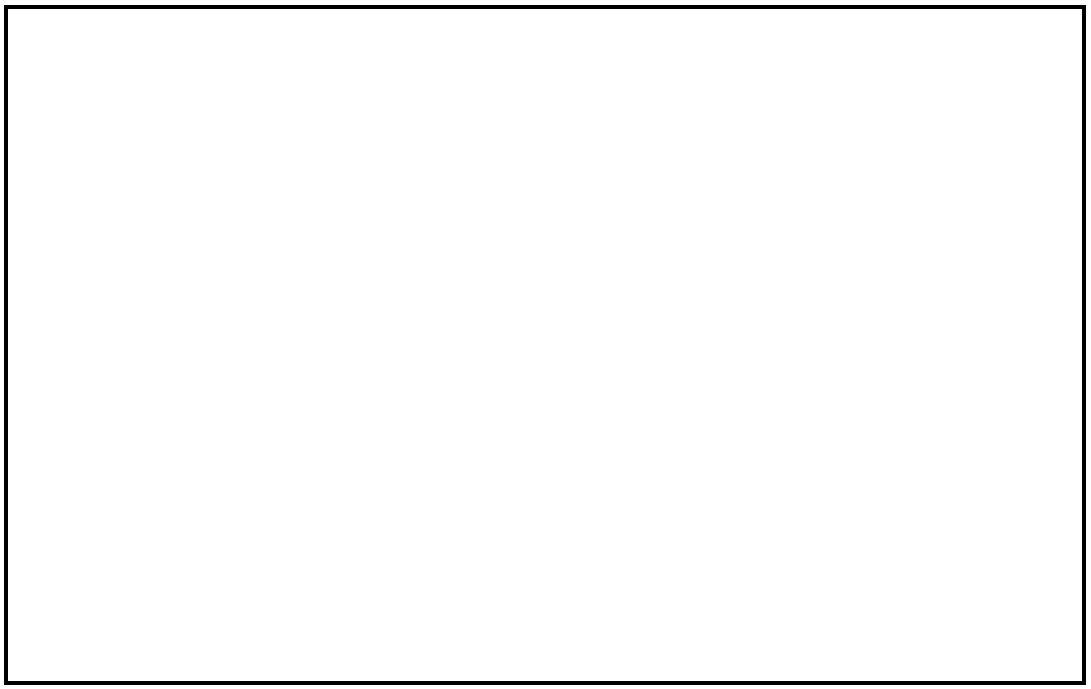
THE DEATH PENALTY IN TEXAS

Due Process and Equal Justice . . .
... or Rush to Execution?



THE SEVENTH ANNUAL REPORT
ON THE STATE OF HUMAN RIGHTS IN TEXAS
BY
THE TEXAS CIVIL RIGHTS PROJECT

SEPTEMBER 2000

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The Texas Civil Rights Project seeks to promote racial, economic, and social justice through education and litigation.

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INTRODUCTION

Every year the Texas Civil Rights Project issues a report on the status of human rights in Texas. This year's report on capital punishment originates because of the attention the nation has focused this year on the death penalty generally, and often on its application in Texas.

Judges, columnists, politicians, journalists, scholars, religious leaders, and people from all walks of life have expressed grave concern regarding the death penalty and how it is applied by the State of Texas. To be sure, some of those persons personally, or their organizations, oppose the death penalty in general. However, the issue of how the death penalty is applied in Texas does not turn on whether one believes in the death penalty or not, but, rather, on whether a person who believes in the death penalty also believes that the state should not exact the ultimate punishment without being legally and morally certain that the person whom it seeks to kill is actually guilty of the crime involved.

Governor George Ryan of Illinois is an example. Although a strong proponent of the death penalty, he has issued a moratorium on its application in the State of Illinois because of substantial questions raised there about the fairness and accuracy of its use -- many of the same questions raised about the system here in Texas. Ryan calls it the "ultimate nightmare" that the state would actually execute an innocent person.

The attention paid to the Texas capital punishment scheme has focused on one issue at a time, sometimes two issues. But not all issues together. This report is different because it presents an overall view of the of capital punishment system in Texas and focuses on six problem areas, each of which in and of itself can, and too often does, cause a malfunction of the Texas death penalty, but, when taken together with yet another aspect of the system, increases the probability of wrongful execution by the state.

This report refers to these six areas where the probability of error and the probability of wrongful execution grow dramatically, and exponentially, as "breaks" in the chain of due process.

Thus, in Texas, we end up with a situation that seems designed to facilitate the prosecution and execution of people whom the prosecutors think are guilty, or want to be guilty, without giving those persons, who are typically poor, the opportunity of sufficient due process to protect themselves.

We see a grossly flawed system that appoints attorneys who are often incompetent to represent poor people. Judges cannot persuade competent and skilled practitioners to accept cases because they pay too little and require the competent attorney effectively to work at a loss and lose business. This is the first "break" in the chain of due process.

The second "break" is the unrestricted discretion of the district attorney as to for whom to seek the death penalty. The prosecutor has unchecked discretion whether to charge a person with capital murder or not. The question becomes whether the ability of an accused person to hire a respected, competent attorney has an impact on the prosecutor's decision to seek the death penalty, and, of course, whether more subtle issues of poverty and racism enter into the picture.

The third "break" comes in the qualification process of jurors. Jurors who express reservations about the death penalty are excluded from jury service. In this day and age, in which the majority of Americans believe that innocent people have been executed by mistake, a potential juror who shares the same reservation or question, will not be chosen. The same is true of a potential juror who may believe that the capital punishment system might be skewed against somebody because of race or economic status.

The result is a jury that does not reflect a cross section of the community, as required by the federal and Texas Constitutions, but only a cross section of the death penalty believing community. It thus is often the case that a potential African American juror, who believes in the death penalty but has reservations about its fairness, would be excluded from the jury because she does not pronounce a sufficiently strong belief in capital punishment. The jury thus loses the benefit of her perspective, which is supposed to be the genius of the American jury system.

The fourth "break" is the sentencing process itself. Juries, when given an option of life without parole, would be significantly less likely to assess death against a convicted individual. Yet, powerful district attorneys, who campaign on their death penalty records, have long opposed this legislative change, with great success.

The next "break" in the chain of due process is the entire appellate process. Over the years, federal and state courts, Congress, and the Texas legislature have moved to make appeals significantly more difficult and problematic. They have come to focus on procedure, rather than the search for truth -- even when human life is at stake. They have done this, even though it appears from the studies that the number of people released because of wrongful conviction is happening at a greater rate than before. Thus, the question arises why, when we are finding greater ways of identifying actual innocence, most notably through DNA testing, do the courts and politicians seem driven toward quicker and more reckless executions than seeking the truth.

These burdensome, if not impossible, procedures have dramatically restricted the ability to detect innocence. Prior to new laws and court decisions, for example, the Court of Criminal Appeals, Texas' highest criminal appellate court, reversed about one-third of all death punishments. Since 1995, however, the Court has only granted eight new trials out of 278 capital punishment convictions (3%) -- one of the lowest rates in the country. Nor how can it be that, in the country as a whole two out of three death penalties are reversed by the courts, but in Texas the Court of Appeals hardly ever reverses a single case?

This underlines rather starkly the quantum of error that exists in death penalty procedures, but ever shrinking due process protections -- which, as Governor George W. Bush has pointed out, albeit indirectly, are more real in procedure in substance. The frightening truth of the matter is that Texas is at greater risk than at anytime since it resumed executions in 1982 of killing innocent people.

The effect of procedural changes has been to tighten the time within which to move the convicted person through the system to death. Not only are the procedures very cumbersome, but they make it impossible to examine claims of actual, factual innocence. The appeals system has become a slight of hand, giving the appearance of due process, but in reality, an Orwellian way to shortchange it.

The final "break" in the due process chain is with the Board of Pardons and Paroles, which the Texas Constitution establishes to prevent miscarriages of justice and to adjust sentences as need be. Board members vote by fax or telephone after receiving and supposedly reviewing a large stack of papers about a case. They do not meet to discuss the case, and no mechanism is available to present evidence, or conduct any semblance of

due process to examine claims of innocence -- not matter how compelling the evidence. It is a process is so flawed that it functions as nothing more than extending a $80,000 salary to political appointees to shuffle paper and vote according to the political whims of the time.

All these weak links together increase the probability of a breakdown of due process. The Texas death punishment system is not a question of a possible break at one juncture, but a probable break at two or more critical junctures. If the State of Texas is going to continue to take the lives of people, then it needs to repair the system such that fair trials are assured without difference because of economic status, that jurors actually represent a cross section of the community, that there really is due process in the appellate system, and that the Board of Pardons and Parole takes seriously its job assuring due process in substance and not just with the trappings of procedure.

This report pulls together in one place all the studies that exist with respect to the Texas capital punishment system, as well as various studies that deal with the administration of capital punishment overall in the nation. This report assembles all the data and information that appears in different places about Texas into one source. No report about Texas has done this so far. Doing this gives emphasis to the fact that the problems that plague the administration of the death penalty are even greater when all facets of the capital punishment system are seen together as a totality. Just as this report is comprehensive, so too are our recommendations.

To be sure, there is original work in this report, as well. People who worked on this project themselves independently verified empirically the data from other sources to assure its accuracy, and they conducted numerous interviews with officials and individuals at all rungs of the criminal justice "hierarchy" to assure themselves as to how the death penalty system actually functions in Texas.

We are grateful to the following individuals, who dedicated many hours in preparing this report:

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Mariela Olivares
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All could have found lucrative employment during the summer months, but chose to work with us out of their own sense of justice. They impressed us with their commitment and hard work.

We are also appreciative of the invaluable assistance of Andrea Gunn of our legal staff.

We hope this report, and the recommendations it makes, will enhance public discussion on the extensive use of the death penalty in Texas, and help cause the Governor, Legislature, and the state's courts to greatly strengthen due process and equal protection in Texas -- and, in the meanwhile, following the requests of the state's religious leaders, impose a moratorium on the death penalty in Texas.

As of September 8, 2000, 445 persons were on death row in Texas, and 231 had been executed by the state since December 7, 1982, when capital punishment resumed. As people of conscience and believers in

democracy, we can ill afford that any person be executed for a crime of which he or she is actually innocent.

James C. Harrington

RECOMMENDATIONS

Based on the findings in this report and the considerable amount of investigation that has occurred with respect to the Texas capital punishment system, the Texas Civil Rights Project makes the following twenty-four recommendations and suggests strongly that they should each be adopted as quickly as possible to assure that no person, who is innocent of the crime for which he or she is convicted, is wrongly executed by the State of Texas.

A. AS TO A MORATORIUM ON THE DEATH PENALTY IN TEXAS

Following the example of Governor George Ryan of Illinois, who imposed a moratorium in that state when too many questions surfaced about the integrity of the capital punishment system in Illinois, lest a single innocent person by executed by mistake or caprice, Texas should do the same. There is no downside to waiting while the Texas death penalty system is evaluated and, as need be, corrected. In fact, assuring that no innocent person is wrongly executed is a moral imperative. Accordingly:

1. Moratorium. Governor Bush should call for a moratorium on executions in Texas, and ask the Board of Pardons and Parole to initiate a moratorium, pending completion of the reviews called for in the two following provisions.

2. Commission to review convictions. The Governor, Legislature, Supreme Court, Court of Criminal Appeals, and State Bar of Texas should appoint a twelve-person panel to review the process by which each person on death row was convicted and sentenced to death, and make appropriate recommendations as to whether that the death penalty for that person should be stayed pending a full due process hearing. The commission should also take into account systemic racial, ethnic, and economic disparities that emerge. A similar commission should be appointed every five years.

3. Commission to review capital punishment system. The Governor, Legislature, Supreme Court, Court of Criminal Appeals, and State Bar of Texas should appoint a separate twelve-person panel to take a comprehensive look at the Texas capital punishment system and make recommendations for legislation to improve its functioning and delivery of due process in matters of: appointment of counsel, prosecutorial discretion, jury selection, sentencing phase, appellate and habeas corpus mechanisms, and operation of the Board of Pardons and Paroles. The commission should also take into account systemic racial, ethnic, and economic disparities that emerge. The Legislature should pass, and the Governor sign, the recommendations into law during the 2001 Legislative Session. A similar commission should be appointed every five years.

B. AS TO APPOINTING COUNSEL IN DEATH PENALTY TRIALS, APPEALS, AND HABEAS CORPUS PROCEDURES

The greatest potential source of error and greatest risk of wrongful execution occurs when incompetent counsel are appointed to represent indigent persons accused of capital punishment crimes. Because of the risk of loss of life to capital punishment, a democracy can only afford that highly competent counsel be appointed. Accordingly:

1. Qualifications of appointed counsel. The courts, by practice, and the Legislature, by statute, should adopt the American Bar Association (ABA) standards for appointing counsel for persons on death row, including:

    a. Being an experienced and active trial practitioner with at least five years litigation experience in criminal defense;

    b. Prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases that were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or, alternatively, of the nine jury trials, at least one was a murder of aggravated murder trial and an additional five were felony jury trials; and,

    c. Have attended and successfully completed, within one year of appointment, a training or educational program on criminal advocacy that focused on the trial of cases in which the death penalty is sought.

2. Certification of appointed counsel. The State Bar of Texas shall certify and maintain a list of those attorneys who comply with the ABA standards, above.

3. Appointment of counsel process.

    a. Appointed counsel must be drawn from the list of certified attorneys, as above, maintained by the State Bar, according to a random selection system maintained by the State Bar.

    b. No attorney may be appointed who has a disciplinary proceeding pending with the State Bar. If a disciplinary proceeding is begun while representation is already underway, the court shall appoint another attorney to assist in the defense.

4. Compensation of appointed counsel.

    a. The Legislation should pass, and Governor sign, a bill requiring that counsel appointed in death penalty cases be compensated at the customary market rate for similarly qualified attorneys, discounted by no more than 15%.

b. The State Bar of Texas shall prepare the compensation schedule referred to in the previous paragraph, and update it yearly.

c. All fee applications and summaries of hours and work shall be filed in the public records of the case by attorneys seeking compensation.

5. Establishing death penalty resource centers for defense attorneys. Texas, by law, should also install an adequately funded capital defender system similar to the federally-funded Death Penalty Resource Centers established in 1988. The Centers, which lost federal funding in 1995, provided post-conviction reviews support to appointed counsel and volunteer defense lawyers with the advice and skill of experienced attorneys, trained in defending against death penalty prosecutions.

6. Allowing counties to establish independent public defender systems. The Legislature tried to rectify, in part, the court appointment system in 1999, when it passed Senate Bill 247 by State Senator Rodney Ellis. That would have allowed counties to band together to set up regional public defender offices that would employ full-time attorneys to handle indigent defense. The bill would have also allowed counties to install their own procedures for court appointments and take away this power from elected officials. This bill, unanimously passed by the Legislature, was vetoed by the Governor.

Texas needs the reforms proposed in the vetoed bill, and it should be passed and signed by the Governor in the 2001 Session of the Legislature.

C. AS TO THE DISCRETION OF PROSECUTORS TO SEEK THE DEATH PENALTY AND PROSECUTE CAPITAL PUNISHMENT CASES

1. Indemnification for erroneous prosecutions. Texas should pass a law requiring the State to reimburse any person, who is erroneously convicted and assigned the death penalty, that person's attorneys' fees and expenses of individuals who assist in setting aside capital punishment conviction .

2. Statutory damages for erroneous prosecutions. The State shall also pay, by law, a statutory amount of $3,000 for each month of erroneous confinement on death row.

3. Prosecutorial misconduct. If a district attorney deliberately hides exculpatory evidence or uses perjured testimony or tainted evidence, the State shall be entitled to reimbursement for expenses in Sections (1) and (2) above from the district attorney.

D. AS TO JURIES IN CAPITAL PUNISHMENT CASES

1. Life-without-parole as alternative to death penalty. Texas should enact a law allowing the jury to assess

life without parole as an alternative to the death penalty, and juries be instructed that life without parole means that parole would not be possible.

2. Jury participation. In order to assure that juries in death penalty cases reflect as closely as possible a cross-section of the community, as required by the Texas Constitution, the Legislature should pass, and the Governor sign, a law allowing citizens to serve on juries in capital punishment cases, even when they have reservations about the fair administration of capital punishment. unless a person expresses an opinion that he or she could never impose the death penalty. This would allow participation of jurors who do not by principle oppose capital punishment, but who have reservations about the fairness of its administration. The participation of such jurors in death penalty trials would help assure equitable application of capital punishment.

E. SENTENCING

1. Not using unadjudicated offenses. Texas should enact a law prohibiting a jury to hear and consider evidence of unadjudicated offenses at the sentencing phase of a capital punishment trial. Unadjudicated offenses are those for which there has not been a trial or final resolution. They are essentially unproven charges. Using unadjudicated offenses, or unproven charges, requires the defendant to litigate those, too, as part of the sentencing phase of a capital punishment case. These become almost "mini-trials." This process is very difficult to do and causes great prejudice. Texas is one of only six states that allow unadjudicated offenses at the sentencing phase of a capital case.

2. Separate jury of sentencing phase of trial. The Governor, Legislature, Texas Supreme Court, and the State Bar of Texas should appoint a twelve-person commission to evaluate whether it would enhance due process and protect against wrongful execution if separate juries were (1) to decide guilt or innocence and (2) to decide whether to assign the death penalty, respectively. The Legislature should adopt, and the Governor sign, a law enacting the commission's recommendations.

F. AS TO STATE APPELLATE AND HABEAS CORPUS PROCEDURES

1. Repeal of current law. Texas Code of Criminal Procedure Article 11.071, which governs current state habeas corpus procedures should be repealed.

2. Re-establish former law. Texas should restore the habeas corpus system in Texas to the manner in which it existed prior to Article 11.071, above.

3. Appointment of separate counsel for appeals and habeas corpus. The Legislature and courts should assure that separate and different counsel are appointed to an individual's appeal from the criminal trial and the convicted person's habeas corpus process.

G. AS TO THE BOARD OF PARDONS AND PAROLES

The Board of Pardons and Paroles currently functions as a rubber stamp functionary of the state's death penalty machinery. It provides no check on the system's inexorable move toward execution. The philosophy and procedures of the Board must change so that Board members effectively aspire to correct errors, do justice, and assure that the Board can guarantee with moral certainty that the person to be executed is actually guilty of the crime for which he or she was convicted. In this last review before the penalty of death is exacted, the Board should give preference to fact and substance over form and procedure. Accordingly:

1. DNA testing. The Board of Pardons and Paroles should establish a special process by which to administer DNA tests to prisoners who request them, and, during the period of testing, suspend the capital punishment process. DNA testing costs about $500. It is a small price worth paying to make sure that the people of Texas do not execute someone unless there is moral certainty of that person's guilt.

2. Administrative proceedings. Currently, Board members review clemency petitions by reading papers filed in the petition process and then voting on the petition by fax or telephone, without any procedures associated with contemporary concepts of due process. The Legislature should subject the Board's procedures to the standard administrative procedures required of virtually all other agencies in Texas. This process is the least a democracy should expect of an agency that has the final *fiat* over whether a person's life is taken.

H. AS TO EXECUTING MENTALLY-RETARDED PERSONS WHO COMMIT CAPITAL PUNISHMENT CRIMES

The Dallas Morning News has noted, with total accuracy, the connection between the Legislature's refusal to appropriate sufficient funds to provide proper care and medical attention for persons who have mental retardation and the probability and propensity that such persons will be swept into the Texas criminal justice system and perhaps even commit capital crimes they would not have otherwise committed. Moreover, executing someone with mental retardation is executing a person who lacks capacity to understand what he or she has done. That, in turn, defeats the purported purposes of the death penalty.
Accordingly:

1. Prohibition of execution. The Texas Legislature should pass, and the Governor sign, a law prohibiting the execution of persons with mental retardation, that is, persons who have an IQ less than 70.

2. Evaluation. The legislation should also establish a uniform and medically accepted method of evaluating mental retardation in criminal offenders.

I. AS TO EXECUTING THOSE WHO COMMIT CAPITAL CRIMES AS A JUVENILE

The Texas Legislature should enact, and the Governor sign, a law following international covenants that the death penalty should not be assigned to anyone for acts committed when that person was less than eighteen years old.

SECTION 1: HISTORY OF THE DEATH PENALTY IN TEXAS

Texas, in its various incarnations under six flags, has always had capital punishment. Although the method of execution has changed over the years, the death penalty has long been part of the Texas legal tradition. Texas, like many other states and countries, once made executions a public spectacle, with the hangman's rope drawing crowds of townspeople.

In 1923, Texas, like the rest of the former Confederacy, was struggling with illegal lynch mobs propelled by white racism, the rise of the Ku Klux Klan, and the desire to keep African Americans "in their place" after the abolition of slavery.[1] Too often, angry mobs meted out random "justice" by carrying out their own executions.

The Texas legislature eventually moved the state sanctioned killings out of the public eye and into the confines of the penitentiary in Huntsville.[2] Along with this change, the legislature replaced the noose with the electric chair as a more "humane" method of killing prisoners. On February 8, 1924, Texas inaugurated "Old Sparky," putting Charles Reynolds to death by electrical current.

These changes in Texas' capital punishment system came along with a countrywide increase, most notably in the South, in executions as the nation entered the Depression. This upward trend in executions was stayed with the country's entry into World War II. After the War, the decline was furthered by public aversion to the atrocities of the War and the burgeoning civil rights movement.[3] With the growing strength of the civil rights movement, public support for the death penalty reached its all time low in 1966: only 42% of the country favored state-sanctioned executions.[4] In fact, between 1948 and 1972, Texas itself averaged roughly about six executions, and three commutations, a year.

As opposition mounted, so too did calls for a moratorium, followed closely by challenges to the states' death penalty statutes in the nation's court systems. These challenges culminated in the 1972 Supreme Court decision *Furman v. Georgia*.[5] In a 5-4 vote, the Court held that death penalty laws, which allowed juries complete discretion in sentencing, violated the Eighth Amendment's prohibition on "cruel and unusual punishment" because they led to capricious and arbitrary sentencing. Two justices of the majority found the death penalty in and of itself a "cruel and unusual punishment" that should be banned in all situations.

