



LETHAL INDIFFERENCE

*The fatal combination of
incompetent attorneys and
unaccountable courts in
Texas death penalty appeals*

TEXAS DEFENDER SERVICE
Houston and Austin, Texas

Acknowledgements

Many people have dedicated countless hours to this project. TDS would like to extend our appreciation to attorneys Dick Burr, Rob Owen, Maurie Levin, Raoul Schonemann, Shelby O'Brien, John Heal, Phil Wischaemper, Chris Colella and University of Texas law students Philip Roskamp, Nadia Ayadi, Brenna Ryan and Ben Gaumond. Special thanks to Kevin Ranlett for his important contributions, along with Joe Hingston and the clerks at the Texas Court of Criminal Appeals.

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Printed in the United States of America

Texas Defender Service: Who We Are

Texas Defender Service is a private, 501(c)(3) nonprofit organization established by experienced Texas death penalty attorneys. TDS was founded and began operating in October of 1995. TDS's primary task and commitment is to the representation of Texas prisoners under a sentence of death. There are three aspects of the work performed by Texas Defender Service, all of which aim to improve the quality of representation provided to indigent persons in Texas charged with or facing a capital sentence and to expose the stark inadequacies of the system by which Texas sentences people to death. These aspects are: (a) direct representation of death-sentenced inmates; (b) consulting, training, case-tracking and policy reform at the post-conviction level; and (c) consulting, training and policy reform focused at the trial level.

Direct Representation of Death-Sentenced Prisoners

Attorneys at TDS represent a limited number of prisoners on Texas's Death Row in their post-conviction proceedings, primarily in federal court, and strive to serve as a benchmark for quality of representation of death-sentenced inmates. TDS seeks to litigate cases that have a broad impact on the administration of capital punishment in Texas. TDS successfully litigated the question of whether death-sentenced prisoners have the right to appeal the denial of access to DNA testing and defeated the State's restrictive reading of the scope of the appeal. TDS represents several inmates who received stays of execution from the U.S. Supreme Court because of claims of potential mental retardation. TDS also brought a civil rights lawsuit on behalf of three death row prisoners against the Texas Court of Criminal Appeals, arguing that the court violated their right of access to courts by appointing incompetent post-conviction counsel. In February of 2002, TDS won a stay of execution for Thomas Miller-El from the U.S. Supreme Court. The Court heard the case in the fall of 2002 and will address the issue of the relevance of overwhelming evidence of a pattern and practice of racial discrimination in the selection of juries in Dallas County.

Consulting, Training and Case-Tracking

Founded in 1999, the Post-Conviction Consulting and Tracking Project serves several critical purposes. First, the project has developed, and maintains, a system to track Texas capital cases to ensure that all death row prisoners have counsel. Such tracking ensures that no prisoner on Texas's Death Row loses his right to appeal based on an attorney's failure to file a timely motion seeking appointment in federal court. At least two prisoners were executed without any federal review of their cases prior to the implementation of TDS's tracking project. Second, the project identifies issues and cases appropriate for impact litigation. Third, TDS develops sample pleadings and brief banks to be distributed both on request and through a national website. Fourth, TDS recruits, consults and provides training for pro bono and appointed attorneys representing prisoners on Texas's Death Row. And fifth, TDS identifies, and intervenes when possible, in cases of system failure or attorney abandonment.

Capital Trial Project

The Trial Project was inaugurated in May of 2000. The goal of the project is to provide resources and assistance to capital trial lawyers, with a particular emphasis on the early stages of capital litigation and the crucial role of thorough investigation, preparation and litigation of a case for mitigation, or a sentence less than death. The impact of the project, now entering its third year, is steadily growing. In the past twelve months, life sentences were returned in 16 cases in which the Trial Project was involved—more than double the seven life sentences obtained in the first year of the project.

The Trial Project helps lawyers by recruiting mitigation specialists to work on the case, identifying and preparing expert witnesses, consulting extensively with trial counsel (including extensive brainstorming sessions), researching and writing evidentiary motions, and producing case-specific pleadings. The Trial Project targets the most difficult cases, such as multiple murders, black defendant-white victim cases and rape-murder cases. The number of successful outcomes in these death penalty cases is unusual and may be fairly attributed to the assistance provided by the Trial Project.

