CHAPTER SEVEN

Sham Appeals: The Appearance of Representation in State Habeas Corpus

We've appointed some absolutely terrible lawyers. I mean lawyers that nobody should have, much less somebody on death row on his last appeal.

Former Court of Criminal Appeals
Judge Charles Baird[1]

I. Background - Article 11.071

In 1995, the Texas Legislature enacted Article 11.071 of the Texas Code of Criminal Procedure. Article 11.071 was intended to be a major reform of the death penalty review process in Texas. For the first time, the State agreed to appoint lawyers to represent death row inmates in their state habeas corpus appeals. The State also promised to pay them for their work, and to provide funds for both investigators and expert witnesses to help them build their cases. The statute specifically requires that the counsel appointed must be "competent," and requires the Court of Criminal Appeals ("CCA") to enforce this guarantee.[2]

From the beginning, the system was plagued with problems. First, the Legislature refused to appropriate enough money for lawyers to represent each prisoner on Texas's enormous death row. This decision in turn led the CCA to impose strict funding caps limiting compensation to an amount far below what was necessary to fairly compensate lawyers for these complex and time-consuming cases.[3] The CCA circulated a questionnaire to attorneys interested

[1] Staff writers, *Defense Called Lacking for Death Row Indigents: but System Supporters Say Most Attorneys Effective*, DALLAS MORNING NEWS, Sept. 10, 2000, at 1A.

[2] *See* TEX. CODE CRIM. PROC. art. 11.071, Sec. 2(a) ("An applicant [under sentence of death] shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary"); Sec. 2(c) ("the convicting court shall appoint competent counsel"); Sec. 2(d) (CCA must "adopt rules for the appointment of attorneys as counsel under this section and the convicting court may appoint an attorney as counsel under this section only if the appointment is approved by the [CCA] in any manner provided by those rules").

[3] Although lack of adequate funding alone cannot explain the disastrous performance of many of the attorneys appointed by the CCA, the history of funding for state habeas representation also deserves at least brief mention. When Article 11.071 was enacted in 1995, the Texas Legislature provided $2 million per year for the program – half the amount requested by the Court of Criminal Appeals. *See* John Makeig, *The Buck Stops Here on Costs to Represent Death Appeals*, HOUSTON CHRON., June 28, 1996, at 16A (noting that Legislature had appropriate less than half the amount estimated as necessary and noting CCA judge's comment that "[y]ou can't appoint lawyers if you can't pay them."); *Defense Called Lacking for Death Row's Poor*, DALLAS MORNING NEWS, Sept. 10, 2000. Faced with hundreds of prisoners asking for appointed counsel, the CCA first announced its intention to cap the amount post-conviction counsel could be paid at $7,500. *Id.* Such a low figure guaranteed that

in 11.071 appeals asking about the attorneys' experience. However, to this day, the Court has never explained what minimum standards, if any, it uses to guide the selection process. As inexperienced appointed lawyers began to wade into the extremely complex area of death penalty appeals, one Austin attorney reported being deluged with last-minute calls from these attorneys, and remarked that "80 percent" of them were "in over their heads."[4] Another observer commented that Texas lawmakers and judges "by ignorance, delay, and arrogance, created a textbook case on how not to deal with habeas reforms."[5]

The current list of "approved" attorneys for 11.071 appeals, which was revised in late August 2000, still contains the name of at least one attorney who currently works for a state prosecuting agency.[6] Also on the list is an attorney who, in one of his earlier 11.071 cases, asked to be removed from the case while it was still under consideration by the CCA, and asked for a hearing into whether he had provided effective assistance of counsel.[7]

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many of the State's most respected appellate attorneys would refuse to apply for the work. Indeed, records from the Court show that some attorneys who had been licensed less than two years received habeas appointments. *Id.* In an effort to attract better attorneys, the Court removed the $7,500 cap, but set no minimum qualifications. The result, according to former CCA Judge Charles Baird, was that the Court "appointed some absolutely terrible lawyers." *Id.* With the cap on payment lifted, the CCA soon ran out of money. Additional funds have been appropriated, but a new cap of $25,000 per attorney may still not suffice, given the complexity of most cases. In 1993, a Report commissioned by the State Bar of Texas Committee on Representation for Those on Death Row analyzed time commitments in Texas post-conviction cases in the 1980s and found that the average lawyer spent approximately 350 hours representing a death-sentenced inmate in Texas state post-conviction proceedings. The Spangenberg Group, *A Study of Representation in Capital Cases in Texas* (March 1993), at 90; Addendum at 7. The Administrative Office of the United States Courts studied the amount of time required to properly represent a death row inmate in habeas proceedings and concluded that available data concerning federal capital habeas corpus representation point overwhelmingly to time commitments in the "several hundreds to several thousands of hours." Administrative Office of the United States Courts, *Capital Habeas Corpus: Approaches to Case Budgeting and Case Management*, at 9 (1997).

[4] Christy Hoppe, *Death Row Inmates Get Lawyers Before Deadline, But Attorneys Lack Expertise, Some Say*, DALLAS MORNING NEWS, April 24, 1997, at 17A.

[5] Robert Elder, Jr., *Uncle Mike Wants You for the Habeas Wars*, TEXAS LAWYER, Oct. 28, 1996, at 2.

[6] The list of attorneys who have been approved for appointment to 11.071 death penalty appeals by the CCA is available online *at* http://www.cca.courts.state.tx.us/11071A08252000.htm. See discussion of the Joe Lee Guy case, *infra*, Chapter Six, for information about the attorney.

[7] *See* discussion of Ex parte Martinez, *infra*, at Chapter Six.

