CHAPTER SIX
The Right to Counsel in Texas: You Get What You Pay For

I. Introduction

For decades, the Sixth Amendment to the United States Constitution has been held to guarantee to every criminal defendant the “assistance of counsel.” In the landmark case of Gideon v. Wainwright, the U.S. Supreme Court observed that the “right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.” Mere formal appointment of a lawyer to assist the accused is not sufficient; the lawyer must possess the skill, training, and resources to “play the role necessary to ensure that the trial is fair;” that is, to subject the State’s evidence to the “crucible of meaningful adversarial testing.” The right to counsel is by far the most important right guaranteed to criminal defendants by the Constitution, because it “it affects [the defendant’s] ability to assert any other rights [the defendant] may have.” An incompetent lawyer can render meaningless constitutional guarantees of fairness and turn a trial into “a sacrifice of unarmed prisoners to gladiators.”

In many Texas capital trials, this is precisely what happens. Unlike other death penalty states, Texas has no central agency responsible for providing specialized representation of defendants in death penalty cases. Moreover, unlike other states, few Texas counties have public defender agencies to provide fair and cost-effective representation. The vast majority of Texas death-row inmates were represented at trial by lawyers in private practice who were appointed by an elected State district judge. Furthermore, once appointed, many judges deny the lawyers they appoint the resources necessary to adequately test the reliability of the State’s case, even when the lawyer knows or cares to exert the effort required to competently defend a poor person accused of a capital crime.

II. The Unique Demands of Death Penalty Representation

Lawyers, scholars, and courts have long recognized that cases in which the State seeks the death penalty differ fundamentally from even the most serious non-capital criminal trial. After extensive study, the American Bar Association in 1989 promulgated Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. These guidelines set out a

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5 Cronic, 466 U.S. at 657.
framework for ensuring that defendants facing execution receive the best possible representation. Because capital cases are uniquely complex and because of the "harsh and irrevocable nature of the potential penalty," the ABA recommends that a minimum of two experienced lawyers be appointed to represent every capital defendant.\footnote{Commentary to Guideline 1.21 at http://www.capdefnet.org/ABA_appoint_guide.htm. The ABA observed that in a death penalty case, "counsel must be an advocate for life as well as a defensive tactician." \textit{Id.} Specifically, trial attorneys must "obtain the investigative resources necessary to prepare thoroughly for both the guilt and penalty phases of trial, \ldots; conduct extensive research in search of precedent helpful to the client; conduct thorough crime and life-history investigations in preparation for both phases of trial, \ldots; integrate the defense theory and strategy used during the guilt phase with the projected affirmative case for life at the penalty phase, \ldots; prepare witnesses for both phases of trial; and present all reasonably available mitigating evidence helpful to the defendant for the purpose of convincing the judge or jury not to impose a sentence of death." \textit{Id.} Finally, the ABA recommends that preparation for the sentencing phase, "must begin immediately after counsel has been appointed to represent the defendant." \textit{Id.}}

Recognizing the unique complexity of capital cases, many death penalty states have created specialized public defender offices exclusively to handle such cases. In Colorado and New York, for example, capital defendants are represented by experienced death penalty defense attorneys who oversee an entire team of investigators, experts, and social workers. As soon as they begin representing a death-eligible defendant, they begin working to piece together the client's life story. They collect records from schools, hospitals, mental health facilities, the military, and employers, and interview the defendant's family to obtain sensitive information about his childhood and early life. Members of the mitigation team visit every neighborhood in which the defendant lived, interviewing neighbors, teachers, friends, and co-workers. By gathering this evidence, defense teams are able to begin the complex task of providing the necessary representation for their clients. In Texas, however, there is no specialized agency to conduct this type of detailed investigation, or to provide the level of experienced legal representation that is crucial to the full and fair representation of a defendant on trial for his life.

III. Texas's Approach: Decentralized and Arbitrary

\textit{Poor defendants get a poor defense in our current system. It is scattershot, inefficient and not accountable to anyone. If we are going to lead the world in incarcerations and executions, then we should at least make sure that defendants are guaranteed effective legal representation.}

Texas has refused to make such a commitment. To this day, Texas courts find lawyers for poor capital defendants primarily by tapping local criminal defense attorneys in private practice. Until 1995, courts were virtually unconstrained in these choices. A capital defendant’s fate often turned on the preference of the judge who happened to be assigned to preside in his case. While some judges chose competent, well-respected lawyers, others appointed law school friends, campaign contributors, or lawyers who promised to free crowded dockets by trying cases quickly.

A recent and groundbreaking study of indigent defense in Texas questioned judges, prosecutors, and defense counsel about the factors relevant to appointment decisions. The results were disquieting: 67.8% of judges reported that their court coordinators—a case manager position which requires no legal training—sometimes influenced their appointment decisions in criminal cases; and 32% of prosecutors reported having advised judges about whom to appoint in a particular defendant’s case. Nearly half the judges reported that their peers “sometimes appoint counsel because they have a reputation for moving cases, regardless of the quality of defense they provide,” and over half indicated that the attorney’s need for income influenced the appointment decision. Similarly, significant numbers of judges reported that their appointment decisions were affected by whether a defense attorney was a personal friend (39.5%), a political supporter (35.1%), or a contributor to the judge’s re-election campaign (30.3%).

The study further found that 66% of the appointed lawyers were solo practitioners, and the vast majority of the remainder practiced in small firms, most of which were merely clusters of lawyers sharing office expenses. “In short, criminal defense attorneys are largely isolated entrepreneurs.” Most of the attorneys reported that only half of their practice involved criminal cases, while the remainder involved civil matters. Prosecutors, by contrast, are by definition full-time criminal law specialists who usually work with dozens of like-minded colleagues in offices with support staff, law libraries and reference materials. They generally are offered regular training to hone their skills, and are subject to discipline for poor performance.

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1 See Mary Flood, *What Price Justice? Gary Graham Case Fuels Debate over Appointed Attorneys*, HOUSTON CHRON., July 1, 2000, at A1 (observing that “the late [Harris County, Texas] District Judge George Walker, occasionally known for taking a nap on the bench, frequently appointed his good friend, the late Joe Cannon, who slept through parts of a capital murder trial” and that the career of controversial Houston criminal-defense attorney Ron Mock “bloomed in the period of judicial cronynism in Harris County”).


10 See discussion of Joe Frank Cannon, infra.


12 Id.

13 Id.

14 Id. at 13.

15 Id. at 5.

16 Id.
Since 1995, a State statute has required that lawyers in Texas capital cases be chosen from a list of “qualified” attorneys.\textsuperscript{17} However, no specific standards are set in the statute; that task is reserved for local committees, which also determines who is qualified for appointments. Because each county is entitled to create its own qualifications for capital defense attorneys, standards vary widely from county to county.