Furman invalidated the statutes in 40 states and the sentences of 629 prisoners on the nation's death rows. Among the laws invalidated was that of Texas. Texas, in the wake *Furman*, like most of the states left without a death penalty, was quick to pass a new law in the months following the decision. This new law was again challenged, but, in 1976, in *Jurek v. Texas*,[6] the Supreme Court upheld the new Texas law because it had a provision for giving sentencing guidelines to juries in order to consider aggravating and mitigating circumstances when assigning the death penalty. The new law limited juries' unfettered discretion in condemning people to death.

With its revised death penalty law newly approved, Texas became the first state to use lethal injection. Charles Brooks was the first person after *Furman* to die in the United States by the needle when the State of Texas injected him with heart-stopping drugs in 1982.

State death penalty laws, including Texas', have continued to face constitutional challenges. In the 1986 case *Ford v. Wainwright*,[7] the United States Supreme Court again found a violation of the Eighth Amendment's prohibitions. This time the violation was in the form of executing mentally ill persons.

Then, in another case from Texas three years later, *Penry v. Lynaugh*,[8] the Supreme Court held that the execution of mentally-retarded offenders was not "cruel and unusual punishment" under the Eighth Amendment. In that same year, another Eighth Amendment challenge to a death penalty statute failed. The Supreme Court, in *Stanford v. Kentucky*,[9] allowed the execution of offenders who committed capital crimes at 16 years or older.

Although federal court challenges to the death penalty still continue, they are now really only possible on a case-by-case basis, according to the facts of the case. As far as systemic attacks with widely applicable effects, the federal court avenue has been exhausted.[10] The forum for changes in Texas and the rest of the country now rests in the hands of the state legislatures and state courts.

Crowds sometimes still gather at prison for an execution, and sometimes create a spectacle, but the needle and lethal drugs have replaced the noose and chair.

HISTORY OF THE DEATH PENALTY IN TEXAS

1. James Marquart, Sheldon Ekland-Olson, & Jonathan Sorenson, THE ROPE, THE CHAIR, AND THE NEEDLE 1 (1994).

2. *Id.*

3. *Id.* at ix.

4. http://www.essential.org/dpic .

5. 408 U.S. 238 (1972).

6. 428 U.S. 262 (1976).

7. 477 U.S. 399 (1986).

8. 492 U.S. 302 (1989).

9. 492 U.S. 361 (1989).

[10.] Interview with Jim Marcus, Texas Defender Services, in Houston, Tex. (July 3, 2000).

SECTION 2: EXECUTING THE INNOCENT -- THE ULTIMATE NIGHTMARE

> *Americans are justifiably concerned about the possibility that an innocent person may be executed. Capital punishment in the United States today provides no reliable safeguards against this danger. Errors can and have been made repeatedly in the trial of death penalty cases because of poor representation, racial prejudice, prosecutorial misconduct, or simply the presentation of erroneous evidence.*
>
> House Subcommittee on Civil and
> Constitutional Rights (Judiciary Committee)
> October 21, 1993

The possibility of executing an innocent person, described by Illinois Governor George Ryan as "the ultimate nightmare," is an alarmingly likely prospect in Texas. Even with the best of intentions, the criminal justice system makes errors. Poor representation, prosecutorial misconduct, racial bias, and even simple mistakes lead to erroneous convictions. And with record numbers of inmates filling death rows and severe restrictions placed on the appellate process, there is a real possibility that the mechanisms meant to catch erroneous convictions will break down even further. Following conviction, death row inmates face an uphill battle in convincing any tribunal that they are innocent. Once an execution occurs, the error is final.

> *This is not a perfect system. Yes, you are going to have mistakes. But with any system that's possible, and [the execution of an innocent person] is an acceptable risk.*
>
> Michael Bowers
> Former Georgia Attorney General

A 1993 report by the United States Congress House Subcommittee on Civil and Constitutional Rights, stated that "the most conclusive evidence that innocent people are condemned to death under modern death sentencing procedures comes from the *surprisingly large number* of people whose convictions have been overturned and who have been freed from death row" (emphasis added).[1] Since reinstating the death penalty, 86 death row inmates have been exonerated in the United States.[2] That amounts to one death row inmate freed for every seven who have been executed.[3] Since 1972, seven innocent people have been set free from Texas death row.[4]

The most alarming aspect of many of these cases is that the inmates' innocence was discovered *despite* the protections of the criminal justice system and only as a result of extraordinary efforts not generally available to death row defendants. Many of these innocence cases were discovered not through the normal appeals process, but rather as a result of new scientific techniques (most notably DNA), investigations by journalists and students, and the dedicated work of nonprofit organizations. Randall Dale Adams, for example, served twelve years on death row in Texas before filmmaker Errol Morris accidentally stumbled across his case and discovered evidence of his innocence. Similarly, Anthony Porter of Illinois was released just 50 hours before his scheduled execution because of the dedicated Northwestern University journalism students working on a class project. One of the students noted that they highlighted the ineffectiveness of the capital punishment system: "We were a bunch

of kids cutting classes. Don't tell me the system works because that isn't how it's supposed to work."[5]

These extralegal mechanisms are rarely available to death row inmates. Further, federal funding for death penalty resource centers, which once helped discover and vindicate several of the innocent people released from death row, has been completely withdrawn by Congress.

Although we have no way of knowing how many innocent people are currently on death row, the number of exonerated death row inmates suggests that more innocent people still remain incarcerated. As the Senate Subcommittee report noted, "[J]udging by past experience, a substantial number of death row inmates are indeed innocent and there is a high risk that some of them will be executed."[6]

Further, there is considerable evidence that some executed individuals were actually innocent. Researchers Michael Radelet and Hugo Adam Bedau found more than 400 wrongful convictions for capital offenses between 1900 and 1984, including at least 23 cases where innocent people were executed.[7] For these 23 innocent individuals, the trial and appellate processes did not catch the mistake; evidence proving their innocence was produced only years after their executions.

And there is reason to believe that the crisis of wrongful death penalty convictions has worsened. The Death Penalty Information Center reports that the annual average of innocent people released from death row has increased in recent year. Between 1973 and October 1993, there was an average of 2.5 convicted persons released. Since then, the average has increased to 4.8 individuals released per year, almost twice the previous pace.[8] Moreover, while the number of prisoners on death row is increasing, opportunities to appeal and to raise newly discovered evidence of innocence have decreased dramatically, leading to a greater likelihood of mistakes. Nothing exists to show that Texas is in any better situation than the rest of the country.

In Texas, the facts are as startling. Prior to 1995, for example, the Court of Criminal Appeals, the state's highest criminal appellate court, reversed about one-third of death punishments. Since 1995, the court and laws have become much more restrictive, and the court has only granted eight new trials out of 278 capital punishment convictions (3%) -- one of the lowest rates in the country. This underlines rather starkly the quantum of error that exists in Texas death penalty procedures, which is especially alarming, given ever shrinking due process protections for death penalty defendants.

> The country and Texas both share a belief, according to the polls, that the capital punishment system is such that innocent people very likely or in fact have been executed. In fact, according to a June Gallup Poll (included at the end of this report), 80% of the people believe that one or more people have been wrongly executed in the last five years. Moreover, 46% believe this has happened under the watch of Governor George W. Bush (26% dispute that, and 28% have no opinion). A June 2000 Scripps Howard Texas poll found that 57% of Texans believe that Texas has executed innocent inmates.

Texas recently has found itself in the position of having release convicted inmates because of DNA testing. If the state has erred at the non-capital level of the criminal justice system, what is to say it has not committed the ultimate error of wrongly executing someone?

STATE OF EXECUTION

In a massive study of the 131 executions occurring as of June 10, 2000, during Governor George W. Bush's tenure, the *Chicago Tribune* documented widespread and systemic flaws in Texas' criminal trials and appeals process:

- In 43 of the cases (33%), the defendant was represented by an attorney who had already been disbarred, would be disbarred or suspended in the future, or has otherwise been sanctioned. Several have been convicted of felonies, while courts have sent others to jail for contempt of court for their sheer incompetence.
- In one-third of the trials, defense attorneys presented no evidence or presented only one witness during the crucial sentencing phase of the trial.
- In 23 cases (18%), the prosecution relied on jailhouse informants or "snitches." These informants often fabricate or embellish their testimony in exchange for leniency or preferential treatment. For instance, in the case of David Wayne Stoker, the key witness was paid for his testimony and, on the day of his testimony, the district attorney dropped drug charges pending against him.
- A quarter of the cases included a psychiatrist proffering an opinion on the "future dangerousness" of the defendant. In many cases, the psychiatrist had not even interviewed or examined the defendant. One doctor, James Grigson, nicknamed "Dr. Death," testified in 16 cases where he claimed he could predict that a defendant would be dangerous in the future. Such predictions garnered him $150/hour from the state.
- At least 23 cases (18%) featured visual hair comparisons, a very unreliable form of evidence. One "expert" on visual hair comparison was temporarily released from a psychiatric ward to testify against a defendant; another "expert" pleaded no contest to multiple charges of falsifying and manufacturing evidence.
- The Court of Criminal Appeals upholds egregious constitutional violations. For instance, police coerced Cesar Fierro into confessing after police in Mexico held his parents captive and threatened to torture his stepfather. More than once, the court has upheld a conviction where the defendant's lawyer slept during trial. It also upheld the conviction and sentencing of Victor Saldano, who was sentenced to death after a psychiatrist testified he was more likely to commit future acts of violence because he is Hispanic. The United States Supreme Court recently ordered a new sentencing hearing in Saldano's case because of that evidence.
- Since 1995, the Court of Criminal Appeals, Texas' highest criminal appeals court, has affirmed 270 capital convictions while granting new trials only eight times (3%).

Sources: Steve Mills, Ken Armstrong, & Douglas Hold, "Flawed Trials Lead to Death Chamber: Bush Confident in System Rife with Problems" (part 1), CHICAGO TRIB., June 11, 2000; Steve Mills & Ken Armstrong, "Gatekeeper Court Keeps Gates Shut: Justices Prove Reluctant to Nullify Cases" (part 2), CHICAGO TRIB., June 12, 2000.

EXECUTING THE INNOCENT -- THE ULTIMATE NIGHTMARE

1. *Fatal Flaws: Innocence and the Death Penalty*, AMNESTY INTERNATIONAL, <http://www.amnesty.org-/ailib/aipub/1998/AMR/25106998.htm>, *citing Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions*, staff report of the Congressional Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, October 21, 1993 (Comm. Print 1994).

2. *Moratorium Bill Introduced in Senate*, MORATORIUM NEWS!, <http://www.quixote.org/ej/news9.html>.

3. *See* Alicia Montgomery, *Angels of Justice*, SALON.COM, <http://wwww.salon.com/news/feature/2000/-03/17/scheck/print.html>.

4. *Texas Criminal Defense Lawyers Association Calls Upon Governor George W. Bush to Impose a Moratorium on Executions in Texas*, http://www.tcdla.com/mockup/March%20press%release.htm.

5. Montgomery, *supra* note 3.

6. *A Total System Failure? The Government Responds*, FRONTLINE, <hoop://www.pbs.org/wgph/pages/-frontline/shows/case/failure>, citing *Assessing the Danger of Mistaken Executions, supra* note 1.

7. Hugo Adam Bedau & Michael Radelet, *In Spite of Innocence*, Northeastern University Press, 1992.

8. *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent,* DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/inn.html>.

9. *Kill the Death Penalty; U.S. Must Adopt Benchmark of a Civilized Society*, Editorial, PITTSBURGH-POST GAZETTE, November 23, 1999 at A18.

SECTION 3: PROBLEMATIC JUNCTURES IN THE ADMINISTRATION OF CAPITAL PUNISHMENT THAT INCREASE PROBABILITY OF WRONGFUL CONVICTION

> *I'm satisfied everybody who has been put to death in Texas has been granted full access to the law.*
>
> -- Governor George W. Bush

Unfortunately, Governor Bush could not be further from the truth. As this report shows, Texas' capital punishment system is fraught with problems. This section looks at six critical steps in a capital punishment prosecution where systemic missteps are taken or procedures devised that undermine due process and enhance the probability of wrongful execution.

The "Stages of A Capital Prosecution" chart that follows this section highlights critical steps in a capital punishment prosecution, from arrest through trial. At six junctures, the legal system often malfunctions and calls into question the quality of justice and moral certainty required before the state can take someone's life.

Texas eclipses all other states in putting inmates to death. However, this does not imply that Texas employs a near-perfect system in which all capital offenders have been "granted full access to the law," but, rather, it equates to a flawed streamlined system eager to alleviate court dockets and accomplish political agendas at the expense of a person's life. (Nor does it imply that the homicide rate is any lower in Texas because of the death penalty.[1])

The words of United States Supreme Court Justice Harry Blackmun ring as true today of Texas as they did on February 22, 1994:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and, despite the effort of the states and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.

Most capital cases do not provide the true adversary system needed to assure justice and moral certainty: "[o]n the one side there is the prosecution with all the investigative agencies of the state … [and] on the other side, a poor person facing the death penalty may be represented by a court-appointed lawyer who may be trying his or her first capital case and perhaps even his first criminal case."[2]

> Sometimes eyewitnesses make mistakes. Snitches tell lies. Confessions are coerced or fabricated. Racism trumps truth. Lab tests are rigged. Defense lawyers sleep.
>
> Jim Dwyer, Peter Neufeld & Barry Scheck, *Actual Innocence*

Generally, the most problematic stages of a criminal prosecution are (1) appointment of counsel, (2) prosecutorial discretion, (3) jury selection, (4) the sentencing phase of the trial, (5) the post-conviction process (appeals and habeas corpus), and (6) clemency.

At each of these stages, the capital punishment defendant faces the greatest chances of decisive and/or detrimental decision-making that may not actually further the outcome of justice or, worse, may jeopardize a just outcome altogether -- and lead to wrongful execution.

This report examines each stage in detail. The chart that follows shows the criminal justice steps in a death penalty prosecution and indicates the problematic areas.

PROBLEMATIC JUNCTURES IN CAPITAL PUNISHMENT

[1.] *See* Raymond Bonner & Ford Fessenden, *States With No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES, Sept. 22, 2000, at A1.

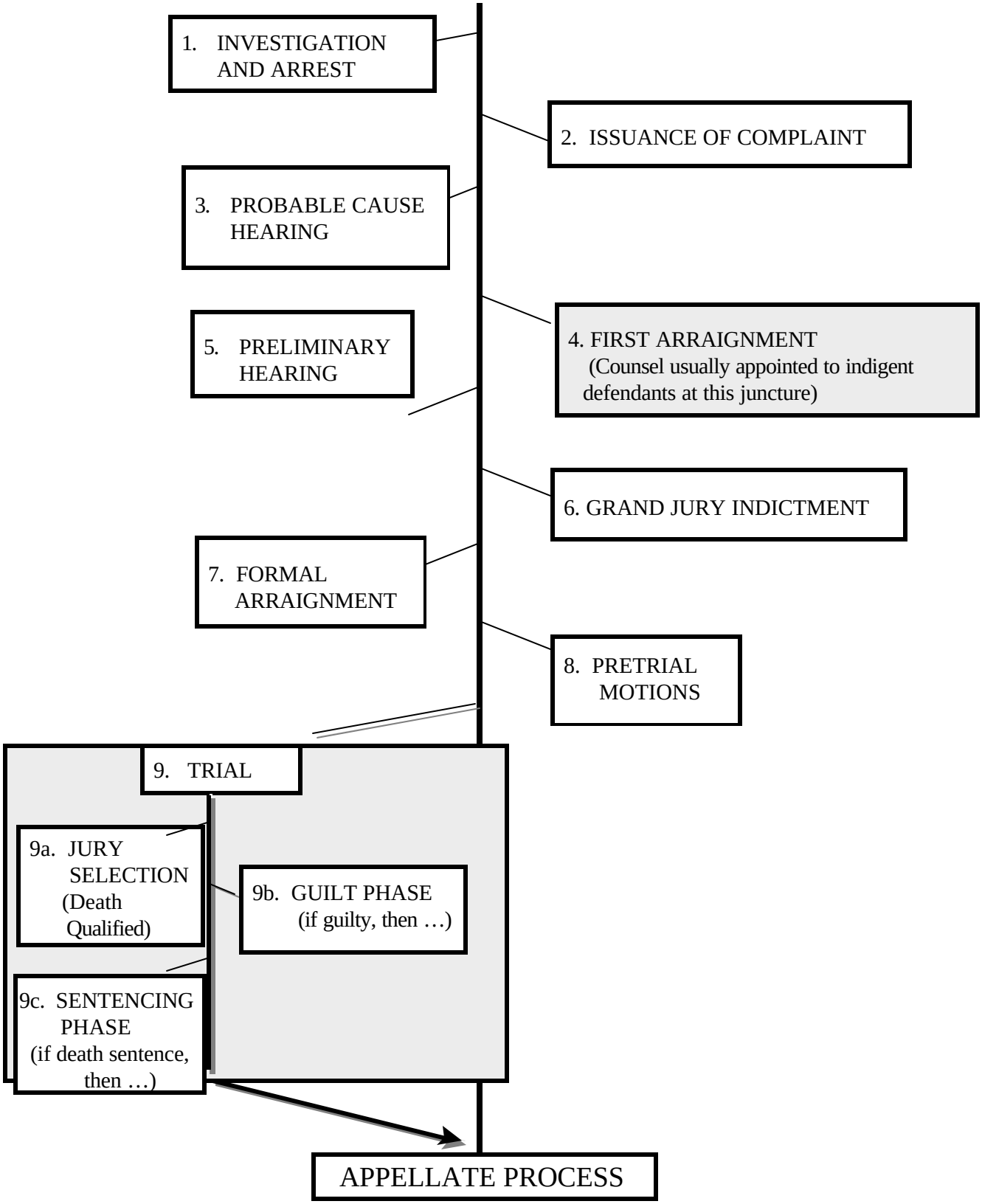
[2.] Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft On Crime," But Hard on the Bill of Rights*, 39 St. Louis U. L.J. 485, 486 (1995); _____, *Death in Texas ... not even the pretense*

of fairness, The Champion (July 1999).

STAGES OF A CAPITAL PROSECUTION

(SECTI ON 3: PROBLEMATIC JUNCTURES IN CAPITAL PUNISHMENT)

(problematic areas highlighted)



Randall Dale Adams
Convicted 1977; released 1989

Randall Dale Adams spent twelve years on death row for killing a police officer. He escaped execution by three days when a group of filmmakers discovered new evidence of his innocence.

The prosecution's key evidence was the testimony of David Harris, who claimed to be in the passenger seat when Adams shot the officer. In return for his testimony, prosecutors dropped all charges against Harris. Dr. James Grigson, a psychiatrist known as "Dr. Death" because of his frequent testimony in support of the death penalty, testified that Adams had a "sociopathic personality disorder" and "will kill again." While Adams sat on death row, a filmmaker began investigating his case. This investigation, profiled in the movie *The Thin Blue Line*, unearthed evidence that Harris killed the officer and framed Adams. Harris recanted and confessed.

The Texas Court of Criminal Appeals, overturning Adams's conviction, castigated the state for "suppressing evidence favorable to the accused, deceiving the trial court during the … trial, and knowingly using perjured testimony."

Source: *Randall Dale Adams*, <http://www.patrickcrusade.org/wrongful.htm>

Frederico Macías
Convicted 1984; released 1993

Frederico Macías, sentenced to death after his court-appointed attorney failed to provide an adequate defense, won his freedom when a large law firm dedicated its extensive resources to his case.

The prosecution's main evidence was the testimony of a man picked up as a suspect in the case, whose story changed several times in the course of the investigation and trial. The court provided Macías' trial attorney only $500 for investigation and expert witness costs. Following his conviction and unsuccessful appeal, Skadden, Arps, Slate, Meagher & Flom, one of the nation's largest firms, took on the case *pro bono*. The firm, which spent more than $1 million on the case, found compelling evidence of Macías' innocence, including a strong alibi defense and witnesses who had not been called at the trial. The new evidence exonerated Macías. In its ruling, The Fifth Circuit Court of Appeals, wrote: "the state paid defense counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for."

Source: Adam Cohen, *The Difference a Million Makes*, TIME, June 19, 1995.

Gary Graham
Convicted 1981; executed 2000

Texas executed Gary Graham on June 22, 2000. The incompetence of his defense counsel, coupled with errors in the investigation, made Graham a national symbol of a "dangerously flawed [capital] process."

Graham, seventeen at the time of the crime, was convicted primarily on the testimony of one eyewitness, who claimed to accurately identify him despite having seen the assailant's face only fleetingly, through her car windshield, at night, from a distance of 30-40 feet. A ballistics test indicated that the pistol found on Graham was not the gun used in the murder.

No physical evidence linked Graham to the crime, and two witnesses who claimed to have seen the actual killer were never called to testify.

Graham's attorney, Ronald Mock, had practiced law for only three years at the time of trial and has been subject to four professional disciplinary actions since 1993. Despite his attorney's failure to present important evidence at trial, new laws limiting post-conviction appeals prevented Graham from receiving a full rehearing of his case.

A *New York Times* editorial referred to Graham's case as "a shocking example of how inadequate legal representation sends poor people to death row, where

Source: *Defiant Graham Executed*, AUSTIN-AM. STATESMAN, June 23, 2000, A1; Bruce Nichols, *Cries of Injustice Grow in '81*

Clarence Brandley
Convicted 1980; released 1990

Clarence Brandley, sentenced to death for the rape and murder of a 16-year-old girl, won his freedom after a long battle with racist police officers and unscrupulous prosecutors.

Brandley worked as a janitor at the school where the crime occurred. He and a co-worker found the girl's body and contacted the police. During interrogation, an officer said: "One of you two is going to hang for this. Since you're the nigger [pointing at Brandley], you're elected." Throughout the trial, prosecutors kept important exculpatory information from the defense, including hair and blood found on the victim's body that did not match Brandley's. The jury also was not told that other suspects in the case had provided alibis for one another. When Judge Jerry Pickett overturned Brandley's conviction ten years later, he concluded, "the color of Clarence Brandley's skin was a substantial factor which pervaded all aspects of the State's capital prosecution of him.… [T]he investigation was conducted not to solve the crime, but to convict Brandley."