II. The Ideal: Basics of Competent Representation

To perform competently, a lawyer representing a defendant inmate in habeas corpus proceedings must do the following:

A. **Perform a thorough investigation of the case.**[8] The lawyer's first task is to carefully read the written record of the trial, but that is only the beginning. She must then contact and interview all important state witnesses; examine the files of all previous defense attorneys, looking for areas of the case which were not adequately developed; review the State's case file looking for indications that state witnesses may have given misleading testimony or that information may have been withheld from the defense lawyer; and assemble all available information about the defendant's background, including any history of mental health problems, brain damage, genetic disorders, or physical or sexual abuse. Of course, in some cases, the habeas attorney may find that the trial defense attorney has already thoroughly investigated all of these areas. However, as the previous section makes clear, it would be foolhardy to assume in any Texas case that the trial lawyer exhausted all possible avenues of investigation. The very purpose of habeas corpus appeals is to permit a vital final "safety check" of the previous work done on the case.

B. **Bring in new evidence to show violations of her client's rights.** Once a defendant is convicted, he is presumed guilty, and the jury's verdict is presumed correct. The inmate bears the burden of demonstrating that his conviction or sentence was tainted by error. The defendant must therefore develop new information, never heard by the jury, which demonstrates a serious violation of his constitutional rights. Claims based on evidence already presented at trial are reserved for the direct appeal, and are not appropriate for habeas corpus appeals.

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[8] The authorities are unanimous on the importance of thorough investigation to competent habeas representation:

> [Habeas] counsel should request that the state postconviction case be conducted, and should be prepared to conduct it, as a civil trial proceeding, initiated by her on behalf of the client, complete with frequent and productive interaction with the client; comprehensive prefiling and pretrial documentary, field, and legal investigation to identify and prepare to litigate the appropriate causes of action; careful pleadings; motions practice; evidentiary hearings; briefing; and any other procedures that counsel might use in civil litigation on a plaintiff's behalf.

1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRAC. & PROC. § 7.1a, at 274-75 (3rd ed. 1998) (LIEBMAN & HERTZ) (footnotes omitted); *see also* Clive A. Stafford-Smith & Rémy Voisin Starns, *Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOYOLA L. REV. 55, 90 (1999) ("If trial counsel did not prepare, then the [habeas] advocate must not only prove this . . . [but also] show the difference that the proper investigation would have made to the outcome of the trial. Obviously, the only way this can be done is to *perform the investigation himself*.") (emphasis added).

C. **Plead every possible claim**. As we have seen, the law gives death row inmates only one "bite at the apple," and every possible claim must be presented to the state court in order to obtain later review by the federal court system. A habeas attorney must err on the side of thoroughness. Every possible piece of evidence must be collected, and every possible legal argument must be made, in the state habeas proceeding. If it is not made there, any opportunity to make the argument very likely has vanished forever. As the American Bar Association advises, a habeas lawyer in a death penalty case must "seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing postconviction proceedings."[9]

III. The Study

Because the CCA was appointing inexperienced and unqualified attorneys to represent death row inmates, it was only a matter of time before stories emerged of lawyers who had made grievous errors in their handling of the appeals. Many such stories are examined in this Report. While the anecdotal evidence in itself is significant, the authors of this Report also conducted a systematic study of the quality of representation being provided by attorneys appointed under Article 11.071.[10] The study intended to evaluate whether Article 11.071 has improved the death penalty appeals process as promised. The initial findings are clear: it has not.

The quality of the work done by attorneys appointed to file 11.071 applications varies greatly. In a handful of cases (often when an inmate is represented by a large civil law firm), the habeas application is comprehensive and detailed, and is bolstered by several volumes of exhibits. However, in a substantial portion of cases, the habeas applications are sketchy, and the issues raised are stale record-based claims inappropriate for habeas applications. In many cases, appointed attorneys apparently performed little or no work at all and simply cribbed already rejected pleadings from prior appeals and filed them – almost verbatim – with the same court.

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[9] ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, at 98. Available at http://www.capdefnet.org/ABA_appoint_guide.htm.

[10] The methodology of this study is described in Appendix One; a summary of the study results are reflected in Appendix Five.

A. Extremely Brief Habeas Petitions

And I'll look through a [habeas] writ, and I'll just think, 'Is this all I'm getting because there wasn't anything else, or is this all I'm getting because someone wasn't putting a lot of time into it?'

D. Hendrix, Law Clerk, Court of Criminal Appeals, commenting on the quality of Article 11.071 appeals[11]

Of the 103 applications reviewed for the study, 18 applications (17.5%) were 15 pages long or less, and 36 applications (35%) were 30 pages or less. Eight applications were each under *ten* pages long[12] – an astonishing feat, as it is difficult to fit even the most rudimentary procedural matters into five pages. Habeas corpus applications filed by adequately funded, experienced counsel routinely run over 150 pages, because that amount of space is necessary to address both the factual issues in the case and the extraordinarily complex law applicable to habeas litigation.

One of the two shortest petitions – a mere three pages long – was filed on behalf of Robert Earl Carter on October 6, 1997.[13] The lawyer advised the court that he was relying on the arguments made in the direct appeal brief in the case, and further advised the court that both of his arguments had recently been "rejected" by the CCA.[14] The lawyer denied the need for an evidentiary hearing[15]– a request so routine and essential to protecting the client's rights that even the most inexperienced habeas corpus attorneys usually file one.

The lawyer who filed Mr. Carter's habeas petition *did not even sign it.*[16] Not only did the State decline to reply to the petition, the trial court did not issue fact findings denying it, even

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[11] ABC News Nightline (Sept. 15, 2000).

[12] *See* state habeas corpus applications filed on behalf of James Rexford Powell, Gustavo Julian Garcia, Johnny Joe Martinez, Ricky Eugene Kerr, Robert Earl Carter, Paul Richard Colella, Bryan Eric Wolfe, and Joe Lee Guy.

[13] *See* Application for Habeas Corpus to the Court of Criminal Appeals, Ex parte Robert Earl Carter, Trial Court No. 8003A, Writ No. 35,746 (Tex. Crim. App. 1997).

[14] *Id.* at 1-2.

[15] *Id.* at 2.

