LETHAL INDIFFERENCE

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

TEXAS DEFENDER SERVICE
Houston and Austin, Texas
Acknowledgements

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

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

Direct Representation of Death-Sentenced Prisoners

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

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

Capital Trial Project

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

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

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

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

— James Madison

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

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

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

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

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

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

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

CHAPTER I  State Habeas Corpus: A Vital Safety Net

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

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

The writ of habeas corpus, also known as the Great Writ, is usually all that stands between the innocent or undeserving and his or her execution. Most of the 102 exonerations have come during habeas corpus proceedings, when lawyers
uncovered and presented new evidence of innocence, prosecutorial misconduct, ineffective representation, mistaken identifications, perjured testimony by state witnesses or unreliable scientific evidence.

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

CHAPTER 2 The Study: A Dismal State of Justice

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

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

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

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

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

For example, in the case of Leonard Rojas, who is scheduled for execution on December 4, 2002, the state habeas lawyer appointed by the CCA had been disciplined twice and given two probated suspensions from the practice of law by the State Bar. His discipline problems included neglecting a legal matter,
failing to completely carry out the obligations owed to his clients and having a mental or psychological impairment materially impairing his fitness to represent his client. He was disciplined a third time just two weeks after being appointed by the CCA to represent Rojas. The lawyer was still serving his two probated suspensions at the time he received this third probated suspension from the practice of law in Texas. Despite these violations, the CCA deemed the lawyer “qualified.” The lawyer filed a 15-page petition raising 13 inappropriate record-based claims and Rojas was denied relief.

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

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

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

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

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

Chapter Three reviews cases illustrating the ramifications of the CCA’s interpretation of Article 11.071. In these cases and many others, a state habeas
lawyer was appointed who, although on the appointment list, failed to perform at the competent level envisioned by Article 11.071.

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

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

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

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

Our study indicates that the lawyers in these cases are all too typical of the lawyers authorized for appointment by the CCA. As a consequence, death row inmates, including those innocent of the crime or undeserving of death, whose trials have been rife with egregious constitutional violations, are being denied fundamental protections necessary to ensure reliable results—competent lawyers and meaningful judicial review.
CHAPTER 4 The Fox Guarding the Hen House: The CCA Controls the Process

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

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

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

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

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

The CCA demonstrates further indifference to the state habeas process by failing to properly fund the appeals, generating boilerplate, two-page opinions in most state habeas cases, and almost universally adopting trial court findings of fact generated by prosecutors in 90% of the cases. These practices instill little confidence that the CCA is as concerned with meaningful appellate
review—designed to weed the innocent from the guilty and those deserving death from those who do not—as it is with speed and finality of conviction.

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

CHAPTER 5  Conclusion: A Breakdown in the System

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

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

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

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

THE STUDY
State Habeas Corpus: A Vital Safety Net

“More often than we want to recognize, some innocent defendants have been convicted and sentenced to death.”

— U.S. Supreme Court Justice Sandra Day O’Connor

I. Why Habeas Matters: Quality Control and Minimizing Risk

Risk is inescapable; it is inherent in every decision and every activity. It can only be guarded against, not eliminated. Thus, industries engaged in potentially harmful activities implement systematic and substantial quality control procedures to minimize risk. The airline industry, for example, conducts rigorous safety tests and quality inspections, and consults with experts before exposing the public to the risk of injury or death. Automobile and tire manufacturers likewise subject their products to exhaustive testing to unearth all possible methods of reducing harm to drivers and pedestrians. Because lives are even more palpably in the balance, physicians must perform thorough tests, gather background information and research illnesses before giving a patient a diagnosis. The miniscule margin for error demands these meticulous screening programs. Thorough research and testing is the only way these industries can adequately protect the consumer from the unnecessary risk of loss of innocent lives. Those who cut corners and sacrifice safety for profit are often harshly fined, forced out of business, or otherwise punished.

4 U.S. Supreme Court Justice Sandra Day O’Connor, Speech to Nebraska State Bar Association (Oct. 18, 2001), in John Fulwider, O’Connor Lectures Lawyers, Recollects for Students in Lincoln, NEB. ST. PAPER, Oct. 18, 2001, available at http://nebraska.statepaper.com/vnews/display.v/ART/2001/10/18/3bcf6460c1279?in_archive=1). See also Charles Lane, O’Connor Expresses Death Penalty Doubt: Justice Says Innocent May Be Killed, WASH. POST, July 4, 2001, at A1 (quoting O’Connor’s July 2, 2001, speech to the Minnesota Women Lawyers association in which she stated that “serious questions are being raised” about the death penalty, “the system may well be allowing some innocent defendants to be executed,” and singled out Texas for opprobrium).
Like these industries, the capital punishment system puts innocent lives in jeopardy. Although intended to identify accurately and swiftly punish offenders whose crimes warrant death, the system is fraught with mistakes and failures causing the conviction of the innocent. The habeas corpus proceeding is usually all that stands between the innocent and his or her execution. Habeas corpus is, in effect, the “quality control” process in the administration of capital punishment. It is supposed to act as a safety net, allowing the system to catch its mistakes. As the U.S. Supreme Court has “‘constantly emphasized,’ habeas corpus and civil rights actions are of ‘fundamental importance . . . in our constitutional scheme’ because they directly protect our most valued rights. [T]he [habeas corpus] petitions . . . are the first line of defense against constitutional violations.”

Despite the importance of habeas corpus, these crucial safety checks have been diluted for speed and political convenience. Just as we would not fly on an airplane before it had been tested for safety, or trust the diagnosis of a physician made without adequate information, we cannot trust the current death penalty system to effectively weed the innocent from the guilty or the undeserving of death from the deserving in the absence of meaningful quality control. Unlike a patient given a diagnosis by an incompetent physician without appropriate testing, death row inmates are not given the option of a “second opinion.”

State habeas proceedings should provide all death row inmates with lawyers who properly investigate the cases and courts that allow them an opportunity to present evidence of innocence or other fundamental flaws that render the proceedings unreliable. Instead, death row inmates today face a one-in-three chance of being executed without having the case properly investigated and without having any claims of innocence or unfairness presented or heard. Hobbed by incompetent lawyers and with their protestations falling on deaf ears, they are marched to the execution chamber with unseemly haste. The current appellate process adopts a hear-no-evil, see-no-evil policy of error control. When examples of systemic flaws are raised, the current system repeatedly demonstrates its indifference by failing to address or correct the problem. But the risk of executing the innocent cannot be willed away; it is not an imaginary bogeyman the specter of which can be dispelled by pulling the covers over our heads. The current state habeas corpus process ignores the risk of innocent casualties.

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6 See Chapter Two.
II. The Death Penalty and the Wrongly Convicted

“The best available evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed and that, on the other hand, convincing proof of their innocence often does not emerge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty, a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence.”

— U.S. District Court Judge Jed S. Rakoff

In measuring risk of innocent casualties, the rate of “near misses” and documented system failures must be evaluated. Since the reinstatement of the death penalty in 1976, 805 inmates have been executed in the United States of America. Texas leads the U.S., by far, in the number of executions—almost 300—making it responsible for one-third of all executions since 1976. As of October 26, 2002, Texas has put to death 29 people this year—more than half of all executions in the U.S.—and another 9 inmates have serious execution dates scheduled through the end of the year. This torrid pace shows no immediate signs of relenting: Over 450 men and women reside on Texas’s Death Row, the nation’s second largest, and 30 to 40 new death sentences are handed down each year.

As flaws associated with capital punishment continue to surface, more voices question the reliability of the process. Concerns of endemic racism, poor representation, prosecutorial misconduct, faulty eye-witness identifications and false testimony have prompted many to urge closer scrutiny of the application of the death penalty, including many prominent former capital punishment

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**Number of Executions**

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3 See Appendix Two. See also Texas Dept of Criminal Justice, Executed Offenders, available at http://www.tdcj.state.tx.us/stat/executedoffenders.htm (as of October 26, 2002).
supporters. Former prosecutor and Arizona Court of Appeals Judge Rudolph J. Gerber conceded that capital punishment “sweeps some innocent defendants . . . in its wide nets . . . .” United States Senators Russ Feingold (D-WI) and Jon Corzine (D-NJ), in calling for a review of the death penalty, wrote that the state capital punishment “systems [are] so riddled with errors that for every eight persons executed in the modern death penalty era, one person on death row has been found innocent.”

A recent poll reports that 94% of Americans believe that innocent people are wrongly convicted of murder and estimate that 12% of those convicted of murder are actually innocent. A July 2002 poll of Texans found that 66% believe that Texas has actually executed an innocent person. This number has increased by nine percentage points from two years ago.

As of August 2002, 102 death row prisoners nationwide have been cleared of charges and freed from imprisonment since 1976, when states began executing inmates under systems in compliance with the requirements of Furman v. Georgia. Most exonerations have come during habeas corpus proceedings, when lawyers uncovered evidence of innocence, prosecutorial misconduct, ineffective representation, mistaken

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10 For example, Virginia legislator Frank D. Hargrove, Sr. (R), who early in his legislative career had sought to reintroduce public hangings, sponsored a bill to abolish Virginia’s death penalty. Matthew Dolan, Death Penalty Wrong: Former Advocate Says: Hanover Delegate Now Seeks Colleagues’ Help in Ridding Virginia of Capital Punishment, VIRGINIAN-PILOT, Jan. 31, 2001, at B7 (referring to the unenacted 2001 H.B. 1827, though Hargrove has sponsored another such bill in the 2002 session, H.B. 224). Senior Texas State District Judge C.C. “Kit” Cooke told a statewide legal seminar in July, 2001, that his experiences as a judge have changed his mind about the death penalty: “people are realizing there are deficiencies in the system. . . . We always think we’ve got the right person, but the system is not infallible.” Anthony Spangler, Judge Expresses Concerns about Fairness of Death Penalty, FT. WORTH STAR-TELEGRAM, July 24, 2001. Oklahoma Governor Frank Keating (R) proposed raising the burden of proof in death penalty cases to a “moral certainty,” explaining that such a standard, which requires jurors to go deeper in their deliberations than the current “beyond a reasonable doubt” standard, is “I think not only appropriate, I think it is essential” to prevent the mistaken execution of an innocent person. Cheyenne Hopkins, Keating Proposes Death Penalty Standard, DAILY OKLAHOMAN, June 23, 2001, at 4A. Former Bexar County District Attorney Sam Millsap, Jr., who prosecuted several death penalty cases, spoke out in favor of a moratorium: “The system in Texas is broken. . . . Until it is fixed and we are satisfied that only the guilty can be put to death, there should be no more executions in Texas.” Dave McNeely, Moratorium on the Death Penalty? This Idea’s Close, AUSTIN AM.-STATESMAN, Feb. 22, 2001, at B1.


12 Russ Feingold & Jon Corzine, Editorial, Halt Executions Across the Nation, BALTIMORE SUN, May 16, 2002, at 19A.


15 Id.

identifications, perjured testimony by state witnesses, or unreliable scientific evidence and presented it to the courts. Exculpatory evidence, diligently gathered through new DNA testing or old-fashioned legwork, reveals persons condemned to die for crimes they did not commit.

In each of these cases, the truth did not emerge until the post-conviction process after exculpatory evidence was suppressed at trial by the state, overlooked by incompetent trial attorneys, ignored by the courts or obscured for lack of DNA testing. One federal judge recently stressed the importance of habeas corpus: “[I]n a large number of cases newly discovered evidence turns up during the course of the habeas post conviction process after the trial and initial appeals are over. This is because counsel failed to properly investigate the case or because law enforcement did not turn over the exculpatory evidence they had or because of new science like DNA testing.”

Texas wrongly convicted and sentenced to death at least seven men, including Randall Adams, Clarence Brandley, Federico Martinez-Macias and Ricardo Aldape Guerra. Freed after nine years, four months and 25 days on death row for a crime he did not commit, Clarence Brandley would have been executed by the State of Texas without access to the courts and meaningful appellate review. Brandley, a high-school janitor in Montgomery County, was wrongly convicted of the murder and sexual assault of Cheryl Ferguson whose body he found on school premises. When the investigating officers arrived on the scene, they began to question Brandley—an African American—and another of the six janitors—a Caucasian—who were on staff that summer afternoon. The officer conducting the interview said, “One of the two of you is going to hang for this. Since you’re the nigger, you’re elected.” During Brandley’s trial, the state withheld exculpatory evidence and sponsored perjured testimony. An investigation by defense lawyers, the Department of Justice and the FBI, conducted during habeas corpus proceedings, uncovered further misconduct, and in 1989, Brandley’s conviction was overturned.

Similar stories of innocence, state misconduct, incompetent lawyers and other legal mistakes can be told in the cases of exonerated inmates Muneer Deeb, John Skelton and Vernon McManus. Freedom came after evidence of their innocence was discovered during the post-conviction review process before

17 U.S. 6th Circuit Court of Appeals Senior Judge Gilbert Merritt, Address to Tennessee Bar Association (Sept. 26, 2002) (transcript on file with author).
18 See Appendix Five.
the mistakes became fatal and irreversible. Relief came, however, only after each man spent a significant portion of his adult life behind bars for a crime he did not commit. Each of the seven exonerated men spent at least eight years in prison before his innocence was discovered.\textsuperscript{24} Other defendants, though not completely vindicated, have been released from death row after presenting evidence during habeas corpus proceedings that they were innocent or deserved less than a death sentence.\textsuperscript{25}

There is no way to tell how many of the 805 people executed in the United States since 1976, or the 285 executed in Texas alone, may also have been innocent. No court is reviewing their cases.\textsuperscript{26} In a number of Texas capital cases, inmates, like David Spence and Gary Graham, have been executed despite lingering, significant doubts about their guilt.\textsuperscript{27} For countless others, evidence calls into doubt the fairness of the trial process or the severity of the sentence imposed. The lesson to be learned from the troubling number of exonerations is that some innocent persons are necessarily overlooked.

Many in Texas placate their fears about wrongful convictions with the mistaken rationalization that no one who is truly innocent or undeserving of the death penalty will actually be executed because of the seemingly endless appeals. The belief that the appellate system prevents fatal mistakes because the cases are meticulously reviewed by a series of attorneys and judges, however, is wholly misplaced. Changes to the appellate process—at both the state and federal level—emphasize speed of resolution rather than integrity of decision. Finality trumps concerns over the reliability of the conviction and sentence. Judges have abandoned careful review of death cases to garner political support.\textsuperscript{28} Defense lawyers have abdicated—or are simply unable to fulfill—their responsibilities to investigate thoroughly and present all claims available to their clients. These changes come at the expense of the innocent. Short-circuiting habeas corpus and affording inmates less than competent counsel inevitably results in the innocent falling prey to the system.

\textsuperscript{24} Average incarceration time of U.S. exonerated defendants before release was also 8 years. Death Penalty Information Center, Innocence and the Death Penalty, supra note 16.

\textsuperscript{25} See Appendix Five.

\textsuperscript{26} Texas does not permit inquests similar to those Australia, Canada and Britain uses to review cases after the sentence has been carried out. See James Lockyer, Guilt Revisited: A Comparative Perspective on Canada, the United Kingdom and the United States, talk delivered at DNA and Human Rights: An International Conference, University of California, Berkeley, CA. Apr. 27, 2001 (transcript on file with author).


\textsuperscript{28} See generally Texas Defender Service, supra note 2. See also Stephen B. Bright, Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U. L. REV. 308 (1997).
For the 102 exonerated inmates, the truth came in time to save their lives, but only after they paid a high price. For countless others, the truth may come too late, if it comes at all. “[O]ur procedure has always been haunted by the ghost of an innocent man convicted. It is an unreal dream.” That unreal dream is a reality in 102 known cases. Only appellate and habeas corpus proceedings prevented the nightmare of these individuals being wrongly executed. How many more are yet to be discovered?

I. The Appellate System in Texas

Texas law provides for the death penalty upon conviction for any of eleven offenses. These offenses include murder during the course of a robbery, sexual assault or burglary; murder for hire; the murder of a police officer; and the murder of a child under the age of six. Should a capital case go to trial, the proceedings will be divided into two stages. In the first stage, the “guilt/innocence” phase of trial, the jury decides whether the defendant has committed the crime charged. If the jury convicts, the trial proceeds to the second stage, the “sentencing” phase. At this second stage, the jury determines whether to sentence the defendant to death.

If a capital murder trial culminates in a death sentence for a defendant, the case begins a multi-stage review process. With the current emphasis on speed and finality, the direct appeal and state habeas corpus proceedings occur simultaneously. This rush through the system limits the ability of the inmate to fully investigate and present all claims. Specifically, because state habeas corpus is the only stage in which an inmate may challenge the effectiveness of his representation on direct appeal, this claim has been effectively eliminated and sacrificed for speed. The direct appeal process allows the inmate to raise issues related to rulings made by the trial judge and reflected in the record of the trial proceedings. The inmate cannot raise issues “outside the record” during the direct appeal.

