989 murder of Helen Bass in Wichita Falls. From the beginning, Barnes insisted he was innocent. His trial attorneys, however, had little experience with capital cases and conducted virtually no investigation into his innocence claim. Years after the trial, experienced capital litigators reinvestigated the trial evidence and testimony, attacking and discrediting each element of the prosecution's case. New evidence uncovered by the defense clearly implicated other suspects and cast serious doubt on the reliability of the results obtained from the original crime scene investigation.

I. Key Facts

A. The investigation by the Wichita Falls Police Department focused exclusively on Barnes. Although the police found a number of unknown fingerprints at the scene, they made no attempt to check these prints against the witnesses who implicated Barnes.

B. Eyewitness testimony used at trial to place Barnes at the scene of the crime on the night of the murder was misinterpreted: the witness actually saw Barnes 90 minutes before the victim arrived home, not at the time of the crime.

C. Barnes told his trial lawyer that he and the victim had been having a consensual sexual relationship, a fact later confirmed by other witnesses. His lawyer failed to develop this evidence, which contradicted the prosecution's theory of the crime and explained the physical evidence found at the crime scene.

D. Witnesses claimed at trial that Barnes had given them a gun similar to one owned by the victim. Years later, a number of people swore these same witnesses had confessed to the crime.

E. The key physical evidence against Barnes was later found to have been adulterated or misinterpreted. Stains of the victim's blood found on Barnes's clothes contained a forensic preservative, leading one expert to conclude that the blood had been planted on the clothing. Retesting of samples of Barnes's semen that had been taken from the victim revealed that the semen most likely had been deposited between one to two days prior to the crime.

II. The Crime

The physical evidence indicated that Helen Bass had been stabbed twice, shot in the head, and struck in the head with a blunt object. The crime scene was horrific: blood was spattered on the ceiling, floor, and three walls of the bedroom where the victim was killed, and there were blood

transfer patterns throughout the home. Semen was later recovered from the victim's vagina.

III. The Trial

In many respects, Odell Barnes appeared to be the perfect suspect. Barnes lived in the same area as Helen Bass, and an eyewitness testified he saw the defendant jumping the fence behind the victim's home on the night of the murder. Police testified they had recovered Barnes's fingerprint from the base of a bedroom lamp; the prosecution claimed Ms. Bass had acquired the lamp only shortly before her death and that Barnes had used it to strike her. Police also told the jury they had recovered a pistol from other witnesses who claimed they got it from Barnes; the pistol was similar to one owned by the victim. Prosecutors produced a pair of Barnes's coveralls with two small blood stains on the sleeves, matching the blood of the victim. Semen found in her vagina also matched Barnes. The jury convicted Barnes and sentenced him to death.

IV. The Appeals

The Texas Court of Criminal Appeals affirmed Barnes's conviction and sentence. The same court later denied the petition for post-conviction relief prepared by the Wichita Falls Public Defender – an organization with virtually no experience in capital post-conviction litigation.

Only years later, when experienced capital litigators took over the appeal, did the truth begin to emerge. These lawyers learned from the victim's son that the lamp, which the prosecution claimed had been acquired only recently, had in fact been in the victim's home for many years. They reinvestigated the eyewitness and established that he had seen Barnes approximately 90 minutes before the victim arrived home from work. In other words, when the witness saw Barnes in the vicinity of the victim's home, Helen Bass was still alive.

But what of the blood stains on Barnes's coveralls? The appellate lawyers sent them to a nationally known chemist, who made a shocking discovery. One of the stains contained a citric acid blood preservative, of the type typically found in forensic or medical laboratories. According to this expert, the stains either were accidentally or deliberately planted on the pants at some time other than the commission of the crime and were not legitimate crime scene evidence.

Barnes had informed his trial attorney that he and the victim had a consensual sexual relationship – a fact confirmed by other witnesses. In one of the great tragedies of the case, however, his original lawyer failed to develop this crucial evidence, which challenged the entire prosecution theory of the crime and shed an entirely new light on the physical evidence. Experts retained by the new defense team performed special protein testing of the semen sample. The testing revealed that the sperm most likely had been deposited 24 to 48 hours prior to the victim's death.

Barnes's post-conviction team also retained crime scene investigation experts who reviewed the credibility and reliability of the original investigation conducted by the Wichita Falls Police

Department. These experts concluded that the investigation protocol used by the police was so poor that it called into question any resulting findings. For example, although the police found a number of unknown fingerprints at the scene, they made no attempt to check these prints against other potential suspects, including the witnesses who implicated Barnes.

The defense team also investigated the credibility of the witnesses who claimed that Barnes had given them a gun allegedly taken from the victim's home. Their inquiries produced sworn statements from several people who had heard those same witnesses confess to the murder. The only fingerprint found on the pistol given to the police came from one of the witnesses who alleged that Barnes had given it to him. In addition, one of these incriminating witnesses had pending criminal charges for drug possession and delivery. Although the Wichita County prosecutors had a written policy forbidding probation plea offers in drug cases, this witness received ten years probation on both cases after he testified against Barnes.

None of this compelling new evidence moved the appellate courts to intervene.

V. Conclusion

The case against Odell Barnes is a classic example of prosecutorial tunnel vision. Faced with crime scene evidence that seemed to implicate one person, police and prosecutors excluded all other possibilities and went after Barnes. His trial attorney failed to investigate and develop his client's protestation of innocence – and the jury drew mistaken inferences from what appeared to be undisputed evidence of guilt. Even though the case against Barnes was thoroughly discredited by careful reinvestigation years later, neither the courts, the Texas Board of Pardons and Paroles, nor Governor Bush saw any need to halt his execution.

The State of Texas executed Odell Barnes, Jr. on March 1, 2000.

For further review of Mr. Barnes's case, see Bob Burton, Killing Time, Houston Post, , January 27, 2000; Sara Rimer & Raymond Bonner, Bush Candidacy Puts Focus on Executions, New York Times, May 14, 2000, at A1; and the court files in: Barnes v. State (CCA No. 70,858); Barnes v. State (CCA No. 71,291); Ex Parte Barnes (CCA No. 30,357); Barnes v. Johnson (5th Cir. 98-20504).

Richard Wayne Jones

Richard Jones, a borderline mentally retarded ex-convict with an I.Q. of 75, apparently confessed to a murder he did not commit to conceal his sister's involvement in the same offense. On the night of the murder, Jones's sister Brenda told him that she and Walt Sellers had committed the crime and begged Jones to help her conceal it. Jones set the field on fire where the body lay. Arrested in possession of some of the victim's property, Jones initially told the police Walt Sellers had given it to him. Once the police threatened to prosecute his girlfriend for capital murder if he did not confess, Jones changed his story and claimed sole responsibility for the crime.

I. Key Facts

A. Jones originally told police he had obtained the victim's car, credit cards, and checks from Walt Sellers, an ex-convict with prior convictions for stealing the same kind of property. Three other witnesses made sworn statements prior to Jones's trial that Sellers had items belonging to the victim and was trying to get rid of them before Jones was arrested with that same property in his possession. These witnesses did not testify at Jones's trial. After the trial, two other witnesses gave sworn statements that they heard Sellers implicate himself in the murder.

B. Jones had an I.Q. of 75 and was borderline retarded. He was uniquely devoted to his sister Brenda, because she had been his sole ally and confidante in the violently abusive household in which he was raised.

C. Three eyewitnesses, a mother and her two daughters, saw the victim abducted. The mother's description of the assailant did not match Jones, and her teenage daughter did not identify Jones in a lineup. Police intentionally omitted this fact from their report concerning the lineup.

D. Jones's pregnant teenage girlfriend, Yelena Comalander, was arrested the night after the murder trying to cash the victim's checks. She was interrogated for hours and threatened with prosecution for capital murder before signing two statements implicating Jones. She later said police changed things she said when writing them down.

E. Jones was arrested the same evening and interrogated for 12 hours. He was allowed no food or sleep. His interrogators threatened that he and his girlfriend would go to death row and their baby would be taken from them if he did not confess. After 21 hours of interrogation, including a trip to the crime scene, more threats, retrieval of his denim jeans and brown plaid shirt, Jones signed a confession. He had second thoughts about doing so but was told that his girlfriend would be released if he signed.

F. Jones's "confession" claimed he took the victim straight from the abduction to the field, a distance easily driven in just a few minutes, and killed her immediately. A witness who lived next to the field, however, heard screams coming from the field more than two hours after the abduction. That fact was not known to the police at the time they extracted Jones's "confession."

G. Two tiny spots of blood were found below the knee on Jones's jeans. The crime lab found no blood whatsoever on his shirt. The victim had bled to death after being stabbed nineteen times in the upper body, one of the wounds severing her carotid artery.

H. DNA testing of previously untested evidence from the crime scene and the victim's vehicle was requested prior to execution and denied by the courts and by Governor George W. Bush.

II. The Crime

The badly burned body of Tammy Livingston, abducted earlier in the day in her own vehicle from a department-store parking lot, was found on the night of February 19, 1986. She had been stabbed 19 times before the field where her body lay was set on fire. The next day, nineteen-year-old Yelena Comalander was arrested while trying to cash checks belonging to the victim. After police interrogated and threatened her, Ms. Comalander eventually said she had obtained them from Richard Jones. Jones was arrested that evening and was subjected to a long and threatening interrogation until he signed a confession.

III. The Trial

The adult eyewitness originally gave a description of the parking-lot assailant that differed from her testimony at Jones's trial. Although her teenage daughter did not pick Jones out of the same lineup, that information originally was concealed by the police and the daughter was never brought before the trial jury. The circumstances of Jones's confession were suspect; one of the interrogating officers even admitted in pre-trial testimony that Jones had been threatened, but retracted that testimony after an overnight recess during which he consulted with the prosecutor. The police never investigated Walt Sellers as a suspect, despite the fact that Jones originally gave them his name and that Sellers had convictions from 1985-87 for stealing the same kind of property. Police arrested Sellers one month after the murder with a dagger in his possession, but destroyed the dagger without subjecting it to forensic testing.

The physical evidence tended to corroborate Jones's initial assertion of innocence, since there were only tiny traces of the victim's blood on the clothes Jones had been wearing that night. Three witnesses, unavailable at the time of trial, stated under oath that Sellers had the victim's property before Jones did. Though a substantial amount of physical evidence was collected from both the interior of the victim's car and the field where she was murdered, much of it was not

subjected to any forensic testing at all, even the less sophisticated testing available in 1986. In fact, crime lab documents reflect that a number of planned tests were foregone on the direct orders of the investigating detective who had obtained Jones's confession. Largely on the basis of his confession, Richard Jones was convicted and sentenced to death.

IV. Appeals

Jones's trial attorney originally represented him in his post-conviction appeals. When subsequent counsel sought to challenge trial counsel's performance at trial, the original lawyer sided with the State, filing an affidavit so unbelievable that even the Fifth Circuit later remarked that it was impossible to reconcile his claims with undisputed facts on the trial record. The trial court refused to grant a hearing on whether trial counsel had performed properly, instead adopting wholesale a set of "findings" penned by the prosecutor. No federal court agreed to hear evidence, despite the fact that while the case was pending in federal court, two witnesses came forward to state under oath that they had heard Walt Sellers implicate himself in the murder. Both the courts and Governor Bush refused to authorize DNA testing that could have confirmed Sellers's involvement in the crime.

V. Conclusion

Richard Jones was executed on the basis of a coerced confession that was inconsistent with the physical evidence and the time line of events following the victim's abduction. The jury that condemned him never heard that three other witnesses had given sworn testimony corroborating Jones's claim that he received the victim's property from Sellers in the first place, or that one of the eyewitnesses to the abduction did not believe Jones was the assailant or identify him as such. After trial, despite the existence of additional sworn testimony implicating Walt Sellers as the killer, the courts and the Governor refused to permit DNA testing – which did not exist in 1986, at the time of the original investigation – of available evidence which could have corroborated Sellers's involvement in the murder.

The State of Texas executed Richard Jones on August 22, 2000.

For more information on Mr. Jones's case, see Dan Malone, A Question of Guilt, Dallas Morning News, Aug. 3, 2000; and the court files in: Jones v. State (CCA No. 69,894); Ex parte Jones (CCA No. 25,990); Jones v. State No. 05-91-00997 (Tex. App.-Dallas,1992).

David Stoker

David Stoker was convicted and sentenced to death in 1987 for the robbery and murder of a convenience store clerk in Hale Center, Texas. His conviction was based entirely on the testimony of three witnesses and a bullet seized from Stoker's car. None of the witnesses claimed to have first-hand knowledge of the murder, but each testified Stoker had confessed to them. Following his conviction, new evidence came to light that undermined the credibility and motives of the witnesses and demonstrated that local officials had perjured themselves to conceal the weakness of their case.

I. Key Facts

A. During post-conviction proceedings, a key prosecution witness recanted his testimony. He stated he had testified against Stoker because the prosecutor had threatened him with a perjury conviction and because his wife had told him that Stoker had raped her, an allegation he no longer believed by the time of the trial.

B. Prosecutors dismissed charges against their key witness in exchange for his testimony against Stoker, and then concealed the plea arrangement from the defense and the jury. The witness had instigated the prosecution of Stoker by providing police with the murder weapon.

C. Local officials obstructed the investigation into the payment of reward money to two of their witnesses. They initially testified that no such payments had been made, but changed their testimony after Stoker's post-conviction counsel subpoenaed the cancelled check.

II. The Crime

Early on the morning of November 9, 1986, someone robbed Allsup's convenience store in Hale Center, Texas. During the robbery, store clerk David Manrrique was fatally shot with a .22 caliber pistol. Several months after the crime, police acted on an informant's tip and arrested David Stoker, a local man known to the authorities as a drug dealer.

III. The Trial

The prosecution's case against Stoker rested almost entirely on the testimony of three witnesses: Carey Todd, Ronnie Thompson, and Debbie Thompson. Todd testified that Stoker had given him the murder weapon, which Todd had then given to the police. The police said they recovered a bullet from Stoker's car that matched the murder weapon and found his fingerprint on the gun. Todd denied under oath that the prosecution had offered him any incentives for his testimony. Both Ronnie Thompson and his wife Debbie swore that Stoker had confessed to the

murder. Debbie Thompson also provided additional evidence of a motive: Stoker needed money for a drug debt. The local police chief and a prosecution investigator denied that any reward had been paid to the witnesses for their testimony. Although the case against him was largely circumstantial and rested on testimony from witnesses of questionable character, David Stoker was convicted and sentenced to death.

IV. The Appeals

During post-conviction proceedings, Ronnie Thompson completely recanted his trial testimony. He stated he had testified against Stoker only because the prosecutor had threatened him with a perjury charge if he did not testify consistent with a statement he had signed earlier. That statement was drafted by his wife, Debbie Thompson, and Ronnie Thompson insisted he had not read it before he signed it. He originally had agreed to testify falsely against Stoker because his wife had told him Stoker had raped her. By the time of the trial, he no longer believed that allegation.

Although she never recanted her testimony, Debbie Thompson was an even less reliable witness than her husband. According to acquaintances, Debbie was a "methamphetamine whore," sleeping with anyone who had drugs to share. Moreover, during the proceedings against Stoker, she had left Ronnie Thompson and moved in with Carey Todd, the man who instigated the prosecution against Stoker and became the primary witness against him. She and Todd then split the Crimestoppers reward in the case, the existence of which local officials had denied.

Carey Todd was critical to the State's case. First, Todd told a local police investigator that Stoker had killed the clerk with a .22 Ruger pistol. Todd gave the gun to the officer, and Stoker's fingerprint was found on the trigger. But witnesses familiar with Stoker, Todd, and the Thompsons told Stoker's investigators that the pistol, like other guns, was regularly traded among these people for drugs. It also was regularly used by a number of people for target shooting. Todd himself was seen by two witnesses in possession of the pistol around the time of the murder. Moreover, Stoker's brother said that Todd gave Stoker the pistol so that he could fix the trigger, which Stoker did.

At the time of Stoker's trial, Carey Todd had a pending drug charge in a neighboring county. Those charges were dismissed after Todd testified against Stoker. At Stoker's trial, the State denied that Todd would receive anything in exchange for his testimony. During the post-conviction proceedings, Stoker's lawyers discovered a note in the prosecutor's file from Todd's drug case stating that the charges against Todd had been dismissed after Todd provided assistance against Stoker. Both the prosecutor and the investigator revealed that the file had contained a phone message slip stating that the prosecutor in the Stoker case had called to say that Todd had provided the required cooperation.