The lack of any centralized standards or controls makes it difficult to ensure indigent defense representation of consistently high quality. The \textit{Dallas Morning News} recently found that 24 attorneys who had been designated as qualified to represent capital murder defendants under the 1995 law had been disciplined for misconduct, one having been suspended from practice twice.\textsuperscript{18} As the \textit{News} observed: “The judge who ordered the most recent suspension [of this attorney], in 1995, delayed its activation so the attorney could finish a capital murder case he had been appointed to handle. He has since received other death penalty cases – as well as another reprimand from the bar.”\textsuperscript{19} Finally, the list of attorneys qualified for appointments is not even mandatory. The Court of Criminal Appeals has held that a judge may ignore the new law and appoint attorneys who are not on the list.\textsuperscript{20}

The cases recounted below represent a system in desperate need of quality control. Many of these cases could have been prevented if Texas had adopted rules requiring applicants to undergo a rigorous screening process, including a full evaluation of their criminal law experience and any disciplinary records. In addition, adequate funds must be provided to appointed lawyers for investigation and other trial preparation. Reformers have proposed that Texas follow the lead of other states and create public defender agencies to provide indigent representation, but these proposals have faced overwhelming and successful opposition from judges. Judicial opposition led Governor Bush in 1999 to veto a bill removing roadblocks to the creation of public defender agencies in counties attempting to adopt that system.\textsuperscript{21} When asked why he had vetoed the measure, Governor Bush merely stated, “I don’t remember that bill. . . . I’m for public defenders.”\textsuperscript{22}

\textsuperscript{17} See \textsc{Tex. Code Crim. Proc.} art. 26.052(c) & (d).

\textsuperscript{18} \textit{Defense Called Lacking for Death Row Indigents, But System Supporters Say Most Attorneys Effective}, \textit{Dallas Morning News}, Sept. 10, 2000, at 1A.

\textsuperscript{19} \textit{Id.}


\textsuperscript{22} \textit{Meet the Press} (NBC television broadcast, Feb. 13, 2000).
Because Texas has not taken any significant steps to ensure competent trial counsel for indigent defendants, in numerous cases defense counsel has failed to subject the prosecution's evidence to the "crucible of meaningful adversarial testing." Instead, as the following cases illustrate, factors such as under-funding, inexperience, and conflicts of interest have combined to cripple the defense.

IV. Systemic Problems Plaguing Death Penalty Representation in Texas

A. Underfunding

Until 1995, Texas courts were not required to appoint two lawyers to represent a defendant in a capital case, and it was common for a capital defendant to be represented by one attorney. Even today, a judge may still choose to appoint only one lawyer. Until 1995, Texas law also capped the entire amount defense counsel could request for investigative and expert expenses at $500. In 1980, defense lawyers for Ricardo Aldape Guerra had to "struggle" for payment of $700 by the Court for investigative expenses. By contrast, the State spent $7,000 alone on a pair of mannequins depicting the suspects. Seventeen years later, after $2 million of work by a large private law firm and a now defunct federally funded death penalty defense agency, Guerra was freed from death row based on a finding of pervasive police and prosecutorial misconduct. The misconduct, which included threatening witnesses and tainting identification procedures, was described by a federal district Court as an "intentional, ... bad faith, and ... outrageous" attempt by prosecutors to frame an innocent man. Guerra was freed from death row after the Harris County District Attorney's Office declined to reProsecute him.

The Guerra case points to the wasteful paradox created by the minimal compensation paid to trial counsel in capital cases: attorneys know they will not be compensated fully for the

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23 U.S. v. Cronic, 466 U.S. at 656.
24 See, e.g., TEX. CODE CRIM. PROC. art. 26.052 (in "capital felony" cases, "judge shall appoint a second counsel to assist in the defense of the defendant, unless reasons against the appointment of two counsel are stated in the record." (emphasized added) (amended 1995)).
26 See Nicholas Varchaver, 9mm Away from Death, AM. LAWYER, Mar. 1995, at 80.
27 Id.
28 The civil firm lawyer who supervised the later phase of Guerra's appeals estimated that if he had billed for his firm's time and expenses on the case at normal rates, the tally would have exceeded $2.5 million. Jennifer Lenhart, Houston Lawyer Reveals in Winning Fight of a Lifetime, HOUSTON CHRON., Apr. 20, 1997, at A3.
29 Guerra v. Collins, 916 F. Supp. 620, 637 (S.D. Tex. 1995), aff'd, 90 F.3d 1075 (5th Cir. 1996); see also supra Chapter Two for a description of the official misconduct leading to Guerra's conviction.
preparation and investigation necessary in a capital case, so they cut corners and enter trial less than fully prepared. By the time appellate lawyers take over the case, witnesses have dispersed, memories have faded, and the investigation needed is much more expensive. The Fifth Circuit Court of Appeals decried this state of affairs when commenting on the “perverse allocation of resources” represented by the case of John Cockrum. At trial, the Court observed “two court-appointed lawyers and an investigator had six months to prepare...[and] were paid $3,500 and $3,200 respectively for their time.” It later took appellate attorneys three years, several experts, and hundreds of hours to conduct the trial that “the federal district Court concluded ought to have been conducted in the first place.”

The Cockrum case also points to the glaring geographic disparities in compensation for capital defense attorneys. A capital defendant’s chance of receiving a reasonably well-funded defense is determined by the county in which the case is tried. In larger metropolitan areas, a first-chair lawyer may now be able to claim up to $25,000 – a fraction of what a privately retained lawyer would charge – to defend a capital case. In rural counties with limited budgets, however, compensation still falls far below what is required even to cover overhead costs. Perhaps such low compensation is the reason some lawyers in these areas put forth little effort, even in capital cases.

In the Kendall County capital murder trial of Douglas Alan Roberts, Roberts’s lead court-appointed trial attorney billed for only 85.1 hours of work for the entire case, which included four full days of trial. The brief time spent on the case is reflected in the substandard quality of the work. Trial counsel obtained a brief psychological evaluation of his client, but did not request any neurological testing, even though his client had suffered a severe head injury in 1968 and had a history of depression and substance abuse. Upon being convicted of capital murder, Roberts asked the trial lawyer not to resist a death sentence, and the lawyer obliged. In fact, the trial counsel did not even ask the jury to spare his client’s life. When the jury returned a verdict of death, Roberts said, “Thank you.”

In another capital case, the same attorney failed to request a neuropsychological evaluation of his client, despite clear indications of seizures and potential symptoms of brain damage in the client’s records. A federal judge later declared that the lawyer’s “decision not to

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31 Cockrum v. Johnson, 119 F.3d 297, 298 (5th Cir. 1997).
32 Id.
33 Id.
34 Mary Flood, What Price Justice? Gary Graham Case Fuels Debate over Appointed Attorneys, HOUSTON CHRON., July 1, 2000, at A1 (reporting $25,000 as customary rate for first-chair counsel in a capital case in Harris County, Texas, which includes the city of Houston).
36 Amended Petition for Writ of Habeas Corpus at 28-38, Roberts v. Johnson, supra.
37 S.F. Vol. 12 at 34-35 Roberts v. State (CCA No. 72,706).
38 Id. at 43.
present – or even investigate – evidence of petitioner’s potential brain damage [was] not competent.”

In Cameron County, the attorney who represented Paul Richard Colella in his 1992 capital murder trial was not reimbursed for an investigator, and was not paid until almost two years after the trial was completed. When he was paid, he received only $9,000 for handling both the trial and the initial appeal of the case. Dividing this payment by the attorney’s estimates of the number of hours he worked yields a rate of approximately $20 per hour – or less than one-third the hourly overhead rate in the average Texas criminal defense attorney’s practice.

Severely inadequate funding “creates an inherent conflict of interest between the attorney and client because the more hours an attorney spends on the case, the greater the personal cost to the attorney.” The Fifth Circuit recognized this link when it reversed the conviction and death sentence of Federico Martinez-Macias. After noting a lower court’s exhaustive catalog of the flaws with former Texas death row inmate Martinez-Macias’s trial defense, the court observed: “We are left with the firm conviction that Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The State paid defense counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for.”

