A State of Denial:

Texas Justice and the Death Penalty

Texas Defender Service

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Texas Defender Service (TDS) is a private, 501(c)(3) non-profit organization. Since 1995, TDS has provided direct representation to indigent inmates on Texas' death row, consulted with other lawyers litigating such cases, and intervened in unusual cases where expert legal assistance was urgently needed. We strive to improve the quality of representation for Texas death row inmates in three ways:

Direct Representation of Death-Sentenced Prisoners

TDS' staff attorneys handle a limited number of cases and strive to provide thorough representation that will serve as a benchmark of quality. By restricting the number of cases we handle, TDS is able to ensure that staff attorneys can devote sufficient time to thoroughly investigate and brief each case. TDS focuses its attention on cases with broad significance to capital representation in Texas.

Consulting, Training and Case-Tracking

In 1999, TDS received a three-year grant from the Death Penalty Representation Project of the American Bar Association, which permits TDS to (1) develop a system to track Texas capital cases; (2) identify issues and cases appropriate for impact litigation; (3) develop sample pleadings and brief banks to be distributed through a national website; (4) identify and intervene in cases of complete system failure; (5) provide "on the ground" assistance to the ABA's efforts to recruit law firms to take death penalty cases on a *pro bono* basis, and consult with those attorneys; and (6) work with other state and national organizations to train attorneys representing inmates on death row.

Trial Project

TDS' Capital Trial Project, the first of its kind in Texas, seeks to raise the quality of indigent capital trial defense in Texas. Specifically, the project provides targeted support on issues critical to capital trials by developing and compiling training materials and legal pleadings, providing limited individual case consultation, developing a system to identify capital defendants and their attorneys as soon after indictment as possible, collecting case specific information for purposes of tracking capital cases, creating and maintaining a database of forensic experts, and working with community groups and state government to promote policy initiatives and to raise public awareness of the fundamental unfairness of capital trials in Texas.

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A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY

Executive Summary

The nation is embroiled in a debate over the death penalty. Each day brings fresh accounts of racial bias, incompetent counsel, and misconduct committed by police officers or prosecutors in capital cases. The public increasingly questions whether the ultimate penalty can be administered fairly – free from the taint of racism; free from the disgrace of counsel sleeping through a client's trial; free from the risk of executing an innocent person. Support for the death penalty is falling, and across the country, momentum gathers for a moratorium. Even death penalty supporters – such as Illinois Governor George Ryan – have acknowledged the need for fundamental reform.

In Texas, the call for reform has been deflected by state officials' aggressive defense of the Texas system. Repeatedly, Governor Bush and others have defended the administration of the death penalty. Texas Attorney General John Cornyn has gone so far as to describe the death penalty in Texas as "a model for the nation."

This report challenges that confident assessment. To show why Texas justice is not a model for anyone, we have undertaken a preliminary examination of the Texas death penalty system. We have conducted original research into the discriminatory charging practices of Texas prosecutors. We studied hundreds of cases, including every published decision (and many unpublished decisions) of the Texas Court of Criminal Appeals in capital cases in the modern death penalty era. We examined over half of the capital post-conviction appeals filed in Texas since 1995 – a stage of the appeals that has never before been systematically scrutinized – and we evaluated treatment given to those appeals by the state courts.

In this Report, we explain and lay bare many disturbing features of a thoroughly flawed system.

CHAPTER ONE
A Brief Overview

In this Chapter, we set forth a preliminary introduction to the Texas death penalty system: the death row population, the procedure by which people are sentenced to death, and the outlines of the torturous path of post-conviction appeals.

CHAPTER TWO
Official Misconduct: A Deliberate Attack on the Truth

We examined and assembled in this report numerous examples of Texas death penalty trials in which the prosecutors failed to discharge their duty to learn, disclose, and speak the truth. After an extensive review of Texas death penalty cases in the post-Furman era, we

identified 84 cases in which a Texas prosecutor or police officer deliberately presented false or misleading testimony, concealed exculpatory evidence, or used notoriously unreliable evidence from a jailhouse snitch.

- In 41 of these cases, state officials intentionally distorted the truth-seeking process by engaging in practices that resulted in the presentation, or serious risk of presentation, of false or misleading evidence.

- In 43 documented cases prosecutors relied upon the inherently unreliable testimony of jailhouse informants, despite the obvious risk that inmates may fabricate testimony to curry favor with authorities. In many of those cases, such testimony was the primary evidence used to obtain a conviction.

