

THE TWENTY-SECOND ANNUAL FRANKEL LECTURE

INTRODUCTION

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Professor Stephen Bright delivered the twenty-second annual Frankel Lecture, entitled *Independence of Counsel: An Essential Requirement for Competent Counsel and a Working Adversary System*, on Friday, October 27, 2017. Although his address was tinged with humor and anecdotes, Bright painted a dark picture regarding the right to counsel in Texas capital cases. In examining the right to counsel, Bright detailed three areas where the right to counsel has failed in Texas. The first failing is independence of the defense counsel from the judiciary. Second, a disturbing practice of tolerating grossly incompetent lawyering. And third, the practice of punishing zealous attorneys in Texas.

Texas will forever be known as the state that believes a sleeping lawyer is effective counsel.¹ Texas is infamous for closing the courthouse door at 5:00 on the day of an execution, despite having knowledge that a last-minute pleading was on the way.² Lawyers who routinely miss statutory deadlines in

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1. In a unanimous opinion, the Court of Criminal Appeals affirmed a death sentence despite the attorney's nap schedule. *Ex parte McFarland*, 163 S.W.3d 743, 753 (Tex. Crim. App. 2005). In an affidavit submitted in the habeas proceeding, one juror stated that Mr. Benn's sleeping "was so blatant and disgusting that it was the subject of conversation within the jury panel a couple of times." *Id.* at 751 n. 8.

2. Although a judicial complaint was filed, the judge who singularly decided to close

capital cases—thus precluding any review of the case—are repeatedly reappointed and paid thousands of dollars.³

The practice of punishing zealous attorneys is an insidious action by the courts to diminish the right to counsel despite the State Bar of Texas's mandate that zealous counsel is required.⁴ Bright mentioned three cases in Texas illustrating these pervasive shortcomings, and the facts are unsettling.

THE CASE OF FRANK MARTINEZ GARCIA

Mr. Garcia was convicted of capital murder and sentenced to death in 2002.⁵ He filed a successive writ of habeas corpus, alleging that his initial writ lawyer failed to raise substantive issues that would preclude him from execution or possibly provide him with a new punishment hearing.⁶ The successive writ was filed October 26, 2011, the day before the pending execution, in derogation of the Court of Criminal Appeals' rules for filing in capital cases.⁷ The writ was denied, and Mr. Garcia was executed the next day.⁸

the door and stated she would do it again, received no actual punishment, but was chastised:

Additionally, [the Special Master] chastised as "highly questionable" Judge Keller's judgment in not keeping the clerk's office open past 5:00 p.m. to allow the late filing. He summarized his determination, finding that Judge Keller "did not violate any written or unwritten rules or laws." Furthermore, the Special Master concluded that, although Judge Keller "says that if she could do it all over again she would not change any of her actions, this cannot be true." He explained that "[a]ny reasonable person, having gone through this ordeal, surely would realize that open communication, particularly during the hectic few hours before an execution, would benefit the interests of justice."

In re Keller, 357 S.W.3d 413, 416–17 (Tex. Spec. Ct. Rev. 2010).

3. Lise Olsen, *Slow Paperwork in Death Row Cases Ends Final Appeals for 9*, HOUS. CHRON. (Mar. 21, 2009, 5:30 AM), <http://www.chron.com/news/houston-texas/article/Slow-paperwork-in-death-row-cases-ends-final-1736308.php>; Lise Olsen, *Tardy Texas Lawyers in Capital Cases Still Paid Thousands*, HOUS. CHRON., (Apr. 19, 2009, 5:30 AM), <http://www.chron.com/news/houston-texas/article/Tardy-Texas-lawyers-in-capital-cases-still-paid-1739659.php>.

4. See Tex. Disciplinary Rules Prof'l Conduct preamble ¶¶ 2, 3, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (West 2017) (stating twice that an attorney should zealously pursue the client's interests.).

5. *Ex Parte Garcia*, WR-66,977-02, 2011 WL 5189081, at *1 (Tex. Crim. App. Oct. 27, 2011).

6. *Id.* at *2–3 (Price, J., dissenting statement joined by Womack, J., and Johnson, J.)

7. *Id.* at *1; *Procedures in Death Penalty Cases Involving Requests for Stay of Execution in Texas State Trial Courts and the Court of Criminal Appeals*, Misc. Docket No. 11-003 (Tex. Crim. App. June 30, 2011) *reprinted in* 74 TEX. BAR. J. 762, 762 (2011), <http://www.txcourts.gov/media/208124/miscruleexecution.pdf> (a request for a stay of execution must be filed seven days prior to the execution date).