[16] *Id.* at 3.

though both steps are clearly required by Article 11.071.[17] The clerk transferred the appeal to the CCA on October 16, 1997 – ten days after the petition was filed. The CCA overlooked the fact that it did not even have a lower court decision to review, and denied Carter relief in a two-page order issued on November 19, 1997.[18] The entire file of Robert Earl Carter's state habeas appeals is fewer than ten pages long. In federal court, Mr. Carter's new counsel tried to flesh out the minuscule three-page petition which had been filed on his behalf in state court. That task proved impossible, and Carter was executed on May 31, 2000.[19]

Ricky Kerr also had a three-page habeas petition filed on his behalf. His lawyer later submitted a sworn affidavit admitting that filing such a brief and superficial appeal was a "gross error in judgment."[20] The CCA also denied relief in his case.

Q. 11.071 writs in some cases have some lawyers filing basically very small, very insignificant writs when they haven't interviewed the witnesses, haven't done an investigation. The court has approved those. It hasn't found ineffective assistance of counsel. I wonder what your thinking on that is.

A. Oh, there have been some, that if I had been an attorney, I would have been ashamed to file. We see those that were caught in the trap.

Interview with CCA Presiding Judge Michael J. McCormick, Voice for the Defense, January/February 1999, at 17.

B. Absence of Extra-Record Claims

Although extremely short habeas petitions are a clear indicator of ineffective performance by counsel, longer ones may prove no better. The most pervasive problem in the representation provided to state habeas applicants is the failure of appointed counsel to raise

[17] Article 11.071 specifies that the state "shall" respond to a habeas corpus application and that the district court "shall" enter an order recommending the grant or denial of the application. TEX. CODE CRIM. PROC. art. 11.071 §§ 7(a) & 8(b).

[18] Order, Ex parte Carter, Writ No. 35,746.

[19] *See* Carter v. Johnson, No. 99-50392 (5th Cir. Nov. 2, 1999) (unpub.).

[20] Application for Writ of Habeas Corpus Filed Pursuant to Art. V, sec. 5, Exhibit 1, Ex parte Kerr (CCA No. 35,065).

extra-record claims. Appointed state habeas counsel is under a statutory obligation, as well as an ethical duty, to "investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus."[21] Our study reveals that in 44 of 103 cases reviewed, counsel's application failed to include any extra-record evidence.[22] In other words, 42.7% of these applications indicated *on their face* that appointed counsel had not conducted the meaningful investigation mandated by statute. In only 15 of the 103 files examined (14.5%) did the state habeas lawyer ask the court for discovery – a process which permits the court to order factual development relevant to an inmate's claims. If discovery is not requested in state court, it is not available later in federal habeas corpus proceedings.[23]

Simply put, almost 43% of the writ applications we reviewed contained only record-based claims, which the CCA will not address in habeas corpus proceedings. In each of these cases, therefore, there was absolutely nothing for the courts to consider.

C. Verbatim Copies and Boilerplate Claims

The errors described above, as egregious as they are, all seem to be the product of ignorance. However, another class of faulty habeas applications may fit into a different category. Many attorneys appointed under Article 11.071 simply rehash – or even copy verbatim – claims already presented in the direct appeal and rejected by the courts. Not only does this approach deny the inmate the investigation which is critical to proper habeas representation, it also completely ignores the strict distinction between record-based and extra-record claims, and guarantees that the inmate will lose. For these inmates, the habeas appeal is literally over before it begins.

The study found a startling number of cases in which it was evident that the attorney had merely copied the direct appeal and re-submitted it as a habeas application. In Ex parte Crawford,[24] for instance, the appointed habeas lawyer filed a 44-page application raising 12 claims. All 12 claims were identical to the claims raised in the already-rejected direct appeal.[25]

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[21] TEX. CODE CRIM. PROC. art. 11.071 § 3(a).

[22] Indeed, in a number of cases, habeas counsel simply repeated the unsuccessful arguments that were raised and rejected on direct appeal. For example, in Ex parte Crawford, Writ. No. 40,439-01 (Tex. Crim. App. 1998), habeas counsel raised 12 claims, all of which were identical to issues that had already been raised and rejected on direct appeal. Relief was denied on this basis. Similarly, in Ex parte Gribble, Writ. No. 34,968 (Tex. Crim. App. 1997), habeas counsel filed a 15-page application raising only two claims, both of which had been raised and rejected on direct appeal.

[23] *See* 28 U.S.C. § 2254(e) (prohibiting a hearing in federal court if the petitioner failed to develop the factual basis of the claims in state court).

[24] No. 40,439-01 (Tex. Crim. App. 1998).

[25] Given that almost 43% of the applications which we reviewed contain only record-based claims, it is quite probable that there are more habeas applications which mirror the direct appeal, at least in part.

A veteran Texas death penalty lawyer then intervened in the case. He informed the CCA that he had compared the direct appeal brief previously filed on Crawford's behalf with the habeas corpus application and found that the latter was "verbatim and exactly" copied from the earlier appeal.[26] Seeking permission to intervene, the lawyer declared that he was "shocked and amazed" by this conduct:

> Where an attorney appointed by the Texas Court of Criminal Appeals to represent a defendant on death row in the *crucial* habeas corpus proceedings, available on only a single occasion to these death row defendants, would file an *exact* "*carbon copy*" writ of habeas corpus based upon *another* attorney's brief on appeal, without apparently doing any other work, . . . such action by the attorney is a *clear violation* of the lawyer's responsibility to the habeas Petitioner.[27]

The new attorney volunteered to assist Crawford "pro bono"– that is, at no further expense to the State of Texas. Furthermore, he advised the CCA that Crawford's current attorneys consented to his involvement.[28] The CCA ignored the new attorney's arguments. On May 5, 1999, in a cursory two-page order, the Court denied permission to intervene, without addressing whether the original habeas attorney had performed effectively. Five days later, again without comment, the Court denied the original "carbon copy" appeal.[29]

Similarly, in Ex parte Gribble,[30] the appointed attorney filed a 15-page application raising four claims.[31] Each claim had already been raised and rejected by the CCA on direct appeal. The trial court found that "the Court of Criminal Appeals addressed the applicant's claims . . . in its opinion on direct appeal."[32] Mr. Gribble complained that his lawyer had violated the CCA's clear rule that "issues raised and rejected on direct appeal may not form the basis of state habeas relief," and asked for a copy of the court record so he could file his own appeal.[33] The CCA rejected both the habeas petition and Gribble's claim of ineffective assistance of counsel in an unsigned two-page order on October 29, 1997.[34]

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[26] Motion of *Pro Bono* Counsel for Leave to Intervene in Article 11.071 Review at 3, Ex parte Crawford, *supra* (filed Dec. 15, 1998).