Texas prosecutors freely engage in tactics that other jurisdictions have found violate due process. In multiple-defendant cases, for example, Texas prosecutors have presented irreconcilably inconsistent theories of the same crime: to the first jury, the prosecutor presents evidence and argument that 'A' shot the victim while 'B' stood by; in a later trial to a different jury, the same prosecutor presents evidence and argument that 'B' shot the victim, while 'A' stood by.

In other cases described in our report, police and prosecutors have suppressed evidence showing that someone other than the defendant committed the crime, have lost or destroyed potentially exculpatory evidence, have resisted the forensic examination of evidence that could exonerate the defendant, have manipulated witnesses' testimony to support the prosecution's theory despite contrary evidence, and have used threats against defendants or their family members to coerce confessions.

Several innocent men have been released from Texas's death row. These wrongful convictions usually stemmed from misconduct committed by prosecutors or police officers. In the overwhelming majority of these cases, the misconduct that sent these men to death row only came to light years after the trial had ended. Since official misconduct is by its nature hidden, it is always difficult to expose. Today, new procedures sharply limit a defendant's ability to secure review of his case in state and federal court, making it unlikely that the truth about the wrongful conviction of an innocent person will ever come to light.

CHAPTER THREE
A Danger to Society: Fooling the Jury with Phony Experts

We treat separately another kind of official misconduct: those cases involving junk science, including "predictions" of future dangerousness, hair comparison evidence, and bite mark testimony. Of the sample we examined, we found *160 cases* which contained some form of "scientific" evidence of dubious reliability.

- In 121 cases, an "expert"psychiatrist testified with absolute certainty that the defendant would be a danger in the future. In the majority of those cases, the

predictions were based on hypothetical questions, or only the most perfunctory interview with the defendant. These impossibly certain predictions of future behavior have been universally condemned as junk science. When the American Psychiatric Association expelled from its ranks the leading proponent of this testimony, he attacked the APA as "a bunch of liberals who think queers are normal."

- In 36 cases, the state relied upon hair comparison testimony – a practice which has been repeatedly proved to be inaccurate and misleading – to obtain a conviction. This "science" is fully replaceable by highly reliable mitochondrial DNA technology.

Because many case records and court opinions are unavailable, these numbers are extremely conservative, and likely represent only a fraction of the cases in which the state relied upon junk science to obtain a conviction and sentence of death.

CHAPTER FOUR
Race and the Death Penalty: The Inescapable Conclusion

In this Chapter, we studied the persistent racism in the Texas death penalty, interviewing practitioners across the state regarding the jury selection process, researching the effect of discrimination statewide, and conducting original research into the charging practices of one East Texas county.

Though more comprehensive statewide research must be done, our data reveals a clear pattern of disparity in the punishment meted out to those convicted of killing whites as compared to those convicted of killing non-whites, despite the fact that black males are the most likely murder victims. Our research indicates that the death penalty is used most often to punish those convicted for murdering white women, the least likely victims of murder.

- While a 1998 study indicates that 23% of all Texas murder victims were black men, only 0.4% of those executed since the reinstatement of the death penalty were condemned to die for killing a black man.

- Conversely, as of 1998, white women represented 0.8% of murder victims statewide, but 34.2% of those executed since reinstatement were sentenced to die for killing a white woman.

- Capital juries in the counties we profile are far "whiter" than the communities from which they are selected. The overall picture that emerges of the Texas death penalty is stark: non-whites are for the most part excluded from the process of assessing a punishment that is disproportionately visited upon them. African-American Texans are the least likely to serve on capital juries, but the most likely to be condemned to die.

CHAPTER FIVE
Executing the Mentally Retarded

Despite a growing national consensus that defendants with the mental age of a child should not be subject to the death penalty, Texas continues the practice of allowing the mentally retarded to be sentenced and put to death. Thirteen states and the federal government have banned the execution of the mentally retarded. Just last year, the Texas Senate passed a bill to ban the execution of the mentally retarded, but the bill was scuttled by the Texas House of Representatives.

Although there are many inmates – both those executed and those who are still on death row – who have never undergone even preliminary I.Q. testing, we know that, to date, Texas has executed at least six mentally retarded inmates. In this section, we profile two such men: one who has been executed; one who is still on death row.

- Mario Marquez, whose jury never heard he was retarded, with an I.Q. of 66. When the trial judge and prosecutor learned the extent of Marquez's impairment, they joined his new lawyer in asking that he be spared. Their plea fell on deaf ears and Marquez was executed the day George W. Bush was inaugurated Governor.

