

COMMENTARY

CHANGES IN HARRIS COUNTY'S DEATH PENALTY MACHINE

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Harris County remains the epicenter of death in Texas. It has been a national leader for decades among United States counties that have historically sought execution as a punishment for capital murder.¹ Over time, prosecutors, judges, and defense attorneys based in Texas' largest county have developed an elaborate infrastructure—a kind of death penalty factory—that

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1. See Mike Tolson, *Part 1: A Deadly Distinction—Harris County Is a Pipeline to Death Row*, HOUS. CHRON. (Feb. 4, 2001, 6:30 AM), <http://www.chron.com/news/article/Part-1-A-Deadly-Distinction-Harris-County-is-2002524.php>; see also Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DEATH PENALTY INFO. CTR. 27 (Oct. 2013), <https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf> [<https://perma.cc/6VDR-VPVN>] (indicating Harris County led U.S. counties in its use execution as punishment from 1976–2012).

enables the county's criminal justice system to handle a high volume of capital prosecutions that linger for years pre-trial, as well as appeals that stretch out a decade or more. By tradition, some Harris County prosecutors and defense attorneys assigned to death penalty cases simultaneously manage enormous caseloads, juggling anywhere from 300 to 1,000 felonies a year on top of their death penalty assignments²—well above caseloads recommended by national standards.³ Though some of the busiest defense attorneys have faced allegations of ineffective assistance of counsel, sleeping in court, missing deadlines, and failure to file appeals, state and federal courts have been reluctant to grant relief or take disciplinary action.⁴

For three out of the four decades of the modern death penalty, many life-and-death decisions were made by two former elected District Attorneys: Johnny Holmes and Chuck Rosenthal.⁵ Harris County assistant district attorneys were encouraged to be aggressive in handling death penalty cases. For years, prosecutors were instructed to share only excerpts of the witness statements, recordings, and evidence they had collected prior to trial. Defense attorneys could view, but not photocopy, these files.⁶ Five other District Attorneys who have held the office since 2008 have all made changes.⁷ Additionally, the Michael Morton Act, which took effect in January 2014 after a high-profile exoneration, forced prosecutors to provide all evidence to defense teams.⁸ Still, Harris County District

2. See WILLIAM R. KELLY, *THE FUTURE OF CRIME AND PUNISHMENT* 109 (2016).

3. *Id.*

4. See Tolson, *supra* note 1.

5. *Id.*

6. Lisa Falkenberg, *Defense Attorneys Lack Copy Rights*, HOUSTON CHRON. (Feb. 12, 2008, 6:30 AM), <http://www.chron.com/news/falkenberg/article/Defense-attorneys-lack-copy-rights-1560785.php>; see also Tolson, *supra* note 1 (stating DAs were encouraged to be aggressive); Brian Rogers, *Man Sent to Death Row in Officer's Killing Is Freed*, HOUSTON CHRON. (June 8, 2015, 10:42 PM), <http://www.chron.com/news/houston-texas/article/DA-6314119.php> (indicating DAs have "inadvertently" not shared all available evidence).

7. Paige Hewitt, *Magidson Now, Then and Forward*, ABC EYEWITNESS NEWS (Nov. 6, 2008, 8:19 AM), <http://abc13.com/archive/6491086/>; Pat Hernandez, *History Is Made in Race for Harris County District Attorney*, HOUS. PUB. MEDIA (Nov. 5, 2008, 6:56 AM), <https://www.houstonpublicmedia.org/articles/news/2008/11/05/12625/history-is-made-in-race-for-harris-county-district-attorney/> [<https://perma.cc/V2HA-END5>]; *Harris County District Attorney Mike Anderson Dies Amid Battle with Cancer*, ABC EYEWITNESS NEWS (Aug. 30, 2013, 10:00 PM), <http://abc13.com/archive/9225905/>; Brian Rogers et al., *Anderson Defeated in Harris County DA Race*, HOUS. CHRON. (Nov. 8, 2016, 10:40 PM), <http://www.chron.com/news/politics/houston/article/Anderson-defeated-in-Harris-County-DA-race-10602957.php>.

8. See Brian Rogers, *New Law Forces Prosecutors to Turn over Evidence Against Suspects*, HOUS. CHRON. (May 17, 2013, 9:04 AM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/New-law-forces-prosecutors-to-turn-over-evidence-4522558.php>; Jones McClure, *Michael Morton Act: Texas Discovery Law Raises Concerns*, O'CONNORS

Attorneys have been kept busy in recent years defending older death sentences in appeals that have raised substantive allegations of prosecutorial misconduct—including a 2015 case that led to the release of former death row inmate, Alfred Brown⁹, and a 2016 appeal that led to an unusual week-long post-conviction hearing for British-national death row inmate, Linda Carty, one of the only women on Texas death row.¹⁰

Harris County's death penalty machine has slowed down significantly since 2005 when the option of life without parole became available for capital murder cases in Texas.¹¹ Even so, a recent report, *Too Broken to Fix*, named Harris County as one of only sixteen "outlier counties" where five or more death penalties were handed down between 2010 and 2015.¹² In the last three years, more people have come off death row than have been added—last year alone the United States Supreme Court struck down two Harris County death sentences, which is expected to impact the machine.¹³ These and other recent appeals have raised questions about mistakes rendered by overburdened defense counsels, prosecutorial misconduct, the disparate impact of race, and how defense attorneys, prosecutors, and judges have seemingly failed to investigate or properly review evidence of criminal defendants' intellectual disabilities.

I. AN ASSEMBLY LINE APPROACH TO DEFENSE:

Harris County has been compelled to develop a cadre of defense attorneys who specialize in defending against the death sentence in response to this forty-years-long tradition of aggressive capital murder prosecutions. A few Houston-based

ANNOTATIONS (Aug. 7, 2014), <https://www.oconnors.com/blog/2014/08/07/michael-morton-act-texas-discovery-law-raises-concerns/> [https://perma.cc/76KU-KD6C].

9. Brian Rogers, *Man Sent to Death Row in Officer's Killing Is Freed*, HOUS. CHRON. (June 8, 2015, 10:42 PM), <http://www.chron.com/news/houston-texas/article/DA-6314119.php>.

10. Lise Olsen, *Death Row Inmate Wins Appeal to Review Claims of Prosecution Misconduct*, HOUS. CHRON. (Feb. 25, 2015, 11:26 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Death-row-inmate-wins-appeal-to-review-claims-of-6101990.php>.

11. Keri Blakinger, *For First Time in More Than 30 Years, No Harris County Death Row Inmates Executed*, HOUS. CHRON. (Dec. 4, 2017, 11:00 PM), <http://www.chron.com/news/houston-texas/article/For-first-time-in-more-than-30-years-no-Harris-12405400.php>.

12. Brian Rogers, *Harris County Stands Out for Death Penalty Cases, Study Finds*, HOUS. CHRON. (Aug. 26, 2016, 9:07 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-stands-out-for-death-penalty-cases-9187154.php>; *Too Broken to Fix: Part II An In-depth Look at America's Outlier Death Penalty Counties*, FAIR PUNISHMENT PROJECT 2 (Sept. 2016), http://fairpunishment.org/wp-content/uploads/2016/12/FPP-TooBroken_II.pdf [https://perma.cc/A9RK-UEMD].

13. Blakinger, *supra* note 11.

defense attorneys have gained fame for their work in winning long-shot capital murder appeals and unearthing invaluable mitigating evidence about intellectual disabilities and other impairments prior to trial.¹⁴ However, most are busy solo practitioners who attempt to juggle their capital murder assignments along with a busy docket of other court-appointed cases.¹⁵ Over the decades, several of the most high-volume Harris County defense attorneys have earned international attention—and infamy—for flaws in what seems to be an assembly line approach to capital defense in these courtroom duels over death.

Houston's Joe Cannon, now deceased, became forever known as the sleeping lawyer after the United States Supreme Court affirmed a finding that Cannon had repeatedly dozed during a death penalty trial while he was supposed to be representing Calvin Burdine.¹⁶ Ronald Mock, who in the 1980s was one of the few African American defense attorneys handling capital cases, was another high-volume death row lawyer in Houston until about 2005. But Mock was repeatedly disciplined by the State Bar of Texas for errors he made while attempting to juggle a heavy caseload.¹⁷

Jerry Guerinot, a former Harris County prosecutor, lost so many death penalty cases as a defense attorney that a commonly-circulated courthouse joke says he should have his own wing of death row to house twenty-one former clients—twenty he had defended and one he had prosecuted.¹⁸ Four of his clients were convicted in just one of his busiest years, 1996.¹⁹ Guerinot still does appointed work in Harris County, but no longer handles death capital cases.²⁰ His last client who was

14. See John Makeig, *Colleagues Polled on the Top Attorneys*, HOUS. CHRON. (Mar. 27, 1994, 5:30 AM), <http://www.chron.com/news/houston-texas/article/Colleagues-polled-on-the-top-attorneys-2016813.php>.