In habeas corpus proceedings, however, the inmate may raise questions based on new evidence about the fairness of the trial; for instance, whether the inmate’s lawyer performed competently at trial, whether the prosecution withheld important evidence or whether the jurors engaged in misconduct. These issues cannot be decided on the basis of the record alone because they necessarily involve facts that were not presented at the trial. For example, an attorney conducting a habeas corpus investigation may discover that a prosecutor

30 See Tex. Penal Code § 19.03.
32 Id.
withheld evidence that a witness lied during his or her testimony, or that a witness identified to police someone other than the inmate as the perpetrator. This evidence should have been turned over to the defense attorney at trial, and, if it was not, it may become the proper subject of a claim in the habeas corpus petition. The inmate may also present new facts, including evidence of his innocence.

A writ of habeas corpus is initially sought in the state courts and then in the federal courts. Because the habeas proceedings are the first occasion for broadening the record from trial, the state habeas corpus proceeding will generally be the first time a court hears claims of ineffective assistance of counsel, prosecutorial misconduct, juror misconduct or facts developed after trial that prove actual innocence. Contrary to the misconception that the capital process is one with multiple opportunities for innocent inmates to get relief, they only get “one bite at the apple.” Thus, barring unique circumstances, claims not litigated at the state court habeas corpus level are lost and unaddressable in federal court. It has become a lethal myth that federal courts reviewing petitions for habeas relief will catch and correct mistakes made by the state courts. Because both state and federal courts regard successive petitions for habeas relief with extreme disfavor, only in rare cases will such petitions receive consideration on the merits. If a wrongly convicted inmate armed with persuasive evidence of his innocence is saddled with an incompetent, unqualified or lazy lawyer who fails to correctly present his claims of innocence in state court, his federal review is but a formality. Review of his claims is forever forfeited.

Texas, unlike most American death penalty states, did not appoint lawyers to represent indigent death row inmates in state habeas corpus proceedings until 1995. Legislation, codified at Article 11.071 of the Texas Code of Criminal Procedure, requires the Texas Court of Criminal Appeals (CCA), “under rules and standards adopted by the court, [to] appoint competent counsel” to indigent death row inmates for state post-conviction proceedings. Such counsel, the statute provides, “shall investigate expeditiously . . . the factual and legal grounds for the filing of an application for a writ of habeas corpus.”

33 See, e.g., Ex parte Torres, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (noting that habeas proceedings are generally the only place in which a claim of ineffective assistance of trial counsel can be heard).
34 See generally 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 23 (4th ed. 2001) (explaining exhaustion requirement that generally prohibits federal courts from considering claims not presented to state courts); id. § 32 (describing constraints under 18 U.S.C. § 2254(d)(1) on ability of federal courts to correct errors made by state courts in resolving the claims that are presented).
35 See TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a)(1) (West 2002) (barring successive state habeas petitions that do not meet narrow exception); 2 HERTZ & LIEBMAN, supra note 34, at § 28 (explaining treatment of successive petitions in federal court).
36 A 1993 report commissioned by the State Bar of Texas Committee on Representation for Those on Death Row noted “the only two states that do not compensate court-appointed counsel [in state post-conviction capital cases] are Georgia and Texas.” The Spangenberg Group, A Study of Representation in Capital Cases in Texas, at 146 (Mar. 1993).
37 TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(d) (West 2002).
38 Id. § 3(a).
Almost immediately upon passage of Article 11.071, problems beset the new system and Texas was faced with a shortage of lawyers willing to take the cases. In response, the CCA began ordering criminal defense lawyers to represent death row inmates in habeas cases. Many lawyers appointed by the CCA lacked any death penalty or habeas corpus experience. The CCA exacerbated the problem by creating disincentives for competent representation by imposing strict caps on funding for habeas counsel, detailed further in Chapter Four of this report. In the words of one observer, Texas lawmakers and judges, “by ignorance, delay, and arrogance, created a textbook case on how not to deal with habeas reforms.”

When the Texas Legislature later shifted responsibility for appointing state habeas counsel to the trial courts, it charged the CCA with the task of maintaining a list of attorneys who are “approved” for capital habeas appointments. As the writs completed by these approved lawyers have reached the CCA, serious deficiencies have become apparent, even to members of the court responsible for maintaining the list of supposedly qualified attorneys.

II. The Basics of Competent Representation in State Habeas

“State habeas corpus proceedings are a vital link in the capital review process, not the least because all federal habeas claims first must be adequately raised in state court.”

— U.S. Supreme Court Justice Harry Blackmun

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39 See Christy Hoppe, 22 Inmates on Texas Death Row Lack Lawyers: State Pressing for Help as Deadline Looms, DALLAS MORNING NEWS, Mar. 4, 1994, at 16A (“In November [of 1996], the Court of Criminal Appeals conscripted 48 defense lawyers, some of whom hadn’t handled a capital cases in 15 years and others who had never been connected to a capital murder case.”).
40 Id. at 17A.
42 See Acts 1999, 76th Leg. ch. 803, §§ 1-2, eff. Sept. 1, 1999 (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 11.071, §§ 2-2A (West 2002)).
43 The current list of counsel approved for Article 11.071 appointments may be found online, at http://www.cca.courts.state.tx.us/rules/11071rules/art11071.htm.
Because the initial state habeas corpus proceeding is the most crucial stage of the appellate process, it is imperative that state habeas counsel provides competent representation. The American Bar Association, recognizing that capital appeals are “extremely specialized and demanding and that the appointment of unqualified, inexperienced counsel can be very costly in terms of delay and expense,”\textsuperscript{46} established guidelines for representation intended to help courts ensure competent counsel and reliable and efficient handling of cases. The American Bar Association urges that counsel in death penalty cases be required to “perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation.”\textsuperscript{47} It advises state post-conviction counsel in capital cases to “seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing post-conviction proceedings.”\textsuperscript{48}

To present any arguably meritorious claim, the state habeas counsel must perform a thorough investigation of the case, starting with the written record of the trial, but exploring far beyond it. The lawyer must contact and interview all important witnesses, scrutinize the files of all previous defense attorneys, look for issues inadequately investigated or presented and examine the state’s case file for evidence that may have been withheld from the defense or for indications that state witnesses may have given false or misleading testimony. The lawyer must investigate and gather all available mitigating information about the defendant’s background, including any history of mental health problems, brain damage, genetic disorders or physical or sexual abuse. The state habeas lawyer must uncover any new evidence of violations of the defendant’s rights, information demonstrating that the conviction or sentence was tainted by error of constitutional magnitude, but was not presented to the jury. Claims based on evidence already presented at trial are reserved for the direct appeal, and may not be raised in habeas corpus proceedings.\textsuperscript{49} Appropriate claims for state habeas proceedings are claims based on facts and evidence found outside of the trial record.\textsuperscript{50}

Because statutory provisions against filing subsequent writs restrict death row inmates to only one “bite at the apple,” and only claims that have been litigated before state courts are reviewable in federal court, a habeas attorney must

\textsuperscript{46} Introduction, A.B.A. Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, available at http://www.capdefnet.org/fdprc/contents/RRADPP/relevant_reading/ABA_appoint_guide1.htm

\textsuperscript{47} Id. at Guideline 11.2 (Minimum Standards Not Sufficient).

\textsuperscript{48} Id. at Guidelines 11.9.2 (Duties of Post-Conviction Counsel).

\textsuperscript{49} See Ex parte Gardner, 959 S.W.2d 189, 199 (Tex. Crim. App. 1998) (refusing to review the merits of a claim that was part of the trial record and therefore could have been, but was not, raised on direct appeal). See also Ex parte Rojas, 981 S.W.2d 690, 690 (Tex. Crim. App. 1998) (Baird, J., concurring) (explaining that “every record claim not raised on direct appeal [is] procedurally defaulted”). Cf. Ex parte Graves, 70 S.W.3d 103, 120 & n.3 (Tex. Crim. App. 2002) (Price, J., dissenting) (noting that the number of times that claims are denied because they are forfeited for not being raised on direct appeal is larger than apparent, because of rarity of written opinions for state habeas proceedings).

\textsuperscript{50} Id.
err on the side of thoroughness. Given the current restrictions on bringing post-
conviction claims, every possible shred of evidence must be compiled and every
possible legal argument made in the state habeas proceeding; otherwise, the
claims may as well not exist.

III. Results of the Study: One out of Three Petitions Deficient

Disturbed by the frequent stories that emerged of lawyers who grievously mis-
handled appeals and recognizing the CCA’s knowing failure to adequately address
or correct the problem, Texas Defender Service undertook a systematic study of
the quality of representation provided by attorneys appointed under Article
11.071. We presented our initial findings in our previous report, A State of De-
nial: Texas Justice and the Death Penalty.\(^\text{51}\) In that study, we reviewed 40% of the
state habeas petitions filed between 1995 and 2000 and examined their content
to evaluate attorney performance. We have now completed that study, examin-
ing virtually every Article 11.071 habeas application filed by appointed counsel.
Of the 263 Article 11.071 initial habeas applications filed during the period of
the study, September 1, 1995 through December 31, 2001, 251 were reviewed.\(^\text{52}\)
The results are conclusive: Article 11.071 fails to consistently fulfill its role as the
vital safety net protecting the innocent and undeserving from execution.

A. The Long and Short of It

Not every Article 11.071 application reviewed was deficient. In some cases,
the petitions were thorough, supplemented by volumes of exhibits, and reflect
the meticulous investigation envisioned by the drafters of Article 11.071. Habeas applications filed by experienced and adequately funded counsel who
conducted a comprehensive investigation generally run into the hundreds of
pages. The need to address the factual issues in each case and the highly tech-
nical law applicable to habeas litigation dictates they be that lengthy.

An alarmingly large proportion of the habeas applications, however, were
perfunctory. Many of the appointed attorneys appear to have done little or no
work at all, instead plagiarizing claims and arguments from previous appeals
only to file them in the same court that had already rejected them.\(^\text{53}\) Despite the
statutory and ethical requirements of an expeditious investigation,\(^\text{54}\) in only 30
cases (12%) that we reviewed did the appointed counsel file a motion for dis-
cover, the process by which attorneys can invoke the power of the court to com-
pel others to turn over requested information that may prove helpful in

\(^{51}\) See Texas Defender Service, supra note 2.
\(^{52}\) See Appendix One. The 12 writs not reviewed were unavailable—they were either lost,
checked out for review to other agencies, or destroyed.
\(^{53}\) See, e.g., Ex parte Crawford, Writ No. 40,439-01 (Tex. Crim. App. Mar. 10, 1999); Ex parte
\(^{54}\) TEX. CODE CRIM. PROC. ANN. art. 11.071, § 3(a) (West 2002).
presenting appropriate habeas corpus claims. If counsel does not request discovery in state habeas, it is not available in later federal habeas proceedings.\(^{55}\)

Of the 251 habeas applications reviewed, 76 (30%) were 30 pages or less. Of those, 37 applications (15%) were 15 pages or less. Twenty-two applications (9%) were 10 pages or less—quite a feat, because the procedural requirements for habeas petitions usually consume five pages alone. It is no surprise that many of the shortest petitions contained only record-based, direct-appeal-type claims presenting nothing for review, thereby forfeiting future review by the federal court.

The shortest state habeas application, filed on behalf of Carlos Granados, was a mere two pages long.\(^{56}\) The entire “argument and authorities” section comprised two paragraphs and covered half of a page. The only claim presented was an inappropriate record-based claim, which was litigable on direct appeal, but not in state habeas corpus. The lawyer did not file a motion for discovery or include any exhibits. Unsurprisingly, the trial court denied a hearing and adopted the prosecutor’s findings of fact. The CCA summarily denied relief in a standard two-page order. Two years earlier, the same attorney filed a four-paged writ in the case of Ramiro Ibarra.\(^ {57}\) Two of the four pages were nothing more than a cursory recitation of the facts of the case. Counsel presented one claim for review; as was the case with Granados, and failed to cite more than five cases as authority. As would be the case two years later, counsel filed no motion for discovery and included no extra-record materials in support of Ibarra’s petition. The CCA denied relief.

Although short petitions are usually a strong indicator of attorney performance, longer petitions, containing the wrong type of claims for state habeas, can be just as worthless. A thick petition that sets forth only record-based claims reserved for the direct appeal process is as certain to result in the denial of relief as is an extremely thin petition. We discovered a 149-page petition containing no extra-record claims.\(^ {58}\) Similarly, another sub-par petition was 154 pages,\(^ {59}\) and yet another 101 pages.\(^ {60}\) These long, seemingly well-investigated

\(^{55}\) See 28 U.S.C. § 2254(e) (prohibiting a hearing in federal court if the petitioner fails to develop the factual basis of the claims in state court).


and well-prepared petitions serve to perpetuate the myth that Texas’s death row inmates are being afforded meaningful appellate review.

B. Habeas in Name Only: The Lack of Extra-Record Claims

Regardless of a petition’s length, content is a more telling barometer of the quality of representation. Of the habeas applications reviewed in our study, 71 (28%) raised claims based solely on the trial record, thus guaranteeing that the petitioner will be denied relief. Like an automobile without an engine, a state habeas petition without extra-record claims will go nowhere. It is certain to be denied.

Despite the crucial importance of a thorough investigation of the case, in 97 cases (39%), no extra-record materials reflecting that investigation were filed with the trial court. Even a quick glance at the materials accompanying most petitions indicates that appointed counsel failed to conduct the investigation required by statute. In 39% of cases we reviewed, the inmates’ right to post-conviction review effectively ended when the petition was filed. In each, there was absolutely nothing for the courts to consider. These petitions were habeas applications in name only.

Toronto Patterson, a juvenile when charged, had a six-page petition filed on his behalf. His lawyer filed no extra-record claims, presented no extra-record materials, failed to raise Patterson’s juvenile status and did not file a motion for discovery. The CCA denied relief in his case, and Toronto Patterson was executed by the State of Texas on August 28, 2002.

In Ex parte Bradford and Ex parte Hatten, two different state habeas lawyers filed mere 15-page petitions, asserting no cognizable claims and failing to file motions for discovery. In Bradford’s case, after competent counsel was appointed in federal court and meaningful investigation was conducted, crucial mitigating evidence was discovered that had not been presented to the jury at trial. This evidence revealed that Bradford was the victim of childhood physical abuse and other violence. His federal counsel stated: “[W]hen I investigated Bradford’s case I found a wealth of mitigation evidence that had not been presented.” Other petitions, guaranteed to lose, were filed in Ex parte Roberts.

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64 Petition for Writ of Habeas Corpus, Bradford v. Cockrell, No. 00-CV-2709 (N.D. Tex).
65 Correspondence with attorney Mick Michelson on file with author.
These petitions consisted of 19 pages of inadequately briefed claims that should have been filed on direct appeal.

Paul Colella received similar treatment. Even though two CCA judges concluded during direct appeal that the evidence suggested Colella was actually innocent of the crime for which he was convicted, Colella’s state habeas counsel prepared a nine-page petition, and filed it late, resulting in its dismissal. After conducting a thorough investigation, subsequent competent counsel discovered troubling evidence about the performance of the trial lawyer, including that the trial lawyer, who was trying his first capital case alone, was denied court funding for an investigator. This new counsel not only discovered evidence that the trial lawyer had mishandled Colella’s strong alibi defense—which had convinced the two CCA judges of his innocence—but that trial counsel had previously been found incompetent in another case for mishandling the client’s alibi. The defendant in that case, Elifonso Lopez, received a life sentence for sexually assaulting a child. Trial counsel was later found incompetent for failing to provide the “minimal effort” required to show that his client could not have committed the crime because he was in jail on the date of the offense. A federal magistrate judge found trial counsel’s explanations of his actions in that case “not credible.” Further, Colella’s new counsel discovered significant mitigating information regarding Colella’s mental health, and evidence that the state had sponsored false testimony at the trial. This information was all readily available to state habeas counsel but was conspicuously absent from the nine-page application.

C. Form over Substance: Failing to Support Extra-Record Claims

Many of the habeas applications that appeared to raise extra-record claims in fact contained only boilerplate claims not tailored to the specifics of the case. For example, a petitioner asserting a claim of ineffective assistance of trial counsel must demonstrate specific errors committed by trial counsel; not doing so forfeits the claim. Thus, if the claimed error was that the trial counsel failed to investigate a particular issue, the habeas lawyer must provide the court with

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specific factual information that could have been located by the trial lawyer and probably would have changed the outcome of the trial.\textsuperscript{71}

As an example of the efforts by some attorneys, one lawyer appointed to represent inmates in state habeas filed five different substandard state habeas petitions. In four of the cases, he filed essentially the same claim without ever including any specific information necessary to support it. In \textit{Ex parte Ogan}, the lawyer filed a nine-page petition without any extra-record materials.\textsuperscript{72} In it, he claimed that the trial lawyer was ineffective for failing to investigate and present mitigating evidence about the defendant's background during the punishment phase. Because the lawyer never detailed the mitigating evidence and failed to support his claim with witnesses' statements or any documentation, the CCA denied all relief. Despite the petition's assurance of existing but unpresented mitigating evidence, there is no indication that state habeas counsel even attempted to discover mitigating evidence. Ogan is scheduled for execution on November 19, 2002.