SECTION 3-A: COURT-APPOINTED COUNSEL -- THE 1st BREAK IN THE LINK OF DUE PROCESS

> *In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided to him.*
>
> GIDEON V. WAINRIGHT (1963)

The United States Supreme Court's landmark decision of *Gideon v. Wainright*[1] recognized the need for representation for all accused. The procedures for appointing counsel, even in capital cases, however, have been left up to the states, and the rights guaranteed in *Gideon* often belong only to those who are able to pay. This section details the substantial inadequacies of the Texas indigent defense system and proposes solutions to assure that each capital punishment defendant, regardless of financial ability, receives due process and equal justice.

METHODS OF REPRESENTATION

In general, states utilize one of three systems in providing criminal defense to indigent people. Contract defense systems employ individual attorneys, law firms, or bar associations to defend indigent people for a specified negotiated fee. In a court-appointment system, which most American jurisdictions use, a member of the private bar is appointed on a case-by-case basis. A judge, court clerk, or other court administrator typically makes the appointment. In other instances, names are randomly drawn from a list of eligible attorneys. Finally, some states utilize public defender systems in which full or part time attorneys represent indigent clients.[2] The overwhelming majority of Texas counties rely on court-appointed counsel to represent indigent defendants.[3] Although the courts appoint counsel, the appointments are in effect voluntary assignments.

This report examines each of the systems, but reserves most of its comments for the court-appointed system in Texas, and shows why it actually assures less-than-competent attorneys assigned to people whom the state wishes to execute. The appointment of counsel in Texas for people charged with a capital crime is indeed a very weak link in the due process procedures assigned to those who face the death penalty. Structural deficiencies in the appointment process contribute to the lack of quality representation.

> The great thing about America is that people have full access to courts. If you're asking me as to whether or not the innocence or guilt of people have had adequate access to the courts in Texas, I believe they have.
>
> Governor George W. Bush

1. Court Appointments System

Texas gives the responsibility of appointing, and paying for, counsel for indigent defendants in capital trials to the individual counties. The counties also appoint counsel for the appellate process, and the state will reimburse the counties for counsel in that process up to $25,000. The judges themselves determine the minimum requirements for appointed counsel at trial, and select whom they want. Most Texas courts rely on voluntary court appointments to assign counsel to indigent defendants. Rarely, will a judge appoint a lawyer to a capital case who does not want to be assigned to the case. For the appellate process, the trial court will appoint an attorney from a list maintained by the Court of Criminal Appeals.[a]

A recent Texas survey by Butcher and Moore about the representation of indigent defendants through the perspective of judges, defense attorneys, and prosecutors revealed that many factors, diverse and often irrelevant, play a part in how judges determine whom to appoint.[4] Most judges appoint counsel themselves, but 10.5% of the judges who responded to the survey reported that their court clerks or other administrative personnel made the appointments.[5] Defense attorneys and prosecutors who responded noted that, in appointing lawyers, judges often take into account such factors as the nature of the case, the speed with which an attorney disposes of a case, and even political and personal factors.[6]

> *The Constitution says everyone's entitled to the attorney of their choice. The Constitution doesn't say the lawyer has to be awake.*
>
> Harris County District Judge Doug Shaver, presiding over the trial of George McFarland, who is now on Texas death row after a trial where his attorney fell asleep several times.
>
> [One of three "sleeping lawyer" cases the Court of Criminal Appeals has upheld. One man, Carl Johnson, whose attorney slept through his trial, was

The attorneys surveyed also noted that judges utilize their appointment power to reward political allies and to punish adversaries.[7] Judges who participated in the survey confirmed this result: 45% of the judges who responded indicated that, at times, they are influenced by friendships with attorneys. Several judges responded that lawyers who were political supporters or campaign contributors received preferential treatment in the appointment process. Two-thirds of the respondent judges actually appoint attorneys who needed supplemental income. More than a third of the judges reported they have given appointments to retired attorneys who needed extra income.[8]

Judges who do not move their docket quickly enough are viewed as inefficient in the eyes of the electorate. Thus, judges will prefer attorneys who may not be the most thorough in pursuing all possible avenues of their clients' cases. Further, many judges feed into the "tough on crime" phenomenon in order to appease voters and secure reelection. In campaign years, judicial candidates will actually tout their efficiency in dispensing of death penalty cases.[9]

a. Inadequate Compensation for Appointed Attorneys

Competent attorneys shy away from taking appointments because they are too poorly compensated by the county, and often lose considerable money and business when they do take appointments. Appointments to

[a] Although much of this section focuses on counsel appointed at trial level, as this section and others show, the comments are equally valid to attorneys appointed to represent indigent capital punishment defendants for post-trial appeals and habeas corpus procedures.

criminal cases pay less than other legal work. Pervasive underfunding by counties is a principal reason for the poor quality of legal representation.

Not only is payment problematic at the trial level where the counties pay court-appointed attorneys, but so too at the appeals and habeas corpus levels where the Court of Criminal Appeals reimburses counties for attorneys for post-conviction appellate and habeas corpus work, up to $25,000. A committee of the State Bar of Texas estimated that defending a *post-conviction* capital client requires between 400 and 900 hours of work.[b] However, the Court of Criminal Appeals, with a reimbursement cap of $25,000, essentially limits state-funded compensation to 150 hours. If attorneys put in the amount of time actually needed to sufficiently represent their clients, they would earn less than the standard hourly rate for lawyers (and, even in some cases that involve intense development, they could be making minimum wage),[10] which means they would not earn enough to support their office operations and staff.

In serving as court-appointed counsel at any level of the capital punishment process, defense attorneys actually work at a deficit from their usual pay schedule. In private practice, these attorneys command a fee that incorporates the costs of running their offices. Thus, when they receive inadequate compensation to defend a capital case, they are losing money and are unable to meet the financial demands of office infrastructure.

The Texas Criminal Defense Lawyers Association, in fact, has warned private attorneys about the financial perils of court appointments to post-conviction reviews:

> The Court's [$25,000] limitations [on fees and expenses] will place you in the untenable position of having to choose between competently representing your client and performing about 250-750 hours of uncompensated work, or, if your practice precludes such a large number of pro bono hours, not being able to competently represent your client.[11]

b. Inadequate Funding for Case Preparation

Apart from the lack of adequate compensation for appointed attorneys, their work is further hindered by the deficient resources afforded them by the courts. To properly defend their cases, defense lawyers often must employ investigators, forensic specialists, mental health experts, or other experts. The District Attorney offices do not have difficulties in obtaining such services. The defense, on the other hand, must request these services from the court and rely on judicial discretion in granting them. In fact, the defense must anticipate which services the lawyer needs to use and then request advance payment from the trial judge.

This procedure, which necessarily involves communicating to the judge the defense strategy and what testimony will be utilized, puts the defense in a Catch-22. In essence, the defense must convince the judge that the money will be well spent. In the confidential request to the judge, the attorney must:

(1) Specify the type of investigation to be conducted;

---

[b] There is a great range of estimates of average hours performed to defend a person at death penalty trials because of the great variety of factors, such as the factual differences in each case, the kind of exculpatory evidence, if any, and the skill and competence of the attorneys involved.

(2) State specific facts that suggest the investigation will result in admissible evidence; and,

(3) Provide an itemized list of anticipated expenses for each investigation.[12]

Ultimately, the judge has full discretion in denying a request the judge feels is unreasonable.[13]

Just as with not having a financial limitation on preparing its case, the district attorney does not have to convince the judge that a certain witness or investigation will help the case in a specific way. The prosecutor does not have to rely upon the judge's definition of "reasonable request" to secure a necessary investigation or employ an expert witness. The prosecution simply acts according to its own judgment, which is how lawyers typically go about preparing a case, except, in this situation, the attorney appointed to represent a person whose life is at risk.

c. Incompetent Counsel

The third highly problematic area regarding appointed counsel is the general overall level of competency. All too often, the courts appoint defense counsel with dubious credentials to serve as the last chance for a person facing death.

The examples of incompetent defense are never-ending, and alarming. Frederico Martínez-Macías, as but one example, spent nine years on death row in Texas and was two days away from execution before a pro bono attorney in Washington, D.C., succeeded in convincing a court that he had investigated and rebutted the state's evidence. A court-appointed attorney represented Martínez-Macías at trial. He did not call witnesses, including an alibi witness who directly disputed the state's evidence. In ordering a new trial, the U. S. Fifth Circuit Court of Appeals, which oversees Texas, noted that his court-appointed attorney effectively had been paid $11.84/hour by the state, and "the justice system got only what it paid for."[14]

FEDERAL JUDGE OVERTURNS INMATE'S DEATH SENTENCE

U.S. District Judge David Folsom of Texarkana has overturned the death sentence of a Texas man condemned to die for a 1980 murder, citing the "dismal" performance of the man's court-appointed defense counsel

Texas leads the way in court-appointment failures. Under Governor George W. Bush, about one third (43) of 131 people recently executed were represented at trial or on initial appeal by an attorney who was later disbarred, suspended, or otherwise sanctioned.[15]

Again, the stories are numerous, and alarming.[c] The Court of Criminal Appeals appointed attorney David K. Chapman to represent Leonard Rojas who has been on death row since 1997. Chapman had received two probated suspensions from the State Bar that allowed him to continue practicing, if he satisfied certain

[c] In preparation of this report, its authors randomly compared court records and State Bar records and found results that mirrored those reported this year by the *Chicago Tribune*. Ken Armstrong and Steve Mills, *Gatekeeper court keeps gates shut: Justices prove reluctant to nullify cases*, CHICAGO TRIB., June 12, 2000.

conditions.[16] His first suspension resulted from neglectful conduct in three cases. His second suspension stemmed from his refusal to withdraw from a case even though his competence was questioned in State Bar disciplinary records.[17] Nine days after his appointment to Rojas' case, Chapman received a third probated suspension for neglecting to represent his client properly. Chapman filed a writ of habeas corpus for Rojas with the Court of Criminal Appeals, which the court denied. Rojas remains on death row. In effect, then, Texas' highest criminal court looked the other way by appointing Chapman to represent Rojas. The Court caused the appointment of inept counsel only to deny the writ he filed in a last attempt to save Rojas' life.[d]

QUESTIONS OF COMPETENCE

The *Dallas Morning News* conducted an examination of 461 Texas death penalty cases as of May 1, 2000, documenting the poor quality of representation to indigent defendants:

- One-fourth of the condemned inmates have been represented at trial or on appeal by court-appointed attorneys who have been disciplined for professional misconduct (reprimands, probation, suspensions or bans from practicing law by the Texas State Bar).
- In about half of those instances, the misconduct occurred before the attorney was appointed to handle the capital case. These infractions included failing to appear in court, falsifying docu-ments, failing to present key witnesses and allowing clients to lie.
- More than 100 prisoners awaiting execution in Texas have been represented by court-appointed attorneys with disciplinary problems.
- Some attorneys with clean disciplinary records put forth minimal effort – rarely meeting with their clients, failing to investigate, spending only a few hours preparing for the trial, missing court deadlines, and even dozing off during trials.
- In 1995, the Texas Legislature required judicial districts to set minimum standards for appointed lawyers in capital cases. However, the list of "qualified attorneys" contains more than two dozen with prior disciplinary records.
- Harris County, while purportedly known for its stringent qualifications, has a list with several disciplined attorneys – one of which has had his license suspended twice.
- Done correctly, a capital case can last for months or years, requiring hundreds of work hours, and costing $50,000 or more. Appointed attorneys are usually paid less than half that amount, and courts provide little or no money to hire investigators or expert witnesses.
- The Court of Criminal Appeals capped the amount an attorney could earn for the appeal at $7,500, but removed the cap in order to try to attract more and better attorneys. However, no minimum qualifications were set.
- Under this appeals process, one attorney filed an appeal 5 ½ pages long, never once quoting the trial record, and citing only 3 cases.
- Judge Mike McCormick, Presiding Judge of the Court of Criminal Appeals, said Texas is going beyond its constitutional duty in providing attorneys for appeal: "what people need to understand is that … the right to bring *habeas corpus* is a grant of grace from our legislators."
- The U. S. Supreme Court ruled in 1984 that criminal defendants are entitled not just to have a lawyer, but an effective one.
- Texas courts, in recent years, have ruled that defendants received an adequate defense even though their lawyers napped in court, had previously prosecuted their client, had a personal relationship with a prosecution witness, or had been suspended or disbarred.

[c] For an overview of examples of incompetent appointed Texas death penalty counsel, *see* Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 Tex. L.R. 1805 (June 2000).

Defense inadequacy is a primary reason why the American Bar Association (ABA) called for moratorium on executions in 1997.[e] In July 2000, the incoming president of the ABA, Martha Burnett, urged a moratorium on the federal death penalty as well: "No defendant should be executed until we assure that the imposition of the ultimate sanction is not a result of inadequate counsel or lack of due process. We cannot ignore that there is unfairness in the way the death penalty is imposed in this country."[18]

The ABA has proposed minimum experience requirements for court-appointed counsel in capital cases. Guided by its Standing Committee on Legal Aid and Indigent Defendants (SCLAID) and the National Legal Aid and Defender Association (NLADA), the ABA adopted *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* in 1989. The comprehensive standards recommend a level of experience for both lead counsel and co-counsel at each stage of the defense: trial, appeal, and post-conviction.[19] For example, the lead trial counsel role should only be assigned to attorneys who possess a total of seven qualifications, including:

[e] According to the ABA Website, the American Bar Association is the largest voluntary professional member-ship organization in the world. With more than 400,000 members, the ABA provides law school accreditation, continuing legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public. <http://www.abanet.org>

- Being an experienced and active trial practitioner with at least five years litigation experience in criminal defense;
- Prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases that were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or, alternatively, of the nine jury trials, at least one was a murder of aggravated murder trial and an additional five were felony jury trials; and,
- Have attended and successfully completed, within one year of appointment, a training or educational program on criminal advocacy that focused on the trial of cases in which the death penalty is sought.

The ABA recommendations emphasize the seriousness of the defense attorney role, but no state, let alone Texas, has adopted these standards, or anything approaching them. Appointing counsel in Texas for indigent clients is a far cry from a careful procedure of checking the credentials of attorneys.

d. Harris County

In Harris County, in part due to sustained adverse publicity in the national press, generated in large part because of the Gary Graham case, district judges there recently enacted reforms designed to improve compensation for, and competence of, defense attorneys. Harris County provides a maximum of $540/day to a court-appointed attorney in a capital case. Each judge, though, makes the ultimate decision whether the attorney will actually receive that sum. Judges also have discretion to award any amount of money they feel is reasonable.[20] Further, though this sum of money *seems* sufficient to a non-lawyer, the great disparity in compensation shows itself when compared with fees that retained attorneys typically receive. Criminal defense attorneys retained for a capital case might typically average $300-$500/hour.[21] Harris County, however, on average, is the highest paying county, and is not representative of the state.[22]

Since the 1981 trial and conviction of Gary Graham and the attendant post-conviction publicity and the general dismal performance of counsel there in capital cases, Harris County has purported to change its appointment system. The County still relies on court appointments, however. The County now has certification and training procedures in place for attorneys who represent indigent defendants in capital cases. The certification process includes a three-step program and a written exam. Harris County offered the last full course in 1995 and continues to appoint from the 1995 list of eligible attorneys. (One attorney on that list, however, has had his license suspended twice -- an indicator of the quality of the list). To retain their eligibility, attorneys must participate in the three-part re-certification course that takes place over several months. The third and last phase of the re-certification program is pending.[23] In addition, Harris County now compensates appointed counsel more

than any other county in Texas, averaging about $25,000 for the whole defense process,[24] all that amount is still much lower than what a retained lawyer would require.[f]

Since 1976, Harris County has executed 62 people, giving the county the distinction of the third-highest execution rate in the country, behind Texas as a whole and Virginia.[25] Ronald G. Mock, a criminal defense lawyer, has served as appointed counsel for at least 12 death row inmates, all of whom lost the fight for their lives. Mock represented Gary Graham, whose conviction sparked the Harris County "reforms." Mock had three years of legal experience when the court appointed him as Graham's counsel, and he has acknowledged he did relatively no investigation of the case.[26] It remains to be seen whether Harris County has learned from the experience of Gary Graham. Reform came too late for Gary Graham, however. Harris County executed him on June 22, 2000.

2. Public Defenders

Most Texas counties do not have a public defender organization, and those that do typically overwork and underpay their attorneys. Harris County, for instance, does not have a public defender office. In contrast, Dallas County employs two county-funded public defenders who may try capital murder cases where the prosecutor seeks the death penalty.[27]

Some counties are authorized by law appoint a public defender (such as Webb, Cherokee, Tarrant, and Wichita Counties, for example), but such attorney "serves at the pleasure of the commissioners court.[28]

These current public defender situations, though, can be fraught with the same difficulties noted above for appointed counsel because they depend on the good will of the appointing authority and lack competency standards for the lawyers appointed.

3. Contract Attorneys

Some counties, like Young County (80 miles west of Fort Worth), employ a "contract system," in which a contracted attorney provides all the indigent representation for a set price. This "contract system" results into little more than a bidding war between attorneys willing to provide the cheapest representation, and, in effect, "bargain basement justice."[29]

ATTEMPTS AT REFORM

1. Federal Level

Responding to inadequacies in representation, the federal government established thirteen regional death penalty Resource Centers in 1988 to provide representation to those sentenced to death for the later stages of

[f] A retained, experienced lawyer would charge in the range of $50,000-$100,000 to defend a capital punishment case, plus expenses, which could easily run from $10,000-$20,000, if not more. A very experienced and respected attorney could charge well over $200,000 for a death penalty defense.

their appeals and post-conviction process. By 1995, there were about 20 Centers throughout the country. One Resource Center assisted with Texas death row inmates' habeas petitions. Over time, the Texas office grew to 23 full-time attorneys. The Resource Center had a dual purpose: help other attorneys with the habeas process and directly represent clients. Lawyers, who were appointed by the courts or who volunteered to represent indigent defendants, received training and support services from the Resource Center. The full-time attorneys at the Resource Centers also represented inmates in habeas corpus. The Texas Center generally had a role in all post-conviction reviews.[30]

This commitment to equal representation signified a step toward lessening the disparities in accessibility to quality legal counsel. However, as part of its "Contract with America," the Republican-dominated Congress cut the federal funding for the Resource Centers in 1995. Throughout the country, the Centers closed in 1996, quashing one positive step toward equal due process.

2. State Level

The Texas legislature also tried to rectify the court-appointment system in 1999, and passed a bill that would have taken the first step. Among other provisions, Senate Bill 247[31] would have:

- Required appointment of counsel to represent an indigent defendant within 20 days of the defendant's request for counsel. This provision would have guaranteed that each indigent defendant have the opportunity to obtain legal representation at state expense if the state wished to incarcerate the person for a crime.
- Allowed rural counties to band together and establish regional public defender offices with attorneys specializing in criminal defense.
- Given county commissioners the responsibility to establish the procedures governing the appointment of counsel. This would have allowed counties to take away the appointment power from elected judges, who have been criticized for basing appointment decisions on personal or political factors.

After passing the Texas Legislature unanimously, Governor Bush vetoed the bill, persuaded by strong behind-the-doors lobbying from judges whose power to appoint was threatened by the bill. The judges had not worked to defeat the bill in the legislature, probably because they lacked political power. The judges chose instead to thwart the legislative process by directly lobbying the Governor after the fact. Governor Bush said judges "are better able to assess the quality of legal representation."[32]

By vetoing the Legislature's attempt to equalize representation in Texas, the Governor condoned the political machine of court appointment procedures. Rather than leave the "life or death" responsibility of capital defense up to a political pal of the judge, Texas should install an adequately funded capital defender system. The provisions for equal due process should be implemented in much the same manner as proposed in the vetoed Senate Bill. Each county or group of counties should receive funding to set up regional public defender offices with competent, trained staff attorneys whose only responsibility is to represent indigent death penalty defendants.

The flaws inherent in the court appointment system, the pervasive underfunding, and the structural deficiencies contribute to inadequate due process for indigent defendants. With determinations of life or death decided each day, Texas cannot continue to ignore the reality of disparate representation.

COURT-APPOINTED COUNSEL

1. 372 U.S. 335, 344 (1963).

2. Allen K. Butcher & Michael K. Moore, *Viewing Justice for the Poor from the Bench: An Examination of Judges' Attitudes Related to Indigent Criminal Defense* (Mar. 31- Apr. 3, 1999) (paper delivered at annual meeting of the Southwestern Political Science Association and part of unpublished *Executive Summary of the Committee on Legal Services to the Poor in Criminal Matters*, prepared for State Bar of Texas).

3. *Id*.

4. *See supra* note 2.

5. Michael K. Moore, Ph.D., *The Status of Indigent Defense in Texas: The Judiciary's Perspective* (March 26, 1999) (part of unpublished *Executive Summary of the Committee on Legal Services to the Poor in Criminal Matters,* prepared for State Bar of Texas).

6. *Id.*

7. *See supra* note 3.

8. *Id.*

9. Quoted in Stephen B. Bright, *Death in Texas ... not even the pretense of fairness,* THE CHAMPION (July 1999) <http://www.-schr.org/champion/index.htm>. One startling example is that of Stephen W. Mansfield who won election to the Texas Court of Criminal Appeals based on his three-part platform. Rather than pledging fairness and impartiality, he promised: greater use of the death penalty, greater use of the harmless error doctrine (meaning that fewer sentences could be reversed on appeal), and sanctions for attorneys who file "frivolous appeals especially in death penalty cases." After his election, it came to light that Mansfield had lied about his birthplace and his political and legal experience, been fined for practicing law without a license in Florida, and lied on his application for his Texas law license. Finally, Judge Mansfield, a member of the highest criminal appeals court in the state, was arrested for scalping U.T. football tickets. The state judicial commission publicly reprimanded him. Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn't What It Seems*, TEX. LAWYER, Oct. 3, 1994, at 1, 32.