15. Lise Olsen, *Attorneys Overworked in Harris County Death-Row 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>.

16. See Linda Greenhouse, *Inmate Whose Lawyer Slept Gets New Trial*, N.Y. TIMES (June 4, 2002), <http://www.nytimes.com/2002/06/04/us/inmate-whose-lawyer-slept-gets-new-trial.html>; *Court: Retry Burdine Because His Lawyer Slept*, HOUS. CHRON. (Aug. 13, 2001, 5:30 AM), <http://www.chron.com/news/houston-texas/article/Court-Retry-Burdine-because-his-lawyer-slept-2026152.php>.

17. Andrew Tilghman, *State Bar Suspends Troubled Local Lawyer*, HOUS. CHRON. (Feb. 12, 2005, 6:30 AM), <http://www.chron.com/news/houston-texas/article/State-Bar-suspends-troubled-local-lawyer-1631385.php>.

18. Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N.Y. TIMES (May 17, 2010), http://www.nytimes.com/2010/05/18/us/18bar.html?_r=0.

19. Michael Graczyk, *Houston Lawyer Labeled Worst Lawyer in the United States*, HOUS. CHRON. (Aug. 13, 2016, 11:24 AM), <http://www.chron.com/news/article/Texas-lawyer-who-lost-all-death-penalty-cases-9140712.php>.

20. *Id.*

sentenced to death, Linda Carty, dubbed Guerinot the “undertaker” after he and his co-counsel spent just three months preparing for her trial on a complex case involving the kidnapping of Carty’s neighbor and the neighbor’s newborn baby.²¹ Carty pursued a high profile ineffective assistance of counsel appeal but lost after the Fifth Circuit Court of Appeals deemed the defense attorneys’ mistakes serious, but not reasonably likely to change the outcome of her case.²² Later, her appellate attorneys presented a prosecutorial misconduct claim after additional evidence surfaced that Guerinot and her previous attorneys never saw.²³

The biggest unanswered question about Harris County’s most frequently appointed defense attorneys remains whether Harris County’s unique courthouse culture has set them up to fail. Despite reforms required by United States Supreme Court decisions and Texas state laws including the Fair Defense Act of 2001,²⁴ Harris County judges have done little to limit the caseloads of attorneys they appoint. These large caseloads give attorneys less time to prepare for complex capital cases, which require both substantial expertise in trial defense as well as knowledge of the complex mitigation evidence assembling process necessary for the punishment stage, in which a jury must decide between life and death.²⁵ Both stages of the case are important. If an attorney fails to find evidence of innocence before trial, an innocent man can be condemned to die. If a they fail to find evidence of intellectual disability or fail to present it at the punishment stage, nothing prevents a prosecutor from seeking the death penalty, even though the intellectually disabled, formerly known as the “mentally retarded,” are not eligible for this punishment.²⁶

21. Liptak, *supra* note 18.

22. Carty v. Thaler, 583 F.3d 244, 266 (5th Cir. 2009).

23. See Lise Olsen, *Prosecutors Accused of Hiding Evidence, Inventing Testimony in Death Penalty Case*, HOUS. CHRON. (July 4, 2016, 11:53 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Prosecutors-accused-of-hiding-evidence-inventing-8340431.php>.

24. See Texas Fair Defense Act, 77th Leg. R.S., ch. 906, §§ 2–18, 2001 Tex. Gen. Laws 1800, 1800–16 (codified in scattered sections of TEX. CODE CRIM. PROC. ANN., TEX. FAM. CODE ANN. § 51.101, and TEX. GOV’T. CODE ANN. §§ 71.0351, 71.051–71.063 (West 2017)). *But see* Acts 2011, 82d Leg. R.S., ch. 984 § 15(3), 2011 Tex. Gen. Laws 2462, 2476 (repealing TEX. CODE OF CRIM. PROC. § 26.05(i), and TEX. GOV’T. CODE ANN. §§ 71.0351, 71.051–71.063 (West 2017)).

25. See Lydia DePillis, *Harris County’s System for Defending the Poor Remains Inadequate, State Audit Finds*, HOUS. CHRON. (Oct. 12, 2016, 1:43 PM), <http://www.houstonchronicle.com/business/article/Harris-County-s-system-for-defending-the-poor-9967866.php>.

26. Atkins v. Virginia, 536 U.S. 304, 322 (2002); Brian Rogers, *Texas Attorneys*

The Texas Fair Defense Act, authored by Houston-based former Texas Senator Rodney Ellis, requires judges to adopt formal procedures for providing appointed lawyers for all indigent defendants beginning in 2001.²⁷ Yet many veteran Harris County district judges have developed their own individual plans to appoint attorneys to death penalty cases and have continued to maintain their own stables of appointed private defense attorneys, some of whom are dubbed “term attorneys.” These term attorneys serve judges for annual or weekly “terms,” though many are automatically and seemingly indefinitely renewed.²⁸ Judges say they select term attorneys they trust, based on experience and abilities. Those assigned to capital cases are required to show knowledge of the law. Some of the highest paid defense attorney appointees contribute to the judges’ campaigns; others are their personal friends.²⁹ One term attorney performed a wedding ceremony for the judge in whose court he works. Another term attorney, James Barr, is an ex-judge (and the husband of a sitting district court judge) who now works as an appointed term attorney for an ex-judicial colleague.³⁰ Barr does not perform appointed death penalty case work, but he is one of the county’s most highly paid appointed indigent defense attorneys, with 403 felony cases assigned in fiscal year 2016.³¹

Collectively, Harris County judges have agreed to enact only a few common rules for appointed defenders, including limiting capital appointments to no more than one every sixty days.³² Despite setting these rules, the courts have still generally failed to implement any mechanism to prevent excessive caseloads.³³

Brace for New Death Penalty Appeals After Supreme Court Ruling, HOUS. CHRON. (Oct. 15, 2017, 3:08 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Texas-attorneys-brace-for-new-round-of-death-12271127.php>; Jordan Smith, *Why Is It So Easy for States to Execute the Mentally Ill?*, THE INTERCEPT (May 20, 2015, 9:47 AM), <https://theintercept.com/2015/05/20/mentally-ill-executed/> [<https://perma.cc/3FED-T2XA>].

27. See TEX. GOVT. CODE ANN. § 79.034 (West 2017) (providing that polices and standards for providing legal representation to indigent defenses shall be developed).

28. See DePillis, *supra* note 25.

29. *Id.*

30. That attorney James Barr, was in 1998 was removed from the bench by the State commission on Judicial Conduct. *In re Barr*, 13 S.W.3d 525, 561 (Tex. 1998).

31. TEX. INDIGENT DEF. COMM’N, STATEWIDE ATTORNEY CASELOAD REPORT, <http://tide.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx> [<https://perma.cc/J7YJ-EPMP>] (select “Harris” in the “County” drop-down list; select “2016” in the “Fiscal Year” drop-down list; then search “Barr” under “Attorney Name”).

32. HARRIS COUNTY DISTRICT COURTS TRYING CRIMINAL CASES: STANDARDS AND PROCEDURES APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS (2013), <https://www.justex.net/JustexDocuments/0/FDAMS/standards.pdf> [<https://perma.cc/PS6E-ESMZ>].

33. Zoë Kirsch, *Court-Appointed Attorneys in Harris County Take On Massive*

Harris County's district judges have generally made little or no attempt to determine whether the attorneys they appoint to complex death capital cases are simultaneously being assigned to hundreds of felonies in Harris County or elsewhere.³⁴ According to the Harris County Auditor's Office and court records in the last few years, judges have assigned hundreds of felony cases annually to certain appointed attorneys.³⁵ Some of the death penalty defense attorneys with crushing caseloads have made costly mistakes because of their crushing caseloads.

II. DEATH ROW INMATES PAID WHEN ATTORNEYS MISSED FEDERAL DEADLINES

Back in 2009, attorney Jerome Godinich missed crucial federal deadlines for death row inmates while juggling an average of 360 cases per year³⁶ as a court-appointed lawyer in Harris County. That caseload is more than twice the recommended caseload of 150 felony clients per year, according to a standard established in 1973 and adopted by the National Legal Aid and Defender Association.³⁷ The attorney was chastised by the Fifth Circuit Court of Appeals for failing to file a federal writ of habeas corpus on time on behalf of two different death row inmates whose final round of appeals he had been assigned by federal judges.³⁸

Johnny Johnson, executed in February 2009 for the 1995 rape and murder of Leah Joette Smith, was one of the clients whose appeal Godinich failed to file on time.³⁹ Godinich missed a federally mandated filing deadline by twenty-four hours for Johnson,⁴⁰ who was executed later. Before he died, Johnson denounced the Texas death row in Livingston's Polunsky Unit as

Caseloads, HOUS. PRESS (June 16, 2015, 8:00 AM), <http://www.houstonpress.com/news/court-appointed-attorneys-in-harris-county-take-on-massive-caseloads-7513563> [<https://perma.cc/PT63-AH5W>].