- Doil Lane, who may soon be executed by the State of Texas. After Lane gave a confession to a Texas Ranger, he crawled into the officer's lap and began to cry. Throughout his life, Lane's I.Q. has measured consistently between 62 and 70.

CHAPTERS SIX AND SEVEN
The Right to Counsel in Texas: You Get What You Pay For; and
Sham Appeals: The Appearance of Representation in State Habeas Corpus

Recent publicity has focused the nation's attention on Texas defense lawyers who slept through capital trials, ignored obvious exculpatory evidence, suffered discipline for ethical lapses, or used drugs or alcohol while representing an indigent capital defendant at trial. Defenders of the system dismiss these cases as an aberration. Our research indicates otherwise.

- In some cases, counsel's performance was the product of his own greed or ineptitude. Joe Lee Guy was represented at trial by an attorney who ingested cocaine on the way to trial, and consumed alcohol during court breaks. Guy's state habeas attorneys failed to investigate the misconduct – which means those facts may never be considered by either a state or federal court.

- In other cases, blame lies with the State's refusal to both appoint lawyers with sufficient experience and training and to fund an adequate defense. For example, despite knowing about his client's history of mental illness, Paul Colella's lawyer failed to make any inquiry into his client's psychiatric history. The only evidence

Colella's jury heard about his background before sentencing him to death was a brief plea from his mother.

Further, the Texas Court of Criminal Appeals routinely denies any remedy to inmates whose court-appointed lawyers performed poorly. The Court has forced lawyers to remain on capital cases even when the lawyers themselves expressed doubts about their ability to handle such cases, and it has denied relief to two death row inmates whose lawyers slept through trial. The Court's rationale in these two cases – that the inmate failed to show that he was harmed by counsel's sleeping – reflects a profound disregard for the constitutionally-guaranteed right to effective assistance of counsel.

When the truth has been hidden by the State or ignored by defense counsel at trial, post-conviction appeals are the only opportunity an inmate has to set the record straight. Yet the quality of counsel in these appellate proceedings has received almost no attention. To evaluate whether post-conviction counsel in Texas are providing the representation demanded by a capital case, we examined over half the post-conviction appeals filed in Texas since 1995 (187) – a study never before conducted. Our findings are deeply unsettling.

- In 42% of the appeals, post-conviction counsel appeared to have conducted no new investigation, and raised no extra-record claims – even though this is the only type of claim that can be considered for review in such a proceeding.

- In many cases, appointed attorneys merely repeated, sometimes word-for-word, claims which had already been rejected by the courts in a previous appeal- practically guaranteeing that there would be nothing for the courts to review in state *or* federal court.

- In approximately one-third of the cases reviewed, the post-conviction application was under 30 pages long. In 17%, the application was under fifteen pages long. Such short applications can barely contain the requisite procedural formalities, let alone the legal arguments and factual assertions that are necessary to present a constitutional claim of error.

- In a number of cases where patently inadequate state habeas applications were filed, subsequent investigation has revealed significant constitutional errors – including an alcoholic trial attorney and a possible claim of innocence – that were not reflected in the habeas application, and would have remained undiscovered if they had continued on the normal track of Texas habeas appeals.

Further, the Court of Criminal Appeals has displayed disgraceful indifference to these problems. The Court has taken no action to protect the rights of defendants – who were promised "competent" counsel by the Texas Legislature – even when the post-conviction lawyers it appoints have displayed obvious signs of inexperience and incompetence. Not only is there no standard of review for these appointed attorneys, there also is no oversight of their work.

CHAPTER EIGHT
The Myth of Meaningful Review

Officials in Texas insist that redundant levels of appellate review will prevent wrongful convictions, and that deficiencies at trial will be corrected in post-conviction appeals. This rhetoric of "super due process" is meant to reassure the public that, despite the astounding number of executions in Texas, each case has received close scrutiny in the state and federal courts. In many cases, however, the notion of careful and meaningful review is a myth. For example, our study found that:

- In the great majority (79% of the 103 cases studied) of post-conviction cases, the judge never held an actual hearing on the inmate's claims of constitutional error, but instead relied merely on whatever documents were submitted.

- In 83.7% of the cases reviewed, the trial court's factual findings were identical or virtually identical to those filed by the prosecutor. In 93% of these cases, the Court of Criminal Appeals summarily adopted the trial court's "opinion." In all but the most unusual cases, the opinion then binds the federal court.

