

# Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights

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Carrying out over two hundred executions in the last twenty years,<sup>1</sup> Texas has dramatically demonstrated that the Bill of Rights—particularly, the most fundamental right, the right to counsel—cannot be left in the hands of partisan elected judges. The Texas judiciary has responded to the clamor for executions by processing capital cases in assembly-line fashion with little or no regard for the fairness and integrity of the process. In doing so, it has shown the need for full habeas corpus review by independent, life-tenured federal judges. However, the once “Great Writ” of habeas corpus barely survives the restrictions put on it by the Supreme Court and Congress. As a result, those most in need of the protection of the Constitution—the “helpless, weak, outnumbered . . . victims of prejudice and public excitement”<sup>2</sup>—often do not receive it, even in cases where their lives are at stake.

Texas trial judges—some treating the appointment of counsel to defend poor defendants as political patronage and some assigning lawyers not to provide zealous advocacy but to help move their dockets<sup>3</sup>—have frequently appointed incompetent lawyers to defend those accused of capital crimes.<sup>4</sup> In 1999, trial judges successfully persuaded the governor to veto legislation that would have made modest improvements in the legal representation of poor defendants.<sup>5</sup> The state’s highest criminal court, the Texas Court of Criminal Appeals, has upheld death sentences

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1. After the reinstatement of the death penalty by the United States Supreme Court, see *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding Texas’s capital sentencing scheme), Texas carried out its first execution on December 7, 1982. NAACP LEGAL DEFENSE & EDUCATIONAL FUND, DEATH ROW U.S.A. REPORTER CURRENT SERVICE 1467 (Winter 2000) [hereinafter DEATH ROW U.S.A.]. By mid-April, 2000, Texas had executed 211 inmates and had about 450 on death row waiting for execution. See Claudia Kolker, *The Art of Execution*, *Texas Style*, L.A. TIMES, Apr. 11, 2000, at A1. The state with the second highest number of executions, Virginia, had executed 76 since the reinstatement of capital punishment. *Id.* Current numbers are available from The Death Penalty Information Center, <<http://www.essential.org/dpic/dpicreg.html>>. See also Texas Department of Criminal Justice, Executed Offenders (last modified Apr. 7, 2000) <<http://www.tdcj.state.tx.us/stat/executedoffenders.htm>> (listing the 211 persons executed by the State of Texas since the death penalty was reinstated in 1974).

2. See *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

3. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1855-57 (1994); Mark Ballard, *Appointed Counsel Must Now Win Judges’ OK*, TEX. LAW., Aug. 28, 1995, at 21; Mark Ballard, *Gideon’s Broken Promise*, TEX. LAW., Aug. 28, 1995, at 1.

4. Bright, *supra* note 3, at 1855.

5. See Bob Ray Sanders, *Judges Decreed Death for Indigent Defense Bill*, FORT WORTH STAR-TELEGRAM, June 23, 1999, at 1, available in 1999 WL 6241494.

*Elected Judges and the Death Penalty in Texas*

even in cases in which defense lawyers slept through trial.<sup>6</sup> In one such case, however, a federal court did grant habeas corpus relief, finding that “sleeping counsel is the equivalent to no counsel at all.”<sup>7</sup> In another case, after the Texas courts had upheld a conviction and death sentence based only on affidavits, a federal court held an evidentiary hearing, made credibility findings, and granted relief to a condemned woman whose lawyer was actively representing another participant in the crime who testified against her.<sup>8</sup>

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6. See *infra* notes 42-52 and accompanying text.

7. See *Burdine v. Johnson*, 66 F. Supp. 2d 854, 866 (S.D. Tex. 1999). The Texas Attorney General appealed the decision to the Court of Appeals for the Fifth Circuit. *Id.*, No. 92-21034 (5th Cir. Nov. 9, 1999).

8. See *Perillo v. Johnson*, 205 F.3d 775, 808 (5th Cir. 2000).

Many people condemned to die in Texas have no access to competent lawyers to represent them in post-conviction challenges to their convictions and sentences. During a four-year period when it was responsible for appointing lawyers to represent the condemned in post-conviction review, the Court of Criminal Appeals repeatedly appointed lawyers who were incapable of preparing petitions and filing them on time.<sup>9</sup> It then punished the inmates for the incompetence of their lawyers by denying them relief over dissents that characterized the court's review as a "farce," "travesty," and "charade,"<sup>10</sup> and "border[ing] on barbarism."<sup>11</sup> In one case, a federal judge found that the appointment of an inexperienced lawyer with serious health problems to represent a condemned man "constituted a cynical and reprehensible attempt to expedite [the] execution at the expense of all semblance of fairness and integrity" and sent the case back to the state courts for review.<sup>12</sup>

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9. See *infra* notes 141-56 and accompanying text.

10. *Ex parte* Kerr, 977 S.W.2d 585, 585 (Tex. Crim. App. 1998) (Overstreet, J., dissenting).

11. *Ex parte* Smith, 977 S.W.2d 610, 614 (Tex. Crim. App. 1998) (Overstreet, J., dissenting).

12. Kerr v. Johnson, No. SA-98-CA-151-OG (W.D. Tex. Feb. 24, 1999) (order dismissing habeas corpus petition without prejudice).

*Elected Judges and the Death Penalty in Texas*

The importance of a fair process, effective advocacy, and thorough review by independent courts is illustrated most clearly and compellingly by the many people wrongfully condemned to death who—usually by mere happenstance—had the good fortune to have competent lawyers, journalists, or others take an interest in their case and prove their innocence. For example, Randall Dale Adams, sentenced to death at a trial in Texas at which he was represented by a real estate lawyer, was later exonerated when evidence of his innocence came to light during the making of the film *A Thin Blue Line*.<sup>13</sup> Volunteer lawyers and Rev. Jim McCloskey proved that racial prejudice and the prosecution's failure to disclose exculpatory evidence resulted in the conviction of an innocent man, Clarence Brandley.<sup>14</sup> Also, volunteer lawyers—Scott Atlas from Vinson & Elkins<sup>15</sup> and Douglas Robinson from Skadden, Arps, Slate, Meagher & Flom—proved that their clients, Ricardo Aldape Guerra and

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13. See RANDALL DALE ADAMS ET AL., *ADAMS V. TEXAS* 242-64, 280-333 (1991); MICHAEL RADELET ET AL., *IN SPITE OF INNOCENCE* 60-72 (1992) (both describing how perjury and regional prejudice played a role in convicting Randall Dale Adams of a murder for which he was later exonerated).

14. See NICK DAVIES, *WHITE LIES: RAPE, MURDER, AND JUSTICE TEXAS STYLE* 307-09 (1991).

15. For a discussion of the success of Scott Atlas and a team of attorneys from Vinson & Elkins in overturning the conviction and death sentence of Ricardo Aldape Guerra, see Nicholas Varchaver, *9 mm Away from Death*, *AM. LAW.*, Mar. 1995, at 81, 85-86.

Frederico Martinez-Macias, were innocent but had been convicted and sentenced to death in violation of the Constitution.<sup>16</sup> Both defendants obtained relief in federal habeas corpus proceedings and were released.<sup>17</sup> If any of those men had been represented by lawyers who missed deadlines or failed to conduct an investigation, like some lawyers assigned by the Texas courts,<sup>18</sup> they would likely have been executed, instead of released.

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16. See *id.* at 87; *Martinez-Macias v. Collins*, 979 F.2d 1067, 1067-68 (5th Cir. 1992) (affirming the district court's grant of habeas corpus relief to Martinez-Macias based on inadequate representation at trial).

17. See Terri Langford, *Former Death Row Inmate Leaves Prison and the U.S.: 35-Year-Old Suspect Vows Never to Return to the United States*, AUSTIN AM.-STATESMAN, Apr. 17, 1997, at B11, available in 1997 WL 2820088 (describing the release of Ricardo Aldape Guerra after fifteen years on death row); *Man Freed After 9 Years on Death Row*, DALLAS MORNING NEWS, June 25, 1993, at 14D, available in 1993 WL 9308485 (describing the release of Frederico Martinez-Macias after a grand jury in El Paso decided there was not enough evidence to retry him).

18. See *infra* Part I.

*Elected Judges and the Death Penalty in Texas*

Over eighty five people—including seven in Texas—have been released from death row in the last twenty years after establishing their innocence.<sup>19</sup> In two separate cases in Illinois, journalism students and professors at Northwestern University discovered the innocence of defendants condemned to die.<sup>20</sup> But in

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19. See Mike Dorning, *Death Penalty Reforms Gain Backers in D.C.*, CHI. TRIB., Mar. 31, 2000, at 1 (reporting that as of that date, 87 persons had been released from death row in the 22 years since the nation resumed executions); Sydney P. Freedberg, *Ex Death Row Inmate Gets Walking Papers*, ST. PETERSBURG TIMES, Mar. 17, 2000, at A1 (reporting that Joseph Green became the 21st person in Florida and the 87th person in the nation to be released from death row after evidence surfaced that he was innocent).

20. DAVID PROTESS & ROB WARDEN, *A PROMISE OF JUSTICE* 122-208 (1998) (describing the investigation by the class that demonstrated the innocence of four men, including two who were released after 18 years in prison); Pam Belluck, *Class of Sleuths to Rescue on Death Row*, N.Y. TIMES, Feb. 5, 1999, at A16, available in LEXIS, News Library, NYT File (describing how journalism students obtained a confession from another person to the murder for which Anthony Porter had been sentenced to death); Pam Belluck, *Convict Freed After 16 Years on Death Row*, N.Y. TIMES, Feb. 6, 1999, at A7, available in LEXIS, News Library, NYT File

Texas—which, unlike Illinois, does not have a statewide public defender system at the trial level<sup>21</sup>—many death row inmates never have their case reviewed by a competent lawyer, filmmaker, journalist, or journalism class. As a result, wrongful convictions, constitutional violations, and other serious injustices may never come to light and be remedied. Yet, despite the role that federal habeas corpus review has played in freeing the innocent and vindicating egregious violations of the right to counsel and other constitutional protections ignored by state courts, the Supreme Court has erected numerous barriers to federal habeas corpus review.<sup>22</sup> The Court has also adopted a standard for the effectiveness of counsel that some courts construe as guaranteeing nothing more than a warm body with a bar card beside the accused at the counsel table.<sup>23</sup> Congress restricted habeas corpus review even

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(describing the release of Anthony Porter after 16 years on death row).

21. See THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS 156-58 (1993) [hereinafter SPANGENBERG GROUP] (prepared for the State Bar of Texas) (reporting that Texas is one of the few states with no state funding for indigent defense; instead, funding is provided at the county level with significant differences from county to county in the level of funding).

22. See *infra* notes 213-20 and accompanying text.

23. See William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91



*Elected Judges and the Death Penalty in Texas*

more in the Antiterrorism and Effective Death Penalty Act of 1996, which, among other things, imposed a statute of limitations on petitions for habeas corpus relief.<sup>24</sup>

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(1995).

24. See Antiterrorism and Effective Death Penalty Act of 1996 § 107, 28 U.S.C. §§ 2261-2266 (Supp. IV 1998) (amending 28 U.S.C. §§ 2241-2255).

What is happening in Texas is not limited to that state; other states lack independent judiciaries and adequate indigent defense systems. Judges are elected in thirty-two of the thirty-eight states that have the death penalty.<sup>25</sup> The removal of judges perceived as “soft on crime” has made it clear to those remaining on the bench that upholding the law in capital cases comes at their own peril.<sup>26</sup> The quality

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25. See Stephen B. 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, 779 (1995).

26. See *id.* at 760-66 (describing the removal of judges in Texas, California, and Mississippi); Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges From Office for Unpopular*

*Elected Judges and the Death Penalty in Texas*

of representation of those accused of crimes has long been a scandal in many states.<sup>27</sup> Some states do even less than Texas to provide lawyers for the condemned

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*Decisions?* 72 N.Y.U. L. REV. 308, 310, 313-15, 331-36 (1997) (describing the successful campaign to remove Justice Penny White from the Tennessee Supreme Court in a retention election because the court reversed one death penalty case, followed by a warning from the governor that other judges should consider “whether they’re going to be thrown out of office” before ruling on a case).

