

ADDRESS

INDEPENDENCE OF COUNSEL: AN ESSENTIAL REQUIREMENT FOR COMPETENT COUNSEL AND A WORKING ADVERSARY SYSTEM

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ABSTRACT

Representation of poor people accused of crimes must be independent of the judiciary if criminal proceedings are to be fair and reliable. Independence is the first of the American Bar Association's *Ten Principles of a Public Defense Delivery System*

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(2002). Independence allows judges and defense counsel to perform their very different roles within the adversary system.

Inadequate representation of the accused by court-appointed lawyers has contributed to 127 executions of people sentenced to death in Harris County—more executions in the last 40 years than any state except Texas itself. Some lawyers have lacked the qualifications to handle capital cases. The Texas Court of Criminal Appeals rejected a challenge on behalf of Anthony Graves to the inadequate pleadings filed by the inexperienced lawyer it provided him for state habeas corpus proceedings. Different counsel established a constitutional violation in federal habeas corpus review and Graves was later exonerated. He is one of 12 men sentenced to death in Texas who were later exonerated. But others sentenced to death have had no review of their cases by the federal courts because the lawyers appointed to represent them missed the statute of limitations for filing a petition for federal habeas corpus.

There have been other egregious instances of malpractice such as lawyers sleeping during death penalty trials, filing briefs that were incomprehensible or did not apply to the case in which they were submitted, and abandoning clients and turning against them. Neither judges nor the Texas Bar have taken action to prevent such malpractice from occurring again. Judges have continued to appoint those lawyers to represent defendants and the Bar has taken no disciplinary action. The Texas Court of Criminal Appeals has sanctioned lawyers for failing to file pleadings a full seven days before an execution but has not punished those who slept during trials or those who submitted incomprehensible or irrelevant briefs—the convictions and death sentences were upheld in those cases.

The defense of capital and other criminal cases requires training, experience, expertise in a number of subjects, and the support of investigators, social workers and experts. Public defender offices and capital habeas units all over the country provide representation by lawyers who specialize and are trained and supervised. Two capital habeas units opened at federal public defender offices in Texas in 2017, over 20 years after such offices were established in other federal districts in other parts of the country. The units and other offices, such as the Office of Capital and Forensic Writs and the Regional Public Defender for Capital Cases are positive developments that will significantly improve representation. Members of the Bar have a responsibility to

provide access to justice that includes providing competent counsel in criminal cases.

I. INTRODUCTION

One of the most urgent issues regarding the legal representation of poor people accused of crimes is the lack of independence from the judiciary. It is indispensable for the appearance of justice as well as the actual realization of the right to counsel and justice.

The lack of independence is related to the fact that a large number of criminal cases have the integrity of a professional wrestling match. They are rigged from the start because the person accused is represented by an incompetent lawyer. In many federal and state courts throughout the nation that lawyer was assigned by a judge. And in many courts judges not only tolerate egregious instances of malpractice by lawyers, which should result in disbarment, but continue to appoint those lawyers to cases.

Judges preside over courts—particularly municipal courts—where people charged with crimes enter guilty pleas without speaking to a lawyer despite the Supreme Court’s holding over forty years ago that “no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel.”¹ Children rarely have access to a lawyer in many juvenile courts despite the Supreme Court’s holding that children facing commitment to an institution are entitled to counsel.² In some courts, judges call lawyers out of the audience to talk for a few

1. *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972). For reports on violations of the holding in *Argersinger*, see STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE*, at iv (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [<https://perma.cc/55UK-BGXM>] (reaching “the disturbing conclusion that thousands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation.”); Robert C. Boruchowitz, Malia N. Brink & Maureen Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts*, NAT’L ASS’N OF CRIM. DEF. LAW. 14–22 (2009), <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808> [<https://perma.cc/3LAC-TGWZ>] (reporting that judges were encouraging defendants to plead guilty without counsel, prosecutors were talking directly with defendants and convincing them to plead guilty without counsel, defendants were discouraged from asking for counsel because of application fees for a public defender as high as \$200, and defense lawyers usually had too many cases to provide competent representation).

2. See *In re Gault*, 387 U.S. 1, 14, 35 (1967).

minutes to an accused adult or child and to stand by the person when he or she enters a guilty plea.³ In other cases, attorneys may be previously assigned, but many of them meet their clients and talk them into pleading guilty moments before a judge takes the bench, accepts the plea and pronounces the sentence. Some judges even elicit statements from defendants that they are satisfied with their lawyers, when it is apparent there has been no “representation” whatsoever—no interview, no review of police reports and other documents, no investigation, no determination of legal issues—nothing beyond a brief conversation to persuade the person to enter a plea.⁴

Of course, there are many reasons for the poor quality of representation received by children and adults charged with offenses. Competent representation cannot be provided without adequate funding for public defense programs, but governments do not have incentives to provide funds for representation that could frustrate their efforts to convict, fine, imprison, and execute the poor. Some states—including Alabama, Arizona, California, Indiana, Michigan, Mississippi, New York, Ohio, Oklahoma, Pennsylvania and Texas—have no state-wide public defender offices to ensure that the poor are represented by competent lawyers who have been trained and are supervised.⁵ They leave primary responsibility to their local jurisdictions. Many public defense programs are governed by a governor, county commissioners or other local officials who lack the commitment and expertise of an independent public defender board. Other factors are all the more reason that judges should be independent of the defense function. Judges have the responsibility of enforcing the Sixth Amendment’s guarantee of counsel when other branches

3. Boruchowitz, et al., *supra* note 1, at 32.

4. *Id.* at 15–16.

5. LYNN LANGTON & DONALD FAROLE, JR., U.S. DEP’T OF JUSTICE: BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: STATE PUBLIC DEFENDERS PROGRAM, 2007, (Sept. 2010), <https://www.bjs.gov/content/pub/pdf/spdp07.pdf> [<https://perma.cc/Z7PV-7UCC>]. The states that have no state-wide public defender program may have good public defender offices in some of their localities, such as the San Francisco Public Defender and the Legal Aid Society in New York City and defender offices in the five boroughs of the City. But representation in other parts of the state may be deficient. *See, e.g.*, Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 300, 305–07 (2009) (describing contracts for representation in 24 California counties, many awarded on the basis of the lowest bid, and poor quality of representation); *Hurrell-Harring v. State*, 930 N.E.2d 217, 222–24 (N.Y. 2010) (addressing issues of “outright nonrepresentation” and nominal representation in four counties in New York).

of government fail to do so.⁶ They should not be complicit in the denial of counsel.

A comprehensive report published by the National Association of Criminal Defense Lawyers reported, that “[f]rom the national level to the individual district courts across the nation, judges—not defense attorneys or others appointed to represent and protect the interests of defendants—manage the nation’s federal indigent defense system,” and that the defense function is increasingly being treated as a “service to the courts” like clerks, marshals, and interpreters.⁷ A committee appointed by Chief Justice John Roberts, Jr., reported after extensive study of representation in federal courts that such management “creates conflicts of interests and other serious impediments to genuine justice,” that independence is necessary for criminal defendants to be represented by “a skilled, independent, and properly resourced advocate,” and recommended creation of an independent Federal Defender Commission.⁸ It reached the same conclusion reached by another committee almost a quarter of a century earlier that found that “the judiciary has become entangled in a web of matters that are more properly the province of separate entities devoted to criminal defense.”⁹ This is also true in the state courts. It is incompatible with the right to counsel and the fairness and integrity of the courts.

The lack of independence is contrary to the very first of the American Bar Association’s *Ten Principles of a Public Defense Delivery System* (2002),¹⁰ and to the responsibilities of judges and

6. Boruchowitz, et al., *supra* note 1, at 11.

7. NAT’L ASS’N OF CRIM. DEF. LAW., FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE 24, 35 (2015) [hereinafter INDEPENDENCE IMPERATIVE], www.nacdl.org/federalindigentdefense2015/ [<https://perma.cc/N6CD-WNJH>] (follow “Read the Report” hyperlink).

8. COMM. TO REVIEW THE CRIMINAL JUSTICE ACT, 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT xvii, xxvi-xxvii, xxxvi (2017) [hereinafter 2017 CJA REPORT].

9. COMM. TO REVIEW THE CRIMINAL JUSTICE ACT, REPORT OF THE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 45 (1993). The two reports were produced by committees composed of federal judges, private attorneys, law professors, and public defenders. The first committee was appointed by Chief Justice Rehnquist. See also David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 355 (2017).

10. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Feb. 2002), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf. [hereinafter ABA TEN PRINCIPLES] [<https://perma.cc/23QH-YQ5V>]. The *Ten Principles* are key elements of a successful public defense system derived from guidelines and standards developed and

defense counsel. Independence allows both judges and defense counsel to perform their very different roles without interference.¹¹ Serving as a judge is a full-time job in most courts with enormous responsibilities in managing dockets and resolving cases. Management of a public defense program is also a full-time job requiring certain experience, knowledge and expertise. Judges lack the time and expertise to run public defense systems.¹² It is impossible for a judge to have full knowledge of all aspects of particular clients and their cases as is necessary to micro-manage how they are defended right down to what experts will be retained, what testing will be allowed, and what evaluations will be conducted.

The complexity of criminal cases today requires lawyers to have a sophisticated knowledge of constitutional law, forensic science, the rules of evidence, trauma, mental illness, intellectual disability and other issues of law and fact.¹³ For example, there are serious questions about the accuracy of some expert testimony routinely presented by prosecutors in areas such as DNA testing, fire science, and comparisons of fingerprints, bite marks, firearms, spent ammunition, handwriting, footwear and hair, as well as the biases of prosecution experts who testify about their testing and conclusions.¹⁴

The responsibility of the defense lawyer in the adversary system is to challenge such evidence—which may include

adopted by the ABA and other organizations. *Id.* at 1.

11. INDEPENDENCE IMPERATIVE, *supra* note 7, at 24–25, 35–36 (describing how lack of independence between the judiciary and defense raises several conflicts of interest and suggesting that a more independent system would permit both judges and defense counsel to more effectively perform their roles).

12. *Id.* at 45.