34. Olsen, *supra* note 15.

35. TEX. INDIGENT DEF. COMM'N, STATEWIDE ATTORNEY CASELOAD REPORT, <http://tide.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx> [<https://perma.cc/BKB8-8SQ3>] (select "Harris" in the "County" drop-down list; select "2014," "2015," "2016," and "2017," respectively, in the "Fiscal Year" drop-down list).

36. Olsen, *Attorneys Overworked*, *supra* note 15.

37. *Id.*

38. *Thurmond v. Quarterman*, No. 08-70008, 2009 WL 2431309, at *6 (5th Cir. Mar. 9, 2009); Lise Olsen, *Slow Paperwork in Death Row Cases Ends Final Appeals for 9*, HOUS. CHRON. (Mar. 21, 2009, 5:30 AM), <http://www.chron.com/news/houston-texas/article/Slow-paperwork-in-death-row-cases-ends-final-1736308.php>.

39. *Id.*

40. Allan Turner, *Houston Murderer-Rapist Executed for Woman's '95 Killing*, HOUS. CHRON. (Feb. 12, 2009, 6:30 AM), <http://www.chron.com/news/houston-texas/article/Houston-murderer-rapist-executed-for-woman-s-95-1633182.php>.

a “dungeon” and sang a hymn as the lethal injection was administered.⁴¹ Johnson never claimed innocence and was suspected of other murders, but Godinich’s mistake denied him a final appellate review by a federal court.

Then, Godinich made the same mistake again by failing to file an appeal on time in the case of death row inmate, Keith Steven Thurmond, a former Montgomery County mechanic. According to case records, Thurmond was on death row in 2009 and attempted to make a final appeal.⁴² Thurmond had been condemned for the murder of his estranged wife and her lover. Until his execution, Thurmond claimed another man committed the murder.⁴³ Thurmond was luckier than Johnson—his appeal, though filed too late, was reviewed. But it was denied and he was executed in 2012.⁴⁴ His last words were: “All I want to say is I’m innocent, I didn’t kill my wife. Jack Leary shot my wife then her dope dealer Guy Fernandez. Don’t hold it against me, Bill. I swear to God I didn’t kill her. Go ahead and finish it off. You can taste it.”⁴⁵

In both condemned men’s cases, Godinich waited until after business hours on the last day of the deadline to file the appeals and then blamed a malfunctioning filing machine for his tardiness.⁴⁶ In its opinion, the Court chastised him for using the same excuse twice and pointed out that based on the Johnson’s case, the attorney already knew the courthouse machine was broken and could have easily filed electronically.⁴⁷

A federal writ of habeas corpus—a right guaranteed by the Constitution⁴⁸—usually gives an inmate a last chance to have the courts review errors or overlooked evidence that could invalidate a conviction or death sentence.⁴⁹ Godinich was not alone in missing habeas corpus deadlines. A 2009 Houston Chronicle report review found nine Texas cases in which inmates lost

41. Turner, *Murderer-Rapist Executed*, *supra* note 40.

42. Olsen, *Attorneys Overworked*, *supra* note 15.

43. Allan Turner, *Condemned Magnolia Man Goes to Death Protesting Innocence*, HOUS. CHRON. (Mar. 8, 2012, 12:30 AM), <http://www.chron.com/news/houston-texas/article/Condemned-Magnolia-man-goes-to-death-protesting-3390160.php>.

44. See *Thurmond v. Quarterman*, 341 F. App’x 40, 42 (5th Cir. 2009); Turner, *supra* note 43.

45. *Last Statement of Keith Thurmond*, TEX. DEPT OF CRIMINAL JUSTICE, https://www.tdcj.state.tx.us/death_row/dr_info/thurmondkeithlast.html [<https://perma.cc/T6ST-4TJR>] (last visited Jan. 2, 2018).

46. *Thurmond v. Quarterman*, No. 08-70008, 2009 WL 2431309, at *6 (5th Cir. Mar. 9, 2009).

47. *Id.*

48. U.S. CONST. art. I, § 9.

49. Olsen, *Slow Paperwork*, *supra* note 38.

chances to appeal death sentences because of tardy lawyers.⁵⁰ The late filings generally meant those death row inmates automatically lost their appeals, waiving the last constitutionally required review before a death sentence is carried out.⁵¹ Out of the nine recorded cases, three were Godinich's responsibility.⁵²

In an article entitled *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, death penalty expert and Yale Law School professor, Stephen Bright, questioned why federal and state courts continued to appoint these attorneys to death penalty cases despite such costly mistakes.⁵³ Bright writes:

Texas provides lawyers for post-conviction review in death penalty cases who are as bad, or worse, than the lawyers that Texas provides at trial. Nine people in Texas, six of whom have been executed, have been denied post-conviction review because the lawyers assigned to them missed the statute of limitations.⁵⁴

He questions why neither the courts nor the Texas Bar had acted against the attorneys involved.⁵⁵ Godinich's clients paid a price for his tardiness, but he faced no fines or other public penalties from Houston-based federal and state judges who appointed and paid him to represent death row inmates.⁵⁶

The courts have made some changes to improve appellate work. Recently, judges from the Fifth Circuit Court of Appeals approved the establishment of new federal capital appellate units inside two federal public defenders' offices in Texas. Attorneys assigned to the new units will likely handle many future federal death penalty habeas cases.

In a letter to the editor Godinich sent after the Chronicle's 2009 reports, Godinich defended the work he does on behalf of the indigent in Harris County. His letter stated:

[This job] entails working seven days a week and investing countless hours in preparation to ensure that my clients receive their rightful due process . . . [I]t is not an easy job, but it is work that is challenging and has given me

50. *Id.*

51. *Id.*

52. *Id.*

53. Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 708–09 (2010).

54. *Id.* at 708.

55. *Id.* at 708–09.

56. Lise Olsen, *Tardy Texas Lawyers in Capital Cases Still Paid Thousands*, HOUS. CHRON. (Apr. 19, 2009, 5:30 AM), <http://www.chron.com/news/houston-texas/article/Tardy-Texas-lawyers-in-capital-cases-still-paid-1739659.php>.

enormous personal satisfaction. That is why my clients know who I am and depend on me to stay invested in the process.⁵⁷

Records show the crushing caseloads managed by Harris County defense attorneys like Godinich have not changed much in the last eight years.⁵⁸ According to data published on the internet by the Texas Indigent Defense Commission, many defense attorneys handling capital cases still accept enormous caseloads.⁵⁹ These attorneys do so at the request of judges who continue to not monitor caseloads or enforce any limits on the assignment of cases.⁶⁰

The Texas Indigent Defense Commission's latest reports show that Harris County judges, as well as judges in other large Texas counties, continue to assign capital cases to attorneys who are simultaneously handling hundreds of other appointments.⁶¹ Godinich still appears on the list of the busiest appointed Harris County attorneys, and according to the report for fiscal year 2016, he was assigned four capital cases on top of 340 felony cases and was paid \$258,055 for his appointments in Harris County alone.⁶² Another solo-practitioner who has been a popular appointee for death row cases for decades, R.P. "Skip" Cornelius, was assigned six capital cases on top of a felony caseload of 166 other cases and received \$501,653 in fees.⁶³ Another popular appointee, Hattie Shannon, handled 381 felonies on top of her capital case assignment.⁶⁴

The practice of overloading attorneys in Texas who are handling complex capital murder cases with hundreds of felony

57. Olsen, *Attorneys Overworked*, *supra* note 15.

58. TEX. INDIGENT DEF. COMM'N, TIDC'S RECENT ACTIVITIES & DATA ANALYSIS, <http://files.constantcontact.com/33b98981401/a72892f9-f04e-4c8b-9846-e8073c16567c.pdf> [<https://perma.cc/2PGK-PNUQ>] (last visited Jan. 2, 2018).

59. *Id.*

60. Olsen, *Attorneys Overworked*, *supra* note 15. Harris County judges have rules that say capital appointments should be spaced at least 60 days apart and that no attorney should be assigned more than 5 cases a day. But even those rules are unenforced. The county's public defender office has strict standards to limit caseloads for its attorneys, but the county judges have no maximum caseloads for private attorneys appointed to represent the poor. HARRIS COUNTY DISTRICT COURTS TRYING CRIMINAL CASES, STANDARDS AND PROCEDURES: APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS (2017); Olsen, *Attorneys Overworked*, *supra* note 15; Kirsch, *supra* note 33.

61. *See* TEX. INDIGENT DEF. COMM'N, *supra* note 58.

62. *Id.*

63. *See* TEX. INDIGENT DEF. COMM'N, *supra* note 58.