In addition, the Trial Project is collecting and providing the data needed to initiate reforms of the system by which indigent capital defendants are tried and sentenced to death. In 2001, the Texas Legislature passed the Fair Defense Act, which requires Texas counties to reform the manner in which they provide legal services to indigent defendants in criminal proceedings. The Trial Project, in conjunction with other organizations, is assisting with the mandated reporting on compliance with the Act. The Trial Project is also challenging the inequities resulting from the extremely varied responses to the Act because some counties have instituted reforms while others have failed to make any meaningful improvements.

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Preface

“[I]t is proper to take alarm at the first experiment upon our liberties.”

— James Madison¹

In response to the threat of terrorism, the United States has been engaged in military action to protect national security and prevent future attacks on American soil. These recent events have inspired greater introspection into what we, as a nation, cherish about being American; our quality of life, our system of government and the individual freedoms guaranteed by the United States Constitution and Bill of Rights. Although the American system of government is designed to preserve individual rights and liberties for all Americans, fundamental freedoms exist in a constant tension with the desire for security. The need to protect ourselves from danger exerts pressure on the guarantee that life, liberty or property cannot be taken without due process of law. To uphold these values, we must not lose sight of their role in our criminal justice system, particularly in cases where the ultimate punishment is at stake.

This report represents a careful and thorough review of the Texas state post-conviction process. Texas Defender Service has undertaken a comprehensive study of the quality of representation provided by attorneys appointed to state habeas corpus cases. In October of 2000, we presented our initial findings in *A State of Denial: Texas Justice and the Death Penalty*.² Despite the stories we reported of lawyers who repeatedly mishandled these critical proceedings, the problem of incompetent attorneys appointed to capital cases persists. Through our consulting and case-tracking project, we have unique and sobering insight into the frequent failures of the state habeas system. The findings of this report reveal that an intolerably high number of people are being propelled through

¹ James Madison, “A Memorial and Remonstrance” para. 3 (circa June 20, 1785) reprinted in 8 THE PAPERS OF JAMES MADISON 299-300 (W. Hutchison & W. Rachal eds, 1973).

² Texas Defender Service, *A State of Denial: Texas Justice and the Death Penalty* (2000), available at <http://www.texasdefender.org/links.html>.

the state habeas process by unqualified attorneys and an indifferent Court of Criminal Appeals. The habeas process in Texas, intended as a vital safety net to catch mistakes, is instead a failed experiment.

Despite the efforts to improve indigent defense through the enactment of Senate Bill 7, the Fair Defense Act,³ reform to the state habeas process was overlooked. Although stories about sleeping and drug-addicted lawyers in capital cases catalyzed concern and discussion about the fairness of the process, Texas adopted only limited solutions to the problems, none of which was sufficient to rectify the ongoing crisis of incompetent representation in state habeas proceedings.

Eroding opportunities for post-conviction relief present a threat to the integrity of the system. The current emphasis on speed rather than careful appellate review means that the execution of innocent people will be the inevitable product of such a haphazard system. We cannot be confident that the post-conviction process in Texas will identify and correct fundamental errors—errors that are irreversible once an execution occurs.

³ Texas Fair Defense Act, 2001 Tex. Gen. Laws 906 (June 14, 2001).

Lethal Indifference: An Executive Summary

Texas Defender Service is a private, non-profit organization specializing in death penalty cases through direct representation, consulting, training and case-tracking projects. This report is a comprehensive study of the quality of representation afforded to death row inmates in the state post-conviction process. Amid heightened awareness of the mistakes and failures permeating the application of the death penalty in Texas, we studied the quality and consistency of attorney performance in the latter stages of the appellate process, especially the critical state habeas corpus proceeding.

The findings of this report reveal that a high number of people are being propelled through the state habeas process with unqualified attorneys and an indifferent Court of Criminal Appeals (CCA). The current capital habeas process in Texas—resulting from new legislation in 1995 and intended as a vital safety net to catch the innocent and those undeserving of the death penalty—is, instead, a failed experiment with unreliable results.