13. *Id.*

14. See, e.g., *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318–321 (2009) (describing flaws and biases with regard to forensic science identified in a report, National Research Council, National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (2009)); PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, *FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS* (Sept. 2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [<https://perma.cc/G87Y-N39X>] (reporting that some forensic methods did not meet scientific standards for validity and reliability, that some were in need of improvement and that expert witnesses have often overstated the probative value of their evidence, going far beyond what the relevant science can justify); Kelly Servick, *Reversing the Legacy of Junk Science in the Courtroom*, *SCIENCE* (Mar. 7, 2016), <http://www.sciencemag.org/news/2016/03/reversing-legacy-junk-science-courtroom> [<https://perma.cc/3VUK-58C3>].

consulting with experts and presenting expert testimony.¹⁵ The judge should not enter the fray during the defense preparation for trial in deciding whether to approve expenditures for experts. The judge should become involved only when the issue is presented in the adversary context.

II. ISSUES OF FAIRNESS AND INDEPENDENCE

A. *Concerns About Costs but not Fairness*

Some judges appear more concerned about cost containment and administrative efficiency than insuring a zealous defense. As chief judge of the Fifth Circuit Court of Appeals, Edith Jones, who is a strong advocate for the death penalty and has advised government lawyers engaged in capital litigation on how to expedite executions,¹⁶ cut funding for experts in capital and other criminal cases.¹⁷ She severely cut the funding for a forensic accounting firm for its professional services in a noncapital case, and subsequently ordered it, without notice or opportunity to be heard, to continue providing services and testimony at trial under penalty of contempt.¹⁸ The firm had no redress for deprivation of its services worth \$1.2 million.¹⁹ This discourages experts from agreeing to being retained in other cases involving indigent defendants because they are, quite reasonably, reluctant to take on work for which they may not be compensated. Many simply cannot afford to take the risk.

15. See Nancy Gertner, *Commentary on the Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 789, 791 (2011).

16. Edith H. Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 TEX. B. J. 850, 850–53 (1990); David Kaplan, *The Fryers Club Convention*, NEWSWEEK, Aug. 27, 1990, at 54.

17. For example, in the capital case of Elmer Garza in the Eastern District of Texas, the district court initially approved a budget of \$176,500 for experts and investigators, finding that it was reasonably necessary for an adequate defense. Chief Judge Jones subsequently reduced the budget to \$65,000. *United States v. Snarr*, 704 F.3d 368, 403 (5th Cir. 2013).

18. *Marcum LLP v. United States*, 753 F.3d 1380, 1382 (Fed. Cir. 2014) (describing chief judge's reduction of payment authorized by the district court and ordering the accounting firm to continue work, including providing expert testimony, but holding that CJA precluded the firm from recovering \$1.2 million it was denied for its services).

19. See *In re Marcum LLP*, 670 F.3d 636, 637 (5th Cir. 2012) (holding that the only avenues of review of denial of compensation are a motion for reconsideration addressed solely to the chief judge or a mandamus action in the United States Supreme Court); *Marcum LLP*, 753 F.3d at 1384 (holding that the Court of Claims had no jurisdiction to consider the denial of compensation because jurisdiction would undermine the CJA's "self-executing remedial scheme for the review of fee awards").

Judge Jones sent a memorandum to chief judges and circuit executives in all the federal courts of appeals about “cost containment” in complex cases, including capital cases.²⁰ The memorandum cautioned against allowing “multiple, overlapping experts” such as “up to three psychiatrist/psychologist/neurologist-type experts” as well as other “types of experts,” such as ones on culture.²¹ Additionally, it recommended placing “an outside dollar limit on all experts”²² and “establishing guidelines for [the] general cost[] of representation” in capital cases.²³ However, because cases vary greatly in their complexity, these generalities are of no value in assessing the number and qualifications of members of a defense team required in a particular case.²⁴ And, because there is no limitation on what can be spent in *prosecuting* a case, limitations on defense expenditures may deny the defendant a fair trial and a reliable verdict.²⁵

Capital cases range from those involving an automobile hijacking with a single victim by a single perpetrator who is promptly apprehended close to the scene of the crime to enormously complex cases involving multiple defendants and multiple informants, engaged in conspiracies that occur over a long period of time in numerous places all over the world and involve hundreds of witnesses and many experts. Some, like the embassy bombings,²⁶ occur outside of the United States and

20. Memorandum from Edith H. Jones to All Chief Circuit Judges, All Circuit Execs., & Gary Bowden 2–4 (Mar. 11, 2011) [hereinafter Jones Memorandum].

21. *Id.* at 2–3 (emphasis in original).

22. *Id.* at 3.

23. *Id.* at 4.

24. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003). The guidelines recognize that experts specializing in various subjects may be needed on the same case. *Id.* at 958–59. See also, e.g., *Caro v. Woodford*, 280 F.3d 1247, 1258 (9th Cir. 1999), *cert. denied*, 536 U.S. 951 (2002) (holding that, although counsel consulted four experts, including a medical doctor, a psychologist, and a psychiatrist, they were ineffective in failing to consult a neurologist or toxicologist who could have explained the neurological effects of defendant’s extensive exposure to pesticides).

25. See Jaeah Lee, Hannah Levintova & Brett Brownell, *Charts: Why You’re in Deep Trouble If You Can’t Afford a Lawyer*, MOTHER JONES (May 6, 2016 10:00 AM), <https://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts/> (“Compounding the caseload problem is the money problem: Public defense budgets are paltry compared to spending on the other side of the criminal-justice system—prosecution, police, and corrections.”) [<https://perma.cc/NFN7-P3ZF>].

26. See Benjamin Weisner, *Jury Rejects Death Penalty for Terrorist*, N.Y. TIMES (July 11, 2001), <http://www.nytimes.com/2001/07/11/nyregion/jury-rejects-death-penalty-for-terrorist.html> (reporting that the jury was unable to reach a unanimous verdict in the case of two terrorists convicted of the bombings resulting in a sentence of life imprisonment without the possibility of parole); Benjamin Weisner, *The Terror Verdict: The*

require extensive travel to other countries. Cases may be resolved with plea dispositions, trials that last a few days or weeks, or trials that last for months.

As with the facts regarding guilt and innocence, issues regarding mitigation vary widely from one defendant to another, requiring different investigations, evaluations, consultations and expert testimony. For example, a number of experts may be required to assess a defendant who was born with fetal alcohol syndrome, subjected to unconscionable abuse as a child, suffered severe brain damage, experienced trauma as a child and adult, and has symptoms of schizophrenia, bi-polar or some other major mental disorder. Cultural influences may be critical in understanding a client's behavior regarding an offense, interaction with law enforcement, understanding of judicial proceedings, demeanor in court, relationship to the defense team and myriad aspects of mitigation.²⁷ A cultural expert may be essential in providing the jury with an understanding of how the client saw the world and the context in which he made decisions.²⁸

Identifying and documenting these critical mitigating factors often requires hours of painstaking work.²⁹ Attorneys, mitigation specialists and medical professionals, who specialize in identifying mental issues, brain damage, the results of trauma and other mitigating factors and are dealing with the client, his family and others familiar with him, are far more likely to assess correctly what is needed than a judge who does not have the time or expertise to make an evaluation, or the circuit's chief judge, who is even further removed from the situation.

Judge Jones also discouraged hiring mitigating specialists who are attorneys and warned against allowing spouses and other "close relatives" to be part of the defense team.³⁰ But this is also too general to be helpful. It fails to take into account the individual characteristics, experiences and expertise of the people involved. Some of the very best mitigation work in the country is being done

Overview: 4 Guilty in Terror Bombings of 2 U.S. Embassies in Africa; Jury to Weigh 2 Executions, N.Y. TIMES (May 30, 2001) <http://www.nytimes.com/2001/05/30/nyregion/terror-verdict-overview-4-guilty-terror-bombings-2-us-embassies-africa-jury.html> (reporting that four were convicted of bombing the American Embassies in Kenya and Tanzania that killed 224 people and injured thousands and that two faced the death penalty).

27. See Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 38 HOFSTRA L. REV. 883, 894–95 (2008).

28. *Id.*

29. American Bar Association, *supra* note 24, at 958–59.

30. Jones Memorandum, *supra* note 20, at 2.

by people who are members of the bar but found their calling in investigating the life and backgrounds of people facing the death penalty. Similarly, some lawyers who go into practice with their spouses and/or children provide exceptional representation in all types of cases. It is neither accurate nor fair to make broad characterizations of attorneys and their relatives.

As previously noted, these cost concerns and limits on evidence do not apply to the prosecution of capital cases, only the defense. Among the many examples of the unlimited budgets given to prosecute capital cases is a case in the Northern District of Georgia in which the United States retained four “overlapping experts”—two neuropsychologists and two psychiatrists at a cost of \$475 per hour for each. The total costs for the experts, who were not allowed to testify because the prosecution misled the judge regarding them, was \$150,000.³¹ It would have been far more had any of them testified. There was simply no limit on the prosecution’s expenditures for experts.

The cost containment memorandum is remarkable for its entire focus on cutting costs without a single sentence about improving legal representation in complex and capital cases³² despite the abundance of examples of ways that representation could be improved, starting with the very basic requirement that attorneys handling federal habeas corpus cases be sufficiently competent to file the petitions within the statute of limitations.

B. Specialization to Insure Fairness

Good public defense programs have lawyers who have an expertise in various areas and, where they lack the expertise in an area, their lawyers should have the time and resources they need to identify and retain experts based on their research, consultation with experts and professional judgment, not the approval of a judge who has little if any time to become conversant with the issue. The work of these public defense programs and lawyers not only insures the proper working of the adversary system, but also minimizes the likelihood of false and fraudulent results that have

31. Bill Rankin, *Costs Questioned in Failed Death-Penalty Case*, ATLANTA J-CONST. (Aug. 13, 2012), <http://www.ajc.com/news/local/costs-questioned-failed-death-penalty-case/nLE2cqxBh0b1oBuhNgZHP/> [<https://perma.cc/6PKM-FPSM>].