8. TEX. DEP'T OF CRIMINAL JUSTICE, *Last Statement of Frank Garcia #999418* (Oct. 27,

Less than a month later, the Court of Criminal Appeals filed an “Order to Appear and Show Cause for Untimely Filed Pleadings in Applicant Garcia’s Case.”⁹ The Order required Mr. Garcia’s two defense attorneys, Jim Marcus and Richard Burr, to appear before the Court to explain their late filing.¹⁰ The two attorneys filed a “Statement Concerning Untimely Filing,” on December 20, 2011. Interestingly, while the Court TAMES system allows for PDF copies of filed documents on the Court’s website, there is no way to access the filings by Burr and Marcus on the website.¹¹

In the pleading, there is immense detail regarding information discovered mere weeks before the scheduled execution date regarding Mr. Martinez’s mitigating circumstances as well as his intellectual disability.¹² The pleading details that the attorneys had just over a month to conduct a comprehensive investigation into the case for a condemned man who had been abandoned by his prior attorney.¹³ The work described was in-depth and comprehensive.¹⁴ The pleading filed by the attorneys was sufficient to convince three members of the Court of Criminal Appeals to dissent because no stay of execution was granted.¹⁵ Despite the work of Garcia’s attorneys, their explanations to the Court, and the three-member dissenting opinion from the Court of Criminal Appeals, both attorneys were found to be in contempt.¹⁶

2011), https://www.tdcj.state.tx.us/death_row/dr_info/garciafrankmlast.html.

9. Order to Appear and Show Cause for Untimely Filed Pleadings in Applicant Garcia’s Case, *In re* Jim Marcus and Richard Burr, *Ex Parte* Garcia, No. WR-66,977-02 (290th Dist. Ct., Bexar County, Tex. Nov. 23 2011), <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=4a599f01-0847-410f-bce0-c45215aa1e8c&coa=coscca&DT=OPINION&MediaID=47bdbdb8-abb8-4260-816f-cba0f74c0178>.

10. *Id.*

11. A call to the clerk of the Court of Criminal Appeals or a request for copies should allow access to the pleading which will be referenced herein by page number. A copy can also be emailed from the author of this introduction.

12. Statement Concerning Untimely Filing, *In re* Marcus, pleading at 2–7. In the pleading, the attorneys detail that Mr. Garcia’s trial attorney misrepresented to the court and to the attorneys that Mr. Garcia had been evaluated for an intellectual disability. *Id.* at 8, 18.

13. *Id.* at 16.

14. *See generally id.*

15. *Ex Parte* Garcia, WR-66,977-02, 2011 WL 5189081, at *2 (Tex. Crim. App. Oct. 27, 2011).

16. Order to Appear and Show Cause for Untimely Filed Pleadings in Applicant Garcia’s Case, *In re* Jim Marcus and Richard Burr, *Ex Parte* Garcia, No. WR-66,977-02 (290th Dist. Ct., Bexar County, Tex. Jan. 11 2012), <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=6e354bb9-a709-4340-bc23-b34a2f29b449&coa=coscca&DT=ORDER&MediaID=a738f851-4317-42df-8914-67ff9d443ad6>.

THE CASE OF RAPHAEL DEON HOLIDAY

Mr. Holiday was executed on November 18, 2015, after being abandoned by his two court-appointed writ attorneys.¹⁷ Mr. Holiday had lost his final writ of habeas corpus and his attorneys determined there were neither legal issues nor a need for a clemency petition:

‘Mr. Kretzer and I are not going to file further appeals for you.’ They advised, ‘[t]he only remaining option is for a clemency petition to the Texas governor, but we do not recommend that because he is not going to grant clemency in this case, or likely in any other death penalty case. A clemency petition just gives an inmate false hope.’¹⁸

Upon learning of the abandonment by his attorneys of Mr. Holiday, attorney Gretchen Sweed filed pleadings to attempt to represent Mr. Holiday.¹⁹ In response to the attempt by Sweed to represent Mr. Holiday, Mr. Holiday’s two-appointed counsel filed objections to her pleadings.²⁰ Although both appointed attorneys believed there were no further claims for relief, they fought against Sweed’s attempt to represent Mr. Holiday.²¹ In denying Mr. Holiday’s request for new counsel, the Fifth Circuit chastised Sweed: “[W]e warn the attorney here that subsequent attempts in this case to displace counsel will be viewed with skepticism.”²²

The Supreme Court denied certiorari on this issue.²³ However, Justice Sotomayor issued a statement respecting the application for stay of execution and denial of certiorari.²⁴ In the statement, Justice Sotomayor specifically named the two court-appointed attorneys who had abandoned their client and further explained: “But given the ‘representations’ of Holiday’s

17. TEX. DEPT. OF CRIMINAL JUSTICE, *Last Statement of Raphael Holiday #999419* (Nov. 18, 2015), https://www.tdcj.state.tx.us/death_row/dr_info/holidayraphaellast.html.

18. Lincoln Caplan, *The Death Penalty in Texas and a Conflict of Interest*, THE NEW YORKER (Dec. 3, 2015), <https://www.newyorker.com/news/news-desk/the-death-penalty-in-texas-and-a-conflict-of-interest>.

19. These pleadings are available on the PACER system of the United States Court of Appeals for the Fifth Circuit, Cause number 15-70035. <https://ecf.ca5.uscourts.gov/>.