In 1972, the Supreme Court struck down the death penalty as unconstitutionally arbitrary. After the death penalty was reinstated, the Court required states to ensure that death sentences would be meted out consistently. Today, whether a Texas capital defendant’s lawyers will receive enough funds to mount a full and vigorous defense depends primarily on the county in which he is tried. These geographical disparities in funding and the resulting disparities in the quality of representation drain practical meaning from the Court’s requirement of consistency. Indeed, it is precisely to avoid these disparities that other states have set up schemes to ensure appropriate funding in capital cases. Until Texas follows their lead, cases like those described here are inevitable.

B. Counsel Who Are Crippled by Substance Abuse, Conflicts of Interest, and Disciplinary Problems

In some capital murder cases, the lawyer appointed to represent the defendant is struggling with personal and professional problems which hinder his ability to effectively

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40 Application for Writ of Habeas Corpus at 61-62 and Exh. 62, Ex parte Colella (CCA No. 37,418).
43 Martinez-Macias v. Collins, 979 F.2d 1067, 1067 (5th Cir. 1992).
represent his clients. This all too common scenario is reflected poignantly in the following cases.

**Betty Lou Beets**

The centerpiece of the circumstantial case against Betty Lou Beets was the State’s claim that she killed her husband, Jimmy Don Beets, to collect benefits. However, Beets had made no attempt either to ascertain the existence of, or to recover, any benefits potentially owed to her as a result of her husband’s disappearance. Over a year after her husband disappeared, Ms. Beets’s trailer home was destroyed by fire in an unrelated incident. Ms. Beets filed a claim with her insurer for the loss of the trailer and its contents, but the insurer refused to pay.\(^{46}\)

Seeking assistance only with her fire insurance claim, Ms. Beets contacted attorney E. Ray Andrews, who had represented her in the past.\(^{47}\) But Andrews knew Ms. Beets’s husband had worked for the City of Dallas prior to his disappearance and suggested she also might be able to claim death benefits.\(^{48}\) It is undisputed that Andrews, rather than Beets, first suggested that she might be entitled to benefits. Andrews eventually determined that benefits were available, and asked an attorney with more experience in the area to secure them for Beets.\(^{49}\)

Before Andrews received payment from the City, Ms. Beets was arrested and charged with the capital murder of her husband, whose body was found buried in her yard. The indictment alleged that Ms. Beets murdered her husband to obtain “the proceeds of retirement benefits from the employment of Jimmy Don Beets with the City of Dallas, insurance policies on the said Jimmy Don Beets in which the defendant is the named beneficiary, and the estate of Jimmy Don Beets.”\(^{50}\) Without the crucial allegation that the murder was committed for the purpose of financial gain, the State could not have sought the death penalty.

After these charges were filed, Andrews agreed to represent Ms. Beets in connection with the capital murder charge. On October 8, 1985, one day after the murder trial had commenced, Andrews presented Ms. Beets with a contract to transfer all literary and media rights in her case to Andrews’s son,\(^{51}\) in exchange for Andrews’ representing her in the case.\(^{52}\) Andrews believed

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\(^{46}\) Petition for Writ of Habeas Corpus, Exhibit 1, (Affidavit of E. Ray Andrews) Beets v. Collins, (5th Cir. No. 91-4606).

\(^{47}\) Id. at ¶3-4.

\(^{48}\) Andrews’s affidavit states: “I knew from my experience that municipalities sometimes provide ... benefits to their employees as a matter of course. Consequently, I suspected that he may have had a pension from the City of Dallas, as well as a life insurance plan. Since they were married at the time of his disappearance, I also suspected that she may have been the beneficiary of these policies.” Id. at ¶6.

\(^{49}\) S.F. Vol. 6 at 454, Beets v. State (CCA No. 69,583).

\(^{50}\) S.F. Vol. 1 at 3. See also TEXAS PENAL CODE § 19.03(a)(3).

\(^{51}\) Petition Exhibit 26, Media Rights Contract.

\(^{52}\) The existence and terms of the media rights contract were brought to the attention of the judge during trial. At the indigency hearing, the prosecutor questioned Ms. Beets on her available income. At one point, he asked her “did you sign over the book rights to your case to E. Ray Andrews, Jr.?” Ms. Beets indicated she had. S.F. Vol.
that because of the notoriety surrounding this case, the media rights were worth a great deal of money.\textsuperscript{53}

At the guilt phase of Beets’ trial, Andrews’s strategy was to attack the remuneration element of the State’s case. In a later affidavit, he recalled: “I knew the State had to prove Ms. Beets killed her husband for the purpose of receiving benefits. That is, she had to have those benefits in mind at the time she killed her husband. Yet I knew from my discussions with her that this was not the case.”\textsuperscript{54} As Beets’s attorney, however, Andrews could not take the stand to testify that she did not know about the benefits until he told her. The jury that convicted Beets heard only from attorneys that Beets had contacted after Andrews had told her about the benefits.\textsuperscript{55} The prosecution used this fact to establish its financial gain allegations and portray Beets as a callous killer. She was convicted and sentenced to death.

A federal court later held that Andrews’s fee contract was unethical and that his responsibilities as an attorney required him to “resign [from the case] in order to testify rather than represent [Beets].”\textsuperscript{56} The Fifth Circuit reversed, upholding Beets’s conviction and sentence. The Court then took the unusual step of convening all of its members to rehear the case, and affirmed Beets’s sentence over a lengthy dissent joined by a large fraction of the court.\textsuperscript{57} After later being elected District Attorney of the county in which Beets had been convicted, Andrews “was nabbed by the FBI in 1994 for soliciting a $300,000 payoff to drop a death penalty case against a businessman accused of killing his wife. He resigned from the prosecutor’s office, gave up his law license, then cried at his sentencing, saying he was a longtime alcoholic, prescription drug abuser and heavy gambler.”\textsuperscript{58}

Andrews’s associates confirmed that, at the time of Beets’s trial, Andrews was drinking “between one half and three-quarters” of a bottle of whiskey every night and “two or three doubles [at lunch] before he had to go back to court.” Beets was executed on February 24, 2000.

\textbf{Joe Lee Guy}

Joe Lee Guy’s case also demonstrates the fatal combination of substance abuse and conflicts of interest. Seven years ago, Guy was the lookout in a bungled robbery at a convenience store in which the store owner, Larry Howell, was killed and his mother was

\textsuperscript{53} Petition Exhibit 3, (Affidavit of Gilbert Hargrave) at ¶ 3, 6.
\textsuperscript{54} Petition Exhibit 1, (Affidavit of E. Ray Andrews) at ¶ 14.
\textsuperscript{55} S.F. Vol. 6 at 453.
\textsuperscript{56} Beets v. Collins, 986 F.2d 1478, 1480 (5th Cir. 1993).
\textsuperscript{57} Beets v. Collins, 65 F.3d 1258 (5th Cir. 1995) (en banc).
\textsuperscript{58} Paul Duggan, A Texas-Sized Case of Injustice? Defense Lawyer’s Lapses Stir Doubts on Fairness Toward a Woman Facing Execution, WASH. POST, Feb. 22, 2000, at A3.
wounded. When Judge Marvin Marshall appointed attorney Richard Wardroup to defend Guy, Wardroup already had been disciplined twice by the bar and was deep in the throes of drug and alcohol addiction. The year after Guy was sentenced to death, the Texas Commission for Lawyer Discipline confirmed several pending complaints against him and ordered him to undergo monthly psychological testing, to attend Alcoholics and/or Narcotics Anonymous, and to submit to random drug screening. Wardroup also was suspended from the practice of law for three years, but again his sentence was probated.