64. TEX. INDIGENT DEF. COMM'N, INDIGENT DEFENSE DATA FOR TEXAS, <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx> [<https://perma.cc/MG7Q-U7T6>]. Those figures do not include appointments that defense attorneys may be handling simultaneously in federal or other county courts. *Id.*

cases in the same year is not unique to Harris County. In Dallas County, defense attorney, Paul James Johnson, had three capital cases, while juggling 249 other felony cases in 2016.⁶⁵ In Travis County, William Jack Browning had one capital murder case while juggling 276 felony cases and 348 misdemeanor cases.⁶⁶

In contrast, in Bexar and Tarrant Counties, only two of the highest paid appointed attorneys handled more than 150 felony cases—though some came close.⁶⁷ In Tarrant County, William H. Ray Jr. was paid for appointments in five capital cases, 126 felonies and forty-four misdemeanors.⁶⁸ Generally, Harris County death penalty attorneys still have the state's highest reported caseloads.⁶⁹

III. THE PROSECUTORS' DEATH PENALTY MACHINE

For three out of the four decades in the modern era of the death penalty, two white male prosecutors, Johnny Holmes and his successor Chuck Rosenthal, controlled Harris County's capital murder agenda.⁷⁰ Holmes, elected in 1979, created and, for twenty-one years, ran what some people called a "death penalty machine."⁷¹ During his tenure, he "created one of the biggest, most powerful prosecutorial machines in the nation."⁷² By his retirement (in 2000), Holmes' staff had almost doubled to 230 lawyers and his budget had swelled to more than \$32 million.⁷³ More than 200 of the people his team prosecuted ended up on Texas's death row.⁷⁴ A report by the Fair Punishment Project identified Holmes as one of

America's five deadliest head prosecutors out of the thousands that have held that office across the country in the last 40 years. Three of the five prosecutors (Joe

65. *Id.*

66. *Id.*

67. *Id.* (showing that one appointed attorney in each of Bexar and Tarrant Counties handled more than 150 felony cases).

68. *Id.*

69. *See id.* (showing that seven of the twenty highest reported death penalty caseloads belong to Harris County attorneys).

70. Simone Seiver, *Why Three Counties That Loved the Death Penalty Have Almost Stopped Pursuing It*, THE MARSHALL PROJECT (Aug. 11, 2015, 1:09 PM), <https://www.themarshallproject.org/2015/08/11/why-three-counties-that-loved-the-death-penalty-have-almost-stopped-pursuing-it> [https://perma.cc/HTN4-Q85G].

71. Allan Turner, *Former DA Ran Powerful Death-Penalty Machine*, HOUS. CHRON. (July 25, 2007, 5:30 PM), <http://www.chron.com/news/houston-texas/article/Former-DA-ran-powerful-death-penalty-machine-1833545.php>.

72. *Id.*

73. *See id.*

74. *See id.*

Freeman Britt of Robeson County, North Carolina; Donnie Myers of Lexington, South Carolina; and Bob Macy of Oklahoma County, Oklahoma) personally obtained more than 35 death sentences each, while the other two (Lynne Abraham of Philadelphia County, Pennsylvania and Johnny Holmes of Harris County, Texas) oversaw District Attorney offices that obtained more than 100 and 200 death sentences respectively during their tenures. Together, they have put the equivalent of 1 out of every 7 people currently on death row.⁷⁵

Many Harris County residents support the death penalty and prosecutors have long been proud of that record.⁷⁶ Holmes' successor, Chuck Rosenthal, a death penalty prosecutor, continued to seek the death penalty frequently after he was elected district attorney in 2001.⁷⁷ Rosenthal also handled many death penalty prosecutions personally before he left office in 2008. Rosenthal resigned after it became public through documents and e-mails obtained from his computer as part of a federal court case that he had carried on an affair with a staff member, misused his official e-mail to send sexist and racist jokes, and abused prescription drugs on-the-job.⁷⁸ At the time, he admitted, "[a]lthough I have enjoyed excellent medical and pharmacological treatment, I have come to learn that the particular combination of drugs prescribed for me in the past has caused some impairment in my judgment."⁷⁹

Rosenthal already had become known as an aggressive prosecutor under Holmes. During Rosenthal's seven-year tenure as DA, he instructed assistant district attorneys to allow defense attorneys to review—but not copy—police reports and witness statements that had been gathered against their clients in death penalty and other cases.⁸⁰

75. *New Report Finds Prosecutors Who Sought Death Penalty Most Frequently Had High Rates of Misconduct*, FAIR PUNISHMENT PROJECT (June 30, 2016), <http://fairpunishment.org/new-report-finds-prosecutors-who-sought-death-penalty-most-frequently-had-high-rates-of-misconduct/> [https://perma.cc/V286-CYTX].

76. *See* Seiver, *supra* note 70.

77. *See id.*

78. *See* Brian Rogers & Peggy O'Hare, *Rosenthal Cites Prescription Drugs in Resignation as DA*, HOUS. CHRON. (Feb. 15, 2008, 6:30 AM), <http://www.chron.com/news/houston-texas/article/Rosenthal-cites-prescription-drugs-in-resignation-1600712.php>; *see also Ex Parte Temple*, No. WR-78,545-02, 2016 WL 6903758 (Tex. Crim. App. Nov. 23, 2016).

79. *Id.*

80. *See* Brian Rogers, *DA's Office Answers Allegations of Misconduct in Katy Murder Case*, HOUS. CHRON. (Sept. 9, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/DA-s-office-answers-allegations-of-misconduct-in-6494420.php>.

Performance reviews show that Rosenthal personally trained numerous attorneys in his office and often praised their skills in winning difficult cases through aggressive prosecution.⁸¹ One of the most well-known prosecutors that answered to Rosenthal was Kelly Siegler—who later was featured in her own TV show called *Cold Justice*.⁸² Among her best-known cases, Siegler re-enacted the stabbing murder of a husband by his wife by hauling a bed into a courtroom, tying her co-counsel to the bedposts and straddling and pretending to stab him with the murder weapon.⁸³ But in 2015, Siegler obtained fame of a different sort. A judge found thirty-six acts of prosecutorial misconduct in the prosecution of David Temple, a non-death capital case involving the murder of Temple's pregnant wife.⁸⁴ Siegler has denied she committed misconduct in the Temple case.⁸⁵ As part of Temple's appeals, Siegler and other Harris County prosecutors have argued that they withheld some evidence because that was the office policy in the Rosenthal era; the policy was that not all witness statements and recordings had to be turned over to defense attorneys. Siegler testified that evidence did not have to be disclosed if prosecutors did not "believe it was true."⁸⁶

Harris County's practice of sharing files with defense attorneys changed after Rosenthal left office and evolved further in the wake of a Texas reform requiring disclosure of all witness statements and evidence to the defense.⁸⁷ That law, which was signed by Governor Rick Perry and took effect in January 2014,

81. See Allan Turner, *7 Years of Barbs and Bouquets for Rosenthal*, HOUS. CHRON. (Jan. 6, 2008 6:30 AM), <https://www.chron.com/news/houston-texas/article/7-years-of-barbs-and-bouquets-for-Rosenthal-1768787.php>.

82. See Rogers, *DA's Office Answers*, *supra* note 80.

83. See Alan Bernstein, *Siegler's Career in Court Comes with Controversy*, HOUS. CHRON. (Jan. 27, 2008, 6:30 AM), <http://www.chron.com/news/houston-texas/article/Siegler-s-career-in-court-comes-with-controversy-1616671.php>.

84. See generally *Temple v. State*, 342 S.W.3d 572 (Tex. App.—Houston), *habeas corpus granted Ex parte Temple*, No. WR-75,545-02, 2016 WL 6903758 (Tex. Crim. App. Nov. 23, 2016); See also Brian Rogers, *Judge Upbraids Legendary Prosecutor in Katy Murder Case*, HOUS. CHRON. (July 8, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Judge-upbraids-legendary-prosecutor-in-Katy-6374049.php>.

85. See Brian Rogers, *DA Kim Ogg Will Review David Temple Case Because of Controversial Prosecutor Kelly Siegler*, HOUS. CHRON. (Jan. 5, 2017), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Ogg-will-personally-review-Temple-case-because-of-10838305.php#photo-8451544>.

86. See Rogers, *DA's Office Answers*, *supra* note 80. See also Craig Malisow, *Judge Says Ex-Prosecutor Kelly Siegler Withheld Evidence in David Temple Case*, HOUS. CHRON. (July 8, 2015, 2:50 PM), <http://www.houstonpress.com/news/judge-says-ex-prosecutor-kelly-siegler-withheld-evidence-in-david-temple-case-7573860> ("Siegler testified in habeas hearing that potential exculpatory evidence didn't need to be disclosed if prosecutors 'did not believe it was true...").