Similarly, in \textit{Ex parte McGowen},\textsuperscript{73} \textit{Ex parte Smith}\textsuperscript{74} and \textit{Ex parte Campbell},\textsuperscript{75} the same appointed counsel raised the unsupported claim of ineffective assistance of counsel. The claims filed by state habeas counsel are virtually identical to that raised in \textit{Ex parte Ogan}. In another case, \textit{Ex parte Davis},\textsuperscript{76} the same lawyer filed a 35-page petition containing only two record-based claims, both of which the CCA had reviewed and rejected on direct appeal. Issues regarding Davis's mental retardation\textsuperscript{77} and a critical error in jury instructions\textsuperscript{78} were missed by appointed counsel. This lawyer remains on the list of approved 11.071 attorneys despite this level of representation in five separate death row cases.\textsuperscript{79}

D. Is It Incompetence, Reckless Indifference or Worse?

Repeated mishandling of cases or egregious examples of attorney incompetence or indifference further illustrate the failure of the habeas corpus safety net. The story of the appointed counsel in \textit{Ex parte Demery}\textsuperscript{80} epitomizes the

\begin{footnotesize}
\textsuperscript{71} See Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988), \textit{vacated on other grounds sub nom. Bridge v. Collins}, 494 U.S. 1013 (1990) (“it is not sufficient that a habeas petitioner merely alleges a deficiency on the part of counsel. He must affirmatively plead the resulting prejudice in his habeas petition.”). \textit{See also} Rector v. Johnson, 120 F.3d 551, 564 (5th Cir. 1997) (requiring petitioner to “present . . . specific evidence of . . . potentially mitigating circumstances” to adequately plead prejudice stemming from ineffective assistance of counsel at punishment).


\textsuperscript{73} Writ No. 63,222, (Tex. Crim. App.). McGowen had been represented at trial by an attorney who jokingly said that he has a "permanent parking spot at the grievance committee." Sara Rimer & Raymond Bonner, \textit{Texas Lawyer’s Death Row Record a Concern}, N.Y. TIMES, June 11, 2000, at A1.

\textsuperscript{74} 977 S.W.2d 610 (Tex. Crim. App. 1998).


\textsuperscript{79} \textit{See}, List of Approved 11.071 Attorneys, \textit{supra} note 43 (viewed October 1, 2002).

\end{footnotesize}
deficiencies in capital habeas corpus representation. When the CCA-appointed habeas lawyer in that case took a job as a prosecutor after filing the habeas application, the trial court asked another attorney to review the first lawyer’s work in the case. What he found disturbed him: Appointed counsel had filed an exceedingly brief petition that only tenuously identified a single claim, but raised it in a manner that guaranteed it would lose.\(^8^1\) Many other potentially meritorious claims, obvious from the face of the record, were not raised.\(^8^2\) The CCA-appointed lawyer had conducted no investigation into the case; indeed, he had not even examined the state’s file.\(^8^3\) But because he filed a habeas petition on Demery’s behalf, he forfeited any review of Demery’s conviction or sentence by any future court: “The appointment of [this lawyer as habeas counsel] . . . leads ineluctably and conclusively to ‘denial without written order’ and procedural default and ‘failure to exhaust’ on the federal application. It was simply foreordained by the appointment itself.”\(^8^4\)

This observation proved prophetic: The CCA accepted the deficient habeas petition filed by the lawyer it appointed and denied relief in a brief, unpublished order.\(^8^5\) The same lawyer had been appointed by the CCA in two other cases. In one, \textit{Ex parte Medina},\(^8^6\) he rewrote several claims previously raised and rejected on direct appeal and failed to file the petition on time, resulting in its dismissal. In the other, \textit{Ex parte Casey},\(^8^7\) he filed an 11-page habeas application raising only record-based claims. In each case, his actions effectively forfeited appellate review of the inmate’s case by any court, state or federal. While he was fined and suspended from practicing law in the first case\(^8^8\) and that inmate given a new chance at habeas corpus review,\(^8^9\) in the second case, no action was taken, and Casey was executed on April 18, 2002, without any merits review of his appeals, which included serious claims of prosecutorial misconduct.\(^9^0\) This lawyer is currently serving a five-year suspension from the practice of law.\(^9^1\)

\(^{81}\) See Motion Suggesting that the Court Appoint New and Competent Counsel to Represent Applicant and Establish a New Filing Date, Ex parte Demery, Writ No. 52,238-01, at 3-4 (Tex. Crim. App. June 26, 2002).
\(^{82}\) See id. at 4-5.
\(^{83}\) See id. at 9.
\(^{84}\) See id. at 5-6.
\(^{89}\) See Ex parte Medina, Writ No. 41,274-02 (Tex. Crim. App. Apr. 28, 1999); TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4A(f) (West 2002).
\(^{90}\) See Casey v. Cockrell, No. 00-20960 (5th Cir. Sept. 12, 2001) (declining to review unexhausted claims); Ex parte Casey, Writ No. 36,380-02 (Tex. Crim. App. Apr. 18, 2002) (dismissing procedurally barred claims of prosecutorial misconduct).
In *Ex parte Rojas,* the state habeas lawyer had been disciplined twice and received two 48-month probated suspensions from the practice of law by the State Bar before the CCA assigned him in this case.92 The lawyer was still on probation at the time of his appointment and continuously throughout the representation of Rojas. His discipline problems included neglecting a legal matter, failing to completely carry out the obligations owed to his clients and having a psychological impairment materially impairing his fitness to represent his client. Fourteen days after the CCA appointed him to the Rojas case, the State Bar disciplined him a third time.93 Despite these violations, counsel was deemed “qualified” and filed a fifteen-page petition raising thirteen claims for relief. All the claims were record-based claims, twelve of which were procedurally defaulted for not having been raised on direct appeal.94 The habeas lawyer pointed out in the petition that “Applicant relies on no facts found outside [the] record.”95 The case prompted a concurring opinion that noted the absence of appropriate claims and reiterated that habeas proceedings cannot be used to address issues that should have been raised on direct appeal.96 Rojas is scheduled for execution on December 4, 2002.

In *Ex parte Nenno,* state habeas counsel filed a petition consisting of eight pages and two record-based claims.97 The first claim on Nenno’s behalf was that trial counsel had been ineffective for failing to request an instruction on the lesser-included offense of felony murder. He wrote, “Applicant would therefore have been entitled to the submission of an instruction on the lesser included offense of felony murder. Since there was no credible contention that Applicant was not responsible for the complainant’s death, there could be no reasonable trial strategy for failing to request such an instruction.”98

93 *Id.*
95 *Id.*
96 *Id.* (Baird, J. concurring).
98 *Id.*
The inclusion of this claim reveals that the habeas counsel did not even read the record in the case. In fact, the trial attorney had requested the lesser included offense instruction, the trial court had instructed the jury on the lesser offense of felony murder and trial counsel’s only argument in closing argument was that Nenno was guilty of the lesser rather than the greater charge. Trial counsel’s contention that Nenno was guilty only of felony murder was clearly stated during closing argument: “Mr. Nenno is guilty of murder but he is not guilty of capital murder . . . . It’s clear that Mr. Nenno did not specifically intend to kill the child . . . . That’s why there is a paragraph or a sheet in here that deals with felony murder.”

After his inaccurate review of the trial record, there can be little hope that the appointed habeas lawyer properly and thoroughly completed the other necessary steps for competent representation.

This same lawyer has represented four other death row inmates. After filing a ten-page petition in Ex parte Rousseau, the lawyer swore in an affidavit:

At the time I was appointed, I was not familiar with how to litigate a capital habeas corpus case.

— State Habeas Attorney
Ex parte Rousseau

This lawyer was also appointed and filed writs in Ex parte Villareal, a nine-page petition, containing no extra-record claims or materials, Ex parte Arthur, a 14-page writ containing no supporting exhibits, and the lawyer co-authored another nine-page writ in Ex parte Smith. This lawyer was appointed to represent Smith five months before being appointed to the case referenced above in which he conceded his inexperience and unawareness of the basic requirements of competent representation. This lawyer was just appointed to another case on July 3, 2002.

Some attorneys on the CCA list for Article 11.071 appointments fail to even submit an application for habeas relief. Such was the case for Joe Garza, whose appointed lawyer, instead of filing a petition, filed an Anders brief. In

100 Affidavit of CCA appointed State Habeas Counsel, Rousseau v. Johnson, No. 00-CV-27 (S.D. Tex).
104 Case of Perry Eugene Williams (Direct appeal No. 74,391)(No petition for habeas corpus has yet been filed).
105 386 U.S. 738 (1967).
*Anders v. California*, the U.S. Supreme Court held that if an attorney believes that no claim of reversible error can be raised on direct appeal, they must nonetheless file a brief referring to anything in the record that might arguably support a claim of error.\(^\text{106}\) The permissibility of *Anders* briefs is limited to cases on direct appeal because an appellate court is in a position to review the entire record of the trial and independently evaluate the existence of error. However, the reasoning of *Anders* does not extend to habeas cases because the judge in habeas cases cannot perform the outside-the-record investigation necessary to identify potential evidence of innocence or fundamental flaws rendering the trial process unreliable.

Despite this, the lawyer wrote that Garza’s arguments for habeas relief were, in his “professional” opinion, “frivolous and without merit.”\(^\text{107}\) Counsel in that case made no attempt to set forth any legitimate claims the client may have and instead implicitly told the court to deny any relief. In his pleadings with the CCA, Garza’s attorney articulated to the court the tasks he had undertaken to come to his conclusion that the petition was frivolous. He indicated that he read the trial record, wrote to the inmate, reviewed the trial lawyer’s file, reviewed the court file and interviewed the trial judge. Conspicuously absent from this list is any review of the *State’s file* for the presence of evidence that may have been withheld from trial counsel.\(^\text{108}\) As an alternative, counsel chose to examine the trial record for evidence that the State might have withheld evidence, a useless task because evidence the state suppressed would not, by definition, be present in the trial record. Aside from inadequacies in case file review, habeas counsel also failed to interview a single trial juror, family members of the inmate or witnesses from the trial—all routine actions taken in any competent state habeas investigation. Although Garza’s counsel believed his habeas claims to be frivolous, counsel did not seek to withdraw from the case, which would have provided Garza the opportunity for a different appointment.\(^\text{109}\) Despite counsel’s position that it was unnecessary to withdraw from the case, the trial court appointed Garza another attorney.

The phenomenon of appointed habeas counsel conceding the frivolity of the client’s post-conviction claims before the court is not as rare as one would hope. In a three-page petition, counsel in *Ex parte Carter* explained to the CCA that not only did the petition rely on claims already presented to the court on direct appeal, but reminded the court they had rejected the claims once before.\(^\text{110}\) Counsel denied the need for an evidentiary hearing, a basic request that even

\(^{106}\) *Id.* at 744.

\(^{107}\) Counsel’s Professional Evaluation, Ex parte Garza, Writ No. 73,850, (filed Mar. 2002). This case was discovered despite being outside the limits of the study, which included only those petitions filed between 1995 and 2001.

\(^{108}\) *Id.*

\(^{109}\) *Id.* See also *Anders*, 386 U.S. at 744-45 (holding that attorney may only seek permission to withdraw if they deem the case to be entirely without merit).

the most inexperienced lawyers typically include. Carter was executed on May 31, 2000.

IV. Conclusion: Prevalent Incompetent Representation

Some appeals are understandably short if there is no new evidence to present. It is theoretically plausible that appointed counsel thoroughly investigates a case, reviews the state's file, contacts all witnesses and, after exploring all avenues, finds nothing to present in the appeal. However, as detailed previously and further in Chapter 3, our study reveals, instead, that many state habeas lawyers do little if any meaningful work for the client. Often, new lawyers appointed by federal courts after the filing of the state habeas petition discover new evidence of serious and substantial mistakes in the original trial. Evidence they discover reflects the lack of appropriate investigation by the state habeas lawyers. Our findings show that competent representation arrives too late in the process. Those who may be innocent or who may have been unfairly sentenced to death often slip through the cracks.
Turning a Blind Eye on Incompetent Representation: CCA’s Abdication of Responsibility

“[T]he State of Texas’[s] decision to appoint [this] attorney to represent the petitioner in what should have been petitioner’s final foray into the state courts in search of relief from his death sentence constituted a cynical and reprehensible attempt to expedite petitioner’s execution at the expense of all semblance of fairness and integrity.”

— U.S. District Judge Orlando Garcia

I. Introduction: Texas’s “Response”

The review of state habeas proceedings in Texas reveals that inexperienced or incompetent lawyers are being appointed to handle cases in which the ultimate punishment is at stake. In unimaginable numbers, these lawyers are failing to perform the most basic of tasks, thereby sacrificing legitimate claims and contributing to unreliable and unfair results. Former CCA Presiding Judge Michael McCormick acknowledged in an interview the facial paucity of some of the writs filed by appointed lawyers:

Q. 11.071 writs in some cases have some lawyers filing basically very small, very insignificant writs when they haven’t interviewed the witnesses, haven’t done an investigation. The court has approved those.

It hasn’t found ineffective assistance of counsel. I wonder what your thinking on that is.

A. Oh, there have been some, that if I had been an attorney, I would have been ashamed to file. We see those that were caught in the trap.\footnote{Interview with CCA Presiding Judge Michael J. McCormick, 28 VOICE FOR THE DEFENSE 17 (Jan./Feb. 1999). See also Nightline (ABC News television broadcast, Sept. 15, 2000) (interviewing D. Hendrix, Law Clerk, Court of Criminal Appeals, on the quality of Article 11.071 appeals: “And I’ll look through a [habeas] writ, and I’ll just think, ‘Is this all I’m getting because there wasn’t anything else, or is this all I’m getting because someone wasn’t putting a lot of time into it?’”).}

The CCA is often confronted with persuasive evidence of this crisis; yet the court refuses to adequately address the problem with real solutions. Texas, by statute, has promised each inmate facing a death sentence “competent” counsel during their post-conviction proceedings. Nevertheless, Texas has systematically appointed attorneys to represent death row inmates who are, for a variety of reasons, incompetent to do so. Owing to a combination of inexperience, negligence and reckless indifference to the consequences, these attorneys take action that results in the procedural default of numerous meritorious claims. By operation of state and federal law, these claims will never be reviewed by any court at any level.\footnote{Claims that are procedurally defaulted under state procedural law or that are not exhausted in state courts cannot be considered in federal habeas proceedings. See Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977); Martinez v. Johnson, 255 F.3d 229, 238 (5th Cir. 2001); Beazley v. Johnson, 242 F.3d 248 (5th Cir. 2001). See generally HERTZ & LIEBMAN, supra note 34, at § 26 (discussing the “adequate and independent state grounds” doctrine). Claims not raised in initial state habeas petition are procedurally defaulted as a matter of state law. See TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a)(1) (West 2002) (barring consideration of successive petitions that do not meet narrow exception).}

Indeed, the CCA was content to deem forfeited death row inmates’ entire state and federal post-conviction reviews due to failure of CCA-appointed lawyers to file petitions on time.\footnote{See Ex parte Smith, 977 S.W.2d 610 (dismissing writ because counsel filed application nine days late); Ex parte Colella, Writ No. 37,418-01 (Tex. Crim. App. Jul. 15, 1998) (dismissing writ because counsel filed application 37 days late).} The court’s selective interpretation of the habeas statute—strictly adhering to the filing deadline while loosely construing the requirement of competent performance to sanction an appointed lawyer’s negligence that, as a consequence, sacrifices the client’s only chance at habeas relief—was too much to bear for two CCA judges: “[T]he majority gives a new meaning to the lady with a blindfold holding the scales of justice, as it dispatches . . . [some] death row inmates toward the execution chamber without meaningful review of their habeas claims . . . To dismiss . . . [death row inmates’ habeas corpus petitions] as [an] abuse of the writ because their lawyers untimely filed writ applications borders — Dissenting Opinion, Ex parte Ramos, Ex parte Smith
on barbarism because such action punishes the applicant for his lawyer’s tardiness.115 This chapter focuses on the CCA’s “response” to this issue.

Recent cases, including those of Ricky Kerr, Napoleon Beazley and Joe Lee Guy illustrate the CCA’s willful failure to acknowledge the consequences of its selective interpretation of Article 11.071. In the case of Anthony Graves, the CCA expressly abdicated its responsibility to ensure the appointment of qualified counsel and meaningful access to the courts. Though the Texas Legislature guaranteed that these inmates would receive competent counsel who would conduct a full and fair review of their cases, the CCA eviscerated that guarantee, ensuring that, for those inmates with inadequate lawyers, the habeas process would do little more than rubberstamp the death sentence—regardless of how compelling the claims that the trial was unfair, and without consideration for whether these claims would be uncovered before execution.