32. See Jones Memorandum, *supra* note 20.

come to light in the many scandals regarding crime laboratories throughout the nation,³³ including the one in Houston.³⁴

Capital cases are of course particularly demanding and the stakes could not be higher. United States Supreme Court Justice Ruth Bader Ginsburg has said, “I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial.”³⁵ Justice O’Connor has decried the “woeful legal representation afforded most indigent defendants in capital cases,” noting six individuals who had been recently exonerated,³⁶ and expressed concern that defendants with court appointed attorneys were more likely to be sentenced to death if convicted.³⁷ What damning admissions that in cases where people’s lives are at stake they are not well represented. Justice O’Connor has said that some of those executed may be innocent.³⁸

The penalty phase of capital cases requires knowledge of how to investigate and document the “compassionate or mitigating

33. See Conor Friedersdorf, *CSI Is a Lie*, ATLANTIC (April 20, 2015), <https://www.theatlantic.com/politics/archive/2015/04/csi-is-a-lie/390897/> (describing longstanding “shoddy forensics” in several jurisdictions).

34. Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Testing in Houston Police Crime Lab*, N.Y. TIMES (August 5, 2004), http://www.nytimes.com/2004/08/05/us/new-doubt-cast-on-testing-in-houston-police-crime-lab.html?_r=0 (detailing a report from independent forensic scientists that poorly trained Houston crime laboratory officials offered “false and scientifically unsound” reports and testimony” and misinterpreted data); Brian Rogers, et al., *Crime-scene Errors Put 65 Cases Under Review, Audit Finds*, HOUS. CHRON. (April 12, 2017), <http://www.chron.com/news/houston-texas/article/New-evidence-problems-raise-questions-in-65-11068118.php> (describing “errors by a Houston crime-scene investigator that raised questions about key evidence in cases that include 26 homicides, five officer-involved shootings and six child deaths since 2015”); Brian Rogers, *Ex-Crime Lab Analyst Told HPD Colleagues of Wrongdoing*, HOUS. CHRON. (June 25, 2014), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Former-HPD-crime-lab-analyst-told-colleagues-of-5580097.php> (reporting that a technician’s failure to follow protocols was the subject of “systemic, long-running complaints,” regarding the Houston Police Department Crime Lab dating back to 2002 which resulted in retesting evidence in 185 cases, including 51 murders or capital murders).

35. Ruth Bader Ginsburg, *In Pursuit of the Public Good: Lawyers Who Care*, Lecture at the University of the District of Columbia, David A. Clarke School of Law (April 9, 2001), http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_04-09-01a [<https://perma.cc/6FGD-WPZ5>].

36. Editorial, *Justice O’Connor on Executions*, N.Y. TIMES (July 5, 2001), <http://www.nytimes.com/2001/07/05/opinion/justice-o-connor-on-executions.html> (“She also deplored the fact that . . . Texas defendants with the resources to hire their own lawyers are considerably less likely to be convicted than those with appointed counsel.”).

37. Associated Press, *O’Connor Questions Death Penalty*, N.Y. TIMES (July 4, 2001), <http://www.nytimes.com/2001/07/04/us/o-connor-questions-death-penalty.html>

38. Editorial, *Justice O’Connor on Executions*, *supra* note 36 (quoting Justice O’Connor saying, “[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed”).

factors stemming from the diverse frailties of humankind” that may provide a basis for a sentence less than death.³⁹ The average lawyer who is not dealing with matters of life and death may not know the value of developing a social history of the life of the client and the client’s family to identify mitigating circumstances such as fetal alcohol syndrome—the brain damage a child receives from the mother’s ingestion of alcohol during pregnancy. They may not recognize the onset of schizophrenia or recognize other major mental disorders or intellectual disability. Lawyers who do not recognize those things and have no idea of what experts they need are not able to capably defend a capital case.

C. Aggressive Prosecutors and Inept Defense Counsel at Trials

The lack of independence and incompetent representation of the poor are problems throughout the country,⁴⁰ but they have been particularly a problem in Texas and Harris County. Texas executed 545 people between 1976 and the end of 2017.⁴¹ During that period, 127 people sentenced to death in Harris County were executed, more executions than any state except Texas itself.⁴² It is considerably more than Virginia, which executed 113 people, and Oklahoma, which executed 112.⁴³ Before the end of 2017, no other state has executed over 100 people. It is no secret how one county is responsible for so many executions. It had a hard

39. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (Opinion of Stewart, Powell and Stevens). *See also* *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that mitigating circumstances are “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”); Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 964 (2008).

40. *See* NAT’L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), <http://www.constitutionproject.org/pdf/139.pdf> [https://perma.cc/3JQ8-7VQ5]; AMERICAN BAR ASSOCIATION STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [https://perma.cc/3NFP-DA6N].

41. DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY 3 (Dec. 14, 2017) (on file with author).

42. TEX. DEPT. CRIM. JUSTICE, *County of Conviction for Executed Offenders*, www.tdcj.state.tx.us/death_row/dr_county_conviction_executed.html [https://perma.cc/74F9DFFT]; TEX. DEPT. CRIM. JUSTICE, *Executed Offenders*, www.tdcj.state.tx.us/death_row/dr_executed_offenders.html [https://perma.cc/YWT7-JHBA].

43. DEATH PENALTY INFORMATION CENTER, *supra* note 41, at 3.

charging prosecutor, Johnny Holmes, who was District Attorney for 21 years,⁴⁴ and, as will be discussed, many of the defendants were represented by inadequate and inept lawyers. The prosecution easily prevailed in getting death sentences. And many of the lawyers assigned to represent the condemned in the appellate and post-conviction proceedings have been just as bad or worse than the trial lawyers.

The prosecution's job was made easier in Harris County by the appointment of incompetent lawyers to represent people facing the death penalty.⁴⁵ Some have even slept during trials.⁴⁶ Asked how he could preside over the capital trial of George McFarland while McFarland's lawyer, John Benn, was snoring, the trial judge answered that "[t]he Constitution doesn't say the lawyer has to be awake."⁴⁷ The Texas Court of Criminal Appeals upheld the

44. See Allan Turner, *Former DA Ran Powerful Death-Penalty Machine*, HOUS. CHRON. (July 25, 2007), <https://www.chron.com/news/houston-texas/article/Former-DA-ran-powerful-death-penalty-machine-1833545.php>; Johnny Holmes, Jr., *Dealing Out Death*, TEX. MONTHLY (July 2002), <https://www.texasmonthly.com/articles/dealing-out-death/>. The District Attorney elected in 2016 by Harris County has said she will seek the death penalty in a "more judicious manner than her predecessors." Phil McCausland, *Why Texas' Death Penalty Capital of the World Stopped Executing People*, NBC NEWS (Dec. 16, 2017), <https://www.nbcnews.com/storyline/lethal-injection/why-texas-death-penalty-capital-world-stopped-executing-people-n830276>.

45. For example, one lawyer, Jerry Guerinot, repeatedly appointed by judges in Houston, had 20 clients sentenced to death due largely to his "failure to conduct even rudimentary investigations." Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N.Y. TIMES (May 17, 2010), www.nytimes.com/2010/05/18/us/18bar.html; Michael Graczyk, *Texas lawyer Who Lost All Death Penalty Cases Says He's Done*, AP (Aug. 13, 2016), <https://apnews.com/31cad6f043314b8886d878a1dfe8e16c>, (reporting Guerinot's decision to stop handling capital cases). Houston judges repeatedly appointed Ronald Mock, despite his poor performance in capital cases. Sara Rimer & Raymond Bonner, *Texas Lawyer's Death Row Record a Concern*, N.Y. TIMES (June 11, 2000), www.nytimes.com/2000/06/11/us/texas-lawyer-s-death-row-record-a-concern.html. Sixteen people represented by Mock were sentenced to death. Andrew Tilghman, *State Bar Suspends Troubled Local Lawyer*, HOUS. CHRON. (Feb. 12, 2005), <https://www.chron.com/news/houston-texas/article/State-Bar-suspends-troubled-local-lawyer-1631385.php>. Houston judges also appointed Joe Frank Cannon, who was known for trying cases like "greased lightning" and not always being able to stay awake during trials; 10 people represented by Cannon were sentenced to death. Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994 at A1.

46. Calvin Burdine, Carl Johnson and George McFarland were all sentenced to death in Houston at trials in which their lawyers slept. *Burdine v. Johnson*, 262 F.3d 336, 349–50 (5th Cir. 2001) (en banc) (reversing where defense lawyer slept during trial); David R. Dow, *The State, The Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694–95 (1996) (describing defense lawyer sleeping during capital trial of Johnson, who was executed); *Ex parte McFarland*, 163 S.W.3d 743, 752–53 (Tex. Crim. App. 2005) (upholding death sentence in post-conviction review even though lawyer slept during trial); *McFarland v. State*, 928 S.W.2d 482, 524 (Tex. Crim. App. 1996) (upholding death sentence on direct appeal despite the sleeping).

47. John Makeig, *Asleep On the Job? Slaying Trial Boring, Lawyer Says*, HOUS.

conviction and death sentence because a second lawyer was appointed to represent McFarland, but Judge Charles Baird dissented, pointing out:

[Co-counsel's] preparation for this trial consisted of only a seven hour review of the State's files. He visited appellant once before trial and prepared some pre-trial motions Neither attorney interviewed a witness and neither attorney reviewed the extraneous offenses that were to be later admitted. [Lead counsel] decided which witnesses 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. And considering the role to which he was relegated, [co-counsel] was in no position to put forth a coordinated defense strategy. Even more disturbing, [lead counsel] could sleep during the direct examination and still elect to conduct cross-examination.⁴⁸

D. Deficient Representation in Post-Conviction Review

After they are sentenced to death, many of the condemned are assigned equally bad lawyers to represent them in post-conviction proceedings. The Texas Court of Criminal Appeals has held that lawyers must be competent *when appointed* to represent a client in post-conviction proceedings but *need not represent the client competently*.⁴⁹ The Court issued this decision in the case of Anthony Graves, over a dissent which argued that “[c]ompetent counsel’ ought to require more than a human being with a law license and a pulse.”⁵⁰ The Court had assigned Graves a lawyer who had been “out of law school for only two years, had been licensed to practice law for only a year-and-a-half” and “by any reasonable assessment was not prepared to handle a case of this type.”⁵¹ Fortunately, other lawyers represented Graves in federal habeas corpus proceedings. They established that the prosecution had failed to disclose exculpatory evidence before Graves’s trial.⁵²

CHRON., Aug. 14, 1992, at A35.