87. Michael Morton Act, 83rd Leg. R.S., ch. 49, 2013 Tex. Gen Laws 106 (codified as Tex. Code Crim. Proc. Art. 39.14).

came as a response to the exoneration of Michael Morton, an Austin man who was revealed to have been wrongfully convicted of a murder in part because a prosecutor withheld evidence that could have established his innocence.⁸⁸

Challenges to the ways Harris County prosecutors for decades sometimes withheld witness statements or evidence from the defense and rewarded aggressive prosecutions keep coming up in appeals. In July 2015, Alfred Dewayne Brown won his freedom after a decade on death row for capital murder of a Houston Police Department Officer when an investigative reporter and attorneys exposed how Harris County prosecutors had withheld potentially exculpatory evidence from his defense team.⁸⁹ Brown was convicted of capital murder in 2005 for the slaying of Houston Police Department Officer Charles Clark and of check cashing clerk Alfredia Jones during an attempted robbery at an ACE check cashing business involving three men.⁹⁰ *Houston Chronicle* columnist Lisa Falkenberg won a Pulitzer Prize for her series on Brown,⁹¹ which unearthed grand jury documents and other evidence that exposed how Brown's girlfriend was brow-beaten by a police officer who served as grand jury foreman and even jailed in an attempt to change her story about Brown's alibi.⁹² The jury that recommended a death sentence in Brown's case never saw a telephone record withheld by prosecutors from his defense team.⁹³ The record would have bolstered Brown's story that he spent the day at his girlfriend's house alone and called her at work twice from her house after

88. Press Release, Office of the Governor Rick Perry, Gov. Perry Signs Senate Bill 1611, the Michael Morton Act (May 16, 2013), available at <http://www.lrl.state.tx.us/scanned/govdocs/Rick%20Perry/2013/press051613.pdf>

89. See Radley Balko, *Texas Death Row Inmate Alfred Dewayne Brown Is Released from Prison*, WASH. POST (June 10, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/06/10/texas-death-row-inmate-alfred-dewayne-brown-is-released-from-prison/?utm_term=.a45aa6859b21.

90. See Lisa Falkenberg, *Evidence Mounts That Wrong Man on Death Row for Killing HPD Officer*, HOUS. CHRON. (Dec. 20, 2014), <https://www.houstonchronicle.com/news/columnists/falkenberg/article/Evidence-mounts-that-convicted-cop-killer-might-5970681.php>

91. Mike Tolson, *Falkenberg Wins Houston Chronicle's First Pulitzer*, HOUS. CHRON. (Apr. 20, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Falkenberg-wins-Houston-Chronicle-s-first-Pulitzer-6212508.php>.

92. See Lisa Falkenberg, *A Disturbing Glimpse into the Shrouded World of the Texas Grand Jury System*, HOUS. CHRON. (July 16, 2014), <http://www.houstonchronicle.com/news/columnists/falkenberg/article/A-disturbing-glimpse-into-the-shrouded-world-of-5626689.php>.

93. See Brian Rogers, *Man Sent to Death Row in Officer's Killing Is Freed*, HOUS. CHRON. (June 8, 2015), <http://www.chron.com/news/houston-texas/article/DA-6314119.php>.

hearing about the murders on the TV news.⁹⁴ After the records came to light, Brown's case was dismissed, but he was never declared "actually innocent," a step required for state compensation, and has filed a civil lawsuit to seek it.

The trial prosecutor in Brown's case, Dan Rizzo, has claimed that phone records were overlooked, but on Friday March 2, 2018, current Harris County District Attorney Kim Ogg announced that her office had obtained an email indicating that Rizzo had been informed about the exculpatory phone record prior to Brown's trial by a DA's investigator and still failed to turn over the documents to Brown's defense team.⁹⁵ Rizzo has retired and is no longer a Harris County employee—the email records came to light as part of Brown's civil lawsuit. Ogg said she would forward the information to the State Bar of Texas, which could take disciplinary action.⁹⁶

Linda Carty had been on death row for a dozen years when, in 2015, her *pro bono* appellate attorneys—assisted by a documentary film and a non-profit organization called Reprieve—uncovered a raft of previously undiscovered evidence and witness statements from Carty's co-defendants that had been withheld from Carty's original appointed attorneys by two Harris County prosecutors,⁹⁷ including Craig Goodhart, who also participated in Temple's case.⁹⁸

Carty's case has attracted international attention ever since she was sentenced to death in 2003.⁹⁹ Her trial came only three months after a Harris County judge appointed Guerinot and another busy criminal defense attorney to handle her complex kidnapping and conspiracy murder case, which involved three co-defendants.¹⁰⁰ Carty is one of only six women on Texas death

94. *Id.*

95. St. John Barned-Smith & Keri Blakinger, *DA: Former Prosecutor Withheld Key Email in Death Row Case*, HOUS. CHRON. (Mar. 3, 2018, 7:09 AM), <https://www.chron.com/news/houston-texas/article/DA-Former-prosecutor-lied-about-exculpatory-12724038.php>

96. *Id.*

97. See Lise Olsen, *Prosecutors Accused of Hiding Evidence, Inventing Testimony in Death Penalty Case*, HOUS. CHRON. (July 4, 2016), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Prosecutors-accused-of-hiding-evidence-inventing-8340431.php>; *Save Linda Carty*, REPRIEVE.COM, <https://reprieve.org.uk/save-linda-carty/> [<https://perma.cc/8WZR-HCEB>] (last visited Feb. 3, 2018).

98. See Olsen, *Prosecutors Accused of Hiding Evidence*, *supra* note 97.

99. See, e.g., Ed Pilkington, *British Woman on Texas Death Row May Be Spared as New Evidence Surfaces*, GUARDIAN (July 8, 2016), <https://www.theguardian.com/world/2016/jul/08/linda-carty-grandmother-death-row-texas-new-evidence> ("Her case has been highlighted in documentaries and championed by the likes of Bianca Jagger and the British government.")

100. See Alex Hannaford, *Did Death Row Inmate Linda Carty Get a Fair Trial?*, TEX. OBSERVER (Jan. 10, 2012, 9:20 PM), <https://www.texasobserver.org/did-death-row-inmate->

row¹⁰¹ and in 2018 is the only British national facing execution in the United States.

In a visit to the Harris County jail in 2004, Carty sat at a wooden table, her dark eyes downcast, surrounded by a phalanx of lawyers from the Houston office of Baker Botts who typically handle civil disputes but had agreed to handle her appeal *pro bono* and were making a rare client visit to the jail.¹⁰² During that interview, Carty's face appeared freckled and unlined. She still looked like the same young woman who had studied pharmacy at the University of Houston, dated a Jamaican who turned out to be a drug dealer, and become a useful informant for the Houston Police and the DEA.¹⁰³ As she spoke, Carty used the precise diction and grammar from her days as a schoolteacher, though the cadence of her native Caribbean Island home of St. Kitt's flavored each word. The petite woman with curly dark hair had become a grandmother during her time on Texas death row and she did not fit the stereotype of a killer.

Harris County prosecutors who handled her case have insisted justice was done in Carty's case.¹⁰⁴ Goodhart teamed up with Connie Spence, who was handling her first death capital case, to win a death sentence for Carty by casting her as a cold-blooded mastermind—a woman so brutally fixated on having another child after a string of miscarriages that she alone hatched a terrible plot to convince a gang of home invaders and drug dealers to snatch and kill her neighbor in order to steal a newborn baby boy.¹⁰⁵ Their victory came after Carty's codefendants testified against her, though Carty was never at the abduction scene.¹⁰⁶ Three men stormed into an apartment in May 2001, in the same complex where Carty lived; demanded money; and ransacked the place looking for drugs. Finding none, instead,

linda-carty-get-a-fair-trial/

101. See *Death Row Information: Women on Death Row*, TEX. DEP'T CRIM. JUST. (July 14, 2015), https://www.tdcj.state.tx.us/death_row/dr_women_on_dr.html [<https://perma.cc/55D5-4XXU>].

102. See Lise Olsen, *Death Row Inmate Wins Appeal to Review Claims of Prosecution Misconduct*, HOUS. CHRON. (Feb. 25, 2015, 11:26 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Death-row-inmate-wins-appeal-to-review-claims-of-6101990.php>.

103. See *id.*

104. See Feliks Garcia, *Linda Carty: British Woman on Texas Death Row Will Not Receive New Trial*, INDEP. (Sept. 2, 2016, 7:27 PM), <http://www.independent.co.uk/news/world/americas/linda-carty-death-penalty-texas-appeal-rejected-a7222906.html>.