Although Wardroup has acknowledged drinking "alcoholically" for up to 15 years and periodically using cocaine and methamphetamine around the time of Guy’s trial, he maintained that he refrained from drug and alcohol abuse during the trial itself. However, many of the people who worked with Wardroup on Guy’s case have sworn under oath that they personally witnessed him abusing both drugs and alcohol during the trial. Indeed, Wardroup’s then secretary declared in an affidavit that “[d]uring the Joe Lee Guy trial, I personally participated in cocaine use [with Wardroup] while in transit to [the trial]” and that Wardroup’s “drug and alcohol use was so pervasive throughout the period of my employment and his representation of . . . Mr. Guy, that I felt compelled to report his conduct to the State Bar of Texas, and testified at a Grievance Hearing regarding those matters.” An investigator affiliated with Wardroup who sat with him throughout much of Guy’s trial and later confirmed that during the trial, Wardroup drank in the evenings on “more than one occasion” and got “very drunk” in the middle of the punishment phase.

Even more bizarre was the role of Frank SoRelle, who occasionally helped Wardroup with investigative tasks. He was recruited to help prepare for Guy’s case even though he had no training as an investigator and had never held or applied for an investigator’s license. SoRelle quickly developed a close relationship with the surviving victim of the crime, French Howell, a wealthy widow. Indeed, near the time of Guy’s trial, Howell assured family members that SoRelle was against Guy’s interests. According to transcripts of taped conversations between Howell and her brother, Howell said that SoRelle “works hard to keep . . . those murderers from

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59 In 1985, Waldrup was placed on one year of probation for making misrepresentations to a client and to a bar committee that heard the client’s complaint. The following year, while still on probation, he was publicly reprimanded for failing to “act competently as a lawyer”. Dan Malone and Steve McGonigle, Questions of Competence Arise in Death Row Appeal: Lawyer with History of Problems Defends Handling of Case, DALLAS MORNING NEWS, Sept. 11, 2000, at A1.

60 Id.; see also Linda Kane, Death Row Inmate’s Lubbock Attorney Used Drugs, Alcohol, LUBBOCK AVALANCHE-JOURNAL, Sept. 10, 2000, at 12A.

61 Petition for Habeas Corpus, Appendix at 239-273, Guy v. Johnson (N.D. Tex. No. 5:00-CV-027).

62 Petition, Supplemental Appendix 16a, Guy v. Johnson (N.D. Tex. No. 5:00-CV-027). Deposition of Richard Wardroup at 45-52. Wardroup admitted that he was "impaired" as a result of his extensive alcohol and drug abuse, and defined "impairment" as "just not caring the way that something was done right and completed the way I generally do." Id. at 53.

63 Id.

64 Supplemental Appendix 7a.

65 Supplemental Appendix 6a.

66 Appendix at 203, SoRelle Dep. at 50.
getting ... whatever you call it a transfer of their trial to Tulia," 67 and at another point said that SoRelle was "trying to get them from getting another trial. ... He says they need to be put on death row." 68

SoRelle described how he perceived his role: "I knew Joe Lee Guy was guilty. I knew that getting Joe Lee Guy acquitted was not the right thing morally and I do believe that the death penalty is just, an appropriate sentence." 69 SoRelle billed the Court for time spent cultivating a relationship with Howell, 70 directed police to the murder weapon used in the crime, 71 and, after Howell’s death, urged police to remind the medical examiner before he performed the autopsy that Howell had also been shot during the robbery. 72 Outside observers were hard-pressed to discover how these actions—especially the last two—advanced Guy’s interests. However, Wardroup tolerated and allowed SoRelle’s involvement with French Howell. As an associate of Wardroup’s described: “I know that Richard was aware of French Howell’s dependence on Frank SoRelle. I discussed it with Richard occasionally and that relationship was something of an office joke.” 73 Shortly after French Howell died on April 21, 1995, SoRelle produced a will executed by her naming him as the executor and the sole beneficiary of her considerable estate. 74

Joe Lee Guy, who participated only as a lookout during the robbery, went to Texas’s death row. His two co-defendants in the crime—including the person who actually shot the victims—received life sentences.

_Pamela Perillo_

The lead trial attorney representing Pamela Perillo at her 1984 capital murder trial, Jim Skelton, had close ties to Perillo’s co-defendant and the prosecution’s key witness, Linda Fletcher. Not only had Skelton represented Fletcher at a trial stemming from the same incident, he had also befriended her and even attended her wedding. 75 Skelton did not fully inform Perillo of his ties. When Fletcher took the stand and gave damaging testimony against Perillo, Skelton “failed to ask questions that might have impugned Fletcher’s credibility or exposed any ulterior motives for her testimony, although he could have fruitfully pursued both avenues.” 76 Perillo’s state habeas petition set out these facts but was rejected in Texas’s state courts, which denied her

67 Transcript of conversation between French Howell and Floyde Heathington, (July 7, 1994) at 7.
68 Id. at 8.
69 Supplemental Appendix 1.
70 Supplemental Appendix 20a.
71 Supplemental Appendix 1a.
72 Appendix at 205, SoRelle Dep. at 289. Howell’s death was not found to have been related to injuries she suffered from the gunshot wound.
73 Supplemental Appendix 3a (Affidavit of Dena Lauderdale).
74 Appendix at 226-229.
75 Perillo v. Johnson, 205 F.3d 775, 784 (5th Cir. 2000).
76 Id. at 790.
a hearing on whether Skelton’s loyalties to Fletcher had compromised his representation. After finding that the state courts had denied Perillo a “full and fair” appeal, a federal court held a hearing during which Skelton downplayed his ties to Fletcher and denied that his representation of Perillo had been compromised. The federal court denied Perillo relief.

Shortly after the judge issued his original opinion, Skelton was disbarred by the State of Texas for lying to an indigent client about an appeal he had been appointed to handle. When the client called to ask about the case, Skelton told him that the court had heard oral argument on the appeal and denied relief. In fact, the appeal had been dismissed “for lack of prosecution” because Skelton had not filed it on time. The client tape-recorded Skelton’s false statements and sent them to the disciplinary board. Skelton admitted the lies, and said: “[T]here are times when you cannot be truthful with a client.” This new information led the federal court to reopen Perillo’s appeal and reassess Skelton’s credibility. Because the other evidence in the record pointed to a clear conflict of interest between Skelton and his client, the court granted Perillo relief. The Harris County District Attorney’s Office elected not to re-try her for capital murder, and she pled guilty to lesser charges which did not carry a death sentence. Skelton’s law license was reinstated, but he was later “permanently and finally disbarred” for several ethical lapses, including seeking “the payment of fees from an indigent client that he was appointed to represent.”