48. McFarland v. State, 928 S.W.2d at 527–28 (Baird, J., dissenting).

49. *Ex parte Graves*, 70 S.W.3d 103, 114–116 (Tex. Crim. App. 2002) (holding that the term ‘competent counsel’ in the Habeas Corpus Reform Act of 1995 applies to the “appointment of a habeas attorney” rather than the “final product or services rendered by that otherwise experienced and competent counsel”).

50. *Id.* at 118 (Price, J., dissenting).

51. *Id.* at 120, 122.

52. *Graves v. Dretke*, 442 F.3d 334, 336 (5th Cir. 2006).

The federal court of appeals set aside his conviction and death sentence.⁵³ When the case was returned to the trial court for a new trial, the prosecutor conducted an investigation and determined that Graves was innocent, saying, “[t]here’s not a single thing that says Anthony Graves was involved in this case There is *nothing*.”⁵⁴ Graves was released after 18 years of incarceration, 12 of them on death row.⁵⁵ He was one of twelve men who left Texas’s death row after being exonerated; five of whom were spared execution in federal habeas corpus proceedings.⁵⁶

E. Failure to File Within the Statute of Limitations

Not everyone sentenced to death in Texas has an opportunity to present their case to the federal courts as Graves did. Lise Olsen published an article describing egregious malpractice in nine capital cases—the lawyers in those cases missed the statute of limitations for filing federal habeas corpus petitions.⁵⁷ As Graves’s case demonstrates, habeas corpus review by life-tenured federal judges is essential to ensure compliance with the Constitution after claims have been rejected by elected state court judges. Anyone licensed to practice law should be capable of filing pleadings within the statute of limitations. It is a simple and fundamental responsibility of a lawyer.

Jerome Godinich, Jr. was the lawyer in three of the nine cases. In two cases, Godinich failed to file within the statute of limitations and offered the same excuse—that the time stamp machine at the courthouse did not work—which was rejected by

53. *Id.*

54. Pamela Colloff, *Free at Last*, TEX. MONTHLY, (Nov. 2010) (emphasis in original), <https://www.texasmonthly.com/articles/free-at-last-3/> [<https://perma.cc/W9WV-S7CE>].

55. *Id.*

56. Ken Armstrong, *Lethal Mix: Lawyers’ Mistakes, Unforgiving Law*, WASH. POST, Nov. 15, 2014, at A1. *In re Commonwealth’s Motion to Appoint Counsel*, 790 F.3d 457, 481 (3d Cir. 2015) (McKee, J., concurring) (observing that inadequate representation resulting in missed deadlines “creates a very real risk of miscarriages of justice” because “some actually innocent petitioners only gain relief at the federal habeas corpus stage”).

57. Lise Olsen, *Slow Paperwork in Death Row Cases Ends Final Appeals for 9*, HOUS. CHRON., (Mar. 22, 2009), [hereinafter Olsen, *Slow Paperwork*] <http://www.chron.com/news/houston-texas/article/Slow-paperwork-in-death-row-cases-ends-final-1736308.php> (describing failure of Texas lawyers to file federal habeas corpus within the statute of limitations in 9 cases); see also *Ex parte Rojas*, No. 39062-01, 2003 WL 1825617, at *1–5 (Tex. Crim. App. Feb. 12, 2003) (Price, J., dissenting) (describing lack of qualifications of attorney appointed by the Court of Criminal Appeals who missed the statute of limitations for filing a habeas corpus petition in federal court on behalf of Rojas).

the courts.⁵⁸ In the case of Keith Thurmond, the federal district judge stated:

It is worth noting that this is not the first time petitioner's counsel, Jerome Godinich, Jr., has run afoul of the statute of limitation in a capital habeas corpus case. In at least one prior case, Mr. Godinich offered the same excuse—that his attempt to file the petition after hours on the due date was frustrated by a broken time stamp machine. *See Johnson v. Dretke*, No. H-05-cv-0035 (S.D. Tex. Mar. 9, 2006). That petition was also dismissed as time-barred.⁵⁹

Both Thurmond and Johnson have been executed.⁶⁰ In the third case:

[A] Houston-based U.S. district judge took so long to appoint Godinich that the appellate deadline already had lapsed [by the time he was appointed]. Court records show Godinich requested more time but took 162 days to file the appeal. The judge then ruled that it, too, was too late to be considered.⁶¹

Yet, despite such gross malpractice, Godinich “faced no fines or other public penalties from the Houston-based federal judges who both appointed and paid him to represent the three men.”⁶² The Texas Bar took no action, nor did the Texas Court of Criminal Appeals. Asked why the Texas Bar took no action, its president responded that there had been no complaint against Godinich. But Lise Olsen's articles about Godinich and others missing the statute of limitations were published in the *Houston Chronicle*.⁶³ The *Chronicle* also called the missed deadlines “indefensible” in an editorial that pointed out the lawyers usually “were paid for their lousy work and continued to receive more court appointments.”⁶⁴ It continued:

58. Olsen, *Slow Paperwork*, *supra* note 57.

59. *Thurmond v. Quarterman*, No. H-06-2833, at 4–5 (S.D. Tex. Feb. 12, 2008) (rejecting the broken time stamp machine excuse and finding that Godinich did not file within the statute of limitations).

60. Johnson was executed on April 30, 2009; Thurmond was executed on March 7, 2012. Texas Department of Criminal Justice, *Executed Offenders*, http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html [hereinafter *Executed Offenders*].

61. Olsen, *Slow Paperwork*, *supra* note 57. *See Nelson v. Quarterman*, 215 Fed. Appx. 396, 399 (5th Cir. 2007) (noting the 162 days in upholding district court's determination that the petition was barred because it was not filed on time).

62. Olsen, *Slow Paperwork*, *supra* note 57.

63. *Id.*

64. Editorial, *Indefensible Defenders: For Life-and-Death Appeals, Texas Can't*

Consider Houston lawyer Jerome Godinich, who's missed three—count 'em, three—federal deadlines in capital cases. For two of those he used the same excuse: that the courthouse's antiquated after-hours filing machine wasn't working. That explanation seemed limp the first time Godinich used it, since most lawyers file after-hours appeals electronically from their office computers. So how dumb does a lawyer have to be to make the same mistake a second time?

And more to the point: How does a lawyer with that track record continue to get work with life-or-death consequences?⁶⁵

How could the Texas Bar and the state and federal judges in Texas be unaware that Godinich and other lawyers were making egregious mistakes that were fatal to their clients? If the Bar is responsible for protecting the public from incompetent and dishonest lawyers, it certainly should protect people from lawyers who cannot stay awake during trials or file their papers on time when their clients' lives are at stake.

The trial court judges in Houston who take an oath to uphold the Constitution have continued appointing Godinich to defend poor people accused of crimes, including people facing the death penalty. Indeed, Godinich continued to be “one of the county's busiest appointed criminal attorneys.”⁶⁶ He was assigned 406 felony cases at the trial level in 2017—more than twice the national standard of 150 felony cases⁶⁷—as well as 8 capital cases, and 7 felony appeals.⁶⁸ He was paid \$372,685.⁶⁹ The year before, he handled 341 felony cases, 4 capital cases and 11 appeals, and

Tolerate Sloppy Lawyers, HOUS. CHRON., April 26, 2009, <http://www.chron.com/opinion/editorials/article/Indefensible-defenders-For-life-and-death-1743465.php>.

65. *Id.*

66. Lise Olsen, *Attorneys Overworked in Capital Cases*, HOUS. CHRON. (May 25, 2009, 5:30 AM), <http://www.chron.com/news/houston-texas/article/Attorneys-overworked-in-Harris-County-death-row-1727249.php>; Lise Olsen, *Tardy Texas Lawyers in Capital Cases Still Paid Thousands*, HOUS. CHRON. (Apr. 19, 2009, 5:30 AM), www.chron.com/news/houston-texas/article/Tardy-Texas-lawyers-in-capital-cases-still-paid-1739659.php [hereinafter Olsen, *Tardy Texas Lawyers*].

67. NAT'L LEGAL AID & DEF. ASS'N, NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, THE DEFENSE, Standard 13.12, <http://www.nlada.org/defender-standards/national-advisory-commission/black-letter>; ABA TEN PRINCIPLES, *supra* note 10, Principle 5, at 2 n. 19.

68. TEX. INDIGENT DEF. COMM'N, INDIGENT DEFENSE DATA FOR TEXAS—STATEWIDE ATTORNEY CASELOAD REPORT, FISCAL YEARS 2015, 2016, 2017, <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx> [<https://perma.cc/LP5Q-4S4E>].

69. *Id.* (all the cases were in Harris County except one in Montgomery County).

was paid \$271,555.⁷⁰ In 2015, he handled 478 felony cases, 4 felony appeals in Harris County, and 2 capital cases in Montgomery County and was paid \$285,747.⁷¹

How could judges appoint a lawyer, with his history of missing the statute of limitations, to more cases than any lawyer can possibly handle? One of his clients, Juan Balderas, was sentenced to death in Houston in March 2014 after his case had been pending eight years.⁷² Balderas' wife said, "Godinich and his second chair attorney didn't even meet with [Balderas] until just before the trial and conducted almost no investigation."⁷³

Missing critical deadlines is not limited to Texas. Throughout the country, lawyers assigned to represent condemned inmates have missed the statute of limitations for filing federal habeas corpus petitions, thereby depriving their clients of any review of their cases by federal courts.⁷⁴ The clients are executed, but the lawyers are not sanctioned in any way. Many of the lawyers who have missed the statute of limitations have been assigned to other cases and, like Godinich, missed the statute of limitations in them as well. This is a deadly game of roulette, not a system of justice. Independent programs at both the district and national level are urgently needed to insure competent representation.

F. Gibberish and other Deficient Pleadings

No matter how egregiously lawyers fail their clients, Texas judges keep appointing them to represent those whose lives are at stake. Attorney Toby Wilkinson of Greenville filed appellate briefs that contained gibberish, repetitions, rambling arguments, and completely irrelevant sections of briefs from other cases. In the

70. *Id.* (all the cases were in Harris County except one in Montgomery County).