[27] *Id.*

[28] *Id.* at 2.

[29] *See* Ex parte Crawford, No. 40,439-02 (Tex. Crim. App. May 10, 1999).

[30] No. 34,968 (Tex. Crim App. 1997).

[31] *See* Application for Writ of Habeas Corpus (Post-conviction), Ex parte Gribble, No. 87 CR0828-83, at 2-3 (122nd Dist. Ct. of Galveston County, Apr. 29, 1997).

[32] Order on Writ of Habeas Corpus at 2 (June 29, 1997). Later in its order, the court denied two more of Gribble's claims without noting that they had been addressed on direct appeal, but Gribble's petition reveals that they were previously raised on direct appeal. *Compare* Order at 3 *with* Application, *supra*, at 2.

[33] Motion to File an Out of Time Petition for Writ of Habeas Corpus, Ex parte Gribble, *supra*, at 2 (filed January 14, 1998).

[34] Order, Ex parte Gribble, *supra*.

of the story she narrates was an independent recollection of the memory of observation, and how much had been refracted through the prism of discussions with Ricky McGinn's antagonist, her mother, during the past eight or nine years?

Tex.R.Crim.Evid. 601(a)(2) places the power to determine a witness' competency into the hands of the trial judge. A ruling by the trial court will not be disturbed upon review unless an abuse of discretion is shown. Broussard v. State, 910 S.W.2d 952, 960 (Tex. Crim. App. 1995).

But in the instant case, the court did not exercise its discretion after inquiry, as it is implicit from Watson, supra, that it must. The court made its ruling instantly, without any inquiry whatsoever. The factors recited in Watson could not have been considered.

The court's failure to inquire into competency placed defense counsel in an untenable position. The testimony given was clearly devastating. For the defense to inquire further at that point, to seek the kind of details that would establish where the recollections came from before the jury, after they had already heard the gravamen of her testimony, would risk twisting the knife.

The State, on the other hand, which sponsored the witness, had every reason to seek the kind of corroborative detail which might, taken as a whole, vindicate the admission of the testimony as competent. But the State did

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not do so, and the court made no inquiry of its own. The testimony, taken as a whole, gives no indication of the capacity of the then three- or four-year-old Natasha to observe and understand the alleged events. Neither does it demonstrate her present ability to recall and narrate accurately a story from three-quarters of her life ago.

This Court, in reviewing the trial court's decision on the competency of a witness, takes into consideration the whole of the testimony of the witness, and not just the answers given on an initial inquiry into competency. Clark v. State, 558 S.W.2d 887, 890 (Tex. Crim. App. 1977); Fields v. State, 500 S.W.2d 500, 503 (Tex. Crim. App. 1973). Applicant asks that, in doing so, the Court also take into consideration the trial court's failure to exercise its discretion, and remand the case for a new punishment hearing pursuant to Arts. 44.251(c) and 44.29(c), V.A.C.C.P., or reform the sentence to imprisonment for life pursuant to Art. 44.251(b), V.A.C.C.P., as appropriate.

POINT OF ERROR NUMBER FOUR:

THIS CONVICTION IS INVALID AND THE APPLICANT WAS DENIED DUE PROCESS OF LAW HEREIN BECAUSE THE CONVICTION IS BASED ON ARTICLE 37.071, §2(f)(1), V.A.C.C.P., WHICH DIMINISHES THE STATE'S BURDEN OF PROOF FROM BEYOND A REASONABLE DOUBT TO THAT OF ONLY "PROBABLE."

Arguments

At the punishment phase of this trial jurors were given a charge that included questions and instructions required by Art. 37.071, §2(b), V.A.C.C.P. Specifically, jurors were

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Above are two pages from the direct appeal of a defendant who had been sentenced by a Texas court to death. Below are two pages from the same defendant's state habeas petition. Although the format and a few words have been modified, the habeas petition is otherwise identical to the direct appeal. This defendant's attorney at state habeas did almost no original work – he merely copied the claims that had already been written by another attorney, and rejected by the Texas courts.

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abuse of discretion is shown. *Broussard v. State*, 910 S.W.2d 952, 960 (Tex.Cr.App. 1996).

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Figure 1: Comparison of two pages from Ricky McGinn's direct appeal brief with the same claim in his state habeas application.

In Ex parte Anderson,[35] the appointed counsel filed an 18-page application which raised three claims. The trial court did not make findings of fact and conclusions of law denying relief. The CCA saw no need for them either. Noting that all three claims had been raised and rejected on direct appeal, the Court wrote, "we remain convinced of the correctness of our decision."[36]

In yet another case, the state habeas application was nearly a word-for-word copy of the direct appeal brief (there were minor changes – for example, the term "Appellant," which is used on direct appeal to refer to the convicted defendant, was changed to "Applicant" or "Petitioner"). *See Figure 1, infra.* At the end of this reprocessed direct appeal brief, the lawyer added a short boilerplate argument. The fact that the pleadings were identical did not elicit any comment from the CCA.[37]