In addition, officials connected with the murder investigation obstructed fact-finding into the payment of the Crimestoppers reward money to Todd, which he had split with Debbie Thompson. Hale Center's police chief, Richard Cordell, initially testified there was no local Crimestoppers group, but was forced to acknowledge on the witness stand that he was, in fact, one of the group's founders. And Riley Rogers, an investigator for the district attorney's office, took the stand and

denied any knowledge of the $1,000 payment. Bank records were later uncovered that linked him to the $1,000 payment. Even then, they denied that Todd had been promised this reward.

Carey Todd figures at each critical juncture in the case against David Stoker. And at each of these points, Todd was in a position to manipulate the evidence to implicate Stoker. There is a substantial indication that he did just that.

V. Conclusion

The State's case against Mr. Stoker was entirely dependent on Carey Todd, a drug dealer who was in a position to set Stoker up, whose drug charges were dismissed in exchange for his testimony against Stoker, and who received a cash payment for his efforts. Neither Stoker's trial attorney nor the jury were aware of Todd's ulterior motives or those of the other prosecution witnesses. As one federal court of appeals judge noted during oral argument, in the final analysis it is just as likely that Carey Todd committed the crime as it is that David Stoker did.

The State of Texas executed David Stoker on June 16, 1997. After Stoker's execution, a member of the Texas Board of Pardons and Paroles sent one of Stoker's family members a heartfelt letter informing her that his vote to grant Stoker a commutation mistakenly had been recorded as a vote to deny all relief. The Board member said he had voted for Stoker because he doubted Stoker's guilt.

For more information on Mr. Stoker's case, see Steve Mills, Ken Armstrong & Douglas Holt, Flawed Trials Lead to Death Chamber: Bush Confident in System Rife with Problems, Chicago Tribune, June 11, 2000; and the case files in: Stoker v. State (CCA No. 70,031); Stoker v. Collins (N.D. Tex. 5:92-CV-148); Stoker v. Scott (5th Cir. No. 94-11089).

APPENDIX ONE: METHODOLOGY

We began our study by identifying a number of areas in the capital punishment system where arbitrariness or unreliability could intrude. These areas include: the State's withholding of evidence, its use of false evidence, involuntary confessions, jailhouse informants, inconsistent prosecutions, the use of hair comparison analysis, the use of bite mark evidence, the use of psychiatric testimony concerning future dangerousness during sentencing, ineffective assistance of counsel, and the racially discriminatory striking of jurors. We compiled every existing direct appeal decision, published and unpublished, for the 445 defendants who are currently on death row, and every published direct appeal decision for inmates who have been executed, as well as those who had been sentenced to death, but who are no longer on death row (because they have been executed, have died from other causes, have obtained relief from the courts, or received executive clemency.). Each case was then examined and any relevant information recorded.

Despite the far-reaching character of our research, the results likely underestimate the occurrence of major problems. First, none of the most recent cases have yet been reviewed by the Texas Court of Criminal Appeals (CCA), a process that may take several years after conviction. Second, many facts which reveal the systemic problems in the Texas capital punishment system do not appear, if at all, until the post-conviction stage, after someone has been convicted and has initiated a direct appeal. Problems that may exist in recent capital trials, therefore, are yet to be discovered – if the inmate is lucky enough to have an experienced, determined post-conviction lawyer.

Third, we consciously decided to err on the conservative side. Because we were unable to investigate every claim raised by each defendant in an appeal, we have only included cases where the reviewing court verified the allegations or where the defendant's allegations were uncontroverted. Thus, where we describe a case as involving official misconduct, either a judge has made a finding that the alleged behavior occurred, or the State did not contest the matter. Many cases potentially involving state misconduct and other contested issues therefore remain outside the scope of our study.

Fourth, claims that were never raised by a defense attorney on appeal will never be addressed by a reviewing court, and thus cannot be enumerated accurately. In this way, many troubling aspects of Texas capital convictions never come to light. If inmates do not have good post-conviction lawyers, the fact that a jailhouse informant lied on the witness stand, or that some form of junk science was used to obtain a conviction, may never be discovered, and never printed in a public opinion or record. Numerous cases in which Dr. James Grigson testified, for example, remain undetected, because his name is not mentioned in the appellate opinions reviewed. In 1991, Grigson claimed to have testified for the prosecution in 136 cases.[1] However, we have been able to authenticate only 121 cases with psychiatric testimony. When such disparities have arisen, we have chosen to use only our well-documented numbers rather than other less verifiable sources. In summary, our findings are reliable but conservative. As a

[1] Clark v. State, 881 S.W.2d 682, 695 (Tex. Crim. App. 1994).

result, it is highly probable that our findings underestimate the problems that plague the Texas capital punishment system.

Two areas of our study deserve further explanation.

The Habeas Study

To fully evaluate the current appellate review practice in Texas, we analyzed a random sampling of habeas corpus applications. Initially, we developed a five-page questionnaire to assist in outlining the basic details of each case: the names of the attorneys and judge, when the case was filed, length of the petition, number of claims presented for review, a comparison of the court's findings of fact with those submitted by the local District Attorney, and the final action of the Court of Criminal Appeals. With this questionnaire, we examined the files housed at the CCA and recorded the data. To ensure our selection was random, we obtained from the CCA a list of all 187 applications for a writ of habeas corpus filed since September 1, 1995.[2] We then culled out only the initial, or first-time, applications, and examined every fifth such application on the list provided by the CCA. After reviewing every fifth application on our initial pass through the list, we returned to the start and once again inspected every fifth application. We repeated this process four times, aiming to review 150 habeas cases. However, many of the files we sought to review were unavailable.[3] In total, we reviewed 103 case files. Once again, when calculating the final figures reflected in the report, we were conservative. We did not include in the final calculation any cases where the pertinent information was not fully available. Nonetheless, the results provide unique and sobering insight into state habeas practice in Texas.

The Race Study

To further study the effect of race on the decision to seek the death penalty, we set out to conduct an in-depth study of the process by which cases are chosen for capital prosecution in a single Texas county. Because results from small counties with minimal yearly homicide rates would fail to yield useful data, and because large cities such as Houston and Dallas have been examined in previous studies, we searched for a county that would provide meaningful statistics as well as original research. We chose Montgomery County (Conroe).

In Montgomery County, we collected data on homicides that occurred during the last five years. First, we identified every death characterized by the Medical Examiner as a homicide. Next, we reviewed each charging instrument for every individual charged with a homicide of

[2] This is the date the new Texas habeas statute took effect.

[3] The Texas Attorney General's Office borrows files from the CCA in the course of litigating federal habeas corpus proceedings. Some of the more recent applications may have been pending before the court or in the possession of a CCA judge. These applications, therefore, were not reviewed. We also learned that numerous files had been destroyed by the CCA. At some time in the past few years, a clerk at the CCA retrieved court files of persons who had been executed and reportedly destroyed them to create more space. CCA staff assured us that this was done in error and will not be repeated.

any type, noting the final judgment, disposition, or verdict. We then determined the race of each defendant and victim through review of court files, police reports, and newspaper articles, and interviews with family members.

Several deaths classified as homicides were excluded, because the perpetrator was killed at the scene of the crime. For instance, there were two murder-suicides, and a case in which a robber and a store clerk killed each other. These cases are irrelevant to a study of prosecutorial decision-making, because the prosecutor was never called on to make any charging determinations. For the same reason, the case of a defendant who killed himself in jail was excluded. In this study, therefore, our numbers reflect only those cases in which a prosecutor or law enforcement officer decided whether to pursue a case.

After tracing each murder to determine whether an arrest was made, and if so, whether there was a plea or trial, we analyzed the final outcome in each case by reference to the race and gender of both the defendant and the victim(s). One of the figures we calculated based on this information was the percentage of defendants condemned to death for murders of victims in each race and gender combination. Because these figures represent percentages of *defendants*, rather than victims, each defendant had to be counted only once. Thus, where a defendant was convicted in a multi-victim, mixed-race case, each victim was assigned a fraction based on the total number of victims so that all victims of that defendant totaled one. In this way, no defendants were double counted.

APPENDIX TWO:
OFFICIAL MISCONDUCT AND JAILHOUSE SNITCH CASES

Cases Involving Official Misconduct

1. **Randall Dale Adams**: As set forth in the documentary *The Thin Blue Line*, multiple charges against Harris, state's primary witness (and probable killer) "disappeared" in exchange for his testimony; the primary identification witness's prior inconsistent statement was suppressed; and the prosecutor failed to correct an eyewitness's perjured testimony. Ex parte Adams, 768 S.W.2d 281, 284-93 (Tex. Crim. App. 1989).

2. **Ronald Keith Allridge**: The State refused to provide the defense with a statement given by his codefendant that corroborated the defendant's version of events. Allridge v. Scott, 41 F.3d 213, 215-18 (5th Cir. 1994).

3. **Antonio Barrientes**: The State presented misleading testimony in the sentencing phase suggesting that the defendant had committed other murders and withheld evidence that could have been used to impeach that testimony. Barrientes v. Johnson, 221 F.3d 741 (5th Cir. August 7, 2000); Barrientes v. Johnson, No. B-89-044 (S.D. Tex. Feb. 27, 1998) (unpub.).

4. **Nathaniel Barley**: The prosecution failed to disclose a composite sketch of the suspect that did not resemble the defendant. The prosecution also suppressed a surreptitiously-recorded interview with a critical state's witness that was inconsistent with the witness's earlier statement to the police. Finally, the prosecution did not correct testimony it knew to be false when a police officer failed to mention the composite sketch during his testimony recounting the investigation of the crime. Application for Post-Conviction Writ of Habeas Corpus, Ex parte Barley (CCA No. 599915-A); Barley v. State, 906 S.W.2d 27, 36 (Tex. Crim. App. 1995).

5. **James Lee Beathard**: *See* Chapter Two.

6. **Clarence Brandley**: *See* Chapter Two.

7. **James G. Buffington**: The State engaged in "prosecutorial chicanery," by allowing a key witness to falsely deny that he had been promised leniency and by taking affirmative steps to ensure that the promise of leniency was not discovered. Buffington v. Copeland, 687 F. Supp. 1089, 1092 n.2, 1096 (W.D. Tex. 1988). The State also produced a transcript of a witness interview which was represented to be true and correct, but was actually severely redacted. Buffington v. State, 652 S.W.2d 394, 396-98 (Tex. Crim. App. 1983).

8. **James Lee Clark**: *See* Chapter Two.

9. **Kerry Max Cook**: *See* Chapter Two.

10. **Jack Warren Davis**: The prosecutor threatened and intimidated a witness with prosecution for perjury in order to convince her to change her testimony, and then "knowingly created [the] false impression to the jury" that she had voluntarily contacted him and corrected her testimony. Davis v. State, 831 S.W.2d 426, 435-39 (Tex. Crim. App. 1992). Two other witnesses, including a police officer, testified falsely. Ex parte Davis, 957 S.W.2d 9, 10 (Tex. Crim. App. 1997). Key evidence was lost or mishandled and a witness statement was erased by the police. *Id.* at 11.

11. **Robert Drew**: The prosecutor withheld a recorded statement of an eyewitness in which the witness stated that he did not see the actual murder. At trial, the prosecutor attempted to discredit a written statement saying the same thing by arguing that the typist could have mis-transcribed the statement. Drew v. Collins, 964 F.2d 411, 419-20 (5th Cir. 1992); *see also* Chapter Nine.

12. **Wayne East**: The prosecutor concealed impeachment evidence about one of its penalty phase witnesses that would lead the defense to evidence that the witness had serious mental problems and "was incapable of distinguishing between reality and the fantasies caused by her hallucinations." East v. Johnson, 123 F.3d 235, 237-40 (5th Cir. 1997). The prosecution placed more emphasis on the testimony of this witness than on any other evidence of future dangerousness and referred to it at least eight times during closing arguments. *Id.* The Fifth Circuit vacated the death sentence based on this State misconduct. The State also withheld evidence that contradicted trial testimony of state witnesses and called into question the original suspect's alibi. According to the State's trial testimony, Mr. Robinson, the original suspect, was at the Wildcat Apartments, and not the scene of the crime, at the time of the murder. *Id.* at 240. In post-conviction proceedings, a prosecutor submitted an affidavit swearing that "[t]he State had no information placing Troy Robinson at any location other than the Wildcat Apartments early on the morning of November 23, 1981, during the time in which the murder occurred." Affidavit of Patricia Elliot, dated April 12, 1991, provided in Ex parte East, No. 7099-B (Tex. Crim. App.). In fact, the prosecution had in its files affidavits from two of four alibi witnesses for Mr. Robinson, stating that Mr. Robinson left the Wildcat Apartments in the morning before the murder. *Id.*

13. **Joseph Stanley Faulder**: Though Faulder unequivocally asserted his Fifth Amendment right to remain silent, three officers spent three to four hours interrogating Faulder in a hidden room out of the county in which he was arrested, in the presence of a lie detector machine, and illegally extracted a confession from Faulder. Faulder v. State, 611 S.W.2d 630, 633-35 (Tex. Crim. App. 1979). After the Texas Court of Criminal Appeals reversed his conviction and remanded the case for a second trial, the murder victim's son hired two special prosecutors, who retained the services of private investigators and a Canadian law firm to secure a conviction against Faulder. Faulder v. Johnson, 81 F.3d 515, 518-19 (5th Cir. 1996).

14. **Sammie Felder**: After Felder was appointed counsel, giving him a constitutional right to have his lawyer present when the police questioned him, and after the appointed lawyer told the police he wanted to be present at any interrogation, the police proceeded to interrogate Felder (a man of low intelligence) until Felder confessed. Felder v. McCotter, 765 F.2d 1245, 1246-47 (5th Cir. 1985).

15. **Cesar Roberto Fierro**: *See* Chapter Two.

16. **David Earl Gibbs**: The prosecutor called an inmate who testified that the defendant had assaulted him in their cell, but concealed the fact that the disciplinary charges had been dismissed based on evidence the assault was in self-defense. Gibbs v. Johnson, 154 F.3d 253, 255-58 (5th Cir. 1998).

17. **Alvin Urial Goodwin**: A jailhouse snitch testified that he had not been offered any deal in exchange for his testimony, but later admitted that prosecutors indicated "that they would look into pending criminal matters, which included a probation revocation in Travis County and assistance with [his] parole for the Montgomery County charges." On the day that the defendant was sentenced, two charges against the snitch were dismissed. Goodwin v. Johnson, 132 F.3d 162, 185-88 (5th Cir. 1997).

18. **Feryl John Granger**: Granger's codefendant (the State's primary witness) was under a death sentence and a motion for new trial was pending in her case at the time of Granger's trial. The prosecutors concealed the fact that they had assured the codefendant's attorney that, in exchange for codefendant's testimony, her death sentence would be reduced to a term of years. This "understanding" was known to the presiding judge, the prosecutors, the witness's defense attorney and the witness, but was withheld from the defense and the jury. Granger v. State, 653 S.W.2d 868, 872-78 (Tex. Crim. App. 1983); Granger v. State, 683 S.W.2d 387, 388-89 (Tex. Crim. App. 1984).

19. **Ricardo Aldape Guerra**: *See* Chapter Two.

20. **Curtis Paul Harris**: Prosecutor's handwritten notes mentioned that a state witness was the lookout in the robbery of the convenience store the night of the murder. In the margin were the words "leave out." The prosecutor never disclosed the witness's claimed role in the crime to the defense. Harris v. TDCJ, 806 F. Supp. 627, 641-42 (1992).

21. **Gene Hathorn**: *See* Chapter Two.

22. **Bobby Ray Hopkins**: The defendant was held in isolation for two weeks and was then interrogated by a personal friend. Hopkins v. State, No. 71,922, at 6, 8-9 (Tex. Crim. App. Oct. 1, 1997) (unpub.).

23. **Tommy Ray Jackson**: The State concealed four prior inconsistent statements by Jackson's accomplice, a key witness for the prosecution, that could have been used to impeach his testimony. Jackson v. Johnson, 194 F.3d 641, 648-52 (5th Cir. 1999).