II. Non-Applications: The Case of Ricky Kerr

The case of Ricky Kerr epitomizes the failings of Article 11.071. The lawyer appointed to file Kerr’s habeas application had no capital post-conviction experience and had been licensed to practice law for less than three years.116 On Kerr’s behalf, counsel filed a five-page petition containing a single boilerplate claim that failed to challenge Kerr’s conviction or sentence.117 This lawyer later acknowledged his incompetence in handling the case conceding that the “decision concerning how to protect [the inmate’s] rights under 11.071 may have been a gross error in judgment” and that “[i]t may be that I was not competent to represent [the inmate] in a death penalty case.”118 Counsel also described meritorious claims of error he had not asserted due to his misunderstanding of Texas law.119

“It appears that this Court, in approving such a charade, is punishing applicant, rewarding the State, and perhaps even encouraging other attorneys to file perfunctory ‘non-applications.’”

— Texas Court of Criminal Appeals
Judge Overstreet

115 Ex parte Smith, 977 S.W.2d at 614 (Baird, J., joined by Overstreet, J., dissenting). See, also, Ex parte Ramos, Writ No. 35-938-01 (Tex. Crim. App. Jul. 15, 1998) (Overstreet, J., dissenting). The CCA’s mishandling of these cases led to the Texas Legislature’s amending Article 11.071 in 1999 to give these inmates a second chance at review if they can show good cause. See TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4A (West 2002) (amended 1999).


119 Id.
Noting that Kerr’s counsel had filed a habeas application that failed to request cognizable relief, the trial court denied the application and scheduled Kerr’s execution. When the case arrived at the CCA for review, it was clear that Kerr’s appointed lawyer had failed to investigate the case or raise any challenges appropriate in a habeas corpus proceeding. Nevertheless, the CCA accepted the pleading filed by Kerr’s lawyer and denied relief.\textsuperscript{120}

Shortly before his scheduled execution, represented by appropriately qualified volunteer counsel, Kerr requested that the CCA grant him an opportunity to prepare and file a proper application for habeas relief. The CCA dismissed Kerr’s request without elaboration as an “abuse of the writ.”\textsuperscript{121} Judge Overstreet strenuously dissented, condemning the majority’s action:

Must applicant suffer the ultimate punishment, death, because of his attorney’s mistake? According to a majority of this Court, yes, he must . . . For this Court [to] refuse to stay this scheduled execution is a farce and travesty of applicant’s legal right to apply for habeas relief. It appears that this Court, in approving such a charade, is punishing applicant, rewarding the State, and perhaps even encouraging other attorneys to file perfunctory “non-applications.” Such a “non-application” certainly makes it easier on everyone—no need for the attorney, the State, or this Court to consider any potential challenges to anything that happened at trial . . . . I do not know what the majority thinks is going to happen to applicant, but he does have an imminent execution date set. If applicant is executed as scheduled, this Court is going to have blood on its hands for allowing [it]. By this dissent, I wash my hands of such repugnance.\textsuperscript{122}

The federal district court stepped in and stayed Kerr’s execution. In the opinion, the federal court cited a “cornucopia of new evidence” questioning Kerr’s conviction and sentence, including claims of ineffective assistance of trial counsel and prosecutorial misconduct.\textsuperscript{123} The federal judge castigated the CCA’s behavior in the case—appointing a plainly incompetent attorney with serious health problems to represent Kerr.\textsuperscript{124} Worried that the CCA would deem Kerr’s claims procedurally defaulted but constrained by precedents that foreclosed review of claims a state court has not considered, the federal judge dismissed Kerr’s federal habeas corpus petition so he could seek relief once more in the state courts.\textsuperscript{125}

Kerr re-filed in state court. After the federal judge’s rebuke and the media outcry over the handling of Kerr’s case, the CCA agreed that Kerr had not yet been given the “one full and fair opportunity” to present his constitutional

\textsuperscript{121} See Ex parte Kerr, 977 S.W.2d at 585 (Overstreet, J., dissenting).
\textsuperscript{122} See id. at 585 (Overstreet, J., dissenting).
\textsuperscript{124} Id. at 20.
\textsuperscript{125} See id. at 21-26.
claims that might merit relief from his death sentence.\textsuperscript{126} In a remarkable about-face, the CCA acknowledged that the habeas application filed by Kerr’s CCA-appointed counsel—that had not attacked the validity of Kerr’s conviction or sentence—was not a true “writ application,” and therefore, Kerr was entitled to have his most recent application considered.\textsuperscript{127}

The CCA “decline[d] to place blame upon anyone for Mr. Kerr’s present situation,” characterizing Kerr’s appointed counsel’s filing of a non-application the “innocent mistake” of an attorney who was “competent and qualified to handle the matter when he was appointed.”\textsuperscript{128} CCA Judge Johnson took issue with the majority’s description of the lawyer as competent: “Holding a general license to practice law does not guarantee that the attorney possesses sufficient knowledge of relevant areas of law such that the client receives competent counsel rather than the mere presence of a licensed attorney. Mere presence is not enough.”\textsuperscript{129} The federal court also disagreed that the lawyer was adequate and characterized the appointment as “. . . apparent bad faith demonstrated by the State of Texas in appointing a plainly incompetent attorney to represent petitioner in his initial state habeas corpus proceeding.”\textsuperscript{130}

But even if counsel’s filing of the deficient application—by his own admission a “gross error in judgment”—was a mistake born of ignorance and inexperience, the mistake in appointing him to represent a death-sentenced inmate in a proceeding he was unqualified to handle was not. The CCA had ample knowledge of the lawyer’s inadequacies: Kerr had repeatedly written to the CCA to complain of his appointed counsel’s shortcomings;\textsuperscript{131} the CCA knew the extent of the lawyer’s experience (or lack thereof) when it placed him on the appointment list; and, at the very least, the facial paucity of the so-called “habeas application” the lawyer filed betrayed his incompetence. Although the CCA’s decision in Ex parte Kerr\textsuperscript{132} requires the habeas application to raise on its face a claim attacking the inmate’s conviction or sentence, anything that does so—no matter how far short of the petition envisioned by Article 11.071’s drafters raising all potentially meritorious claims discovered after a comprehensive investigation into the facts of a case—is acceptable, even if it is a record-based claim previously raised and rejected or an extra-record claim devoid of factual support.\textsuperscript{133}

\textsuperscript{126} See Ex parte Kerr, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002).
\textsuperscript{127} See id at 419-20.
\textsuperscript{128} Id. at 420.
\textsuperscript{129} Id. at 422 (Johnson, J., concurring).
\textsuperscript{130} Kerr v. Johnson, No. SA-98-CA-151-OG, Slip op. at 1, 16-17 (W.D. Tex. Feb. 24, 1999).
\textsuperscript{131} Id. at 416-17 (describing Kerr’s correspondence with the CCA, complaining that his appointed counsel’s failure to “at least research the record and investigate the facts (as he is required to do)” before filing the non-application threatened Kerr “with the possibility of losing [sic] all state and federal constitutional claims.”).
\textsuperscript{132} 64 S.W.3d 414 (Tex. Crim. App. 2002).
\textsuperscript{133} See Ex parte Graves, 70 S.W.3d at 120 (Price, J., dissenting) (observing that under the rule announced by the majority, “a habeas applicant has no recourse for the appointment of less-than-competent counsel, unless counsel fails to file an application or files a document that does not constitute an application.”).
III. The Empty Promise of “Competent Counsel”

A. Anthony Graves

“‘Competent counsel’ ought to require more than a human being with a law license and a pulse.”

— Texas Court of Criminal Appeals Judge Price

The case of Anthony Graves presented the CCA with an opportunity to rectify the problems with quality of representations in state habeas corpus proceedings, a step they had declined to take in *Ex parte Kerr*. The CCA did not correct the problems.

Committed under cover of darkness, the brutal slaying of a family of six, their home set ablaze to conceal the crime, rocked Burleson County, Texas. Robert Earl Carter was quickly arrested. Texas Rangers, present at the victims’ funeral, spotted him, tearful, with bandages covering burn wounds on his face, neck and hand. He told police that he had gone to the victims’ house to confront a former girlfriend and had ended up killing everyone in the house. Pressed by police challenging his claims that he committed all the murders by himself, Carter named Graves, his wife’s cousin, as his accomplice. Though Carter told the grand jury that he had fabricated his prior statements regarding Graves’s involvement, both men were indicted for capital murder.

At Graves’s capital murder trial, however, Robert Earl Carter, who had already been sentenced to die for the murders, proved to be the prosecution’s star witness in describing how the two men committed the crime. The other evidence against Graves was weak: No physical evidence linked him to the crime, and prosecutors could never ascribe to him a clear motive. According to Carter, Graves participated in the murders because he was angry that one of the victims had been promoted over his mother at their workplace—a promotion that took place several years before the murders were committed. Graves denied any involvement in the murders, claiming that he spent that evening with his girlfriend, Yolanda Mathis, and that Carter had framed him. But Mathis never testified; when she was called as a witness, the prosecutor asked the trial court to “warn [Mathis] of her rights” outside the presence of the jury.

134 *Id.*
137 See *Graves*, No. 72,042, slip op. at 5.
138 *Id.* at 6.
139 *Id.* at 2-5.
141 *Id.*
because Mathis was also “a suspect in these murders” with it “quite possible” that she “might be indicted.”\textsuperscript{142} After being told the consequences of taking the stand, Mathis invoked her Fifth Amendment right not to incriminate herself and fled the courthouse.\textsuperscript{143} Ultimately, Graves was convicted and sentenced to death, largely on Carter’s testimony.

The prosecutor kept other exculpatory evidence out of Graves’s trial. While informing the defense counsel that Carter had failed a polygraph test about his account of the crime, the prosecutor did not specifically disclose that Carter failed a question regarding his wife’s involvement in the crime.\textsuperscript{144} Indeed, it was in return for not prosecuting his wife that Carter agreed to testify against Graves.\textsuperscript{145} The prosecutor further did not disclose to Graves’s trial attorneys that Carter had admitted to him during the trial that his wife had been present with him at the scene of the murders.\textsuperscript{146} In a sworn deposition shortly before his execution, Carter said that he had lied initially because the police pressured him to name an accomplice, and that he had testified against Graves to protect his wife: “The only reason why I testified against Graves [was] because of the pressure that I felt from y’all going after another innocent party, which was my wife. So, therefore, I gave him up . . . . Graves is innocent.”\textsuperscript{147}

Carter’s last words, minutes away from his execution, addressed to the victims’ family members there to witness his death, avowed Graves’ innocence: “I’m sorry for all the pain I’ve caused your family. It was me and me alone. Anthony Graves had nothing to do with it. I lied on him in court.”\textsuperscript{148}

Almost all of this evidence suggesting Graves’s potential innocence had already been developed within days of the trial court’s appointing state habeas counsel, a lawyer who had been out of law school only three years. That lawyer, however, failed to conduct an adequate investigation and failed to prepare the habeas application properly. He neglected to subpoena Carter, meaning that no court ever heard Carter’s recantation.\textsuperscript{149} Further, the habeas lawyer did not raise all the claims in one petition, but instead filed them piecemeal—in violation of the ban on successive petitions—thus procedurally defaulting a number of compelling claims of prosecutorial misconduct.\textsuperscript{150}

\textsuperscript{142} See Ex parte Graves, No. 73,424-01, at 7 (Tex. Crim. App. Feb. 9, 2000).
\textsuperscript{143} Id. at 9.
\textsuperscript{144} See Ex parte Graves, 70 S.W.3d at 106 n.6.
\textsuperscript{145} Id.
\textsuperscript{147} Mark Wrolstad, \textit{Key Witness for Condemned Man Is Scheduled to Die Today}, \textit{Dallas Morning News}, May 31, 2000, at 19A.
\textsuperscript{148} Molly Ivins, \textit{Innocence Getting Harder to Prove}, \textit{Charleston Gazette}, June 6, 2000, at 4A.
\textsuperscript{149} See Wrolstad, \textit{supra} note 147, at 19A. \textit{See also} Texas Department of Criminal Justice, \textit{Last Statement of Robert Earl Carter, #999091}, available at http://www.tdcj.state.tx.us/stat/carterrobertlast.htm.
\textsuperscript{150} See Ex parte Graves, 70 S.W.3d at 106-07 (summarizing procedural history of Graves’s state habeas proceedings).
Volunteer lawyers intervened and filed a new petition on Graves’s behalf, arguing that the poor performance of his appointed counsel deprived Graves of his right to competence of counsel in his habeas corpus proceedings, and that the procedural bar against successive petitions ought therefore to be excused to permit consideration of his claims.\textsuperscript{151} The CCA agreed that Graves had the right to be represented by competent counsel,\textsuperscript{152} but balked at granting Graves any relief. The CCA decided that there would be no remedy for inmates who receive incompetent representation in state habeas proceedings. The CCA reasoned that while a death row inmate is entitled to a competent lawyer under Article 11.071, the competence of an attorney is not measured according to what the attorney does during the period of habeas representation.\textsuperscript{153} Instead, the CCA held that being on the list of approved attorneys is sufficient, regardless of the actual performance, or lack thereof, by the attorney. The CCA forced Graves to bear the dire consequences of his lawyer’s incompetence and eliminated the possibility that any inmate could obtain relief from the court for the inadequacies of the state habeas lawyer.

The attorney appointed to represent Anthony Graves remains on the list of attorneys approved for appointment in state habeas proceedings.\textsuperscript{154}

\section*{B. Johnny Joe Martinez}

"\textit{I am trying to get off your case and get you someone who is familiar with death penalty post-conviction habeas corpus.}"

— Letter from appointed state habeas counsel to Johnny Joe Martinez, July 14, 1998\textsuperscript{155}

Johnny Joe Martinez was charged with capital murder for the 1993 killing of Clay Peterson, a convenience store clerk. After drinking at least 13 beers, Martinez robbed the store and stabbed the clerk. Martinez was nineteen years old at the time and had never been in trouble with the law. He immediately expressed extreme remorse. He called 911 to report the incident, waited for police to arrive and admitted his responsibility in the crime.

At Martinez’s capital murder trial, the State introduced no evidence at the punishment phase.\textsuperscript{156} It was unnecessary; Martinez’s lawyer conducted virtually no investigation in connection with the punishment phase of the trial, and the

\textsuperscript{151} See id. at 107.
\textsuperscript{152} See id. at 113.
\textsuperscript{153} See id. at 114.
\textsuperscript{154} See, List of Approved 11.071 Attorneys, supra note 43 (viewed October 1, 2002).
\textsuperscript{155} Letter from state habeas counsel to Johnny Joe Martinez, (on file with author).
defense case occupies fewer than 40 pages in the transcript. Because the jury heard nothing about Martinez’s background that would have persuaded them to sentence him to life in prison, Martinez was sentenced to death.

On direct appeal, the CCA, by a 5-4 vote, affirmed the conviction and rejected Martinez’s claim that the evidence was insufficient to demonstrate beyond a reasonable doubt that he would be a future danger to society. Judge Baird noted in his dissent that it was “clear the evidence [was] insufficient to support a finding of future dangerousness.” Each dissenting judge observed that the CCA had held—in cases more aggravated than Martinez’s—that the evidence was insufficient to support a finding of future dangerousness.

In the state habeas proceedings, the CCA appointed a lawyer to represent Martinez who had never previously handled a death penalty post-conviction case, or, for that matter, any post-conviction litigation at all. The lawyer never spoke to Martinez and spent less than 50 hours on the case. The lawyer filed a five-page state habeas petition that raised four record-based claims, citing only three cases as authority. His incompetence was evident from the beginning. The lawyer waited three months to contact his client, doing so only in writing—promising to keep Martinez informed of developments in his case. In fact, he did not keep Martinez informed, never visited him in person and refused to accept the collect calls Martinez placed to his office.

Martinez, aware of his lawyer’s indifference, sent his lawyer letters asking for information. He wrote:

I am writing to you concerning my Writ of Habeas Corpus Proceedings . . . I would like to know the status of my appeal . . . I am wondering about the due date on my appeal, when is the due date, for have we had an opportunity to hire an investigator to search issues or run down leads to save my life? . . . [P]lease don’t get me wrong, I am not trying to sound pushy or anything like that, it’s just that I’m in the dark here and my life is on your hand, I am putting all my faith and hope in you, so please keep me informed and lets stay in touch O.K.!? . .

I wrote you a letter . . . [three weeks ago] and I still have not heard from you . . . I need to hear from you since you have not come up here and spoken to me . . . I have written you numerous times and I have not heard from you . . . [T]his is my life we are dealing with here . . . I want you to get in touch with my family so they can help you look into some very important things that will benefit and help me in my case. Have you hired the investigator I told you too [sic] so he can talk to numerous helpful witnesses . . . .

157 Id at 706 (Baird, J., dissenting).
158 Letter from Johnny Joe Martinez to state habeas counsel, Feb. 9, 1998 (on file with author) (emphasis added).
beg you to answer this letter. It’s urgent that I hear or see you so I can speak with you on these very important issues.159

State habeas counsel responded with the following two-sentence letter:

Please find enclosed a copy of the Amended Original Application For Writ of Habeas Corpus and a copy of the Trial Court’s Findings of Fact and Conclusions of Law.