105. See *id.*

106. Lise Olsen, *DEA Agent Former Eyewitness Allege Prosecutorial Misconduct in Linda Carty Murder Case*, HOUS. CHRON. (Last updated Feb. 14, 2015, 10:53 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/DEA-agent-former-eyewitness-allege-prosecutorial-6080417.php>.

they snatched Joana Rodriguez and her three-day old infant. The child survived but the mother asphyxiated, still bound and gagged in the trunk of a car.¹⁰⁷ Testimony offered by the witnesses differed dramatically in the details of what had occurred.¹⁰⁸ What is undisputed is that Carty, who had long been accustomed to helping officers as a DEA informant, voluntarily gave officers information about men she claimed had threatened her in the same apartment complex the day of the kidnapping.¹⁰⁹ Her tips helped police find the car, discover the body, and rescue the baby.¹¹⁰ Her accomplices had more extensive criminal histories, but only Carty went to death row.¹¹¹

Then and now, her appellate attorney, Michael Goldberg, who normally handles international civil matters, has complained the loudest about the injustice in Carty's case.¹¹² Goldberg, who has now been representing Carty fourteen years *pro bono*,¹¹³ recalls how prosecutors raised a pair of dull scissors at trial and claimed Carty had planned to use them to cut a baby out of the belly of the murder victim.¹¹⁴ To Goldberg, those scissors were a symbol of the two assistant district attorneys' determination to portray Carty as a monster in order to win their case.¹¹⁵

Carty's lawyers from Baker Botts are a *pro bono* dream team far more used to defending corporate giants and millionaires than murderers.¹¹⁶ Goldberg has estimated the firm has invested more than \$1 million in staff time and expenses on the Carty case.¹¹⁷ Initially, they targeted mistakes made by Carty's original

107. See Olsen, *Prosecutors Accused of Hiding Evidence*, *supra* note 97.

108. See *id.*

109. See *id.*

110. See *id.*

111. See Olsen, *DEA Agent*, *supra* note 106.

112. See Tom Dart, *British Woman on Texas Death Row Should Not Get New Trial, Judge Says*, *GUARDIAN* (Sept. 2, 2016, 9:02 AM), <https://www.theguardian.com/world/2016/sep/02/lindy-carty-texas-death-row-trial-judge>.

113. See Olsen, *Prosecutors Accused of Hiding Evidence*, *supra* note 97.

114. See *Carty v. Quartman*, 345 Fed. Appx. 897, 903–904 (5th Cir. 2009) (denying Carty's ineffective assistance of counsel claim based on the failure to have Dr. Brown to testify that “bandage scissors could not cut human flesh”).

115. There were no scissors used in the murder of Joana Rodriguez, nor was Rodriguez pregnant at the time of death. In fact, she had just brought her newborn son home from the hospital the day before her murder. *Carty v. State*, No. 74295, 2004 WL 3093229 at *1–2 (Tex. Crim. App., Apr. 7, 2004) (habeas corpus granted in part by *ex parte* Carty, No. WR-61,055-02, 2015 WL 831586 (Tex. Crim. App., Feb. 25, 2015)).

116. See *Corporate Investigations and Government Enforcement*, BAKER BOTTS, <http://www.bakerbotts.com/services/practice-areas/litigation/corporate-investigations-and-govt-enforcement> [<https://perma.cc/Q2Q2-2B5F>] (last visited Dec. 25, 2017).

117. See “Wonderful Day for Justice”: Death Row Brit Wins Appeal after “Fabricated Testimony” Claims, *RT* (Feb. 26, 2015, 3:45 PM), <https://www.rt.com/uk/235771-death->

defense team. Even though the Fifth Circuit Court of Appeals found that three months was insufficient time to prepare a death penalty defense and that the attorneys provided ineffective assistance of counsel, the court ruled defense errors were not extensive enough to have likely changed the outcome of the case given the other evidence against Carty.¹¹⁸

Then, Carty's attorneys uncovered evidence that the prosecutors withheld information from Carty's original defense attorneys. In 2015, the conservative Texas Court of Criminal Appeals ordered a rare post-conviction hearing for Carty to review claims that prosecutors committed misconduct in their efforts against her.¹¹⁹

For six days in July 2016, her attorneys presented testimony and eighteen long-hidden statements and recordings that they say prove that the prosecutors systematically hid evidence from Carty's original defense team and coached and offered deals to Carty's co-conspirators to win their case.¹²⁰ In the most explosive allegation, Carty's former DEA handler also signed an affidavit and testified that one of the prosecutors had threatened him prior to trial to keep him from helping Carty's defense team.¹²¹

Inside the ceremonial courtroom in the top floor of the Harris County courthouse, an odd series of witnesses—prosecutors, perpetrators, and a former DEA agent—took the stand. After taking his oath while still wearing shackles, Chris Robinson, the star prosecution witness and an accomplice in the kidnapping, testified that prosecutors told him to add details to his testimony—encouraging him to claim he had seen Carty put a bag over the victim's head—in eleven separate meetings and that he believed such details were designed to “nail Linda.”¹²²

row-carty-appeal [https://perma.cc/U777-Y4HB] (“[Attorney] Goldberg estimates his firm has invested more than \$1 million in *pro bono* labor on Carty's defense.”).

118. See *Carty v. Thaler*, 583 F.3d 244, 257–66 (2009) (reviewing Carty's numerous ineffective assistance of counsel claims and affirming district court's judgment to deny Carty relief). See also *Carty v. Quartman*, No. 06-614, 2008 WL 8104283 (S.D. Tex. Sept. 30, 2008); Michael Graczyk, *Judge Rejects Appeal from British Woman on Texas Death Row*, HOUS. CHRON. (Sept. 2, 2016, 4:59 PM), <http://www.chron.com/neighborhood/woodlands/news/article/Judge-rejects-appeal-from-British-woman-on-Texas-9895929.php>

119. *Ex parte Carty*, No. WR-61,055-02, 2015 WL 831586 (Tex. Crim. App., Feb. 25, 2015).

120. See Olsen, *Prosecutors Accused of Hiding Evidence*, *supra* note 97.

121. See *id.*

122. See *id.* The article includes a link to the affidavit of Chris Robinson. The first sentence of Paragraph 33 is key: “Spence and Goodhart repeatedly told me that I was the ‘key witness’ and that ‘what you will say will nail Linda.’” HOUS. CHRON., *Chris Robinson Aff.*, SCRIBD, <https://www.scribd.com/document/255684064/Chris-Robinson-Affidavit> [https://perma.cc/K3KX-GLC6].

Later that same day, Charles Mathis, Carty's former DEA agent handler, testified that he considered Carty incapable of murder and believed her to be genuinely afraid of her alleged co-conspirators.¹²³ In both a 2014 sworn statement and in his 2016 testimony, Mathis also said a prosecutor on the case threatened him in an attempt to discourage him from cooperating with Carty's original defense team.¹²⁴

Mathis, was handpicked as one of the original agents in the first DEA training class.¹²⁵ In his long career, he faced down members of Colombian cartels.¹²⁶ Later, he served as a supervisor in a program that analyzed heroin purchases nationwide to determine the origin of America's illicit supply—a program in which Carty participated as a paid informant.¹²⁷ But Mathis was near retirement when, in a private meeting prior to Carty's trial, Spence questioned him about why he believed Carty was innocent and suggested that he might have had an affair with his informant. Mathis said the accusation was totally untrue, but he saw the question as a threat because if the prosecutor had asked him the same thing in open court, he believed her baseless allegation could have affected his career and his marriage.¹²⁸

At the time of the hearing in 2016, both Spence and Goodhart still worked as Harris County prosecutors. A different pair of prosecutors assigned to defend their colleagues' past actions told the judge they did not believe Spence or Goodhart threatened or coerced witnesses.¹²⁹ But they admitted that the practice of denying to provide all copies of police documents and recorded statements to defense attorneys had occurred in Carty's case and would no longer be permitted.¹³⁰ Later the visiting judge who presided over the evidentiary hearing concluded that some witness statements taken by prosecutors should have been turned over to Carty's defense team but suggested the actions did not rise to the level necessary to justify a new trial for Carty.¹³¹ Even though courts have now ruled that both Harris

123. See Olsen, *Prosecutors Accused of Hiding Evidence*, *supra* note 97.

124. *Id.* The article includes a link to the 2014 affidavit of Charles Mathis. *Id.*

125. Lise Olsen, *DEA Agent, Former Eyewitness Allege Prosecutorial Misconduct in Linda Carty Murder Case*, HOUS. CHRON. (Feb. 14, 2015, 10:53 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/DEA-agent-former-eyewitness-allege-prosecutorial-6080417.php>.

126. *See id.*

127. *See id.*

128. See Olsen, *Prosecutors Accused of Hiding Evidence*, *supra* note 97.

129. *See id.*

130. *See id.*

131. See Graczyk, *supra* note 118.

County prosecutors and defense attorneys erred in her case, Carty remains on death row.¹³²

IV. THE DEATH PENALTY PACE HAS SLOWED—BUT APPEALS KEEP COMING

The pace of death penalty prosecutions slowed dramatically in Harris County in 2005 when Texas became one of the last of the nation's thirty-seven death penalty states to approve the option of life without parole for capital murder cases.¹³³ Governor Rick Perry said when he signed the law in June 2005, "I believe this bill will improve our criminal justice system because it gives jurors a new option to protect the public with the certainty a convicted killer will never roam our streets again."¹³⁴

Harris County jurors and prosecutors subsequently have condemned fewer convicted killers to death compared to previous decades. In fact, the most recent death sentence in Harris County was handed down in 2014, four years ago.¹³⁵ Harris County prosecutors all have said race does not play a role in charging decisions.¹³⁶ But all of those newly-sentenced to death from 2005 to 2014 were African American or Hispanic offenders.¹³⁷

In the last decade, a philosophically diverse group of Harris County District Attorneys has been weighing death penalty charging decisions and has altered the death penalty machinery. Republican Reformer Pat Lykos was elected to succeed Rosenthal, though she served only a two-year term before voters chose former judge and ex-prosecutor Mike Anderson, who promised a return to a hardline approach as District Attorney.¹³⁸

132. Michael Graczyk, *Court Rejects Appeal From British Woman on Texas Death Row*, HOUS. CHRON. (Feb. 7, 2018), <https://www.houstonchronicle.com/news/texas/article/Court-rejects-appeal-from-British-woman-on-Texas-12558740.php>.