Summary

A recent study by the Dallas Morning News confirmed that the trial lawyers who had represented Texas death row inmates had been disciplined at approximately eight times the rate of lawyers as a whole. Ron Mock, the controversial Houston attorney with one of the largest number of former clients on death row, has been reprimanded so many times that he jokingly says he has “a permanent parking spot at the grievance committee.” When confronted about the large number of capital defense attorneys with disciplinary problems, CCA Presiding Judge Michael McCormick admitted that it “doesn’t pass the smell test,” but also noted that “there are

77 Id. at 793.
78 Id. During the State habeas appeal, Skelton had submitted an affidavit defending his trial performance, which the State Court accepted as the basis for denying Perillo relief. The federal Court noted that Skelton had been hostile and uncooperative toward his former client, and characterized the language in Skelton’s affidavit as “vitiolic and unprofessional,” “crude,” and “callous.” Id. at 794 & n.7.
79 Id. at 795.
80 Id.
81 Id. at 796.
82 Steve Brewer, Deal Takes Woman off Death Row; Perillo Agrees to Life for Role in Murders, HOUSTON CHRON., July 14, 2000, at A1.
83 Perillo, 205 F.3d at 795 n.8.
84 Defense Called Lacking for Death Row Indigents, DALLAS MORNING NEWS, Fri., Sept. 10, 2000, at 1A.
85 Sara Rimer & Raymond Bonner, Texas Lawyer’s Death Row Record a Concern, N.Y. TIMES, June 11, 2000, at 1.
many, many, very, very competent attorneys who have had grievances and have had disciplinary sanctions that in no way impact or reflect upon their ability to try a lawsuit."^{86} What Judge McCormick does not mention is that the entry of a public reprimand against an attorney is the rare culmination of a thorough fact-finding process that discloses serious misconduct, usually involving dishonesty or incompetence. Indeed, Illinois Governor George Ryan cited the fact that many Illinois death row inmates had been represented by lawyers with disciplinary records as one of the principal reasons he declared a moratorium on executions earlier this year.^{87} Because of their central role in the criminal justice process, attorneys have a singular responsibility for both behaving ethically and working diligently on behalf of those they represent. When they do not take that responsibility seriously, the miscarriages of justice that can result are grave.

C. Another Kind of a "Dream Team:" Sleeping Lawyers

The Constitution says everyone's entitled to the attorney of their choice . . . The Constitution doesn't say the lawyer has to be awake.

Harris County District Judge Doug Shaver, reacting to a capital defendant's lawyer sleeping during trial in his court^{88}

John Benn

When George McFarland was indicted on capital murder charges in Houston, Texas, he hired local criminal defense attorney John Benn to represent him at his 1992 trial. Benn, who spent four hours preparing for trial, "did not examine the crime scene, interviewed no witnesses, prepared no motions, did not request that any subpoenas be issued, relied solely on what was in the prosecutor's file, and visited his client only twice."^{89} As one reporter wrote:

Benn spent much of the trial in apparent deep sleep. His mouth kept falling open and his head lolled back on his shoulders and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again. Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the November 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan. When State District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during

^{86} Id.

^{87} Ken Armstrong & Steve Mills, Ryan: 'Until I can be sure' Illinois is First State to Suspend Death Penalty, CHI. TRIB., Feb. 1, 2000, at 1.

^{88} Quoted in John Makeig, Asleep on the Job: Slaying Trial Boring, Lawyer Said, HOUSTON CHRON., August 14, 1992, at 35A.

a capital murder trial. ‘It’s boring’, the 72 year old longtime Houston lawyer explained . . . . Court observers said Benn seems to have slept his way through virtually the entire trial.\textsuperscript{90} 

The judge who presided over McFarland’s trial, Doug Shaver, later recalled that he knew Benn “wasn’t competent,” and observed that Benn looked like “a heavy drinker” because of his rumpled clothes and watery red eyes.\textsuperscript{91} Indeed, Shaver went so far as to appoint a second attorney, Sandy Melamed, to assist Benn. However, Melamed had never before tried a capital case, had performed little investigation into the circumstances of McFarland’s case, and recalled that he felt he “couldn’t take responsibility for trial strategy.”\textsuperscript{92}

The striking revelation in McFarland’s case is that even this complete breakdown in the adversarial process was not enough to produce a reversal on appeal. The trial Court appointed yet another inexperienced attorney, Marcelyn Curry, to represent McFarland. It was Curry’s first capital appeal, and at the time, she was struggling with severe health problems, including anemia, Hepatitis A and B, and dizzy spells.\textsuperscript{93} As Curry later recalled: “The Court of appeals was informed of the fact that during this [appeals] process I was sick, I was in need of surgery and still they demanded a brief. All they wanted was a brief so that they could get th[e] appeal behind them.”\textsuperscript{94} Curry missed several deadlines, and was cited repeatedly in the CCA’s opinion for errors in her brief.\textsuperscript{95}

Nevertheless, a majority of the CCA’s judges eventually denied relief, finding that McFarland had not met the burden of proving that his defense team’s lack of preparation and Benn’s in-court sleeping actually affected the outcome of the trial.\textsuperscript{96} Indeed, in a footnote that

\textsuperscript{90} John Makeig, \textit{Asleep on the Job: Slaying Trial Boring, Lawyer Said}, HOUSTON CHRON., August 14, 1992. Sandy Melamed, Benn’s co-counsel, later testified that he tried to keep Benn awake, but the task was too onerous and he actually thought the jury “would feel sorry for [them]” because of Benn’s extensive slumber. S.F. Vol. 20 at 56, State v. McFarland (CCA No. 71,557).

\textsuperscript{91} Henry Weinstein, \textit{A Sleeping Lawyer and a Ticket to Death Row}, L.A. TIMES, July 15, 2000, at A1.

\textsuperscript{92} Id.

\textsuperscript{93} Id.

\textsuperscript{94} Interview with Marcelyn Curry, Nightline (ABC television broadcast, September 15, 2000). Mr. McFarland’s case is not the only one in which the Court of Criminal Appeals has ignored an attorney’s own doubts about his competence to handle a capital appeal. See discussion of Ricky Kerr and Johnny Joe Martinez, Chapter Seven, \textit{supra}.

\textsuperscript{95} Henry Weinstein, \textit{A Sleeping Lawyer and a Ticket to Death Row}, L.A. TIMES, July 15, 2000, at A1.

has since become infamous, the Court suggested that Benn’s sleeping in court could have been sound trial strategy: “We might also view Melamed’s decision to allow Benn to sleep as a strategic move on his part. At the new trial hearing, Melamed stated that he believed that the jury might have sympathy for appellant because of Benn’s ‘naps.’”97

Only two of the nine judges on the CCA dissented. They observed that at trial, both lawyers were completely unprepared to even cross-examine witnesses, let alone present evidence: “Benn decided which witness he would cross-examine and he informed [co-counsel] of his decision only after the State’s examination. Thus, [co-counsel’s] preparation for cross-examination of his witnesses could not have been effective because he did not know which witnesses he was to question. . . . Even more disturbing, Benn could sleep during the direct examination and still elect to conduct cross-examination.”98 Mr. McFarland, they maintained, had proved that “sleeping counsel is equivalent to no counsel at all.”99 Since that opinion, new counsel have been appointed for Mr. McFarland and they have conducted the first serious investigation of the case. McFarland’s new attorneys stress that no physical evidence linked McFarland to the offense, and maintain that if McFarland’s defense attorneys had bothered to investigate that case, they would have discovered serious inconsistencies in the testimony presented by the State’s witnesses.100

Joe Frank Cannon

George McFarland’s case is not the only one in which the CCA has tolerated a lawyer who slept through trial. In the case of Calvin Jerold Burdine, the CCA upheld the result of a trial during which Joe Frank Cannon, the defendant’s court appointed defense attorney, slept. The Court apparently was unmoved by the fact that in Burdine’s case, unlike McFarland’s, there was no appointed co-counsel who theoretically could have monitored the proceedings.101

In addition to his habit of sleeping at capital trials, Mr. Cannon used to “boast[] of hurrying through trials like ‘greased lightning.’”102 Indeed, a former Harris County prosecutor swore in a 1988 affidavit that he overheard Cannon promising a State district judge that if he was appointed to represent capital defendant Jeffrey Motley, he would finish the case in two

97 Id. at 505 n.20.
98 Id. at 527-528.
99 Id. at 527.
weeks. Cannon and the judge denied that such a conversation took place, but Cannon was appointed to the case, and finished it in nineteen days. Mr. Motley’s case was initially reversed by the Fifth Circuit Court of Appeals in 1994, but that court later reversed itself, and Motley was put to death in 1995.