24. **Jesse Jacobs**: *See* Chapter Two.

25. **Jerry Lane Jurek**: The defendant, who had an I.Q. of 66, was questioned over a period of two days, for as long as 10 hours at a time, until he signed two written confessions. *See* Chapter Five.

26. **Harold Lane**: *See* Chapter Two.

27. **Andrew Lee Mitchell**: *See* Chapter Two.

28. **Robert Mize**: The prosecutor failed to disclose to the court or defense counsel that a

juror had received a phone call prior to the penalty phase deliberations threatening retaliation if Mize was sentenced to death. Defense equivocation about whether to have judge or jury make sentencing decision would have affected by knowing this. Mize v. State, 754 S.W.2d 732, 737-740 (Tex. Crim. App. 1988).

29. **Joseph Nichols**: *See* Chapter Two.

30. **Jonathan Wayne Nobles**: The prosecution introduced an edited version of the defendant's confession that omitted exculpatory remarks. The district court found the omission of these remarks "at least to some degree, misleading in an important way." Nobles v. Johnson, 127 F.3d 409, 415-18 (5th Cir. 1997).

31. **Johnny Dean Pyles**: *See* Chapter Two.

32. **John Henry Quinones**: During a pretrial hearing on defense motion for discovery, the prosecution falsely and knowingly denied the existence of a tape recording of the defendant's and accomplice's conversation. Quinones v. State, 592 S.W.2d 933, 940-41 (Tex. Crim. App. 1980).

33. **Magdaleno Rodriguez**: The trial court ordered the prosecution to produce "[a]ll arrest records, police records, juvenile records, and records of convictions, if any, of the Defendant." Despite this order, the prosecutor failed to produce police reports concerning defendant's prior, violent unadjudicated offenses. Because of this, defense counsel was misled into thinking that his client had no serious record, questioned a state future dangerousness expert on this basis, and thereby unwittingly opened the door to the expert's testimony concerning these other offenses. Rodriguez v. State, 597 S.W.2d 917, 922-23 (Tex. Crim. App. 1980) (dissenting opinion), *vacated*, 453 U.S. 906 (1981).

34. **Paul Rogeau**: In penalty phase, a Department of Corrections Security Officer testified that he had been involved in an altercation with defendant. The prosecution failed to inform the defense that the officer had been suspended from his job for previous altercations with other inmates; a fact which could have been used for impeachment. Rogeau v. State, 738 S.W.2d 651, 667-68 (Tex. Crim. App. 1987).

35. **David Wayne Spence**: *See* Chapter Nine.

36. **David Wayne Stoker**: *See* Chapter Nine.

37. **Jackie Wayne Upton**: After Upton was appointed counsel and the police were informed by counsel that he had advised Upton not to submit to police interrogation in his absence, the police interrogated Upton and obtained a confession in violation of Upton's Sixth Amendment right to counsel. Upton v. State, 853 S.W.2d 548, 553-58 (Tex. Crim. App. 1993).

38. **Coy Wayne Wesbrook**: The prosecution and police surreptitiously employed a jailhouse informant to gather incriminating information from defendant. This evidence was used, in part, to help satisfy the prosecution's burden of proving defendant would continue to be a future danger. Wesbrook v. State, No. 73,205 (Tex. Crim. App. Sept. 20, 2000) (unpub.).

39. **Claude Lee Wilkerson**: Wilkerson was illegally held in custody without probable cause, and was interrogated by the police in violation of Wilkerson's Fifth amendment right to have counsel present during any custodial interrogation. Wilkerson v. State, 657 S.W.2d 784 (Tex. Crim. App. 1983) (en banc).

40. **Ernest Willis**: *See* Chapter Two.

41. **John Charles Zimmerman**: *See* Chapter Two.

Cases Relying on Jailhouse Snitches

1. **Ernest Orville Baldree**: Baldree v. Johnson, 99 F.3d 659, 661 (5th Cir. 1996).
2. **Antonio Barrientes**: Barrientes v. State, 752 S.W.2d 524, 526 (Tex. Crim. App. 1987).
3. **Robert V. Black**: Black v. State, 816 S.W.2d 350, 354 (Tex. Crim. App. 1991).
4. **Ricky Don Blackmon**: Blackmon v. Scott, 145 F.3d 205, 208-09 (5th Cir. 1999).
5. **Clifford Holt Boggess**: Boggess v. State, 855 S.W.2d 656, 660 (Tex. Crim. App. 1989).
6. **Gayland Bradford**: Bradford v. State, 873 S.W.2d 15, 22 (Tex. Crim. App. 1993).
7. **Thelette Brandon**: Brandon v. State, 599 S.W.2d 567, 570 (Tex. Crim. App. 1979), *vacated by* 453 U.S. 902 (1981).
8. **William Wesley Chappell**: Chappell v. State, No. 72, 666, at 11 (Tex. Crim. App. Oct. 13, 1999) (unpub.).
9. **Clydell Coleman**: Coleman v. State, 881 S.W.2d 344, 358-59 (Tex. Crim. App. 1994).
10. **Kerry Max Cook**: Cook v. State, 940 S.W.2d 623, 626 (Tex. Crim. App. 1996); *see* Chapter Two.
11. **Muneer Mohammed Deeb**: Deeb v. State, 815 S.W.2d 692 (Tex. Crim. App. 1991).
12. **Markham Duff-Smith**: Duff-Smith v. State, 685 S.W.2d 26, 30 (Tex. Crim. App. 1985).
13. **Troy Farris**: Farris v. State, 819 S.W.2d 490, 498 (Tex. Crim. App. 1990), *overruled by* Riley v. State, 889 S.W.2d 290 (Tex. Crim. App. 1993).
14. **Arron Christopher Foust**: Tr. Vol. 40 at 2-40, State v. Foust (CCA No. 73,130).
15. **Aaron Fuller**: Fuller v. State, 829 S.W.2d 191, 197-98, 201 (Tex. Crim. App. 1992).
16. **Johnny Garrett**: Garrett v. State, 682 S.W.2d 301, 304 (Tex. Crim. App. 1984).
17. **David Earl Gibbs**: Gibbs v. Johnson, 154 F.3d 253, 255-58 (5th Cir. 1998).
18. **Alvin Urial Goodwin**: Goodwin v. Johnson, 132 F.3d 162, 185-88 (5th Cir. 1997).
19. **Norman Evan Green**: Green v. State, 840 S.W.2d 394, 398-400 (Tex. Crim. App. 1992).
20. **David Hicks**: Hicks v. State, 860 S.W.2d 419, 425 n. 9 (Tex. Crim. App. 1993).
21. **James Ray Knox**: Knox v. Johnson , __ F.3d __, 2000 WL 1182275, *10-11 (5th Cir. 2000).
22. **Leo Ernest Jenkins**: Jenkins v. State, 912 S.W.2d 793, 799 (Tex. Crim. App. 1993).
23. **Eddie C. Johnson**: Johnson v. State, No. 72,946, at 2 (Tex. Crim. App., June 21, 2000) (unpub.).

24. **T.J. Jones**: Jones v. State, 944 S.W.2d 642, 646 (Tex. Crim. App. 1996).
25. **Justin Lee May**: May v. State, 738 S.W.2d 261, 265-66 (Tex. Crim. App. 1987); May v. Collins, 955 F.2d 299, 304-05 (5th Cir. 1992).
26. **Noble Mays**: Mays v. Collins, No. 7:89-CV-006-A, p. 17 (N.D. Tex. Apr. 15, 1994) (unpub.).
27. **Michael Lee McBride**: McBride v. State, 862 S.W.2d 600, 605 (Tex. Crim. App. 1993).
28. **Jamie Bruce McCoskey**: McCoskey v. State, No. 71, 629 (Tex. Crim. App. May 22, 1996) (unpub.).
29. **Jerry Walter McFadden**: Tr. at 1214-1272, State v. McFadden (CCA No. 69,868).
30. **Ivan Ray Murphy**: Murphy v. Johnson, 205 F.3d 809 (5th Cir. 2000).
31. **Jay Pinkerton**: Pinkerton v. State, 660 S.W.2d 58, 64 (Tex. Crim. App. 1983).
32. **Johnny Dean Pyles**: Petition for Writ of Habeas Corpus, Pyles v. Collins (N.D Tex. No. 97-10809); *see* Chapter Two.
33. **Daniel Earl Reneau**: Reneau v. State, No. 72,812, p. 4 (Tex. Crim. App. Jan. 27, 1999) (unpub.).
34. **Angel Galvan Rivera**: Rivera v. State, 808 S.W.2d 80, 96 (Tex. Crim. App. 1991).
35. **Paul Rogeau**: Rogeu v. State, 738 S.W.2d 651, 667-68 (Tex. Crim. App. 1987).
36. **Patrick F. Rogers**: Rogers v. Director, TDCJ-ID, 864 F. Supp. 584, 595 (E.D. Tex. 1994).
37. **Clifton Charles Russell**: Russell v. State, 665 S.W.2d 771, 778 (Tex. Crim. App. 1983).
38. **Carlos Santana**: Santana v. State, 714 S.W.2d 1, 5 (Tex. Crim. App. 1986).
39. **Roy Gene Smith**: Smith v. State, No. 71009 (Tex. Crim. App. Feb. 24, 1993) (unpub.).
40. **David Wayne Spence**: Spence v. Johnson, 80 F.3d 989, 991-106 (5th Cir. 1996); *see* Chapter Two.
41. **Shannon Charles Thomas**: Thomas v. State, No. 72,710, pp. 5-10 (Tex. Crim. App., March 31, 1999) (unpub.).
42. **Coy Wayne Westbrook**: Westbrook v. State, No. 73,205 (Tex. Crim. App. Sept. 20, 2000) (unpub.).
43. **David Leonard Wood**: Wood v. State, No 71,594, pp. 4-5 (Tex. Crim. App. Dec. 13, 1995) (unpub.).

APPENDIX THREE: PHONY EXPERT CASES

Cases Involving Psychiatric Predictions of Future Violence

1. **Ernest Orville Baldree**: Baldree v. Johnson, 99 F.3d 659, 661 (5th Cir. 1996).
2. **Randall Dale Adams**: Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979).
3. **John Avalos Alba**: Alba v. State, 905 S.W.2d 581 (Tex. Crim. App. 1995).
4. **Steven Brian Alvarado**: Alvarado v. State, 912 S.W.2d 199 (Tex. Crim. App. 1995).
5. **Bernard Eugene Amos**: Amos v. State, 819 S.W.2d 156 (Tex. Crim. App. 1991).
6. **Milton James Anthony**: Simmons v. State, 594 S.W.2d 760 (Tex. Crim. App. 1980).
7. **Artie Armour**: *See* Trial Record, State v. Armour (CCA No. 57,848).
8. **Johnny Armstrong**: Armstrong v. State, 502 S.W.2d 731 (Tex. Crim. App. 1974).
9. **Esequel Banda**: Banda v. State, 890 S.W.2d 42 (Tex. Crim. App. 1994).
10. **Danny Lee Barber**: Ex parte Barber, 879 S.W.2d 889 (Tex. Crim. App. 1994).
11. **Thomas A. Barefoot**: Barefoot v. State, 596 S.W.2d 875 (Tex. Crim. App. 1980).
12. **Billy Joe Battie**: Battie v. State, 551 S.W.2d 401 (Tex. Crim. App. 1977).
13. **Baby Ray Bennett**: Bennett v. State, 742 S.W.2d 664 (Tex. Crim. App. 1987).
14. **Doyle Boulware**: *See* Trial Record, State v. Boulware (CCA No. 50,524).
15. **Gayland Bradford**: Bradford v. State, 873 S.W.2d 15 (Tex. Crim. App. 1993).
16. **Thelette Brandon**: Brandon v. State, 599 S.W.2d 567 (Tex. Crim. App. 1979).
17. **James G. Buffington**: *See* Trial Record, State v. Buffington (CCA No. 68,819).
18. **Stanley Keith Burks**: *See* Trial Record, State v. Burks (CCA No. 60,757).
19. **Jeffrey Caldwell**: *See* Trial Record, State v. Caldwell (CCA No. 70,846).
20. **Kenneth Ray Callaway**: *See* Trial Record, State v. Callaway (CCA No. 62,666).
21. **Domingo Cantu Jr.**: Cantu v. State, 842 S.W.2d 667 (Tex. Crim. App. 1992).
22. **Tony Chambers**: Chambers v. State, 866 S.W.2d 9 (Tex. Crim. App. 1993).
23. **Ronald Curtis Chambers**: Chambers v. State, 568 S.W.2d 313 (Tex. Crim. App. 1978).
24. **Jack Wade Clark**: Clark v. State, 881 S.W.2d 682 (Tex. Crim. App. 1994).
25. **George Edward Clark**: Clark v. State, 627 S.W.2d 693 (Tex. Crim. App. 1981).
26. **Raymond Levi Cobb**: Cobb v. State, 2000 WL 275644 (Tex. Crim. App. 2000).
27. **Wilbur Charles Collins**: Collins v. State, 548 S.W.2d 368 (Tex. Crim. App. 1976).
28. **Anthony Quinn Cook**: Cook v. State, 858 S.W.2d 467 (Tex. Crim. App. 1993).
29. **Kerry Max Cook**: Cook v. State, 821 S.W.2d 600 (Tex. Crim. App. 1991).
30. **Edward Eldon Corley**: *See* Trial Record, State v. Corley (CCA No. 58,703).
31. **William Edward Cortez**: Cortez v. State, 571 S.W.2d 308 (Tex. Crim. App. 1978).
32. **Charles County**: *See* Trial Record, State v. County (CCA No. 68,950).
33. **Justin Seven Cruz**: *See* Trial Record, State v. Perez aka Cruz (CCA No. 64,342).
34. **James Carl Lee Davis**: Davis v. State, 782 S.W.2d 211 (Tex. Crim. App. 1989).
35. **David Wayne DeBlanc**: *See* Trial Record, State v. DeBlanc (CCA No. 69,580).
36. **Justin Dickens**: *See* Trial Record, State v. Dickens (CCA No. 72,129).
37. **Michael Wayne Evans**: *See* Trial Record, State v. Evans (CCA No. 60,016).
38. **Joseph Stanley Faulder**: *See* Trial Record, State v. Faulder (CCA No. 60,554).
39. **John Fearance, Jr.**: Fearance v. State, 620 S.W.2d 577 (Tex. Crim. App. 1980).
40. **John Fearance, Jr.**: Fearance v. State, 771 S.W.2d 486 (Tex. Crim. App. 1988)(retrial).
41. **Kenneth Wayne First**: First v. State, 846 S.W.2d 836 (Tex. Crim. App. 1992).