CHAPTER I **State Habeas Corpus: A Vital Safety Net**

No concern surrounding the death penalty is more pervasive and troubling than the system's history for and continued potential to convict the innocent. A recent poll reports that 94% of Americans believe innocent people are wrongly convicted of murder. Nowhere is this issue more critical than in Texas. A July 2002 Scripps Howard poll of Texans found that 66% polled believe that Texas has executed an innocent person. This number has increased by nine percentage points from two years ago.

Texas is responsible for one-third of all executions in the U.S. since 1976 and more than half of all executions in the U.S. in 2002 (through October). Between 1976 and October 2002, 102 death row prisoners nationwide, including seven in Texas, have been cleared of charges and freed from imprisonment.

The writ of habeas corpus, also known as the Great Writ, is usually all that stands between the innocent or undeserving and his or her execution. Most of the 102 exonerations have come during habeas corpus proceedings, when lawyers

uncovered and presented new evidence of innocence, prosecutorial misconduct, ineffective representation, mistaken identifications, perjured testimony by state witnesses or unreliable scientific evidence.

The risk of wrongly convicting and executing an innocent person is increased when the process lacks basic fundamental protections, such as competent lawyers and meaningful judicial review.

CHAPTER 2 **The Study: A Dismal State of Justice**

Because of anecdotal information of lawyers mishandling state habeas proceedings, we undertook a thorough review of all the state habeas petitions filed since 1995 when the Texas Legislature created and codified the current habeas process in Article 11.071. Of the 263 initial habeas applications filed during the six-year period of the study, 251 were available for review. The results of the study reveal a systemic problem: Death row inmates today face a one-in-three chance of being executed without having the case properly investigated by a competent attorney and without having any claims of innocence or unfairness presented or heard.

The barometer of the quality of representation is whether or not appropriate claims are filed in the habeas petition. Claims based on evidence already presented at trial are reserved for the first appellate stage, known as the direct appeal. Claims based on new, unlitigated facts and evidence found outside of the trial record are appropriate in state habeas corpus proceedings. Consequently, the statute governing the habeas process requires appointed counsel to conduct a thorough investigation of the case.

Despite the critical importance of a comprehensive investigation, 71 of the habeas applications reviewed in our study (28%) raised claims based solely on the trial record. In 97 cases (39%), no extra-record materials were filed to support the claims.

The result of these inadequate applications is that, in over one-third of the cases, the inmates' right to post-conviction review effectively ended when the petition was filed. In those cases, there was absolutely nothing presented that was appropriate for the court to consider in habeas proceedings.

In Chapter Two, numerous cases are cited illustrating the frequency with which appointed lawyers are either filing the wrong kind of claims, failing to support the claims, copying verbatim claims that had been previously raised and rejected or otherwise neglecting to competently represent their clients.

For example, in the case of Leonard Rojas, who is scheduled for execution on December 4, 2002, the state habeas lawyer appointed by the CCA had been disciplined twice and given two probated suspensions from the practice of law by the State Bar. His discipline problems included neglecting a legal matter,

failing to completely carry out the obligations owed to his clients and having a mental or psychological impairment materially impairing his fitness to represent his client. He was disciplined a third time just two weeks after being appointed by the CCA to represent Rojas. The lawyer was still serving his two probated suspensions at the time he received this third probated suspension from the practice of law in Texas. Despite these violations, the CCA deemed the lawyer “qualified.” The lawyer filed a 15-page petition raising 13 inappropriate record-based claims and Rojas was denied relief.

The study reveals that many state habeas lawyers are unqualified, irresponsible, or overburdened and do little if any meaningful work for the client. Often, new lawyers appointed by federal courts after the filing of the state habeas petition discovered evidence of innocence or of serious and substantial mistakes in the trial process. However, contrary to the misconception that the capital process is one with multiple opportunities for innocent or undeserving inmates to obtain relief, they only get “one bite at the apple.” Barring unique circumstances, the federal courts cannot consider claims that were not litigated at the state habeas corpus level.