Among Cannon’s notable attributes was his reluctance to object to legal errors during trial. Cannon declared that juries don’t like a bunch of “jack-in-the-box” objections, and that “[c]apital cases come down to split second decisions made on your feet – something these second-guessers and nitpickers don’t understand.” Unfortunately for Cannon’s clients, the law is strict in this area: if trial attorneys do not object to legal errors and prosecutorial misconduct at trial, they forfeit their client’s right to complain of those errors on appeal. Ten of Cannon’s twelve capital clients went to death row, one of the largest number of cases among active lawyers. At one point in the early 1990s, almost 1 in 5 death row inmates whose cases had come from Harris County had been represented by Joe Cannon. What follows are extended discussions of two of Cannon’s cases, although his performance has been questioned in many others.

**Calvin Jerold Burdine**

Calvin Jerold Burdine was convicted of the murder of his former housemate and companion, W.T. “Dub” Wise. Wise was killed on April 17, 1983, during the course of a robbery committed by Burdine and another man, Douglas McCreight. The State did not prosecute McCreight for capital murder, despite evidence indicating that McCreight was the primary actor. Instead, the State offered McCreight an eight-year prison sentence in exchange for his testimony at Calvin Burdine’s death penalty trial. McCreight has since been paroled.

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103 Id. (quoting Petition for Writ of Habeas Corpus, Exhibit 1, Anderson v. Lynaugh, (S.D. Tex)(No. H-87-1318)).

104 Id.


106 Id.


109 Id.


111 See, e.g. Anderson v. Collins, 18 F.3d 1208, 1215-21 (5th Cir. 1994) (discussing challenges to Cannon’s conduct during every phase of trial); Williams v. Collins, 35 F.3d 159 (5th Cir. 1994) (discussing ineffectiveness challenges and holding that Williams could not claim the State had concealed exculpatory evidence from him because Cannon could have discovered the evidence by investigating the case with “due diligence” but did not do so).


113 Id.
Burdine was sentenced to die.

At the time of Burdine’s trial, his poor reputation and habit of sleeping through trials were well-known in the legal community. The Court clerk testified that she had seen Cannon sleep in court before Burdine’s trial: “I know Joe Cannon. I had seen him before. I knew that he had this problem.” A Court coordinator for Burdine’s trial Court testified that the chief felony prosecutor for that Court (and the lead prosecutor in Burdine’s capital trial) told him that Joe Cannon was incompetent and had “asked [him] not to appoint Cannon to any more capital cases” for that reason. Although the coordinator could not recall whether the conversation took place before or after Burdine’s trial, the prosecutor’s concern demonstrates how clear Cannon’s inadequacies were.

Cannon’s behavior did not change after he was appointed to represent Burdine. Court clerk Rose Marie Berry declared, “I do know that he fell asleep and was asleep for long periods of time during the questioning of witnesses.” The jury foreperson saw Cannon “nod off or perhaps doze ... for a few minutes.” Cannon’s sleeping was so obvious that members of the jury discussed it during breaks in the trial. Two other jurors testified that they observed Cannon “nodding,” with his head down, his chin on his chest, and his eyes closed. One juror recalled seeing Cannon, red-eyed, suddenly awaken from a ten-minute nap when a clerk dropped a book. These naps occurred “five to ten times” during the trial.

Not surprisingly, Cannon’s representation of Burdine was compromised. He failed to investigate or present mitigating evidence concerning Burdine’s background, even though the information was available and known to him. Cannon’s presentation to the jury at the punishment phase of Burdine’s case was, in its entirety, as follows:

Q.: Calvin, do you want to take the stand and plead for your life?
A: No, sir, they didn’t listen to me the first time, I don’t see --
The Court: What says the Defense, gentlemen?
Mr. Cannon: We close, your honor.

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114 Id.
115 Id. at 10.
116 Id. at 126.
117 Id.
120 Id.
121 S.F. Vol. 16 at 641, State v. Burdine (CCA No. 69,271). Cannon later admitted that a competent defense lawyer would never conduct such an inquiry in front of the jury because “it would be prejudicial. And they [the jury] don’t need to know that he refused [to testify].” S.H. Vol. 1 at 225, Ex parte Burdine (CCA No. 16,725). A legal expert who testified for Burdine at the State habeas hearing stated even more emphatically that “there is absolutely no logical, legal, fundamental common sense reason for ever placing someone before a jury and saying, ‘I’m not going to testify.’” Id. Vol. 4 at 655.
In closing argument at the punishment hearing, Cannon did little more than provide a rambling discourse on the history of torture in medieval England, ending with a plea for mercy based upon the Biblical account of Cain and Abel. He did not object when the prosecutor argued during his punishment phase summation that sentencing Burdine, who is gay, to life in prison “isn’t a very bad punishment for a homosexual.” During a later hearing which examined his performance at trial, Cannon referred to gay men as “queers,” “fairies,” “tush hogs,” and people who have a medical “problem which they can’t help” that causes him to “pit[y]” them.

A trial judge later convened a hearing into Burdine’s allegation that Cannon had slept through his trial. The judge heard days of evidence from clerks, jurors, and other trial participants establishing that Cannon slept through large portions of Burdine’s trial. The Court found that Cannon had indeed slept through the trial, and recommended that Burdine receive a new trial, as it was impossible for Cannon to have provided “effective assistance of counsel” while he was sleeping. The Texas Court of Criminal Appeals disagreed. Although it is extremely rare for the CCA to reject the recommendation of an experienced trial judge who has held an extensive hearing in a habeas matter, the CCA did so in Burdine’s case and affirmed his death sentence. On March 1, 2000, the federal district court rejected the CCA’s “one page, unsigned” order, which “altogether failed to provide any justification for its rejection of the trial court’s conclusions,” and granted Mr. Burdine habeas corpus relief. The district court held unambiguously that “sleeping counsel is equivalent to no counsel at all.”

Governor Bush, when asked about the Burdine case in a March 2, 2000 presidential primary debate, pointed to the fact that Burdine received relief from a federal court as evidence that “the system worked” in his case, and said he hoped Burdine would be “retried soon.” Nevertheless, at that very time, the State’s lawyers were actively appealing the grant of relief to Burdine to the United States Court of Appeals for the Fifth Circuit. Assistant Solicitor General Julie Parsley urged that court to permit Burdine’s execution despite the fact that Cannon had slept through trial. Parsley reminded the justices that they had, in other cases, denied relief to defendants whose lawyers were intoxicated or were suffering a “psychotic episode” during a defendant’s trial, and argued that Burdine’s situation was analogous.