133. See TEX. DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/texas-1> [<https://perma.cc/36J5-H4WG>] (last visited Dec. 23, 2017).

134. *Law Allows Jury to Give Life Without Parole*, L.A. TIMES (June 18, 2005), <http://articles.latimes.com/2005/jun/18/nation/na-briefs18.3>.

135. See *Executions By County*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions-county> [<https://perma.cc/P39C-595X>] (last visited Mar. 1, 2018).

136. E.g., Brian Rogers, *Harris County Stands Out for Death Penalty Cases, Study Finds*, HOUS. CHRON. (Apr. 26, 2018), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-stands-out-for-death-penalty-cases-9187154.php> (offering an example of a Harris County prosecutor who claims race does not factor into decisions to seek the death penalty).

137. See *Death Row Information: Offenders on Death Row*, TEX. DEP'T OF CRIM. JUST., http://www.tdcj.state.tx.us/death_row?dr_offenders_on_dr.html (last visited Dec. 29, 2017).

138. See Brandi Grisson, *Pat Lykos: The TT Interview*, TEX. TRIB. (Aug. 27, 2010, 5:00 AM), <https://www.texastribune.org/2010/08/27/an-interview-with-harris-county-da-pat-lykos/>; Richard Connelly, *Pat Lykos's Loss Brings Joy to Lots of Ex-Prosecutors*, HOUS.

However, Anderson got sick and died while in office and then was replaced by his wife, Devon Anderson.¹³⁹ Thus, it was Devon Anderson, a former Harris County prosecutor herself, who inherited the decision of what to do about Brown, the death row inmate who had claimed innocence and won an appeal based on prosecutorial misconduct.¹⁴⁰ She decided not to retry him.¹⁴¹

Anderson was defeated in the November 2016 election by the county's first female Democrat District Attorney, Kim Ogg.¹⁴² Before she took charge, Ogg declared she wanted to change the culture of the office and laid off or encouraged dozens of prosecutors to retire, including Goodhart and Spence.¹⁴³ During Ogg's short time, she has already inherited decisions about what to do regarding appeals that spotlight problems with the county's tradition of high-volume defense or hardline prosecution.¹⁴⁴

In 2017, the United States Supreme Court overturned two Harris County death sentences, including the 1997 death sentence of Duane Buck.¹⁴⁵ Buck had been sentenced to death in an atmosphere charged with racism because his appointed defense attorney, Guerinot, had invited a psychologist, Walter Quijano, to testify in Buck's sentencing. Quijano, who was later discredited for giving racist testimony as a prosecution witness in other capital cases, told the jury that Buck, as a black man, was inherently more dangerous than a white defendant.¹⁴⁶

PRESS (May 30, 2012, 12:00 PM), <http://www.houstonpress.com/news/pat-lykoss-loss-brings-joy-to-lots-of-ex-prosecutors-6733012> [<https://perma.cc/28S5-X3ZG>].

139. Jeremy Heallen, *Anderson to Fill Late Husband's Role as Harris County DA*, LAW360 (Sept. 24, 2013, 8:24 PM), <https://www.law360.com/articles/475309> [<https://perma.cc/LB2L-7ANJ>].

140. Phil Archer, *Death Row Inmate Released from Prison*, CLICK2HOUSTON.COM (June 9, 2016, 6:21 PM), https://www.click2houston.com/news/death-row-inmate-released-from-prison_20151123142559699.

141. *Id.*

142. *Ogg's Historic Win Gives Her Mandate to Protect Victims*, ABC13 NEWS.COM (Nov. 9, 2016), <http://abc13.com/politics/oggs-historic-win-gives-her-mandate-to-protect-victims/1597345/>.

143. See Brian Rogers, *Shake-up at the Courthouse: Incoming DA Ogg Hands Pink Slips to 37 Top Prosecutors*, HOUS. CHRON. (Dec. 16, 2016, 9:12 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Shake-up-at-the-courthouse-Incoming-DA-Ogg-hands-10802264.php>.

144. See, e.g., Jolie McCullough, *Prosecutor Asks for Current Medical Standards in Death Penalty Evaluations*, TEX. TRIB. (Nov. 3, 2017, 12:00 AM), <https://www.texastribune.org/2017/11/03/death-penalty-bobby-moore-kim-ogg/> (discussing a case of an intellectually disabled man on death row); Meagan Flynn, *What You Can Expect to See Under Kim Ogg as Harris County District Attorney*, HOUS. PRESS (Nov. 10, 2016, 7:00 AM), <http://www.houstonpress.com/news/what-you-can-expect-to-see-under-kim-ogg-as-harris-county-district-attorney-8935097> [<https://perma.cc/DGR4-Y4E4>] (discussing the power Ogg will wield in Harris County).

145. *Buck v. Davis*, 137 S. Ct. 759, 780 (2017).

146. *Id.* at 775–76; see Ray Paternoster, *Racial Disparity in the Case of Duane Edward*

Buck's appeal generated national attention. But back in Harris County, the decision about whether to again seek a death sentence was not clear-cut. His victims too were African-American and some of them wanted Buck to be executed. After a night of alcohol use and arguing, Buck entered his girlfriend's home with a gun and shot three people.¹⁴⁷ He killed his girlfriend, Debra Gardner, along with her friend Kenneth Butler as Gardner's daughter plead for her life. Buck's own step-sister, Phyllis Taylor, who was also shot, survived.¹⁴⁸ The surviving victims and victims' families were divided about the death sentence.¹⁴⁹ Ogg engineered a plea deal that ensured Buck could never be released from prison but declined to seek death. "[A] Harris County jury would likely not return another death penalty conviction in a case that has forever been tainted by the indelible specter of race," she said.¹⁵⁰

Buck was one of two Harris County death sentences that were overturned by the United States Supreme Court as unconstitutional in 2017.¹⁵¹ In its other decision, the United States Supreme Court found that the Texas Court of Criminal Appeals had set a standard for determining intellectual disability that was too limited to protect constitutional rights. The Texas Court of Criminal Appeals had created its own set of factors to determine intellectual disability—likening defendants who could win relief to Lennie, the feeble-minded character depicted in the novel in *Of Mice and Men*.¹⁵² The Supreme Court decision could

Buck, LEGIS. REFERENCE LIBR. OF TEX. (Dec. 19, 2012), <http://www.lrl.state.tx.us/scanned/archive/2012/20618.pdf>.

147. *Buck*, 137 S. Ct. at 767.

148. *Id.*

149. Compare Alex Arriaga, *Texas Death Row Inmate Duane Buck Has Sentence Reduced to Life after Supreme Court Orders Retrial*, TEX. TRIB. (Oct. 3, 2017, 5:00 PM), <https://www.texastribune.org/2017/10/03/high-profile-death-row-case-comes-end-guilty-plea/> (discussing Taylor advocating against Buck receiving the death penalty), with Accie Smith, *Smith: Justice Is Served in Case of Duane Buck*, HOUS. CHRON. (July 13, 2013, 2:50 PM), <http://www.chron.com/opinion/outlook/article/Smith-Justice-is-served-in-case-of-Duane-Buck-4663725.php> (showing Gardner's sister feels no injustice occurred during Buck's original trial).

150. Arriaga, *supra* note 149.

151. See TEXAS COALITION TO ABOLISH THE DEATH PENALTY, TEXAS DEATH PENALTY DEVELOPMENTS IN 2017: THE YEAR IN REVIEW (2017), <http://tcadp.org/wp-content/uploads/2017/12/Texas-Death-Penalty-Developments-in-2017-Year-in-Review.pdf> [<https://perma.cc/2X78-PYED>].