I will keep you informed of further developments.160

The habeas petition contained only stale record-based claims that had already been denied on direct appeal.161 The petition failed to raise any claims considered appropriate for consideration in state habeas. Unsurprisingly, the petition was denied, prompting a dissent by Judge Baird questioning the competence of state habeas counsel.162

Shortly after the denial, the state habeas attorney filed a request to withdraw from the case, in which he admitted that he “had never handled a post conviction writ of a death penalty case and therefore must humbly agree with the dissenting opinion in this case (without joining in its reasoning) that merits of this application should not be reached.”163

In a letter to the CCA asking the court to grant his lawyer’s Motion to Withdraw, Martinez stated: “My lawyer . . . filed my State Habeas Corpus Writ . . . knowing that he had no clue of how to prepare a proper one . . . . He admits to the courts that he has handled many Direct Appeals but never has handled a State Habeas Corpus Writ of a death penalty case.”164 To demonstrate his efforts to assist his state habeas counsel, Martinez attached copies of some of the letters he had previously written to his lawyer, in which he implored his lawyer to provide him with information and offered suggestions for extra-record investigation.

159 Letter from Johnny Joe Martinez to state habeas counsel, Feb. 28, 1998 (on file with author) (emphasis added).
160 Letter from state habeas counsel to Johnny Joe Martinez, Mar. 4, 1998 (on file with author).
162 Id. Judge Baird wrote “Applicant is represented by counsel appointed by this Court. The instant application is five and one half pages long and raises four challenges to the conviction. The trial record is never quoted. Only three cases are cited in the entire application, and no cases are cited for the remaining two claims for relief. Those claims comprise only 17 lines with three inches of margin.” Ex parte Martinez, 977 S.W.2d 589, 589 (Tex. Crim. App. 1998) (Baird, J., dissenting). Judge Baird further noted “counsel did not seek reimbursement for any travel or investigatory expenses, nor request any expert assistance in preparing this application. The same records reflect that counsel spent less than 50 hours preparing the application.” Id. at 590. Judge Baird recommended “the merits of the application should not be reached. Instead, this matter should be remanded to the habeas court to determine whether applicant has received effective assistance of counsel.” Id. at 590.
Neither the CCA nor state habeas counsel responded to the letters Martinez sent them. In federal habeas corpus proceedings, the District Judge, expressing concern about the performance of state habeas counsel, noted: “I don’t know what’s holding up the State of Texas giving competent counsel to persons who have been sentenced to die.”

Only after the appointment of a different attorney for the federal habeas proceeding was an investigation conducted. It revealed that Martinez had not received effective assistance of counsel during the punishment phase of the trial. The investigation disclosed that Martinez had been subjected to an extremely traumatic childhood. His mother drank heavily, was a victim of physical abuse, and sold heroin. Martinez was a witness to this physical abuse and drug dealing. Martinez had been sexually abused by a neighbor who repeatedly sodomized him and paid him not to disclose the abuse. At age 14, because of the disturbing situation at home, Martinez was living under bridges or with friends and relatives when possible.

Neither trial counsel nor state habeas counsel asked Martinez about his background. Other family members corroborated the history. All of these witnesses expressed their willingness to testify about the facts, but were not asked to do so by trial counsel. None of these witnesses were contacted by state habeas counsel despite the fact that every one of them found by Martinez’s federal habeas counsel lived in or near Corpus Christi, Texas, where state habeas counsel’s offices were located.

Because these facts could have been presented previously in his initial habeas application had state habeas counsel done his job, failure in federal court was a foregone conclusion. Due to the incompetence of his state habeas counsel, no court ever heard Martinez’s claim. His death sentence, already in question due to the lack of punishment phase evidence, was further compromised by the fact that compelling and significant mitigation was not presented that likely would have made a difference to jurors. The state habeas lawyer neglected to challenge the effectiveness of Martinez’s trial counsel, even though trial counsel—by failing to conduct a meaningful punishment phase investigation—had acted in a fashion that the Supreme Court has condemned as ineffective, and even though, as the Fifth Circuit pointed out, the mitigating evidence Martinez’s trial counsel failed to develop was substantial and easily accessible. His death sentence was unreliable, but Texas, by appointing an unqualified habeas lawyer, denied Martinez the meaningful access to the courts necessary to catch these errors.

167 See Martinez v. Johnson, 255 F.3d at 238 n.8.
Martinez was executed on May 22, 2002. Despite asking to be removed from the case while it was being considered by the CCA, and conceding that he was less than effective, the state habeas attorney remains on the list of attorneys approved for appointment in 11.071 cases.168

C. Napoleon Beazley

“The bottom line is that certain issues critical to the fairness of Napoleon Beazley’s capital murder trial were not discovered in his state habeas process . . . .”

— State habeas attorney for Napoleon Beazley169

Napoleon Beazley, age 25, was executed on May 28, 2002, for a crime committed when he was 17 years old. He was convicted of capital murder for the 1994 shooting of John Luttig during a car jacking in Tyler, Texas. A successful student, star athlete and active church member with no prior arrests, Beazley was immediately remorseful for his crime. Beazley’s conviction and death sentence were based in large part on the testimony of the two co-defendants, Donald and Cedric Coleman.

In December of 1996, the court appointed state habeas counsel. At that time, the CCA faced a shortage of competent habeas attorneys.170 The situation ultimately became so bad that the Board of Directors of the Texas Criminal Defense Lawyers’ Association adopted a resolution encouraging its members not to seek appointment from the CCA on capital cases, describing the state habeas system that resulted from the Court’s appointment scheme as a “meaningless farce” in which the efforts of defense counsel could only “result in the removal of a procedural hurdle to execution.”171

Two former clerks of the CCA—one who had never represented a death row client and one who had never represented any client at all—opened a law practice together by taking ten state capital habeas appointments from the CCA. The lawyer appointed to Beazley’s case was appointed to six capital cases within three days of leaving his position at the CCA. Petitions were due in five of the six cases 180 days later.172 The factual investigation that was done in Beazley’s case—eighteen hours worth—occurred within two weeks of the filing date. Records indicate that the attorney read the investigator’s reports—

168 See, List of Approved 11.071 Attorneys, supra note 43 (viewed October 1, 2002).
170 Hoppe, supra note 39, at 16A (noting failure to appoint in 22 capital cases with only “eight weeks to either file an appeal or lose their right to federal court review.”).
the only factual investigation in the case—on the same day that he also did “final preparation of [the] writ application.”

The petition for writ of habeas corpus contained only four record-based claims, two of which were repeated from the direct appeal. The state did not bother to reply to the record-based claims. After a perfunctory hearing, the trial court issued findings and conclusions of law recommending that the petition be denied. In an unpublished order, the CCA adopted those findings and denied Beazley relief.

Had the state habeas lawyer conducted any meaningful investigation, nine available issues could have been discovered and raised in the initial petition. For example, one of the jurors in the all white jury who harbored deep racial prejudice against blacks stated “the nigger got what he deserved.” His wife provided an affidavit asserting that her husband was likely racially biased during the jury deliberations. Another juror appears to have been a long-time employee of one of the victim’s business partners, a fact not revealed during jury selection. Also missed by initial state habeas counsel was the state suppression of evidence favorable to Beazley regarding the testimony of his co-defendants. The prosecution had denied the existence of a plea agreement with the two co-defendants in the case and had allowed them to falsely testify at trial. The district attorney’s office had agreed that they would not pursue the death penalty against the co-defendants in exchange for their testimony against Beazley. In affidavits, both co-defendants admitted to lying at trial and stated that they had been told to “make Napoleon look as bad” as possible to the jury. They further swore that Beazley had not actually planned the crime beforehand and had been extremely remorseful after the crime. The false testimony of these two contributed greatly to the jury’s finding of Beazley’s “future dangerousness,” a requirement for a death sentence in Texas. This finding otherwise had little or no support. Mitigation witnesses, including church members, teachers, fellow students and other members of the community described a respectful, decent teenager whose involvement in this crime seemed completely out of character.

177 Id.
178 Id.
179 Id.
180 Id.
181 Id.
These claims were raised in a second habeas petition filed by new counsel. Attached to that petition was an affidavit in which the initial state habeas attorney admitted his incompetence:

I acknowledge that the investigation of [the inmate’s] case was inadequate to discover all of the potentially important issues affecting the legality of his conviction and death sentence . . . . [W]hat little was done by my factual investigator came way too late . . . [M]any factors contributed to the failure . . . of the state writ process . . . [including the] inability of appointed counsel adequately to supervise and control the work of his authorized investigator.\(^\text{182}\)

Nevertheless, in a brief unpublished order, the CCA dismissed this second state habeas petition pursuant to the bar against successive petitions.\(^\text{183}\) Thus, because of the incompetence of the lawyer appointed to represent Beazley in his post-conviction proceedings—a lawyer the CCA knew to be inexperienced and severely overworked—no court ever addressed the merits of Beazley’s claims, including claims of serious prosecutorial misconduct. Beazley’s death sentence was constitutionally unreliable, but he was deprived of meaningful access to the courts.

Napoleon Beazley was executed on May 28, 2002. Despite calling his own work “woefully inadequate,” the attorney remains on the CCA’s list of qualified attorneys.\(^\text{184}\)

D. Gary Etheridge

Gary Etheridge was convicted of capital murder for the 1990 killing of Christie Chauviere. Etheridge was represented at trial by court-appointed counsel. This court-appointed lawyer’s entire punishment phase defense consisted of the following:

\begin{quote}
COURT: . . . , is the defense ready to proceed?
[DEFENSE COUNSEL]: Your Honor, Defense rests.\(^\text{185}\)
\end{quote}

The case was affirmed on direct appeal in 1994. The state habeas attorney was not appointed until 1996 (after the CCA first appointed an attorney who was no longer practicing). He was two years out of law school. This was his first capital writ appointment; he had never been lead trial counsel in a murder case, had never tried a capital murder case in any capacity and had never been counsel of record in the appeal of a murder or capital murder conviction. Nor had counsel ever before filed a state or federal writ of habeas corpus as lead counsel in any type of case.

Etheridge feared that his appointed attorney was insufficiently experienced to handle a writ of habeas corpus in a capital case, and that he lacked

\(^{183}\) Id.
\(^{184}\) See, List of Approved 11.071 Attorneys, supra note 43 (viewed October 1, 2002).
the resources necessary to research, prepare and file such a writ. Furthermore, from his dealings with the lawyer, Etheridge concluded that his appointed counsel would fail to raise certain issues, thereby waiving them for later review in federal court. Etheridge was proven to be right.

The first of Etheridge’s five written attempts to discharge his appointed state habeas counsel was made in a letter to the lawyer. The letter stated:

\[
\ldots I \text{ do not want you to prepare nor file anything in my case at all.} \\
\text{You are not board certified, you have never handled a capital case before} \ldots \text{you have no experience or expertise in Art. 11.071 on appeal} \ldots \text{and Art. 11.071 § 2a provides that I am entitled to competent counsel.} \\
\text{I mean no insult to you yet my life is not a gamble} \ldots \\
\text{and you are not possibly able to do anything yourself from your small one-man office} \ldots \text{you simply do not have adequate resources nor funding} \ldots \text{and you cant carry the weight of a man’s life in your hand this way KNOWING as you do that you have no chance at all to do the extensive job necessary} \ldots \text{please do not pursue any further action in my case at all and do not file anything.}^{186}
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Etheridge then filed a pro se motion “to dismiss court appointed counsel . . . from 11.071 proceedings and for the appointment of counsel to handle applicants original application for 11.071 writ.” In his pro se motion, Etheridge explained that his current attorney was unqualified.\(^ {187}\) The CCA denied the motion for competent counsel without discussion.\(^ {188}\)

After repeatedly expressing to his appointed lawyer his objections to how his case was being handled, Etheridge filed a letter with the trial court reiterating his request for a different, more qualified lawyer. Despite his attempts to discharge his court-appointed state habeas counsel prior to the filing of the state writ, the lawyer remained on the case throughout the proceedings.

Gary Etheridge’s state habeas counsel failed to raise meritorious claims of ineffective assistance of trial counsel. Because of a fundamental misunderstanding of the jury’s ability to consider mitigating evidence, trial counsel had completely failed to present any to the jury at the punishment phase. Abundant mitigating evidence was available. Counsel failed to raise evidence of Etheridge’s emotionally scarred upbringing, abuse by his drunken father, a head injury as a child, his mother’s suicide attempts and drug dependence since adolescence. At age six, Etheridge was savagely raped by his older brother resulting in hospitalization. Etheridge was raped again as an adult while serving an unrelated prison sentence. A psychological evaluation of Etheridge concluded

that there was no significant risk that Etheridge would be dangerous in the future unless he was under “states of extreme provocation or intoxication.”

This evidence, if presented, could have impacted at least one juror to vote for life imprisonment instead of death, which would have resulted in a life sentence. As it stood, however, the jury heard no evidence that might have convinced them to spare Etheridge’s life, only the prosecution’s pleas for the death penalty. Despite this obvious and inexcusable failure by trial counsel, Etheridge’s state habeas counsel failed to raise these claims of ineffectiveness in his petition. Failure to present these claims in the initial petition led to the CCA’s dismissal of Etheridge’s second habeas petition filed by new counsel and the federal court’s refusal to hear the claims because they were procedurally barred. Etheridge was deprived of any forum in which to litigate the denial of his right to effective assistance of counsel—a denial that renders his death sentence constitutionally unreliable.

Etheridge was executed on August 20, 2002. The attorney appointed to represent Mr. Etheridge in state habeas proceedings remains on the list of attorneys approved for appointment in 11.071 cases.

E. Joe Lee Guy

Joe Lee Guy was the lookout in the botched robbery of a convenience store during which the storeowner, Larry Howell, was killed. His appointed lawyer at trial was suffering from drug and alcohol addiction at the time and actually used cocaine on the way to Guy’s trial. The trial lawyer hired an investigator, who was vastly under-qualified to work on a capital case. Instead of working for Guy, the investigator soon developed a close and bizarre relationship with the surviving victim, French Howell, who had been wounded during the robbery. The investigator told Howell that he “works hard to keep . . . those murderers from getting . . . whatever you call it a transfer of their trial to Tulia.” The investigator assured Howell he was trying to put murderers on death row, yet continued to work as the defense investigator and billed the court for his time. He had developed such a relationship with the crime victim that, within six months of the trial, she drafted a will naming the defense investigator as the sole beneficiary to her very substantial estate.

Guy was tried for capital murder and, despite his participation as the lookout, was sentenced to death. The two co-defendants in the case, including the shooter, received life sentences. As often is the case, the trial lawyer was appointed to represent Guy in his direct appeal. In the direct appeal stage,

190 See Appendix Two. See also Texas Dep’t of Criminal Justice, Executed Offenders, supra, note 8.
191 See, List of Approved 11.071 Attorneys, supra note 43 (viewed October 1, 2002).
193 Transcript of taped conversation between Howell and Floyde Heathington 7 (July 7, 1994).
194 Id. at 8.
documents were filed with the CCA that revealed the lawyer’s history of discipline by the State Bar and drug and alcohol addiction. In fact, the lawyer had to file a motion for extension of time to file the brief because his license to practice law had been suspended. This motion also included information regarding the inappropriate relationship between the defense investigator and surviving victim. The CCA file also contained a copy of a letter from the trial judge to the General Counsel of the State Bar discussing and questioning the ethics of the investigator’s conduct and status as beneficiary of the surviving victim’s will.

The CCA affirmed Guy’s conviction on appeal and appointed a new lawyer to represent him in state habeas. The habeas petition, only nine pages long—five pages of which consisted of the cover page, table of contents, table of authorities, prayer and certificate of service—failed to raise any of the above facts about trial counsel’s addictions or the investigator’s relationship with the surviving victim. Instead, the lawyer raised five unsupported, mostly boilerplate, record-based claims. She filed these claims despite the fact that the information, critical to the fairness of the trial, was readily discoverable in the CCA file itself.

Although the CCA had facts in its own file that cast serious doubt on the fairness and reliability of the trial results, the CCA did not question the competence of state habeas counsel or call for further inquiry. Instead, the CCA accepted the nine-page petition, denied it, and left Guy to bear the grave consequences of his lawyer’s incompetence.

State habeas counsel also failed to ensure that Guy’s federal habeas appeal was filed on time. So poor was the representation that even a prosecutor expressed concern: “He was abandoned. My concern with Joe Lee Guy was that he get the process he deserved. He was getting robbed of federal habeas.”

In federal court, new counsel was appointed to represent Guy. After completing an exhaustive investigation, counsel filed a petition over a hundred pages in length and presented the claims regarding the lawyer’s drug use, history of disciplinary infractions and the investigator’s relationship with the surviving victim. In an unprecedented move, the Attorney General’s Office, acknowledging the extreme nature of state habeas counsel’s incompetence, waived the defense

“**He was abandoned. My concern with Joe Lee Guy was that he get the process he deserved. He was getting robbed of federal habeas.”**

— Former Assistant Attorney General Matthew Wymer

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196 Motion for Extension of Time, Id.
197 Guy v. Johnson, No. 5:00-CV-027-C (N.D. Tex. Feb. 27, 2001).
199 Id.
that the issues had not been exhausted in state court. In doing so, they gave the federal court the leeway to address the merits of the issues presented. The case is now pending before the 5th Circuit Court of Appeals.