71. *Id.*

72. There are questions about the guilt of Balderas. See Casey Tolan, *Lining Up a Conviction*, TEX. OBSERVER (Feb. 16, 2017), <https://www.texasobserver.org/lining-up-a-conviction/> [<https://perma.cc/6F5Y-G4F3>].

73. Casey Tolan, *She Watched Her Husband Get Sentenced to Death. Now She's Becoming a Lawyer to Save Him and Others*, SPLINTER (Oct. 24, 2016), <https://splinternews.com/she-watched-her-husband-get-sentenced-to-death-now-she-1793863088> [<https://perma.cc/DW9B-C3ZV>].

74. Ken Armstrong, *When Lawyers Stumble, Only their Clients Fall*, WASH. POST (Nov. 16, 2014), http://www.washingtonpost.com/sf/national/2014/11/16/when-lawyers-stumble-only-their-clients-fall/?utm_term=.b2a8b236b278 (reporting that lawyers missed the statute of limitation in at least 80 cases); Armstrong, *supra* note 56.

case of Justin Chaz Fuller, Wilkinson copied wording from an appeal he had filed for a different condemned inmate, Henry Earl Dunn.⁷⁵ As a result, the brief complained about testing for blood on a gun used by Dunn's co-defendant that had no relevance to Fuller's case.⁷⁶ Wilkinson later copied five claims from Fuller's brief in a brief he filed for Daniel Clate Acker. The brief for Acker also included 24 pages of letters from his client that contained "unintelligible arguments, flawed grammar and even his complaint that he was about to run out of paper."⁷⁷ Both Dunn and Fuller were executed.⁷⁸ Wilkinson was paid \$36,514 for his work in the Fuller and Acker appeals.⁷⁹

Apparently neither the Bar nor the judiciary noticed, but the *San Antonio Express-News* did and said in an editorial:

If the legal services Toby C. Wilkinson of Greenville performed on behalf of recently executed death row inmate Justin Chaz Fuller are representative of the work he does, he should be removed from the list of attorneys the Texas Court of Criminal Appeals uses to assign appellate cases.

...

His less-than-stellar appellate work at taxpayer expense warrants review by the State Bar of Texas.

...

The type of work Wilkinson submitted in Fuller's case would have brought serious repercussions to a 1st-year law student. In this case, however, there have been no formal complaints—only an \$18,000 bill to the taxpayers for services rendered.

...

It's unconscionable that the courts would allow the work Wilkinson submitted to go unchallenged, especially in cases where defendants' lives are at stake.⁸⁰

75. Maro Robbins, *Convict's Odds Today May Rest on Gibberish*, SAN ANTONIO EXPRESS-NEWS, Aug. 24, 2006, at A1 (describing incomprehensible pleading filed on behalf of Texas inmate shortly before his execution).

76. *Id.*

77. *Id.*

78. *Executed Offenders*, *supra* note 60. (Henry Earl Dunn was executed on February 6, 2003; Justin Chaz Fuller was executed on August 24, 2006).

79. Robbins, *supra* note 75.

80. Editorial, *Shoddy Legal Work Matter of Life, Death*, SAN ANTONIO EXPRESS-NEWS, Sept. 7, 2006, at B6.

Nevertheless, Wilkinson represented Micah Brown at a capital trial in 2013. Brown was sentenced to death.⁸¹

Attorney Leslie Ribnik filed petitions in two unrelated capital appeals that were, for the first twenty pages, “word-for-word identical, right down to a capitalization error on page 17.”⁸² Ribnik did not mention either of his clients, Angel Resendiz and Robert Gene Will, by name and missed the filing deadline for federal habeas corpus review in Resendiz’s case.⁸³

The petition filed by a lawyer that the Court of Criminal Appeals appointed to represent Johnny Joe Martinez was described by one member of the court, 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 application, and no cases are cited for the remaining two claims for relief. Those claims comprise only 17 lines with three inches of margin.⁸⁴

A lawyer assigned to represent Andrew Cantu admitted he had not visited Cantu, claiming that he did not know where Cantu was. As might be expected, Cantu was on death row. The lawyer also admitted that he had made no efforts to contact an investigator or an expert and was not familiar with the Antiterrorism and Effective Death Penalty Act (AEDPA),⁸⁵ which established a one-year statute of limitations for filing a federal habeas corpus petition. Cantu was executed on February 16, 1999, without any state or federal review of the issues in his case.⁸⁶

One would expect that any court concerned about properly doing its job of reviewing capital cases would discharge the lawyers in these cases, refer them to the Bar, and appoint a

81. Marc Bookman, *10 Ways to Blow a Death Penalty Case*, MOTHER JONES (Apr. 22, 2014), <http://www.motherjones.com/politics/2014/04/10-death-penalty-cases-bad-lawyering/#> [https://perma.cc/6C8K-C2UL] (“5. Cut and Paste Your Appeals”).

82. Chuck Lindell, *Lawyer Makes 1 Case for 2 Killers*, AUSTIN AM.-STATESMAN, Feb. 26, 2006, at A1.

83. *Id.*

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

85. Pub. L. 104-132, 110 Stat. 1214, 1220 (codified as amended at 28 U.S.C. § 2255 (2012)) (“A 1-year period of limitation shall apply to a motion under this section.”)

86. *See Cantu-Tzin v. Johnson*, 162 F.3d 295, 296–97 (5th Cir.) (holding that because habeas petition was time-barred, the district court was not required to appoint counsel pursuant to 21 U.S.C. § 848(q)(4)(B)).

competent lawyer capable of filing a brief that addresses the issues in the case.⁸⁷ But that would not be the case for the Texas Court of Criminal Appeals, which decides cases no matter how uninformed it is by the appellate advocacy.

In one exception the Court of Criminal Appeals removed a lawyer who filed *nothing at all* in four habeas corpus cases, making it impossible for the Court to consider anything. It removed Suzanne Kramer of San Antonio in October 2008 from three state habeas corpus actions after she failed to file *anything* on time and fined her \$750.⁸⁸ The Court allowed her to continue representing a fourth client, Juan Castillo, but Kramer had not filed anything with the clerk by the following April. The Court removed her from the case, fined her an additional \$250, required that she forfeit any attorney fees due her in the case, and appointed new counsel.⁸⁹ The Court also forwarded a copy of its order to the Chief Disciplinary Counsel of the State Bar of Texas.⁹⁰ Kramer failed to make any payments and the Court held her in contempt and had her taken into custody.⁹¹ After Kramer paid the fines, she was released on personal bond.⁹²

G. Clients Abandoned and Worse

Nor do the federal courts insure that people are competently represented with regard to issues of life and death. The attorney for Louis Castro Perez did not file a notice of appeal after his petition for a writ of habeas corpus was denied by a United States

87. See *Hunter v. State*, 8 So. 3d 1052, 1076 (Fla. 2008) (Anstead, J., dissenting), and *Smith v. State*, 998 So. 2d 516, 530 (Fla. 2008) (Anstead, J., dissenting). Justice Anstead recognized that “[c]apital cases represent the most serious category of cases reviewed by this Court and such cases require diligent and competent advocacy by counsel.” *Smith*, 998 So.2d at 530. He was “struck by the similarity in approach and the facially flawed advocacy contained in the briefs in both cases” and found “the written and oral presentations of counsel for the appellant fundamentally lacking.” *Id.* He would “strike the appellate briefs, discharge counsel, and direct the trial court to appoint new appellate counsel for the appellant.” *Id.*

88. Olsen, *Tardy Texas Lawyers*, *supra* note 66; see also *In re Kramer*, Nos. WR-70,510-01, 511-01, 512-01, 513-01, 2010 WL 360318 (Tex. Crim. App., Jan. 20, 2010), and *In re Kramer*, Nos. WR-70,510-01, 511-01, 512-01, 513-01, 2009 WL 4696063 (Tex. Crim. App., Dec. 7, 2009).

89. *Ex parte Castillo*, No. WR-70,510-01, at 3–4 (Tex. Crim. App. Apr. 22, 2009), available at <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=7c71bd6d-abb6-4c09-a3e9-4e0a54d9ecd0&coa=coscca&DT=OTHER&MediaID=77785f06-f5bf-4283-a43c-3d0d74fefe5f> [https://perma.cc/V29D-2ZUT].

90. *Id.* at 4.

91. *In re Kramer*, 2010 WL 360318 at *1.

92. *Id.*

District Court.⁹³ The lawyer did not tell Perez or other counsel on the case that she was not filing a notice of appeal. The District Court concluded that the lawyer had abandoned Perez and entered a new order so that new counsel could file a notice of appeal within the time limit.⁹⁴ The Court of Appeals for the Fifth Circuit reversed, holding that the attorney had missed the deadline and that the District Court erred by entering a new order.⁹⁵ Judge Dennis dissented, pointing out that the lawyer's failure to file a notice of appeal was "an egregious breach of the duties an attorney owes her client" and that Perez had made a strong showing that he may have been sentenced to death in violation of the Constitution.⁹⁶ There are also questions about whether Perez is even guilty of the crimes for which he was sentenced to death due to issues involving the reliability of the DNA evidence used to convict him.⁹⁷

A month before he was scheduled to be executed, Raphael Holiday received a letter from his lawyers, James "Wes" Volberding and Seth Kretzer. The letter advised Holiday that the Supreme Court had denied his final appeal and they would not file additional appeals or seek clemency from the governor because there was no chance of success with regard to either.⁹⁸ Volberding

93. Perez v. Stephens, 745 F.3d 174, 176 (5th Cir. 2014).

94. See *id.* at 176–77.

95. *Id.* at 177, 179–81.

96. *Id.* at 182, 187, 191–92 (Dennis, J., dissenting).

97. See Chase Hoffberger, *Reasonable Doubt*, AUSTIN CHRON. (April 29, 2016), <https://www.austinchronicle.com/news/2016-04-29/reasonable-doubt/> (reporting on questions regarding the DNA evidence and that Texas Forensic Science Commission presiding officer Vincent Di Maio had sent a letter to state and local law enforcement agencies on Aug. 21, 2015, disclosing "concerns [involving] the interpretation of DNA results where multiple contributors may be present" and an announcement by the FBI that it had found "minor discrepancies" in its population database); Spencer S. Hsu, *FBI Notifies Crime Labs of Errors Used in DNA Match Calculations Since 1999*, WASH. POST (May 29, 2015), https://www.washingtonpost.com/local/crime/fbi-notifies-crime-labs-of-errors-used-in-dna-match-calculations-since-1999/2015/05/29/f04234fc-0591-11e5-8bda-c7b4e9a8f7ac_story.html?utm_term=.c97087ede124 (reporting that "[t]he FBI has notified crime labs across the country that it has discovered errors in data used by forensic scientists in thousands of cases to calculate the chances that DNA found at a crime scene matches a particular person").