Few cases illustrate the myth better than Gary Graham's. After Graham's initial post-conviction proceedings proved unsuccessful, his new post-conviction attorneys found compelling evidence to support Graham's longstanding claim of innocence. Graham spent the next seven years trying to secure an evidentiary hearing – in state and federal courts – at which the strength of his newly developed evidence of innocence could be measured against the prosecution's single eyewitness. He never got it. The state courts adopted "findings" penned by the prosecutor assessing Graham's innocence claims as if there had been a hearing where witnesses testified – but there was no such hearing. The prosecutor's version of the facts controlled the litigation in subsequent proceedings, and no federal court ever reviewed the merits of Graham's claims.

CHAPTER NINE
A Bitter Harvest

In our final chapter, we profile the cases of six men executed despite substantial and compelling doubt about their guilt. Some of these cases received widespread national attention, like the case of Gary Graham. Others were executed in obscurity. These six men, however, have at least two things in common. In each case, the truth came to light long after the trial – long after it had been suppressed by the State of Texas, ignored by defense counsel at trial, or dismissed by the courts. And in each case, the truth came too late.

CONCLUSION

Five years ago, the State of Texas implemented several changes in the system of review of death penalty convictions. These changes, however, have done very little to repair a system that needs fundamental reform. Indeed, some of the changes have backfired. The reforms to state post-conviction appeals were intended to speed up the process, while ensuring fairness by granting defendants a right to competent legal assistance. However, many of the lawyers appointed under the law do not know how to provide effective representation in state habeas proceedings and end up grossly mishandling this critical stage of the case. Thus, the 1995 reforms created merely an appearance of review, and thwarted meaningful access to the state and federal courts. Neither this reform, nor any other, has slowed the Texas death penalty system's powerful but flawed rush to execution.

In this report, we have assembled an unprecedented volume of objective evidence that raises profound questions about the fairness of how and when the death penalty is applied. We articulate the scope and breadth of the underlying problems, and offer preliminary recommendations for change. We confirm the critical need for a thorough investigation of every capital case, and we show that all too often, such an investigation either does not take place, or takes place too late for the courts to consider it. In short, we lay bare a system in desperate need of reform. We urge all who are committed to justice to read our report thoughtfully. It compels the conclusion, reached by increasing numbers of Americans, that our current method of enforcing the death penalty does violence to the ideal of basic fairness that is supposed to be the foundation of our criminal justice system.

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PREFACE

Texas leads the nation in executions, and has the second largest death row in the country. While anecdotes about Texas's administration of the death penalty are legion, there is relatively little concrete statistical data about the system as a whole. Due in large part to the problems identified in this report – especially the lack of competent trial and post-conviction counsel, and state misconduct – it is impossible to know the extent to which the fundamental fairness of many Texas death penalty cases has been compromised without first conducting a thorough investigation of each case. In fact, some of the cases discussed in this report only came to our attention by pure chance, usually when a crisis arose that required immediate intervention.

Thus, our report, while representing a careful and time-consuming examination of a number of issues vital to the administration of the death penalty in Texas, merely scratches the surface. What is clearly visible through this window into the system, however, is that an intolerably high number of people are being sentenced to death and propelled through the appellate courts in a process that lacks the integrity to reliably identify the guilty or meaningfully distinguish those among them who deserve a sentence of death.

CHAPTER ONE

Brief Overview: The Death Penalty in Texas

I. Texas's Death Row

To fully evaluate capital punishment in Texas, one must appreciate the relative frequency with which it is imposed and the legal procedures governing its use. In 1972, in Furman v. Georgia, the United States Supreme Court invalidated the existing system of capital punishment.[1] Some Justices of the highly fractured Court compared the arbitrary manner by which people were convicted and sentenced to death to a "lottery"[2] or getting "struck by lightning."[3] The result was that, while the Court did not condemn the practice altogether, capital punishment was rejected in its then-existing form. In the wake of Furman, the Texas Legislature enacted a new death penalty statute,[4] which the Supreme Court upheld in 1976.[5] When we speak of "the modern era" of the death penalty, we mean the death penalty as it has been administered since 1976.

There are currently 438 men on death row at the Terrell Unit of the Texas Department of Criminal Justice, Institutional Division, in Livingston, Texas, and seven women on death row at the Mountain View Unit in Gatesville, Texas. In the modern era, we have condemned 857 people to death – approximately one every 11 days. On average, 40-50 new people arrive each year. One-third are sent by Harris County (Houston).[6] Approximately 64% of Texas's death row are people of color (40% African American; 22% Hispanic; 1% Other); the remaining 36% are Caucasian.