10. *See supra* note 2.

11. Quoted in Bright, *supra* note 9.

12. TEX. CODE CRIM. P. ANN. art. 26.052 (West 2000).

13. *Id.*

14. Allen Berlow, *The Wrong Man,* ATLANTIC MONTHLY (Nov. 1999) <http://www.theatlantic.com/issues/-99nov/9911-wrongman4.htm>, *quoting Martínez-Macías v. Collins*, 979 F.2d 1067 (5th Cir. 1992).

15. Ken Armstrong & Steve Mills, *Gatekeeper court keeps gates shut: Justices prove reluctant to nullify cases*, CHICAGO TRIB., June 12, 2000, <wysiwyg://1/file/Cl/Windows/Desktop/trib2.htm>.

16. *Id.*

17. *Id.*

18. *ABA President-Elect Calls for a Moratorium on Federal Death Penalty, Urges Lawyers to Review Death Penalty Systems in Their States*, <http://www.abanet.org/media/jul00/barnettdeath.html>.

19. Black Letter Guidelines, *Guideline 5.1: Attorney Eligibility*, can be found at <http://www.abanet.org>.

20. This information is derived from the Attorney Fees Expense Claim form used in the Harris County District Courts and Article 26.05 of the Texas Code of Criminal Procedure. Because of complicated (and confused) Harris County bookkeeping procedures, the authors of this report could not secure any figures as to what Harris County actually paid over time to appointed counsel in capital cases. Harris County does not track this matter as a separate budget item with sufficient specificity or in an easily discernible manner.

21. *See id.*

22. *See* Interview with Jim Marcus, Texas Defender Services, in Houston, Texas (July 3, 2000).

23. This information was provided by staff of the Harris County District Courts office on August 3, 2000.

24. *See supra* note 21.

25. *See* Sara Rimer & Raymond Bonner, *Texas Lawyer's Death Row Record a Concern*, N.Y. TIMES, June 11, 2000, A1.

26. *Id.*

27. This information was provided by staff of the Dallas County Public Defender Office on August 7, 2000.

27. *See* Tex. Code Crim. Pro. arts. 26.042, 26.043, 26.046, & 26.048; *and see* Tex. Code Crim. Pro. art. 26.045 (33rd Judicial District).

29. Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft On Crime," But Hard on the Bill of Rights*, 39 St. Louis U. L.J. 485, 486 (1995).

30. Telephone Interview with Eden Harrington, former Executive Director of Texas Death Penalty Resource Center (Aug. 8, 2000).

31. S.B. 247, 76th Tex. Leg. §§ 1, 5 (1999).

32. Steve Mills, Ken Armstrong & Douglas Holt, *Flawed trials lead to death chamber*, CHICAGO TRIB., June 11, 2000.

SECTION 3-B: PROSECUTORIAL DISCRETION -- THE 2nd BREAK IN THE LINK OF DUE PROCESS

> *You shall not follow a majority in wrongdoing: when you bear witness in a lawsuit, you shall not side with the majority so as to pervert justice.*
>
> Exodus 23, verse 2

> *... It shall be the primary duty of all prosecuting attorneys ... not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused.*
>
> Texas Code of Criminal Procedure, Article 2.01

The second "break" in the due process chain can occur either because of the discretion the prosecutor has against whom to seek the death penalty or how ethically the prosecutor elects to prosecute a capital punishment case, or both.

> Prosecutors, who are the criminal justice system's gatekeepers, hold powers and responsibilities unique in American society. The decisions they make can determine who avoids or stands trial, who is convicted or acquitted, who lives or dies. They must protect society from criminals while upholding the justice system's integrity. They are supposed to avoid underhanded tactics that can help put away the guilty but threaten the innocent. Many prosecutors follow the rules and honor their obligations ... [but] many…violate[ ] their oaths and the law.[1]

The district attorney has unrestricted discretion as to for whom to seek the death penalty. The prosecutor has unchecked discretion whether to charge a person with capital murder or not. The question becomes whether the ability of an accused person to hire a respected, competent attorney has an impact on the prosecutor's decision to seek the death penalty, and, of course, whether more subtle issues of poverty and racism enter into the picture.

Hiring a well respected and seasoned defense attorney may discourage a district attorney from seeking the death penalty, preferring instead to seek a life sentence, either by indictment or plea bargain. A poor person with the kind of attorney generally appointed in Texas does not have this leverage. Similarly, a district attorney may well not seek the death penalty when a more influential or respected Anglo member of the community is charged with murder than when a poor, unemployed minority person, perhaps with a prior criminal record, is charged with the crime.

Nor is there any way to measure the District Attorney's choices in excluding members of potential jurors in capital cases. So long as the prosecutor does not overtly state a discriminatory reason, he or she can exclude members of the community because of race, sex, religion, or economic status whom the district

> *The State was guilty of suppressing evidence favorable to the accused, deceiving the trial court during the applicant's trial, and knowingly using perjured testimony.*
>
> (from the court decision overturning Randall Dale Adams' death penalty conviction)

attorney feels would not be helpful in getting the death penalty by simply exercising peremptory strikes to remove those individuals from the jury list.

The second series of issues that arise is when prosecutors seek, perhaps for political reasons, to win the death penalty at all costs, even to the point of themselves violating the law or engaging in unethical conduct. Although violations of the law such as suppression of evidence[2] and malicious prosecution do occur, research conducted by the *Chicago Tribune* failed to find a single case of disbarment of a prosecutor in where in the country who engaged in misconduct of any kind in a criminal case. The research found only two cases where the prosecutor was convicted of criminal charges for misconduct, and both these convictions were misdemeanors carrying $500 penalties.[3]

Prosecutors in Texas are charged with seeking justice, not convictions.[4] This command is not as simple as it sounds. In Texas, as in the rest of the country, state district attorneys are elected positions. Texas district attorneys, like Texas judges, campaign vigorously on "tough on crime" platforms. Prosecutors typically show they are tough on crime through convictions: "The drive to win is fueled by a variety of factors, including ... pleasing the public."[5] In Texas, the prosecutor's ability to win is also bolstered by a skewed balance of power in the courtroom where elected judges also need to look tough on crime and where a poor defendant has to face off against all the resources that a district attorney can muster to win the case.[6]

Prosecutorial abuse in Texas is not infrequent, and when discovered, is often reported in the media -- although the abuse does not always lead to a reversal of the conviction. It has led to cases like Randall Adams', who served 12 years in prison, part of the time on death row, before being exonerated and set free.[7] The prosecutor who "won" the case against Adams had never lost a case. To "win" against Adams, however, the district attorney failed to turn over exculpatory evidence to the defense and supported perjury among other indiscretions. But he himself was never disciplined, despite the harm he caused to Adams and the miscarriage of justice he perpetrated.

In a recent series on capital punishment in Texas, the *Dallas Morning News* brought to light yet another case, involving a disabled oilfield roughneck, Ernest Willis, who was sent to death row thirteen years ago by a former district attorney, J. W. Johnson, who surreptitiously had Willis drugged heavily with psychotropic medication during the jury trial and refused to disclose significant exculpatory evidence.[8] There was no physical evidence or eyewitness testimony that linked him to the crime. And, later, another man, on death row for other murders, confessed to the crime, but nothing happened. In June, a district judge recommended that Willis' conviction should be thrown out. The Court of Appeals has not yet acted on the recommendation.

> "I'd say he didn't get a defense. If he'd had a sufficient defense, he wouldn't be on death row .... They messed this old boy around for years."
>
> Larry D. Jackson
> Pecos County Deputy Sheriff
> (describing the Willis trial)

Willis had a court-appointed attorney, who spent only three hours with his client, preparing for trial. The lawyer had worked for the district attorney until two months before his appointment to represent Willis. Since the Willis trial, he lost his law license after being sentenced to ten years' probation for cocaine possession. He now works for the same former district attorney, Johnson, as a paralegal. Before losing his license, the State Bar had reprimanded him, suspended his license, ordered him to Alcoholics Anonymous, and required

him to seek professional treatment.

Willis' case came to light through the *pro bono* efforts of three New York attorneys with the firm of Latham & Watkins.

The very difficult problem here is that the criminal justice system itself rarely discovers the prosecutorial abuse. Rather, it comes to light only when the media take an interest in a particular case. The question is how many death penalty convictions and executions occur because of abuse. The integrity of this part of the system cannot depend on media interest or the chance assistance of out-of-state *pro bono* lawyers; it must have its own internal safeguards.

PROSECUTORIAL DISCRETION

1. Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHICAGO TRIBUNE, Jan. 10, 1999, at C1.

2. *See* Randall Adams with William Hoffer & Marilyn Mona Hoffer, ADAMS v. TEXAS (1991).

3. *The Verdict: Dishonor*, *supra* note 1.

4. Tex. Code Crim. Pro. Art. 2.01.

5. *The Verdict: Dishonor*, *supra* note 1.

6. Interview with Jim Marcus, Texas Defender Services, in Houston, Tex. (July 3, 2000).

7. ADAMS v. TEXAS, *supra* note 2.

8. Howard Swindle & Dan Malone, "Judge says inmate wrongly convicted," DALLAS MORNING NEWS (Sept. 10, 2000), at A1.

SECTION 3-C: JURY SELECTION AND DEATH-QUALIFIED JURIES -- THE 3RD BREAK IN THE LINK OF DUE PROCESS

> *As I explained in a filing before the United States Supreme Court on May 3,* [*2000,*] *it is inappropriate to allow race to be considered as a factor in our criminal justice system.*
>
> Texas Attorney General John Cornyn, announcing he was reviewing nine capital punishment cases in which juries may have considered race as a factor in delivering a death sentence, after the United Supreme Court reversed one such Texas case.

In the jury selection process for a trial, potential jurors can be dismissed from the jury panel for "cause" by the judge, that is, because they do not meet the legal requirements for jury service. This can be, for example, because a potential juror is a convicted felon, incompetent, related to the defendant, or has a bias or prejudice against the defendant or the law that applies to the case. The number of potential jurors that can be eliminated for "cause" is unlimited, and some potential jurors are usually dismissed in most trials.

Apart from challenges for cause, both the district attorney and defendant have eight peremptory challenges in a death penalty case that they can each exercise in their discretion, without giving a reason (though it cannot be for an impermissible reason, such as race), to remove potential jurors from the panel.[1] They also may have one or two more peremptory challenges to exercise against alternate jurors, depending on the number of alternates to be chosen.

During the jury selection process in Texas, a juror who expresses "conscientious scruples in regard to the infliction of the punishment of death" or "bias or prejudice" against the death penalty is disqualified from jury service for cause.[2] It is through this process that jurors become "death qualified." Unfortunately for the defendant, studies demonstrate, and common sense teaches, that a "death qualified" jury is more likely to convict.[3]

Not only does this process inhibit the composition of a fair and impartial jury that represents a cross-section of the community, as commanded by the Texas Constitution,[4] but it may also serve as a vehicle for racial bias or to exclude minorities from juries when a defendant is a minority person, as happens about 50% of the time in Texas capital punishment trials.

Take the example of a female African American. First, more likely than not, she will have reservations about the death penalty because she may believe it historically has been imposed in a racially discriminatory manner -- or against low-income persons. That reservation alone might well serve as cause for the judge, acting in his or her discretion, to strike her automatically from the jury panel. Second, even if she survives the death qualification process because she sets her views aside, her hesitancy most likely will result in her being struck from the jury by the prosecutor's discretionary peremptory challenge.[5] The resultant jury is far from the aspired cross section of the community that the Federal and Texas Constitutions require.

All the polls show that African Americans generally express concern about the fair administration of the death penalty at about a 2-1 ratio more frequently than do white persons.[6] Similarly, women show about a 10% more likelihood to have reservations about the use of capital punishment than do men. Thus, African Americans and women would tend to be excluded more often than whites and white men from jury service for cause, and, of course, African Americans would have a greater probability of being excluded. Moreover, prosecutors read the polls also and, even if they are unable to eliminate African Americans and women for cause, can do so through their discretionary, peremptory challenges.

Thus, the jury selection process in capital punishment cases has a built-in propensity to give the death sentence, if guilt is found.[7]

GALLUP POLL		Total	Male	Female	White	Non-White	Black
In favor of death penalty	Yes	67%	73%	62%	72%	42%	32%
for murder?	No	28%	22%	33%	23%	52%	60%

Gallup Poll Social Series: Crime (August 29 – September 5, 2000)

JURY SELECTION AND DEATH-QUALIFIED JURIES

1. Tex. Code Crim. Pro. Ann. art. 35.15(a)&(d) (West 2000).

2. *Id*. art. 35.16(b)(1)&(3) (West 2000).

3. Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft On Crime," But Hard on the Bill of Rights*, 39 St. Louis U. L.J. 485, 501 (1995).

4. Tex. Const. art. I, § 15.

5. *Id.* at 502.

6. *See, e.g.*, Peter D. Hart Research/American Viewpoint, "Americans' Views on The Death Penalty" (Altitudes On The Death Penalty: Support Among Subgroups), Sept. 14, 2000 <http://justice.policy.-net/proactive/newsroom/release.vtml?id=18360>.

7. *See* "Death sentence overturned after race-based testimony,"Associated Press (Sept. 29, 2000) <http://-www.cnn.com/-2000/LAW/criminal/09/29/deathsentence.race.ap/>.

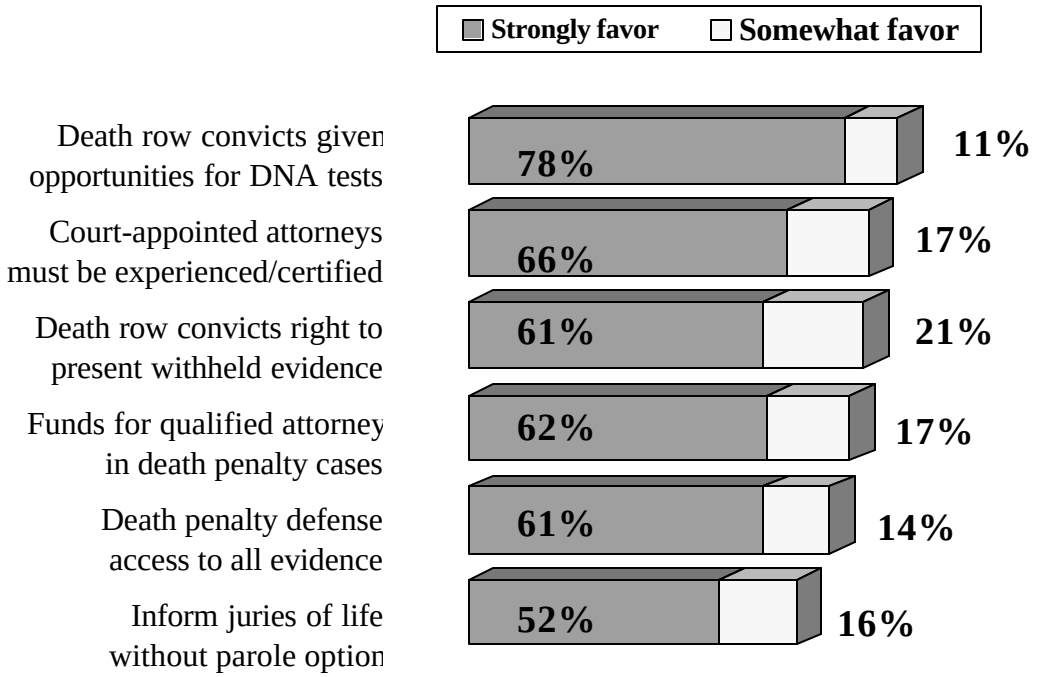
Americans' Views
On the Death Penalty

September 14, 2000

Nationwide survey among 802 registered voters
Conducted August 18-23, 2000

PETER D. HART RESEARCH / AMERICAN VIEWPOINT
FOR THE JUSTICE PROJECT

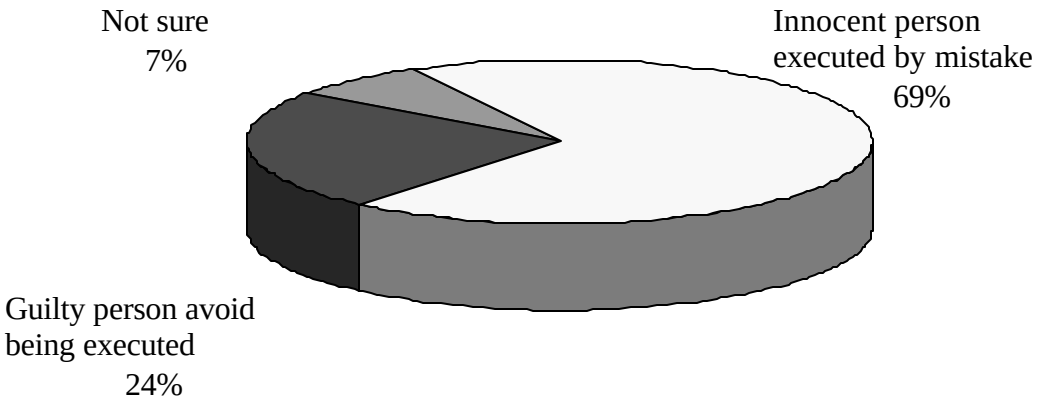
Six Changes in Death Penalty
That Majorities Strongly Support



The Justice Report
September 14, 2000

(drafting by Elias Harrington)

Which Worries You More about the Death Penalty?



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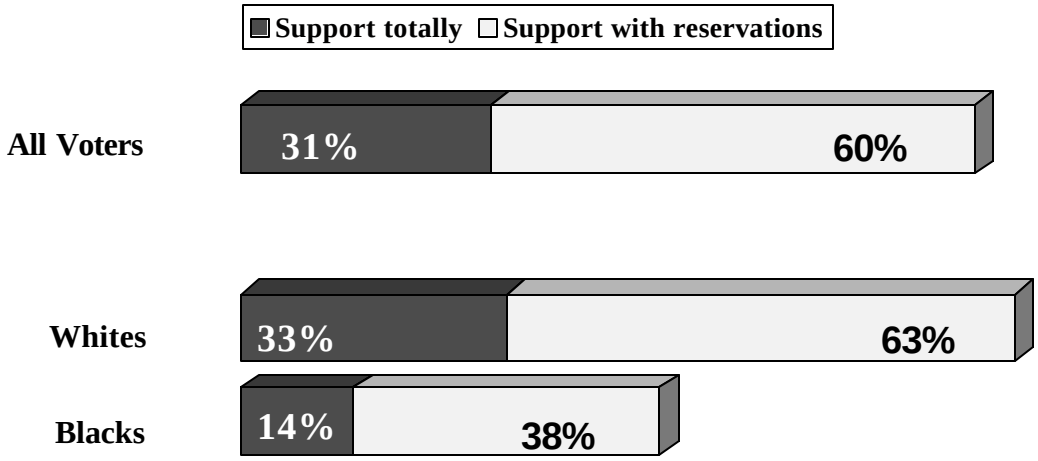
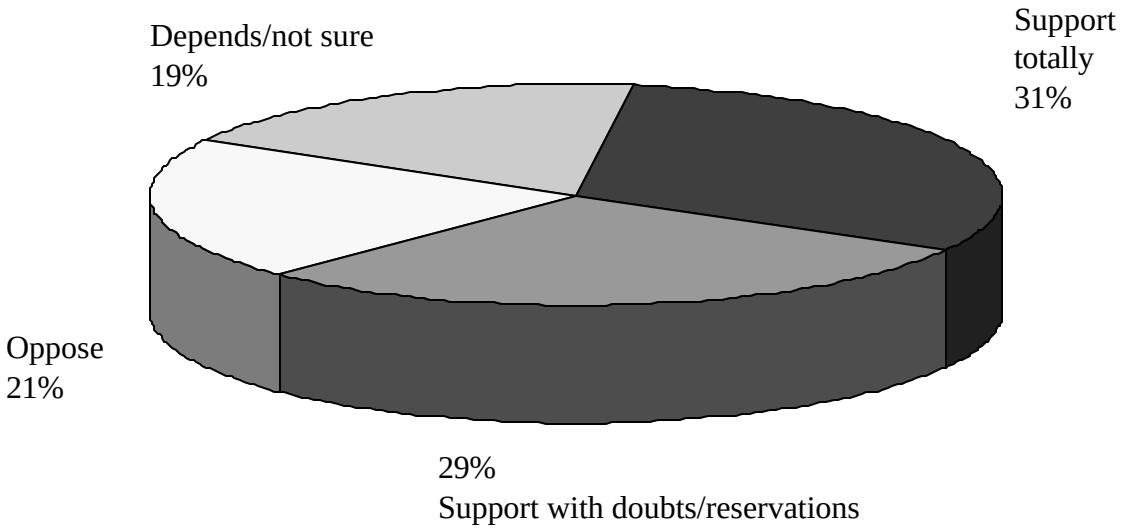
Attitudes on the Death Penalty
Support among Subgroups



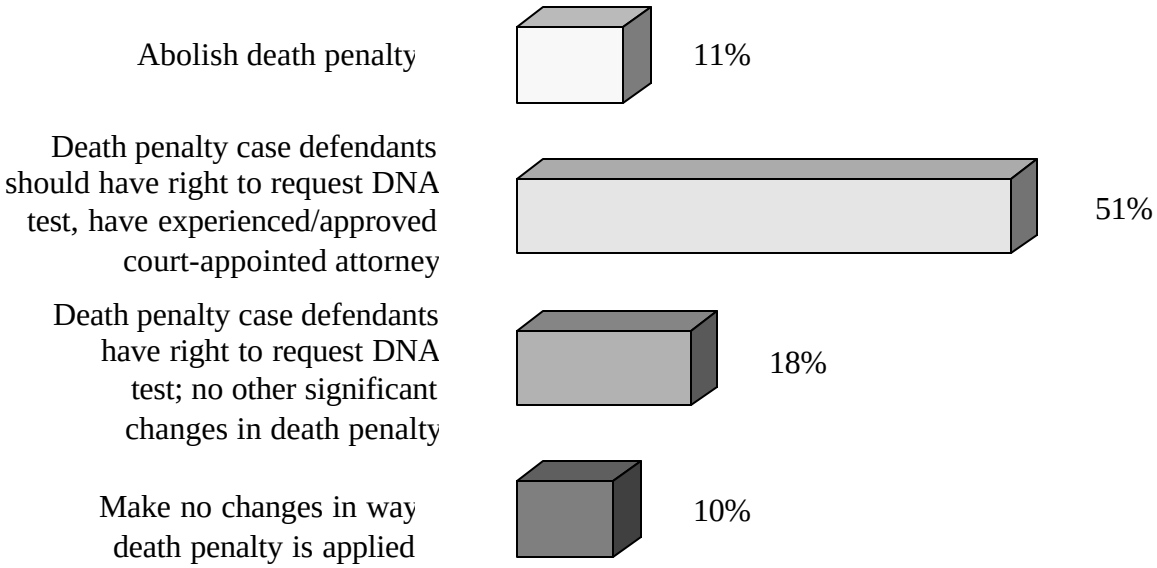
The Justice Report
September 14, 2000

Attitudes on the Death Penalty



The Justice Report
September 14, 2000

Point of View on Death Penalty



55% believe it is not enough just to require access to DNA testing without ensuring access to a competent/experienced defense lawyer.