98. See Brandi Grissom, *Condemned Man's Lawyers Stop Helping, Cite 'False Hope'*, DALL. DAILY NEWS (Nov. 16, 2015), www.dallasnews.com/news/texas/2015/11/16/condemned-mans-lawyers-stop-helping-cite-false-hope (reporting that James "Wes" Volberding wrote, "I am sorry, but the Supreme Court just denied your appeal . . . This marks the end of work for your appeals I regret."); see also Gretchen Sween, *Raphael Holiday Was Put to Death, and His Lawyers Should Have Tried Harder to Stop It*, MARSHALL PROJECT (Dec. 17, 2015), www.themarshallproject.org/2015/12/17/raphael-holiday-was-put-to-death-and-his-lawyers-should-have-tried-harder.

explained that filing a petition for clemency would give Holiday “false hope.”⁹⁹ The lawyers did not even meet with Holiday in person to deliver the devastating news that he had lost all of his appeals and that they were abandoning him. Instead, they sent a letter that was a page and a half long.¹⁰⁰

Holiday wrote the federal district court begging it to appoint new counsel to seek clemency. Volberding and Kretzer *opposed* this request from their own client—or better put, former client.¹⁰¹ The court denied the request.¹⁰² They also opposed the efforts of Austin attorney Gretchen Sween, who volunteered to help Holiday obtain counsel.¹⁰³ Holiday’s original lawyers even threatened to seek sanctions against her if she persisted.¹⁰⁴ She persisted nonetheless—all the way to the Supreme Court—but to no avail.¹⁰⁵ “[I]n an effort to mollify Sween, Volberding and Kretzer filed a clemency petition—hastily.”¹⁰⁶

On the first page of the clemency application they threw together, they twice misreported Holiday’s execution date as February 18, 2015, a date that had long passed. Most of the application is a description of the gruesome details of the crime, lifted virtually verbatim from a 2006 court decision.¹⁰⁷

The petition contained “little evidence that might persuade the governor to show Holiday mercy.”¹⁰⁸ Justice Sotomayor observed that the petition “likely would have benefited from additional preparation by more zealous advocates.”¹⁰⁹ Holiday was

to-stop-it#.NPDNI0bxx [https://perma.cc/25ZU-4SJT] (describing the efforts of a pro bono advocate to obtain counsel for Holiday after his lawyers ended representation before making every legal appeal).

99. Grissom, *supra* note 98.

100. *Id.*

101. *Id.*

102. *Holiday v. Stephens*, 136 S. Ct. 387, 387 (2015) (Statement of Sotomayor, J.) (regarding the denial of certiorari).

103. Grissom, *supra* note 98.

104. *Id.* (The lawyers told Sween that unless she knew of an approach that had a reasonable chance of success “we respectfully ask that you take no further action in this case. We will respond firmly if you do.”)

105. *See Holiday*, 136 S. Ct. at 387 (Statement of Sotomayor, J.) (expressing the view that the district court’s failure to provide counsel was an abuse of discretion); Grissom, *supra* note 98.

106. Grissom, *supra* note 98.

107. Sween, *supra* note 98.

108. Grissom, *supra* note 98; Sween, *supra* note 98 (detailing facts that could have been included in the clemency petition).

109. *Holiday v. Stephens*, 136 S. Ct. 387, 388 (2015).

executed.¹¹⁰ Volberding and Kretzer also ignored a conflict of interest they had and took a position in opposition to another client, Robert L. Robertson III, when Robertson tried to obtain conflict-free counsel and other counsel came forward to represent Robertson.¹¹¹ The Supreme Court denied review of petitions from two sets of lawyers,¹¹² but new counsel obtained a stay of execution arguing that Robertson's conviction was based on junk science.¹¹³

H. Sanctions Reserved for Competent Counsel

The case of Frank Martinez Garcia provides a tragic example of the kind of poor criminal defense representation taking place in Texas. Garcia's trial lawyers, Michael Gross and Joseph Esparza, retained a psychologist but instructed the psychologist not to perform any testing for IQ.¹¹⁴ Nevertheless, the lawyers represented to the courts that there had been testing and Garcia was "average."

Another lawyer, appointed to represent Garcia in state habeas corpus proceedings, did no investigation outside the record except for one conversation with Garcia and one with trial counsel.¹¹⁵ That lawyer sought and obtained authorization for \$5,000 for experts from the trial court.¹¹⁶ However, he did not retain an expert but kept the money for himself.¹¹⁷ At the state post-conviction hearing, lead trial counsel Michael C. Gross testified that a psychologist had examined Garcia and reported to counsel that his IQ "was within the normal range."¹¹⁸ This was simply not true. The Texas courts denied the petition.¹¹⁹

110. *Executed Offenders*, *supra* note 42 (Raphael Holiday was executed on November 18, 2015).

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

112. *Id.*; *Robertson v. Stephens*, 136 S. Ct. 607 (2015) (mem. op.) (denying petition for certiorari).

113. Johnathan Silver, *Appeals Court Halts Texas Man's Execution in Shaken Baby Syndrome Case*, TEX. TRIB. (June 17, 2016, 8:00 AM), www.texastribune.org/2016/06/17/appeals-court-halts-east-texas-mans-execution/.

114. Statement Concerning Untimely Filing, *Ex parte* Garcia, No. WR 66,977, at 2–3 (Tex. Crim. App. Dec. 20, 2011) (on file with author).

115. *Id.* at 5.

116. *Id.* at 2.

117. *Id.*

118. *Id.* at 7–8, 13.

119. *Ex parte* Garcia, No. WR-66,977-01, 2007 WL 1783194, at *1 (Tex. Crim. App. June 20, 2007).

A new lawyer took over representation of Garcia in habeas corpus proceedings in federal court. That lawyer attached to the petition school records showing that as a child Garcia had failed three grades, was diagnosed with a learning disability, and was placed in special education.¹²⁰ He also attached an affidavit from the psychologist retained by trial counsel saying that in accordance with instructions from counsel he had not performed IQ or neurological tests.¹²¹ The lawyer also obtained authorization for psychological testing of Garcia.¹²² The testing revealed that Garcia had a full-scale IQ of 55.¹²³ This evidence showed that Garcia was not “normal” but had an IQ indicative of intellectually disability and that his execution could well be barred by the Eighth Amendment.¹²⁴

But the federal district court limited its consideration to the record before the state court.¹²⁵ It credited the finding that trial counsel had Garcia tested and found him to be “normal.”¹²⁶ Even though the court had the affidavit from the psychologist stating that no testing ever happened, the court did not mention it. Instead, the court stated six times in its opinion that the psychologist tested Garcia’s IQ and found it to be in the normal range.¹²⁷ Again, this was simply not true. After appealing to the Fifth Circuit and the Supreme Court without success,¹²⁸ the lawyer who had been representing Garcia in federal court, advised Garcia that, under his appointment by the court, he would no longer represent Garcia, leaving him without counsel.¹²⁹

The truth was important in Garcia’s case, but the case was decided in both the state and federal courts on significant misrepresentations of IQ testing had found him “normal.” The truth was briefly put before the courts, but the machinery of death

120. Statement Concerning Untimely Filing, *supra* note 114, at 8–9.

121. *Id.*

122. *Id.*

123. *Id.* at 10.

124. *See* Hall v. Florida, 134 S. Ct. 1986, 2000 (2014) (“an individual with an IQ test score ‘between 70 and 75 or lower,’ may show intellectual disability” (citation omitted) (quoting Atkins v. Virginia, 536 U.S. 304, 309 n.5 (2002)).

125. Statement Concerning Untimely Filing, *supra* note 114, at 13.

126. Statement Concerning Untimely Filing, *supra* note 114, at 12, 17 (citing order in Garcia v. Thaler, No. SA-08-CA-62-XR, 2009 WL 4931069, at *7 (W.D. Tex. Dec. 14, 2009)).

127. Statement Concerning Untimely Filing, *supra* note 114, at 12, 17 (citing order in Garcia, 2009 WL 4931069, at *5–7, *9).

128. Garcia v. Thaler, 389 Fed. Appx. 396 (5th Cir. 2010), cert denied, 131 S. Ct. 1604 (2011).

129. Statement Concerning Untimely Filing, *supra* note 114, at 14, 15.

did not pause to consider it. The Texas Court of Criminal Appeals was more interested in enforcing a procedural rule and sanctioning lawyers than reexamining the facts.

Two outstanding lawyers who have long represented people facing the death penalty, Richard H. Burr and Jim Marcus, became aware of Garcia's IQ score of 55 and the history of his case.¹³⁰ They undertook the representation of Garcia in order to get these critical facts before the courts. They needed to get a new psychological evaluation, investigate Garcia's life, and prepare pleadings. But there was very little time before any further pleadings were barred by the Texas Court of Criminal Appeals Miscellaneous Rule 11-003, which provides that "a pleading shall be deemed untimely if it is filed in the proper court fewer than seven days before the scheduled execution date."¹³¹ In a statement filed with the Court after Garcia's execution, Burr and Marcus stated that "every step we took further confirmed the existence of at least two meritorious claims for relief."¹³² But it was impossible to file seven days before the execution date. They filed on October 26, 2011.¹³³ The Court of Criminal Appeals denied the petition over a dissent by Judge Price, joined by two other members of the Court, who observed that there was "substantial evidence" that the state habeas counsel "failed to conduct any meaningful investigation" and that there was "more than a colorable claim" that Garcia was intellectually disabled.¹³⁴ Garcia was put to death the next day.¹³⁵

It is instructive to consider which set of lawyers were disciplined: (a) the trial counsel who falsely testified he had obtained a psychological evaluation showing that Garcia was "normal;" (b) the lawyer who handled the state post-conviction

130. *Id.* at 3.