Our findings show that competent representation arrives too late in the process. Slipping through the cracks are those who may be innocent or have been unfairly sentenced to death.

CHAPTER 3 **Turning a Blind Eye on Incompetent Representation: The CCA’s Abdication of Responsibility**

With the 1995 enactment of Article 11.071, the Texas Legislature statutorily promised indigent death row inmates that they would receive “competent” counsel who would expeditiously investigate the case. Article 11.071 is failing to live up to that promise. The CCA is often confronted with persuasive evidence of inadequately investigated and poorly prepared state habeas petitions.

Despite the Legislature’s guarantee of “competent” counsel, the CCA recently decided that Article 11.071 provides no remedy or second chance for death row inmates who do not *actually receive* competent counsel. At odds with the fundamental purpose of the legislation, the CCA reasoned that it will not measure the competence of an attorney according to what the attorney *actually does* during the period of habeas representation; but, rather, simply on whether the attorney has been placed on the list of those eligible for appointment. The CCA’s interpretation is at odds with the clear intent of the 1995 legislation to provide inmates with one full and fair opportunity for meaningful judicial review of their claims.

Chapter Three reviews cases illustrating the ramifications of the CCA’s interpretation of Article 11.071. In these cases and many others, a state habeas

lawyer was appointed who, although on the appointment list, failed to perform at the competent level envisioned by Article 11.071.

For example, in the case of Anthony Graves, the CCA appointed a lawyer who had only been out of law school three years. This lawyer failed to conduct an adequate investigation and missed compelling evidence of Graves's innocence, including the statement of a witness who admitted he lied when he implicated Graves at the trial. Graves was convicted largely based on the testimony of this witness, Robert Carter, who had participated in the murders and was also sentenced to death. The other evidence against Graves was weak: No physical evidence linked him to the crime, and prosecutors could never ascribe to him a clear motive.

Strapped to the gurney in the execution chamber, Carter admitted: "Anthony Graves had nothing to do with it." Because of the lawyer's failure to investigate the case and present the evidence of innocence, no court has ever considered these facts. The CCA's decision in that case to effectively eliminate the Legislature's promise of meaningful appellate review prompted a dissenting judge to note: "*Competent counsel' ought to require more than a human being with a law license and a pulse.*" Anthony Graves remains on death row.

Similarly, in the case of Johnny Joe Martinez, the CCA appointed a lawyer who had never previously handled any capital post-conviction matters. Having never spoken with his client and after spending less than 50 hours in preparation, the lawyer filed a five-page petition that raised four inappropriate claims. Because of his incompetence, the lawyer failed to uncover evidence rendering the process unreliable, including compelling mitigating evidence that was not presented at trial.

Despite having actual knowledge of the ineptitude of the lawyer, the CCA would not remedy the problem and refused to consider the compelling new claims. The lawyer's performance in Martinez's case was so inadequate it prompted the federal judge to note: "*I don't know what's holding up the State of Texas giving competent counsel to persons who have been sentenced to die.*" Martinez suffered the consequences of his lawyer's incompetence and was executed on May 22, 2002, without any court ever addressing the merits of these claims.

Our study indicates that the lawyers in these cases are all too typical of the lawyers authorized for appointment by the CCA. As a consequence, death row inmates, including those innocent of the crime or undeserving of death, whose trials have been rife with egregious constitutional violations, are being denied fundamental protections necessary to ensure reliable results—competent lawyers and meaningful judicial review.

CHAPTER 4 **The Fox Guarding the Hen House: The CCA Controls the Process**

The CCA's analysis of Article 11.071 is based on the incorrect assumption that all the lawyers on the list of approved counsel are *actually qualified* to represent death row inmates in habeas corpus proceedings. The CCA has not promulgated standards for appointed counsel, made public the qualifications of the attorneys currently on the list or reviewed the quality of attorneys already on the list.

While one CCA judge has made the facile accusation that all it takes to make it on the CCA's list of attorneys approved for appointment in Article 11.071 cases is a "*law license and a pulse*," the fact remains that a dead person is currently on the list of approved attorneys. Also on the list are at least five other lawyers who are ineligible for appointment in these cases, including three prosecutors, and an employee of the Texas Department of Criminal Justice.