On other occasions, appointed lawyers have simply reiterated "boilerplate" claims without attempting to tailor them to the specifics of the case at hand. The law requires, for example, that when alleging a trial lawyer's ineffectiveness for failing to investigate a certain issue, a habeas lawyer must provide the court with specific factual information which could have been located by the trial attorney and probably would have changed the outcome of the trial: "[I]t is not sufficient that a habeas petitioner merely alleges a deficiency on the part of counsel. He must affirmatively plead the resulting prejudice in his habeas petition."[38] To adequately plead prejudice stemming from ineffective assistance of counsel at punishment, for example, a petitioner must "present[] . . . specific evidence of . . . potentially mitigating circumstances."[39]

One lawyer filed essentially the same claim of ineffective assistance of counsel in four different cases without once providing "specific evidence" relevant to the claim.[40] On April, 18, 1997, the attorney filed a habeas application in Roy Gene Smith's case that raised only a single claim alleging that trial counsel was ineffective for failing to investigate the defendant's background and present mitigation evidence in support of a life sentence at the punishment phase of the trial.[41] This claim was completely unsupported by any allegation of mitigating evidence which could have been discovered.

Indeed, there is no indication that appointed counsel even made an attempt to discover any mitigation evidence. On April 23, 1997, the same attorney filed an application in Robert Campbell's case. This application consisted of two claims. One complained of a record-based

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[35] No. 43,459 (Tex. Crim. App. 1999).

[36] *Id.*

[37] Filing a brief which merely recycles an existing pleading is clearly not a time-consuming endeavor. However, there is no way to know how much time appointed counsel bill for this activity. The CCA refuses to release attorney payment information in Article 11.071 cases, even after relief has been denied in state court.

[38] Bridge v. Lynaugh, 838 S.W.2d 770, 773 (5th Cir. 1988).

[39] Rector v. Johnson, 120 F.3d 551, 564 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1061 (1998).

[40] The cases are Ex parte Smith, 977 S.W.2d 610 (Tex. Crim. App. 1998), Ex parte Campbell, No. 44,551 (Tex. Crim. App.) (unpub.), Ex parte McGowen, No. 63,222 (Tex. Crim. App.) (unpub.), and Ex parte Ogan, No. 54,893-A (Tex. Crim. App.) (unpub.).

[41] Ex parte Smith, *supra*, at 9-13.

error regarding jury instructions. The other claim was a virtually identical copy of the ineffective assistance claim raised in Smith.[42] The applications in Ex parte Ogan and Ex parte McGowen reprint the same claim almost verbatim.[43] None of the applications was over 30 pages long, none cited any extra-record material, and none contained any of the specific proof necessary to satisfy the applicable legal standard for gaining relief. The CCA, which appointed this lawyer, never inquired why he filed these boilerplate claims. Indeed, the Court has appointed him to five cases, and he remains on the list of "approved" 11.071 attorneys.

1. Are the Appeals Short Because the Trial Was Fair?

CCA Presiding Judge Michael McCormick was asked about some of these cases during a recent episode of *Nightline*. Without providing any specifics, he declared that he assumed the lawyers in these cases had diligently investigated them but found nothing to brief: "You can't make a silk purse out of a sow's ear."[44]

However, in at least four cases mentioned in this study, counsel appointed after state habeas counsel withdrew found, after thoroughly investigating the case for the first time, evidence of numerous serious constitutional violations. One case reviewed was Ex parte Guy.[45] Guy's appointed lawyer filed a state habeas application that was less than ten pages long and raised four record-based claims.[46] The trial court entered findings of fact and conclusions of law which were nearly identical to those submitted by the district attorney. The CCA affirmed the findings authored by the district attorney with no changes.

New counsel, a large law firm willing to represent Guy free of charge, was appointed in federal court. After completing an extensive investigation, Guy's new lawyers submitted a petition that was over one hundred pages long.[47] Federal habeas counsel discovered that Mr. Guy's trial counsel had his license to practice suspended five times in the past 15 years and was addicted to alcohol and cocaine during the time of Guy's capital murder trial. They also found that the investigator appointed to assist in Guy's defense at trial was simultaneously currying favor with the elderly and wealthy surviving victim, and was eventually named the executor of her estate. Not surprisingly, it was the defense investigator who developed some of the most damning evidence against Guy. Much of this information could easily have been discovered by state habeas counsel if she had simply reviewed the record on file with the CCA.

Not only did state habeas counsel fail to investigate the case, she also was not able to arrange for Guy's federal habeas appeal to be filed on time after he was denied relief in state

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[42] Ex parte Campbell, *supra*, at 22-26.

[43] Ex parte Ogan, *supra*, at 4-9; Ex parte McGowen, *supra*, at 13-17. In Ogan, this boilerplate claim was the only one raised.

[44] ABC News Nightline (Sept. 15, 2000).

[45] No. 40,437 (Tex. Crim. App.).

[46] *See id.*

[47] Application for Writ of Habeas Corpus, Guy v. Johnson, No. 00-CV-191 (N.D. Tex.)

court.[48] Mr. Guy's appeal had been dismissed, and his execution scheduled, when new lawyers stepped in and won the right to file a proper appeal in federal court.[49] The lawyer who handled Guy's case is still on the recently revised list of attorneys approved to handle 11.071 cases, even though she is now a prosecutor and has held that post for over eight months.

He was abandoned. My concern with Joe Lee Guy was that he get the process he deserved. He was getting robbed, getting robbed of federal habeas.
Former Assistant Attorney General Matthew Wymer

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, September 11, 2000, at A1.

In Ex parte Rousseau,[50] appointed counsel filed an 11-page state habeas application raising two record-based claims. The trial court signed the proposed findings of fact and conclusions of law filed by the district attorney, and the CCA affirmed those findings without change. After investigation, subsequent counsel filed a 120-page petition with 16 exhibits in federal court.[51] Among the 24 errors raised by federal counsel were the presentation of false evidence by the district attorney at trial; the suggestive nature of the identification procedures used with the only eyewitness in the case; and the claim that Mr. Rousseau is actually innocent of the crime. This evidence was readily available to state habeas counsel had he only investigated the case. The state habeas counsel who failed to discover these issues in Mr. Rousseau's case has filed at least three other Article 11.071 applications. *All three applications are under 15 pages long and not one raises any extra-record claims.* The lawyer is still on the appointment list.