27. See generally Bright, *supra* note 3 (describing the inadequacy of counsel in capital cases); Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993) (contending that a “narrower definition of ‘counsel’ that encompasses only those licensed attorneys with the requisite skill and knowledge to wage an adequate criminal defense” is needed); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST.L.Q. 625 (1986) (describing the failure to establish and adequately fund public defender offices and other programs to implement the right to effective assistance of counsel for poor people); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent*

in post-conviction review. For example, Georgia makes no provision for counsel in a post-conviction review.<sup>28</sup> The Georgia Supreme Court upheld the denial of state habeas corpus relief in a capital case in which a bewildered man with an IQ in the eighties had no lawyer at all and was forced to represent himself.<sup>29</sup> Also, Alabama pays only one thousand dollars to a lawyer appointed to defend a post-conviction case.<sup>30</sup>

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*Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995) (“The failure of the states to provide the resources necessary to give effect to the abstract values of fairness and reliability in individual capital cases offends the Eighth Amendment.”); *Special Report: Poor Man's Justice*, AM. LAW., Jan.-Feb. 1993, at 45-87 (collecting thirteen articles describing the inadequacy of representation for indigent defendants in various parts of the country).

28. See *Gibson v. Turpin*, 513 S.E.2d 186, 191 (Ga. 1999) (holding that “there is no state or federal constitutional right to an appointed lawyer upon habeas corpus”), *cert. denied sub nom. Gibson v. Head*, 120 S. Ct. 363 (1999).

29. See *id.*

30. ALA. CODE § 15-12-23 (Supp. 1999) (providing for compensation of

*Elected Judges and the Death Penalty in Texas*

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\$50/hour for court time and \$30/hour for out-of-court time, up to a limit of \$1,000, and although the dollar amounts increase to \$60/hour and \$40/hour, respectively, on October 1, 2000, the total limit remains the same).

Texas, however, provides particularly vivid and undeniable examples of the need for full habeas corpus review. Not only have Texas judges tolerated injustices, but in many cases, they have been responsible for them by appointing grossly inadequate counsel.<sup>31</sup> Texas has carried out far more executions than any other state.<sup>32</sup> Texas carried out its two hundredth execution before any other state had executed seventy-five.<sup>33</sup> Remarkably, Texas has been held out as a “model” by proponents of speedier executions, more restrictive review of capital cases, and greater deference by federal courts to the decisions of state courts. In August 1999, the United States Court of Appeals for the Eleventh Circuit convened a conference for state judges in the three states comprising the circuit, at which Michael McCormick, the presiding judge of the Texas Court of Criminal Appeals, a representative of the Texas Attorney General’s office, and Edith Jones, a judge on the Fifth Circuit Court of Appeals, explained how capital cases were processed in Texas.<sup>34</sup> The following January, the Florida legislature, in a frantic three-day special session—brushing aside concerns about the dangers of execution of the innocent and the mentally retarded, racial discrimination, and legal representation for poor people condemned to die—passed laws modeled after Texas law to speed up the review of death penalty cases by imposing deadlines and timetables for the

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31. See *infra* Part I.

32. See Death Penalty Information Center, *Number of Executions by State Since 1976* (last modified Mar. 23, 2000) <<http://www.deathpenaltyinfo.org/> (stating that since 1976, Texas has executed 211 people, followed by Virginia with 76, Florida with 46, Missouri with 42, and the rest of the states with 25 or fewer).

33. See *Texas, Oklahoma Execute Convicted Killers*, ASSOCIATED PRESS, Jan. 13, 2000, available in Westlaw, ALLNEWSPLUS (reporting that Texas carried out its 200th execution and that Virginia had the second highest number of executions, 72).

34. See David Firestone, *Judges Criticized Over Death-Penalty Conference*, N.Y. TIMES, Aug. 19, 1999, at A16 (reporting that the conference agenda included “a detailed look at the process in Texas”); Bob Herbert, *Death Takes a Holiday*, N.Y. TIMES, Aug. 19, 1999, at A21 (describing the invited guests at the conference as “some of the most rabid death penalty advocates from that most rabid of death penalty states, Texas”); Bill Rankin, *Upcoming Judicial Forum Under Fire As Slanted*, ATLANTA CONST., Aug. 10, 1999, at A11 (describing criticism by members of the defense bar of the leading roles played at the conference by particularly outspoken and strident proponents of capital punishment); Jonathan Ringel, *Rough Times for Texans at Death Penalty Forum*, FULTON COUNTY DAILY REPORT, Aug. 23, 1999, at 1 (reporting allegations by defense lawyers that invited guest speakers, Judge Edith Jones and Judge Michael McCormick, were the most “egregious” examples of a conference featuring “too much discussion from prosecutors and judges who wanted to speed the pace of capital cases”).

*Elected Judges and the Death Penalty in Texas*

processing of cases.<sup>35</sup> (The Florida Supreme Court later unanimously declared some provisions of the law unconstitutional.)<sup>36</sup> Brad Thomas, Florida Governor Jeb

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35. See Steve Bousquet et al., *Florida Speeds up Death Row Appeals*, PITTSBURGH POST-GAZETTE, Jan. 8, 2000, at A4, available in 2000 WL 10872386 (reporting that Republican legislators at the special session criticized judges who “discover ‘technicalities’ to delay death sentences and deny justice to victims”); Marcia Gelbart, *Limits Set on Appeals to Speed Executions*, PALM BEACH POST, Jan. 8, 2000, at 1A (reporting that Gov. Jeb Bush’s bill requires inmates to meet strict deadlines for filing claims and limits the number of appeals they can file “with the goal of putting [inmates] to death within 5 years of conviction”); Sara Rimer, *Florida Lawmakers Reject Electric Chair*, N.Y. TIMES, Jan. 7, 2000, at A13 (describing defeat of a proposed amendment to Gov. Jeb Bush’s bill that would have allowed inmates to show that racial bias played a role in their sentencing); Larry P. Spalding, *The High Price of Killing Killers*, PALM BEACH POST, Jan. 4, 2000, at A1, available in 2000 WL 7592885 (quoting the bill’s primary sponsor, Republican Victor Crist, as saying that Florida should be “executing more people a year than [it] send[s] to Death Row, in order to catch up”); Jim Yardley, *A Role Model for Executions*, N.Y. TIMES, Jan. 9, 2000, § 4, at 5 (reporting widespread criticism of Gov. Jeb Bush’s bill as a “hurried proposal”

Bush's top policy advisor on the issue, said that the goal of the legislation was to make Florida "more like Texas," explaining, "[b]ring in the witnesses, put [the defendants] on a gurney, and let's rock and roll."<sup>37</sup> However, close examination of what often passes for justice in Texas's state courts demonstrates that the Texas approach is anything but a model and that the restrictions on federal habeas corpus review were a grave mistake.

**I. Capital Trials in Texas: No Requirement that Defense Counsel Be Awake, Prepared, Free of Conflicts, or Adequately Compensated**

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that is "possibly unconstitutional" and "might result in executing wrongly convicted inmates").

36. *Allen v. Butterworth*, No. SC00-113, 2000 WL 381484, at \*15 (Fla. Apr. 14, 2000).

37. See Yardley, *supra* note 35, § 4, at 5 (reporting Mr. Thomas's comments and quoting Democratic State Representative Chris Smith, who stated at the special session that Texas should be "our role model for killing people"); William Yardley, *Bush's Adviser Key in Push for Quicker Death Row Appeals*, ST. PETERSBURG TIMES, Jan. 6, 2000, at 5B (describing Thomas's role in prompting Florida's overhaul of the death row appeals process).



### *Elected Judges and the Death Penalty in Texas*

Michael McCormick, the presiding judge of the Court of Criminal Appeals, has lamented that Texas “lost its sovereignty in ‘right to counsel’ matters for indigent defendants” the day the Supreme Court held in *Gideon v. Wainwright*<sup>38</sup> that states were required to provide counsel in felony cases.<sup>39</sup> He has argued that a case-by-case assessment of whether the accused needed counsel, which the United States Supreme Court previously required, was “better reasoned and more true to principles of federalism”<sup>40</sup> than *Gideon* and decried *Gideon*’s “mischievous results.”<sup>41</sup> However, under McCormick’s leadership the Texas Court of Criminal Appeals has maintained what some would call “sovereignty”—and others might call lawlessness—in rendering the right to counsel all but meaningless.

The Court has upheld at least three death sentences from Houston in which the defendant’s lawyer slept during trial. The *Houston Chronicle* described one trial as follows:

Seated beside his client—a convicted capital murderer—defense attorney John Benn spent much of Thursday afternoon’s trial in apparent deep sleep. His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long

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38. 372 U.S. 335 (1963).

39. See *Ex parte Jordan*, 879 S.W.2d 61, 64 (Tex. Crim. App. 1994) (McCormick, P.J., dissenting).

40. *Id.* at 63 (referring to *Betts v. Brady*, 316 U.S. 455 (1942), which was overruled in *Gideon*).

41. *Id.* at 63 n.1 (quoting *Douglas v. California*, 372 U.S. 353, 361-64 (1963) (Harlan, J., dissenting)).

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 Nov. 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 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.<sup>42</sup>

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42. John Makeig, *Asleep on the Job? Slaying Trial Boring, Lawyer Says*, HOUS. CHRON., Aug. 14, 1992, at A35, available in 1992 WL 8083373 (describing trial proceedings in *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996)).

*Elected Judges and the Death Penalty in Texas*

The judge presiding over McFarland's trial in Houston permitted the trial to continue on the theory that "[t]he Constitution doesn't say the lawyer has to be awake."<sup>43</sup> The Court of Criminal Appeals affirmed over the dissent of Judges Charles Baird and Morris Overstreet.<sup>44</sup> Judge Baird wrote, "[a] sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense."<sup>45</sup> He pointed out that although McFarland had a second lawyer assigned to his case,

[n]either attorney interviewed a witness and neither attorney reviewed the extraneous offenses that were to be later admitted. 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.<sup>46</sup>

The Court of Criminal Appeals also upheld the convictions and death sentences imposed on Calvin Burdine and Carl Johnson, even though Joe Frank Cannon, the lawyer appointed by the trial court to defend them at separate trials, slept during their trials.<sup>47</sup> Cannon, known by his own account for hurrying through capital trials like "greased lightning," had at least ten clients sentenced to death.<sup>48</sup>

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43. *Id.*

44. *See McFarland*, 928 S.W.2d at 525-28.

45. *Id.* at 527.

46. *Id.* at 527-28.

47. *See Ex parte Burdine*, 901 S.W.2d 456, 456 (Tex. Crim. App. 1995) (denying defendant's state habeas corpus appeal despite a finding by the trial court that he was denied effective assistance of counsel because his lawyer slept through the trial); *see also* David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691 (1996) (describing the *Johnson* case, in which the Court of Criminal Appeals did not publish its opinion).

48. *See* Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts*

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*About System*, WALL ST. J., Sept. 7, 1994, at A1 (describing Cannon's "sloppiness on vital legal procedure"), available in 1994 WL-WSJ 343264.

*Elected Judges and the Death Penalty in Texas*

Although the Texas court upheld Burdine's conviction, a federal court, concluding that "sleeping counsel is equivalent to no counsel at all," granted habeas corpus relief to Burdine.<sup>49</sup> The court found that Cannon "dozed and actually fell asleep during portions of [Burdine's] trial on the merits, in particular during the guilt-innocence phase when the State's solo prosecutor was questioning witnesses and presenting evidence."<sup>50</sup> In finding that Cannon had slept, the court relied on testimony that he had also slept during the trial of Carl Johnson.<sup>51</sup> However, Johnson never received relief; he was executed in 1995.<sup>52</sup> Another of Cannon's clients, Larry Norman Anderson, was put to death by Texas after the Fifth Circuit Court of Appeals found that evidence that Cannon had a reputation for incompetence and "habitually trie[d] capital cases in a perfunctory manner" was not relevant to his performance in Anderson's case.<sup>53</sup>

Frederico Martinez-Macias was represented at his capital trial in El Paso by a court-appointed attorney paid only \$11.84/hour.<sup>54</sup> Counsel failed to present an available alibi witness, relied upon an incorrect assumption about a key evidentiary point without doing the research that would have corrected his erroneous view of the law, and failed to interview and present witnesses who could have testified in rebuttal of the pro-secutor's case.<sup>55</sup> Martinez-Macias was sentenced to death. He avoided execution only because he had the good fortune to receive pro bono

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49. See *Burdine v. Johnson*, 66 F. Supp. 2d 854, 866 (S.D. Tex. 1999).