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122 S.F. Vol. 17 at 683, 689-90, Burdine v. State (CCA No. 69,271).
124 Id. at 80-84.
127 Id. at 866.
John Cornyn admitted to being “troubled” by some of Parsley’s arguments, but still presses for Burdine’s execution.  

**Carl Johnson**

Carl Johnson was convicted of shooting and killing a security guard during a robbery in Houston, Texas, in October of 1978. As in Burdine’s case, Johnson’s defense was handicapped by Cannon’s failure to stay awake:

In Carl Johnson’s case, the ineptitude of the lawyer who represented him jumps off the printed page. During long periods of jury voir dire, while the State was asking questions of individual jurors, the transcripts give one the impression that Johnson’s lawyer was not even present in the courtroom. Upon investigation, it turned out that he was in fact present; it’s just that he was asleep.  

This fact was confirmed in the 1989 affidavit of Philip Scardino, Cannon’s co-counsel in the case, who stated that Cannon slept through “significant periods on numerous occasions” during jury selection. Scardino was “an attorney less than a year out of law school who had never previously tried a capital case. He did not fall asleep. His burden was not incompetence but inexperience.”

Mr. Johnson’s appeal, which detailed numerous errors by the defense, was denied in 1995 in an unpublished opinion of the Fifth Circuit. He was executed in 1995.

**D. Inexperienced Counsel**

Many Texas death row inmates are represented by defense lawyers who have never tried a capital case. Unfamiliar with the unique demands of such cases, these lawyers routinely commit elementary blunders: they misunderstand the specialized rules of evidence applicable to capital trials, fail to perform the necessary investigation of the defendant’s background, and are unaware of the need for experts to address a particular area of the case. Neither of the lawyers who represented Ernest Willis at his 1987 capital murder trial in Iraan, Texas, had any capital experience. In fact, one of these lawyers recently had stopped working for the District

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130 Cornyn’s Dilemma: Recent Actions by the State Attorney General’s Office Merit both Praise and Criticism, FORT WORTH STAR-TELEGRAM, June 12, 2000, at 8.


132 Id.

133 Id. at 694-95.

134 Howard Swindle & Dan Malone, Judge Says Inmate Wrongly Convicted; Man Has Spent 13 Years on Death Row, DALLAS MORNING NEWS, Sept. 10, 2000, at A1. For further discussion of the misconduct in this case, see Chapter Three, supra.
Attorney who prosecuted Willis. The State had a weak circumstantial case with no motive, no eyewitnesses, and no physical evidence linking Willis to the fire which killed the victims. The District Attorney himself estimated his chances of a conviction before trial at 10 percent. Mr. Willis's lawyers spent fewer than three hours consulting with him before trial, conducted minimal cross-examination of the State's witnesses, and called no character witnesses on Willis's behalf, even though many would have been willing to testify. Not surprisingly, he was convicted and sentenced to death.\footnote{Id.}

Willis's lead trial lawyer surrendered his law license in 1997 after being convicted of a cocaine charge, and now works as a legal assistant for the former District Attorney (now in private practice) who prosecuted Willis. After reviewing the case in state habeas proceedings, a Texas state trial judge took the extremely rare step of recommending a new trial for Willis.\footnote{Id.} Willis's fate now rests with the Texas Court of Criminal Appeals.

Similarly, the lawyer appointed to represent Paul Richard Colella in his 1992 Cameron County capital murder trial also had never before represented a capital defendant. He was paid only a minimal sum for his work and was denied co-counsel. Defense counsel's inexperience became painfully apparent during the punishment phase of the trial, when he repeatedly invoked evidence rules inapplicable to capital cases, apparently unaware of the governing law.\footnote{Id. at 162-185.} Although he admitted in a later hearing that he knew about his client's history of mental illness, defense counsel did nothing to investigate this history and never asked the court to appoint a mental health expert. The only testimony about Colella's background was a brief plea from his mother, whom the lawyer had not prepared before he put her on the witness stand. Counsel appointed after the conviction discovered that Colella had grown up in dire poverty, had been in classes for the emotionally handicapped since the beginning of his education, and had attempted suicide several times before he was ten years old. Following up on repeated suggestions of neurological injury in Colella's extensive mental health records, counsel retained a neuropsychologist who confirmed that Colella was brain-damaged.\footnote{Ransom v. Johnson, 126 F.3d 716, 722 (5th Cir. 1997).}

The Colella case is by no means isolated. In dozens of Texas cases, appointed lawyers have utterly failed to perform the meticulous investigation of the defendant's background essential to proper representation at the punishment phase. The attorney responsible for Kenneth Ransom's defense offered no evidence on his client's behalf at the punishment phase.\footnote{Id. at 721-22 & n.3.} Had the attorney mailed a single letter requesting it, he would have received a 500-page child welfare case file. In that file were descriptions of how Ransom had been taken from his mother and placed in foster care because of his mother's constant physical abuse, which included whipping Ransom with extension cords that left permanent U-shaped bruises over his back and limbs.\footnote{Original Application for Writ of Habeas Corpus at 199-201, Ex Parte Colella (357th Dist. Ct. of Cameron County, Texas No. 92-CR-173-E).}

\footnotetext[135]{Id.}
\footnotetext[136]{Id.}
\footnotetext[137]{Id. at 162-185.}
\footnotetext[138]{Ransom v. Johnson, 126 F.3d 716, 722 (5th Cir. 1997).}
\footnotetext[139]{Id. at 721-22 & n.3.}
The attorney claimed that Ransom had not informed him that he been abused as a child. The court found this argument hard to accept, however, given that the attorney himself had represented Ransom’s mother a few years earlier in the lawsuit which terminated her parental rights over Ransom’s brother.

If Joseph Stanley Faulder’s trial counsel had researched his background before his trial, he could have found much evidence to present in favor of a life sentence, including: brain damage stemming from a childhood incident in which Faulder’s head was “split open on both sides” after he fell out of a moving car, a good prison record, his performance as a “loyal friend, trusted employee and father of two girls,” and the fact that he had “once saved the life of an accident victim when he drove the woman to the hospital in a blizzard.” None of this evidence was presented. Explaining his decision during a hearing into his competence, the lawyer testified that he introduced no mitigating evidence on Faulder’s behalf because, incredibly, “he did not know that presentation of evidence at sentencing was allowed under Texas procedure.”

Jon Wood, Jesus Romero’s lawyer, similarly offered no mitigating evidence during the punishment phase and gave the following closing argument: “You are an extremely intelligent jury. You’ve got that man’s life in your hands. You can take it or not. That’s all I have to say.”

During appeals, two expert witnesses testified that Wood’s preparation for the punishment phase was deficient, noting that the defense could have introduced evidence of Romero’s youth, intoxication at the time of the crime, and violently abusive upbringing. The federal district court granted a new sentencing hearing, noting that Wood’s decision to deliver a closing argument in which he did not even ask the jury to spare his client’s life or explain any reasons why they should do so was “patently unreasonable.” The Fifth Circuit disagreed, concluding that is was not “outside the range of reasonable professional assistance” because, had it worked, the Court speculated, it “might well have been seen as a brilliant move.”