A similar story unfolds in Ex parte Colella.[52] When Mr. Colella's conviction was affirmed on direct appeal, two judges dissented, stating their belief that the case against Colella was so weak that the record suggested he was actually *innocent of the crime*.[53] Nevertheless, Mr. Colella's appointed 11.071 attorney did not perform any meaningful investigation, and filed a

[48] *See* Response to Respondent Johnson's Motion to Dismiss and Petitioner's Motion for Equitable Tolling, Guy v. Johnson, No. 00-CV-27 (N.D. Tex. Mar. 7, 2000).

[49] *See* Order, Guy v. Johnson, No. 00-CV-27 (N.D. Tex. Mar. 8, 2000).

[50] Rousseau v. State, No. 43,534 (Tex. Crim. App. 1999).

[51] Rousseau v. Johnson, No. 00-CV-2588 (S.D. Tex).

[52] Ex parte Colella, No. 37,418-01 (Tex. Crim. App. 1998).

[53] Colella v. State, 915 S.W.2d 834, 859 (Tex. Crim. App. 1995) (Baird, J., dissenting, joined by Overstreet, J.) ("In conclusion, after a painstaking review of the entire record, I am convinced the non-accomplice evidence is insufficient to corroborate the accomplice witness testimony. I would reverse the judgment of the trial court and order an acquittal. Judge Learned Hand once wrote that 'our procedure has always been haunted by the ghost of an innocent man convicted. It is an unreal dream.' I fear, in the instant case, that unreal dream is a reality. I respectfully dissent.").

nine-page habeas application on his behalf. As noted earlier, this application was dismissed for late filing. Subsequent counsel, after an appropriate investigation, later filed a habeas application over 250 pages long, accompanied by five volumes of exhibits.[54] Investigation revealed that the court-appointed trial lawyer was denied co-counsel, was underpaid, had no previous death penalty experience, and was not provided with an investigator. The client, unbeknownst to his lawyer, was brain-damaged and had a long history of mental illness, including several suicide attempts by his tenth birthday. Investigation also supported claims that the prosecution had knowingly sponsored perjured testimony and knowingly misled the jury repeatedly throughout the trial. Each of these claims would have been discovered if state habeas counsel had conducted a thorough investigation.

In Article 11.071 proceedings, Johnny Joe Martinez was represented by a court-appointed attorney who filed a six-page habeas petition. When new lawyers were appointed in federal court, they discovered substantial additional mitigating evidence about his background that had not been discovered or presented to the jury by Mr. Martinez's trial lawyer. At a hearing into the adequacy of Mr. Martinez's representation in state habeas proceedings, the federal judge expressed his frustration with the poor representation Texas death row inmates were receiving: "I don't know what's holding up the State of Texas giving competent counsel to persons who have been sentenced to die."[55] Nevertheless, the judge later concluded that he was required by precedent to ignore all of Mr. Martinez's claims which had not been presented to the state court system (although it called that result "harsh"), and denied Mr. Martinez all relief.[56]

Mr. Martinez's case illustrates an additional dimension to the problem. The exhaustion requirement discussed earlier requires federal judges to ignore any fact or claim that was not previously introduced in state court. In 1991, the Supreme Court held, in a five-to-four decision, that the federal constitution does not entitle death row inmates to representation by competent lawyers in their state habeas corpus appeals.[57] Thus, even if a federal court agrees that the state habeas lawyer was abysmally incompetent, it is not entitled to review claims that lawyer missed in state court. For defendants like Martinez and Guy, therefore, the assistance of a competent lawyer may come too late, even if they are innocent or wrongly sentenced to die.

2. Incompetence, or Worse

In many Article 11.071 applications, the defendant's chances were dashed because his lawyer was so unfamiliar with the complexities of death penalty law that he inadvertently broke basic rules. In 1998, two death row inmates had their entire appeals dismissed because their lawyers filed them late, despite Article 11.071's clear warning that an attorney's failure to obey

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[54] *See* Original Application for Writ of Habeas Corpus Pursuant to Art. 11.071 § 4A, Ex parte Colella, No. 37,418-01 (357th Dist. Ct. of Cameron County, Aug. 18, 2000).

[55] Hearing Transcript at 19, Martinez v. Johnson, No. C-98-300 (S.D. Tex. April 16, 1999).

[56] *See* Order, Martinez v. Johnson No. C-98-300 (S.D. Tex.) (filed Aug. 18, 1999).

[57] Coleman v. Thompson, 501 U.S. 722 (1991).

the deadline would forfeit his client's entire appeal.[58] Two members of the CCA, in dissent, declared that "[t]o dismiss Smith and Colella as abuse of writ because their lawyers untimely filed writ applications borders on barbarism because such action punishes the applicant for his lawyer's tardiness."[59] The dissenters also questioned why the majority chose to strictly interpret the statutory filing deadline while at the same time loosely interpreting the requirement of competent performance to condone the behavior of an attorney whose avoidable mistake destroyed his client's only habeas appeal.[60] The Texas Legislature, under fire from observers both in Texas and nationally, later revised Article 11.071 to give these inmates a second chance at review.[61]

Other attorneys simply appeared unsure of what was expected of them, and therefore filed applications that were unclear even to the CCA:

> Applicant is represented by counsel appointed by this Court. The instant application appears to allege ineffective assistance of trial counsel, but also includes a wish list of discovery, research, and hearings necessary to represent applicant. No cases are cited. No analysis of the law is presented. Indeed, even the State recognizes this "application" appears to be a motion for discovery.[62]

In another case, a CCA judge observed:

> Applicant is represented by counsel appointed by this Court. The instant application is five and one half pages long and raises four challenges to the conviction. The trial record is never quoted. Only three cases are cited in the entire application, and no cases are cited for the remaining two claims for relief. Those claims comprise only 17 lines with three inches of margin.[63]