In 1982, Charlie Brooks became the first person executed in Texas in the modern era. As of this report, Texas has executed 232 people since then – three times as many as the state with the second highest number of executions, Virginia.[7] If Texas were a country, it would rank fifth in the world in executions. So far this year, Texas has executed 33 people, and eight more

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[1] Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam).

[2] *Id.* at 293 (Brennan, J., concurring).

[3] *Id.* at 309 (Stewart, J., concurring).

[4] TEX. CODE CRIM. PROC. art. 37.071 (1974). For a thorough discussion of the legislative history of the Texas post-Furman death penalty statutory scheme, see Michael Kuhn, Note, *House Bill 200: The Legislative Attempt to Reinstate Capital Punishment in Texas*, 11 HOUS. L. REV. 410 (1974).

[5] Jurek v. Texas, 428 U.S. 262 (1976).

[6] *See* Texas Department of Criminal Justice, *Offenders on Death Row, at* http://www.tdcj.state.tx.us/stat/offendersondrow.htm. Those figures would have been considerably higher but for a series of Supreme Court capital cases from Texas in the 1980s that invalidated well over 100 death sentences. *See* Penry v. Lynaugh, 492 U.S. 302 (1989); Estelle v. Smith, 451 U.S. 454 (1981) Adams v. Texas, 448 U.S. 38 (1980).

[7] *See* Death Penalty Information Center, *Executions, at* http://www.deathpenaltyinfo.org/facts.html#Executions. As of August 1, 2000, the number of people executed in Virginia was 77. *Id.*

executions are scheduled to take place before the end of the year.

II. The Capital Offense and Trial

Texas permits the death penalty to be imposed for 11 offenses. These include murder during the course of a burglary, robbery, or sexual assault; murder for hire; and the murder of a child who is less than six years old.[8] If a defendant is charged with a death-eligible offense, the prosecution then chooses whether to seek the death penalty.[9]

Death penalty trials are bifurcated into a "guilt/innocence phase" and a "sentencing phase." During the initial phase, the jury determines whether the defendant committed the offense charged. If a defendant is found guilty of a capital offense, and the prosecution is seeking the death penalty, the case enters the sentencing phase.[10] The sentencing phase occurs in the same court, before the same jury, and generally follows immediately after the conclusion of the guilt/innocence phase. At the sentencing phase, the jury may hear evidence regarding the defendant's character, personal background, criminal history, and/or mental health.[11]

At the end of the sentencing phase, the trial judge submits questions, known as "special issues," to the jury. The first question, which is always asked, is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (the "future dangerousness" question).[12] The second question is "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken."[13] This question is asked only if the evidence submitted in the guilt/innocence phase raises the possibility that, although another's acts actually caused the victim's death, the defendant may be held responsible for the death as well.[14] This might occur, for instance, if the defendant and an accomplice committed a robbery, and the accomplice shot a bystander.[15]

If the jury answers "no" to either question, the death sentence may not be imposed, and the defendant is sentenced to life in prison. A person who is sentenced to life in prison on a capital crime is not eligible for parole until he has been incarcerated for 40 years.[16]

If the jury answers "yes" to each question, it considers a third question: "[w]hether,

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[8] TEX. PENAL CODE § 19.03.

[9] TEX. CODE CRIM. PROC. art 37.071(1).

[10] TEX. CODE CRIM. PROC. art 37.071(2)(a).

[11] TEX. CODE CRIM. PROC. art 37.071(2)(a).

[12] TEX. CODE CRIM. PROC. art 37.071(2)(b).

[13] TEX. CODE CRIM. PROC. art 37.071(2)(b).

[14] TEX. CODE CRIM. PROC. art 37.071(2)(b).

[15] TEX. CODE CRIM. PROC. art 37.071(2)(b)(2); TEX. PENAL CODE § 7.01 & 7.02 (on law of the parties).