20. *Id.*

21. Caplan, *supra* note 18.

22. *Holiday v. Stephens*, 806 F.3d 334, 335 n.1 (5th Cir. 2015).

23. *Holiday v. Stephens*, 136 S. Ct. 387, 387 (2015).

24. *Id.*

attorneys, the court found new counsel unwarranted This denial was an abuse of discretion.”²⁵

THE CASE OF MIGUEL PAREDES

On October 21, 2014, Professors David Dow and Jeffrey Newberry filed a successive application for writ of habeas corpus for Mr. Paredes.²⁶ Mr. Paredes was executed on October 28, 2014.²⁷ After the execution, the Court of Criminal Appeals issued an Order to Appear and Show Cause for Untimely Filed Documents in Applicant Paredes’s Case.²⁸ In response, Dow and Newberry submitted a detailed timeline regarding the filing.²⁹ The details establish that the untimely motion was filed on October 21, 2014 at 12:29 AM.³⁰ On its face, the seven day deadline to file the motion for stay of execution appears to have been met—yet the Court of Criminal Appeals held Professors Dow and Newberry in contempt.³¹ The contempt order also precluded Professor Dow from practicing before the Court of Criminal Appeals for one year, opining “[h]aving previously admonished respondent Dow that a future violation could result in a suspension from practicing before this Court, this Court now suspends respondent Dow from practicing before this Court for a period of one year.”³²

25. *Id.* (internal citation omitted).

26. Application for Writ of Habeas Corpus, *In re Paredes*, No.14-51160 (Tex. Crim. App. Oct. 21, 2014), <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=ae147e62-7cc0-49159d7a-%207b0801544dd4&coa=coscca&DT=11.071%20WRIT%20RECD&MediaID=e42abc00-2aa4-4200-bcdc-af3ed8780336>. Professor Dow and Mr. Newberry had previously filed an initial application for a writ in 2015 which was denied 133 days after being filed.

27. TEX. DEPT. OF CRIMINAL JUSTICE, *Last Statement of Miguel Angel #999400* (Oct. 28, 2014), https://www.tdcj.state.tx.us/death_row/dr_info/paredesmiguellast.html.

28. Order to Appear and Show Cause for Untimely Filed Documents in Applicant Paredes’s Case, *In re Dow, Ex Parte Paredes*, Nos. WR-61,939-01 and WR-61,939-02 (399th Dist. Ct., Bexar County, Tex. Nov. 19, 2014), <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=5be88ece-3bd7-4238-966e-46f312d2b072&coa=coscca&DT=ORDER&MediaID=d2685250-45c7-4d7c-b216-78c9d865a416>.

29. Motion for Leave to File, Ex. A, *In re Dow, Ex Parte Paredes*, Nos. WR-61,939-01 and WR 61,939 02 (Tex. Crim. App. Jan. 12, 2015), <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=72ae603b-1149-49b8-a2b7-0ebfe37483dc&coa=coscca&DT=MOTION&MediaID=aa9d43f7-7c46-44c0-9c7f-f1c8cfeab0f2>.

30. *Id.*

31. *In re Dow*, Nos. WR-61,939-01 & WR-61,939-02, (Tex. Crim. App. Jan. 14, 2015) (per curiam), <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=0935b4f2-774f-4d50-abae-6a9779661a5b&coa=coscca&DT=ORDER&MediaID=04bc866d-65f7-448c-8768-85eca2391e53>.

32. *Id.* at 3.

Arguably the seven days to file Paredes' motion for stay of execution was met.³³ Yet, the Court of Criminal Appeals forced the attorneys to Austin for a hearing and then found them in contempt for representing a man awaiting execution.

CONCLUSION

Professor Bright detailed many cases where capital habeas right to counsel in Texas has been undermined, but he also offered solutions. Capital habeas units and attorneys who specialize in capital work are essential for this work. Although some progress is being made, the State has an absolute responsibility to make the system work. Lawyers who merely seek a payday and fail to zealously advocate for their clients should be reported to the State Bar. And Bright questioned why the Texas Court of Criminal Appeals was satisfied with inadequate lawyering. Professor Bright's lecture illustrates the core issue—bad lawyers are ignored while zealous advocates are punished.

33. Judge Alcala filed a dissenting statement to the denial of rehearing, explaining why the pleading was late, but the rule was ambiguous:

This Court's decision to hold Dow in contempt, however, apparently stems from the example following Rule 11-003, which states, [sic] "For example, a request for a stay of execution filed at 8:00 a.m. on a Wednesday morning when the execution is scheduled for the following Wednesday at 6:00 p.m. is untimely." That example changes the seven-day rule into an eight-day rule. Applying the example of Rule 11-003 to this case instead of the rule's plain language, Dow's pleadings should have been filed on October 20 by midnight, and, therefore, were about eighteen and one-half hours late.

In re Dow, 460 S.W.3d 151, 153 (Tex. Crim. App. 2015) (Alcala, J., dissenting to denial of reh'g).