42. **Miguel Angel Flores**: Flores v. State, 871 S.W.2d 714 (Tex. Crim. App. 1993).
43. **Aaron Lee Fuller**: Fuller v. State, 829 S.W.2d 191 (Tex. Crim. App. 1992).
44. **Tyrone Leroy Fuller**: Fuller v. State, 827 S.W.2d 919 (Tex. Crim. App. 1992).
45. **David Allen Gardner**: Ex Parte Gardner, 959 S.W.2d 189 (Tex. Crim. App 1996).
46. **Selwynn Barry Gholson**: Gholson v. State, 542 S.W.2d 395 (Tex. Crim. App 1976).
47. **Joe Lee Guy**: *See* Trial Record, State v. Guy (CCA No. 71,913).
48. **Curtis Paul Harris**: *See* Trial Record, State v. Harris (CCA No. 66,879).
49. **Danny Ray Harris**: *See* Trial Record, State v. Harris (CCA No 69,366).
50. **Eddie Ray Harris**: Ex Parte Harris, 618 S.W.2d 369 (Tex. Crim. App. 1981).
51. **Robert Henry**: *See* Trial Record, State v. Henry (CCA No. 72,011).
52. **Adolfo Gil Hernandez**: Hernandez v. Johnson, 213 F.3d 243 (5th Cir. 2000).
53. **Mack Oran Hill**: Hill v. Johnson, 210 F.3d 481 (5th Cir. 2000).
54. **Jerry Lee Hogue**: Hogue v. State, 711 S.W.2d 9 (Tex. Crim. App. 1986).
55. **David Lee Holland**: Holland v. State, 761 S.W.2d 307 (Tex. Crim. App. 1988).
56. **Emmett Murray Holloway, Jr.**: Holloway v. State, 613 S.W.2d 497 (Tex. Crim. App. 1981).
57. **Emmett Murray Holloway, Jr.**: Holloway v. State, 691 S.W.2d 608 (Tex. Crim. App. 1984)(retrial).
58. **Anderson Hughes**: Hughes v. State, 562 S.W.2d 857 (Tex. Crim. App. 1978).
59. **Johnny James**: James v. State, 772 S.W.2d 84 (Tex. Crim. App. 1989).
60. **Gary Johnson**: Johnson v. State, 1990 WL 208091 (Tex. Crim. App 1990).
61. **Orien Joiner**: Joiner v. State, 825 S.W.2d 701 (Tex. Crim. App. 1992).
62. **Jessie Ray Jones**: Jones v. McCotter, 767 F.2d 101 (5th Cir. 1985).
63. **Raymond Jones**: Jones v. State, 833 S.W.2d 118 (Tex. Crim. App. 1992).
64. **Edward Lagrone**: Lagrone v. State, 942 S.W.2d 602 (Tex. Crim. App. 1997).
65. **Doil Lane**: Lane v. State, 933 S.W.2d 504 (Tex. Crim. App. 1996).
66. **William Little**: *See* Trial Record, State v. Little (CCA No. 69,476).
67. **James Livingston**: Livingston v. State, 542 S.W.2d 655 (Tex. Crim. App. 1976).
68. **David Martin Long**: *See* Trial Record, State v. Long (CCA No. 69,781).
69. **Henry Lee Lucas**: Lucas v State, 791 S.W.2d 35 (Tex. Crim. App. 1989).
70. **Raymond DeLeon**: Martinez v. State, 867 S.W.2d 30 (Tex. Crim. App. 1993).
71. **Jason Massey**: Massey v. State, 933 S.W.2d 141 (Tex. Crim. App. 1996).
72. **Noble Mays**: Mays v. State, 653 S.W.2d 30 (Tex. Crim. App. 1983).
73. **Noble Mays**: Mays v. State, 726 S.W.2d 937 (Tex. Crim. App. 1986) (retrial).
74. **Michael Lee McBride**: McBride v. State, 862 S.W.2d 600 (Tex. Crim. App. 1993).
75. **Ricky Nolen McGinn**: McGinn v. State, 961 S.W.2d 161 (Tex. Crim. App. 1998).
76. **Laquan Cameron Miles**: Miles v. State, 918 S.W.2d 511 (Tex. Crim. App. 1996).
77. **Charles Mines**: Mines v. State, 852 S.W.2d 941 (Tex. Crim. App. 1992).
78. **John Glen Moody**: Moody v. Johnson, 139 F.3d 477 (5th Cir. 1998)
79. **Mark Milton Moore**: Moore v. State, 542 S.W.2d 664 (Tex. Crim. App. 1976).
80. **Eric Lynn Moore**: Moore v. State, 882 S.W.2d 844 (Tex. Crim. App. 1994).
81. **Michael Patrick Moore**: Moore v. State, 935 S.W.2d 124 (Tex. Crim. App. 1996).
82. **Ricky Eugene Morrow**: *See* Trial Record, State v. Morrow (CCA No. 71,219).
83. **Julius Jerome Murphy**: *See* Trial Record, State v. Murphy (CCA No. 73,194).
84. **Billy Ray Nelson**: *See* Trial Record, State v. Nelson (CCA No. 71,412).
85. **Eric Nenno**: Nenno v. State, 970 S.W.2d 549 (Tex. Crim. App. 1998).

86. **Stephen Nethery**: Nethery v. State, 692 S.W.2d 686 (Tex. Crim. App. 1985).
87. **Charles Eugene O'Brient, Jr.**: *See* Trial Record, State v. O'Brient (CCA No. 61,870).
88. **Jermiah B. O'Pry**: *See* Trial Record, State v. O'Pry (CCA No. 66,144).
89. **Calvin Loyd Padgett**: Ex parte Padgett, 673 S.W.2d 303 (Tex. Crim. App. 1984).
90. **Johnny Penry**: Penry v. State, 903 S.W.2d 715 (Tex. Crim. App. 1995).
91. **James Willard Pierson**: *See* Trial Record, State v. Pierson (CCA No. 63,437).
92. **Daniel Angel Plata**: *See* Trial Record, State v. Plata (CCA No. 72,639).
93. **David Powell**: Powell v. State, 767 S.W.2d 759 (Tex. Crim. App. 1989).
94. **Robert Michael Purtell**: Purtell v. State, 761 S.W.2d 360 (Tex. Crim. App. 1988).
95. **Johnny Pyles**: Pyles v. State, 755 S.W.2d 98 (Tex. Crim. App. 1988).
96. **Damon Jerome Richardson**: Richardson v. State, 879 S.W.2d 874 (Tex. Crim. App. 1993).
97. **Michael Riley**: *See* Trial Record, State v. Riley (CCA No. 72,229).
98. **Howie Ray Robinson**: *See* Trial Record, State v. Robinson (CCA No. 51,800).
99. **Magdaleno Rodriguez**: Rodriguez v. State, 597 S.W.2d 917 (Tex. Crim. App. 1980).
100. **Patrick F. Rogers**: Rogers v. State, 774 S.W.2d 247 (Tex. Crim. App. 1989).
101. **John Satterwhite**: Satterwhite v. State, 726 S.W.2d 81 (Tex. Crim. App. 1986).
102. **Tommy Lynn Sells**: State v. Sells, (sentenced to death on Sept. 19, 2000).
103. **Robert Alan Shields**: *See* Trial Record, State v. Shields (CCA No. 72,278).
104. **John Charles Shippy**: Shippy v. State, 556 S.W.2d 246 (Tex. Crim. App. 1977).
105. **Dale Wayne Sigler**: Sigler v. State, 865 S.W.2d 957 (Tex. Crim. App. 1993).
106. **John Charles Simmons**: Simmons v. State, 594 S.W.2d 760 (Tex. Crim. App. 1980).
107. **Doyle Edward Skillern**: Sanne v. State, 609 S.W.2d 762 (Tex. Crim. App. 1980).
108. **Ernest Benjamin Smith**: Smith v. State, 540 S.W.2d 693 (Tex. Crim. App. 1976).
109. **Larry Smith**: Smith v. State, 683 S.W.2d 393 (Tex. Crim. App. 1984).
110. **Juan Soria**: Soria v. State, 933 S.W.2d 46 (Tex. Crim. App. 1996).
111. **Oswaldo Regalado Soriano**: *See* Trial Record, State v. Soriano (CCA No. 71914).
112. **David Wayne Spence**: Spence v. State, 795 S.W.2d 743 (Tex. Crim. App. 1990).
113. **David Stoker**: Stoker v. State, 788 S.W.2d 1 (Tex. Crim. App. 1989).
114. **John Russell Thompson**: Thompson v. State, 621 S.W.2d 624 (Tex. Crim. App. 1981).
115. **Gerald Wayne Tigner, Jr.**: *See* Trial Record, State v. Tigner (CCA No. 72,809).
116. **Jackie Wayne Upton**: *See* Trial Record, State v. Upton (CCA No. 69,717).
117. **Hai Hai Vuong**, *See* Trial Record, State v. Vuong (CCA No. 70,402).
118. **Robert Excell White**: *See* Trial Record, State v. White (CCA No. 51,123).
119. **James Lewis Wilder**: *See* Trial Record, State v. Wilder (CCA No. 57,848).
120. **Alton Von Byrd**: Von Byrd v. State, 569 S.W.2d 883 (Tex. Crim. App. 1978).
121. **Todd Willingham**: Willingham v. State, 897 S.W.2d 351 (Tex. Crim. App. 1995).
122. **Jeffrey Lee Wood**: Wood v. State, 18 S.W.3d 642 (Tex. Crim. App. 2000).
123. **Billy Joe Woods**: Ex Parte Woods, 745 S.W.2d 21 (Tex. Crim. App. 1988).

Cases Involving Hair Comparison Analysis

1. **Caruthers Alexander**: Alexander v. State, 740 S.W.2d 749 (Tex. Crim. App. 1987).
2. **Richard Andrade**: Andrade v. State, 700 S.W.2d 585 (Tex. Crim. App. 1985).
3. **Esequel Banda**: Banda v. State, 890 S.W.2d 42 (Tex. Crim. App. 1994).
4. **Michael Blair**: *See* Trial Record, State v. Blair (CCA No. 72,009).
5. **Charles Anthony Boyd**: Boyd v. State, 811 S.W.2d 105 (Tex. Crim. App. 1991).
6. **Benjamin Herbert Boyle**: Boyle v. State, 820 S.W.2d 122 (Tex. Crim. App. 1989).
7. **Clarence Brandley**: Brandley v. State, 691 SW 2d 699 (Tex. Crim. App. 1985).
8. **Domingo Cantu Jr.**: Cantu v. State, 842 S.W.2d 667 (Tex. Crim. App. 1992).
9. **Ruben Ramirez Cardenas**: Cardenas v. State, ___ S.W.2d ___, 2000 WL 489759 (Tex. Crim. App. April 26, 2000).
10. **Daniel Lee Corwin**: *See* Trial Record, State v. Corwin (CCA No. 71,072).
11. **James Carl Lee Davis**: Davis v. State, 782 S.W.2d 211 (Tex. Crim. App. 1989).
12. **Tyrone Leroy Fuller**: Fuller v. State, 827 S.W.2d 919 (Tex. Crim.App. 1992).
13. **Karl Hammond**: Hammond v. State, 799 S.W.2d 741 (Tex. Crim. App. 1990).
14. **Curtis Paul Harris**: Harris v. State, 738 S.W.2d 207 (Tex. Crim. App. 1986).
15. **Samuel Christopher Hawkins**: Hawkins v. State, 660 S.W.2d 65 (Tex. Crim. App. 1983).
16. **Tommy Ray Jackson**: Jackson v. State, 745 S.W.2d 4 (Tex. Crim. App. 1988).
17. **Eddie James Johnson**: Johnson v. State, 871 S.W.2d 183 (Tex. Crim. App. 1993).
18. **Clarence Lackey**: Lackey v. State, 819 S.W.2d 111 (Tex. Crim. App. 1989).
19. **Charlie Livingston**: Livingston v. State, 739 S.W.2d 311 (Tex. Crim. App. 1987).
20. **Kenneth McDuff**: McDuff v. State, 939 S.W.2d 607 (Tex. Crim. App. 1997).
21. **Frank McFarland**: McFarland v. State, 845 S.W.2d 824 (Tex. Crim. App. 1992).
22. **Ricky Nolan McGinn**: Ex parte McGinn, ___ S.W.2d ___, 2000 WL 763245 (Tex. Crim. App. June 14, 2000).
23. **John Glen Moody**: *See* Trial Record, State v. Moody (CCA No. 70,883).
24. **Robert Brice Morrow**: *See* Trial Record, State v. Morrow (CCA No. 73,023).
25. **Pedro Cruz Muniz**: Muniz v. State, 851 S.W.2d 238 (Tex. Crim. App. 1993).
26. **Jonathan Wayne Nobles**: Nobles v. Johnson, 127 F.3d 409 (5th Cir. 1997).
27. **Kenneth Julian Palafox**: Palafox v. State, 608 S.W.2d 177 (Tex. Crim. App. 1979).
28. **Scott Pannetti**: *See* Trial Record, State v. Pannetti (CCA No. 72,230).
29. **Jessie Joe Patrick**: Patrick v. State, 906 S.W. 2d 481 (Tex. Crim. App. 1995).
30. **Michael Eugene Sharp**: Sharp v. Johnson, 107 F.3d 282 (5th Cir. 1997).
31. **Jerry McFadden**: *See* Trial Record, State v. McFadden (CCA No. 69,868).
32. **Kenneth Dee Stogsdill**: Stogsdill v. State, 552 S.W.2d 481 (Tex. Crim. App. 1977).
33. **Jim Vanderbilt**: Vanderbilt v. State, 629 SW 2d 709 (Tex. Crim. App. 1981).
34. **Alton Von Byrd**: Von Byrd v. State, 569 S.W.2d 883 (Tex. Crim. App. 1978).
35. **Jackie Barron Wilson**: Wilson v. State, 863 S.W.2d 59 (Tex. Crim. App. 1993).
36. **Billy Joe Woods**: Woods v. State, 569 S.W.2d 901 (Tex. Crim. App. 1978).

Cases Involving Bite Mark Comparison

1. **Mario Marquez**: Marquez v. State, 725 SW 2d 217 (Tex. Crim. App. 1987).
2. **Jessie Joe Patrick**: Patrick v. State, 906 S.W. 2d 481 (Tex. Crim. App. 1995).
3. **David Wayne Spence**: Spence v. State, 795 SW 2d 743 (Tex. Crim. App. 1990).

APPENDIX FOUR: RACE DATA

Table A: Montgomery County

County Seat: Conroe, Texas.
Population: 287,644.

White non-Hispanic population:	85.3%
Black population:	4.6%
Latino population:	8.7%
Asian population:	1%
Native American:	.4%

Approximately 11 homicides per year.

1995	13 homicides
1996	12 homicides
1997	7 homicides
1998	7 homicides
1999	19 homicides

Victim	Date	R/G	Suspect/Defendant	R/G	Outcome
Joseph, Yasin Selik	990609	AM	Ontario Carvon Williams	BM	plead to charged murder; 45 yrs TDCJ
Pandya, Rajendraprasad, Ratanial	960211	AM	James Warren Templin Neil Travis Giese	WM WM	State reduced CM to murder; Templin pled to 40 yrs TDCJ State reduced CM to murder; Giese pled to 40 yrs TDCJ
Bui, Thanh Van	951125	AM	Rodney Eugene Starcher	WM	murder trial; serving life
Alidam, Amjad	990920	AM	Ali Mahd Awad	AM	No billed
Momin, Rahem Jullah	990120	AM			No charges; robbery
Robinson, Rosalyn Ann	990716	BF	Larry Allen Hayes	WM	guilty of CM: death
Griffin, Nakesha Lynn	990216	BF	Don Ramon Hines	BM	gulty of charged murder after trial; 75 yrs TDCJ
Woodley, Richard, Jr.	990106	BM	Jeffrey Lamont Hudson	BM	Hudson died in custody

Williams, Jonathan Lynn	950725	BM	6Jesse Gilbert Gonzales	LM	CM reduced to att murder; pled 20 yrs TDCJ
			Quinton Leo Burford	WM	
			Ernest Olivos, Jr.	LM	CM reduced to agg kidnapping; 8 yrs TDCJ
			Nick Ortiz	LM	CM reduced to agg kidnapping; 8 yrs TDCJ
			Ruben Esparza	LM	CM reduced to agg kidnapping; 5 yrs TDCJ
			Andrew Sanchez Selph	WM	CM reduced to agg kidnapping; 5 yrs TDCJ
			Oscar Andres Vazquez	LM	CM reduced to Agg Kidnap; 12 yrs TDCJ
			John Chris Hernandez	WM	guilty of att CM after trial; Life
			Gustavo Pena	LM	CM reduced to agg Kidnap; 5 yrs TDCJ
			Joseph Roger Valentine	WM	CM reduced to agg kidnap; 15 yrs TDCJ
			Artemio Amado Saldivar	LM	CM reduced to agg kidnap; 8 yrs TDCJ
			Lionel Pena Jr	LM	CM reduced to att CM; 10 yrs probation
			Jose Luis Longoria	LM	CM reduced to kidnap; 6 yrs probation
Moore, Mike Alexander	961224	BM	Paul Regis Stewart	BM	pending murder charge
Rodriguez, Clemencia G.	980730	LF			No arrests
Guevara, Martha Sixtos Martinez	960616	LF			Fled to Mexico
Garza, Cesario, Jr.	960904	LM			No suspects
Zapata, Ruperto Tojin	991127	LM	Israel Longoria	LM	pending murder charge
Guadarrama, Gilberto Carba	980301	LM			Suspects fled park
Hernandez, Aurelio, Jose	980206	LM			No arrests
Torres, Juan Diego	990324	LM	Victor Manuel Najara	LM	Not charged
Brown, Mary E.	980524	WF	Henry Lee Toney	WM	Murder charge; dismissed & refiled
Morgan, Misty	970609	WF	Russell Wayne Lefleur	WM	guilty after trial of CM; state declined to seek death
			Lonnie LaBonte	WM	convicted after trial; life
			Melissa Nicole Branon	WF	CM charge; no dispo
Hayes, Mary Faust	990716	WF	Larry Allen Hayes	WM	guilty of CM; death