The Justice Report
September 14, 2000

SECTION 3-D: JURY INSTRUCTIONS -- THE 4th BREAK IN THE LINK OF DUE PROCESS

Capital trials in Texas are bifurcated, that is, the guilt or innocence phase of the trial is separate from the sentencing phase. Jurors first hear arguments and evidence about whether the defendant committed the crime. If the jury returns a guilty verdict, then the trial judge conducts a separate procedure, called the sentencing phase, in which both the prosecution and defense present evidence of aggravating and mitigating circumstances that may be relevant to the issue of sentencing.

Capital sentencing procedures in Texas are complex. While the jurors do not technically sentence the defendant, their answers to three specific questions during the sentencing phase of the trial determine whether the death penalty will be imposed. When both the prosecution and defense have finished presenting their cases in the sentencing phase, the court instructs the jury to answer the three questions, or "special issues."

The jurors must first consider whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.[1]

Second, if the defendant acted as a party to the offense, the jurors must consider "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased ... but intended to kill the deceased or another or anticipated that a human life would be taken."[2]

If the jury answers "yes" to both questions, it must then answer the third issue:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.[3]

The court must sentence the defendant to life or death based upon the jury's answers to the three issues.[4] If the jury answers affirmatively to the first two questions and negatively to the third, the court renders a death sentence. Conversely, if the jury answers "no" to either or both of the first two issues, or answers "yes" to the third issue, or cannot answer any of the three issues, the court must impose a life sentence.[5]

Texas' sentencing procedures differ from those of most other states in two important respects: first, juries do not have the option of sentencing a defendant to life in prison without parole; second, juries are not given any information about a defendant's parole eligibility with a life term.

NO 'LIFE IN PRISON WITHOUT PAROLE' OPTION

Of the 38 states that impose the death penalty, 27 states provide life without parole as a sentencing alternative in capital cases.[6] Texas is one of only eleven states that do not offer jurors the opportunity to impose life in prison without parole instead of the death penalty. This leads juries to impose the death penalty in greater

numbers, as jurors are left believing that a sentence of death is the only way to keep a dangerous individual behind bars.

Evidence suggests that many Americans are wary of imposing the death penalty and, if given the alternative, would opt for a sentence of life without the possibility of parole.

Contrary to conventional opinion, Americans do not wholeheartedly support the death penalty when faced with alternative sentences that would guarantee both protection and punishment. Although a majority of Americans support the death penalty in the abstract, only 41% favor capital punishment when given the alternative of life without parole coupled with a requirement for victim restitution. According to a study by Greenberg/Lake and the Tarrance Group, while abstract support for the death penalty in 1993 was 77%, those numbers dropped when respondents were presented with certain alternatives[a]:

- when given the alternative of no parole for over 25 years, support for the death penalty was 56%;
- for the alternative of no parole ever, support for the death penalty declined to 49%; and,
- when the alternative of no parole ever plus restitution was offered, support for the death penalty dropped substantially to 41%.[7]

In an ABC News.com poll of June 14-18, 2000, 63% of respondents favored the death penalty. However, when asked which punishment they prefer for people convicted of murder, only 48% chose the death penalty, while 43% chose life in prison without parole.[8]

GALLUP POLL		Total	Male	Female	White	Non-White Black
In favor of death penalty for murder?	Yes	67%	73%	62%	72%	42%	32%
	No	28%	22%	33%	23%	52%	60%
Which is better penalty for murder?	Execution	49%	55%	44%	55%	21%	9%
	Life without parole	47%	42%	52%	42%	72%	82%

These studies of the general population would surely be mirrored in the juror population.[b] The significant drop in support when given the option of life without parole reflects a growing awareness of the problems posed by capital punishment and a desire for other effective alternatives. Juror concerns about both punishment and protection of society can be addressed by offering them the alternative of imposing life in prison without parole.

[a] Four justices of the United States Supreme Court have noted similar statistics for Nebraska, Georgia, Arkansas, Georgia. *See Brown v. Texas*, 522 U.S. 940, 118 S.Ct 355, 356 (1997).

[b] These numbers may be skewed somewhat for capital juries, since the requirement of a "death qualified" jury necessarily means that only people who support the death penalty may be eligible to sit on a capital jury.

JURY INSTRUCTIONS AS TO PAROLE ELIGIBILITY

In capital trials in Texas, the jury has two sentencing options: death or life imprisonment. With such a profoundly important decision left in the hands of twelve ordinary citizens, the State should make every effort to ensure that jurors are given any and all information that could help their decision-making.

Texas took an important step in the right direction when, during the 1999 legislative session, the legislature amended the Criminal Code to allow jurors to hear that defendants sentenced to life imprisonment would not be eligible for parole for 40 years.[c] The newly-amended Article 37.071, section 2 is an important protection of a defendant's due process rights. It is important to note, though, that a jury only hears this information if the defendant's attorney, in writing, specifically requests the instruction.[9] Thus, incompetent defense attorneys, all too prevalent in capital trials, may fail to ask for this instruction, thereby forcing juries to make life and death decisions based on their own – often inaccurate – conclusions about the true implications of their sentences.

Prospective jurors do not know what a term of "life" actually means. As the late Georgia Supreme Court Judge Charles Weltner said, "Everybody believes that a person sentenced to life for murder will be walking the streets in seven years."[10] People are understandably disturbed by reports of prisoners who were released after a relatively short time, only to commit more crimes. They do not know that Texas parole eligibility laws are significantly stricter for inmates convicted of capital crimes. Concerned with society's safety, jurors often return sentences of death because they feel that is the only way to ensure that a dangerous individual does not harm again. Juries are torn between not wanting to impose a death sentence and fear that a dangerous individual may be back on the streets in just a few years. As noted by Justice Stevens in the United States Supreme Court case of *Brown v. Texas*,[11] not informing juries of a defendant's parole ineligibility "unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose."[12]

Asking jurors to rely on their own conceptions of what "life imprisonment" means is troubling, given that most people are uninformed about such matters. A National Research Group study in Virginia revealed that jurors are significantly uninformed about the likelihood of early release for inmates convicted of capital crimes. While Virginia requires that persons convicted of capital crimes serve at least 25 years before being eligible for parole, the study found that the average prospective juror in a sample Virginia county believed that a capital defendant sentenced to life imprisonment would serve only ten years in prison. The study further found that prospective jurors would be influenced significantly in their sentencing decision by information about Virginia's mandatory minimum 25-year sentence.[13]

The job of the jurors would be made easier, and the capital process made fairer, if juries were given full information about a defendant's parole eligibility. The Texas Legislature should certainly be commended for

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[c] Parole eligibility in Texas depends on the crime for which an individual is convicted. An inmate serving a death sentence is ineligible for parole. An inmate serving a life sentence for a non-capital crime is only eligible for parole after having served at least 35 years. And an inmate serving a life sentence for a capital crime cannot become parole eligible until he or she has served at least 40 years.

changing the criminal code to *allow* jurors to hear information concerning parole eligibility.[d] Now, the legislature should take the next step and make parole eligibility information a manda-tory jury instruction. Just as a capital jury is automatically instructed to answer the three special issues, it should be told that a term of life imprisonment means a minimum 40-year sentence.

Juries need to be fully informed of the true implications and meaning of the state's sentencing laws. With overwhelming evidence of the inadequacy of defense counsel in capital cases, the State should make every effort to ensure that certain due process protections are automatically put in place.

CONCLUSION

The capital punishment process in Texas is far from perfect. As illustrated throughout this report, numerous systemic failures plague the death penalty system. The recommendations suggested here – offering juries the alternative sentence of life in prison without parole, and automatically instructing jurors on parole eligibility laws – are fairly easy, non-controversial steps the State can take to strengthen the system. These important changes would go a long way toward helping juries make reasonable life and death decisions. Rather than weakening the capital process, these changes would ensure that Texas' sentencing procedures are fair and constitutional.

JURY INSTRUCTIONS

1. *See* Tex. Code Crim. Proc. Ann. Art. 37.071, §§ 2(b)(1) (Vernon Supp. 1988).

2. *See id*. § 2(b)(2).

3. *Id*. § 2(e).

4. *See id*. § 2(g).

5. *See id*.

6. *See* Amanda Dowlen, *An Analysis of Texas Capital Sentencing Procedure: Is Texas Denying its Capital Defendants Due Process by Keeping Jurors Uninformed of Parole Eligibility?*, 29 TEX. TECH L. REV. 1111.

7. *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.essential.org/dpic/dpic.r07.html>.

8. *Crime, PollingReport.com*, <http://www.polingreport.com/crime.htm>.

9. *See* Tex. Code Crim. Proc. Ann. Art. 37.071, §§ 2(e)(2) (Vernon Supp. 1988).

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[d] Previously, prosecutors and defense attorneys were expressly forbidden from explaining parole eligibility laws to the jury. Trial judges were not even allowed to answer jurors' specific questions about the meaning of life imprisonment. Of 38 death penalty-imposing states, only Texas, Pennsylvania, and South Caroline excluded information about parole eligibility during capital trials

[10.] *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.essential.org/dpic/dpic.r07.html>.

[11.] 522 U.S. 940, 118 S.Ct 355 (1997).

[12.] *Id*. at 356.

[13.] Dowlen, *supra* note 6, *citing* W. Hood, Note, *The Meaning of "Life" for Virginia Jurors and its Effect on Reliability in Capital Sentencing*, 75 VIRGINIA L.REV. 1605, 1624-25 (1989).

SECTION 3-E: APPEALS OF DEATH SENTENCES -- THE 5th BREAK IN THE LINK OF DUE PROCESS

> *Over the last 19 years, Mr. Graham's case has been reviewed more than 20 times by state and federal courts. Thirty-three judges have heard and found his numerous claims to be without merit. Mr. Graham has had full and fair access to state and federal courts, including the United States Supreme Court.[a] After considering all the facts, I am confident justice is being done.*
>
> Governor George W. Bush[1]

Governor Bush and other proponents of the death penalty in Texas often point to what they claim to be the complex and lengthy process of post-conviction reviews and appeals as safeguards, guaranteeing that prisoners scheduled for execution have received a fair trial and are truly guilty of the crimes for which they were convicted. Supporters of capital punishment argue that post-conviction hearings – at both the state and federal level – provide "full and fair access to the courts" for condemned prisoners.

However, while post-conviction appeals are an important and indispensable part of the process, the fact is that Congress, state legislatures, and court decisions increasingly have limited the effectiveness of such review for capital offenders by enacting restrictive laws and adopting harsh judicial standards. In reality, the safeguards preventing the execution of innocent people have eroded significantly in recent years. Thus, the question becomes whether diminished legal safeguards enhance the probability of executing people for crimes that they in fact did not commit.

> *…the Court today continues its crusade to erect petty procedural barriers in the path of any state seeking review of his federal constitutional claims.…*
>
> *I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights.*
>
> Harry Blackmun, dissenting
> United States Supreme Court
>
> *Coleman v. Thompson*,
> 501 U.S. 722, 758-59 (1991)

This section looks at the appeals process, first at the state and then the federal level. At all levels, courts and legislatures have imposed restrictive procedural limitations that separately, and together, preclude "full and fair access" to the courts. These limitations, in turn, effectively diminish real review of possibly erroneous convictions.

Therefore, while it may be true, as Governor Bush said, that Gary Graham's case was "reviewed" twenty times, the real issue is whether the "review" was truly meaningful or simply procedural machinations giving the

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[a] For a view different from the Governor's of the quality of the hearings had for Gary Graham, *see* Richard Burr, "How Gary Graham Was Convicted Despite the Evidence That He Was Innocent," *Voice for the Defense* (June 2000), at 16.

appearance of due process but wholly lacking in substance. Are the "reviews," then, as William Faulkner, quoting Shakespeare, put it "full of sound and fury, signifying nothing?"

Perhaps this analysis appears harsh, but the taking of human life is at stake. If the state wrongly kills a person, it does no better than the murderer it purports to execute. As Justice Blackmun wrote, "The execution of a person who can show that he is innocent comes perilously close to simple murder."[2]

STATE APPELLATE PROCESS

In 1995, the Texas legislature radically restructured and restricted the appeals process available to capital offenders. Governor Bush supported and signed this law. The law, codified as Article 11.071 of the Texas Code of Criminal Procedure,[3] adopted a unitary appeals process that required the appeals and habeas corpus proceedings to take place concurrently. The law limits the appellate process that a death-row inmate may invoke. This was a dramatic revision of prior Texas practice.

PRE-1995

Before the 1995 law, a prisoner convicted of a capital offense would pursue three distinct and successive appeals processes. (*See* diagram following this section). The first appeal was directly to the Texas Court of Criminal Appeals.[4] On direct appeal, the convicted per-son argues that the court should overturn the conviction because of reversible error during the trial. If the Court of Criminal Appeals affirmed the trial verdict on direct appeal,[b] the defendant could petition the United States Supreme Court, although the high court infrequently grants such review.[5]

> *At best, he made some people think that he might be innocent. But he didn't prove it.*
>
> Judge Sharon Keller
>
> Texas Court of Criminal Appeals
>
> (regarding Roy Criner, sentenced to 99 years for the rape of a 16-year-old girl, but for whom DNA testing demonstrated innocence (PBS "Frontline," Jan. 2000).
>
> ---
>
> On August 14, 2000, the governor, upon a 18-0 vote of the Board of Pardons and Paroles, pardoned Criner, having spent ten years in prison.

After completing the direct appeals process (including denial of Supreme Court review, if any), the convicted person would then begin habeas corpus proceedings in Texas state court. In habeas corpus proceedings, the prisoner generally raises claims alleging federal and state constitutional violations that happened during the trial and direct appeals.[6] The prisoner could also raise claims alleging non-constitutional violations that he or she could not adequately raise at trial or on appeal.[7] The proceedings began with the convicted person filing a petition for a writ of habeas corpus in the trial court with the judge who presided over the original trial.[8]

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[b] The Court of Criminal Appeals reversed almost one-third of capital judgments between 1973 and 1995. James Liebman *et al.*, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (visited July 31, 2000), 50 <http://207.153.244.129/>. Since 1995, the Court of Criminal Appeals has affirmed 270 capital convictions while granting only eight new trials (3%). Steve Mills & Ken Armstrong, "Gatekeeper Court Keeps Gates Shut: Justices Prove Reluctant to Nullify Cases" (part 2), CHICAGO TRIB., June 12, 2000.

Certainly, the new 1995 procedures restricting the appellate process have drastically cut the rate of reversal, but it defines rationale thought and empirical data to contend that the new procedures have improved the search for truth and the vindication of innocence. Rather, the opposite conclusion appears to be the reality.

Holding the state habeas proceedings *after* the completion of the appeals process often allowed sufficient time for the prisoner, lawyers, journalists, and other members of the community to develop exculpatory evidence to prove innocence where such evidence existed.[9] Pursuing state habeas corpus after the convicted person had exhausted the direct appeal also allowed the prisoner to raise, as part of the habeas proceedings, claims of ineffective counsel during the trial and appeals processes.

Claims of ineffective assistance of counsel often form the basis upon which the court finds a conviction to be erroneous. The trial judge appoints most of the attorneys who represent prisoners on death row, and the quality of the representation received by the convicted person often falls short of even the lax standards deemed acceptable by the courts. This report explores this problem in greater detail in a separate section.

POST-1995

However, this process all changed with the 1995 law (Article 11.071), which imposed substantial procedural requirements on a person convicted of a capital offense seeking habeas relief from a death sentence. Article 11.071 requires the convicted person to apply for habeas relief no later than forty-five days after filing the original brief on direct appeal. (Prior to Article 11.071, prisoners and counsel usually filed habeas appeals three to four years after conviction.[10]) This requires the convicted person to go through the direct appeal and habeas proceedings almost simultaneously.[11]

> The Texas system is a "model for the nation."
>
> Judge Mike McCormick
> Presiding Judge
> Court of Criminal Appeals
> *Dallas Morning News* (9/10/00)

Applications filed after that 45-day period date, in almost all circumstances, are presumed untimely and rejected.[12] Under Article 11.071, the court may not consider untimely applications unless the prisoner sets forth facts establishing one of several specific very limited conditions.[13] The convicted person is generally limited to only one application for habeas corpus. Additional or subsequent applications must show "good cause" -- a fairly high standard -- and be filed no later than ninety-one days after the applicable due date for the original application.[14] Failure to show "good cause" and file within the 91-day period constitutes "a waiver of all grounds for relief that were available to the applicant before the last day on which an application could be timely filed."[15]

The requirement that convicted individuals pursue both their direct and habeas appeals simultaneously substantially limits the effectiveness of habeas corpus. First, the new procedure effectively precludes the convicted person from raising standard points of reversal on direct appeal – including ineffectiveness of counsel, a violation of a constitutional right, or other error arising during the appeal – simply because the claims are not timely or have not yet matured.[16] A prisoner is understandably hesitant to raise a claim of ineffective assistance of counsel against a lawyer who is currently assisting on the direct appeal. Moreover, the convicted person is not likely to fully know the quality of the appellate representation by the time the habeas petition is due.[c]

[c] Although now discouraged, but not prohibited, sometimes the convicted person had the same attorney appointed for both the appeal and the habeas corpus process, which made it even more problematic (impossible, actually) to raise ineffective assistance claims against the appellate attorney since that lawyer was the same attorney handling the habeas corpus.

On a related issue, a failure to raise such claims during the state proceedings might later preclude the prisoner from raising them in federal courts due to various federal habeas corpus doctrines.[17] Federal habeas corpus legislation and doctrine, discussed in more detail later, basically requires prisoners to include in their state habeas petition whatever they want to preserve for their federal habeas corpus petition and that was not extensively litigated at trial and on direct appeal.[18]

Article 11.071 also imposed other procedural limitations on habeas corpus relief in Texas courts. First, the new law requires the court to appoint "competent" counsel upon receiving an application for a writ of habeas corpus.[19] The statute fails, however, to set standards of "competency," leaving such determinations to the Court of Criminal Appeals, which has yet to promulgate any competency standards.

> *... what people need to understand is that … the right to bring habeas corpus is a grant of grace from our legislators.*
>
> Presiding Judge Mike McCormick
> Court of Criminal Appeals
> *Dallas Morning News* (9/10/00)

Second, the statute gives the Court the authority to determine reasonable compensation, including the reimbursement of investigative expenses, for appointed counsel,[20] with a maximum reimbursement of $25,000.[21] Thus, appointed defense counsel are effectively restricted in the quality and amount of the investigation, whereas district attorneys have virtually unlimited resources to support the prosecution.[d]

Further, if the defense wants to be prepaid for the investigative expenses, the convicted person's and their attorney's position vis-à-vis the judge and the opposing district attorney is weakened because their counsel has to provide the court with a request for expenses, detailing the claims of the application to be investigated, specific facts that suggest a claim of possible merit may exist, and an itemized list of anticipated expenses for each claim.[22] Although the request may be made *ex parte*[23] — to the judge without the presence of opposing counsel, the close working relationship that usually exists between the judge and the local district attorney understandably raises concerns about the divulgence of the defense's legal strategies to the prosecution.

If the Texas courts uphold the conviction in the habeas proceedings, the convicted person, as noted, may petition for review by the United States Supreme Court. Again, such review is rarely granted.[24] Finally, after the convicted person has exhausted the possible remedies at the state court, and has unsuccessfully petitioned the United States Supreme Court for review, the individual may then appeal to the appropriate federal district court for federal habeas corpus relief, which itself is limited.