Despite the poor quality of the state habeas lawyer's work and the fact that she has been a prosecutor for years, she remains on the list of approved 11.071 attorneys.201

IV. No Bites at the Apple: Ignoring Legislative Intent

By its decision in *Ex parte Graves*—holding that there is no remedy for inmates whose lawyers are incompetent—the CCA has stripped away the legislature's promise of “competent” counsel in Article 11.071. The CCA's selective interpretation of Article 11.071, eliminating the inmate's opportunity to challenge the effectiveness of his state habeas representation, is at odds with the fundamental purpose of that statute. Representative Pete Gallego—the House Sponsor of the legislation that became Article 11.071—explained that its purpose was to streamline death row state habeas corpus by limiting inmates to one meaningful, comprehensive post-conviction proceeding:

What we're attempting to do here is to say “raise everything at one time.” You get one bite at the apple. If you have to stick the kitchen sink in there, put it in there, and we will go through those claims one at a time and make a decision . . . The idea is this: You're going to be able to fund counsel in these instances and we are going to give you one very well-represented run at a habeas corpus proceeding. And unless you meet a very fine-tuned exception, you're not going to be able to come back time after time after time.202

During House floor debate on May 18, 1995, Representative Gallego affirmed that the bill’s purpose was to “ensur[e] adequate, competent, and paid representation of capital defendants, and [to provide] full and fair review of their cases.”203 He explained that in the absence of adequate funding for the appointment of habeas counsel “[s]o many times there is actually no investigation . . . No one has investigated these claims adequately from the ground up. So you are right. Our intent is to provide funding so we can do investigation properly at ground zero . . . .”204

201 See, List of Approved 11.071 Attorneys, *supra* note 43 (viewed October 1, 2002).
204 *Id.*
If that court-appointed lawyer fails to do the job, however, forfeiting any meaningful review, the inmate loses his “one bite at the apple.” The all-too-frequent occurrence of habeas applications that raise only record-based, direct-appeal claims and that procedurally default all cognizable claims falls far short of “one very well-represented run at a habeas corpus proceeding.” If death row inmates are to be given access to the courts, surely that access should be meaningful and extend past the courthouse door.

V. Texas: Apart from the Other States

State and federal courts across the nation have consistently recognized that the right to appointment of counsel—even when based solely on a statutory guarantee—necessarily entails the right to competent assistance of counsel. For example, the Nevada Supreme Court remarked, “[i]t is axiomatic that the right to counsel includes the concomitant right to effective assistance of counsel.”205

The Iowa Supreme Court concluded: “We believe the statutory grant of a post-conviction applicant’s right to court-appointed counsel necessarily implies that that counsel be effective . . . . It would seem to be an empty gesture to provide counsel without any implied requirement of effectiveness.”206 The Connecticut Supreme Court reasoned that “[i]t would be absurd to have the right to appointed counsel who is not required to be competent.”207 Indeed, a right to habeas counsel “would become an empty shell if it did not embrace the right to have the assistance of a competent counsel.”208 The South Dakota Supreme Court concurred: “[W]e will not presume that our legislature has mandated some useless formality requiring the mere physical presence of counsel as opposed to effective and competent counsel.”209

A New Jersey appellate court concluded that “[n]one can currently dispute the principle that mere appointment, without more, does not satisfy the requirements of our rules . . . . [N]o true justice system could be satisfied with pro forma fulfillment of a guarantee as important as the right to counsel where there has been no actual assistance rendered.”210

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208 Id. at 821-22. Cf. State v. Anonymous, 425 A.2d 939, 943 (Conn. 1979) (holding that where a statute “mandates the assistance of counsel, it is implicit that this means competent counsel.”).
While other state and federal courts have consistently found a right to “competent” counsel implicit in a bare statutory provision for appointment of counsel, the Texas Legislature explicitly signaled its intent that appointed state habeas counsel in capital cases provide competent representation with a specific mandate that death-sentenced inmates be “represented by competent counsel,” and

213 In re Sanders, 981 P.2d 1038, 1055-56 (Cal. 1999); In re Clark, 855 P.2d 729, 748-49 (Cal. 1993) (“[A] petitioner who is represented by counsel when a petition for habeas corpus is filed has the right to assume that counsel is competent and is presenting all potentially meritorious claims.”).
215 Hernandez v. State, 992 P.2d 789, 794-95 (Idaho Ct. App. 1999) (permitting consideration of otherwise time-barred successive post-conviction application upon a showing that prior post-conviction counsel had performed ineffectively “because failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process.”) (citation omitted).
216 See People v. Pitsonbarger, No. 89368, 2002 Ill. LEXIS 326, at *16-*49 (Ill. May 22, 2002). Cf. In the matter of Carmody, 653 N.E.2d 977, 983-84 (4th Dist. Ill. 1995) (holding that appointment of counsel pursuant to statutory mandate permits petitioner to complain of ineffective assistance of counsel in involuntary commitment proceedings, because legislature could not have intended to provide the right to counsel but then permit that counsel to be prejudicially ineffective).
221 Crump v. Warden, 934 P.2d 247, 253 (Nev. 1997); McKague, 912 P.2d at 258 n.5.
225 Jackson, 637 N.W.2d at 22-24.
227 See, e.g., Cullins v. Cruse, 348 F.2d 887, 889 (10th Cir. 1965) (“When counsel is appointed he must be effective and competent. Otherwise, the appointment is a useless formality.”); United States v. Wren, 682 F. Supp. 1237, 1241-42 (S.D. Ga. 1988) (noting that statutory right to appointed counsel “would be meaningless if it did not require that counsel be effective as well as merely present”).
228 See, e.g., COLO. REV. STAT. ANN. § 16-12-205(5) (Lexis through 2002); FLA. STAT. ANN. § 27.711(10) (Lexis through 2002); MONT. CONST. art. VII, § 2(4); N.C. GEN. STAT. 15A-1419(c) (Lexis through 2002); OHIO REV. CODE 2953.21(H)(2); VA. CODE ANN. § 19.2-163.8(D) (Lexis through 2002).
by defining the duty of counsel to include conducting an expeditious investigation.\textsuperscript{229} In the context of Article 11.071, the logic of these other courts’ reasoning is all the more compelling; Article 11.071 requires that habeas counsel provide effective assistance.\textsuperscript{230} The CCA’s construction of “competent” in Article 11.071’s guarantee of “competent” counsel, however, effectively reads it out of the statute.

VI. Conclusion: A Systemic Problem

These cases are merely examples of a systemic problem. By appointing incompetent lawyers to represent death row inmates during their state habeas appeals, Texas denies death row inmates meaningful access to the courts. As a consequence, death row inmates, including those innocent of the crime or undeserving of death, whose trials have been rife with egregious constitutional violations never have any court—state or federal—address the merits of their claims. In each case mentioned in this chapter, the CCA had actual knowledge of the ineptitude of the lawyers it authorized to represent the death row inmates in state habeas proceedings. Moreover, far from being aberrational, our study of habeas petitions filed under Article 11.071 indicates that the lawyers in these cases are all too typical of the lawyers authorized for appointment by the CCA.

The CCA has commented several times that if the operation of Article 11.071 is “barbarous” in that it operates to deny the review of death sentences it purports to grant, “the legislature should repeal it or the governor should commute or pardon those who are subjected to it.”\textsuperscript{231} The CCA forgets, however, that it, too, has abdicated its role in the appellate process to ensure that death sentences are appropriate. Through its selective interpretation of Article 11.071, the CCA has rendered the statute’s guarantee of “competent” counsel meaningless.

\textsuperscript{229} TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(a) (West 2002).

\textsuperscript{230} See Ex parte Graves, 70 S.W.3d at 127 n.3 (Johnson, J., dissenting) (criticizing majority’s attempt to differentiate between “competent” counsel and “effective assistance of counsel”); id. at 129-130 (Holcomb, J., dissenting) (same).

\textsuperscript{231} Ex parte Smith, 977 S.W.2d at 611. See also Ex parte Ramos, 977 S.W.2d 616, 618 (Tex. Crim. App. 1998) (Keller, J., dissenting) (arguing that court should not consider habeas petition filed out of time even though counsel had been misled by trial court as to the due date).
I. The CCA’s List of “Qualified” Attorneys

The Article 11.071 promise of competent counsel rings hollow if appointed counsel does not actually provide competent assistance. A guarantee of counsel “cannot be satisfied by mere formal appointment”; that the person appointed happens to be an attorney means nothing if counsel fails to act as an advocate and to ensure that the proceedings are fair.

Under the CCA’s analysis in *Graves*, as long as a lawyer is on the list of counsel approved for appointment in Article 11.071 cases, anything that lawyer does in the case is the work of competent counsel. While the CCA acknowledges that a “‘potted plant’ as counsel is no better than no counsel at all,” the CCA appears to approve of appointed counsel who does little or no meaningful work on behalf of his client.

A. The CCA’s Failure to Police the List

The CCA’s analysis of Article 11.071 is premised on the assumption that lawyers on the list of approved counsel are *actually qualified* to represent death row inmates in habeas corpus proceedings. The CCA has abdicated its

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232 *Cf. Evitts v. Lucey*, 469 U.S. 387, 397 (1985) (“the promise . . . that a criminal defendant has a right to counsel on appeal—like the promise of *Gideon* that a criminal defendant has a right to counsel at trial—would be a futile gesture unless it comprehended the right to the effective assistance of counsel.”).


234 *Ex parte Graves*, 70 S.W.3d at 114.
responsibility to promulgate standards for appointed counsel,235 make public the qualifications of the attorneys currently on the list,236 and has failed to police the work of the attorneys already on the list. While one CCA judge made the facile accusation that all it takes to make it on the CCA’s list of attorneys approved for appointment in Article 11.071 cases is a “law license and a pulse,”237 the fact remains that the requirement of a pulse is dispensable: A dead person is currently on the list of approved attorneys.238

An attorney who is ineligible to practice law in Texas, attorneys who have been reprimanded by the bar, three prosecutors, an employee of the Texas Department of Criminal Justice and attorneys who have repeatedly demonstrated their inability to conduct habeas corpus proceedings also appear on the CCA’s list of approved habeas counsel. The CCA has been on notice for months that these attorneys were included on the list.239 By failing to regulate the list by removing the names of these attorneys, the CCA has demonstrated its indifference to providing competent counsel in compliance with Article 11.071.

The CCA perpetuates this problem by keeping on the list of approved capital habeas attorneys who have consistently filed exceedingly brief petitions that do not raise extra-record claims. For example, attorneys that have filed several very short petitions—some less than ten pages and raising no extra-record claims—continue to receive appointments.240

There are currently 142 attorneys on the approved list. Of those, 106 (75%) attorneys filed petitions during the period of our study. Forty-two (39%) of the

235 By contrast, 22 other death penalty states have promulgated standards for appointed post-conviction counsel. See ARIZ. R. CRIM. P. 6.8; ARR. R. CRIM. PROC. 37.5(c); CAL. R. OF CT., DIV. I R. 76.6; COLO. REV. STAT. ANN. § 16-12-205 (Lexis through 2002); Fla. STAT. ANN. § 27.7040(2) (Lexis through 2002); IDAHO CRIM. R. 44.3; IND. R. CRIM. PROC. 24(J); KAN. STAT. ANN. § 22-4506(d)(1) (Lexis through 2002); LA. ST. S. CT. R. 31(A)(1); MD. REGS. CODE, tit. 14, § 06.02.05(B)(1) (Lexis through 2002); MISS. R. APP. PROC. 22(d); MO. SUP. CT. R. 29.16(b); MONT. R. 11, 40 ST. REP. 1960 (1984); NEV. S. CT. R. 250(2); N.Y. JUD. LAW 35-b(2); OHIO S. CT. SUP. R. 20; OR. R. APP. COUNSEL STANDARD 3.1(D) & (J); 42 PA. CONS. STAT. ANN. § 9572(c) (Lexis through 2002); S.C. CODE ANN. § 19.2-163.8 (Lexis through 2002).

236 Lawyers interested in appointments in habeas cases file an application with the CCA. The CCA, then, exercises complete discretion in approving a lawyer’s application to receive capital habeas appointments. Individual trial courts, deferring to the CCA’s authority to control the list, may only assign lawyers from that list to state habeas proceedings.

237 See, e.g., Ex parte Graves, 70 S.W.3d at 118 (Price, J., dissenting).

238 See, List of Approved 11.071 Attorneys, supra note 43 (viewed October 1, 2002).

239 See Martinez v. Texas Court of Criminal Appeals, 292 F.3d 417 (5th Cir. 2002) (dismissing civil rights action against CCA brought by death row prisoners whose appeals were forfeited through the actions of state habeas counsel that CCA appointed, knowing them to be incompetent, because action was construed to be an improper successive habeas petition).

attorneys who have filed habeas applications failed to raise any extra-record claims. Counting those petitions that purport to raise extra-record claims but do not include the extra-record documentation and exhibits crucial to review of those claims, there are 60 (57%) attorneys on the list who have filed such petitions. Even counting only the most deficient petitions—habeas applications that by their brevity and their failure to raise an extra-record claim demonstrate inadequacy on their face—19 (18%) of the attorneys on the list have a history of such substandard performance as appointed Article 11.071 counsel.

There are also attorneys on the approved list who, in violation of Article 11.071, have abandoned their clients after the conclusion of 11.071 proceedings. This abandonment resulted in the failure of anyone to seek appointment of counsel to represent the death row inmates in federal habeas proceedings prior to the expiration of the statute of limitations for filing a federal habeas petition. Not all of these failures to file motions for appointment of counsel in federal court were due to neglect; some such attorneys “unilaterally decided”—without consulting the clients—not to seek federal habeas relief on the client’s behalf. The basis for these decisions was the desire not to litigate the case personally, although counsel could readily have moved for the appointment of alternative counsel. In one case, the attorney believed that the client’s cause “would not be served by rushing into federal court.” Nevertheless, the CCA has kept many of these attorneys on its list, as well as lawyers who failed to file a timely notice of appeal from the federal district court’s denial of the federal habeas petition, which resulted in a waiver of further appeals to the Fifth Circuit and the U.S. Supreme Court.

The CCA has also failed to safeguard inmates’ opportunities for federal habeas review by ensuring that Article 11.071 counsel move for appointment of counsel in federal court as required. In one notable case, the state habeas lawyer filed the motion for appointment of federal habeas counsel in the CCA.

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244 See id.

245 See, e.g., In re Davis, No. 02-20479 (5th Cir. May 6, 2002); Order Granting Motion to Dismiss Appeal for Lack of Jurisdiction, Dunn v. Cockrell, No. 01-40980 (5th Cir. Nov. 20, 2001); Wilmens v. Johnson, 238 F.3d 328 (5th Cir. 2001), Plata v. Cockrell, No. 01-CV-2587 (S.D. Tex. May 3, 2002), Docket Entry #20.

246 See Tex. Code Crim. Proc. Ann. art. 11.071, § 2(e) (providing that, if appointed state habeas counsel fails to file with CCA a copy of the motion for appointment of counsel in federal court, the CCA may “take any action to ensure that the applicant’s right to federal habeas review is protected, including initiating contempt proceedings against the attorney.”).
instead of in federal district court. Rather than acting immediately to dispel the habeas lawyer’s obvious confusion, the CCA did not rule on the motion for over five months. During that time the federal statute of limitations ran out. Belatedly, the CCA denied the motion and directed the lawyer to file it in the proper court. In that case, the CCA-appointed lawyer had filed a 17-page habeas application raising only stale record-based claims. The CCA kept this lawyer on the appointment list, evidently deeming him competent to represent other death-sentenced inmates in their Article 11.071 proceedings.

Another attorney on the list recently sent a letter to every inmate on death row advertising his legal services: “Even if you have previously filed a section 11.07 state petition or a section 2255 federal petition, you may still have other options available which need to be explored.” The letter does not inspire much confidence, as it incorrectly cites both statutes: A section 11.07 state petition applies only to non-capital post-conviction proceedings, and a section 2255 federal petition applies only to federal prisoners.

Our study revealed a correlation between State Bar discipline and performance. Because of their critical responsibilities in the state habeas process, attorneys appointed in death penalty cases should behave ethically and work diligently on behalf of their clients. Violations of disciplinary rules can often indicate irresponsible behavior by the attorney. One reason Illinois Governor George Ryan declared a moratorium on executions in his state was the frequency with which death row inmates were represented by attorneys with disciplinary problems.

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

247 See Dickens, No. 2:00-CV-0110, at *4-6 & n.4. State habeas counsel committed the same error in Ex parte Matamoros, Writ No. 50,791-01 (Tex. Crim. App. Dec. 5, 2001) (unpublished order), though a pro se motion for appointment was eventually filed before the federal statute of limitations ran out. See Motion for Appointment of Counsel, Matamoros v. Cockrell, No. 4:02-CV-2503 (S.D. Tex. Mar. 11, 2002), Docket Entry #2.