There are currently 142 attorneys on the approved list. Of those, 106 (75%) attorneys filed petitions during the period of our study. Forty-two (39%) of the attorneys who filed habeas applications failed to raise any extra-record claims. Counting petitions that purport to raise extra-record claims but do not include the extra-record material crucial to review of those claims, there are 60 (57%) attorneys on the list who filed such petitions.

The CCA has overlooked repeated poor performance, disciplinary problems and admissions of incompetence from the attorneys themselves. One attorney sent a letter to his client saying: "*I am trying to get off your case and get you someone who is familiar with death penalty post-conviction habeas corpus.*" After receiving two death penalty cases, another lawyer confessed: "*At the time I was appointed, I was not familiar with how to litigate a capital habeas corpus case and was not aware of the need to investigate facts outside of the trial record.*" Yet another admitted: "*I acknowledge that the investigation of [the inmate's] case was inadequate to discover all of the potentially important issues affecting the legality of his conviction and death sentence.*"

State Bar grievance procedures have proven ineffective in protecting inmates from poor representation. Lawyers who have been publicly disciplined by the State Bar represented at least 13 death row inmates during the period of the study. In 11 of those 13 known cases, the petitions failed to raise or support appropriate state habeas claims. However, most of the disciplined lawyers have received multiple cases and remain eligible for additional appointments.

The CCA demonstrates further indifference to the state habeas process by failing to properly fund the appeals, generating boilerplate, two-page opinions in most state habeas cases, and almost universally adopting trial court findings of fact generated by prosecutors in 90% of the cases. These practices instill little confidence that the CCA is as concerned with meaningful appellate

review—designed to weed the innocent from the guilty and those deserving death from those who do not—as it is with speed and finality of conviction.

Though two out of three capital cases nationwide are overturned for error; the reversal rate in Texas since 1995 approaches zero. The CCA reversed only eight of the 270 death sentences it reviewed on direct appeal between 1995 and 2000—the lowest reversal rate of any state. Prior to 1995, Texas reversed about one-third of all death punishments.

CHAPTER 5 **Conclusion: A Breakdown in the System**

Cases highlighted in this report reflect a systemic problem. Over the six-year period of the study and even today, lawyers known to be inexperienced and untrained or known for their poor work in past cases continue to receive appointments, file perfunctory habeas petitions and turn over cases without proper investigation. It is not an exaggeration to say that by turning its back on this level of performance, the CCA is punishing the inmates, *including those who may be innocent*, and robbing them of the chance to have their cases reviewed. One judge noted that the CCA, in holding inmates accountable for their lawyer's shortcomings, *"gives a new meaning to the lady with a blindfold holding the scales of justice, as it dispatches [some] death row inmates toward the execution chamber without meaningful review of their habeas claims."*

Post-conviction review is crucial: It is the method of ensuring that capital trials are fair and that death sentences are appropriate. It is a proceeding intended to prevent wrongful executions, to find any new evidence proving innocence and to root out cases of prosecutorial misconduct, shoddy police work, mistaken eye-witnesses, false confessions and sleeping trial lawyers. But when inadequate lawyers and unaccountable courts sacrifice meaningful post-conviction review for speed and finality, death sentences are unreliable because mistakes are not caught and corrected.

Because there is no punishment for appallingly insufficient performance by defense lawyers, the problems will only worsen. Supreme Court Justice Ruth Bader Ginsburg, criticizing the quality of representation provided to indigent capital defendants, has voiced support for a moratorium on the death penalty. Her more conservative colleague, Justice Sandra Day O'Connor, acknowledged: *"Serious questions are being raised about whether the death penalty is being fairly applied in this country. . . . If statistics are any indication, the system may well be allowing some innocent defendants to be executed."*

By providing substandard review, we are running full tilt at the edge of a cliff—the execution of the innocent. Except, because there is no meaningful review, we do not know whether we are still on the precipice, peering over the brink, or already in free fall down into the abyss.