50. *Id.* at 859.

51. *Id.* at 859.

52. See Dow, *supra* note 47, at 694-95 (relating the history of Carl Johnson's death penalty case and his ultimate death by lethal injection).

53. *Anderson v. Collins*, 18 F.3d 1208, 1215 (5th Cir. 1994). Anderson was executed by Texas on April 26, 1994. DEATH ROW U.S.A., *supra* note 1, at 16.

54. See *Martinez-Macias v. Collins*, 979 F.2d 1067, 1067 (5th Cir. 1992) (affirming grant of habeas corpus relief based on ineffective assistance of counsel).

55. See *Martinez-Macias v. Collins*, 810 F. Supp. 782, 786-87, 796-813 (W.D. Tex. 1991), *aff'd*, 979 F.2d 1067 (5th Cir. 1992).

representation from a Washington, D.C., firm, which proved in federal habeas corpus proceedings that “the justice system got only what it paid for,”<sup>56</sup> woefully deficient representation that prejudiced Martinez-Macias. After he was granted habeas corpus relief, an El Paso grand jury refused to re-indict Martinez-Macias and he was released after nine years on death row.<sup>57</sup>

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56. *Martinez-Macias*, 979 F.2d at 1067.

57. See Gordon Dickinson, *Man Freed in Machete Murder Case*, EL PASO TIMES, June 24, 1993, at 1.

*Elected Judges and the Death Penalty in Texas*

Federal habeas corpus relief was the only thing that kept Pamela Lynn Perillo from being executed in Texas, even though her lawyer had a conflict of interest because of his active representation of the state's star witness against her.<sup>58</sup> The Texas Court of Criminal Appeals upheld her conviction and death sentence on the basis of an affidavit from her lawyer without even requiring an evidentiary hearing. However, a federal court, after conducting a hearing, found that her lawyer, disbarred for lying to a client in another case, was not credible and that the conflict adversely affected his conduct of Perillo's defense, including his cross-examination of his client who testified against Perillo.<sup>59</sup>

*Perillo* illustrates the remarkable casualness with which defense counsel is assigned to represent defendants facing the death penalty in Houston. The trial judge initially appointed an attorney who had never tried a capital case.<sup>60</sup> That attorney asked another lawyer with whom he "ran several machine shops" to assist in the defense.<sup>61</sup> The judge appointed the lawyer, who had defended the state's key witness against Perillo, a co-participant in the crime, at a separate trial.<sup>62</sup> The lawyer continued to represent the witness in obtaining immunity in testifying against another participant, knew that the client-witness had given new and damaging testimony about Perillo at that trial that was inconsistent with testimony the witness had given at her own trials, and encouraged the witness to meet with the survivors of the victim.<sup>63</sup> The lawyer even went over the prior testimony given at the two earlier trials by the witness, who was staying at the lawyer's home, and "mapped out" the cross-examination he would conduct the next day at Perillo's trial.<sup>64</sup> The lawyer failed to impeach the testimony of his client-witness, thereby, according to

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58. See *Perillo v. Johnson*, 205 F.3d 775, 780 (5th Cir. 2000) (affirming a district court's grant of habeas relief because defendant's lawyer previously represented the state's witness in the same crime and continued to represent her in other matters).

59. See *id.* at 783.

60. See *id.* at 786.

61. See *id.*

62. See *id.*

63. *Id.* at 786-87.

64. See *id.* at 788.

the District Court, not pursuing “a plausible defensive strategy that could have had significant impact with respect to Perillo’s punishment.”<sup>65</sup>

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65. *Id.* at 796.



*Elected Judges and the Death Penalty in Texas*

This was too much even for the United States Court of Appeals for the Fifth Circuit,<sup>66</sup> which, in applying the standard for effective assistance of counsel established in *Strickland v. Washington*,<sup>67</sup> has generally upheld convictions and death sentences even in cases of conflicts of interest<sup>68</sup> and scandalously poor representation.<sup>69</sup> Judge Alvin Rubin, concurring in the denial of habeas relief in one capital case, observed that “[t]he Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel,”<sup>70</sup> and noted that, as a result, “accused persons who are represented by ‘not-legally-ineffective’ lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence.”<sup>71</sup> In one such case, a Texas lawyer, later suspended from practice,<sup>72</sup> presented no evidence about his client at the penalty phase of the trial and then made no closing argument, instead saying, “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.”<sup>73</sup> A United States District Court granted habeas corpus relief, but the Fifth

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66. See *supra* note 58 and accompanying text.

67. 466 U.S. 668, 687-96 (1984) (holding that in order to prove ineffective assistance of counsel, a defendant must first show that counsel’s performance was deficient, and second, that this deficiency prejudiced the defense).

68. See, e.g., *Moreland v. Scott*, 175 F.3d 347, 348-49 (5th Cir. 1999) (finding no conflict and upholding conviction and death sentence where defense counsel, who was running for district attorney, advised client to reject a plea offer which would have resulted in a sentence of 50 years on the theory that the case would be reversed on appeal and, upon being elected district attorney, counsel would give him a more favorable plea offer); *Beets v. Scott*, 65 F.3d 1258, 1279 (5th Cir. 1995) (en banc) (reversing district court’s order and a panel opinion, see 986 F.2d 1478, that found a violation of Beets’s right to counsel because her lawyer obtained a media contract for her story and failed to withdraw and testify as a defense witness); *Russell v. Lynaugh*, 892 F.2d 1205, 1216 (5th Cir. 1989) (upholding a conviction and death sentence despite defense attorney’s representation of a state witness on previous occasions in criminal matters); *Kirkpatrick v. Butler*, 870 F.2d 276, 284 (5th Cir. 1989) (upholding conviction and death sentence even though the defense attorney was an “attorney to and fishing buddies with” the victim’s family and failed to bring out evidence that the defendant may have acted in response to a sexual advance by the victim).

69. See, e.g., *infra* notes 72-74.

70. *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

71. *Id.* (emphasis in original).

72. See *Suspensions*, 56 TEX. B.J. 73, 73 (Jan. 1993) (stating that Jon R. Wood was suspended for entering his client into an agreed judgment without the consent of his client).

73. *Romero v. Lynaugh*, 884 F.2d 871, 875 (5th Cir. 1989).

Circuit, characterizing counsel's nonargument as a "dramatic ploy,"<sup>74</sup> reversed and the defendant was executed. The court also reversed a district court's finding of ineffective assistance for failure to present any mitigating evidence, including the defendant's mental retardation, abuse by his parents, and serious alcohol and drug problems.<sup>75</sup>

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74. *Id.* at 877 (denying habeas relief, even though the attorney presented no mitigating evidence and only made a few perfunctory remarks at the sentencing phase).

75. *See Williams v. Cain*, 125 F.3d 269, 279 (5th Cir. 1997).

*Elected Judges and the Death Penalty in Texas*

In another case, two judges of the court rejected a claim of ineffective assistance of counsel<sup>76</sup> despite 230 findings of fact by the state trial court regarding ineffective representation, including the lawyer's failure to object to the state's use of peremptory challenges to exclude black venire members, to obtain critical portions of transcripts of the codefendant's trial, to consult with an independent ballistics expert, to preserve legal issues for review, and to give an effective closing argument at the penalty phase.<sup>77</sup> The state trial judge recommended that habeas corpus relief be granted because of the poor representation, but the recommendation was rejected by the Texas Court of Criminal Appeals in a five-to-four per curiam decision.<sup>78</sup> In dissenting from the Fifth Circuit's conclusion that the lawyer's poor performance did not violate the right to counsel, Judge DeMoss observed, "[i]f the state court findings in this case do not satisfy both the 'ineffectiveness' and 'prejudice' prongs of *Strickland*, then in my view there is no such animal as an 'ineffective counsel' and we should quit talking as if there is."<sup>79</sup> The Fifth Circuit refused even to order a hearing on a claim that a defense lawyer was intoxicated during a capital trial,<sup>80</sup> and has found no violation of the right to counsel in other cases where defense counsel failed to present any mitigating evidence at the sentencing phase of the trial.<sup>81</sup> The Fifth Circuit's view that the right to counsel means so little appears to be inconsistent with the Supreme Court's recent decision in *Williams v. Taylor*,<sup>82</sup> holding that the failure to present mitigating evidence at the penalty phase of a capital trial constituted ineffective assistance.<sup>83</sup> However, it is

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76. *Westley v. Johnson*, 83 F.3d 714, 721-24 (5th Cir. 1996) (holding that, although Westley's counsel was deficient in at least two areas of his defense, the deficiencies "did not operate to Westley's prejudice at his trial").

77. *Id.* at 727-29 (DeMoss, J., dissenting).

78. *Id.* at 728 (DeMoss, J., dissenting).

79. *Id.* at 729 (DeMoss, J., dissenting).

80. *Russell v. Lynaugh*, 892 F.2d 1205 (5th Cir. 1989).

81. See, e.g., *Ransom v. Johnson*, 126 F.3d 716, 723 (5th Cir. 1997) (finding the failure of counsel to present any evidence of mitigation, including Ransom's terrible abuse as a child, "very troublesome," but holding that it did not violate the Sixth Amendment); *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir. 1997) (holding that defense counsel was not ineffective despite failure to present any mitigating evidence including "child abuse, family instability, a poor educational background, low IQ, gunshot injuries, and that his mother was severely and chronically mentally ill"); *Faulder v. Johnson*, 81 F.3d 515, 519-20 (5th Cir. 1996) (holding that counsel was not ineffective for failure to present any mitigating evidence at the sentencing phase even though his reason for doing so was that he was unaware of his right to present the evidence).

82. 120 S. Ct. 1495 (2000).

83. *Id.* at 1497-98 (holding that Williams's constitutionally protected right to effective counsel was violated by his trial attorney's failure to prevent mitigating

apparent both from decisions in which the Fifth Circuit has found ineffectiveness and from many in which it did not that the Texas courts are assigning incompetent lawyers to represent the poor in capital cases and providing no remedy for breakdowns in the adversarial system resulting from poor representation.

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evidence such as child abuse, mental retardation, prison records, and lack of education).

*Elected Judges and the Death Penalty in Texas*

Although a poor defendant may pay with his life for the poor representation he receives, he has no voice in the selection of court-appointed counsel. A poor person accused of a crime is powerless to enforce the right upon which all others depend, the right to counsel.<sup>84</sup> Kenneth Dwayne Dunn's death sentence was upheld despite the fact that he objected to the counsel appointed to represent him at trial.<sup>85</sup> After his first death sentence was overturned because the court failed to adequately transcribe the trial proceedings, the judge reappointed Dunn's attorneys.<sup>86</sup> At first, Dunn attempted to represent himself, but the court appointed the same lawyers who had represented him at his first trial as standby counsel, despite Dunn's objection that he had filed a malpractice suit against them and did not want them to represent him because of this conflict of interest.<sup>87</sup> Then, he asked not to represent himself but to be represented by different counsel.<sup>88</sup> Again, the court appointed the same lawyers.<sup>89</sup> Over the dissent of Justice Charles Baird, the Texas Court of Criminal Appeals upheld Dunn's second death sentence.<sup>90</sup> The poor quality of indigent defense in Texas has been well documented and widely recognized.<sup>91</sup> However, Texas judges, in order to maintain control over their dockets and receive campaign contributions from appointed lawyers,<sup>92</sup> have been extremely hostile even to modest attempts to limit their powers of appointment. In 1999, the Texas legislature unanimously passed a bill that created the mere *possibility* of public defenders' offices, and required indigent defendants to be appointed attorneys

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84. Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services When Life and Liberty Are at Stake*, 1997 N.Y.U. ANN. SURV. AM. L. 783, 793-96 (1997) (describing the unsuccessful efforts of an indigent defendant to have his incompetent lawyer replaced).