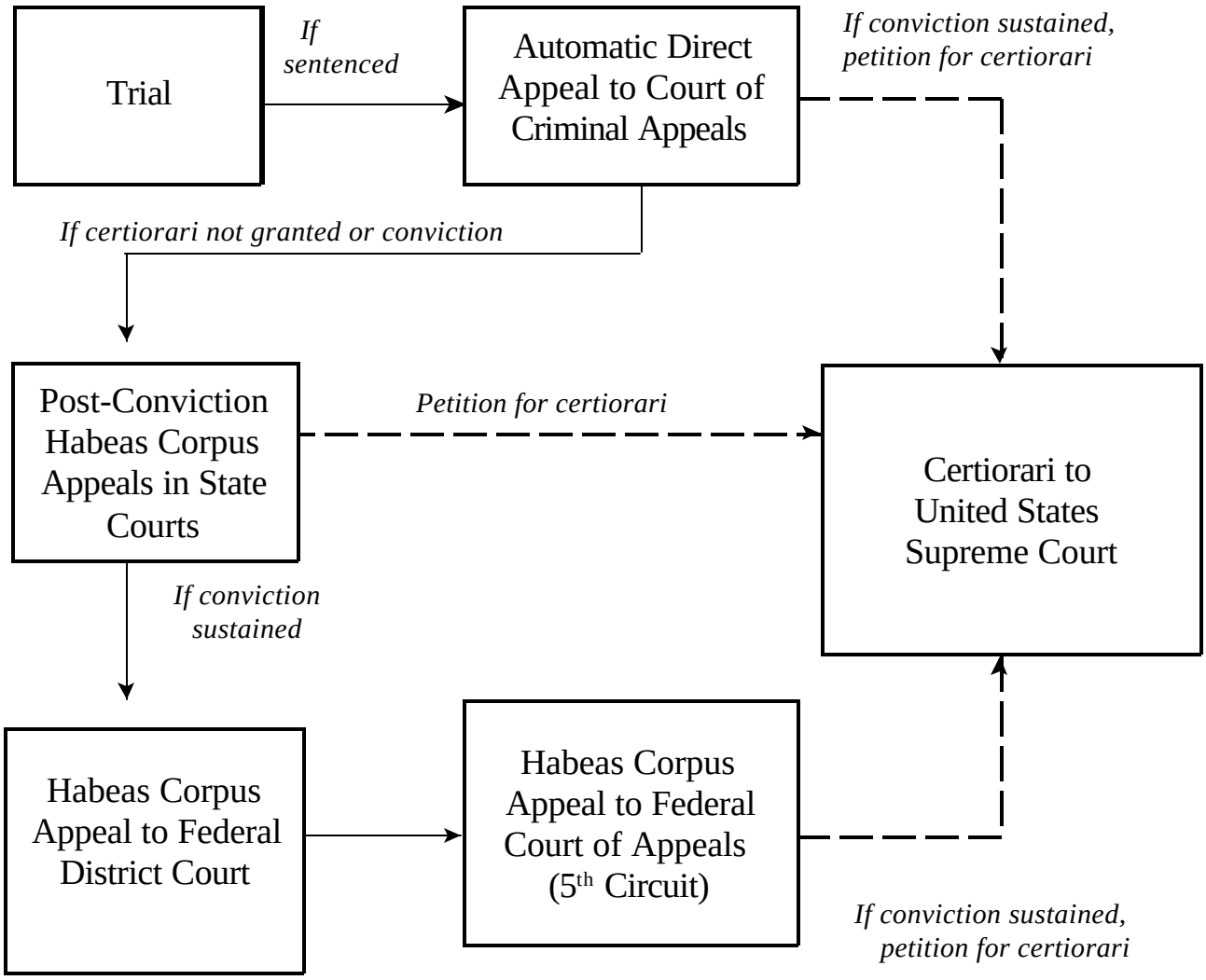
> *In recent years, it has become increasingly unlikely that the federal courts can correct constitutional violations occurring in state prosecutions.*
>
> Stephen Reinhardt
> U.S. Court of Appeals (9th Circuit)

[d] A retained, experienced lawyer would charge in the range of $50,000-$100,000 to defend a capital punishment case, plus expenses, which could easily run from $10,000-$20,000, if not more. A very experienced and respected attorney could charge well over $200,000 for a death penalty defense.

BEFORE CHANGES TO TEXAS AND FEDERAL HABEAS CORPUS LAW

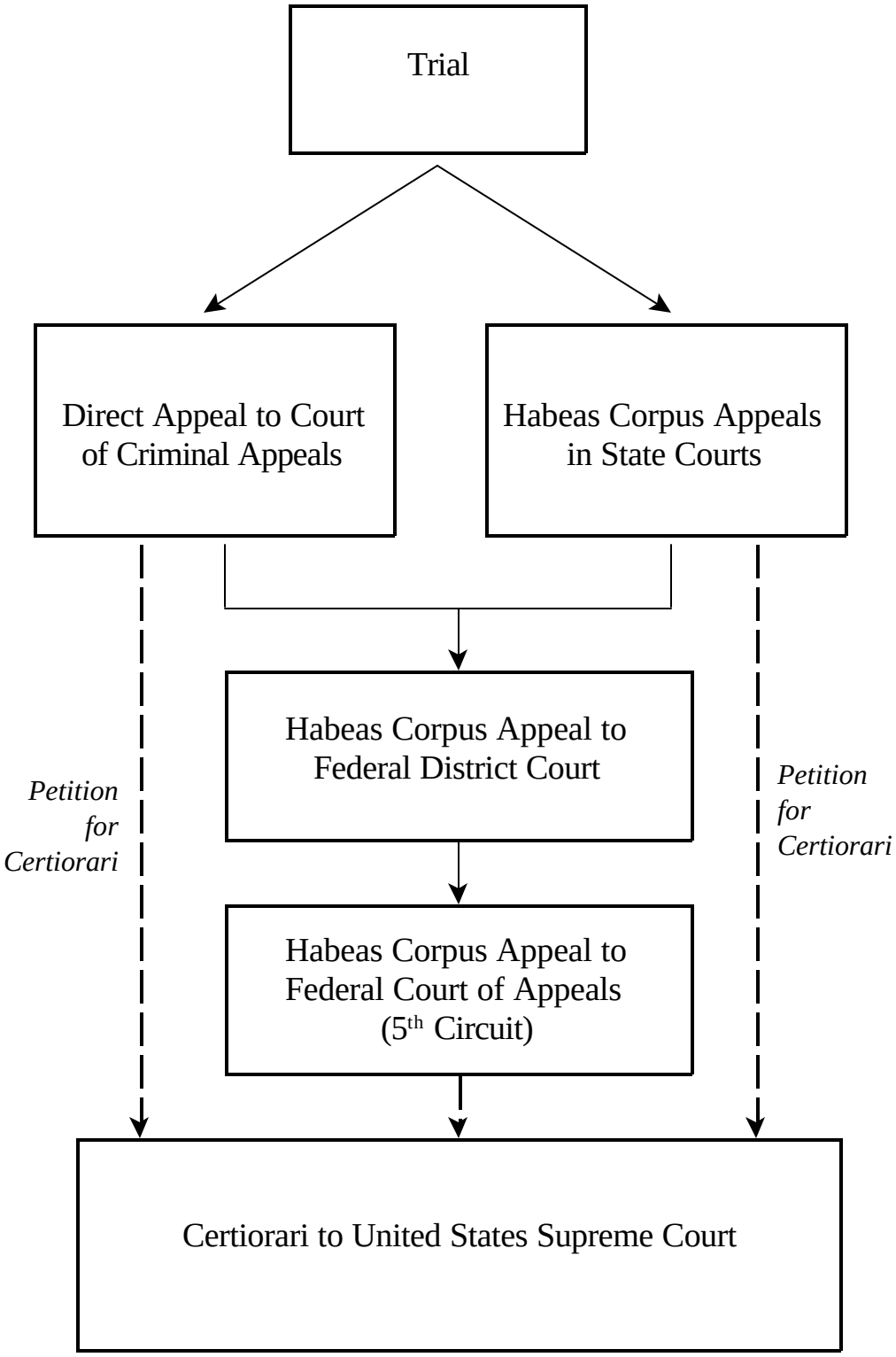
(PRE-1995)

(SECTION 3-E: APPEALS OF DEATH SENTENCES*)*



AFTER CHANGES TO STATE AND FEDERAL HABEAS CORPUS LAW
(1995)

(SECTION 3-E: APPEALS OF DEATH SENTENCES)



FEDERAL APPELLATE PROCESS

Procedural and judicial barriers like those enacted by Texas similarly restrict the habeas corpus relief available at the federal level. Federal habeas corpus doctrine has developed into an incredibly complex and arcane body of law, with all branches of government working together to create an almost impenetrable labyrinth of barriers to effective habeas corpus relief.[25] The Supreme Court and Congress have elevated these procedural and court-made barriers above concerns for constitutional rights and actual innocence. Thus, in federal habeas corpus proceedings, even blatantly unconstitutional state trials are upheld, unless the prisoner and counsel have successfully, fully, and competently navigated their appeals through previous state-level proceedings.[26]

Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[27] shortly after the Oklahoma City bombing as a "get tough on crime" response to a horrible tragedy.[28] AEDPA made important changes in federal habeas corpus law, as well as codifying some of the more restrictive judicial barriers adopted by the Supreme Court under the leadership of Chief Justice William Rehnquist.[29] Congress stated the purpose of AEDPA was "to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases."[30]

Much of the impact of AEDPA is still unclear. Many legal commentators have criticized AEDPA as a poorly written, incongruous amalgamation consisting of previously proposed legislation, recommendations of various commissions and committees, and a number of Supreme Court holdings.[31] In interpreting AEDPA, courts have read it narrowly, largely attempting to fit the provisions of the law into pre-existing, court-made federal habeas corpus doctrine.[32] In those instances, different federal courts of appeal around the country have adopted very different (but always onerous) interpretations, leading to different federal habeas corpus procedures and practice throughout the nation.

Even given its poor construction and varying interpretations by federal courts, AEDPA has changed in important ways the ability of convicted persons to gain federal habeas corpus from unconstitutional state convictions.[33] Many AEDPA provisions parallel the restrictions enacted by Texas in Article 11.071. AEDPA establishes a one-year period in which habeas corpus petitions must be filed.[34] The one-year period generally begins on the date when the prisoner completes the direct review process discussed above for state courts.[35] This significantly limits the time available to the habeas corpus counsel — who was usually not involved in either the trial or direct appeals — to conduct the necessary legal and factual investigations.[36] The new one-year limitation requires the prisoner or lawyer to proceed with the federal habeas proceedings concurrently with the Supreme Court certiorari proceedings following the end of the direct appeal process.[37]

For more than 20 years I have endeavored – indeed, I have struggled – along with a majority of this Court, to develop potential and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor ... I feel morally and intellectually obligated to concede that the death penalty experiment has failed.

Harry Blackmun
United States Supreme Court

As Professors James Liebman and Randy Hertz point out, AEDPA essentially requires that prisoners "include in their state post-conviction petitions 'every colorable ground[] for relief'" while providing "considerably less time than before in which to discover and plead those claims."[38] Thus, convicted persons who fail to include claims of inadequate assistance of counsel in their state habeas petitions – against attorneys who are quite likely concurrently representing them on direct appeal – lose the claim altogether because they did not raise the claim in a timely manner.[39]

AEDPA sets a maximum hourly fee for appointed counsel in federal habeas proceedings. It also imposes a general limit on the amount of money available to the defense for investigators, expert witnesses, and other support.[40] Moreover, AEDPA limits the prisoner's ability to obtain a federal evidentiary hearing regarding state court findings of fact where the state judge failed to develop the material facts because of a default by the prisoner.[41] In such instances, the prisoner actually may never receive a hearing, absent a showing of "cause" and "innocence."[42]

Additionally, AEDPA limits the ability of federal courts to correct errors made by the state court in adjudicating a federal legal claim.[43] AEDPA exacerbates the accelerative effects of the Article 11.071 by limiting federal habeas relief based on the claims and quality of adjudication that occurs in the state habeas proceedings.[44] Under AEDPA, a federal court may not grant relief unless the state court's resolution of federal claims was "contrary to … clearly established [Supreme Court] law" or "involved an unreasonable application of clearly established [Supreme Court] law."[45]

This last provision, along with the previous one, elevates the findings of the state trial and direct appeals to a determinative position in federal habeas proceedings. Essentially, the federal habeas corpus process takes the findings of the state courts as the starting point, even if the state judge incorrectly applied federal law. Rather than review the evidence anew, the federal habeas trial takes the conclusions of the state courts as established, absent the very high standards of "innocence" and "cause." If, for instance, the convicted individual failed to develop mitigating or exculpatory evidence during the trial – perhaps because certain witnesses had not yet come forth or because of inadequate investigation by appointed counsel – the convicted individual would face a substantial hurdle raising that newly found evidence in the federal habeas proceedings.

AEDPA finally restricts a prisoner's ability to file successive petitions for habeas corpus relief. Prisoners must seek approval by an appeals court for authorization to file a successive petition.[46] AEDPA bars the prisoner from raising the same claims that he or she raised in the previous petition. In order to raise new claims, prisoners must show either they are relying on a new legal rule that applies retroactively to the case or that the prisoner is probably innocent and is relying on facts not previously available.[47]

APPEALS PROCESS DOES NOT PROVIDE "FULL AND FAIR" ACCESS TO THE COURTS

> ***Thou Shall Not Ration Justice.***
>
> **Judge Learned Hand**

The direct appeal and habeas corpus proceedings available to a prisoner on death row do not provide the protection necessary to correct for the fundamentally flawed Texas criminal justice system. Texas law, by requiring the prisoner to pursue direct appeals and habeas corpus review simultaneously, effectively precludes the prisoner from raising certain claims in both state and federal habeas corpus petitions. Additionally, Texas law has reduced the number of reviews available to the prisoner. In a state where the prisoner often receives incompetent or inadequate legal assistance during trial and appeals, the restriction of state habeas corpus relief inevitably increases the likelihood that the state will execute an innocent person.

AEDPA and the restrictions it imposes at the federal level further diminishes the appellate review that the prisoner actually receives to a technical review that one can hardly describe as "full and fair."

APPEALS OF DEATH SENTENCES

[1.] *Text of Bush's Comments on Execution*, CHARLESTON GAZETTE, June 23, 2000, *available at* 2000 WL 2614481.

[2.] *Herrera v. Collins*, 506 U.S. 390, 445 (1993) (Blackmun, J., dissenting).

[3.] Act of May 24, 1995, S.B. 440, § 1, 74th Leg., R.S. (codified at TEX. CODE CRIM. PROC. ANN. art. 11.071).

[4.] The Texas death penalty statute requires that the Court of Criminal Appeals directly and automatically review all trials resulting in a death sentence. TEX. CODE CRIM. P. ANN. art. 37.071, §2(h) (West 2000).

[5.] James C. Harrington & Anne Moore Burnham, *Texas's New Habeas Corpus Procedure for Death-Row Inmates: Kafkaesque -- and Probably Unconstitutional*, 27 ST. MARY'S L.J., 69, 71 (1995); James Liebman *et al.*, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (visited Jul. 31, 2000), 21 <http://-207.153.244.129/>.

[6.] James S. Liebman & Randy Hertz, 1 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 179 (1998).

[7.] *Id.*.

[8.] Liebman *et al.*, *supra* note 5, at 21.

[9.] Harrington & Burnham, *supra* note 5, at 74.

[10.] Kristin N. Sullivan, *Richards calls for Death Row reforms*, FORT-WORTH STAR-TELEGRAM Aug. 5, 1994, *available at* 1994 WL 3718053.

[11.] Act of May 24, 1995, S.B. 440, § 1(4)(a), 74th Leg., R.S. (codified at TEX. CODE CRIM. PROC. ANN. art. 11.071). An applicant convicted before September 1, 1995, with no habeas petition pending, had to file for

habeas relief within 180 days from date counsel was appointed or within 45 days after the original brief was due on direct appeal, whichever is later. *Id.*

[12.] *Id.* at § 1(4)(h).

[13.] An application is considered untimely unless application sets forth facts establishing (a) that the claims could not have been timely raised because factual or legal bases for the claims were unavailable in the exercise of due diligence; (b) by a preponderance of the evidence that, but for a federal constitutional violation, no rational juror could have found the capital felon guilty beyond a reasonable doubt; or, (c) by clear and convincing evidence that, but for a federal constitutional violation, no rational juror would have answered one or more of the special issues in the State's favor. *Id.* at §1(5)(a)(1)-(3). *See also* Harrington & Burnham, *supra* note 5, at 90.

[14.] TEX. CODE CRIM. PROC. ANN. art. 11.071 at § 1(4)(h).

[15.] *Id.* at § 1(4)(g).

[16.] Harrington & Burnham, *supra* note 5, at 92.

[17.] Liebman & Hertz, *supra* note 6, at 255.

[18.] *Id.* at 256.

[19.] TEX. CODE CRIM. PROC. ANN. art. 11.071 § 1(2).

[20.] *Id.* at § 1(2)(h).

[21.] *Id.* at § 2A(a). The statute does not limit total compensation the court may award counsel for reasonable expenses. *Id.* at § 2A(c). The $25,000 cap is the maximum amount the state will reimburse the county for compensation of counsel and payment of reasonable expenses. *Id.*

[22.] *Id*. at § 3(b).

[23.] *Id.*

[24.] James Liebman *et al.*, *supra* note 5, at 21.

[25.] Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y.U. L. REV. 313, 318-19 (1999).

[26.] *Id.*

[27.] Pub. L. 104-132, 110 Stat. 1214 (1996).

[28.] Reinhardt, *supra* note 25, at 349.

[29.] *See, generally*, Liebman & Hertz, *supra* note 6, §§ 3.1 – 3.5; Reinhardt, *supra* note 25.

[30.] U.S. H.R. Conf. Rep. 104-518, 94th Congress., 2d Sess. 111 (1996), quoted in Liebman and Hertz, *supra* note 6, at 108.

[31.] *See, e.g.*, Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996); Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578 (1998); Benjamin Robert Ogletree, Comment, *The Antiterrorism and Effective Death Penalty Act of 1996, Chapter 154: The Key to the Courthouse Door or Slaughterhouse Justice?*, 47 CATH. U. L. REV. 603; Liebman and Hertz, *supra* note 6.

[32.] Liebman & Hertz, *supra* note 6, at 115.

[33.] *See, generally*, Liebman & Hertz, *supra* note 6, at § 3.2.

[34.] *See* 28 U.S.C. §2244(d)(1)(A)-(D) (West 1994 & Supp. 1998).

[35.] AEDPA also created a new Chapter 154 entitled "Special Habeas Corpus Procedures in Capital Cases." Chapter 154 provides for accelerated deadlines and resolution of petitions for habeas relief from prisoners in states that "provide the capital prisoners with certain procedural advantages during state postconviction

proceedings." Liebman & Hertz, *supra* note 6, at 110. Since no state has successfully met the standards established by the Chapter 154, this section will not address the process established under that chapter.

[36.] Liebman & Hertz, *id.* at 259.

[37.] Liebman and Hertz, *supra* note 6, at 255. Although the statute of limitations does not begin until the prisoner has completed the direct appeal process in the state courts, it is not tolled during the filing of the writ of *certiorari* in the U.S. Supreme Court and any *certiorari* proceedings thereafter. *Id.*

[38.] *Id.* at 258 (quoting *McFarland v. Scott*, 512 U.S. 849, 860 (O'Connor, J., concurring in the judgment in part)).

[39.] Reinhardt, *supra* note 25, at 318.

[40.] Liebman & Hertz, *supra* note 6, at 111.

[41.] *Id.*

[42.] *Id.*

[43.] *See also Williams v. Taylor*, 120 S.Ct 1495 (2000).

[44.] Liebman & Hertz, *supra* note 6, at 257.

[45.] *Id.* at 111-12.

[46.] *Id.* at 112.

[47.] *Id.*

SECTION 3-F: BOARD OF PARDONS AND PAROLES -- THE 6TH BREAK IN THE LINK OF DUE PROCESS

It is abundantly clear that the Texas clemency procedure is extremely poor and certainly minimal. A flip of the coin would be more merciful than these votes.

U.S. District Judge Sam Sparks
About the secretive clemency process
in the Texas Board of Pardons and Paroles

After the appeals process finishes, the fate of the convicted individual moves from the judiciary to the executive branch. The prisoner, his or her counsel, or the governor can ask the Board of Pardons and Paroles for a full pardon, a commutation to a life sentence or other appropriate maximum penalty, or a temporary reprieve from execution.[1]

The Board then, if it so chooses, makes recommendations to the governor. The Board is supposed to consider various grounds for relief, including clemency, the correction of judicial error, and to prevent unjust or wrongful executions. Without the Board's approval, however, the governor is unable to grant the convicted person anything more than a single 30-day reprieve.[2] The Board's approval by a simple majority is necessary for either a commutation or a pardon. The Board's comprehensive authority goes back to state constitutional reforms enacted in the 1930s, after evidence emerged that several governors had sold pardons during the 1920s and 1930s.[3]

Although theoretically the existence of the Board provides a final avenue for relief, the Board, in reality, is like much of the rest of the process, more of a review in form than a review in substance. The quality of the Board's review, much less its impartiality, is compromised by a number of factors.

Karla Fay Tucker, executed on February 3, 1998, despite pleas of religious leaders (such as Rev. Pat Robertson and Pope John Paul II) to spare her and despite her pledge never to seek parole. Both the Board of Pardons and Paroles and Governor Bush rejected her plea for clemency.

First, the members of the Board are all political appointees and subject to the same political pressures as the governor and the elected judges. For instance, Governor Bush has appointed all 18 members of the current board. It is, to say the least, a lucrative appointment: the appointees are full-time government employees, earning about $80,000 a year during their six-

year term.[4] The governor also selects the chair of the Board and appoints those members who will be on the Board's rule-making subcommittee.[5]

Thus, despite Governor Bush's repeated efforts to distance himself from the decisions and operation of the Board, the record bears out their adherence to the Governor's hard line on capital punishment: since 1995, the Board has granted only one of 68 requests for clemency made by a person on death row.[6] The granted request was an extraordinary situation; the state Attorney General recommended that the Board grant clemency in that case.[7]

Second, the decision-making process of the Board falls far below any standards that would be acceptable in a legislative or judicial setting. Given the gravity of the Board's responsibility, its unique role in the death penalty process (its decisions are not reviewed by courts and cannot be appealed to courts), and the frequent executions, one would think that the review and hearing of the requests would require that Board members spend a great deal of time together in review and debate of the merits of each request. However, the Board does not operate that way. In a process that some criticize as "death by fax,"[8] Board members review the evidence individually in their home cities and then telephone in or fax their decision to the Board office, which tallies the votes. Board members do not meet to discuss the case among themselves.

Additionally, the deliberations of the Board are not public: the Board is exempt from open government laws and the standard procedures under which most Texas agencies operate; it does not issue opinions; and there are no provisions for public hearings or any public commentary.[9] Nor are there standard features of due process: no hearings, no argument on the merits, no ability to challenge erroneous evidence, no right to appointed counsel. And, as mentioned, the decisions of the Board are not subject to appeal or court review. Thus, the procedures for clemency review – the last possible stage to save the life of the convicted individual (save a stay of execution from a court) – limit the ability of condemned individuals to fully present their case for clemency.