152. See *Moore v. Texas*, 137 S. Ct. 1039, 1044, 1053 (2017); Adam Liptak, *Supreme Court to Consider Legal Standard Drawn from 'Of Mice and Men'*, N.Y. TIMES (Aug. 22, 2016), <https://www.nytimes.com/2016/08/23/us/politics/supreme-court-to-consider-legal-standard-drawn-from-of-mice-and-men.html>; *Ex Parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004) (citing JOHN STEINBECK, *OF MICE AND MEN* (1937) ("Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills [be exempted from the death penalty].")).

set off a review of a string of cases in Harris County and elsewhere across Texas about whether evidence of intellectual disability had been overlooked or was considered insufficient in other death penalty cases because of the Texas Court of Criminal Appeals' so-called Briseno factors.¹⁵³

Even before that 2017 decision, the Texas Court of Criminal Appeals itself had found problems with a Harris County death row case in which prosecutors, defense attorneys, and the trial judge did not find or consider evidence about the intellectual disabilities of a Hurricane Katrina evacuee named Roosevelt Smith before Smith was sentenced to death.¹⁵⁴ Smith, and two other Katrina evacuees from Louisiana were arrested and accused of the strangulation of seventy-seven-year-old Betty Blair in 2005.¹⁵⁵ Blair, a Pasadena church worker, had been volunteering to help evacuees and had hired them to do odd jobs around her home.¹⁵⁶

It was clear the three had robbed and murdered Blair; they were caught at a toll booth in her 2000 Buick only hours after the killing.¹⁵⁷ Under the Texas law of parties, all three could have been charged with capital murder and could have faced a potential death sentence.¹⁵⁸

Smith was the eldest—a huge man who had suffered brain damage after being beaten as a child.¹⁵⁹ His accomplices, a teenaged couple, cut deals to testify against him; he alone was sentenced to death.¹⁶⁰ At the time of the 2007 trial, Smith's

153. See Rogers, *Texas Attorneys Brace for New Death Penalty Appeals*, *supra* note 26.

154. *Ex parte* Smith, No. AP-76,906, 2012 WL 5450895, at *1 (Tex. Crim. App. Apr. 10, 2012).

155. Annie Marie Kilday, *Louisiana Man Gets Death in Church Worker's Murder*, HOUS. CHRON. (Oct. 25, 2007, 5:30 AM), <http://www.chron.com/news/houston-texas/article/Louisiana-man-gets-death-in-church-worker-s-murder-1835526.php>.

156. *Id.*

157. *Id.*

158. See TEX. PENAL CODE § 7.02 (West 2017) (providing the rule more commonly known as Texas's *law of parties* which allows a person to be criminally responsible for an offense committed by the conduct of another).

159. See State's Proposed Findings of Fact and Conclusions of Law, Ex. 1 at 3, 7, *Ex parte* Smith, No. 1045419-A (263d Dist. Ct. Harris Cty. Apr. 10, 2012) (containing a description of abuse suffered as a child).

160. Brian Rogers, *Plea Deal Spares Life of Elderly Pasadena Woman's Killer: Beaumont Man Is the Second Hurricane Evacuee Convicted in the Case*, HOUS. CHRON. (Jan. 27, 2009, 6:30 AM), <https://www.chron.com/neighborhood/pasadena-news/article/Plea-spare-life-of-elderly-Pasadena-woman-s-1735116.php> (noting that Jimmy Hoang Le pleaded guilty to the murder of Betty Blair in exchange for life without parole, and that his girlfriend Stephanie Jacobo offered to also testify against Le); see Judgment of Conviction by Court, Waiver of Jury Trial, *Texas v. Le*, No. 1045418 (263d Dist. Ct. Harris Cty. Jan. 27, 2009) (noting that Jimmy Le pled guilty in exchange for life without parole); Judgment of Conviction, Waiver of Jury Trial, *Texas v. Jacobo*, No. 1198157 (263d Dist.

attorney, Gerald Bourque, described Smith as “a vagabond,” who had been physically and sexually abused by the adults in his family at age six.¹⁶¹ “This kid never had a chance. The problem is, when he’s 43, you can’t see him as a 6-year-old kid crying for help,”¹⁶² Bourque said. However, Smith’s first defense attorneys did not present school records or expert testimony about Smith’s intellectual disability, possibly because they had trouble finding documents and witnesses after Hurricane Katrina.¹⁶³ Such evidence could have been crucial to sparing his life.

After his conviction, his subsequent lawyers eventually obtained that proof. But, it would take years before the courts would commute his death sentence—again his court-appointed defense lawyers did not seem to have enough time or resources to work the case, records show.¹⁶⁴ Initially, Smith’s appeal was assigned to one of Harris County’s overburdened defense attorneys who blew deadline after deadline and was chastised in this court of appeals decision in August 2008:¹⁶⁵

Appellant’s brief was originally due on February 6, 2008. On February 14, 2008, more than a week after the day appellant’s brief was due, appellant’s counsel filed a motion to extend the filing date of the brief. This Court [Texas Court of Criminal Appeals] granted an extension to July 7, 2008, with a warning that no further extensions would be entertained. On July 10, 2008, again after the date his brief was due, counsel filed a motion to abate the appeal for the trial court to file findings and conclusions. This Court denied the motion the same day. Counsel did not attempt to file an incomplete brief or another motion for extension at that time. Instead, he waited yet another three-and-a-half weeks until August 4, 2008, to file his motion to extend the filing deadline of appellant’s already late brief. In a separate order issued this day, appellant’s counsel has been ordered to show cause for his failure to timely file a brief, or be held in contempt.¹⁶⁶

Eventually, other attorneys assembled experts and evidence sufficient to convince the Texas Court of Criminal Appeals of

Ct. Harris Cty. Apr. 29, 2010) (noting Stephanie Jacobo pled guilty in exchange for life in prison).

161. Kilday, *supra* note 156.

162. *Id.*

163. State’s Proposed Findings of Fact & Conclusions of Law, *Ex Parte* Smith, No. 1045419-A (263d Dist. Ct., Harris County, Tex. Apr. 12, 2012).

164. *See* Smith v. Texas, No. AP-75,793 (Tex. Crim. App. Aug. 11, 2008).

165. *See Id.*

166. *Id.*

Smith's substantial intellectual disability.¹⁶⁷ A state-appointed psychologist also separately determined that Smith was impaired.¹⁶⁸ The Texas Court of Criminal Appeals overturned Smith's sentence in November 2012.¹⁶⁹

Then in March 2017, the United States Supreme Court struck down another Harris County man's death sentence in a broader ruling that found Texas courts that had relied on the Texas Court of Criminal Appeals' *Briseno* factors were not properly considering evidence of intellectual disability.¹⁷⁰

More Harris County death sentences are expected to be challenged based on that U.S. Supreme Court decision. Joshua Reiss, head of the Post-Conviction Writs Division at the Harris County District Attorney's office, told the *Houston Chronicle* he'd been notified that at least three inmates planned to appeal under the ruling. Defense attorneys estimated eight to twelve other Harris County death row inmates could win relief too: "If there's one case that would be affected by this, I'd be thrilled," said defense attorney Pat McCann. "And I'm pretty sure there's a dozen."¹⁷¹

One of the cases that could be affected is the most recent death sentence issued in Harris County. Harlem Lewis, now twenty-six, landed on death row in 2014 for gunning down Bellaire Police Officer Jimmie Norman and Good Samaritan Terry Taylor after a police chase.¹⁷² Lewis testified in his own defense that he was scared when he was chased in 2012 and shot both men after they struggled to get him out of his car.¹⁷³ But his Harris County defense attorneys did not raise intellectual disability issues in his trial.¹⁷⁴ Other attorneys now say they plan to raise that defense on appeal.

The Harris County death penalty machine seems to be entering a decidedly new phase. No other inmates have been sentenced to death in Harris County since 2014, though a backlog of pending cases remains under review. It seems

167. See State's Proposed Findings of Fact and Conclusions of Law, *Ex parte* Smith, No. 1045419-A (263d Dist. Ct. Harris Cty. Apr. 10, 2012) (showing State's expert found Smith to be mentally retarded). See also *Ex parte* Smith, No. AP-76,906, 2012 WL 5450895, at *1 (Tex. Crim. App. Apr. 10, 2012) (holding that Smith's sentence be reformed to life without parole).

168. *Ex parte* Smith, 2012 WL 5450895, at *1.

169. *Id.*

170. *Moore v. Texas*, 137 S. Ct. 1030, 1044, 1053 (2017).

171. *Id.*

172. *Lewis v. State*, No. AP-77,045, 2017 WL 1493489, at *1, *8 (Tex. Crim. App. Apr. 26, 2017) (affirming the trial court death sentence).

173. *Id.* at *5.

174. *Rogers, Texas Attorneys Brace for New Death Penalty Appeals*, *supra* note 26.

possible—or even likely—that in the next few years the number of convicts leaving death row because of successful appeals could continue to exceed the number of new death sentences. Plenty of Harris County inmates remain on death row—but none were executed in 2017. And appeals continue to raise more pointed questions about race, past prosecutorial standards, overburdened defense attorneys’ errors, and a failure to identify defendants who are intellectually disabled and illegible for the death penalty.¹⁷⁵

175. See, e.g., Jon B. Gould & Kenneth Sebastian Leon, *A Culture that Is Hard to Defend: Extralegal Factors in Federal Death Penalty Cases*, 107 J. CRIM. L. & CRIMINOLOGY 643, 675, 686 (2017) (explaining causes of concern for death penalty outcomes); See TEXAS DEATH PENALTY DEVELOPMENTS IN 2017, *supra* note 151 (offering examples of Texas cases in which such concerning issues were raised).