[16] TEX. CODE CRIM. PROC. art 37.071(2)(e)(2)(B).

taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment, rather than a death sentence be imposed."[17] If the jury answers "yes" to this final question, the defendant is sentenced to life in prison. If the jury answers "no," the defendant is sentenced to die.[18]

III. The Appeal and Post-Conviction Review

After the conviction and death sentence, death penalty cases are subject to essentially three stages of post-conviction review: direct appeal, state "habeas corpus" proceedings, and federal "habeas corpus" proceedings.[19] The "direct appeal" is conceptually (and usually chronologically) the first post-trial review. On direct appeal, the prisoner generally raises challenges to rulings made by the judge during trial, such as the judge's decision to admit or exclude a certain item of evidence, a faulty instruction to the jury, or the improper questioning of witnesses. Such issues, by their nature, appear "on the record" of the trial; that is, all the information necessary for the reviewing court to decide them is present in the transcript of testimony, written motions, and other documents from the trial. Indeed, during the direct appeal, the defendant's attorney cannot go "outside the record." If the attorney learns of new facts relevant to the fairness of the defendant's conviction which were not mentioned during the trial, she may not mention them in the direct appeal.

"Habeas corpus" proceedings, on the other hand, most often involve constitutional questions about the fairness of the trial (whether the prisoner's trial lawyer performed competently, or whether the prosecution suppressed evidence that someone other than the prisoner may have committed the crime), which usually cannot be decided based on the trial record alone. Instead, issues raised in habeas corpus proceedings rely on facts which do not appear in the record. For example, an attorney may discover during a habeas appeal that the trial attorney failed to investigate his client's mental health history, so relevant evidence must be added to the trial record. Or, an attorney may review the State's file and discover a document that reveals an eyewitness identified someone other than the defendant, a document that should have been turned over to the trial defense attorney.

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[17] TEX. CODE CRIM. PROC. art 37.071(2)(e).

[18] TEX. CODE CRIM. PROC. art 37.071(2)(g). Under the statute as originally enacted, juries were asked to answer three narrow statutory special issues: (i) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (ii) whether there is a reasonable probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society; and (iii) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. TEX. CODE CRIM. PROC. art. 37.071 (1974). Upon unanimous affirmative answers to the special issues, a death sentence was automatic; a negative answer to any one special issue by ten or more jurors would result in a life sentence. TEX. CODE CRIM. PROC. art. 37.071 (1974). Article 37.071 was significantly amended in 1991, effective with respect to all capital murders committed after September 1, 1991. TEX. CODE CRIM. PROC. art. 37.071 (1991).

[19] Terminology can be arcane in this area of the law. "Direct appeal" is also called "direct review." Habeas corpus proceedings are also called "post-conviction" or "collateral attack" proceedings.

The issues raised in state court define and limit the scope of habeas review in federal court. While there are numerous constraints on a federal court's power to correct errors in the state court proceedings, the overriding principle is simply that the quantity of review in federal court will be, at most, no greater than the extent of review in state court. That means, in turn, that the *quality* of review in federal court depends directly on the *quality of representation* in the earlier, state court stages of the process. If the defendant had competent counsel during state court proceedings, and that lawyer raised every available challenge in precisely the manner required by state procedural rules, then he will be entitled to at least some examination of those claims in federal court. If, however, the lawyer during state court proceedings (whether at trial, on direct appeal, or in habeas corpus) is incompetent, and fails to make the right legal objections in the right way at the right time, then the defendant may lose his claim to any subsequent review of whether he had a fair trial.

Moreover, in any system of post-trial review of capital cases, the *substance* of the verdict – for example, whether the defendant is, in fact, guilty or deserving of a death sentence – is almost never at issue. Instead, the overwhelming majority of appellate and post-conviction proceedings concern whether the *procedures* that led to the verdict met minimal standards, not whether the defendant is innocent, or what the appropriate sentence should be. Incredibly, in *federal* habeas corpus proceedings, the Fifth Circuit has held it has no power to assist a defendant who can show that he did not commit the crime but cannot point to anything irregular about the procedures used to convict him.[20]

Finally, it is crucial to understand that the inmate has only "one bite at the apple." Second or "successive" habeas petitions – in either state or federal court – are looked on with extreme disfavor; only in very rare cases will the courts even consider such appeals. For all intents and purposes, if the facts are not discovered and properly presented in the defendant's initial habeas corpus proceedings, they will never be considered by the courts, no matter how grave the constitutional error alleged.

[20] *See, e.g.,* Lucas v. Johnson, 132 F.3d 1069, 1074 (5th Cir.), *cert. denied*, 524 U.S. 965 (1998); Herrera v. Collins, 954 F.2d 1029, 1033-34 (5th Cir. 1992), *aff'd*, 506 U.S. 390 (1993).