Dorsey, Pamela Gale	960514	WF	Charles Ray Dorsey	WM	jury trial; found guilty as charged to murder: Life
Trotter, Melissa	990103	WF	Larry Ray Swearingen	WM	Convicted of CM; death
Cleary, Sarah V.	970609	WF	Russell Wayne Lefleur Lonnie LaBonte Melissa Nicole Branon	WM WM WF	guilty after trial of CM; State declined to seek death; life sentence Convicted after trial; Life CM charge; no dispo
Redonios, Sandra Lee	960505	WF	Ronald Dewey Bledsoe	WM	pled to charged murder; 50 yrs TDCJ
Holland, Ruth Ann	980909	WF	Joe Hernandez Gutierrez	LM	guilty of charged murder after trial; 12 years
Bice, Roberta	951018	WF	Milton Paul Dubose	WM	guilty of charged murder; 85 years to serve
Stewart, Panzy Lucille	950823	WF			unsolved
Harrison, Kathryn S.	960122	WF	Richard William Kutzner	WM	guilty of CM; death
Thompson, Margie Moya	960928	WF	Samuel S. Gonzales	LM	charged murder
Bell, Kelvin Dewonn	950529	WM	Thomas Earl Massey Clarence Leon Clewis Maverick Plattenburg	BM BM BM	Capital charge dismissed because D pled to a different Robbery charge; 10 yrs TDCJ guilty after trial of CM; Life in TDCJ guilty of CM; Life
Rivet, Tristen Sky	980512	WM	Robbins, Neil Hampton	WM	Capital pending
Christensen, Charles	991203	WM	Michael Knox	WM	Murder charge dismissed; reindicted for manslaughter; pending
Nelson, Herman Stanley	971025	WM	Diana Lynn Miskell	WF	charged with injury to child and murder; guilty of murder after trial; life
Sneed, Eric Deshaun	990601	WM	Mark Dewayne Lee	BM	murder charge pending
Pearson, Donald Ray	960704	WM	Golden, Lejuan Alexandria; Christopher Brock; Miguel Angel Zapata	BM, BM, LM	Capital trial; judge sentencing–all serving Life (14, 14 and 16 yoa)

Stokes, Richard Glenn	951119	WM	Joanie L. Hennessey	WF	charged with murder; pled to crim negligent homicide; 2 yrs to serve; 5 yrs probation
Cedars, John M.	960921	WM	Eddie Shayne Brown; James R. Long	BM WM	charged with CM; plead to agg assault, 25 yrs. guilty of CM; state did not seek death
Land, Brantley Cole	950505	WM	Jesse Alvin Land III	WM	murder charge; pled to injury to child; 5 yrs TDCJ
Halfpap, Wolfgang	980903	WM	Sharon Annette Copeland	WF	plead to charged murder; 45 yrs TDCJ
Willtrout, Timothy Andrew	970313	WM	Randy Lee Holcombe	WM	charged with murder; found guilty of manslaughter after trial; 5 yrs probation
Meiberger, Cody Austin	980805	WM			Infant; no charges
Martinez, Walter Alexander	961007	WM	James Edward Herzog Heriberto Lujan Jonathan Lee Ford	WM LM WM	Murder charge; plea to murder; serving 25 years Lujan was convicted in another case; State dismissed the charges Charged murder; pled to att murder ; 20 yrs TDCJ
Yaws, Ronnie Dale	960608	WM	Curtis Lorenzo Melton	WM	charged with murder; found guilty of manslaughter; 20 yrs to serve
Curl, Aaron Bradley	980529	WM	Ricky Joe Cole	WM	charged with murder; pled to manslaughter; 4 yrs TDCJ
Hammond, Wayne E.	951210	WM	Joseph Le Normand	WM	Capital murder trial; serving life; state elected not to seek death
Sanchez, Joseph Wolfgang	970305	WM	Benjamin Trinidad Trujillo	WM	found guilty after trial of 2nd degree murder as charged
Stromberg, Norman	990724	WM	Timothy Donald Bean	WM	charged murder; no dispo
Bonds, Charles Glen	990728	WM	Charles Lacaze	WM	Convicted; juvenile

Wenzel, Gary Ralph	990916	WM	Denice Lynn Savage Roger Dale Smith Jr	WF WM	pled to charged murder; 30 yrs TDCJ pending murder charge
Stewart, John Marshall	950823	WM			unsolved
Fults, Ricky Wayne	991008	WM	Ronald Wayne Everett	WM	charged murder; reindicted for manslaughter; pled to 9 yrs TDCJ
Vancalditz, Paul Dickson	971031	WM	Police		No billed
Herring, James Leslie	950319	WM	Patricia Ann Herring	WF	No charge; self-defense
Odstreil, William Gregory	971004	WM	NA		No arrest
Everett, Samuel McKay	950916	WM	Irene Vela Flores Hilton Crawford	WF WM	Charged with CM; pled to agg kidnap; 25 yrs TDCJ Guilty of CM; death

Five people have been executed: 4W; 1B (all victims white; 2M and 3F)
1) Joseph Starvaggi, W/M (Victim: W/M)
2) G. W. Green, W/M (Victim: W/M)
3) Daniel Corwin, W/M (Victims: 3W/F)
4) Glen McGinnis, B/M (Victim W/F)
5) David Gibbs, W/M (Victims 2W/F)

Eight people on death row: all white; (Victims 5W; 2U; 5F; 2M)
1) Larry Swearingen, W/M (Victim: W/F)
2) Larry Hayes, W/M (Victims: W/F, B/F)
3) Hilton Crawford, W/M (Victim: W/M)
4) James Colburn, W/M (Victim: W/F)
5) Dennis Dowthitt, W/M (Victims: 2W/F)
6) Gerald Casey, W/M (Victim: W/F)
7) Alvin Goodwin, W/M (Victim: W/M)
8) Richard William Kutzner, WM (Victim: WF)*

Released from Death row:
Clarence Brandley, BM (Victim WF)*

*These defendants were prosecuted by Montgomery County, but tried on changes of venue before juries in other counties, and, therefore, appear on the TDCJ list as having been tried in other counties although they reflect the discretionary actions of the Montgomery County District Attorney's office.

Table B: TDCJ Death Row List

R/G	Defendant	Victim(s)	Date	Trial County
BM	Patterson, Kelsey	WF, WM	1993	Anderson
WM	Cook, Bobby Glen	WM	1994	Anderson
WM	Delk, Monty Allen	WM	1988	Anderson
WM	Lewis, David	UF	1987	Angelina
BM	Moddon, Willie Mack	WF	1985	Angelina
BM	Earvin, Harvey	WM	1977	Angelina
LM	Sosa, Pedro Solis	WM	1985	Atascosa
WM	Bagwell, Dennis	4WF	1996	Atascosa
LM	Reyes, Gilberto Guadalupe	LF	2000	Bailey
LM	Hernandez, Ramiro	WM	2000	Bandera
BM	Reed, Rodney	WF	1998	Bastrop
LM	Cannady, Rogelio	B/LM	1997	Bee
BM	Black, Christopher, Sr.	3BF	1998	Bell
LM	Guillen, Derrick Jermaine	WF	1999	Bell
BM	Moore, Frank	2BM	1996	Bexar
WM	Kimmell, Clifford Allen	2UF, UM	2000	Bexar
LM	Prieto, Arnold	2LF, LM	1995	Bexar
BM	Jasper, Ray	WM	2000	Bexar
LM	Perez, Robert Martinez	2LM	1999	Bexar
LM	Leal, Humberto, Jr.	LF	1995	Bexar
BM	Foster, Kenneth	WM	1997	Bexar
BM	Richardson, Miguel A.	UM	1981	Bexar
BM	Johnson, Kia Levoy	WM	1995	Bexar
LM	Amador, John Joe	WM	1995	Bexar
LM	Salazar, Cervantes	LM	1998	Bexar
LM	Ruiz, Roland, Jr.	LF	1995	Bexar
BM	Bartee, Anthony	UM	1998	Bexar
WM	Little, Leo Gordon	LM	1999	Bexar
WM	Kerr, Ricky Eugene	WF, WM	1995	Bexar
BM	Cockrell, Timothy	WF	1993	Bexar
LM	Arroyo, Randy	LM	1998	Bexar
LM	Trevino, Carlos	LF	1997	Bexar
BM	Alexander, Caruthers	UF	1982	Bexar
LM	Rodriguez, Steve	WF	1992	Bexar
LM	Guiterrez, Vincent	LM	1998	Bexar
LM	Flores, Andrew	LM	1994	Bexar
WM	Moore, Jonathan Bryant	LM	1997	Bexar
LM	Salazar, Luis	LF	1998	Bexar
LM	Moreno, Jose Angel	LM	1987	Bexar
LM	Martinez, David	LF, LM	1998	Bexar
LM	Hinojosa, Richard	WF	1997	Bexar
BM	Brooks, Carl L.	BM	1997	Bexar
LM	Gonzales, Gabriel	WF	1997	Bexar
LM	Vasquez, Manuel	LF	1999	Bexar
BM	Brown, Mauriceo M.	BM	1997	Bexar
BM	Murphy, Julius Jerome	UM	1998	Bowie

BM	Burns, William Kendrick	WM	1981	Bowie
BM	Pondexter, Willie Earl, Jr.	WF	1994	Bowie/Red River
BM	Henderson, James Lee	UF	1994	Bowie
BM	Banks, Delma Jr.	WM	1980	Bowie
BM	Solomon, Christopher	WM	1999	Bowie
BM	Wyatt, William E. Jr.	BM	1998	Bowie
WM	Taylor, Lee Andrew	BM	2000	Bowie
WM	Ethridge, Gary Wayne	UF	1990	Brazoria
LM	Martinez, Virgil	2LF, 2LM	1998	Brazoria
BM	Graves, Anthony Charles	5BF, BM	1994	Brazoria
WM	Baker, Stanley Allison, Jr.	WM	1995	Brazos
BM	Blue, Carl Henry	BF	1995	Brazos
WM	Shamburger, Ron Scott	WF	1995	Brazos
WM	Brewer, Lawrence Russell	BM	1999	Brazos/Jasper
WM	McGinn, Ricky Nolan	WF	1995	Brown
LM	Monterrubio, Jose Ignacio	LF	1994	Cameron
WM	Colella, Paul Richard	2WM	1992	Cameron
LM	Rivera, Jose Alfredo	LM	1994	Cameron
LM	Barrientes, Antonio	LM	1985	Cameron
LM	Aguilar, Jesus Ledesma	LF, LM	1996	Cameron
LM	Gutierrez, Ruben	LF	1999	Cameron
WM	Busby, Jasen Shane	2WF	1996	Cherokee
LM	Garcia, Gustavo Julian	WM	1992	Collin
BM	Bruce, Kenneth Eugene	WF	1992	Collin
BM	Moore, Eric Lynn	WF	1991	Collin
WM	Hood, Charles Dean	WF, WM	1990	Collin
BM	Blair, Michael Nawee	WF	1994	Collin/Midland
LM	Saldano, Victor	WM	1996	Collin
LM	Alba, John Avalos	LF	1992	Collin
LM	Hernandez, Rodolfo Baiza	LM	1985	Comal
WM	Gallamore, Samuel Clark	2WF, WM	1994	Comal
WM	Moore, Michael Patrick	UF	1994	Coryell
BM	Thomas, Kenneth Dewayne	BF, BM	1987	Dallas
BM	Hearn, Yokamon	WM	1998	Dallas
WM	Hittle, Daniel Joe	WM	1990	Dallas
BM	Bradford, Gayland Charles	WM	1990	Dallas
BM	Cooks, Vincent Edward	WM	1988	Dallas
WM	Morrow, Ricky Eugene	UM	1983	Dallas
BM	Rudd, Emerson	BM	1989	Dallas
WM	Jacobs, Bruce Charles	UM	1987	Dallas
BM	Smith, Laroyce Lathair	UF	1991	Dallas
WM	Reed, Jonathan Bruce	UF	1979	Dallas
BM	Johnson, Derrick Lamone	BF	1999	Dallas
BM	Turner, Carlton Aker	BF, BM	1999	Dallas
BM	Hughes, Tommie	UF	1998	Dallas
BM	Lewis, Andre Anthony	WM	1987	Dallas
WM	Robertson, Mark Allen	WF, 2WM	1991	Dallas
WM	Wright, Gregory Edward	WF	1998	Dallas
WM	Hopper, George Anderson	UF	1992	Dallas
WM	Feldman, Douglas Alan	2UM	1999	Dallas
BM	Hudson, Robert	BF	2000	Dallas

BM	Miller-el, Thomas Joe	WM	1986	Dallas
LM	Chavez, John	LM	1996	Dallas
WM	Patrick, Jessie Joe	WF	1990	Dallas
WF	Routier, Darlie	2WM	1997	Dallas
WM	Adams, John	WF	1998	Dallas
BM	Chambers, Ronald C.	WF, WM	1976	Dallas
BM	Newton, Rodrick	UU	2000	Dallas
BM	Mosley, Kenneth	WM	1997	Dallas
BM	Lave, Joseph Roland	2WM	1994	Dallas
LM	Garcia, Fernando	LM	1989	Dallas
LM	Medina, Javier Suarez	LM	1989	Dallas
LM	Wilson, Jackie Barron	WF	1989	Dallas
BM	Patterson, Toronto Markkey	3BF	1996	Dallas
BM	Dorsey, Leon IV	BM	2000	Dallas
WM	Hines, Bobby Lee	WF	1992	Dallas
BM	Williams, Bruce Lee	AF	1999	Dallas
BM	Jones, George Alarick	BM	1995	Dallas
WM	Chamberlain, Carl Eugene	WF	1997	Dallas
LM	Flores, Charles Don	WF	1999	Dallas
BF	McCarthy, Kimberly Legayle	WF	1998	Dallas
BM	Roderick, Newton	BM	2000	Dallas
WM	Carpenter, David Lynn	WF	1999	Dallas
BM	Nealy, Charles	AM	1998	Dallas
WM	Clark, James Lee	WF	1994	Denton
WM	Summers, Gregory Lynn	WF, 2WM	1991	Denton
LM	Gonzalez, Michael Dean	WF, LM	1995	Ector
WM	Rowton, Edward	WF	2000	Ector
WM	Wood, David L.	WF	1993	El Paso
LM	Gomez, Ignacio	3WM	1998	El Paso
LM	Rivera, Angel	WF	1986	El Paso
BM	Ford, Tony Egbuna	LM	1993	El Paso
LM	Ortiz, Ricardo	LM	1999	El Paso
LM	Alvarado, Steven Brian	LF, LM	1993	El Paso
LM	Fierro, Cesar	LM	1980	El Paso
WM	Massey, Jason Eric	WF, WM	1994	Ellis
BM	Mines, Charles E., Jr.	LF	1989	Ellis
BM	Mathis, Milton Wuzael	BM, UM	1999	Fort Bend
WM	Knox, James Roy	LM	1986	Galveston
BM	Walbey, Gaylon George, Jr.	BF	1994	Galveston
WM	Shields, Robert Alan, Jr.	WF	1995	Galveston
LM	Varelas, Santiago Margarito Rangel	WF	1995	Galveston
WM	Reneau, Daniel Earl	WM	1997	Gillespie
WM	Murphy, Ivan, Jr.	WF	1991	Grayson
WM	Bower, Lester Leroy	4WM	1984	Grayson
BM	Jones, Anzel Keon	WF	1996	Grayson
WM	Kelly, Alvin Andrew	WF, 2WM	1991	Gregg
BM	Jones, T.J.	WM	1994	Gregg
BM	Mosley, Daroyce Lamont	WF, 3WM	1995	Gregg
WM	Hyde, Ronnie	WM	2000	Grimes
BM	Guy, Joe Lee	WM	1994	Hale
BM	Cathey, Eric Dewayne	LF	1997	Harris