85. See *Dunn v. State*, 819 S.W.2d 510, 515-18 (Tex. Crim. App. 1991).

86. See *id.* at 517.

87. See *id.* at 518.

88. See *id.*

89. See *id.*

90. See *id.* at 526.

91. See, e.g., SPANGENBERG GROUP, *supra* note 21, at ii (describing the situation in Texas as "desperate"); Ballard, *Gideon's Broken Promise*, *supra* note 3, at 18-21; Debbie Nathan, *Wheel of Misfortune*, TEX. OBSERVER, Oct. 1, 1999 (describing the lottery system in Bexar County, Texas for assigning counsel to indigent criminal defendants); Bob Sablatura, *Appointment of Defenders Varies in Court; Some Judges Create Own Systems; Critics Call for Independent Office*, HOUS. CHRON., Oct. 18, 1999, at A9, available in LEXIS, News Library, HCHRN file (discussing the problems of permitting judges to appoint counsel for indigent criminal defendants).

92. See Ballard, *Gideon's Broken Promise*, *supra* note 3, at 18; Ballard, *Appointed Counsel*, *supra* note 3, at 18.

within twenty days of arrest.<sup>93</sup> Texas judges mobilized to convince Governor George W. Bush to veto the bill.<sup>94</sup> Despite resounding denunciations, Governor Bush vetoed the bill.<sup>95</sup> Thus, the Texas judiciary, instead of protecting the right to counsel, has played a key role in perpetuating the systematic denial of competent and effective representation.

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93. See Tex. S.B. 247, 76th Leg., R.S. (1999), available in Texas Legislature Online, <<http://www.capitol.state.tx.us/cgi-bin/db2www/tlo/billhist/billhist.d2w/report?LEG=76&SESS=R&CHAMBER=S&BILLTYPE=B&BILLSUFFIX=00247&SORT=Asc>>; John Moritz, *Public Defenders Measure Defended by State Senator, Judges Who Oppose the Bill Say They Should Choose Counsel for Indigent Suspects*, FORT WORTH STAR-TELEGRAM, June 5, 1999, at 4, available in 1999 WL 6238340; Joe Stinebaker, *Officials Size Up Bill Limiting Judges from Appointing Lawyers*, HOUS. CHRON., June 2, 1999 at A1, available in 1999 WL 3999789 (explaining that the bill would have given Texas commissioner courts the power to appoint attorneys for indigent defendants and possibly to set up public defender offices).

94. See A. Philips Brooks, *Bush Veto on Legal Aid Bill Draws National Scrutiny*, AUSTIN AM.-STATESMAN, June 22, 1999, at A6, available in 1999 WL 7416622; John Council, *Judicial Furor: Criminal Judges Irate Over Bill Stripping Them of Appointment Power*, TEX. LAW., June 14, 1999, at 1 (noting that Bush's office "received numerous calls from judges throughout Texas . . . who have voiced their concerns [about] the legislation"); Melinda Prentice & Adolfo Pesquera, *Indigent Defense Bill Sparks Call for Veto*, SAN ANTONIO EXPRESS-NEWS June 5, 1999, at B1, available in LEXIS, News Library, San Antonio Express-News file ("State District judges . . . sent Bush a letter saying the bill is unconstitutional and calling on him to veto it."); Sanders, *supra* note 5 at 1 (stating that district judges were "determined to see [the bill] die at the hands of Gov. George W. Bush" because they were unhappy that the legislation "would give county commissioners the responsibility to determine how attorneys would be appointed for the poor . . . [and would] give county auditors the authority to decide how court-appointed attorneys would be paid"); Kathy Walt, *Supporters Urge Bush to Sign Bill; Judges Seek Veto*, HOUS. CHRONICLE, June 5, 1999, at A31 ("Criminal district judges in Harris County voted unanimously earlier this week to authorize Administrative Judge George Godwin to urge Bush to veto the measure.").

95. See Bob Herbert, *Texas Justice: It's an Oxymoron But Gov. Bush Doesn't Mind*, N. Y. TIMES, June 24, 1999, at A27, available in LEXIS, News Library, NYT File ("George W. Bush put his vaunted compassion on hold Sunday night and vetoed a bill that would have modestly improved the abysmal quality of legal representation available to indigent defendants in Texas."); Viveca Novak, *The Cost of Poor Advice*, TIME, July 5, 1999, at 38 ("Texas's reputation as a state without tender mercies for the accused is nowhere more apparent than in how it deals with defendants too poor to hire lawyers.").

**I. Post-Conviction Review: The Role of the Texas Court of Criminal Appeals in Appointing Incompetent Lawyers and Punishing Clients**

A poor person accused of a crime is constitutionally entitled to a lawyer only for trial<sup>96</sup> and for one direct appeal.<sup>97</sup> But several important avenues of review exist beyond one appeal: for example, state post-conviction review, where a condemned inmate may raise issues that could not have been presented at trial or on direct appeal, such as the denial of the Sixth Amendment right to counsel at trial<sup>98</sup> or the failure of the prosecutor to disclose exculpatory evidence.<sup>99</sup> Beyond that, a death-sentenced inmate can seek habeas corpus review in the federal courts.<sup>100</sup> A death-sentenced inmate has a statutory right to counsel for federal habeas corpus,<sup>101</sup> but

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96. See *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (holding that the Sixth and Fourteenth Amendments require a state defendant to be provided with counsel at trial).

97. See *Douglas v. California*, 372 U.S. 353, 355-58 (1963) (holding that the Due Process and Equal Protection clauses of the Fourteenth Amendment only require states to provide indigent defendants counsel for their initial appeal).

98. See *Strickland v. Washington*, 466 U.S. 668, 667-96 (1984).

99. See *Brady v. Maryland*, 373 U.S. 83, 84-85 (1963).

100. See 28 U.S.C. § 2254 (Supp. IV 1998). For a discussion of the role that habeas corpus has played in vindicating constitutional rights, see *infra* notes 210-11 and accompanying text.

101. See 21 U.S.C. § 848(q) (1994); see also *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994) (holding that 21 U.S.C. § 848 provides inmates with a right to legal counsel in seeking federal habeas corpus review).

counsel can present only claims that have been presented to and decided by the state courts.<sup>102</sup>

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102. See 28 U.S.C. § 2254(b) (Supp. IV 1998).



### *Elected Judges and the Death Penalty in Texas*

For several years, federally-funded resource centers, also called post-conviction defender organizations, in Texas and other states employed attorneys who specialized in capital post-conviction litigation. Those programs provided representation in some cases and recruited attorneys in others.<sup>103</sup> The Texas Resource Center was attacked by politicians, who thought tax dollars should not be spent on defending murderers,<sup>104</sup> and prosecutors, who felt the Resource Center attorneys were representing their clients too zealously.<sup>105</sup> Congress eliminated all funding for resource centers in 1996,<sup>106</sup> and the Texas Resource Center closed shortly thereafter.<sup>107</sup>

The Texas legislature amended its post-conviction review law in 1995, and provided that the complex task of representing those under death sentence in post-conviction proceedings be assigned to individual lawyers.<sup>108</sup> From 1995 to 1999, the legislature gave the Court of Criminal Appeals the responsibility for “appoint[ing]

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103. See Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 906-913 (1996).

104. See David Elliot, *State Senator Sues Legal Resource Center*, AUSTIN AM-STATESMAN, Sept. 23, 1993, at B3, available in 1993 WL 6803110 (reporting Texas State Senator Jerry Patterson’s frustration with “11th hour appeals” and the Resource Center’s representation of Richard Lee Beavers, who had previously volunteered for execution but changed his mind and filed an appeal); Kathy Walt, *Death Row Lawyers Win Bid to Keep Lid on Books*, HOUS. CHRON., June 22, 1995, at A1, available in 1995 WL 5909378 (reporting on Senator Patterson’s accusation that the Resource Center hired “public relations experts to mount campaigns for their clients” and used “taxpayer dollars to recruit witnesses who are pressured to perjure themselves on the witness stand”).

105. See Howard, *supra* note 104, at 913 (reporting that the Texas office had been criticized as “obstructionist,” but that its director described the criticism as “the reaction to a vigorous defense bar in capital cases”); Mark Ballard, *Trial Captivates Death Row Bar*, TEX. LAW., Apr. 26, 1993, at 1, 30 (reporting on allegations that the head of the Texas Resource Center suborned perjury and her lawyer’s response that the subpoena issued to her was part of a “witch hunt”); Susan Warren, *Taking Offense at Death Row Defense*, HOUS. CHRON., Nov. 7, 1993, at A20, available in 1993 WL 9632102 (reporting on prosecutors’ frustration with the Resource Center’s filing of what veteran capital defense attorney Will Gray called “frivolous trash,” and accusing the center of manipulating appeals through the media).

106. See Howard, *supra* note 103, at 912-15.

107. See Christy Hoppe, *McVeigh’s Texas Lawyers Known for Their Battles Against Death Penalty*, DALLAS MORNING NEWS, June 9, 1997, at 1A, available in 1997 WL 11498836.

108. See TEX. CODE CRIM. PROC. art. 11.071, § 2(a) (Vernon Supp. 2000).

competent counsel” to represent the condemned.<sup>109</sup> As the *Dallas Morning News* charitably put it, the court did “a less-than-stellar job.”<sup>110</sup> The court’s lack of concern about the qualifications of the lawyers it appointed was apparent from the outset when, while conscripting forty-eight attorneys to handle cases, it appointed a longtime federal prosecutor to represent one of the condemned.<sup>111</sup> The court was not even aware that the lawyer was an assistant U.S. attorney and thus could not represent a death-sentenced inmate.<sup>112</sup>

Equally disturbing was the Court of Criminal Appeals’ assignment of 14 capital post-conviction cases to two of its former law clerks, initially paid \$265,000, which was 13 percent of the first \$1.9 million paid to lawyers by the court.<sup>113</sup> The two

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109. *Id.* at § 2(c)-(d) (emphasis added).

110. Editorial, *Death Penalty Reforms are Needed for the System to be Fair*, DALLAS MORNING NEWS, Dec. 20, 1998, at 2J, available in 1997 WL 23044432.

111. See Janet Elliott, *Habeas Surprise: Court Orders 48 to Take Death Cases*, TEX. LAW., Dec. 2, 1996, at 1.

112. *Id.*

113. See *Ex-Court Clerks got \$265,000 for Death Row Inmates’ Cases*, DALLAS MORNING NEWS, Oct. 4, 1997, at 26A, available in 1997 WL 11525334; Kathy Walt, *Lawyers Who Aid Condemned Paid \$265,000/State Payments by Far*

*Elected Judges and the Death Penalty in Texas*

former clerks had no experience in such proceedings.<sup>114</sup> Even the most experienced lawyers could not take on so many clients under death sentence and provide adequate representation to all of them.

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*Largest to Any Attorneys*, HOUS. CHRON., Oct. 3, 1997, at 33, available in 1997 WL 13064743.

114. See Walt, *supra* note 113.

The court assigned Ricky Kerr to a young lawyer who in his four years in the practice had never been involved in the trial or appeal of a capital case in any way.<sup>115</sup> The lawyer suffered severe health problems that kept him out of his office in the months before he was to file a habeas corpus application on behalf of Kerr.<sup>116</sup> The lawyer so misunderstood habeas corpus law that, as he later admitted, he thought he was precluded from challenging Kerr's conviction and sentence<sup>117</sup>—the very purpose of a habeas petition. He filed what one member of the Court of Criminal Appeals called a “non-application,”<sup>118</sup> which failed to raise any issue attacking the conviction.

After he and his family were unable to contact his lawyer, Kerr wrote a letter to the court complaining about his lawyer and asking the court to appoint another lawyer to prepare a habeas petition.<sup>119</sup> Even though prosecutors did not object to a stay,<sup>120</sup> the Court of Criminal Appeals denied Kerr's motions for a stay of execution

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115. See Janet Elliott, *Habeas System Fails Death Row Appellant*, TEX. LAW., Mar. 9, 1998, at 1, 25; Christy Hoppe, *Critics Say Case Shows Danger in Limiting Death-Row Appeals: Speeding Execution Criticized After Error by Inmate's Lawyer*, DALLAS MORNING NEWS, Mar. 9, 1998, at 1A, available in 1998 WL 2519101.

116. See Walt, *supra* note 113.

117. See *Ex parte* Kerr, 977 S.W.2d 585, 585 (Tex. Crim. App. 1998) (Overstreet, J., dissenting); Elliott, *supra* note 115, 116 at 25 (reporting how Robert McGlohon, Jr., the appointed counsel, mistakenly believed “he could not attack the validity of Kerr's conviction in the habeas appeal because Kerr's direct appeal . . . was not yet final”).