248 See Dickens, No. 2:00-CV-0110, at *5.

249 See id.


251 Letter from Michael D. Samonek to Texas Death Row Inmates (June 12, 2002) (on file with author).

252 Compare TEX. CODE CRIM. PROC. ANN. art. 11.07 (West 2002) (governing noncapital state post-conviction proceedings); with TEX. CODE CRIM. PROC. ANN. art. 11.071 (West 2002) (governing capital state post-conviction proceedings).


A disciplined lawyer represented Charles Turtle in his state habeas proceedings. The lawyer filed a 35-page petition that lacked any extra-record materials to support his claim. The same lawyer was appointed to represent Douglas Roberts. In that case, he filed a 19-page petition containing only record-based, inappropriate claims. Neither inmate was afforded any relief. This lawyer was appointed despite twice being publicly reprimanded by the State Bar of Texas, including a reprimand for neglecting a legal matter. Both reprimands occurred before petitions were filed in these cases. A second disciplined lawyer represented Ramiro Ibarra and Carlos Granados. Their petitions, previously discussed in Chapter Two, consisted of four- and two-page petitions, respectively.

Another disciplined attorney, while creating the appearance of competent representation by filing lengthy petitions, failed to raise or support extra-record claims in two state habeas cases. In the case of Bobby Woods, the attorney filed a 154-page petition that contained no cognizable habeas claims. The CCA denied the petition. Similarly, in the case of Bruce Williams, a 164-page petition was essentially worthless as it contained no evidence or materials supporting its claims. In Ex parte McGinn, this same attorney did almost no original work in the state habeas proceedings. Instead, he nearly copied verbatim the claims from the direct appeal brief—claims that the CCA had already rejected on direct appeal. This attorney, who remains on the CCA’s list, was reprimanded by a federal court for poor conduct and incompetence in a separate capital habeas case. The federal court ultimately removed the attorney from that case for making false statements about his history of discipline by the state bar, his “inability to conduct litigation properly,” making “false statements to various courts” and “repeatedly engag[ing] in a practice of unprofessional and unethical behavior.” The attorney was also suspended from practicing law in the federal courts in the Northern District of Texas. The Texas state courts, however, continue to consider this same attorney “competent” to represent death-sentenced prisoners in habeas corpus proceedings.

263 See, List of Approved 11.071 Attorneys, supra note 43 (viewed October 1, 2002).
B. The CCA Is Giving Its Blessing to Bad Lawyers

In all of the cases mentioned in this chapter, and in many others, the CCA has ignored evidence, sometimes from the lawyers’ mouths, that the lawyer had failed to perform at a minimally competent level. The CCA maintains a list of “qualified” counsel, but fails to promulgate standards for appointed counsel or exercise any oversight. Thus, local trial judges continue to appoint the same lawyers—many of whom are known to be inexperienced, untrained or infamous for their poor work in past cases—who then file perfunctory habeas petitions. In a dissenting opinion, one CCA Judge criticized the majority’s failure to provide a remedy for poor lawyer performance:

“If a lawyer’s actions deny an indigent death row applicant meaningful review of his claims, then I question whether the inmate standing in line to be executed has received effective assistance of counsel. Common-sense tells me that if you do not have effective assistance of counsel . . . I consider that worse than having no lawyer at all because having an ineffective lawyer gives a sense of legitimacy to the proceeding, yet the degree of assistance may be equivalent to not having a lawyer at all.”

The American Bar Association, through its guidelines, advises the appointing authority to “monitor the performance of assigned counsel to ensure that the client is receiving quality representation. Where there is compelling evidence that an attorney has inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client’s case, the attorney should not receive additional appointments.” It is not an exaggeration to say that by ignoring this guideline and condoning poor performance, the CCA is punishing the inmates, including those who may be innocent, and depriving them of the chance to have their cases thoroughly reviewed. The result is that the habeas proceeding becomes a meaningless ritual, a brief hiatus in the inexorable march to the execution chamber. The CCA effectively gives its blessing to both this charade, and the grossly substandard representation that propels it along.

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266 Guideline 7.1, A.B.A. Guidelines for the Appointment and Performance of Counsel, supra note 43 (Monitoring; Removal).
II. You Get What You Pay For: Inadequate Compensation Draws Incompetent Lawyers

At the root of the abundance of incompetent, unqualified attorneys on the list for capital habeas appointments is the CCA’s unwillingness to properly fund these proceedings. In 1995, the CCA, with the enactment of Article 11.071, estimated the cost of providing representation to Texas’s sizable death row at $4 million.\(^\text{267}\) The Legislature appropriated less than half that amount.\(^\text{268}\) Initially, the CCA announced its intention to cap the amount post-conviction counsel could be paid at $7,500.\(^\text{269}\) Experienced defense counsel and judges worried that such a low figure would guarantee that many of Texas’s most qualified attorneys would refuse to accept Article 11.071 appointments. One commented: “I’m afraid we’re going to find lawyers who’ll do it for $7,500 but aren’t competent to do it . . . . If you have a law license and can cast a shadow on a sunny day, you get on the list.”\(^\text{270}\) Indeed, records from the Court show that some attorneys who had been licensed less than two years received state habeas appointments.\(^\text{271}\)

In an effort to attract better attorneys and respond to the requests of hundreds of inmates asking for attorneys, the CCA removed the $7,500 cap, but set no minimum qualifications. The result, according to then-CCA Judge Charles Baird, was that the CCA “appointed some absolutely terrible lawyers. I mean lawyers that nobody should have, much less somebody on death row on his last appeal.”\(^\text{272}\) Additional funds were approved in an attempt to rectify the situation, and the CCA raised the compensation cap per case, including investigative and expert assistance as well as costs, to $15,000,\(^\text{273}\) and then $25,000.\(^\text{274}\) Even this higher amount may not suffice given the complexity of most cases. Once a case’s allocated funds have been exhausted, appointed counsel is forced to make the awful choice between working for free—
paying additional investigative costs out of pocket and endangering their law practices—and cutting corners in the cases to which they have been appointed.\footnote{275}

Eventually, the Texas Legislature did allocate more money to compensate appointed counsel and to pay for investigative expenses. Paradoxically, the CCA has not, for the most part, lifted its $25,000 funding cap. Nor has the CCA reimbursed any of the attorneys who saw their bills slashed to comply with past fee caps.\footnote{276} Instead, the money not paid out on “approved” vouchers has been funneled back into the state’s general budget.\footnote{277} More disturbingly, however, most appointed attorneys do not use all of the money available to them.\footnote{278}

Between 1995 and 1999, the CCA handled the billing and payment of attorney fees resulting from habeas representation. In 1999, the individual trial courts became responsible for attorney payment. Records of these post-1999 cases are available to the public through the State Comptroller’s Office. According to the State Comptroller’s Office, as of June, 2002, only four of the thirty-nine attorneys who have submitted bills for their work on capital post-conviction cases requested the full $25,000 available to them under the CCA’s fee cap.\footnote{279} The cost of a thorough investigation and appeal is at least twice the fee cap.\footnote{280} The state habeas work that exonerated Ricardo Aldalpe Guerra, who had been wrongfully convicted of killing a police officer, cost “in the hundreds of thousands of dollars” at early 1990s rates.\footnote{281}

Given the results of our study revealing the poor quality of significant numbers of state habeas petitions, it should come as no surprise that many appointed attorneys bill well below the maximum amount. Low fee requests often reflect very little time spent on the case. This rate of under- (or non-) performance by appointed counsel is a stunning indictment of Texas’s capital post-conviction system: Past and current draconian fee caps have driven away qualified lawyers and encouraged the proliferation of perfunctory, worthless habeas petitions.

The CCA refused to release the records of attorney fees in specific cases between 1995 and 1999 for our study.\footnote{282} The CCA has refused similar requests by the media for disclosure of this information.\footnote{283} Attorney timesheets would

\footnotetext{276}{Susswein, supra note 275, at A1.}
\footnotetext{278}{Id.}
\footnotetext{279}{Id.}
\footnotetext{280}{Susswein, supra note 277, at A1.}
\footnotetext{281}{Id.}
\footnotetext{282}{Claiming to be exempt from the Public Information Act, the CCA rejected a request from the authors for attorney bills and invoices in cases where petitions were filed between 1995 and 1999. (Letter on file with author).}
\footnotetext{283}{Correspondence on file with author.}
likely confirm that unqualified lawyers are not conducting the basic tasks necessary to preserve their clients’ rights. About $3.4 million of the $4 million earmarked for helping death row inmates present their petitions has already been returned to the state coffers because it was unspent by attorneys.

In 1996, a federal study of habeas proceedings estimated the average cost of an appropriately investigated petition at $42,800. A study commissioned by the State Bar of Texas Committee on Representation for Those on Death Row analyzed time commitments in Texas post-conviction cases in the 1980s. This committee found that the average lawyer spent approximately 350 hours representing a death-sentenced inmate in state post-conviction proceedings. The Administrative Office of the U.S. Courts concluded “available data concerning federal habeas corpus representation point overwhelmingly to time commitments in the several hundreds to several thousands of hours.”

The lack of a procedure for appointing and compensating attorneys who file a second habeas petition reveals an additional breakdown in Texas’s capital post-conviction system. These “successive” petitions are often the only vehicle for bringing to the CCA’s attention new evidence of constitutional violations that could not have been discovered at the time the original habeas petition was filed or new developments in the law occurring since the initial filing. No provision exists in Article 11.071 for the courts to pay attorneys for their services in preparing a successive petition or authorize funds for investigators and experts to assist the attorney in developing the facts of a successive claim. Consequently, attorneys wishing to file a successive petition must hire investigators and experts out of their own pockets and perform the work pro bono. The Supreme Court’s 2002 decision banning the execution of the mentally retarded vividly illustrates the problems that this unfunded system creates. Death row inmates who may be mentally retarded, but who already filed their original state habeas petitions, now find themselves without appointed, compensated counsel who can investigate and present a claim that they are ineligible for execution. The CCA will authorize the appointment and payment of counsel, investigators and experts only if the death row inmate can first make a showing that he or she is mentally retarded. In effect, the Court is requiring a potentially mentally retarded inmate who is without the assistance of counsel to present evidence that can only be developed with the assistance of counsel.

In Ex parte Black, Sr., Writ No. 48,139 (Tex. Crim. App. June 2, 2000), the lawyer appointed to represent Black filed a 21-page habeas petition, submitting no extra-record materials in support of his claims. He expended a mere 140 hours of work on the case and billed the court just over fourteen thousand dollars. In Ex parte Garza, Writ No. 73,850 (filed Mar. 2002), the attorney’s bills reflect that he spent only 2.8 hours with his client.

Susswein, supra note 275, at A1.

Spangenberg Group, supra note 36, at 90 & Addendum at 7.


III. Rubberstamping: Adopting the Prosecutor’s Findings of Fact

Because habeas corpus claims, by their very nature, rely on facts outside the trial record, it is usually necessary for the trial court to hear some evidence and make findings about the facts. Sometimes these hearings include in-court testimony from witnesses. More often, though, trial courts in Texas resolve disputes about the facts solely on the written materials filed, thus underscoring the importance of the petition and supporting exhibits to the success of the inmate’s claims. These materials, reports from experts and affidavits of witnesses—although a poor substitute for live testimony, where judges can evaluate credibility face to face—are critical in determining the truth. Both parties in a habeas proceeding file “proposed findings of fact and conclusions of law” in which they set forth their respective views of the disputed evidence. After the submission of these proposals, principles of fairness and reliability would dictate that the judges review the evidence and synthesize the facts according to their interpretations of the evidence.

Few Texas courts, however, prepare their own findings of fact and conclusions of law. Instead, most courts presiding over habeas proceedings rubberstamp the prosecutor’s version of the case. Given the adversarial nature of the post-conviction process, the parties usually have vastly different views of the evidence in question. It strains credibility that the prosecutor—hardly an impartial participant in the proceedings—will be completely accurate in representing all disputed facts in the case. Prudence intimates that the truth lies at some point of compromise between the two views. The wholesale adoption of the State’s version of the facts that takes place in most state habeas proceedings demonstrates that Texas courts rarely engage in meaningful independent review.

Our study revealed that, in the 211 cases in which the prosecution’s proposed findings of fact were available for review, the trial court entered findings of fact and conclusions of law which were identical or virtually identical to the prosecutor’s in 189 (90%) of the cases.

After the trial court makes its findings and recommendations, the case proceeds to the CCA for review. Not bound by the findings of the trial court, the CCA has the ultimate power to make its own determinations of the facts in question. Of the cases in which CCA orders were available for review, changes

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289 Article 11.071 of the Texas Code of Criminal Procedure uses the term “convicting” court.
290 Hearings were only granted in 55 of the 251 petitions reviewed (22%). See Appendix One.
291 The study reviewed 251 cases. However, due to a number of reasons, including poor record keeping, the file at the Court of Criminal Appeals did not contain a copy of the prosecution’s proposed findings of fact and conclusions of law.
292 The trial court may have made grammatical or stylistic changes to the findings of fact without changing the substance of the findings.
293 See TEX. CODE CRIM. PROC. art 11.071, §§ 8-9 (West 2002).
were made to the trial court’s findings of fact and conclusions of law in only nine (4%) cases. Of the cases in which the state and trial court findings of fact were available and the CCA order was available (204 cases), the CCA adopted the trial court’s findings that were exactly or virtually identical to the prosecutor’s in 180 of them.

This means that in a staggering 88% of the cases we reviewed, the ultimate findings of fact were authored not by a fair and impartial judicial officer elected to make these important decisions, but by prosecutors in state habeas proceedings.

The CCA demonstrates further indifference to the state habeas process by generating boilerplate, two-page opinions in most cases. The pattern of most CCA opinions consists of two parts: adoption of the trial court’s findings, and denial of relief without any recitation of the facts or analysis of the claims presented. This practice instills little confidence that the CCA is as concerned with truthful, serious fact-finding as it is with speed and finality of conviction.

IV. Secret Decisions: Unpublished Direct Appeal Opinions

The CCA has obscured its role in the breakdown of the appellate review of capital cases in Texas. Though two out of three capital cases nationwide are overturned for error, the reversal rate in Texas approaches zero. Prior to 1995, Texas had a reversal rate of 31% in direct appeals of capital sentences. Between 1995 and 2000, however, the CCA has reversed only eight of the 270 death sentences it reviewed on direct appeal—the lowest reversal rate of any state. By contrast, Illinois and Florida had reversal rates of 30 and 50 percent, respectively. The CCA conceals the sheer number of times it affirms conviction and sentences by not publishing most of its opinions.

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294 James S. Liebman, et al., Capital Attribution: Error Rates in Capital Cases, 78 TEX. L. REV. 1839, 1850 & n.37 (2002) (“Nationally, over the entire 1973-1995 period, the overall error-rate in our capital punishment system was 68%). However, these numbers should be taken with some caveats, as they include reversals prompted by (1) broad shifts in capital procedural rules announced by the Supreme Court in the 1970s and 80s, and (2) the higher quality of representation during the time period of the study—while the federally funded death penalty resource centers were still in operation—was higher than what generally prevails today.


296 See Sara Rimer & Raymond Bonner, Bush Candidacy Puts Focus on Executions, N.Y. TIMES, May 14, 2000, at A1 (evaluating Texas’s reversal rate when compared with that of other death penalty states).

297 Id.
Since 1941, Texas judicial rules have authorized the issuance of unpublished appellate opinions. These rules also prohibit unpublished opinions from being cited as precedent. Today, Texas Rules of Appellate Procedure provide a list of standards to be used by the judges in each case when deciding whether to publish an opinion. Relying on these rules, the CCA published opinions in only 71 out of 265 direct appeals in capital murder cases from 1995 through 2001. Thus, the state’s highest criminal court elected not to publish an opinion in roughly 73% of capital murder appeals during this period.

Rules similar to the ones adopted by Texas exist in many state and federal courts around the country, and the number of unpublished opinions nationwide has been on the rise. In the federal courts of appeals, for example, judges now designate almost 80% of their opinions as “Do Not Publish.” This trend has led to widespread criticism of the practice. One commentator has listed a total of eight distinct problems with unpublished opinions. Two of the more worrisome criticisms for homicide defendants include less careful decision-making and less judicial accountability. The analytical process of writing a published opinion with precedential authority “often will show weaknesses or inconsistencies in the intended decision that may compel a change in the rationale or even in the ultimate result.”

Given the importance of capital cases, the high percentage of unpublished opinions in these appeals in Texas seems difficult to justify. Even if judges correctly decide all of the cases in which they do not publish an opinion, the lack of a written opinion can still be problematic. As one


TEX. R. APP. P. 47.4 (Vernon 2001) (“An opinion should be published only if it does any of the following: (a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (b) involves a legal issue of continuing public interest; (c) criticizes existing law; or (d) resolves an apparent conflict of authority.”).

List of CCA published opinions (on file with author).

Adams, 53 BAYLOR L. REV. at 663.

*Id.* at 682.