BM	Johnson, Lonnie Earl	2UM	1995	Harris
WM	Coulson, Robert O.	3WF, 2WM	1994	Harris
BM	Williams, Jefferey	BM	2000	Harris
BM	Jackson, James Lewis	3BF	1998	Harris
BM	Coleman, Christopher	3LM	1997	Harris
LM	Elizalde, Jamie,Jr.	2LM	1997	Harris
LM	Rosales, Mariano Juarez	LF	1985	Harris
LM	Martinez, Raymond Deleon	LM	1984	Harris
BF	Newton, Frances Elaine	BF, 2BM	1988	Harris
BM	Broxton, Eugene	2UF	1992	Harris
BM	Whittaker III, George H.	BF	1996	Harris
BM	Goynes, Theodore	BF	1992	Harris
WM	Pippin, Roy Lee	2LM	1995	Harris
LM	Estrada, Larry Edgar	AM	1998	Harris
AM	Lim, Kim Ly	AF, AM	1992	Harris
BM	Jackson, Donell	BM	1996	Harris
BM	Hughes, Preston III	BF, BM	1989	Harris
LM	Resendiz, Angel	LM	2000	Harris
BM	McWilliams, Frederick Patrick	LM	1997	Harris
BM	Clay, Keith Bernard	AM	1997	Harris
LM	Garcia, Juan	LM	2000	Harris
AM	Tong, Chuong Duong	AM	1998	Harris
BM	Tennard, Robert	BM	1987	Harris
LM	Rodriguez, Lionell	AF	1991	Harris
BM	Kincy, Kevin Christopher	BM	1996	Harris
WM	Rhoades, Rick Allan	2WM	1992	Harris
LM	Medellin, Jose Ernesto	2WF	1995	Harris
BM	McGee, Calvin Wilson	BF	1999	Harris
BM	McFarland, George Edward	AM	1992	Harris
BM	Jennings, Robert Mitchell	BM	1989	Harris
LM	Medina, Anthony Shawn	LF, LM	1996	Harris
WM	Rowell, Robert	LM	1994	Harris
LM	Escobedo, Joel	LM	1999	Harris
BM	Trottie, Willie Tyrone	BF, BM	1993	Harris
LM	Dennes, Reinaldo	LM	1997	Harris
BM	Shannon, Willie Marcel	LM	1993	Harris
BM	Alix, Franklin DeWayne	BM	1998	Harris
LM	Maldonado, Virgilio R.	LM	1997	Harris
BM	White, Garcia Glen	2BF	1996	Harris
BM	Jackson, Jimmy	BM	1967	Harris
BM	Thompson, Robert	AM	1998	Harris
WM	Mays, Rex Warren	2WF	1995	Harris
AM	Rabbani, Syed Mohmed	AM	1988	Harris
LM	Rocha, Felix	LM	1998	Harris
WM	Arthur, Mark Sam	LM	1998	Harris
BM	Wheatfall, Daryl Keith	BF, BM	1992	Harris
BM	Mamou, Charles Jr.	BF, BM	1999	Harris
BM	Reese, Raymond	BF, BM	1999	Harris
BM	Conner, Johnny Ray	UF	1999	Harris
BM	Thomas, Shannon Charles	LF, 2LM	1996	Harris
BM	Williams, Richard Head	BF	1998	Harris

BM	McGowen, Roger Wayne	UF	1987	Harris
WM	Thompson, Charles Victor	UF, UM	1999	Harris
BM	Richards, Michael W.	UF	1987	Harris
LM	Plata, Daniel Angel	AM	1996	Harris
LM	Cantu, Peter Anthony	2WF	1994	Harris
BM	Green, Edward, III	UF, UM	1993	Harris
WM	Napier, Carl Edward	UF, 2UM	1987	Harris
BM	Butler, Steven Anthony	UF	1988	Harris
BM	Carr, Darrell Glenn	UF	1993	Harris
BM	Sonnier, Derrick J.	BF, BM	1993	Harris
LM	Villanueve, Jorge	LF	1996	Harris
BM	Madison, Deryl	UF	1989	Harris
BM	Matchett, Farley Charles	UF	1993	Harris
BM	Buck, Duane Edward	BF, BM	1997	Harris
BM	Eldridge, Gerald Cornelius	2BF	1994	Harris
BM	Johnson, Johnny Ray	UF	1996	Harris
BM	Campbell, Robert James	UF	1992	Harris
WM	Alexander, Guy Stephen	UF	1989	Harris
BM	Demery, Gregory Wayne	UF	1995	Harris
BM	O'Brien, Sean Derrick	2WF	1994	Harris
BM	Dudley, Marion Butler	LF, 2LM	1995	Harris
BM	Smith, Clyde, Jr.	UM	1994	Harris
BM	Morris, Lorenzo	UM	1992	Harris
WM	Moody, Stephen Lindsey	UM	1993	Harris
BM	Green, Dominque Jerome	UM	1993	Harris
BM	Brown, Arthur, Jr.	1LF, 2LM, 1BF	1994	Harris
BM	Rachal, Rodney Charles	UM	1993	Harris
BM	Simms, Demetrius Lott	BF	1996	Harris
LM	Matamoros, John Reyes	UM	1993	Harris
LM	Rousseau, Anibal Garcia	UM	1989	Harris
WM	Nelson, Marlin Enos	UM	1988	Harris
BM	Slater, Paul Wayne	2BM	1996	Harris
BM	Williams, Nanon McKewn	UM	1995	Harris
BM	Rivers, Warren Darrell	UM	1988	Harris
LM	Alvarez, Juan Carlos	2LM	1999	Harris
WM	Ripkowski, Britt Allen	2WF	1999	Harris
BM	Selvage, John Henry	LM	1980	Harris
BM	Aldridge, Rulford	UM	1990	Harris
BM	Jordan, Clarence Curtis	UM	1978	Harris
BM	Norris, Michael Wayne	BF, BM	1987	Harris
LM	Bernal, Johnnie	UM	1995	Harris
WM	Burdine, Calvin Jerold	UM	1984	Harris
BM	Jackson, Derrick	2UM	1998	Harris
BM	Wilson, Geno Capoletti	UM	1999	Harris
WM	Miller, Donald	2WM	1982	Harris
BM	Mitchell, Gerald Lee	UM	1986	Harris
LM	Villarreal, Raul Omar	2WF	1994	Harris
WM	Draughon, Martin Allen	LM	1987	Harris
BM	Smith, Roy Gene	UM	1990	Harris
LM	Perez, Efrain	2WF	1994	Harris
LM	Ayestas, Carlos Manuel	LF	1997	Harris

BM	Smith, Robert	UM	1992	Harris
BM	Washington, Willie T.	UU	1986	Harris
WM	Janecka, Allen Wayne	WM	1981	Harris
WM	McCosky, Jamie Burce	WM	1993	Harris
WF	Perillo, Pamela	WM	1980	Harris
WM	Thomas, Danny Dean	WF	1982	Harris
BM	Cotton, Marcus B.	WM	1998	Harris
LM	Lopez, Michael	WM	1999	Harris
BM	Robinson, William	WM	1985	Harris
BF	Sheppard, Erica Yvonne	WF	1995	Harris
BM	Moore, Bobby James	WM	1980	Harris
WM	Duncan, Richard Charles	WF, WM	1995	Harris
BM	Burton, Arthur	WF	1998	Harris
LM	Capetillo, Edward Brian	WF, WM	1996	Harris
BM	Greer, Randolph Mansoor	WM	1992	Harris
BM	McCullum, Demarco Markeith	WM	1996	Harris
WM	Kutzner, Richard William	WF	1997	Harris
WM	Smith, Jack Harry	WM	1978	Harris
BM	Jones, Shelton Denoria	WM	1992	Harris
WM	Buntion, Carl Wayne	WM	1991	Harris
WF	Basso, Suzanne Margaret	WM	1999	Harris
BM	Morris, Kenneth Wayne	WM	1994	Harris
BM	Haynes, Anthony Cardell	WM	1999	Harris
WM	Griffith, Michael Durwood	WF	1996	Harris
LM	Fuentes, Anthony Guy	WM	1996	Harris
BM	Dixon, Tony Tyrone	WF	1995	Harris
BM	Guidry, Howard Paul	WF	1997	Harris
WM	Ogan, Craig Neil	WM	1990	Harris
BM	Williams, Arthur Lee, Jr.	WM	1983	Harris
WM	Nenno, Eric Charles	WF	1996	Harris
WM	Prystash, Joseph Andrew	WF	1996	Harris
LM	Tamayo, Edgar Arias	WM	1994	Harris
LM	Miniel, Peter J.	WM	1988	Harris
WM	Soffar, Max Alexander	WF, 2WM	1981	Harris
BM	Williams, Jeffery Demond	WM	1995	Harris
WM	Raby, Charles Douglas	WF	1994	Harris
WM	Thacker, Charles Daniel	WF	1994	Harris
WM	Davis, Brian Edward	WM	1992	Harris
BM	Nichols, Joseph Bernard	WM	1982	Harris
BM	Riles, Raymond G.	WM	1976	Harris
WM	Wesbrook, Coy	WF, WM, LM	1998	Harris
WM	Mason, William Michael	WF	1992	Harris
WM	Fratta, Robert Alan	WF	1996	Harris
WM	Lane, Doil Edward	LF	1994	Hays
LM	Vasquez, Pablo Lucio	LM	1999	Hidalgo
LM	Garcia, Hector Torres	LM	1990	Hidalgo
LM	Diaz, Arturo Eleazar	UM	2000	Hidalgo
WM	Lookingbill, Robert Andrew	WF	1991	Hidalgo
LM	Cardenas, Ruben	LF	1998	Hidalgo
LM	Ramos, Robert Moreno	2LF, LM	1993	Hidalgo
LM	Martinez, Jose Noey	2LF	1997	Hildago

WM	Ries, Joseph Ray	WM	1999	Hopkins
WM	Nelson, Billy Ray	WF	1991	Howard
WM	Galloway, Billy John	WM	2000	Hunt
LM	Flores, Miguel Angel	WF	1990	Hutchinson/Collin
WM	King, John William	BM	1999	Jasper
WM	Herrin, John	WM	2000	Jasper
BM	Wilson, Marvin Lee	BM	1994	Jefferson
BM	Bell, Walter	WF, WM	1975	Jefferson
WM	Dinkins, Richard Eugene	2WF	1992	Jefferson
WM	Harris, David Ray	WM	1986	Jefferson
WM	Dewberry, John Curtis	WM	1996	Jefferson
WM	Zimmerman, Kevin Lee	WM	1990	Jefferson
BM	Chester, Elroy	WM	1998	Jefferson
BM	Broussard, Windell	BF, BM	1993	Jefferson
BM	Wolfe, Bryan Eric	BF	1993	Jefferson
BM	King, Calvin Eugene	UM	1995	Jefferson
WM	Reeves, Whitney	UU	2000	Jefferson
BM	Hopkins, Bobby Ray	2WF	1994	Johnson
WM	Rojas, Leonard Uresti	WF, LM	1996	Johnson
WM	Miller, Gary Dean	WF	1989	Jones
WM	Murray, William	WF	1999	Kaufman
WM	Roberts, Douglas Alan	LM	1997	Kendall
LM	Santellan, Jose, Sr.	LF	1995	Kerr
WM	Wood, Jeffery Lee	WM	1998	Kerr
BM	Wooten, Larry	BF, BM	1998	Lamar
WM	Vickers, Billy Frank	WM	1994	Lamar
WM	Morrow, Robert Brice	WF	1997	Liberty
WM	Styron, Ronford Lee, Jr.	WM	1994	Liberty
BM	Deblanc, David Wayne	WM	1985	Liberty
WM	Mooney, Nelson Wayne	WM	1987	Liberty
BM	Blue, Michael Lynn	WM	1989	Liberty
WM	Woods, Bobby Wayne	UF	1998	Llano
LM	Hernandez, Adolph Gil	LF	1990	Lubbock
WM	Clark, Jack Wade	LF	1991	Lubbock
LM	Salazar, Robert, Jr.	LF	1999	Lubbock
LM	Garza, Joe Franco	LM	2000	Lubbock
WM	Yowell, Michael J.	2WF, WM	1999	Lubbock
WM	Joiner, Orien	WM	1988	Lubbock
LM	Rosales, Michael	UF	1998	Lubbock
WM	Hill, Mack Oran	WM	1990	Lubbock
BM	Parr, Kenneth	WF	1999	Matagorda
BM	Tigner, Gerald Wayne, Jr.	2BM	1994	McLennan
WM	Coble, Billie Coble	WF, 2WM	1990	McLennan
WM	Johnson, Michael Dewayne	WM	1996	McLennan
LM	Ibarra, Ramiro Rubi	LF	1997	McLennan
WM	Casey, Gerald Dewight	WF	1991	Montgomery
WM	Dowthitt, Dennis Thurl	2WF	1992	Montgomery
WM	Colburn, James Blake	WF	1995	Montgomery
WM	Swearingen, Larry	WF	2000	Montgomery
WM	Hayes, Larry	BF, WF	2000	Montgomery
WM	Crawford, Hilton Lewis	WM	1996	Montgomery

WM	Goodwin, Alvin Urial	WM	1987	Montgomery
BM	Walker, Tony Lee	BF, BM	1993	Morris
WM	Wardlow, Billy Joe	UM	1995	Morris/Titus
WM	Oliver, Khristian	WM	1999	Nacogdoches
WM	Willingham, Cameron Todd	3WF	1992	Navarro
BM	Sterling, Gary Lynn	WM	1989	Navarro
WM	Powell, James Rexford	WF	1991	Newton
LM	Vasquez, Richard	LF	1999	Nueces
BM	Arnold, Jemarr Carlos	LF	1990	Nueces
WM	Cartwright, Richard	LM	1997	Nueces
LM	Valdez, Alberto	UM	1988	Nueces
BM	Hatten, Larry	BM	1996	Nueces
LM	Baltazar, John Richard	LF	1998	Nueces
WM	Doughtie, Jeffery Carlton	WF, WM	1994	Nueces
LM	Martinez, Johnny Joe	WM	1994	Nueces
WM	Kunkle, Troy Albert	WM	1985	Nueces
WM	Gardner, David Allen	UF	1981	Parker
WM	Tucker, Jeffery Eugene	WM	1989	Parker
WM	White, Melvin Wayne	WF	1999	Pecos
WM	Willis, Ernest Ray	2WF	1987	Pecos
WM	Smith, Charles Edward	WM	1989	Pecos
WM	Pursley, Lonnie Wayne	WM	1999	Polk
WM	Anderson, Robert James	WF	1993	Potter
WF	Holberg, Brittany Marlowe	WM	1998	Potter
BM	Van Alstyne, Gregory	WM	1992	Potter
WM	Vanderbilt, Jimmy	WF	1976	Potter
BM	Davis, Larry Donell	WM	1999	Potter
WM	Roach, Tony	WF	1999	Potter
WM	Riddle, Granville	WM	1990	Potter
BM	Balentine, John Uzell	3WM	1999	Potter
WM	Dickson, Ryan Heath	WF, WM	1997	Potter
WM	Titsworth, Timothy	WF	1993	Randall
WM	Hafdahl, Randall Wayne, Sr.	WM	1986	Randall
LM	Soriano, Oswaldo Regalado	WM	1994	Randall
WM	Dickens, Justin Wiley	WM	1995	Randall
WM	Knight, Patrick Bryan	WF, WM	1993	Randall
WM	Brewer, Brent Ray	WM	1991	Randall
BM	Reeves, Reginald Lenard	WF	1994	Red River
BM	Frazier, Derrick	WF, WM	1998	Refugio
BM	Herron, Jermaine	WF, WM	1999	Refugio
WM	Henry, Robert L.	2WF	1994	San Patricio
WM	Jones, Claude Howard	WM	1990	San Jacinto
BM	Lawton, Stacey Lamont	WM	1993	Smith
WM	Anderson, Newton	WM	2000	Smith
BM	Bridgers, Allen	BF	1998	Smith
BM	Chambers, Tony	BF	1991	Smith
BM	Fuller, Justin	WM	1998	Smith
BM	Lewis, Ricky Lynn	WM	1994	Smith
BM	Ladd, Robert Charles	WF	1997	Smith
WM	Clark, Troy	WF	2000	Smith
WM	Wilkens, James Joseph, Jr.	2WM	1988	Smith