In dissent, Judge Baird declared that he would have ordered a hearing into whether Mr. Martinez had received competent representation. Just over one week later, the lawyer for Mr. Martinez submitted a "Motion for Reconsideration," which read as follows:

> Petitioner [sic] attorney . . . has handled many direct appeals but has never handled a post-conviction writ of a death penalty case and therefore must humbly agree with the dissenting opinion in this case (without joining in its reasoning) that merits of this application should not be reached. Also Petitioners [sic] attorney requests that he be allowed to withdraw from the case and another

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[58] Ex parte Smith, 977 S.W.2d 610 (Tex. Crim. App. 1998) (writ dismissed because counsel filed application nine days late); Ex parte Colella, Writ No. 37,418-01 (Tex. Crim. App. Jul. 15, 1998) (entire writ dismissed due to untimeliness).

[59] Ex parte Smith, 977 S.W.2d 610 (Tex. Crim. App. 1998) (Baird, J., dissenting).

[60] *See id.* at *4.

[61] *See* Art. 11.071 § 4A (amended 1999).

[62] Ex parte Wolfe, 1998 WL 278960, at *1 (Tex. Crim. App. May 20, 1998) (Baird, J., dissenting).

[63] Ex parte Martinez, 1998 WL 211569, at *1 (Tex. Crim. App. Apr. 29, 1998) (Baird, J., dissenting).

lawyer be appointed to represent Petitioner in this cause.[64]

The CCA, far from dismissing the lawyer and ordering the hearing to which the attorney himself had consented, instead sent him a letter informing him that the Rules of Appellate Procedure clearly forbade "motions for reconsideration" in habeas cases, and ordered him to continue representing Mr. Martinez. This attorney is still on the list of approved counsel for Article 11.071 cases.

The clearest example of the CCA's lack of concern about the competence of the habeas attorneys it appoints is the notorious case of death row prisoner Ricky Kerr.[65] Kerr's CCA-appointed habeas lawyer – who had no capital post-conviction experience and had been licensed to practice law for less than three years[66] – failed to file *any* cognizable challenge to Kerr's conviction or sentence. Instead, he lodged a single generic attack on the 1995 amendments to the Texas state habeas statute.[67] The trial court – noting that Mr. Kerr's counsel had not raised a single specific challenge to his conviction or death sentence – denied the application and scheduled Mr. Kerr's execution.[68] When the case arrived at the CCA for review, it was clear that Kerr's attorney had failed to investigate the case or raise any challenges that could be properly heard in a habeas corpus proceeding. Yet the Court accepted the pleading filed by Kerr's lawyer and denied relief.

> ***If applicant is executed as scheduled, this Court is going to have blood on its hands for allowing [it]. By this dissent, I wash my hands of such repugnance.***
>
> Former CCA Judge Morris Overstreet, dissenting to the Court's denial of Ricky Kerr's Petition

Kerr, represented later by appropriately qualified volunteer counsel, returned to the CCA to request an opportunity to prepare and file a proper application for habeas relief. The Court dismissed Kerr's request without further comment as an "abuse of the writ." Judge Overstreet condemned the majority's action in the strongest terms:

> Must applicant suffer the ultimate punishment, death, because of his attorney's mistake? According to a majority of this Court, yes, he must. . . . For this Court [to] refuse to stay this scheduled execution is a farce and travesty of applicant's legal right to apply for habeas relief. It appears that this Court, in approving such

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[64] Motion for Reconsideration, Ex parte Martinez (CCA No. 36,840).

[65] Ex parte Kerr, 977 S.W.2d 585 (Tex. Crim. App. 1998) (Overstreet, J., dissenting).

[66] Janet Elliott, *Habeas System Fails Death Row Appellant*, TEXAS LAWYER, Mar. 9, 1998, at 1, 25.

[67] The attorney subsequently conceded that his "decision concerning how to protect Mr. Kerr's rights under 11.071 may have been a gross error in judgment" and that "[i]t may be that I was not competent to represent Mr. Kerr in a death penalty cause." *Id.* He also described meritorious claims of error he had not asserted owing to his misunderstanding of Texas law. *Id.*

[68] *Id.*

> a charade, is punishing applicant, rewarding the State, and perhaps even encouraging other attorneys to file perfunctory "non-applications." Such a "non-application" certainly makes it easier on everyone – no need for the attorney, the State, or this Court to consider any potential challenges to anything that happened at trial. . . . I do not know what the majority thinks is going to happen to applicant, but he does have an imminent execution date set. If applicant is executed as scheduled, this Court is going to have blood on its hands for allowing [it]. By this dissent, I wash my hands of such repugnance.[69]

A federal district judge stayed Mr. Kerr's execution the same day, two days before it was scheduled to occur. After reviewing the course of events in state court, the federal judge concluded that the State's decision to appoint a woefully inexperienced lawyer to represent a death row inmate "constituted a cynical and reprehensible attempt to expedite [Kerr's] execution at the expense of all semblance of fairness and integrity."[70]

Kerr is only the most widely known case in which state habeas counsel appointed by the CCA failed to perform basic tasks associated with representation. In a number of other cases, the attorney appointed by the CCA simply failed to file his client's habeas application by the applicable deadline.[71] The CCA reacted by dismissing each such filing as an "abuse of the writ," on one occasion remarking that if the result of such a harsh interpretation of the habeas statute were "barbarous," it was the Legislature's job to correct it.[72] Remarkably, the majority in Smith acknowledged that the appointed counsel in that case had filed Smith's habeas application late even after having been warned by the CCA's Executive Administrator that by doing so she ran

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[69] Ex parte Kerr, 977 S.W.2d 585, 585 (Tex. Crim. App. 1998) (Overstreet, J., dissenting).