Those problems include (1) loss of precedential value; (2) careless or sloppy decisions; (3) lack of uniformity; (4) increased difficulty of higher court review; (5) unfairness to litigants; (6) reduced judicial accountability; (7) less predictability; (8) constitutional concerns regarding the legality of unpublished opinions under separation of powers. Chip Babcock, *Texas Supreme Court Considers Abolishing Unpublished Opinions*, 39-OCT HOUS. LAW. 22-23. See also Williams v. Dallas Area Rapid Transit, 236 F.3d 260 (5th Cir. 2001) (Smith, J., joined by Jones and DeMoss, JJ., dissenting to denial of rehearing en banc) (criticizing on constitutional grounds the practice of denying precedential status to unpublished opinions).


commentator has said: “Justice must not only be done, it must appear to be done.”\textsuperscript{307} The lack of a formal, published opinion detailing the rationale for a decision raises questions of judicial accountability. Unpublished opinions may appear to be a judicial tool for avoiding public scrutiny in difficult or unpopular cases.\textsuperscript{308} Furthermore, large numbers of unpublished opinions make it more difficult for the public to monitor judicial activity in the aggregate.

These criticisms have prompted the Texas Supreme Court Advisory Committee to revise Texas Rule of Appellate Procedure 47.\textsuperscript{309} The change, which applies only in civil cases, allows all opinions, including the shorter “memorandum opinions,” to be cited as precedent and prohibits unpublished opinions.\textsuperscript{310} The CCA’s deliberate decision not to follow the Texas Supreme Court’s lead suggests that the CCA wants to continue using unpublished opinions to process cases without calling attention to them or having to be bound by the precedents thereby created.\textsuperscript{311} At least one federal court has concluded that this practice is unconstitutional.\textsuperscript{312} The revision would help to alleviate concerns with both the judicial decision-making process and judicial accountability. And while adopting the revision would likely put an added burden on the CCA, “[a]n expansive code of law is one of the inconveniences necessarily connected with the advantages of a free government.”\textsuperscript{313}

\begin{itemize}
    \item \textsuperscript{307} Mandell, 34 LOY. L.A. L. REV. at 1268.
    \item \textsuperscript{308} Melissa H. Weresh, \textit{The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?}, 3 J. APP. PRAC. & PROCESS 175, 181.
    \item \textsuperscript{310} Robbins, \textit{supra} note 308, at 1.
    \item \textsuperscript{311} \textit{Id}.
    \item \textsuperscript{313} Adams, 53 BAYLOR L. REV. at 685.
\end{itemize}
Conclusion: A Breakdown in the System

“Perhaps the bleakest fact of all is that the death penalty is imposed not only in a freakish and discriminatory manner, but also in some cases upon defendants who are actually innocent.”

— Justice William J. Brennan, Jr., 1994

The findings of our study on the quality of representation afforded to death row inmates in state habeas corpus proceedings reveal that attorneys who are simply not qualified for the job receive multiple appointments, and commit terrible blunders. Their work product is perfunctory, demonstrating that all too often, no investigation into the case is performed. No oversight is exercised to prevent the same errors from being repeated; indeed, the current appointment and compensation scheme encourages them. The result is that, in many cases, the defendant’s right to review is functionally terminated when the petition is filed.

During the period in which it was directly responsible for appointing lawyers to represent death row inmates in post-conviction proceedings, the CCA repeatedly appointed lawyers who were incapable of preparing petitions and filing them on time. It then punished the inmates for the incompetence of their lawyers by denying them relief over dissents that characterized the CCA’s review as a “farce,” a “travesty,” a “charade,” and “bordering on barbarism.” Though the Texas Legislature has tinkered slightly with the appointment process since then, the dissenters’ epithets still apply. The CCA, still given control of the list and charged with the solemn responsibility of ensuring that the condemned receive a full and fair review, has instead turned a blind eye to cases where death row inmates received far less than the promised “competent counsel.”

315 Ex parte Kerr, 977 S.W.2d at 585 (Overstreet, J., dissenting).
316 Ex parte Smith, 977 S.W.2d at 614 (Overstreet, J., dissenting).
Post-conviction review is crucial: It is the only method of ensuring that capital trials are fair and that death sentences are appropriate. It is a proceeding intended to prevent wrongful executions, to find any new evidence proving innocence, and to root out cases of prosecutorial misconduct, shoddy police work, mistaken eye-witnesses, false confessions and sleeping trial lawyers. But when post-conviction review is short-circuited and shrouded in secrecy, death sentences are unreliable. Mistakes are simply not caught or corrected. Furthermore, because there is no punishment for prosecutorial overreaching or appallingly poor performance by defense lawyers, the problems will only worsen. Supreme Court Justice Ruth Bader Ginsburg, criticizing the quality of representation provided to indigent capital defendants, has voiced support for a moratorium on the death penalty. Her colleague, Justice Sandra Day O’Connor, agreed with Justice Ginsburg’s concerns: “Serious questions are being raised about whether the death penalty is being fairly applied in this country . . . . If statistics are any indication, the system may well be allowing some innocent defendants to be executed.”

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

LETHAL INDIFFERENCE
RECOMMENDED REFORMS
Recommended Reforms

“No government is perfect. One of the chief virtues of a democracy, however, is that its defects are always visible and under democratic processes can be pointed out and corrected.”

— Harry S. Truman

§ Follow the American Bar Association’s recommendations and the leads of states such as Illinois and Maryland calling for a moratorium on the death penalty while a comprehensive study of its fairness, adequacy of procedures and protections is conducted.

§ Create a statutory remedy for inmates represented by incompetent attorneys during state habeas proceedings, allowing them to file an additional petition alleging ineffective representation of state habeas counsel and allowing for merit review of the newly presented claims.

§ Establish a state funded commission to review claims and evidence of actual innocence regardless of the procedural posture of the case.

§ Support and encourage the Innocence Protection Act, legislation pending before Congress which would provide additional, improved access to DNA testing and protect innocent defendants by ensuring that lawyers in capital cases are competent.

§ Reform existing DNA legislation to provide death row inmates with access to DNA testing or retesting with newer, more sophisticated techniques of evidence that is potentially relevant to the issue of guilt or innocence, regardless of the procedural posture of the case.

§ Create a peer review panel to recruit and maintain the list of counsel qualified for appointment in capital cases. The panel would consist of members from the defense bar. The panel would review the list on at least an annual basis to ensure that each attorney continues to demonstrate the proficiency and commitment to quality representation.320

§ Establish a statewide public defender system to protect defendants from poor representation at the trial level.

§ Establish a statewide appellate public defender’s office to ensure only qualified, committed attorneys are appointed to direct appeal and state habeas cases.

§ Establish meaningful statewide standards for capital counsel, including mandatory peer review. Prohibit the appointment of unqualified counsel.

§ Abolish the presumptive fee cap of $25,000 paid to attorneys in state habeas cases. Reasonably compensate attorneys for their work and encourage more qualified attorneys to accept habeas appointments. Allow claims of unfairness or innocence to be properly developed.

§ Allow for the appointment and reasonable compensation of attorneys for successor petitions.

§ Establish a statewide commission to examine the system of the elected judiciary and the political effect it has on independent decision making.

§ Require trial courts to author their own findings of fact and conclusions of law in habeas cases rather than allowing the wholesale adoption of either party’s findings.

§ Grant inmates the opportunity for a hearing in habeas proceedings, during which they may present live testimony and extra-record evidence supporting their claims.

§ Define “cognizable” claims in Article 11.071, and require attorneys to investigate and file any claim that exists and is based upon facts outside the trial record.

§ Require the CCA to publish all its opinions in capital cases, both direct appeal and state habeas opinions.

320 Panel similar to that in Washington State, pursuant to Washington Rule of Appellate Procedure 16.25 and Ohio State, pursuant to Oh. Super.R 20.
LETHAL INDIFFERENCE

APPENDICES
Appendix

Review of State Habeas Applications on File with the Texas Court of Criminal Appeals

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>NUMBER</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of initial habeas corpus applications filed with and decided by the Texas Court of Criminal Appeals, 9/1/95–12/31/01</td>
<td>263</td>
<td>N/A</td>
</tr>
<tr>
<td>Number of initial applications reviewed</td>
<td>251</td>
<td>95%</td>
</tr>
<tr>
<td>Number of initial applications unavailable for review</td>
<td>12</td>
<td>5%</td>
</tr>
<tr>
<td>Applications under 30 pages in length / % of total reviewed</td>
<td>76</td>
<td>30%</td>
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<tr>
<td>Applications under 15 pages in length</td>
<td>37</td>
<td>15%</td>
</tr>
<tr>
<td>Applications under 10 pages in length</td>
<td>22</td>
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<td>Number of cases where discovery motions filed</td>
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<td>Number of cases where discovery motions not filed</td>
<td>221</td>
<td>88%</td>
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<tr>
<td>Number of cases where no extra-record claim presented</td>
<td>71</td>
<td>28%</td>
</tr>
<tr>
<td>Number of cases where no extra-record material filed</td>
<td>97</td>
<td>39%</td>
</tr>
<tr>
<td>Number of case files where trial court’s and state’s findings of fact and conclusions of law available for review</td>
<td>211</td>
<td>N/A</td>
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<td>Number of cases where trial court’s findings of fact and conclusions of law identical or virtually identical to those filed by the state / % of 211 cases where available for review</td>
<td>189</td>
<td>90%</td>
</tr>
<tr>
<td>Number of cases where evidentiary hearings held by trial court</td>
<td>55</td>
<td>22%</td>
</tr>
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</table>

The following 12 habeas corpus applications were unavailable for review. The files or initial petitions were either checked out, missing, or destroyed. Ex parte Michael Blair, Writ No. 40,719, Ex parte Gabriel Gonzales, Writ No. 44,073, Ex Parte Jeffrey Doughtie, Writ No. 36,790, Ex parte Kenneth Parr, Writ No. 48,257, Ex Parte Robert Neville, Writ No. 48,694, Ex parte Damon Richardson, Writ No. 48,696, Ex parte Derrick Frazier, Writ No. 49,164, Ex parte Arnold Prieto, Writ No. 49,954, Ex parte Kimberly McCarthy, Writ No. 50,360, Ex parte Kenneth Mosley, Writ No. 50,421, Ex parte Jeffrey Williams, Writ No. 50,662, and Ex parte Lionell Rodriguez, Writ No. 50,773.
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<tr>
<th>Description</th>
<th>Number</th>
<th>Percentage</th>
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</thead>
<tbody>
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<td>In cases where evidentiary hearing held, number where trial court’s findings of facts and conclusions of law identical or virtually identical to those filed by the state (of those where findings of fact available, 38)</td>
<td>31</td>
<td>82%</td>
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<td>In cases where evidentiary hearing held, number where trial court’s findings of facts and conclusions of law different from those filed by the state (of those where findings of fact available, 38)</td>
<td>7</td>
<td>23%</td>
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<td>Number of cases where CCA Order available for review</td>
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<td>In cases where CCA Order present, number of cases where CCA adopted trial court’s findings of fact and conclusions of law</td>
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<td>In cases where CCA Order present, number of cases where CCA made changes to the trial court’s findings of fact and conclusions of law</td>
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<td>Number of cases where state and trial court’s findings identical or virtually identical (189), and CCA order available</td>
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<td>Number of cases where state and trial court’s findings available for review (211) and CCA order available (204), number of cases in which CCA adopts state and trial court’s findings</td>
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Appendix

Death Row Exonerations by State

102 inmates released since 1973 (as of October 2002)

322 Death Penalty Information Center, Innocence and the Death Penalty, supra note 16.
Death Row Exonerations by Year

Since 1973 there have been 102 death row inmates exonerated in the United States. Between 1973 and October 1993, an average of 2.75 innocent defendants were released. Since then, the average has increased to five per year. As of October, there had been four death row exonerations in 2002.

Inmates released since 1973

2.75
2
5
6
4
2
8
8
5

Death Penalty Information Center, Innocence and the Death Penalty, supra note 16.
Wrongly Convicted and Others Released

Wrongly Convicted

Randall Adams, whose case drew national scrutiny with the release of the documentary film *The Thin Blue Line*, was wrongly convicted and sentenced to death for the murder of a Dallas Police officer. Adams was freed after the real killer, David Harris, confessed on tape to the crime. Harris, unlike Adams, had an extensive background of violent criminal activity and his false testimony had largely contributed to Adams’s conviction. Adams’s trial lawyer, a real estate attorney, was not up to the task of refuting the charges against his client. The substantial evidence of Adams’s innocence was discovered much later, during the appellate process. After twelve years in prison, Adams, who continually proclaimed his innocence, was released.\(^{324}\)

Wrongly convicted and sentenced to death for murdering an El Paso couple who had once hired him as a gardener, Federico Martinez-Macias lived for nine years on Texas’s death row. The evidence against Martinez-Macias was wholly lacking; no fingerprints, bloodstains or physical evidence linked him to the crime. The true murderer, Pedro Levanos—found with property taken from the victims’ home and identified by an eyewitness—later confessed to burglarizing the home after being confronted with evidence of his failed polygraph test. A post-conviction investigation revealed that lawyers at trial had been given $500 total to cover expenses for investigators and expert witnesses. After the Texas Court of Criminal Appeals dismissed his 100-page brief in state habeas within a week of its submission, the Fifth Circuit Court of Appeals granted him relief for ineffective assistance of counsel. The Fifth Circuit chastised the state for supplying such meager funds for Martinez-Macias’s defense:

“The state paid defense counsel $11.84 per hour. Unfortunately, the justice system got what it paid for.”

Martinez-Macias’s conviction was overturned, and he was released from prison.

In a bizarre murder case involving three guns and one victim, Ricardo Aldape Guerra was convicted and sentenced to death for the murder of a Houston police officer in 1982. In federal habeas corpus proceedings, after an exhaustive investigation by counsel, the court ruled that the testimony of the state’s witnesses—the only evidence linking Guerra to the crime—was tainted by official misconduct. The federal court ruled that the actions of the police and prosecutors in this case were “outrageous,” “intentional,” “done in bad faith” and “designed and calculated to obtain . . . another ‘notch in their guns.’” Guerra was freed in 1997, after more than twelve years on death row.

Clarence Brandley, a high-school janitor in Montgomery County, was wrongly convicted of the murder and sexual assault of Cheryl Ferguson whose body he found on school premises. When the investigating officers arrived on the scene, they began to question Brandley—an African American—and another of the six janitors—a Caucasian—who were on staff that summer afternoon. The officer conducting the interview said, “One of the two of you is going to hang for this. Since you’re the nigger, you’re elected.” During Brandley’s trial, the state withheld exculpatory evidence and sponsored perjured testimony. An investigation by defense lawyers, the Department of Justice and the FBI, conducted during habeas corpus proceedings, uncovered further misconduct, and in 1989, Brandley’s conviction was overturned.

John Skelton was released in 1990 after being imprisoned since 1982. Despite several witnesses who testified that he was 800 miles from the scene of the murder, Skelton was convicted and sentenced to death for killing a man by exploding dynamite in his pickup truck, the Court of Criminal Appeals reversed the conviction, entered a directed verdict of acquittal and found that the purely circumstantial evidence was insufficient to support a guilty verdict.

Prosecutors dropped charges in 1990 against Vernon McManus and he was released after serving nearly ten years in prison. Muneer Deeb was wrongly convicted and sentenced to death for allegedly hiring three hitmen to kill his ex-girlfriend. Granted a new trial in 1991 because of improper trial proceedings,

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327 See, DAVIES, supra, note 19.
330 See McManus v. State, 591 S.W. 2d 505 (Tex. Crim. App. 1979). See also Horswell, supra note 23, at 3A.
Deeb was acquitted. After maintaining his innocence and serving eight years in prison, he was released.\textsuperscript{331}

**Others Released**

Andrew Mitchell was released from death row after thirteen years. He received a reduced sentence after proving that the state had withheld evidence at his trial.\textsuperscript{332} The case of Kerry Max Cook, riddled with police and prosecutorial misconduct, is another compelling example of the flaws in the system. In 1978, Cook was convicted for the murder of Linda Jo Edwards. Eleven days before he was to be executed in 1988, the U.S. Supreme Court stepped in when Texas courts had denied relief.\textsuperscript{333} Cook's conviction was overturned in 1991.\textsuperscript{334} Eventually, after two hung juries,\textsuperscript{335} Cook pleaded no contest to a reduced murder charge and was released. He continues to maintain his complete innocence, but accepted the state's offer to avoid the possibility of another wrongful conviction. Recent DNA tests of evidence taken from the victim matched the genetic profile of an ex-boyfriend, an original suspect in the case, and not that of Cook.\textsuperscript{336}

The notorious case of Henry Lucas provides another example of the courts' failure to rectify mistakes made by police and prosecutors. Lucas originally confessed to the 1979 murder of a hitchhiker in Texas. Lucas also confessed to hundreds of other murders—including the murder of Jimmy Hoffa and his fourth grade teacher, who is still alive. Two investigations by the Texas Attorney General's Office concluded that he almost certainly did not commit the murder for which he was condemned to die, though no court ever granted Lucas relief. Upon the recommendation of the Board of Pardons and Paroles, the governor commuted his sentence to life.\textsuperscript{337}

\textsuperscript{331} See Deeb v. State, 815 S.W.2d 692 (Tex. Crim. App. 1991). See also Kessler, supra note 21, at 1A.