131. *Procedures in Death Penalty Cases Involving Requests for Stay of Execution in Texas State Trial Courts and the Court of Criminal Appeal*, Misc. Docket No. 11-02 (Tex. Crim. App. June 30, 2011) reprinted in 74 TEX. B. J. 762, 762 (2011), <http://www.txcourts.gov/media/208124/miscruleexecution.pdf> [<https://perma.cc/NA7S-BP8J>]. See Statement Concerning Untimely Filing, *supra* note 114, at 23.

132. *Id.* at 23.

133. *Id.* at 24.

134. *Ex Parte Garcia*, No. WR-66,977-02, 2011 WL 5189081, at *2 (Tex. Crim. App. Oct. 27, 2011) (Price, J., dissenting).

135. *Executed Offenders*, *supra* note 60 (Frank Garcia was executed on October 27, 2011). See Miriam Rosen, *Delayed Requests for Execution Stays + CCA = Contempt Citations*, TEX. LAWYER (Apr. 13, 2015), <https://www.law.com/texaslawyer/almID/1202723116544/?slreturn=20180003000853> [<https://perma.cc/P4BR-3QVN>].

proceedings and failed to investigate and learn that his client had never been tested and that there were strong indicators of intellectual disability in his background and also failed to obtain a psychological evaluation that would have revealed that Garcia had an IQ of 55; or (c) the lawyers who, upon learning that a death sentence might well be barred because of Garcia's intellectual disability, worked furiously to inform the Court that its previous decisions were based on misrepresentations and that the execution of Garcia could violate the Eighth Amendment. One might expect the answer to be (a) or (b)—the lawyers who failed Garcia. But the answer is (c)—the lawyers who put the truth before the courts for the first time. The Solicitor General of Texas moved to have Burr and Marcus sanctioned, and the Court held them in contempt and fined them.¹³⁶

The Court was even more severe in sanctioning David Dow, another outstanding lawyer—a professor at the University of Houston Law Center and founder of the Texas Innocence Network.¹³⁷ Dow has represented over 100 people sentenced to death in twenty years.¹³⁸ When he was arguably thirty minutes late in filing seven days before the execution of his client, Miguel Paredes, in 2015, the Court of Criminal Appeals suspended him from practicing before the Court *for a year*.¹³⁹ Judge Alcala, dissenting from the denial of rehearing, concluded that “under a plain reading of the seven-day rule and applying the Rule of Lenity, Dow’s pleadings were arguably timely filed” and that the “one-year ban is unreasonable and excessive.”¹⁴⁰ She also pointed out that even if Dow was late, his “pleadings were thirty minutes late under the plain language of this rule.”¹⁴¹ Nevertheless, the

136. *See id.*

137. U. HOUS. L. CTR., *The University of Houston Law Center Faculty: David Dow*, <http://www.law.uh.edu/faculty/main.asp?PID=12> [<https://perma.cc/5WQU-Y92H>] (last visited Dec. 17, 2017). The page includes links to Dow’s curriculum vitae and publications. In addition to handling many cases, he has written books and articles on the death penalty.

138. *Id.*

139. Allan Turner, *UH Law Professor, Noted Death Penalty Lawyer, Sanctioned by Texas Court of Criminal Appeals*, HOUS. CHRON. (Jan. 20, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/UH-law-professor-noted-death-penalty-lawyer-6028143.php>; Dahlia Lithwick, *Revenge, Not Justice*, SLATE (Mar. 12, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/david_dow_suspended_by_texas_court_death_penalty_defense_lawyer_s_conflicts.html [<https://perma.cc/XS7Y-GTNS>].

140. *In re Dow*, 460 S.W.3d 151, 152 (Tex. Crim. App. 2015) (Alcala, J., dissenting from denial of rehearing).

141. *Id.* at 153.

court proceeded with the one-year sanction and noted that Dow failed to meet filing deadlines in 2010 when the court required filing 48 hours before an execution.¹⁴²

The unique rule of the Texas Court of Criminal Appeals requiring that pleadings be filed a certain number of days before an execution is apparently the result of the infamous “We Close at 5” episode in which Professor Dow and other attorneys sought to file a petition based on the Supreme Court’s grant of certiorari *that day* to consider arguments regarding lethal injection.¹⁴³ They sought to present the lethal injection claim on behalf of their client so that the Supreme Court could hold the case until it resolved the issue, but, when they had some difficulties and asked for twenty minutes past the usual closing time to file their pleadings, presiding Judge Sharon Keller told the court’s counsel, “[w]e close at 5.”¹⁴⁴ Unable to get to court by 5, their client was executed.¹⁴⁵ Every other execution was stayed for the next six and a half months, pending the Supreme Court’s decision regarding lethal injection.¹⁴⁶

I. *What About the Judges?*

Let’s take stock of how the Texas courts deal with capital cases. Several lawyers miss a one-year statute of limitations for obtaining federal habeas corpus review, and no action is taken by the Texas Bar, the Court of Criminal Appeals or the federal courts. But a lawyer who barely misses—by thirty minutes—getting pleadings to the Texas Court of Criminal Appeals a full seven days before an execution is severely sanctioned with a one-year suspension. The Court of Criminal Appeals apparently has no problem with lawyers sleeping during capital trials but has no interest in the fact that it decided a case on completely inaccurate information even when it is pointed out by a dissenting colleague.

142. *In re Dow*, No. WR-57,060-03, 2010 WL 2332420, at *1 (Tex. Crim. App. June 9, 2010) (taking no action against Dow but warning that if he again violated the rule without good cause “a sanction could result in a suspension from practicing before this Court”).

143. See Michael Hall, *The Judgment of Sharon Keller*, TEX. MONTHLY, Aug. 2009, at 106, 147–49.

144. Allan Turner, *UH Law Professor, Noted Death Penalty Lawyer, Sanctioned by Texas Court of Criminal Appeals*, HOUS. CHRON. (Jan. 20, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/UH-law-professor-noted-death-penalty-lawyer-6028143.php>. A district court judge, appointed as a special master, said Keller’s action was “not exemplary of a public servant,” but did not require discipline beyond “the public humiliation she has suffered.” *Id.* See also Hall, *supra* note 143.

145. *Executed Offenders*, *supra* note 60 (Michael Richards was executed on September 25, 2007).

146. Hall, *supra* note 143, at 147–49.

The courts discipline the most capable and competent lawyers and give more cases to the lawyers who cannot stay awake or file their pleading on time or abandon their clients.

What does that say about the judges? What does that say about their commitment to justice? What does it say about where they put their thumbs on the scales of justice? How can they be so indifferent to such gross malpractice in the way in which people are selected to be killed by the state?

What does a lawyer do upon learning, as in *Garcia*, that someone who is about to be executed may not even be eligible for execution because that person appears to be intellectually disabled? Does the lawyer decide that because there is a seven-day rule, not to present the information to any court and be complicit in an unconstitutional execution? How could any lawyer live with himself or herself if he or she did that?

There are states where this does not happen. Some states have state-wide public defender programs, like the one that has been representing clients for 50 years in New Jersey,¹⁴⁷ providing experienced lawyers who are trained and supervised in all types of cases. Capital units of state public defender offices, like the ones in Colorado, Georgia and Virginia, make sure that capital cases are defended by lawyers who specialize in death penalty cases. Capital Habeas Units (CHUs) in federal public defender offices provide lawyers who know much more about federal habeas corpus than just the statute of limitations. “[S]eventeen federal defender organizations across the country, operating in twelve states, have CHUs focused exclusively on capital habeas litigation . . . and staffed by knowledgeable people trained in the complexities of such litigation.”¹⁴⁸

Independent public defender programs in Florida and Missouri took actions on behalf of their clients to limit their caseloads so that they could meet their legal and ethical obligations to their clients.¹⁴⁹ But lawyers in programs that are not independent cannot litigate these issues because it will cost them their jobs. As a result, if any actions are filed on behalf of their clients, they must be filed by independent organizations.¹⁵⁰

147. N.J. OFFICE OF THE PUB. DEF., <http://www.state.nj.us/defender/> (last visited Feb. 23, 2018) [<https://perma.cc/G4VS-BVT5>].

148. *Lugo v. Secretary*, 750 F.3d 1198, 1215 (11th Cir. 2014).

149. *See Pub. Def., Eleventh Cir. v. State*, 115 So. 3d 261, 264–65 (Fla. 2013); *State ex rel. Mo. Pub. Def. Comm’n v. Waters*, 370 S.W.3d 592, 597 (Mo. 2012).

150. *See, e.g., Hurrell-Harrington v. State*, 930 N.E.2d 217, 218 (N.Y. 2010) (lawsuit

When judges manage the defense, clients may receive less than the zealous representation guaranteed to them; some defense counsel will not do anything that might not meet the approval of a judge for fear of not receiving future appointments or incurring some adverse consequence to the lawyer's office or program. Quite often those fears have a basis in fact,¹⁵¹ but even when they do not, the lawyer is still influenced by the perception that it matters. Representation of the accused should not include calculations of whether certain advocacy will have such an adverse impact. When judges run the defense, clients are less likely to trust the lawyers assigned to them. The public is less likely to see the courts as credible and legitimate. It is no secret that court-appointed lawyers are not held in high regard.¹⁵² Serious questions are raised when judges repeatedly appoint incompetent lawyers to defend the accused, arbitrarily reduce the compensation for appointed counsel, and micro-manage the defense of cases despite lacking the time, knowledge of the cases and expertise to do so. In these and other instances, judges appear not to be holding "the balance nice, clear and true between the [prosecution] and the accused,"¹⁵³ but to be influencing the outcome of cases by making it difficult, if not impossible, for the accused to contest the charges and present a defense. This is particularly so in the highly politicized, ideological court systems of today, where some judges are outspoken with regard to controversial issues of criminal justice.

The Chief Judge for the Fifth Circuit also suggested in her memorandum that the federal circuit courts of appeal should have the power to exclude from their circuits federal public defenders from other circuits.¹⁵⁴ This would give federal judges another

brought by the American Civil Liberties Union to obtain counsel at arraignment and subsequent proceedings); *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 143 (Tex. 2012) (holding in suit filed by the Texas Fair Defense Project brought lawsuit and pro bono counsel that people accused of crimes could maintain a class action suit seeking counsel in misdemeanor cases in Williamson County, Texas).