BM	Dunn, Henry Earl	LM	1995	Smith
WM	Aldrich, Donald Loren	LM	1994	Smith/Kerr
BM	Beazley, Napoleon	WM	1995	Smith
WM	Toney, Michael Roy	UF, 2UM	1999	Tarrant
BM	Taylor, Elkie Lee	BM	1994	Tarrant
WM	Bigby, James Eugene	2WM	1991	Tarrant
BM	Johnson, Eddie C.	WM	1997	Tarrant
BM	Lagrone, Edward Lewis	3BF	1993	Tarrant
WM	Neville, Robert James, Jr.	WF	1999	Tarrant
LM	Barraza, Mauro Morris	WF	1991	Tarrant
WM	Skinner, Henry Watkins	WF, 2WM	1995	Tarrant
BM	Moore, Curtis	BF, 2BM	1996	Tarrant
BM	Allridge, James III	WM	1987	Tarrant
BM	Goff, David Lee	UM	1991	Tarrant
WM	Hall, Michael Wayne	WF	2000	Tarrant
BM	Kemp, Emanuel	BF	1988	Tarrant
BM	Clark, Kenneth Ray	WM	1992	Tarrant
WM	Staley, Steven Kenneth	WM	1991	Tarrant
WM	Wheat, John L.	2WF, WM	1997	Tarrant
LM	Melendez, Pablo, Jr.	WM	1996	Tarrant
WM	Chappell, William Wesley	2WF	1990	Tarrant
BM	Ransom, Cedric Lamont	WM	1993	Tarrant
BM	Richardson, Damon Jerome	BF, 2BM	1988	Taylor
WM	Cole, Ted Calvin	WM	1988	Tom Green
LM	Ramirez, Luis	LM	1999	Tom Green
LM	Martinez, David	WF	1995	Travis
WM	Powell, David Lee	LM	1978	Travis
LM	Perez, Louis	3WF, BF	1999	Travis
WF	Henderson, Cathy Lynn	WM	1995	Travis
BM	Curry, Alva	LM	1993	Travis
BM	Howard, Ronald Ray	WM	1993	Travis
LM	Elliott, John William	LF	1987	Travis
WM	Hathorn, Gene Wilford, Jr.	WF, 2WM	1985	Trinity
WM	Penry, Johnny Paul	WF	1980	Trinity
WM	Johnson, Gary James	2WM	1988	Walker
WM	Cobb, Raymond Levi	2WF	1997	Walker
LM	Briseno, Jose Garcia	WM	1992	Webb
LM	Martinez, Miguel	WM, 2LM	1992	Webb
LM	Aranda, Arturo D.	UU	1979	Webb/Victoria
WM	Wardrip, Faryion Edward	WF	1999	Wichita
WM	Dillingham, Jeffrey	WF	1992	Wichita
WM	Collier, James Paul	WF, WM	1996	Wichita
WM	Vaughn, Roger Dale	WF	1992	Wilbarger
LM	Granados, Carlos	LF, LM	1999	Williamson
BM	Riley, Michael Lynn	WF	1986	Wood

Last Updated on 10/6/2000

Table C: Texas Executions in the Modern Era

ex.	Name	Ex. Date	Race	County	Victim(s)
1	Brooks, Jr., Charlie	12/7/82	BM	Tarrant	WM
2	Autry, James	3/14/84	WM	Jefferson	WF WM
3	O'Bryan, Ronald	3/31/84	WM	Harris	WM
4	Barefoot, Thomas	10/30/84	WM	Bell	WM
5	Skillern, Doyle	1/16/85	WM	Lubbock	WM
6	Morin, Stephen	3/13/85	WM	Jefferson	2WF
7	De La Rosa, Jesse	5/15/85	LM	Bexar	AM
8	Milton, Charles	6/25/85	BM	Tarrant	BU
9	Porter, Henry	7/9/85	LM	Tarrant	WM
10	Rumbaugh, Charles	9/11/85	WM	Potter	WM
11	Bass, Charles Wm.	3/12/86	WM	Harris	WM
12	Barney, Jeffery	4/16/86	WM	Harris	WF
13	Pinkerton, Jay	5/15/86	WM	Nueces	2WF
14	Esquivel, Rudy	6/9/86	LM	Harris	WM
15	Brock, Kenneth	6/19/86	WM	Harris	WM
16	Woolls, Randy	8/20/86	WM	Tom Green	WF
17	Smith, Larry	8/22/86	BM	Dallas	WM
18	Wicker, Chester	8/26/86	WM	Galveston	WF
19	Evans, Michael Wayne	12/4/86	BM	Dallas	LF
20	Andrade, Richard	12/18/86	LM	Nueces	LF
21	Hernandez, Ramon	1/30/87	LM	El Paso	LM
22	Moreno, Eliseo	3/4/87	LM	Fort Bend	WM
23	Williams, Anthony	5/28/87	BM	Harris	WF
24	Johnson, Elliott	6/24/87	BM	Jefferson	LM
25	Thompson, John R.	7/8/87	WM	Bexar	WF
26	Starvaggi, Joseph	9/10/87	WM	Montgomery	WM
27	Streetman, Robert	1/7/88	WM	Hardin	WF
28	Franklin, Donald Gene	11/3/88	BM	Nueces	WF
29	Landry, Raymond	12/13/88	BM	Harris	BM
30	King, Leon Rutherford	3/22/89	BM	Harris	WM
31	McCoy, Stephen	5/24/89	WM	Harris	WF
32	Paster, James "Skip"	9/20/89	WM	Harris	WM
33	De Luna, Carlos	12/7/89	LM	Nueces	LF
34	Butler, Jerome	4/21/90	BM	Harris	BM
35	Anderson, Johnny Ray	5/17/90	WM	Jefferson	WM
36	Smith, James	6/26/90	BM	Harris	WM
37	Derrick, Mikel	7/18/90	WM	Harris	WM
38	Buxton, Lawrence	2/26/91	BM	Harris	WM
39	Cuevas, Ignacio	5/23/91	LM	Harris	2WF
40	Bird, Jerry Joe	6/17/91	WM	Cameron	WM
41	Russell, James	9/19/91	BM	Fort Bend	WM
42	Green, G. W.	11/12/91	WM	Montgomery	WM

43	Cordova, Joe Angel	1/22/92	LM	Harris	WU
44	Garrett, Johnny	2/11/92	WM	Potter	WF
45	Clark, David	2/28/92	WM	Brazos	2WM
46	Ellis, Edward	3/3/92	WM	Harris	WU
47	White, Billy	4/23/92	BM	Harris	WF
48	May, Justin	5/7/92	WM	Brazoria	WF
49	Romero, Jr., Jesus	5/20/92	LM	Cameron	LF
50	Black, Jr., Robert	5/22/92	WM	Brazos	WF
51	Johnson, Curtis	8/22/92	BM	Harris	WM
52	Demouchette, James	9/22/92	BM	Harris	2WM
53	Griffin, Jeffery	11/19/92	BM	Harris	BM
54	Linecum, Kavin	12/10/92	BM	Brazoria	WF
55	Santana, Carlos	3/23/93	LM	Harris	LM
56	Montoya, Ramon	3/25/93	LM	Dallas	WM
57	Stewart, Darryl	5/4/93	BM	Harris	WF
58	Herrera, Leonel	5/12/93	LM	Cameron	2LM
59	Sawyers, John	5/18/93	WM	Harris	WF
60	Duff-Smith, Markum	6/29/93	WM	Harris	WF
61	Harris, Curtis	7/1/93	BM	Brazos	WM
62	Harris, Danny	7/30/93	BM	Brazos	WM
63	Jernigan, Joseph	8/5/93	WM	Navarro	WM
64	Holland, David	8/12/93	WM	Jefferson	WF
65	Kelly, Carl	8/20/93	BM	McLennan	WM
66	Cantu, Ruben	8/24/93	LM	Bexar	LM
67	Wilkerson, Richard	8/31/93	BM	Harris	WU
68	James, Johnny	9/3/93	WM	Chambers	WF
69	Bonham, Antonio	9/28/93	BM	Harris	WF
70	Cook, Anthony	11/10/93	WM	Milam	WM
71	Phillips, Clifford	12/15/93	BM	Harris	WF
72	Barnard, Harold	2/2/94	WM	Galveston	AM
73	Webb, Freddie	3/31/94	BM	Nueces	WM
74	Beavers, Richard	4/4/94	WM	Harris	WM
75	Anderson, Larry	4/26/94	WM	Harris	WF
76	Rogeau, Paul	5/3/94	BM	Harris	BM
77	Nethery, Stephen	5/27/94	WM	Dallas	WM
78	Crank, Denton	6/14/94	WM	Harris	WU
79	Drew, Robert	8/2/94	WM	Harris	WM
80	Gutierrez, Jessie	9/16/94	LM	Brazos	WF
81	Lott, George	9/20/94	WM	Potter	2WM
82	Williams, Walter	10/5/94	BM	Bexar	WM
83	Bridge, Warren	11/22/94	WM	Galveston	WM
84	Clark, Herman	12/6/94	BM	Harris	WM
85	Kinnamon, Raymond	12/11/94	WM	Harris	WM
86	Jacobs, Jesse	1/4/95	WM	Walker	WF
87	Marquez, Mario	1/17/95	LM	Bexar	LF LF
88	Russell, Clifton	1/31/95	WM	Taylor	WM

89	Williams, Willie	1/31/95	BM	Harris	WM
90	Motley, Jeffrey	2/7/95	WM	Harris	LF
91	Gardner, Billy	2/16/95	WM	Dallas	WF
92	Hawkins, Samuel	2/21/95	BM	Travis	WF
93	Mays, Noble	4/6/95	WM	Denton	WM
94	Mann, Fletcher	6/1/95	WM	Dallas	WM
95	Allridge, Ronald	6/8/95	BM	Tarrant	WF
96	Fearance, John	6/20/95	BM	Dallas	WM
97	Hammond, Karl	6/21/95	WM	Bexar	WF
98	Sattiewhite, Vernon	8/15/95	BM	Bexar	WF
99	Johnson, Carl	9/19/95	BM	Harris	BM
100	Lane, Harold	10/4/95	WM	Dallas	WF
101	Amos, Bernard	12/6/95	BM	Dallas	WM
102	Vuong, Hai	12/7/95	AM	Jefferson	2AU
103	Banda, Esequel	12/11/95	LM	Hamilton	WM
104	Briddle, James	12/12/95	WM	Harris	WM
105	Jenkins, Leo	2/9/96	WM	Harris	WM WF
106	Granviel, Kenneth	2/27/96	BM	Tarrant	6BF BM
107	Gonzales, Joe	9/18/96	LM	Potter	2WF WM
108	Brimage Jr., Richard	2/10/97	WM	Kleberg	WF
109	Barefield, John	3/12/97	BM	Harris	WF
110	Herman, David	4/2/97	WM	Tarrant	WF
111	Spence, David	4/3/97	WM	McLennan	2WF WM
112	Woods, Billy	4/14/97	WM	Harris	WF
113	Gentry, Kenneth	4/16/97	WM	Denton	WM
114	Boyle, Benjamin	4/21/97	WM	Potter	WF
115	Baldree, Ernest	4/29/97	WM	Navarro	WM WF
116	Washington, Terry	5/6/97	BM	Brazos	WF
117	Westley, Anthony	5/13/97	BM	Harris	WM
118	Belyeu, Clifton	5/16/97	WM	McLennan	WF
119	Drinkard, Richard	5/19/97	WM	Harris	3WF
120	Lackey, Clarence	5/20/97	WM	Tom Green	WF
121	Callins, Bruce	5/21/97	BM	Tarrant	WM
122	White, Larry	5/22/97	WM	Harris	WF
123	Madden, Robert	5/28/97	WM	Leon	2WM
124	Rogers, Patrick	6/2/97	BM	Collin	BM
125	Harris, Kenneth	6/3/97	BM	Harris	WF
126	Johnson, Dorsie	6/4/97	BM	Scurry	WM
127	Losada, Davis	6/4/97	LM	Cameron	LF
128	Behringer, Earl	6/11/97	WM	Tarrant	WM WF
129	Stoker, David	6/16/97	WM	hale	WM
130	Johnson, Eddie	6/17/97	BM	Aransas	WF,LF, WM
131	Montoya, Irineo	6/18/97	LM	Cameron	WM

45	West, Robert	7/29/97	WM	Harris	W
132	West, Robert	7/29/97	NM		WU
133	Davis, James	9/9/97	BM	Travis	BF,2BM
134	Turner, Jessel	9/22/97	BM		WU
135	Stone, Benjamin	9/25/97	WM	Harris	2WF
136	Cockrum, Johnny	9/30/97	WM		WU
137	Adanandus, Dwight	10/1/97	BM	Bexar	WM
138	Green, Ricky Lee	10/8/97	WM		WU
139	Ransom, Kenneth Ray	10/28/97	BM	Harris	LU
140	Lauti, Aua	11/4/97	AM	Harris	AF
141	Fuller, Aaron	11/6/97	WM	Dawson	WF
142	Sharp, Michael	11/19/97	WM	Crockett	2WF
143	Livingston, Charlie	11/21/97	BM	Harris	WF
144	Lockhart, Michael	12/9/97	WM	Bexar	WM
145	Tucker, Karla Faye	2/3/98	WF	Harris	2WF
146	Renfro, Steven	2/9/98	WM	Harrison	2WF, M
147	Hogue, Jerry	3/11/98	WM	Tarrant	WF
148	Cannon, Joseph	4/22/98	WM	Bexar	WF
149	Gosch, Lesley	4/24/98	WM	Victoria	WF
150	McFarland, Frank	4/29/98	WM	Tarrant	WF
151	Carter, Robert	5/18/98	BM	Harris	LF
152	Muniz, Pedro	5/19/98	LM	Williamson	WF
153	Boggess, Clifford	6/11/98	WM	Clay	2WM
154	Pyles, Johnny	6/15/98	WM	Dallas	WM
155	Narvaiz, Leopoldo	6/26/98	LM	Bexar	3WF,WM
156	Camacho Jr., Genaro	8/26/98	LM	Brazos	BM
157	Teague Jr., Delbert	9/9/98	WM	Tarrant	WM
158	Castillo, David	9/23/98	LM	Hidalgo	LM
159	Cruz, Javier	10/1/98	LM	Bexar	2WM
160	Nobles, Jonathan	10/7/98	WM	Travis	2WF
161	McDuff, Kenneth	11/17/98	WM	Harris	2WF
162	Corwin, Daniel	12/7/98	WM	Montgomery	3WF
163	Emery, Jeff	12/8/98	WM	Brazos	WU
164	Meanes, James	12/15/98	BM	Harris	LM
165	Moody, John	01/05/99	WM	Taylor	WF
166	Farris, Troy	01/13/99	WM	Tarrant	WM
167	Vega, Martin	01/26/99	LM	Caldwell	WM
168	Cordova, George	02/10/99	LM	Bexar	LM
169	Barber, Danny	02/11/99	WM	Dallas	WF
170	Cantu, Andrew	02/16/99	LM	Taylor	2WM,WF
171	Green, Norman	02/24/99	BM	Bexar	WM
172	Rector, Charles	03/26/99	BM	Travis	WF
173	White, Robert	03/30/99	WM	Collin	3WM
174	Foust, Aaron	04/28/99	WM	Tarrant	WM