118. *Kerr*, 977 S.W.2d at 585 (Overstreet, J., dissenting).

119. See Elliott, *supra* note 115 at 25.

120. See *id.*

*Elected Judges and the Death Penalty in Texas*

and for the appointment of competent counsel.<sup>121</sup> Judge Morris Overstreet, warning that the court would have “blood on its hands” if Kerr was executed, dissented in order to “wash [his] hands of such repugnance,”<sup>122</sup> saying:

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121. *See Kerr*, 977 S.W.2d at 585 (Overstreet, J., dissenting).

122. *Id.*

For this Court to approve of such and refuse to stay this scheduled execution is a farce and travesty of applicant's legal right to apply for habeas relief. It appears that the Court, in approving such 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.<sup>123</sup>

Even the prosecutors who sought Kerr's execution acknowledged that the lawyer assigned to him "failed to comply with the letter and the spirit" of Texas's law allowing post-conviction review.<sup>124</sup> The Texas Criminal Defense Lawyers Association noted that in the court's *Kerr* decision, the court had made it clear "that the duty of defense counsel . . . is discharged by doing absolutely nothing."<sup>125</sup>

Other lawyers appointed by the court have also filed patently inadequate pleadings. For example, the petition filed by the lawyer the court appointed to represent Johnny Joe Martinez was described by Judge Charles Baird as follows:

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

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123. *Id.*

124. Elliott, *supra* note 115 at 26 (quoting the chief appellate lawyer for the district attorney's office handling the case).

125. *TCDLA Urges Members to Pass on Accepting Habeas Cases*, TEX. LAW., June 22, 1998, at 4 (citing the resolution passed by the Board of Directors of the Texas Criminal Defense Lawyers Association on June 6, 1998) [hereinafter *TCDLA Urges Members*].

*Elected Judges and the Death Penalty in Texas*

application, and no cases are cited for the remaining two claims for relief. Those claims comprise only 17 lines with three inches of margin.<sup>126</sup>

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126. *Ex parte* Martinez, 977 S.W.2d 589, 589 (Tex. Crim. App. 1998) (Baird, J., dissenting).

Although a state bar committee report found that handling a capital post-conviction case requires, on average, somewhere between four hundred and nine hundred hours of attorney time,<sup>127</sup> records indicated that the lawyer assigned to Martinez spent less than fifty hours preparing the application.<sup>128</sup> The lawyer did not seek any reimbursement for travel or investigatory expenses or seek funds for expert assistance.<sup>129</sup> Martinez wrote to the Court of Criminal Appeals, informing the court that his attorney was failing to investigate his claims and asking to be assigned new counsel.<sup>130</sup> The court denied Martinez's petition over a dissent by Judge Baird that urged the court to remand the case to the trial court to determine whether Martinez was adequately represented.<sup>131</sup>

The court also denied what it treated as an “[a]pplication for writ of habeas corpus” filed by the lawyer it assigned to represent Bryan Wolfe,<sup>132</sup> even though the pleading filed “appear[ed] to be a motion for discovery.”<sup>133</sup> Again, Judge Baird

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127. See Elliott, *supra* note 115 at 26 (reporting the results of a 1993 study commissioned by the State Bar of Texas, finding the median number of attorney hours to be 400 and the mean to be 900).

128. See *Martinez*, 977 S.W.2d at 589, n.2 (Baird, J., dissenting).

129. See *id.*

130. See Elliott, *supra* note 115.

131. See *Martinez*, 977 S.W.2d at 590 (Baird, J., dissenting).

132. *Ex parte Wolfe*, 977 S.W.2d 603, 603 (Tex. Crim. App. 1998) (Baird, J., dissenting).

133. *Id.* Judge Baird described the application as follows:

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.



*Elected Judges and the Death Penalty in Texas*

urged his colleagues to remand the case for a determination of whether the inmate was properly represented, and they refused.<sup>134</sup>

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*Id.*

134. *See id.*

In another case, Andrew Cantu resorted to representing himself after the first two lawyers assigned by the court withdrew and a third failed even to show up to interview him.<sup>135</sup> The first lawyer assigned to represent him had represented his co-defendant. The second had represented the state as an assistant attorney general in capital habeas corpus cases. At a hearing held five months after the third lawyer was assigned to represent Cantu, the lawyer admitted he had not visited Cantu, claiming that he did not know Cantu's location.<sup>136</sup> (Texas had only one death row at that time, which was located near Huntsville.)<sup>137</sup> The lawyer also admitted that he had made no effort to contact an investigator or an expert and was not familiar with the Antiterrorism and Effective Death Penalty Act of 1996,<sup>138</sup> which established a one-year statute of limitations for filing a federal habeas corpus petition.<sup>139</sup> Cantu was executed on February 16, 1999, without any state or federal review of the issues in his case.<sup>140</sup>

The court has also appointed attorneys who failed to file any petition within the 180-day deadline established by statute,<sup>141</sup> and then strictly enforced the deadlines to preclude any post-conviction review.<sup>142</sup> In refusing to consider one untimely application from a lawyer it assigned, the court noted that the "screamingly obvious" intent of the Texas legislature in setting a time limit for the filing of post-conviction petitions was "to speed up the habeas corpus process."<sup>143</sup> Judge Baird took issue with the majority's conclusion that "speed should be our only

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135. See Paul Duggan, *On Death Row, Not Even Dying Is Certain*, WASH. POST, Dec. 20, 1998, at A22, available in 1998 WL 22542235.

136. See *State v. Cantu*, 104th Dist. Ct. of Taylor County, Tex., No. 10,172-B, Transcript of Hearing of Aug. 15, 1997, at 26 [hereinafter *Cantu Transcript*].

137. Bruce Tomasco, *Change of Address: Death Row's New Home Offers Fewer Amenities for its Tenants*, DALLAS MORNING NEWS, June 9, 1999, at 25A, available in 1999 WL 4127009.

138. Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered titles of U.S.C.) (Supp. IV 1998).

139. See *id.* §§ 101, 105 (amending 28 U.S.C. § 2244(d)(1)). See *Cantu Transcript*, *supra* note 136, at 27-28 (recording the lawyer's testimony at the hearing).

140. See *Cantu-Tzin v. Johnson*, 162 F.3d 295 (5th Cir. 1998) (holding that because the habeas petition was time-barred, the district court was not required to appoint counsel pursuant to 21 U.S.C. § 848(q)(4)(B)), *stay denied*, 525 U.S. 1132 (1999).

141. TEX. CODE CRIM. PROC. art. 11.071, § 4(a) (Vernon Supp. 2000).

142. See *Ex parte Smith*, 977 S.W.2d 610, 610 (Tex. Crim. App. 1998) (dismissing the petition because it was filed nine days late); *Ex parte Colella*, 977 S.W.2d 621 (Tex. Crim. App. 1998) (dismissing the petition because it was filed thirty-seven days late). See also *infra* notes 143-56.

143. *Smith*, 977 S.W.2d at 611.

*Elected Judges and the Death Penalty in Texas*

concern when interpreting the statute,” and argued in dissent that the court had failed “to accept our statutory responsibility for appointing competent counsel.”<sup>144</sup>

By strictly enforcing deadlines, the Court of Criminal Appeals sweeps questions regarding unjust convictions or sentences under the rug. One of the most egregious examples is the case of Henry Skinner.<sup>145</sup> Two days before Skinner's application for post-conviction review was due to be filed, his lawyer filed a motion in the Court of Criminal Appeals to extend the deadline. On the day the application was due, the court ruled that the motion for an extension should have been filed in the trial court.<sup>146</sup> The motion was filed the following day in the proper court, which ultimately held it untimely and refused to hear Skinner's claims.<sup>147</sup>

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144. *Id.* at 613-14 (Baird, J., dissenting).

145. *Ex parte* Skinner, No. 20,203-03 (Tex. Crim. App. Dec. 2, 1998).

146. *Id.* at slip op. 1 (order).

147. *Id.* at slip op. 1-2 (order).

The court upheld the trial judge's ruling that Skinner was barred from the post-conviction process because his lawyer had missed the deadline by one day. In dissent, Judge Baird pointed out that the dismissal of the application meant that no court would review the quality of representation provided to Skinner by a former district attorney who had twice prosecuted Skinner, had cocaine problems, and had a questionable relationship with the presiding judge.<sup>148</sup> Judge Baird observed:

Counsel [appointed to defend Skinner at trial] was the former district attorney who had prosecuted [Skinner] on at least two prior occasions. . . . Moreover, when trial counsel served as district attorney, it was well known he had a cocaine problem. Newspaper reports indicated trial counsel, on his way to a fund raiser for [the judge who appointed him to defend Skinner], was involved in an accident and later admitted to the hospital for a drug overdose. Because of trial counsel's known drug addiction, there was a substantial investigation by the Attorney General's Office regarding missing funds from the district attorney's office. After leaving office, trial counsel was assessed a \$90,000 bill from the I.R.S. A few months later, trial counsel was appointed to the instant case and ultimately paid almost \$90,000. These facts demand a substantive evidentiary hearing before an impartial tribunal.<sup>149</sup>

The Court of Criminal Appeals has also used strict adherence to the Texas post-conviction statute to avoid correcting its own mistakes on direct appeal. In 1993, the court explicitly overruled the holding it had used to affirm Troy Farris's 1990 conviction and death sentence.<sup>150</sup> However, despite recognizing that it decided

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148. *Id.* at slip op. 5-6 (Baird, J., dissenting).

149. *Id.* at slip op. 5 (dissent).

150. See *Riley v. State*, 889 S.W.2d 290, 298 (Tex. Crim. App. 1993) (overruling *Farris v. State*, 819 S.W.2d 490 (Tex. Crim. App. 1990)).

*Elected Judges and the Death Penalty in Texas*

the issue incorrectly in *Farris*, the court refused to reconsider the issue when Farris presented it on habeas,<sup>151</sup> and Farris was executed on January 13, 1999.<sup>152</sup>

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151. See John Council, *Writs and Wrongs: Farris Case Bolsters Concerns Over Subsequent Habeas Petitions*, TEX. LAW., Feb. 15, 1999, at 17.

152. See Michael Graczyk, *Texas Executes Inmate for Deputy's 1983 Slaying*, AUSTIN AM.-STATESMAN, Jan. 14, 1999, at B2, available in 1999 WL 7399514.

The court refused to hear another case because the lawyer failed to file within the 180-day deadline.<sup>153</sup> In dissent, Judge Morris Overstreet said the court's action "borders on barbarism because such action punishes the applicant for his lawyer's tardiness."<sup>154</sup> The *Austin American-Statesman* thought the court crossed the line. In an editorial, the paper said "[b]arbarism is an appropriate description" of the court's refusal to hear the petition.<sup>155</sup> The paper observed that the court's "disgraceful" action would "only heighten the state's deadly reputation and make its judiciary appear to be barbaric."<sup>156</sup>

During the four years it was responsible for appointing counsel, the Court of Criminal Appeals not only appointed its cronies, the inexperienced, and the incompetent to represent those facing death; it also discouraged capable lawyers from taking capital cases and devoting the time necessary to do an adequate job by limiting compensation to the lawyers appointed and denying necessary expert and investigative assistance.

Despite the finding by a committee of the Texas Bar that an average of 400 to 900 hours of an attorney's time is required to handle a post-conviction case,<sup>157</sup> the Court of Criminal Appeals adopted a limit on fees that compensated counsel for only 150 hours at \$100/hour.<sup>158</sup> The Texas Criminal Defense Lawyers Association warned potential appointees:

[T]he Court's limitations [on fees] will place you in the untenable position of having to choose between competently representing your client and performing about 250-750 hours of uncompensated work or, if your practice precludes such a huge number of pro bono hours, not being able to competently represent your client. . . . You should also

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153. See *Ex parte Smith*, 977 S.W.2d 610, 610 (Tex. Crim. App. 1998).

154. *Id.* at 614 (Overstreet, J., dissenting).

155. *A Disgraceful Vote*, AUSTIN AM.-STATESMAN, Apr. 27, 1998, at A1, available in 1999 WL 3608552.

156. *Id.*

157. See *supra* note 127 and accompanying text.

158. See Cynthia Hujar Orr & E.G. "Gerry" Morris, *Dear 11.071 Appointed Counsel*; VOICE FOR THE DEFENSE, Apr. 1998, at 23, 24 n.1 (published by the Texas Criminal Defense Lawyers Association).