[70] Memorandum Opinion and Order, Kerr v. Johnson, Civ. No. SA-98-CA-151-OG, at 18-20 (W.D. Tex. Feb 24, 1999) (emphasis added).

[71] *See* Ex parte Smith, 977 S.W.2d 610 (Tex. Crim. App. 1998) (dismissing late-filed initial application as an "abuse of the writ"); Ex parte Colella, 977 S.W.2d 621 (Tex. Crim. App.1998) (same).

[72] *Id.*

the risk of having the application dismissed outright.[73] As Judge Baird pointed out in dissent:

> The majority alleges applicant's counsel disregarded information from this Court's Executive Administrator regarding the time to file this writ. . . . If this is true, then CLEARLY counsel was incompetent and her continued representation of applicant violated Tex. Code Crim. Proc. Ann. art. 11.071, Sec. 2(a). Why the majority fails to acknowledge [that] applicant did not receive the statutorily mandated assistance of competent counsel is frustrating, especially when it appears our staff was on notice regarding counsel's failings. . . . In [dismissing the instant application as untimely filed], the majority wholly ignores that WE failed in our duty to appoint competent counsel. By choosing this selective construction of the statute, the majority willfully violates the intent of article 11.071. Applicant has not had his "one bite at the apple" through no fault of his own. Indeed, the fault lies with this Court by appointing less than competent counsel.[74]

These cases represent only the tip of the iceberg. The Court of Criminal Appeals is frequently confronted with stark evidence that the attorneys it has appointed in other state habeas cases are failing to perform basic and necessary tasks; yet the court stubbornly refuses to intervene to correct the situation. In the case of Joe Lee Guy, discussed *supra*, the fact that Guy's trial counsel was undergoing treatment for drug and alcohol addiction, and the fact that the defense investigator at trial had become the beneficiary of the surviving victim's will, were all readily apparent from a cursory review of the CCA's files in the case. Also readily available was the nine-page state habeas application, which failed to mention either the addiction of counsel or the bias of the investigator. The conclusion is unavoidable: either the judges and/or their staff fail to read the file, or they do read it, but ignore such egregious examples of incompetence and constitutional error. At best, one or two judges out of nine may express concern, focusing on the inadequacy of counsel's representation.[75] Despite being fully aware of this far-reaching problem, the Court of Criminal Appeals has never, in any case, removed appointed habeas counsel because of incompetence.[76]

A relatively recent CCA decision suggests that more severe consequences may flow from

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[73] Smith, 977 S.W.2d at 610.

[74] *Id.* at 614 (Baird, J., dissenting) (emphases in original).

[75] *See, e.g.*, Ex parte Wolfe, 977 S.W.2d 603 (Tex. Crim. App. 1998) (Baird, J., dissenting) (pointing out that the only pleading filed by "counsel appointed by this Court" is not an application for habeas relief, but apparently "a motion for discovery," and urging that court remand for an inquiry into whether the defendant had received the assistance of "competent counsel" as required by statute).

[76] Indeed, when inmates who have become aware that their attorneys are conducting no investigation have asked the CCA *pro se* for appointment of new, competent counsel, the CCA has denied those requests without comment. *See, e.g.*, Ex parte Gribble, Writ No. 34,966 (Tex. Crim. App. 1997) (denying defendant's request that the Court strike the four-claim, 15-page writ filed by appointed counsel and replace it with the defendant's own *pro se* application); Ex parte Bigby, Writ No. 34,970 (Tex. Crim. App.) (denying *pro se* motion for substitution of counsel).

counsel's failure to investigate facts outside the trial record as the basis for claiming a violation of the defendant's rights.[77] Prior to 1998, a Texas defendant seeking habeas corpus relief could raise constitutional claims based on events reflected in the trial record, as well as those based on "extra-record" facts.[78] In late 1998, however, the CCA for the first time refused to review the merits of a claim that was part of the trial record and therefore could have been, but was not, raised on direct appeal. At least one judge subsequently expressed the opinion that in the wake of this apparent change in the law, "every record claim not raised on direct appeal [is] procedurally defaulted."[79] If that is correct, then in nearly 43 % of the cases we have examined, *see supra*, the lawyer appointed by the CCA filed *no claims which could even be reviewed.* This is a staggering rate of non-performance, because under the strictly enforced technical rules that govern federal habeas proceedings, defendants in those cases will receive *no federal review whatsoever* of the claims presented in their state habeas applications.[80] As a practical matter, those defendants' right to post-conviction review ended when the CCA appointed counsel.

IV. Conclusion

The results of this study confirmed our worst fears. Attorneys without the necessary experience are being appointed to capital post-conviction cases, and are committing the grossest blunders imaginable – such as failing to perform any investigation, pleading only stale record-based claims, or submitting skeletal habeas petitions under ten pages in length. The CCA, charged with ensuring that death row inmates receive "competent" representation, has turned a blind eye to cases of inadequate habeas representation – even when the habeas attorney himself questions his own effectiveness. The end result is a system in crisis which is producing unreliable results.

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[77] Ex parte Gardner, 959 S.W.2d 189, 199 (Tex. Crim. App. 1998).

[78] Previous Texas cases had held that any claim of federal constitutional dimension could be raised for the first time by application for habeas corpus relief, even if not raised on direct appeal. *See* Ex parte Dutchover, 779 S.W.2d 76, 78 (Tex. Crim. App. 1989) (Clinton, J., concurring) (noting Texas rule that any federal constitutional claim could be raised for the first time in an application for habeas corpus relief); Ex parte Banks, 769 S.W.2d 539 (Tex. Crim. App. 1989) (same); Ex parte McLain, 869 S.W.2d 349, 350 (Tex. Crim. App. 1994) (same).

[79] Ex parte Rojas, 981 S.W.2d 690 (Tex. Crim. App. 1998) (Baird, J., dissenting on other grounds).

[80] The Gardner rule makes it essential for direct appeal counsel to raise every conceivable record-based claim to preserve it for later federal review. See Chapter Eight, *infra*.