174	De La Cruz, Jose	05/04/99	LM	Nueces	LM
175	Coleman, Clydell	05/05/99	BM	McLennan	BF
176	Little, William	06/01/99	WM	Liberty	WF
177	Faulder, Joseph	06/17/99	WM	Gregg	WF
178	Tuttle, Charles	07/01/99	WM	Smith	WF
179	Fuller, Tyrone	07/07/99	BM	Grayson	WF
180	Blackmon, Ricky	08/04/99	WM	Shelby	WM
181	Boyd, Charles	08/05/99	BM	Dallas	WF
182	Dunn, Kenneth	08/10/99	BM	Harris	WF
183	Earhart, James	08/11/99	WM	Lee	WF
184	Trevino, Joe	08/18/99	LM	Tarrant	WF
185	Jones, Raymond	09/01/99	BM	Jefferson	AU
186	Barnes, Willis	09/10/99	BM	Harris	BF
187	Davis, William	09/14/99	BM	Harris	BM
188	Smith, Richard	09/21/99	WM	Harris	WF
189	Crane, Alvin	10/12/99	WM	Denton	WM
190	McFadden, Jerry	10/14/99	WM	Bell	WF
191	Cantu, Domingo	10/28/99	LM	Dallas	WF
192	Jennings, Desmond	11/16/99	BM	Tarrant	BM BF
193	Lamb, John	11/17/99	WM	Hunt	WU
194	Gutierrez, Jose	11/18/99	LM	Brazos	WF
195	Long, David	12/8/99	WM	Dallas	3WF
196	Beathard, James	12/9/99	WM	Trinity	WM
197	Atworth, Robert	12/14/99	WM	Dallas	WM
198	Felder, Sammie	12/15/99	BM	Harris	WM
199	Heiselbetz, Earl	1/12/00	WM	Sabine	2WF
200	Goodman, Spencer	1/18/00	WM	Fort Bend	WF
201	Hicks, David	1/20/00	BM	Freestone	BU
202	Robison, Larry	1/21/00	WM	Tarrant	2WF,3WM
203	Hughes, Billy	1/24/00	WM	Matagor	WM
204	McGinnis, Glen	1/25/00	BM	Montgomery	WF
205	Moreland, James	1/27/00	WM	Henderso	2WM
206	Goss, Cornelius	2/23/00	BM	Dallas	WM
207	Beets, Betty	2/24/00	WF	Henderso	WM
208	Barnes, Jr., Odell	3/1/00	BM	Lubbock	BF
209	Wilkerson, Ponchai	3/14/00	BM	Harris	AU
210	Gribble, Timothy	3/15/00	WM	Galvesto	2WF
211	Jackson, Tommy	5/4/00	BM	Williamson	WF
212	Kitchens, William	5/9/00	WM	Taylor	WF
213	McBride, Michael	5/11/00	WM	Lubbock	2WM
214	Richardson, James	5/23/00	BM	Navarro	WM
215	Foster, Richard	5/24/00	WM	Parker	WM
216	Clayton, James	5/25/00	BM	Taylor	WF
217	Carter, Robert	5/31/00	BM	Burleson / Bastrop	5BF,BM
218	Mason, Thomas	6/12/00	WM	Smith	2WF
219	Burks, John	6/14/00	BM	McLennan	LM

220	Nuncio, Paul	6/15/00	LM	Hale	WF
221	Graham, Gary	6/22/00	BM	Harris	WM
222	San Miguel, Jessy	6/29/00	LM	Dallas	WM, LF, LM, AM
223	Joiner, Orien	7/12/00	WM	Lubbock	2WF
224	Soria, Juan	7/26/00	LM	Tarrant	WM
225	Roberson, Brian	8/10/00	BM	Dallas	WM
226	Cruz, Oliver	8/10/00	LM	Bexar	WF
227	Satterwhite, John	8/16/00	BM	Bexar	WF
228	Jones, Richard	8/22/00	WM	Tarrant	WF
229	Gibbs, David	8/23/00	WM	Montgomery	WF
230	Caldwell, Jeffrey	8/30/00	BM	Dallas	3BU
231	McGinn, Ricky	9/27/00	WM	Brown	WF

Table D: Racial Discrimination In Jury Selection Process in Bowie County Felony Cases, Tried January 1, 1979 to September 30, 1980 (Rafaelli Administration)

Case #	Jury List	W	B	Un-known	Pre-perem p-tory Strike Pool	W	B	White Strikes		Black Strikes		W Jury	B Jury
								Tot	Pool	Tot	Pool		
+80-F-86	91	79	12	0	33	30	3	6	6	3	3	12	0
+80-F-32	40	33	7	0	32	27	5	7	7	3	3	11	1
+80-F-1	80	71	9	0	32	28	4	6	6	4	4	12	0
*79-F-243	34	31	3	0	32	29	3	7	7	3	3	12	0
+79-F-241	34	27	7	0	32	25	7	3	3	7	7	12	0
*79-F-237	36	28	2	0	32	30	2	8	8	2	2	12	0
+79-F-226	69	62	7	0	32	27	5	5	5	5	5	12	0
+79-F-221	39	37	2	0	32	30	2	8	8	2	2	12	0
*79-F-200	72	29	4	39	32	29	4	6	6	4	4	12	0
*79-F-76	46	32	5	9	32	27	5	5	5	5	5	12	0
+79-F-67	39	36	3	0	32	30	2	9	9	1	1	11	1
+79-F-44	35	31	4	0	32	28	4	6	6	4	4	12	0
+79-F-26	36	34	2	0	32	31	1	9	9	1	1	12	0
+78-F-154	40	34	6	0	32	28	4	5	5	4	4	12	0
*78-F-81	40	35	5	0	32	27	5	4	4	4	4	11	1
+78-F-20	49	44	5	0	32	30	2	2	2	2	2	12	0
*77-F-173	48	42	6	0	32	26	6	4	4	6	6	12	0
Totals	828	68.5	89	48	545	482	64	100	100	60	60	201	3

* Blacks Identified By Prosecutor Singling Them Out on Venire Sheets

\+ Blacks Identified By Knowledgeable Persons In Bowie County Black Community

Note: The above list represents approximately 75% of the felony cases tried between January 1, 1979 and September 30, 1980. Seven other cases were tried but venire sheets were not

found. They are Nos. 80-F-82, 79-F-245, 79-F-224, 79-F-105, 79-F-57, 79-F-24, 75-F-71 (re-trial).

- Percentage of Blacks Struck by State from Pre-Peremptory Strike Pools 93.75%
- Percentage of Blacks in Pre-Peremptory Strike Pool Population: 11.74%
- Percentage of Blacks in Bowie County Jury Population (17 Cases): 1.47%
- Percentage Difference Between Blacks in Strike Pool and In Jury Population: 10.27%

Table E: Racial Discrimination in Jury Selection Process in Bowie County Felony Cases, Tried January 1, 1975 to December 31, 1978 (Cooksey Administration)

Case #	Jury List	W	B	Un-known	Pre-peremptory Strike Pool	W	B	White Strikes		Black Strikes		W Jury	B Jury
								Tot	Pool	Tot	Pool		
*78-F-57	46	44	2	0	32	30	2	7	6	2	2	12	0
*78-F-33	39	37	2	0	32	30	2	8	8	2	2	12	0
*78-F-17	45	40	5	0	32	27	5	4	4	5	5	12	0
*77-F-182	39	36	3	0	32	29	3	7	7	3	3	12	0
*77-F-125	34	29	5	0	32	27	5	6	6	4	4	11	1
*77-F-113	53	31	3	19	32	29	3	8	8	2	2	11	1
*77-F-101	52	48	4	0	32	28	4	5	5	4	4	12	0
*77-F-88	91	63	9	19	32	28	4	4	4	4	4	12	0
*77-F-11	41	34	7	0	32	27	5	5	5	5	5	12	0
*76-F-141	50	43	7	0	32	28	4	6	6	4	4	12	0
*76-F-101	40	27	5	8	32	27	5	2	2	5	5	12	0
*76-F-88	45	36	9	0	32	24	8	2	2	8	8	12	0
*76-F-70	40	33	7	0	32	25	7	4	4	6	6	11	1
*76-F-57	72	37	3	32	32	30	2	6	6	2	2	12	0
*76-F-12	34	30	4	0	32	28	4	6	6	4	4	12	0
*75-F-143	39	33	6	0	32	26	6	4	3	6	6	12	0
*75-F-134	60	57	3	0	32	29	3	8	8	2	2	11	1
*75-F-71	72	35	5	32	32	29	3	7	7	2	2	11	1
*75-F-3	70	35	5	30	32	28	4	2	2	4	4	12	0
*75-F-2	40	32	8	0	32	25	7	2	2	8	7	12	0
Totals	1002	760	102	140	640	554	86	103	101	82	81	235	5

* Blacks Identified By Prosecutor Singling Them Out on Venire Sheets

Note: The above list represents 80% of the felony cases tried between January 1, 1975 and December 31, 1978. Five other cases were tried but venire sheets were not found. They are Nos. 77-F-197, 77-F-184, 77-F-159, 76-F-124 & 76-F-22.

- Percentage of Blacks Struck by State From Pre-Peremptory Strike Pool: 94.19%
- Percentage of Blacks in Pre-Peremptory Strike Pool Population: 13.44%

- Percentage of Blacks in Jury Population (20 Cases): 2.08%
- Percentage Difference Between Blacks in Strike Pool and in Jury Population: 11.36%

APPENDIX FIVE:
REVIEW OF STATE HABEAS APPLICATIONS
ON FILE WITH THE TEXAS COURT OF CRIMINAL APPEALS

Category	Number	%
No. of initial habeas corpus applications filed with the Texas Court of Criminal Appeals , 9/1/95 - 9/12/00	187	n/a
No. of initial applications reviewed / % of total applications	103	55.0 %
Applications under 30 pages in length / % of total reviewed	36	34.9 %
Applications under 15 pages in length	18	17.5 %
Applications under 10 pages in length	8	8.7 %
No. of cases where discovery motions filed	15	14.5 %
No. of cases where discovery motions not filed	88	8.5%
No. of cases where no extra-record material filed	44	42 %
No. of case files where trial court's and state's findings of fact and conclusions of law available for review	92	n/a
No. of cases where trial court's findings of fact and conclusions of law identical or virtually identical to those filed by the state / % of 92 cases where available for review	77	83.7 %
Cases where evidentiary hearings held by trial court	22	21.3 %
In cases where evidentiary hearing held, no. where trial court's findings of facts and conclusions of law identical or virtually identical to those filed by the state	15	68.2 %
In cases where evidentiary hearing held, no. where trial court's findings of facts and conclusions of law different from those filed by the state	3	13.6 %
No. of cases where CCA Order, of same kind, available for review	97	n/a
In cases where CCA Order present, no. of cases where CCA adopted trial court's findings of fact and conclusions of law	90	92.7 %
In cases where CCA Order present, no. of cases where CCA made changes to the trial court's findings of fact and conclusions of law (note that of these, only one was more than a summary two-page order)	5	.05 %
No. of cases where state and trial court's findings identical or virtually identical (77), and CCA made no changes to the trial court's findings	72	93.5%
No. of cases that CCA filed and set for submission	1	.009 %

APPENDIX SIX: RECOMMENDATIONS

General

- Moratorium: Follow the American Bar Association's recommendations calling for a moratorium on the death penalty to permit an examination the fairness of its imposition, the adequacy of existing trial and appellate procedures, and the implementation of appropriate reforms.

- Innocence Commission: Establish an independent commission, funded directly by the legislature, to review claims of actual innocence regardless of the procedural posture of the case or any technical hurdles, such as lack of contemporaneous objections, exhaustion of remedies, or statutes of limitations.

- Access to DNA testing: Provide death row prisoners with the right to test or retest evidence using current DNA technology, regardless of the procedural posture of the case or any technical hurdles, when there remains untested or inadequately-tested physical evidence which is potentially relevant to the question of guilt or the appropriateness of the death sentence.

- Compensation for the Wrongly Convicted: Abolish the statutory cap on compensation for those who have been wrongly convicted, and permit recovery upon a final, unappealable court order granting relief, thereby abolishing the requirement of a gubernatorial pardon.

Official Misconduct

- Create an independent body to investigate instances in which official misconduct is uncovered. All cases potentially affected by the misconduct should be reviewed for error, and the findings of the independent counsel given appropriate weight and consideration. Publish the findings of the independent counsel's investigation, her recommendations regarding regulatory changes, and disciplinary or criminal charges against the responsible actors.

- Toll the statute of limitations for raising issues regarding the misconduct of officials, until the official is sanctioned, to ensure that similarly-situated defendants may develop and present any claims regarding the impact of that official's misconduct in their own cases.

- Entitle the defense to open-file discovery upon a colorable claim of prosecutorial overreaching or withholding of exculpatory evidence. Violations of Brady v. Maryland

in a particular case may be cause for removal of the actor primarily responsible for the misconduct.

Jailhouse Informants

- Create a rebuttable presumption that a jailhouse informant's testimony is unreliable. The party sponsoring the testimony has the burden, at a pre-trial hearing, of overcoming the presumption of unreliability. Prior to such a hearing, the defense shall be given discovery of the informant's complete criminal history, including jail records, any mental health treatment provided by any state or county institution, as well as transcripts of any previous testimony given by the informant. All deals with jailhouse informants must be in writing, and all communications with any representative of the state either videotaped or audio taped.

Junk Science

- Require the trial courts to follow the strictures of recent U.S. Supreme Court decisions when considering the admissibility of expert testimony, mandating validation studies and other data to establish the scientific basis for the forensic evidence sought to be introduced. In addition to providing the defense experts to test and evaluate forensic evidence, give the defense access to experts regarding the contested field of the science itself.

- Require forensic crime labs to be accredited, subject to oversight by an independent commission, and to submit to blind proficiency tests. Audit labs with unacceptable error rates. Make the records generated from all oversight mechanisms available to the public. Require technical personnel to meet minimal standards of professional achievement and education, and subject to thorough background checks.

- Provide raw data and lab notes to the defense, as part of routine discovery, regardless of the results of the tests. Where testing is certain to destroy the only available sample of evidence, and a suspect is in custody, notify the defense and give an opportunity to have a defense expert present in the lab during the testing and/or interpretation of raw data.

- Replace microscopic hair comparison with mitochondrial DNA testing.

- Exclude bitemark evidence until, and unless, validation studies establish the reliability of this forensic "science."

- Give public defenders and court-appointed attorneys access to funds for qualified, independent experts for both consultation and testing.

- Exclude psychiatric testimony purporting to predict future dangerousness until, and unless, validation studies establish the reliability of such evidence.

Racism in the Death Penalty

- Implement screening procedures in District Attorneys' Offices that track race and gender of victims and defendants and periodically monitor their own office's use of the death penalty to insure that capital cases involving white victims are not being charged disproportionately to their representation among all murder victims.

- Create a statewide commission to review the overall pattern of all death sentences, and to establish appropriate mechanisms to ensure that similar crimes are being treated in a similar fashion, regardless of the race of the victim or defendant. The trial court will complete a sentencing report for each death sentence, reflecting the race and gender of the victim and the defendant, the aggravating circumstance, and a brief synopsis of the facts.

- Adopt legislation providing that "no person shall be put to death where the race of the defendant and/or the victim were considered in imposition of the sentence." This legislation would be the basis of an appellate claim challenging a death sentence as part of a discriminatory pattern. The defendant would not be required to establish discriminatory intent on the part of any state actor, but rather the discriminatory effect of the administration of the death penalty in that county or multi-county judicial district.

Mental Retardation

- Prohibit, retroactively and prospectively, the execution of the mentally retarded, as defined by the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association. Require evaluations be performed by an independent court-appointed expert agreed upon by the defense and the prosecution teams.

Ineffective Assistance of Counsel

- Establish a statewide capital public defender system or, in the alternative, a well-funded trial support unit.

- Establish statewide statutory standards for capital trial counsel, including a peer review system and particularized capital training and experience. Prohibit appointment of counsel who do not meet such standards.

- Allocate state funding to remedy the dramatic disparity between the wide-ranging resources available to the prosecution and the severely limited funding provided to the defense.

- Abolish the presumptive cap on fees paid to capital habeas corpus attorneys and, in accordance with TEX. CODE CRIM PROC. art 11.071, reasonably compensate counsel for her time.

- Monitor the attorneys on the Court of Criminal Appeals' list of qualified habeas counsel, and sanction – including removal from the list – any attorney whose performance is deficient.

Lack of Appellate Review

- Establish a statewide commission to examine the system of the elected judiciary, its deleterious effect on the independence of judicial decision making, and the factors affecting decisions pertaining to appointment of qualified counsel and payment of investigative and expert fees.

- Require that trial courts write their own Findings of Fact and Conclusions of Law when adjudicating habeas corpus cases. Courts may require the defense and the state to submit proposals on computer disk to facilitate the court's adoption of factual findings from both sides, but shall not adopt wholesale the findings and conclusions of either side.

- Abolish "paper hearings"and give each applicant an opportunity to present the court with extra-record evidence supporting his claims for relief. Provide applicants sufficient time to prepare for such hearings, and the discovery mechanisms necessary to a fair presentation of the evidence.