### *Elected Judges and the Death Penalty in Texas*

be aware that the Court has been routinely cutting vouchers without explanation, and seemingly without regard to the necessity

of the work performed. Some attorneys have had vouchers reduced by more than \$10,000.<sup>159</sup>

The Association passed a resolution finding that the Court of Criminal Appeals had “made it clear . . . that it will not afford a citizen sentenced to death any meaningful review, and further that it will often refuse to pay necessary investigative and other expenses, forcing the appointed counsel to, in effect, finance the proceedings themselves.”<sup>160</sup> The organization urged its members not to ask for or accept appointments to capital cases under these constraints.<sup>161</sup>

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159. *Id.* at 23.

160. *TCDLA Urges Members*, *supra* note 125, at 4.

161. *See id.*

In 1999, the legislature removed the appointing authority from the Court of Criminal Appeals and gave it to the trial courts.<sup>162</sup> The legislature directed the Court of Criminal Appeals to create guidelines for trial courts to use in appointing counsel.<sup>163</sup> The Texas legislature also provided for attorney fees of \$100/hour in post-conviction proceedings and established a \$25,000 limit on total expenditures for post-conviction proceedings, including investigation and experts.<sup>164</sup>

There is little reason to believe that these changes will improve the quality of representation that poor people receive in post-conviction proceedings. The Court of Criminal Appeals showed no concern for the quality of lawyers it appointed in the four years it was responsible for assigning counsel. Thus, there is little reason to imagine that the court will issue guidelines that will ensure adequate representation. If anything, giving trial courts the authority to appoint state habeas counsel may make things worse. As previously shown, trial judges zealously guarding their authority to appoint lawyers at trial are responsible for the indefensible quality of representation in many cases.<sup>165</sup>

By assigning incapable lawyers to defend the poor at trial and equally incapable lawyers to represent the condemned in the post-conviction process, Texas provides only a blurry appearance of fairness. But too often, the reality is no reliable adversarial process at all. While the legislature, the bar, the governor, and others all share the blame for the poor quality of representation in capital cases in Texas, the state's judges—who have taken an oath to uphold the Constitution, including the Sixth Amendment's guarantee of counsel—have not only tolerated bad representation, but, by appointing incompetent lawyers, frequently have been directly responsible for it. The role of judges in appointing bad lawyers and swiftly processing capital cases has further diminished the reputation of the Texas judiciary, which has long been tarnished by campaign contributions to judicial candidates from groups that have cases before the courts.<sup>166</sup>

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162. See TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(c) (Vernon Supp. 1999).

163. See *id.* § 2(d).

164. See *id.* § 2A(a) (stating that expenditures beyond \$25,000 are a county's responsibility); see also Kurt Sauer, *Bill Would Move Power to Habeas Courts*, TEX. LAW., Apr. 26, 1999, at 2; John Council, *Reforms to the Habeas Reforms*, TEX. LAW., Feb. 15, 1999, at 17 (discussing potential modifications to the habeas reforms).

165. See *supra* notes 91-95 and accompanying text.

166. See John Cornyn, *Ruminations on the Nature of Texas Judging*, 25 ST. MARY'S L. REV. 367, 378 (1993) (stating, from the standpoint of a Texas Supreme Court justice, that "[t]he gravest concern that inheres in the elective system . . . is that judicial candidates are compelled to raise campaign funds: money and judges simply do not mix"); Robert D'Agostino, *The Decline of the Law in the Texas*



*Elected Judges and the Death Penalty in Texas*

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*Supreme Court*, 2 BENCHMARK 171, 171 (1986) (describing how the Texas Supreme Court “ignored precedent, invalidated on Texas constitutional grounds long-accepted legislative enactments, interpreted Texas statutes so as to render them meaningless, and glossed over and misinterpreted fact findings of trial courts, all in pursuit of desired results”); Orrin W. Johnson & Laura Johnson Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 TEX. TECH L. REV. 525, 545-52 (1992) (discussing the rising campaign costs in Texas judicial elections). See generally Stephen J. Adler, *The Texas Bench: Anything Goes*, AM. LAW., Apr. 1986, at 1 (describing the nuances of partisan judicial elections in Texas at a time when such races were heavily influenced by plaintiffs’ lawyers).

### **III. The Partisan Election of Judges: The Triumph of Politics Over the Rule of Law**

One can reasonably ask how judges who have taken an oath to uphold the Constitution and laws of the United States and Texas, including the right to counsel, could play such a role in denying the protections of the Constitution to those most in need of them. How can a judge be so indifferent to injustice? A large part of the answer is that Texas has partisan judicial elections.<sup>167</sup> Some judges run and are elected with an agenda, more like a legislator than a judge.<sup>168</sup> Other

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167. TEX. CONST. art V, §§ 2, 4, 6-7; Cornyn, *supra* note 166, at 379 n.40 (stating that the nine states that “select members of their highest courts by partisan elections are: Alabama, Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Tennessee, Texas, and West Virginia”). *See also* Johnson & Urbis, *supra* note 166, at 543 (stating that Texas is one of the few remaining states in which judges at all court levels are selected in partisan elections).

168. *See infra* notes 207-09 and accompanying text. *See, e.g.*, Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate—His Past Isn't What It Seems*, TEX. LAW., Oct. 3, 1994, at 1, 32 (reprinting a campaign advertisement of a Texas

*Elected Judges and the Death Penalty in Texas*

judges, once in office, appoint lawyers to criminal cases as political patronage, more like a political boss than a judicial officer.<sup>169</sup> Once in office, any vote that might be perceived as “soft on crime” or as delaying executions—no matter how clear the law requiring it—carries with it the risk that the judge will be voted out of office in the next election.

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Court of Criminal Appeals candidate that lists a series of pro-death penalty positions).

169. See *infra* notes 199-200 and accompanying text; Bright & Keenan, *supra* note 25, at 802-03; see also *supra* note 92 and accompanying text.

In 1980, Michael J. McCormick, then the executive director of the Texas District and County Attorneys Association, challenged in an election a judge on the Texas Court of Criminal Appeals who, according to McCormick, “was not considered friendly to prosecutors.”<sup>170</sup> McCormick ran on a “law enforcement philosophy,” spoke out against the court’s doctrine of reviewing fundamental error in jury charges—which he said was “thriving” on the court—and won the election.<sup>171</sup>

There was no danger during the next 20 years he served on the court that anyone would accuse McCormick, who became presiding judge in 1989,<sup>172</sup> of not being friendly to prosecutors. Four years after his election, McCormick, his briefing attorney, and his research assistant published a law review article critical of the fundamental error doctrine, attributing hundreds of reversals in two years to it, and advocating “a retreat from rote appellate reversals of otherwise valid convictions.”<sup>173</sup>

The following year, the Court adopted the position advocated by Judge McCormick in his campaign and law review article and by the State in a petition for rehearing, and abandoned the fundamental error doctrine, deciding that instead an appellate court was to decide if an error was “so egregiously harmful as to require reversal.”<sup>174</sup>

McCormick’s “law enforcement philosophy” as a judge ranged from criticizing the United States Supreme Court’s decision requiring states to provide lawyers for

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170. John Sirman, *Texas Court of Criminal Appeals Presiding Judge Michael J. McCormick*, 62 TEX. B.J. 271, 274 (1999).

171. *Id.*

172. *Id.*

173. Michael J. McCormick et al., *Fundamental Defect in Appellate Review of Error in the Texas Jury Charge*, 15 ST. MARY’S L.J. 827, 827-28 (1984).

174. *Almanza v. State*, 686 S.W.2d 157, 174 (Tex. Crim. App. 1985).

*Elected Judges and the Death Penalty in Texas*

poor people accused of crimes<sup>175</sup> to opposing bills in the Texas legislature that would have banned capital punishment for the mentally retarded and required that inmates be mentally competent to be executed.<sup>176</sup>

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175. *Ex parte Jordan*, 879 S.W.2d 61, 62 (Tex. Crim. App. 1994) (McCormick, P.J., dissenting) (criticizing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

176. Janet Elliott, *McCormick Critical of Ban on Death Sentences for the Retarded*, TEX. LAW., May 31, 1999 at 4 (reporting that “McCormick actively worked to kill a bill that would have banned capital punishment of the mentally retarded” and “even opposed” a bill following a U.S. Supreme Court ruling prohibiting execution of the incompetent).

Even former prosecutors and judges friendly to prosecutors are subject to removal from the court if they make an unpopular decision. After the Court of Criminal Appeals reversed the conviction in a particularly notorious capital case, *Rodriguez v. State*,<sup>177</sup> a former chairman of the state Republican Party called for Republicans to take over the court.<sup>178</sup> The next year, Stephen W. Mansfield challenged the author of the *Rodriguez* decision, Charles F. Campbell, a former prosecutor who served twelve years on the court, for his position. Mansfield campaigned on promises of greater use of the death penalty, greater use of the harmless-error doctrine, and sanctions for attorneys who file “frivolous appeals especially in death penalty cases.”<sup>179</sup>

Before the election, it came to light that Mansfield had misrepresented his prior background, experience, and record.<sup>180</sup> Mansfield admitted lying about his

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177. 848 S.W.2d 141 (Tex. Crim. App. 1993).

178. See Elliott & Connelly, *supra* note 168, at 32.

179. *Id.*

180. See *Do It Now*, FORT WORTH STAR-TELEGRAM, Nov. 12, 1994, at 32, available in 1994 WL 4033647 (calling for the reform of the judicial election system in Texas and for an immediate challenge to Mansfield's election because he had “shaded the truth of virtually every aspect of his career”); *Q & A with Stephen Mansfield: “The Greatest Challenge of My Life,”* TEX. LAW., Nov. 21, 1994, at 8 (printing a post-election interview with Mansfield in which he retracts a number of statements made before and during the election).

*Elected Judges and the Death Penalty in Texas*

birthplace (he claimed to have been born in Texas, but was born in Massachusetts), his prior political experience (he portrayed himself as a political novice despite having twice unsuccessfully run for Congress), and the amount of time he had spent in Texas.<sup>181</sup> It was also disclosed that he had been fined for practicing law without a license in Florida,<sup>182</sup> and that “contrary to his assertions that he had experience in criminal cases” and had “written extensively on criminal and civil justice issues,” he had virtually no such experience.<sup>183</sup>

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181. See Janet Elliott, *Unqualified Success: Mansfield's Mandate—Vote Makes a Case for Merit Selection*, TEX. LAW., Nov. 14, 1994, at 1 (stating that Mansfield's suspect past and poor qualifications make him a “poster boy” for advocates of nonpartisan judicial elections); *Q & A with Stephen Mansfield*, *supra* note 180, at 8.

182. See John Williams, *Election '94: GOP Gains Majority in State Supreme Court*, HOUS. CHRON., Nov. 10, 1994, at A29, available in 1994 WL 4602404.

183. See Elliott & Connelly, *supra* note 168, at 32 (reporting that Mansfield's writings consisted of a guest column in a local paper regarding a capital murder conviction, and two articles that appeared in a journal for charter life underwriters); Elliott, *supra* note 181, at 1 (reporting that Mansfield was unable to verify campaign claims regarding the number of criminal cases he had handled).

Nevertheless, Mansfield received fifty-four percent of the votes in the general election.<sup>184</sup> *Texas Lawyer* declared him an “unqualified success.”<sup>185</sup> It was later discovered that Mansfield had failed to report ten thousand dollars in past-due child support when he applied for his Texas law license in 1992.<sup>186</sup> Judge Mansfield was arrested on the University of Texas campus on Thanksgiving Day, 1998, and charged with scalping the complimentary football tickets that judges receive.<sup>187</sup> He was reprimanded by the state’s judicial conduct commission.<sup>188</sup>

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184. See Elliott, *supra* note 181, at 1 (pointing out that this result was similar to other partisan elections around the state).

185. See *id.*

186. See *Child Support Allegations Threaten Judge Seat*, FORT WORTH STAR-TELEGRAM, Dec. 10, 1994, at 29, available in 1994 WL 4037619 (outlining the allegations of back child support by Mansfield’s ex-wife and his subsequent denial of the allegations).