Third, the Board's operation arguably does not follow the provisions set out in the constitutional provision that created it. Article IV, Section 11 of the Texas Constitution establishes the Board, and requires it "to keep records of its actions and the reasons for its actions."[10] Given that the Board was established after revelations that governors had been selling pardons, this requirement quite likely grows out of concerns for due process and ensuring a fair review. In spite of this requirement, the Board provides no reasons for its actions; and no record, other than a tally of the votes themselves, is kept regarding its decisions. As one former judge on the Court of Criminal Appeals stated, "[T]he Board's refusal to follow the law with apparent impunity is outlandish."[11]

Thus, although the Board nominally provides a last line of protection against a wrongful execution, its secretive procedures and extremely infrequent granting of clemency, even of a temporary nature, point toward the conclusion that it is yet another weak link in a flawed system.

Although the United States Supreme Court has described the Board as "a forum to raise [] actual innocence claims,"[12] closer judicial scrutiny of the Board's operation shows it to be more of a hollow process than meaningful review. United States District Judge Sam Sparks of Austin concluded that the Texas clemency review process was "extremely poor and certainly minimal."[13] He went on to say "a flip of the coin would be more merciful than these votes," but he felt compelled to uphold the Texas clemency system when measured against the rather minimal federal procedural standards. A Texas state judge described the "death by fax" procedure as "troubling."[14]

Despite such criticisms and a number of lawsuits that have attempted to change the Board's decision-making process, the courts have not ordered the Board to conduct public meetings or to provide reasons for the denial of clemency. Thus, while the Board may be a forum to raise claims of actual innocence, it most likely will refuse to recognize those claims or to provide them a full and fair hearing.

BOARD OF PARDONS AND PAROLES

[1.] Tex.Admin.Code §§ 143.1, 143.57, & 143.43.

[2.] *Id.* at § 143.41(a).

[3.] Dave McNeely, *What Bush Could and Couldn't Have Done*, AUSTIN-AMERICAN STATESMAN June 24, 2000, A15, *available in* 2000 WL 7337534; John Moritz, *Criticism Intensifying on 'Secret' Clemency Review*, FORT WORTH STAR-TELEGRAM, June 24, 2000, *available in* 2000 WL 5013551.

[4.] Moritz, *supra* note 3. Sara Rimer & Jim Yardley, *Low-Profile Panel Holds Inmates' Fate*, SUN-SENTINEL (FT. LAUDERDALE), June 21, 2000, *available in* 2000 WL 22180524.

[5.] Rimer and Yardley, *supra* note 4.

[6.] *Id.*

[7.] In a recent case, the Board recommended a pardon to the governor, which he approved, after national publicity showed conclusively through DNA testing that Roy Criner, convicted of rape, could not have committed the crime. He served ten years of a 99-year sentence in prison. The Court of Criminal Appeals, in an opinion by Judge Sharon Keller, to much astonishment, upheld the sentence, the DNA test notwithstanding. The DNA testing conclusively established that Criner could not have been the rapist.

[8.] *Texan Loses Clemency Appeal; Defiant Gary Graham Struggles with Jailers after 'Death by Fax' Parole Board Ruling*, GUARDIAN, June 23, 2000, *available at* 2000 WL 23283085.

[9.] Kathy Walt, *The Graham Execution: Parole Board Keeps Low Profile After its Decision*, HOUSTON CHRONICLE, June 23, 2000, *available in* 2000 WL 4306992.

[10.] Tex. Const., art. IV, § 11.

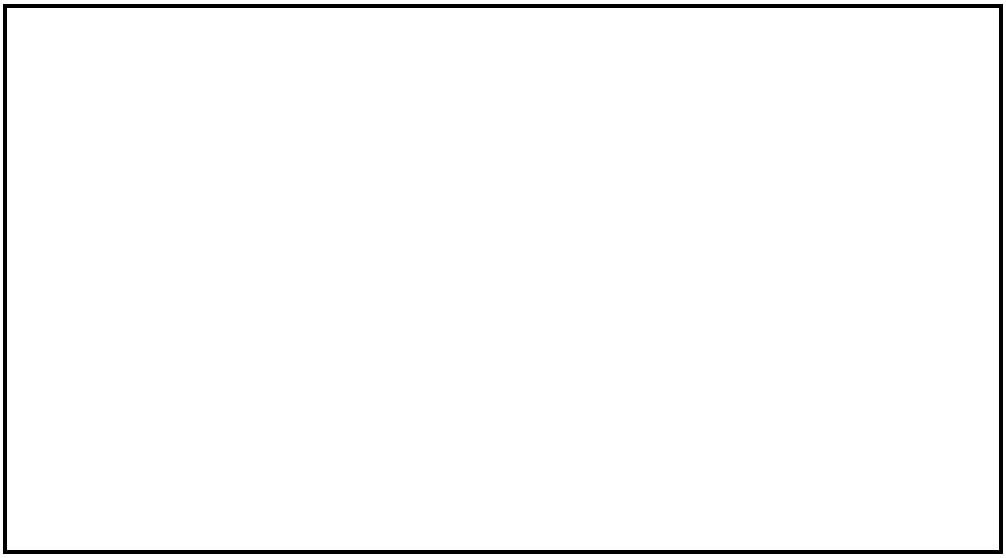
[11.] *Texas Board of Pardons & Paroles*, 976 S.W.2d 207, 208 (1998) (Baird, J., concurring and dissenting)

[12.] *Herrera v. Collins*, 506 U.S. 390, 411 (1993).

[13.] Unpublished opinion, quoted in Moritz, *supra* note 3.

[14.] Judge Scott McCown, quoted in Moritz, *supra* note 3.

SECTION 4: DEATH PENALTY AND JUVENILE OFFENDERS



Since 1977, the State of Texas has executed nine juvenile offenders. A juvenile offender is a person who commits a crime while under age 18, the age of majority. The constitutionality of death sentences for juvenile offenders was challenged in the United States Supreme Court in 1988 and 1989.

In 1988, the Court held, in *Thompson v. Oklahoma*,[1] that the execution of offenders age 15 or under is prohibited by the Eighth Amendment's proscription against cruel and unusual punishment. The following year in *Stanford v. Kentucky* and *Wilkins v. Missouri*[2] the Court held, however, that the Eighth Amendment does not prohibit the imposition of the death penalty for crimes committed at age 16 or 17.

In 1992, the United States ratified the International Covenant on Civil and Political Rights. Although Article 6(5) of the Covenant prohibits the death penalty for those who commit crimes when they were below the age 18, the United States reserved the right to execute juvenile offenders. With this reservation in place, 24 of the 38 United States jurisdictions that retain the death penalty allow juvenile offenders to be sentenced to death. Ten countries that are signatories to the International Covenant on Civil and Political Rights have lodged formal complaints regarding the United States exception.

Texas leads all jurisdictions with 30% of the total number of death-sentenced juvenile offenders, 24, currently on death row.[3]

DEATH PENALTY AND JUVENILE OFFENDERS

1. 487 U.S. 815 (1988).
2. 492 U.S. 361 (1989).

[3] *http://amnestyusa.org/rightsforall/dp/index.html. See* Sara Rimer & Raymond Bonner, *Whether to Kill Those Who Killed as Youths*, N.Y. TIMES, Aug. 22, 2000, at A1.

Juvenile Offenders Executed from 1977 to July 2000

Name	Date of Execution	Age at Offense	Age at Execution	Race	Race of Victim
Charles Rumbaugh	1985	17	28	W	W
Jay Pinkerton	1986	17	24	W	W
Johnny Garret	1992	17	28	W	W
Curtis Harris	1993	17	31	AA	AA
Ruben Cantu	1993	17	26	H	H
Joseph John Cannon	1998	17	38	W	W
Robert Anthony Carter	1998	17	34	AA	AA
Glenn Charles McGinnis	2000	17	34	AA	W
Gary L. Graham	2000	17	35	AA	W

Juvenile Offenders on Death Row in Texas in August 2000

Name	Date of Conviction	Age at offense	Race	Race of Victim
Gerald Lee Mitchell	1985	17	AA	W
Robert James Wills	1985	17	AA	W
Mauro Morris Barraza	1989	17	H	W
Johnny Rey	1991	17	H	W
Miguel Angel Martinez	1991	17	H	W, H
Laquan Miles	1991	17	AA	AA
Steven Brian Alvarado	1991	17	H	H
Nanon McKewn Williams	1992	17	AA	W
Oswaldo Regaldo Soriano	1992	17	H	U
Jose Ignacio Monterrubio	1993	17	H	H
Efrian Perez	1993	17	H	W, H
Raul Villareal	1993	17	H	W, H
Charles Burnell	1993	17	AA	U
Napoleon Beazley	1994	17	AA	W
John Curtis Dewberry	1994	17	W	W
Justin Wiley Dinkins	1994	17	W	U
Anthony Jerome Dixon	1994	17	AA	W
T.J. Jones	1994	17	AA	U
Oscar Ortiz III	1994	17	H	H
Edward B. Capetillo	1995	17	H	U
Anzel Jones	1995	17	AA	U
Toronto Patterson	1995	17	AA	AA
Mark Arthur	1996	17	AA	H
Randy Arroyo	1997	17	H	H

KEY: W = WHITE, AA = AFRICAN AMERICAN, H = HISPANIC, U = UNKNOWN

SECTION 5: EXECUTING PERSONS WITH MENTAL RETARDATION

> *We are killing the mentally retarded without serious qualm. We are killing persons for crimes they committed as children. And it is increasingly difficult not to notice and admit we are mainly executing people of marginal intelligence, doubtful sanity, debilitating poverty. The death penalty has become an act of class warfare, fought top-down against the poor and incompetent.*
>
> Tom Teepen,
> *Atlanta Journal & Constitution* (Sept. 5, 1987)

Recent polls show that a majority of those who favor the death penalty oppose the execution of individuals with mental retardation.[1] This opposition is attributed to the fact that most people believe persons with mental retardation are less culpable for their crimes.[2] Experts define mental retardation as sub-average intelligence -- an IQ of 70 or below.[3] An IQ at this level or below causes an individual to have difficulties dealing with routine aspects of his or her life. To be classified as having mental retardation, a person must have had the condition since childhood.[4]

In 1989, the Supreme Court held in *Penry v. Lynaugh*,[5] a case from Texas, that executing people who have mental retardation is not a violation of the Eighth Amendment, no matter their level of mental capacity or retardation. This decision, however, did require jury instructions to incorporate evidence of mental retardation as a possible mitigating factor in the imposition of the death penalty. The Court stayed Johnny Penry's execution in 1986, and then vacated it in 1989 because evidence of mental retardation had not been introduced as a mitigating factor during trial. On re-trial, this evidence was introduced, and Penry again received the death sentence. Penry is estimated to have an IQ between 50 and 60 and the reasoning skills of a seven-year-old.[6] He is on death row, awaiting his January 2001 execution date.

> *Not only does the death penalty not deter murder, it fosters a culture of brutality.*
>
> Judge Rudolph Gerber
> Arizona Court of Appeals
> (1998)

Penry's lawyers hope to bring his case back before the Supreme Court. Some scholars believe the Court may reverse its earlier decision and hold that executing people with mental retardation is in fact "cruel and unusual punishment" and unconstitutional.[7] This belief is based on the language of Justice O'Connor's majority opinion in *Penry*,[8] which emphasized that no "national consensus" had developed among the States regarding the execution of person with mental retardation.[9]

When the *Penry* decision was handed down, only Georgia and Maryland prohibited execution of people with mental retardation.[a] Since 1989, eleven more states have passed laws prohibiting these

[a] The federal government passed a law under President Reagan barring execution of people with mental retardation who were convicted in federal courts.

executions.[b] In addition to these thirteen states, five others,[c] including Texas, have considered ending executions of people with mental retardation, but have not yet done so.

In 1999, Texas State Senator Rodney Ellis, a supporter of capital punishment, unsuccessfully sponsored a bill that would have disallowed death sentences for persons who could prove they were mentally retarded at the time of the commission of the offense. Mentally retardation was assumed for persons with an IQ of 65 or less. To establish mental retardation, the bill required that a disinterested third party test the offender.[d] Once found to be mentally retarded, offenders would have been subject to life imprisonment instead of the death penalty. Although the Republican-dominated Texas Senate passed this bill, it died in the House. Governor Bush opposes laws that prohibit executing people with mental retardation.[e]

> Texas has never adequately funded mental health services -- yet it is perfectly willing to execute people for crimes that good mental health care might have prevented.
>
> Editorial, *Dallas Morning News*

Senator Ellis appears optimistic in light the current death penalty attention by the media.[10] He plans to reintroduce the bill in the 2001 legislative session.[11] In the new bill, Senator Ellis wants raise the IQ limit to 70 in line with the common medical definition of mental retardation and in line with several other states' laws.[12]

Although the passage of this bill would go a long way toward ending the execution of people with mental retardation, it will not solve the problem entirely. One problem under the current system, which undermines the effective use of mental retardation as mitigation or an extenuating factor to avoid execution, is the failure to introduce such evidence at trial. This failure occurs for two main reasons: incompetent counsel and hidden conditions.[13]

> Doil Lane was convicted of the rape and murder of an 8-year-old girl based mostly on his own confession. Tests showed his IQ to be between 62 and 70. After he confessed, he climbed into the lap of the Texas Ranger he had been talking to. At trial, he requested a crayon to color with; the judge denied his request. Lane is on death row awaiting execution.

In the great majority of capital murder trials, appointed counsel represent the defendants; most people charged with capital murder are too poor to afford counsel. Many appointed lawyers are inexperienced, and often incompetent.[14] Inexperience and

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[b] These states are Arkansas, Colorado, Indiana, Kansas, Kentucky, Nebraska, New Mexico, New York, South Dakota, Tennessee, and Washington.

[c] These five are Illinois, Missouri, Arizona, Florida, and Texas.

[d] There is currently no testing of death-sentenced offenders for mental retardation when they enter prison. All other offenders are tested so that special accommodations can be made for them within the Texas prison system and its programs. Letter from Wayne Scott, Executive Director of the Texas Department of Criminal Justice, to Senator Rodney Ellis (June 28, 2000), on file with Texas Civil Rights Project.

[e] Interestingly, his brother Governor Jeb Bush of Florida, also a stanch death penalty supporter, does not believe people with mental retardation should be executed. Florida is on the brink of outlawing these executions with the chairman of the State's Republican Party pledging to support a bill to end them. Raymond Bonner & Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. TIMES, August 7, 2000, at A1.

incompetence often lead to the failure to introduce evidence of mental retardation at trial, where it is the easiest and most appropriate to introduce.

The second reason that evidence of mental retardation is often not introduced at trial is that defendants sometimes seek to hide their mental disability because they want to appear "normal" or because they are afraid that the social stigma associated with retardation will hurt their case rather than help. Just as frequently, their attorneys fail to convince them this tact is a two-edged sword that may have deadly consequences.[15]

Of all the problems surrounding the death penalty, the one most related to mental retardation may be actual innocence. Individuals with mental retardation are likely to confess to a crime simply to please authorities.[16] "Given time you could get him [Doil Lane, a mentally retarded man on death row for capital murder] to confess to anything."[17]

EXECUTING PERSONS WITH MENTAL RETARDATION

1. Raymond Bonner & Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. TIMES, August 7, 2000, at A1.

2. *Id.*

3. *Id.*

4. *Id.*

5. 492 U.S. 302 (1989).

6. AP, *Court lifts reprieve for killer: Inmate on death row for '79 rape-slaying*, DALLAS Morn. NEWS, June 21, 2000.

7. Bonner & Rimer, *supra* note 1.

8. 492 U.S. 302

9. *Id.* at 305.

10. Bonner & Rimer, *supra* note 1.

11. *Id.*

12. *Id.*

13. *Id.*

14. *See, e.g.*, Steve Mills, Ken Armstrong, & Douglas Holt, *Flawed trials lead to death chamber: Bush confident in system rife with problems*, CHICAGO TRIBUNE, June 11, 2000.

15. Bonner & Rimer, *supra* note 1.

16. *Id.*

[17.] *Id*. (quoting William Allison, attorney for Doil Lane).

SECTION 6: CALLS FOR A MORATORIUM

I think a moratorium would indeed be very appropriate.

Rev. Pat Robertson (*Washington Post*, 4/8/00)

Until the state can be absolutely certain that there are no innocent inmates on death row, and that the mechanisms for preventing innocent people from being convicted are in place, a moratorium on executions would ease fears that we may impose the ultimate punishment on an innocent person.

Fear of executing an innocent person has prompted officials at the local, state, and federal levels to support execution moratoriums. In addition, growing awareness of the systemic failures in the capital system, brought to light by such reports as the Liebman study and the *Chicago Tribune*'s numerous death penalty investigations, have led to the establishment of various state commissions charged with examining – and modifying – capital punishment procedures.

On January 31, 2000, Republican Governor George Ryan declared an indefinite moratorium on all executions in Illinois. Calling the prospect of executing an innocent person "the ultimate nightmare," Ryan issued the moratorium in order to conduct an exhaustive review of the state's death row, where, since reinstating the death penalty in 1977, more prisoners have been exonerated (13) than executed (12).[a] Ryan declared "until I can be sure … that no innocent man or woman is facing a lethal injection, no one will meet that fate."[1] Governor Ryan established a 14-person commission, composed of legal and political professionals, to head up the study.

Following Illinois' example, a number of state legislatures expressed reservations about the use of capital punishment. Although Governor Mike Johanns vetoed the bill, Nebraska's legislature passed a moratorium bill last year. New Hampshire's legislature passed a resolution several months ago calling for complete abolition of the state's death penalty, which the governor vetoed. Maryland Governor Parris Glendening recently ordered a two-year study of racial bias and death penalty procedures in his state. And the Florida Supreme Court issued a six-month moratorium on all executions so that it could examine the constitutionality of the state's new Death Penalty Reform Act.

> *Let us pause to be certain we do not kill a single innocent person. This is really not too much to ask for a civilized society.*
>
> --Senator Russ Feingold

All told, more than a dozen states are considering either moratorium or abolition legislation. Many more states are conducting comprehensive reviews of their capital procedures. For other states, concerns about executing innocent defendants have led to legislation calling for greater access to DNA testing. In addition, many state legislatures have banned the execution of minors or persons with mental retardation. (*See* following table for more information on state actions in this regard.)

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[a] For similar reasons, Minnesota Governor Jesse Ventura announced in February that he no longer supported the death penalty. William Saletan, "Calculating the Risk," *Mother Jones* (July/August 2000), p.28.

Cities, too, have begun to call for moratoriums. Four major cities – Philadelphia, Baltimore, San Francisco, and Pittsburgh – approved resolutions calling for review of the death penalty and a moratorium on executions. Nearly two dozen other cities around the country have passed similar resolutions.[2] City councils are becoming instrumental in pressing governors and state representatives to consider moratoriums.

On the national level, moratorium bills are currently pending in both chambers of Congress. In the House, Congressman Jesse Jackson, Jr. (D-IL) introduced HR 3623, "The Accuracy in Judicial Administration Act of 2000" (AJA), on February 10, 2000. The bill would impose a moratorium on all state and federal executions in the United States until every inmate currently on death row has had an opportunity to explore potentially exculpatory evidence. The bill sets a minimum seven-year moratorium so that prisoners have adequate time to look into the possibility of DNA testing.[3]

> The death penalty has been administered in a way that discriminates against minorities and poor people who can't afford high-priced attorneys.
>
> Rev. Pat Robertson (April 2000)

In the Senate, Senators Russ Feingold (D-WI) and Carl Levin (D-MI) introduced the "National Death Penalty Moratorium Act of 2000" in April. The bill calls on the federal government and all states that impose the death penalty to immediately suspend executions until a national blue ribbon commission determines whether the death penalty can be imposed "fairly and with due process." The commission would investigate all matters relating to the administration of the death penalty and issue recommendations on how to fix flaws in the capital punishment process on both federal and state levels. The moratorium would end only after Congress considers the commission's final report and enacts or rejects its recommendations. In introducing the bill, Senator Feingold emphasized the problems inherent in the administration of capital punishment:

> Both supporters and opponents of the death penalty should be concerned about the flaws in the system by which we impose sentences of death. More than 3,600 inmates sit on state and federal death rows around the country, while it becomes increasingly clear that innocent people are being put to death .... The flaws in the Illinois criminal justice system I am sure are not unique. Problems like convicting the innocent, racial disparities in the application of the death penalty, and inadequacy of defense counsel have plagued the administration of capital punishment across the Nation. That is why we need a national review of the death penalty and a suspension of executions until we can be sure that death row inmates across the country have been given full protections of justice, fairness, and due process.[4]

In conjunction with his bill, Senator Feingold urged President Clinton to impose a moratorium on federal executions and begin a comprehensive review of geographic and racial disparities in the imposition of the federal death penalty.[b] A number of religious groups, including the U.S. Catholic Conference and the Union of American Hebrew Congregations, have joined calling for a federal moratorium and Presidential review of capital punishment. President Clinton has promised to examine the issue in greater detail.

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[b] Of the 21 prisoners on federal death row, 17 are black, Asian, or Hispanic. Charles Babbington and Bill Miller, *Clinton Halts Execution Until Federal Clemency Policy is Set*, WASH. POST, July 8, 2000, at A2.