151. INDEPENDENCE IMPERATIVE, *supra* note 7, at 37 (describing a lawyer who stopped getting assigned to represent defendants and was told that "the reason she was not receiving appointments was because she advocated too strongly").

152. See, e.g., *Public Defenders: Last Week Tonight with John Oliver* (HBO Broadcast), YOUTUBE (Sept. 13, 2015), <https://www.youtube.com/watch?v=USkEzLuzmZ4> (satirically describing public defenders); *Adam Ruins Everything: Why the Public Defender System is So Screwed Up* (TruTV), YOUTUBE (Dec. 7, 2016), <https://www.youtube.com/watch?v=koTV3EGwWDI> (showing the ridiculousness of the public defender system in which public defenders earn little yet have great responsibility).

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

154. Jones Memorandum, *supra* note 20, at 7. The federal government sends its prosecutors all over the country to represent the United States in capital cases, but Judge

major administrative task of assessing the representation needs in individual cases and the capacities of federal defender programs or capital habeas units within them. Preventing representation of a defendant by a federal public defender from another circuit would certainly have the appearance of depriving one facing the death penalty of adequate legal representation. Often it would accomplish just that. This is particularly so in states like Texas where, as described, post-conviction representation in the state and federal courts has been a disgrace to the state, the legal profession, and the judiciary for decades with lawyers missing statutes of limitations, filing incomprehensible pleadings, and abandoning their clients. “Deciding issues of life and death on such procedural intricacies threatens to undermine trust and confidence in the accuracy of the criminal justice system.”¹⁵⁵

III. ENCOURAGING DEVELOPMENTS IN TEXAS

While individuals have been dispatched to the execution chamber because of failings in representation, there have been encouraging developments with regard to competence and independence of representation today and in the future. Most recently, capital habeas corpus units (CHUs) have been established in the office of Federal Public Defender for the Western District of Texas in Austin and the office of the Federal Defender for Northern District in Dallas.¹⁵⁶ The units—staffed with attorneys, social workers, investigators and others who specialize in the representation of clients in capital habeas corpus cases in the federal courts—are long overdue. The CHUs are funded by the federal government; the one in Philadelphia has an annual budget of more than \$16 million.¹⁵⁷ They have existed throughout the country since 1995.¹⁵⁸ This funding and expertise have been missing from the three states in the Fifth Circuit, which have had no capital habeas units despite the large number of death sentences that come from those states, particularly Texas.

Jones did not mention any concern about that.

155. *In re Commonwealth’s Motion to Appoint Counsel*, 790 F.3d 457, 481 (3d Cir. 2015) (McKee, C.J., concurring).

156. 2017 CJA REPORT, *supra* note 8, at 194 (noting authorization for the two CHUs).

157. Dylan Segelbaum, *Why Do 4 York County Death Row Inmates Have Federal Lawyers?*, YORK DAILY REC., <https://www.ydr.com/story/news/local/2016/07/07/how-the-federal-community-defender-office-capital-habeas-unit-came-to-represent-death-row-inmates-in-york-county/86556598/> [https://perma.cc/U87X-DV3C] (last updated July 8, 2016, 4:37 PM).

158. *See Lugo v. Secretary*, 750 F.3d 1198, 1215 (11th Cir. 2014).

The need has been as obvious in Texas as it was in Florida where a capital habeas unit was established in a federal public defender office¹⁵⁹ only after it came to light that lawyers had missed the statute of limitations in at least 34 capital habeas corpus cases.¹⁶⁰ An office that specializes in capital defense is not only more likely to provide competent representation by specialists, but it is also the most cost effective way to provide representation since the specialization is devoted to many cases.¹⁶¹

As a result of the scandals generated by ill-prepared lawyers handing post-conviction capital cases, the Texas Legislature created the Office of Capital Writs in 2009 to employ full-time lawyers who specialized in capital habeas corpus cases.¹⁶² The office was given an initial budget of \$1 million to handle a dozen or more new death cases each year.¹⁶³ The office reports on its website that it represents “a substantial majority of persons sentenced to death in Texas in initial state habeas corpus applications and related proceedings, and is committed to client-centered and excellent post-conviction representation.”¹⁶⁴ The Office’s mission expanded to include the representation of a select number of individuals raising challenges to their convictions through forensic science writs on September 1, 2015, and its name changed to the Office of Capital and Forensic Writs.¹⁶⁵

159. The capital habeas unit is in the office of the Federal Defender for the Northern District of Florida. FED. PUB. DEF. N. DIST. FLA, *Home Page*, www.fln.fd.org/offices.html#chu (last visited Feb. 24, 2018).

160. *Lugo*, 750 F.3d at 1215 (attributing failures to file within the statute of limitations in Florida to the absence of a capital habeas unit in the state and observing that “[e]stablishing a CHU in one of that state’s three federal districts would have several benefits,” including providing “direct representation to capital inmates in some federal habeas proceedings,” and “critical assistance and training” to private counsel, and monitoring and tracking capital cases to prevent the statute of limitations “from lapsing before a formal federal habeas petition has been filed”). *See also id.* at 1216–18, 1222–26. (Martin, J., concurring) (listing 34 capital cases in Florida in which lawyers missed the federal statute of limitations).

161. 2017 CJA REPORT, *supra* note 8, at 212 (“CHUs are uniquely qualified to accept and effectively represent death penalty habeas clients while keeping costs lower than those expended on private attorneys providing commensurate representation”).

162. Act of June 19, 2009, 81st Leg., R.S., ch. 78, 2009 Tex. Gen. Laws. 1972, 1972–74 (codified at TEX. GOV’T CODE ANN. § 78).

163. *See* Brandi Grissom & Brad Levenson: *The TT Interview*, TEX. TRIB. (July 6, 2010), <https://www.texastribune.org/2010/07/06/trying-to-restore-integrity-to-death-row-defense/>.

164. *Id. Home*, OFFICE OF CAPITAL AND FORENSIC WRITS, <http://www.ocw.texas.gov> [<https://perma.cc/2U9H-RULQ>] (last visited Feb. 17, 2018).

165. *See id.*

The Texas Regional Public Defender for Capital Cases was created in Lubbock in 2007 to provide representation at trials for indigent persons facing the death penalty. Its mission is to provide high quality, cost-effective legal services in an ethical, professional, and competent manner, enhance the quality of life in the communities it serves, and treat all people with dignity, respect, honesty and fairness.¹⁶⁶ The program has expanded to over 160 participating counties. It issued a report describing its work in 2014.¹⁶⁷

A public defender office which represents those accused of crimes in all types of cases except capital was established in Houston in 2011.¹⁶⁸ Alexander Bunin, who previously established and managed federal defender offices in Alabama, New York and Vermont, established and manages the office. The office has fifty-three attorneys and is making a difference by giving people, particularly mentally ill people as well as other people, competent representation. The Council of State Governments Justice Center issued a positive evaluation of the office in 2013.¹⁶⁹

And the Texas Defender Service, a private, nonprofit, public interest program, continues to represent people facing the death penalty, consult with lawyers throughout the state, and issue important reports as it has since it was established in 1995.¹⁷⁰ And there are also a number of exceptionally competent private counsel who have provided exemplary representation for people facing the death penalty at various stages of the process, as well as many other clients accused of crimes.

IV. CONCLUSION

It is apparent that some judges regard the right to counsel as a nuisance, an unfunded mandate from the Supreme Court that only complicates and delays the efficient processing of people through the courts. The editorial boards of the *Houston Chronicle*

166. See *Home*, TEX. REG'L PUB. DEF. FOR CAPITAL CASES, <http://rpdo.org/> [<https://perma.cc/DY23-U78R>].

167. TEX. REG'L PUB. DEF. FOR CAPITAL CASES, FISCAL YEAR 2014 SUMMARY, rpdo.org/media/1037/fy14rpdosummary.pdf [<https://perma.cc/M9FT-ANCC>].

168. See HARRIS CTY. PUB. DEF. OFFICE, <http://harriscountypublicdefender.org/> [<https://perma.cc/6ZVD-HJQE>] (last visited Dec. 20, 2017).

169. Dr. Tony Fabelo, Carl Reynolds, & Jessica Tyler, *Improving Indigent Defense: Evaluation of the Harris County Public Defender*. COUNCIL OF ST. GOV'TS JUST CTR. 25 (Sept. 30, 2013), http://harriscountypublicdefender.org/wpcontent/uploads/2013/10/JC_HCPDFinalReport.pdf [<https://perma.cc/L3J5-R8XS>].

170. See *Home*, TEX. DEFENDER SERV., <http://texasdefender.org/> [<https://perma.cc/T5QT-7KFK>] (last visited Feb. 24, 2018).

and *San Antonio Express-News* asked questions not raised by the Bar or judiciary: why do judges continue to appoint incompetent lawyers to cases and why don't they refer incompetent lawyers to the Bar to prevent future malpractice?

Every member of the Bar should be asking those questions and doing what he or she can to support and develop programs that provide competent counsel at all stages of all criminal cases from misdemeanors to death penalty cases. Lawyers have a monopoly on legal services. With that monopoly comes a responsibility to ensure that the entire legal system works for everyone. The progress that is being made is encouraging. But a lot more progress must be made. The organizations that are providing representation must be independent, adequately funded, and staffed by competent lawyers, investigators, social workers, and administrative staff. There must be excellent training and supervision of the entire staff.

Law students are going to become lawyers and will be responsible for the legal system and access to justice for everyone. Regardless of the kind of law practiced, whether corporate law, prosecution, public service, or any other type of practice, lawyers have a legal and moral responsibility to make the system work. Members of the Texas Bar have a responsibility to see that the legal system protects people from lawyers who cannot even file pleadings within the statute of limitations. Lawyers have a moral responsibility to take cases *pro bono* and see that the system works. Some graduates of law schools will take on these issues full time in public defender offices, capital habeas units, the Office of Capital and Forensic Writs, the Texas Defender Service or offices like them. People accused of crimes—whether charged in municipal courts or charged with offenses carrying the death penalty—have an urgent need for high quality legal assistance from competent lawyers. Responding to those needs is a great way to spend one's life in the law and make the right to counsel a reality for many people.