187. See Janet Elliott & John Council, *Scalping Allegation Lands Mansfield in Hairy Situation*, TEX. LAW., Dec. 14, 1998, at 1 (outlining the controversies that have plagued Judge Mansfield); Claire Osborn, *Judge Charged with Trespassing at UT*, AUSTIN AM.-STATESMAN, Dec. 5, 1998, at B2, available in 1998 WL 3633981 (outlining the circumstances surrounding Judge Mansfield’s arrest at the University of Texas).

188. See Pete Slover, *Judge Reprimanded After Arrest Over Ticket Selling Incident*, DALLAS MORNING NEWS, May 14, 1999, at A31, available in 1999 WL 4120830 (reporting Judge Mansfield’s reprimand by the Texas Conduct Commission).



*Elected Judges and the Death Penalty in Texas*

Although some called Judge Mansfield an embarrassment to the court,<sup>189</sup> Texas lawyer Kent Alan Schaffer put things in perspective in an open letter to Judge Mansfield in which he suggested that the judge “leap over the bench and into the well of the court” one morning during arguments and beseech his colleagues:

Who among you dares to call me an embarrassment to this court? I suppose it is not an embarrassment when we appoint inexperienced lawyers to handle death penalty writs and then refuse to pay them for the work they perform, or when we engage in intellectual game playing in order to uphold wrongfully obtained death penalties. None of you are embarrassed when we put someone to death or uphold some severe sentence because of a missed deadline, or when we pretend that a lawyer is not ineffective, just because he slept through trial. Yet I get caught scalping a few lousy football tickets and suddenly, I am the embarrassment.

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189. See Elliott & Council, *supra* note 187, at 11-12 (arguing that the University of Texas arrest raises new questions of Judge Mansfield’s ethical fitness for the Court of Criminal Appeals).

In case after case, you strip people of their freedom and liberty and ensure that the laws are used as the government's weapons against the people, rather than the people's protection against the government. . . . You wrestle the Goddess of Liberty to the ground and ram her own sword through her just heart while the citizens of this state watch in horror. And then you call me an embarrassment because I was trying to make a few extra bucks on Thanksgiving Day.<sup>190</sup>

Shaffer assured Judge Mansfield, "if this court has any reason to be embarrassed, ticket scalping, trespassing or leaving your little Pomeranian dogs in your car are so far down the list that they are hardly worth mentioning."<sup>191</sup>

Judges Baird and Overstreet—the dissenters in cases where the defense lawyer slept, failed to present any issues, or missed the filing deadline—are no longer on the Court of Criminal Appeals. Judge Baird was defeated in the election of 1998.<sup>192</sup> Judge Overstreet unsuccessfully sought another office.<sup>193</sup> With their departure, the

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190. Kent Alan Schaffer, *An Open Letter to Judge Stephen W. Mansfield*, VOICE FOR THE DEFENSE, Jan.-Feb., 1999, at 6-7, reprinted in TEX. LAW., Mar. 1, 1999, at 22.

191. *Id.*

192. See Bruce Nichols, *GOP Candidates Sweep 3 Seats: Appeals Court Will Be All Republican for the First Time*, DALLAS MORNING NEWS, Nov. 4, 1998, at 35A, available in 1998 WL 13115456.

193. See *id.* (stating that Judge Overstreet gave up his seat on the Court to run unsuccessfully for the position of Attorney General).

*Elected Judges and the Death Penalty in Texas*

previous defeat of other Democrats on the court, and Presiding Judge McCormick's switch to the Republican Party, the Republican goal of taking over the court was achieved. For the first time in its history, all of the judges on the court were Republicans; just six years before, all the judges had been Democrats.<sup>194</sup> In the absence of Judges Baird and Overstreet, no one remains on the court to raise a voice of dissent as the court dispatches the condemned to the execution chamber without any hesitation or concern that poor representation may keep serious injustices from coming to the court's attention.

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194. *Id.*

Independence is not tolerated on the trial bench in some Texas judicial districts. For example, rulings against Houston's powerful district attorney attracted an opponent and led to the defeat of Judge Norman E. Lanford, a Republican, in 1992. Lanford suppressed evidence based upon an illegal arrest of a man accused of killing a police officer.<sup>195</sup> A prosecutor who specialized in death cases, Caprice

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195. Lanford became the center of controversy after he ruled that there had been an illegal arrest and ordered the acquittal of a man accused of killing a police officer. See Barbara Linkin, *Controversial Judge Lanford to Leave Bench*, HOUS. POST, June 13, 1992, at A25.

*Elected Judges and the Death Penalty in Texas*

Cosper, defeated Judge Lanford in the Republican primary.<sup>196</sup> Lanford accused District Attorney John B. Holmes of causing congestion of Lanford's docket to help bring about his defeat.<sup>197</sup> In the November election, Cosper was elected after radio advertisements on her behalf attacked her Democratic opponent for having once opposed the death penalty.<sup>198</sup>

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196. Eric Hanson, *Election '92, 6 Criminal Judges Re-elected, Newcomers Win in 4 Civil Courts*, HOUS. CHRON., Nov. 5, 1992, at 33, available in 1992 WL 11455667 (as corrected Nov. 6, 1992, available in the same citation).

197. The *Texas Lawyer* reported that “[c]ourthouse records, which show a dramatic increase in the number of cases on Lanford's docket in the months prior to the March 10 primary, lend credence to his claim that prosecutors stalled cases in a calculated effort to provide ammunition for the judge's opponent.” Mark Ballard, *Gunning for a Judge; Houston's Lanford Blames DA's Office for His Downfall*, TEX. LAW., Apr. 13, 1992, at 1.

198. See Alan Bernstein, *Campaign Briefs*, HOUS. CHRON., Oct. 26, 1992, at A14, available in 1992 WL 11453883 (explaining the death penalty debate between the two candidates); *Criminal Court Races: Northcutt, Cosper, 4 Incumbents*

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*Deserve to Win*, HOUS. POST, Oct. 24, 1992, at A28.

*Elected Judges and the Death Penalty in Texas*

Once elected, many Texas judges behave as other politicians do, doling out favors and appointments to their supporters. In a survey of Texas judges, over half said that judges they knew based their appointments to defend indigent defendants in part on whether the attorneys were political supporters or had contributed to the judge's political campaign.<sup>199</sup> A quarter of the judges admitted that their own decisions in appointing counsel were influenced by these factors.<sup>200</sup> In another

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199. Michael K. Moore, *The Status of Indigent Criminal Defense in Texas: A Survey of Texas Judges* (prepared for the State Bar of Texas Committee on Services to the Poor in Criminal Matters) Survey Question 7g, h, (visited May 9, 2000) <[http://www.uta.edu/pols/moore/indigent/judge\\_results.htm](http://www.uta.edu/pols/moore/indigent/judge_results.htm)> (reporting that only 43.8% of judges responded that the judges they knew “never” considered whether the attorney was a political supporter, and only 46.6% responded that judges they knew “never” considered campaign contributions). Judges in the survey were specifically asked to discount their experiences in capital cases, but there is no reason to believe that their motivations for appointment decisions would vary depending on the type of case. See *id.*, instruction box on page 1 of survey. Indeed, the experience of people like Judge Lanford indicates that the political repercussions of being perceived as sympathetic to persons facing the death penalty may provide even more of an incentive to appoint attorneys who will not zealously defend their clients. See *infra* note 209 and accompanying text.

200. *Id.*, Survey Question 8g, h (reporting that 71.6% of judges polled said that they “never” considered whether the attorney was one of their political supporters, and 75.7% said they “never” considered whether the attorney had contributed to

survey of Texas judges, forty-eight percent admitted that campaign contributions are a “very” or “fairly” influential factor in their courtroom *decisions*.<sup>201</sup> Lawyers' and court personnel's perception is that the influence of campaign contributions on elected judges' decisions is even more significant, with seventy-nine percent of the lawyers and sixty-nine percent of the court personnel saying they believe campaign contributions affect judges' decisions.<sup>202</sup>

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their campaign).

201. See Osler McCarthy, *Campaign Gifts Sway Judges, 48% Say in Poll*, AUSTIN AM.-STATESMAN, June 10, 1999, at B1, available in 1999 WL 7415316 (outlining the results of a survey conducted by the Texas Supreme Court and the Texas State Bar).

202. See *id.*



*Elected Judges and the Death Penalty in Texas*

Using appointments as a reward for campaign contributions is not the only way in which Texas judges misuse their power to appoint lawyers to defend the poor. Almost half of the judges with criminal jurisdiction admitted in a survey that an attorney's reputation for moving cases quickly, *regardless of the quality of the defense*, was a factor that entered into their appointment decisions.<sup>203</sup> In addition to deciding who will represent an indigent defendant, Texas judges also decide *when* an indigent defendant will become represented by counsel.<sup>204</sup> Many counties in Texas determine indigence on the basis of whether a defendant can post bail.<sup>205</sup> Hence, the power to appoint an attorney also carries with it the power to ensure that a given defendant remains in jail. Some observers have said that the time for

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203. See Moore, *supra* note 199, Survey Question 7d (reporting that only 51.1% of judges polled said that the attorney's reputation for moving cases, regardless of the quality of the defense, was "never" a factor they considered).

204. See generally Ballard, *Gideon's Broken Promise*, *supra* note 3 (discussing the process of appointing counsel for indigents in Harris County).

205. See Moore, *supra* note 199, Survey Question 11 (65.4% of defense attorneys questioned on the appointment practices in their counties responded that whether or not the client was in jail was the criterion used for determining indigency status).

appointment of counsel is manipulated to encourage defendants to plead guilty in exchange for being sentenced to the time they have already served in order to obtain their release.<sup>206</sup>

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206. See Ballard, *Gideon's Broken Promise*, *supra* note 3, at 19 (indicating that “an indigent defendant spends so much time in jail awaiting action on his case that he jumps at the chance to plead to a lesser offense, just to get out”).

### *Elected Judges and the Death Penalty in Texas*

Running for judicial office on a “law enforcement philosophy” or a pro-capital punishment platform, while perfectly appropriate for candidates for sheriff, the legislature, governor, or other non-judicial offices, is not appropriate for judges, who have a constitutional responsibility to hold “the balance nice, clear and true between the State and the accused.”<sup>207</sup> It is equally inappropriate for judges to use their offices to reward their supporters, expedite their dockets, or coerce guilty pleas. Judges are charged with upholding the rule of law, including the protections of the Bill of Rights, “undisturbed by the clamor of the multitude.”<sup>208</sup> However, in Texas, as in other states with elected judiciaries, judges ignore public attitudes and their political supporters at the peril of losing their positions in the next election.<sup>209</sup> As the defeat of Judge Campbell in Texas and judges in other states demonstrates, a single decision can result in a judge being tagged as “soft on crime” and voted out of office. As a result, the rule of the law is often trumped by political realities.

#### **IV. The Once Great Writ: Is There any Habeas Left in this Corpus?**

The Texas judiciary has amply demonstrated the need for full review of convictions and death sentences by independent, life-tenured federal judges who are not in danger of being voted out of office for an unpopular, but legally required, decision. However, habeas corpus review—the process by which a person convicted in a state or federal court may petition the federal courts for review of a conviction or sentence on the grounds that it was obtained in violation of the Constitution—has been drastically restricted by the Supreme Court and Congress.

The Supreme Court once described federal habeas corpus as “the com-mon law world’s ‘freedom writ’ by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration

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207. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

208. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 303 (1926) (quoting Judge William Cranch’s opinion in *United States v. Bollman*, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (No. 14,622)). See also MODEL CODE OF JUDICIAL CONDUCT Canon 3B(2) (1990) (stating that a judge “shall not be swayed by partisan interests, public clamor or fear of criticism”).

209. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges From Office for Unpopular Decisions?*, 72 N.Y.U. L. Rev. 308, 313-15, 316-18 (1997) (describing the defeats of Justice Penny White of the Tennessee Supreme Court and Justice James Robertson of the Mississippi Supreme Court after unpopular decisions in capital cases); Bright & Keenan, *supra* note 25, at 760-61 (describing defeat of Chief Justice Rose Bird and two other members of the California Supreme Court after campaigns against them based on their votes in capital cases).

inquired into, failing which the prisoner is set free”<sup>210</sup> and declared that “‘there is no higher duty than to maintain it unimpaired,’ and unsuspended, save only in the cases specified in our Constitution.”<sup>211</sup>

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210. *Smith v. Bennett*, 365 U.S. 708, 712-13 (1961) (quoting *Bowen v. Johnson*, 306 U.S. 19, 26 (1939)).