The Innocence Protection Act, a bipartisan bill currently being considered in Congress, aims to reduce the risk of executing innocent persons. The bill would ensure that convicted offenders, on the federal and state levels, are afforded an opportunity to prove their innocence through DNA testing, help states provide competent legal services, and inform jurors about sentencing options (for instance that they can ask for "life without the possibility of parole").[5]

In June, the President expressed his concerns about the fairness of the federal death penalty: "the issues at the federal level related more to the disturbing racial composition of those who've been convicted. And the apparent fact that almost all the convictions are coming out of just a handful of states."[6]

On June 8, 2000, President Clinton postponed the execution of Juan Garza, scheduled to be the first prisoner executed by the federal government in 37 years. The execution was delayed until the Justice Department finishes drafting guidelines for seeking presidential clemency in federal death penalty cases.[7]

The Justice Department conducted the study on whether the federal death penalty is racially biased, and, on September 12, issued a report showing great racial and geographical disparities in the administration of the federal death penalty.[8]

RECENT STATE ACTIONS REGARDING CAPITAL PUNISHMENT[9]

STATE	PROPOSED LEGISLATION/ACTION	OUTCOME
ALABAMA	Senate Bill SB7 (order 3-year moratorium on death penalty).[c]	Adjourned without voting.
ARIZONA	SB 1353 (allow DNA testing of any existing evidence at inmate's request).	Passed House and Senate. Signed into law by Governor on 4/24/00.
FLORIDA	Florida Legislature passed the Death Penalty Reform Act of 2000, which limits appeals from death row inmates.	Florida Supreme Court imposed 6-month moratorium on implementing law, citing concerns about constitutionality.
ILLINOIS	SB 1488 and HB 4017 would ban the execution of mentally retarded persons.	Passed overwhelmingly in House. Currently in Senate Rules Committee.
INDIANA	Criminal Law Study Commission to examine death penalty, focusing on issues of adequate counsel, cost, race, review process, and recommending changes	Established by Governor
KENTUCKY	BR 1015 (abolish the death penalty) SB 325 and HB 880 (5-year moratorium)	Adjourned without voting on bills

[c] Most resolutions calling for a moratorium also include a proposal to conduct an intensive evaluation of the State's death penalty process. Commissions will generally look at issues of class and race in the imposition of the death penalty. Many studies will also examine effectiveness of defense counsel, prosecutorial conduct, the appellate process, and potential DNA testing.

MARYLAND	HB 388 (3-year moratorium on executions while University of Maryland, College Park completes a study of the administration of the death penalty)	Adjourned without voting
MISSOURI	SB 838 and HB 1887 would create a death	Currently in committee
NEBRASKA	Legislature passed a bill calling for a moratorium	Governor vetoed bill
NEW HAMPSHIRE	House and Senate passed bill that would have repealed death penalty	Governor vetoed bill. House failed to override veto[d]
NEW JERSEY	AB 1853 (impose 2-year moratorium)	In committee
NORTH CAROLINA	Legislative panel created to study whether to ban executions of mentally retarded persons, and whether racial discrimination affected sentences of those currently on death row	
OKLAHOMA	HB 2347 (impose 2-year moratorium) DNA Forensic Testing Act authorizes state Indigent Defense System to investigate inmates' claims that DNA testing would exonerate them	Died in House Rules Committee. Governor Frank Keating signed the bill into law.
OREGON	Former U.S. Senator Mark Hatfield inroduced initiative petition, asking voters to overturn state death penalty	
PENNSYLVANIA	SB 952 calls for a temporary suspension of the death penalty.	In Judiciary Committee.
SOUTH DAKOTA	HB 1197 (ban execution of defendants with mental retardation)	Signed into law by Governor
VIRGINIA	House Joint Resolution 307 would study death penalty appeals process	Died in the House Committee on Rules
WASHINGTON	SB 6137 would create a death penalty task force	In Senate Ways and Means Committee

LEGAL, SOCIAL, AND RELIGIOUS GROUPS JOIN CALL FOR MORATORIUM

Many prominent political and legal organizations have long opposed the death penalty. Groups such as Amnesty International, the National Association for the Advancement of Black People (NAACP), and the

[d] The repeal measure was somewhat symbolic, since New Hampshire has not executed anyone since 1939. The state has no capital murder trials pending, and has no one on death row. New Hampshire's legislature was the first to vote for abolition in over twenty years.

American Civil Liberties Union (ACLU) have called consistently for complete abolition of capital punishment. Recently, more political and religious groups have joined the call for either abolition of the death penalty or a moratorium on executions.

> The majority of the appeal courts of the USA will not look at the simple question of whether a death row inmate is innocent of the crime for which he or she was sentenced to die. Their main concern seems to be whether the legal procedures and the constitution were followed.
>
> Piers Bannister

The American Bar Association (ABA) House of Delegates, in its February 1997 midyear meeting, passed a resolution calling for a halt to executions until courts can ensure that death penalty cases are "administered fairly and impartially, in accordance with due process." The ABA, which takes no official position on the death penalty, also urged jurisdictions across the country to halt the execution of mentally retarded persons and persons who committed crimes as minors, and emphasized the need for competent counsel in capital cases.[10]

Religious leaders have joined the call for a moratorium on executions. In a surprising statement, conservative death penalty proponent, Rev. Pat Robertson told *Meet the Press* in May that "a moratorium [on executions] would indeed be appropriate."[11] Leaders of numerous religious organizations, representing – among others – the Catholic, Baptist, Jewish, Episcopal, Lutheran, Presbyterian, and Methodist faiths, have expressed support for a death penalty moratorium. Pope John Paul II, a strong opponent of capital punishment, recently announced his new policy of writing to every Governor in the United States before an imminent execution, asking that it be halted.[12]

THE MORATORIUM MOVEMENT IN TEXAS

Many Texas religious and social action groups have issued calls for reform of the death penalty. The Texas Conference on Churches and the Catholic Bishops of Texas have called for complete abolition.

In their statement on capital punishment, the Catholic Bishops of Texas write: "Since the reinstatement of the death penalty in the United States in 1976, the Catholic Bishops … have repeatedly condemned its use as a violation of the sanctity of human life. Capital punishment … is inconsistent with the belief of millions of Texans that all life is sacred."[13]

The Texas Conference of Churches, in a resolution unanimously adopted by the General Assembly, writes: "the evidence is overwhelming that racism, classism, and economics are governing factors in administering the death penalty; and that greater numbers of people of color are executed than is reflected in the general population; that mentally incapacitated people and far too many poor and uneducated people have been executed – thus demonstrating the injustice of the current practice of exercising the death penalty."[14]

> For most of my life, I have believed the death penalty to be a deterrent to the brutal crimes that result in such a sentence. However, today I'm not as sure....
>
> Charles T. Terrell, Sr.,
> Past Chair,
> Texas Department of
> Criminal Justice

Texas Impact, a statewide interfaith social justice advocacy coalition, supports a statewide moratorium on all executions. Bee Moorhead, acting director of Texas Impact, explained that while most religious groups seek abolition as their ultimate goal, many also support a moratorium. A moratorium would, at the very least,

force people to examine issues of innocence and fairness in the imposition of the death penalty. Though some religious leaders refuse to accept anything less than full abolition, the general feeling, she noted, is that a moratorium would tend to increase support for full abolition.[15] Texas Impact's members include: American Jewish Committee, American Jewish Congress, Arlington Ministerial Association, Austin Metropolitan Ministries, Christian Church (Disciples of Christ) in the Southwest Region, Church Women United in Texas, Episcopal Church Dioceses in Texas, Evangelical Lutheran Church in America Synods in Texas, Greater Dallas Community of Churches, Greek Orthodox Church, Interfaith Ministries of Greater Houston, Port Arthur Board of Missions, Presbyterian Church (U.S.A.) Presbyteries in Texas, San Antonio Community of Churches, Texas Conference of Churches, United Church of Christ in Texas, United Methodist Church Conferences in Texas.

> The death penalty is the privilege of the poor.
>
> Clinton Duffy
> Former Warden, San Quentin

A moratorium campaign has begun in Texas. Spearheaded by the Texas Coalition to Abolish the Death Penalty and other social action and religious groups across the state, the movement hopes to increase public awareness of the problems in the capital punishment system. The campaign will work to pass a moratorium bill during the 2001 Texas legislative session.

The Texas Criminal Defense Lawyers Association (TCDLA), an organization of more than 2000 attorneys, recently issued a call for a moratorium on executions in Texas. Noting that "Texas stands apart in executing those the rest of the world spares," the TCDLA urged Governor Bush to "pause in the race to execute and join Illinois, Nebraska, New Hampshire, Missouri, Indiana, and the federal government to review the application of the death penalty in Texas."[16]

Additional efforts are underway to make the death penalty process as fair as possible. State Senator Rodney Ellis will propose, in the next legislative session, a bill to allow post-conviction DNA testing for inmates with innocence claims. His bill, similar to legislation passed in Illinois and New York, would require law enforcement and the courts to preserve all DNA and biological evidence for as long as the convicted person is incarcerated. Ellis' bill also would ban the execution of mentally retarded persons and allow juries the option of imposing life without parole. In addition, the bill would create an "Innocence Commission" to review select death penalty cases and make recommendations for improving the system.[17]

WHY IMPOSE A MORATORIUM IN TEXAS?

Governor Bush repeatedly claims that the Texas death penalty process is fair and efficient, that all possible precautions are taken to ensure that defendants' due process rights are protected, and that no innocent person has been executed during his term.

Public opinion, though, does not reflect Governor Bush's unbending faith in the system. The CNN/USA Today/Gallup Poll of June 30, 2000 found that 80% of Americans surveyed believe that an innocent person has been executed in the United States in the past five years; 46% believe that an innocent person has been executed in Texas during Governor Bush's tenure as governor.[18] A Scripps-Howard Poll of June 21, 2000 found that 57% of Texans surveyed believe that Texas has executed an innocent person.[19]

Further, studies such as that by Liebman and the *Chicago Tribune*'s report on capital punishment in

Texas raise important questions about the competency of counsel in capital trials, the fairness of the appellate process, and the risk of executing the innocent. These and other reports have raised public awareness and led to a decline in public support for the death penalty in general. Numerous polls show decreased support for capital punishment:[20]

In a June 23-35, 2000 CNN/*USA Today*/Gallup Poll, support for the death penalty was at 66%, compared with 80% in 1994.

In a June 14-18, 2000 *ABC News.com* poll, support for the death penalty was at 63%, compared to 77% in 1996.

In a February 1999 Gallup Poll, 65% of respondents answered that a poor person is more likely than a person of average or above average income to receive the death penalty for the same crime.

In the same poll, 50% of respondents said that a black person is more likely than a white person to receive the death penalty for the same crime.

A review of the death penalty is essential if Texas is to claim that its process is fair and innocent defendants are not at risk. The Governor or the State Legislature can call for a comprehensive study of the capital system. As in other states, a moratorium should be imposed while the study is conducted. A moratorium would serve two important purposes. First, it would prevent any innocent people from being executed. Second, a moratorium would allow the state to fully examine, without the pressure of upcoming executions, the capital punishment process from trial to execution, particularly in those areas described by this report as the most problematic (competency of counsel, sufficient funds to investigate and prepare the case for trial, "death qualified" juries, and the adequacy of appellate review).

Numerous systemic failures cause people to end up on death row. A powerful combination of poverty, racism, prosecutorial misconduct, ineffectiveness of defense counsel, lackluster appellate review, and a restricted habeas process leads people to death row without proper due process. A moratorium would ensure that due process is tightened substantially and that all steps of the system, at every level, are thoroughly examined and adjusted before any more people are executed.

> The death penalty is a poor person's issue. Always remember that: after all the rhetoric that goes on in the legislative assemblies, in the end, when the deck is cast out, it is the poor who are selected to die in this country.
>
> -- Sister Helen Prejean (January 24, 1995)

Most important, a moratorium would enable the state to establish mechanisms for ensuring that innocent people do not end up on death row. One such mechanism would be expanded use of DNA testing in capital cases. DNA testing has emerged as a potent tool for exonerating the innocent and identifying the guilty. Barry Scheck's Innocence Project at the Benjamin Cardozo School of Law has successfully employed DNA evidence to exonerate 39 convicted felons, including eight individuals on death row.[21] Nationwide, DNA testing has helped secure the release of 67 men convicted of crimes they did not commit. In 16 of those cases, DNA testing not only remedied the miscarriage of justice, but also led to the identification of the real perpetrator.[22]

> The system is not working.... Innocent people are being sentenced to death.
>
> Judge Moses Harrison II
> Illinois Supreme Court

A 1996 Justice Department Report, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, found that, of 8,048 rape and rape-and-murder cases referred to the FBI crime lab from 1988 to mid-1995, 2,012 of the primary suspects were exonerated by DNA evidence alone, a total of 25%.[23] THERE IS NO REASON NOT TO SUPPOSE THAT THE 25% EXONERATION FIGURE IS NOT SIMILAR, OR APPROXIMATE, FOR PEOPLE ON DEATH ROW.

In response to the findings of this study, the Justice Department created the National Commission on the Future of DNA Evidence. The Commission's first report encouraged DNA testing in pursuit of inmates' claims of innocence and emphasized that this "pursuit of truth" should be more important than mechanical adherence to time limits on appeals, or other procedural and institutional bars to justice.[24]

Americans overwhelmingly support DNA testing for convicted inmates with innocence claims. A March 3, 2000 Gallup Poll revealed that 92% of Americans believe that prisoners convicted without DNA testing should be allowed to have DNA tests now, if such tests might prove their innocence. The poll showed that support for this position runs solidly across all demographic and ideological groups.[25]

> "You always lose some soldiers in any war."
>
> Michigan State Senator David Jaye, commenting on the risk of executing an innocent person

The Texas Legislature should heed the advice of the Justice Department and pass State Senator Rodney Ellis' bill calling for DNA testing of inmates with innocence claims. The State also should create a commission to examine the systemic failures in the capital process. Only after a thorough review of the Texas death penalty, and the implementation of recommendations to improve the system, can the State claim that it has done everything possible to prevent the execution of innocent defendants. Even a pro-death penalty Governor cannot argue with the idea that "a little time and a little reflection are not too much to ask when the lives of innocent people may hang in the balance."[26]

THE VICTIMS SPEAK

As one victim, as a colleague, I stand before you to ask that you vote to abolish the death penalty, not so much because I want murderers to live but because if the state kills them, that forever forecloses the possibility that those of us who are victims might be able to figure out how to forgive. We've lost enough already. Don't take that option for healing away, please.

New Hampshire State Rep. Robert Renny Cushing
Representatives Hall (March 12, 1998)
His father was murdered in 1988

You stand there and you watch a man take two gasps and it's over. I would like to have seen him humiliated a little bit. I think that he should have been brought in and strapped down in front of us.

Linda Kelley
After watching execution of killer of her two children

In my case, my own daughter was such a gift of joy and sweetness and beauty, that to kill someone in her name would have been to violate and profane the goodness of her life; the idea is offensive and repulsive to me.

Marietta Jaeger
Her 7-year-old daughter, Susie, was kidnapped
and murdered

When the prosecutors in Houston promised to give the murderer the death penalty I was extremely gratified -- at first. In fact, I went to the trial every day because I thought that hearing the judge pronounce the sentence of death would bring me some relief. Instead of healing, I found myself focusing on my anger and hatred, which only seemed to increase the pain I felt over the loss of my mother. Eventually I came to realize that capital punishment was not the answer because wishing for another human being to die wasn't helping me heal.

Celeste Dixon
Her mother was murdered in 1986

We have an obligation to provide the victim's family with every opportunity to gain closure to their horrible ordeal.

New Jersey State Senator Norman Robertson
Arguing for the right of victims' relatives to
watch executions

With an execution, everyone is a victim. I never believed that crap about closure.

Larry Fitzgerald

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City: _____ State: ____ Zip: _____ Phone: (___) _____

Enclosed is my added contribution of $_____ to support TCRP's good work.

L please remove and send this page

ATTACHMENT 1

# # # # # #

DEATH ROW AND EXECUTION STATISTICS

ATTACHMENT 2

# # # # # #

GALLUP POLLS ON CAPITAL PUNISHMENT SUPPORT

DEATH PENALTY POLLS

Are you in favor of the death penalty for a person convicted of murder?

	For %	Against %	No opinion %
2000 Jun 23-25	66	26	8
2000 Feb 14-15	66	28	6
1999 Feb 8-9	71	22	7
1995 May 11-14	77	13	10
1994 Sep 6-7	80	16	4
1991 Jun 13-16	76	18	6
1988 Sep 25-Oct 1	79	16	5
1988 Sep 9-11	79	16	5
1986 Jan 10-13	70	22	8
1985 Jan 11-14	72	20	8
1985 Nov 11-18	75	17	8
1981 Jan 30-Feb 2	66	25	9
1978 Mar 3-6	62	27	11
1976 Apr 9-12	66	26	8
1972 Nov 10-13	57	32	11
1972 Mar 3-5	50	41	9
1971 Oct 29-Nov 2	49	40	11
1969 Jan 23-28	51	40	9
1967 Jun 2-7	54	38	8
1966 May 19-24	42	47	11
1965 Jan 7-12	45	43	12
1960 Mar 2-7	53	36	11
1957 Aug 29-Sep 4	47	34	18
1956 Mar 29-Apr 3	53	34	13
1953 Nov 1-5	68	25	7

[IF 'favor death penalty' in above question] Do you support the death penalty with reservations or without reservations?

	Support w/o Reservations	Support w/ reservations	Do not Support	No Opinion
2000 Jun 23-25	28%	37%	26%	9%

COMBINED RESPONSES

Generally speaking, do you believe the death penalty is applied fairly or unfairly in this country today?

	Fairly	Unfairly	No opinion

2000 Jun 23-25	51%	41%	8%

Whose position on the death penalty comes closer to your view: Al Gore's position or George W. Bush's position?

	Gore's position	Bush's position	Both/ Neither	No opinion
2000 Jun 23-25	23%	34%	10%	33%

Based on what you have heard or read, do you approve or disapprove of how George W. Bush has handled death penalty cases as governor of Texas?

	Approve	Disapprove	No opinion
2000 Jun 23-25	49%	30%	21%

And, does the way Bush has handled the death penalty in Texas make you more likely to vote for him for president, less likely to vote for him, or will it have no effect on your vote?

	More likely	Less likely	No effect	No opinion
2000 Jun 23-25	10%	18%	68%	4%

How often do you think that a person has been executed who was, in fact, innocent of the crime he or she was charged with -- do you think this has EVER happened in the past five years, or do you think it has NEVER happened? [Based on --520-- National Adults in Form A; +/-5 Percentage Points]

	Yes, in the past 5 years	No, never happened	No opinion
2000 Jun 23-25	80%	14%	6%
2000 Feb 14-15*	91%	6%	3%
1995 May 11-14*	82%	14%	4%

*WORDING: How often do you think that a person has been sentenced to the death penalty who was, in fact, innocent of the crime he or she was charged with -- do you think this has EVER happened in the past twenty years, or do you think it has NEVER happened?

(If 'ever happened' in above question): Just your best guess, about what percent of people convicted to serve the death penalty are really innocent? [Based on --417--National Adults; +/- 5 Percentage Points]

0%…… 1%

1-5%…… 41%
6-10%…….. 16%
11-20%…… 11%
21-30%……. 7%
31-40%……. 3%
41-50%……. 7%
51% + ……. 4%
No opinion……10%
Mean…….14.0
Median…….. 6.0

Since George W. Bush became governor of Texas in 1995, how often do you think that a person in Texas has been executed who was, in fact, innocent of the crime he or she was charged with -- do you think this has EVER happened since Bush became governor, or do you think it has NEVER happened?

[Based on --500- National Adults in Form B; +/-5 Percentage Points]

	Yes, since Bush gov	No, never happened	No opinion
2000 Jun 23-25	46%	26%	28%

(If 'ever happened' in above question) Just your best guess, about what percent of people administered the death penalty in Texas since 1995 were really innocent? [Based on--231--National Adults; +/- 7 pct. pts.]

0% …… 1%
1-5% ……39%
6-10% ……13%
11-20%…… 8%
21-30%…… 4%
31-40%…… 3%
41-50%…… 5%
51% + ……. 6%
No opinion…….. 21%

Mean ……16.5
Median……10.0

What do you think should be the penalty for murder -- the death penalty, or life imprisonment with absolutely no possibility of parole? [Based on --511-- National Adults Form B Respondents; +/- 4 pct. pts.]

	Death Penalty %	Life imprisonment %	No opinion (*)
2000 Feb 20-21	52	37	11
1999 Feb 8-9**	56	38	6
1997 Aug 12-13**	61	29	10
1994 June 22	50	32	18
1993 Oct 13-18	59	29	12
1992 Mar 30-Apr 5	50	37	13
1991 Jun 13-16	53	35	11
1986 Jan 10-13	55	35	10

1985 Jan 11-14	56	34	10

(*) No opinion category includes true "no opinion" responses as well as volunteered responses including "Other," "Neither," and Depends.
** Asked of half sample

In your opinion, is the death penalty imposed too often today or not often enough?

	Too often	Not enough	About Right	No opinion
2000 Feb 14-15	26%	60%	5%	9%
1999 Feb 8-9	25%	64%	4%	7%

How often do you think that a person has been sentenced to the death penalty who was, in fact, innocent for the crime he or she was charged with -- do you think this has ever happened in the past 20 years, or do you think it has never happened?

	Yes,in the past 20 years	No, never happened	No opinion
2000 Feb14-15	91%	6%	3%
1999 Feb11-14	82%	14%	4%

(If 'yes' to the previous question): Just your best guess, about what percent of people convicted to serve the death penalty are really innocent?

[Based on --961-- National Adults who believe that an innocent person has been sentenced to death in the past 20 years; +/- 3 percentage points]

0%	1%	
1-2%	23%	
3-5%	33%	
6-10%	14%	100%
11-20%	8%	
More than 20%	10%	
No opinion	11%	

MEAN PERCENTAGE 10

Suppose new evidence showed that the death penalty does not act as a deterrent to murder -- that it does not lower the murder rate. Would you favor or oppose the death penalty?

	Feb 8-9, 1999 %	
Favor	55	
Oppose	42	100%
No opinion	3	

As I read each of these statements, would you tell me whether you agree or disagree with it.

A poor person is more likely than a person of average or above average income to receive the death penalty for the same crime.

	Feb 8-9, 1999 %	
Agree	65	
Disagree	32	100%
No opinion	3	

A black person is more likely than a white person to receive the death penalty for the same crime.

	Feb 8-9, 1999 %	
Agree	50	
Disagree	46	100%
No opinion	4	

Taken from the Gallup Organization's poll on the Death Penalty.
<http://www.gallup.com/poll/indicators/inddeath_pen.asp>.