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141 Id. at 722.
142 Id. at 723.
143 Faulder v. Johnson, 81 F.3d 515, 519 (5th Cir. 1996).
144 Id.
145 Romero v. Lynaugh, 884 F.2d 871, 875 (5th Cir. 1989).
146 Id. at 876.
147 Id.
148 Id. at 877.
Ron Mock

No discussion of ineffective assistance of counsel in Texas death penalty trials would be complete without mention of Harris County attorney Ron Mock, if only because so many clients on Texas’s death row were represented by him. Mock is a colorful figure who admits to “drink[ing] a lot of whiskey” and who owned a bar for a time. He was arrested during jury selection in the capital murder trial of Anthony Ray Westley for ignoring an order from the CCA asking him to show cause for delays in filing another condemned client’s appeal. When questioned during Westley’s appeal about his apparent ignorance concerning the law applicable to capital cases, Mock asserted that he kept abreast of rapidly evolving developments in death penalty law by staying up late and reading cases in the “wee hours of the morning.” A Houston attorney designated to review Mock’s performance in the Westley case concluded that Mock’s representation fell below reasonable professional standards in many areas. Mock later called that attorney a “little lying, no good, rotten son of a bitch.” Reviewing Mock’s performance at Westley’s trial, the United States Court of Appeals for the Fifth Circuit found several deficiencies, but the majority held that the errors did not affect the outcome of the case. Judge Harold DeMoss dissented, observing that his confidence in Westley’s guilt was “completely undermined,” and that if Mock’s performance did not satisfy the relevant legal test, “there is no such animal as an ‘ineffective counsel’ and we should quit talking as if there is.” In 1986, shortly after Westley’s trial, State District Judge Thomas Routt ordered respected Houston civil rights attorney Anthony Griffin to accept Routt’s friend Mock as second-chair counsel in the capital murder trial of Anthony Pierce. Griffin “objected and used his money to pay another attorney to sit with them.”

Although Mock claims to fight “like shit” for his clients, others have questioned his commitment. Mervyn West, an investigator who assisted Mock during Gary Graham’s 1981

149 John Makeig, Criminal Lawyer Wins One, Loses Another, HOUSTON CHRON., April 19, 1986, at A33.
150 Steve McVicker, Defending the Indefensible: Do Court-Appointed Attorneys Serve Their Clients or the Courts?, TEX. OBSERVER, April 22, 1994, at 8.
151 Defense Attorney Surrenders to Jail Officials, HOUSTON CHRON., March 26, 1985, at A13. A year later, the client whose appeal Mock had been ordered to file was facing imminent execution without counsel. TDC Attorneys May Represent Prisoner as Execution Nears, HOUSTON CHRON., Mar. 29, 1986, at A21.
152 Steve McVicker, Defending the Indefensible: Do Court-Appointed Attorneys Serve Their Clients or the Courts?, TEX. OBSERVER, April 22, 1994, at 8.
154 Id.
155 Westley v. Johnson, 83 F.3d 714 (5th Cir. 1996), cert. denied, 519 U.S. 1094 (1997). The entire Court agreed that Mock was deficient for not objecting to inadmissible victim-impact testimony and for failing to request transcripts of Westley’s co-defendant, who had been tried earlier. Id. at 721, 723.
156 Id. at 729 (DeMoss, J., dissenting).
158 Steve McVicker, Defending the Indefensible: Do Court-Appointed Attorneys Serve Their Clients or the Courts?, TEX. OBSERVER, April 22, 1994, at 8.
159 Id. at 11 (reprinting one lawyer’s comment that Mock “really doesn’t care” about the fate of his clients.
capital trial, swore in an affidavit that he and Mock devoted little attention to the case because they thought Graham was guilty.\textsuperscript{160} Through routine investigation, counsel appointed after his conviction developed considerable evidence casting doubt on Graham's guilt: crime-scene witness descriptions of the shooter that did not match Graham and leads to other suspects which had not been pursued.\textsuperscript{161}

Despite many questions about his performance, Mock has been appointed to represent over a dozen capital clients, all but a few of whom were convicted and sentenced to death.\textsuperscript{162} So far, seven have been executed. Indeed, he was for a time the highest-paid appointed lawyer in Harris County; he still receives appointments, and now drives a Rolls-Royce and a Harley Davidson.\textsuperscript{163} He claims that he stopped taking capital cases a decade ago because "there was not enough money in them."\textsuperscript{164} When Mock, in 1995, took the newly required certification exam to become eligible for appointment to capital murder cases in 1995, he did not pass.\textsuperscript{165}

V. Conclusion

Whether from inexperience, personal disabilities, or a reluctance to undertake a crushing task for which they will not be compensated fairly, appointed attorneys in Texas have ignored their clients' concerns and the gravity of the charges they face. Courts have been unacceptably tolerant of such behavior, failing to correct what appear to be obvious problems: a complete dearth of training, funding, and oversight for appointed lawyers in capital cases; defense team members who put their own financial gain before competent representation of their clients; and

\begin{footnotesize}
\begin{enumerate}
\item Graham v. Johnson, 168 F.3d 762, 767 (5th Cir. 1999).
\item Id. at 767-78, 770-71. The one prosecution eyewitness who identified Graham as the shooter, Bernadine Skillern, testified that she obtained a clear view of Graham by slowly following him in her car for a substantial distance. However, another crime scene witness—who testified at trial but was never contacted by the defense—swore that she watched the shooter run away from the crime, and that he was not followed by any car. Graham, 168 F.3d at 767 (affidavit of Wilma Amos). Her account was confirmed by other witnesses. Id. (affidavit of Malcolm and Lorna Stephens). Mock, while conceding that the Graham case still troubled him, pointed to Ms. Skillern's testimony as being "strong as an acre of garlic." Steve McVicker, Defending the Indefensible: Do Court-Appointed Attorneys Serve Their Clients or the Courts?, TEX. OBSERVER, April 22, 1994, at 9. However, two experts on eyewitness identification who reviewed the case stated that the identification techniques used in Graham's case were suggestive and observed that studies have shown that "an eyewitness's confidence in the identification and the reliability of an identification bear no relationship to one another." Ex Parte Graham, No. 17,568-05 (179th Dist. Ct., Harris County, Tex. Apr. 27, 1998) (unpub.) (citing affidavits of Dr. Elizabeth Loftus and Dr. Curtis Wills).
\item Steve McVicker, Defending the Indefensible: Do Court-Appointed Attorneys Serve Their Clients or the Courts?, TEX. OBSERVER, April 22, 1994, at 8 (Mock estimates that he has tried more capital murder cases than any attorney in Texas).
\item Lawyer Ron Mock County's Best-Paid Public Defender, HOUSTON CHRON., Jan. 26, 1988, at A19; Sara Rimer & Raymond Bonner, Texas Lawyer's Death Row Record a Concern, N.Y. TIMES, June 11, 2000, at 1.
\item Rimer & Bonner, Texas Lawyer's Death Row Record a Concern, N.Y. TIMES, June 11, 2000, at 1.
\item Mary Flood, What Price Justice? Gary Graham Case Fuels Debate over Appointed Attorneys, HOUSTON CHRON., July 1, 2000 at 1.
\end{enumerate}
\end{footnotesize}
attorneys who – for whatever reason – simply fail to undertake the zealous representation required in the all-or-nothing arena of the death penalty.

When the State proposes to take a human life, it must provide to each defendant experienced lawyers dedicated solely to that person’s interests. Texas’s current disparate “system” for providing counsel falls woefully short of this goal.