211. *Id.* See also *Fay v. Noia*, 372 U.S. 391, 401 (1963) (describing the historic role of habeas corpus in protecting constitutional rights).

*Elected Judges and the Death Penalty in Texas*

As previously described in this Article, the intervention of the federal courts has prevented a number of executions in Texas, including those of people innocently convicted, after the Texas courts had upheld the convictions and sentences.<sup>212</sup>

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212. *See supra* notes 7-8 and accompanying text.

However, the Supreme Court no longer celebrates the role of habeas corpus in vindicating the constitutional rights of those who face a loss of life or liberty. The Court, concluding that federalism, finality, and comity were more important than vindication of constitutional rights, began to restrict habeas corpus review in the 1970s. The Court adopted and rigorously enforced strict rules of procedural default,<sup>213</sup> excluded Fourth Amendment claims from review,<sup>214</sup> made it more difficult for a habeas petitioner to obtain an evidentiary hearing to prove a constitutional violation,<sup>215</sup> adopted an extremely restrictive doctrine regarding the retroactivity of constitutional decisions,<sup>216</sup> made it easier for courts to find any constitutional

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213. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 740 (1991) (refusing a habeas action because the state court's decision was based solely on adequate procedural grounds independent of federal law); *Dugger v. Adams*, 489 U.S. 401, 408 (1989) (holding that federal habeas review was unavailable to a defendant who, without good cause, failed to object to a questionable jury charge as was required to preserve error under the state's procedural rules); *Smith v. Murray*, 477 U.S. 527, 533-34 (1986) (stating that, in the absence of a showing of cause, failure to properly raise a claim on direct appeal will result in dismissal of a federal habeas action that is based on the foregone appellate claim); *Engle v. Isaac*, 456 U.S. 107, 135 (1982) (holding that failure to comply with the state's procedures for making a claim and inability to demonstrate cause for the default bars assertion of a federal habeas challenge); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (applying the adequate and independent state grounds doctrine to federal habeas actions and requiring a federal habeas petitioner to show both "cause" and "prejudice" to escape the effects of a procedural default); *Francis v. Henderson*, 425 U.S. 536, 542 (1976) (concluding that an attack on a state court conviction in which a failure to object caused default of a claimed constitutional violation requires a showing not only of cause but also of actual prejudice); Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims in Capital Cases*, 23 LOY. L.A. L. REV. 193, 209-12 (1989) (criticizing the Court for injecting a "whole new level of arbitrariness" into capital cases by enforcing strict procedural default and "having actual executions turn on whether the defendant was unlucky enough to have a lawyer who failed to make the appropriate objection at the appropriate time").

214. See *Stone v. Powell*, 428 U.S. 465 (1976) (barring federal review of the constitutionality of searches and seizures if state courts provided a "full and fair" hearing on the issue).

215. See *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (changing the standard for obtaining an evidentiary hearing to the harder-to-prove cause-and-prejudice standard).

216. See *Teague v. Lane*, 489 U.S. 288, 315-16 (1989) (holding, without briefing or oral argument, that in collateral review retroactivity is to be treated as a threshold question and that new rules generally should not be applied retroactively).

*Elected Judges and the Death Penalty in Texas*

violation harmless,<sup>217</sup> and erected barriers to the filing of a second habeas petition.<sup>218</sup>

Justice Harry Blackmun observed that the Court's "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims" had resulted in a "Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."<sup>219</sup> In one capital case in which the Court refused to

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217. See *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (replacing the standard which required reversal unless the court was confident beyond a reasonable doubt that error was harmless with a standard of substantial and injurious effect on the verdict).

218. See *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991) (holding that the petitioner's inability to know certain evidence at the time of the first petition fails to establish cause for a writ if other potentially discoverable evidence existed that could have supported the claim).

219. *Coleman v. Thompson*, 501 U.S. 722, 758-59 (1991) (Blackmun, J.,

examine a constitutional violation, Justice John Paul Stevens complained that the Court has “grossly misevaluate[d] the requirements of ‘law and justice’ that are the federal court’s statutory mission under the federal habeas corpus statute” and instead “lost its way in a procedural maze of its own creation.”<sup>220</sup>

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dissenting).

220. *Smith v. Murray*, 477 U.S. 527, 541 (1986) (Stevens, J., dissenting). See also *Dugger v. Adams*, 489 U.S. 401, 412-13 (1989) (Blackmun, J., dissenting) (asserting that the Court was “arbitrarily impos[ing] procedural obstacles to thwart the vindication of what apparently is a meritorious Eighth Amendment claim”).



*Elected Judges and the Death Penalty in Texas*

Congress restricted habeas corpus review even more by adopting the Antiterrorism and Effective Death Penalty Act of 1996.<sup>221</sup> The Act imposes a statute of limitations on petitions for habeas corpus relief for the first time in the nation's history,<sup>222</sup> thus closing the courthouse doors to Albert Cantu<sup>223</sup> and others

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221. See Antiterrorism and Effective Death Penalty Act of 1996 § 107(a), 28 U.S.C. §§ 2261-2266 (Supp. IV 1998) (amending 28 U.S.C. §§ 2241-2255).

222. See *id.* §§ 101, 105, 106, 28 U.S.C. §§ 2244, 2255 Supp. IV 1998 (amending 28 U.S.C. § 2244(d)(1) to establish a one-year statute of limitations). A statute of limitations of 180 days is provided for states that meet certain standards for providing counsel in capital post-conviction proceedings. See *id.* § 107, 28 U.S.C. § 2263 (Supp. IV 1998).

like him if their lawyers miss the deadline for filing. Another unprecedented provision of the Act restricts federal courts from granting relief unless the decision of the state court “was contrary to, or involved an unreasonable application of, clearly established Federal law.”<sup>224</sup> The Act also limits when a federal court may conduct an evidentiary hearing<sup>225</sup> and prohibits second or “successive” petitions for habeas corpus relief except in very narrow circumstances.<sup>226</sup>

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223. See *supra* notes 134-39 and accompanying text.

224. See AEDPA § 104(3), 28 U.S.C. § 2254(d)(1) (Supp. IV 1998); *Williams v. Taylor*, 120 S. Ct. 1479, 1505-11 (2000).

225. See *id.* § 104(4), 28 U.S.C. § 2254(e)(2) (Supp. IV 1998); *M. Williams v. Taylor*, 120 S. Ct. 1479, 1487-91 (2000).

226. See *id.* §§ 105, 106, 28 U.S.C. §§ 2255, 2244(b) (Supp. IV 1998) (limiting any successive habeas corpus petition to constitutional violations that result in conviction of an innocent person or involve a new rule of law that applies retroactively to cases on collateral review).

*Elected Judges and the Death Penalty in Texas*

Because their habeas corpus proceedings commenced before April 24, 1996, when the Antiterrorism and Effective Death Penalty Act was signed into law and became effective,<sup>227</sup> the Act did not apply to federal habeas review of the cases of Ricardo Aldape Guerra and Frederico Martinez-Macias, in which constitutional violations resulted in convictions and death sentences for crimes they did not commit;<sup>228</sup> Calvin Burdine, whose lawyer slept through his trial;<sup>229</sup> and Pamela Lynn Perillo, whose court-appointed lawyer was actively representing the state's key witness against her.<sup>230</sup> If the Act had applied, the State might have argued that the federal courts could not grant relief because of the deference they are now required to give decisions of the state court—that is, because the decisions of the Texas courts denying relief in those cases were not “unreasonable” applications of the law. Just as the poor are entitled only to “not-legally-ineffective” representation<sup>231</sup> under the lax standard of *Strickland v. Washington*,<sup>232</sup> they are entitled only to not unreasonably incorrect application of the law in cases where their lives are at stake.<sup>233</sup>

A great federal judge from Texas, Irving Goldberg, pointed out that in restricting habeas the courts were trading “the most precious legacy of Lord Coke, the power to discharge from custody even one imprisoned by order of the King . . . for a mess of pottage, a gruel composed of questionable notions of efficiency and vague notions of federalism.”<sup>234</sup> He expressed sadness “that there is rarely any escape from the executioner's activities under the lethal blows rained upon the Great Writ, which seems to become less great as the years pass.”<sup>235</sup>

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227. See *Lindh v. Murphy*, 521 U.S. 320, 323 (1997) (holding that the Act applies only to habeas petitions filed after its effective date).

228. See *supra* notes 15-18, 54-57 and accompanying text.

229. See *supra* notes 47-52 and accompanying text.

230. See *supra* notes 58-65 and accompanying text.

231. *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

232. See *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984) (establishing a lax standard that inquires only whether the representation was reasonable considering the circumstances and prevailing professional norms, limits judicial scrutiny by being “highly deferential” to counsel's performance, and requires defendants to overcome the “strong presumption” that their lawyer's actions “might be considered sound trial strategy”).

233. *T. Williams v. Taylor*, 120 S. Ct. 1495, 1521 (2000).

234. *Galtieri v. Wainwright*, 582 F.2d 348, 375 (5th Cir. 1978) (Goldberg, J., dissenting).

235. *Bass v. Estelle*, 696 F.2d 1154, 1162 (5th Cir. 1983) (Goldberg, J., dissenting).

In restricting the power of federal courts to correct constitutional violations in criminal cases, the Supreme Court and Congress have sacrificed fairness for finality and reliability for results. It has become more important to proceed with executions than to determine whether convictions and sentences were obtained fairly and reliably.<sup>236</sup> Such a system produces the results that many desire—convictions and death sentences—but it does not produce justice. While it is unlikely in the current political climate with so much demagoguery on the issue of crime<sup>237</sup> that Congress will restore habeas corpus, the Texas judiciary demonstrates the need for full habeas corpus review and the grievous error that Congress and the Court made in curtailing it.

### **V. Conclusion**

Texas has neither an independent judiciary nor an adequate system for providing representation to the poor. As a result, the process by which poor people are condemned to death is often a farce, a mockery, and a disgrace to the legal system and the legal profession. The Texas judiciary, responding to the perceived will of the state's voters, instead of protecting rights, is not only ignoring constitutional violations, as so many elected judges must do in order to stay in office. It is actively engaged in denying rights to people by providing them grossly inadequate legal representation. An accused may stand virtually defenseless facing the death penalty as his lawyer naps at a trial that is in no way adversarial, and then be denied any post-conviction review because his lawyer misses a deadline or fails to raise any issues. The courts, as Judge Overstreet warned, have blood on their hands.

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236. See generally Stephen Reinhardt, *The Anatomy of an Execution: Fairness v. "Process,"* 74 N.Y.U. L. REV. 313 (1999).

237. See Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," but Hard on the Bill of Rights,* 39 ST. LOUIS U. L.J. 479, 483-500 (1995).

*Elected Judges and the Death Penalty in Texas*

The lethal virus that infects the Texas judiciary is not limited to the Lone Star State. Adequate legal representation is a serious problem in many jurisdictions throughout the United States in both capital and non-capital cases.<sup>238</sup> Judges have been voted off courts in other states<sup>239</sup> and the newly constituted courts have abruptly changed course and found ways to affirm cases that previously would have been reversed.<sup>240</sup>

Perhaps the day will come when state court judges will be able to follow the law without regard to political considerations and the passions of the moment. Perhaps members of the legal profession and others in leadership positions will someday be successful in obtaining independent state courts and strong and independent indigent defense programs. But that day is a long way away. Until it comes, full habeas corpus review by independent federal judges is essential to guarantee that the protections of the Bill of Rights, including the most fundamental right, the right to counsel, are not denigrated and disregarded—as they frequently are in the state courts of Texas—but are fully enforced in order to ensure the fairness and integrity of cases in which life and liberty are at stake.

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238. See *supra* note 27.

239. See *supra* notes 25 and 209.

240. See, e.g., C. Elliot Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique*, 26 U.S.F. L. REV. 41, 84, 89 (1991) (finding that following the removal of Chief Justice Rose Bird and two other members of the California Supreme Court in 1986, the court “reversed every premise underlying the *Bird* court’s harmless-error analysis,” displaying an eagerness that reflects “a desire to carry out the death penalty” more than “jurisprudential theory”).