CHAPTER EIGHT

The Myth of Meaningful Appellate Review

I. Introduction

In the quarter-century since the Supreme Court reauthorized the death penalty in 1976, it has become commonplace to assume that a wrongful execution is unlikely because death penalty cases receive seemingly endless rounds of careful appellate and post-conviction review. During those appeals, it is widely believed, both the procedural fairness of the original trial and the factual accuracy of the underlying verdict are carefully scrutinized by successive waves of conscientious state and federal judges. Politicians of every stripe, at every level of government, have encouraged this view – even decrying some appeals as "frivolous" given the existing level of protection. As a result, many people assert confidently that redundant post-trial safeguards ensure that no one will be put to death in the face of doubt about either his guilt or the fairness of his trial.

In Texas, nothing could be further from the truth. While the system of appellate and post-conviction review in state and federal court may once have permitted a tolerable level of confidence in the accuracy and integrity of the death verdicts imposed by Texas juries, that is no longer the case. In recent years, changes in appeal procedures have limited both the opportunities for review and the depth of scrutiny traditionally applied to such judgments by the courts, both at the state and federal level. At the same time, many of the judges responsible for enforcing the most basic constitutional protections for Texas defendants have either abandoned that duty or actively worked to expedite the pace of executions at the cost of thoughtful, searching review.

Thus, the popular perception that prisoners on Texas's Death Row receive extensive and meaningful post-trial review of their cases is a myth. Unlike some myths, however, this one is pernicious for at least two reasons. First, it creates a false and unjustified level of comfort with Texas's death penalty juggernaut. Second, it undermines the possibility of fundamental reform by effectively "covering up" precisely the type of injustices that would otherwise inspire demands for change.

II. Gary Graham: A Case Study of the Myth in Action

The case of Gary Graham is one of the clearest, and certainly one of the most recent, examples of the myth of appellate review in action.[1] Graham was convicted of shooting a man in the parking lot of a Houston supermarket. The prosecution's entire case rested on the testimony of a single eyewitness; no other evidence linked Graham to the crime. Graham's

[1] Gary Graham, by the time he was executed, had taken the name Shaka Sankofa. We refer to him as Gary Graham simply because it is by that name that he was most widely known.

initial post-conviction proceedings in state and federal court – which were handled by a volunteer lawyer at a time when Texas courts did not appoint or pay attorneys to handle habeas appeals – focused largely on technical questions about the jury's sentencing instructions.[2]

After Graham's initial habeas proceedings proved unsuccessful and an execution date was set, his new post-conviction attorneys launched an investigation into Graham's longstanding claim of innocence. They discovered other witnesses from the parking lot who were certain that Graham was not the person they had seen commit the murder, as well as other information undermining the reliability of the sole eyewitness's account.

These discoveries and the development of this supporting evidence took place, for the most part, in 1993-94. Gary Graham spent the next six years trying to obtain an evidentiary hearing, in some court, somewhere, at which the strength of his newly developed evidence of innocence could be measured against the prosecution's single claimed eyewitness. Graham filed at least three separate state habeas petitions and three separate federal habeas petitions, as well as a civil lawsuit against the Texas Board of Pardons and Paroles, all asking for one thing: a live, fair hearing. He never got it. The state courts, employing a procedure discussed in detail *infra*, initially denied relief by adopting "findings" authored by the prosecutor.

The federal courts thereafter refused to consider Graham's evidence of innocence because it had not been fully presented to the state courts – although that was due to the prosecutors' failure to disclose certain evidence until after the state proceedings were, for all practical purposes, concluded.[3] Emphasizing that "[t]he issues in this case are almost exclusively factual, and the relevant factual scenario is complex, highly controverted, and in many respects unresolved," the Fifth Circuit sent Graham back to try again in state court.[4] After he filed another state habeas application, the Court of Criminal Appeals rejected it on technical procedural grounds without reviewing the merits of his claims. This time, the Fifth Circuit dismissed his case under the authority of procedural provisions of the 1996 amendments to the federal habeas statutes – again, without conducting *any* review of the merits of Graham's claims.[5]

Thus, the record of Gary Graham's post-conviction proceedings based on his evidence of innocence reveals two things: First, the state courts, which purported to review the merits of his claims (at least initially), never conducted any sort of hearing despite the existence of hotly

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[2] Graham's first lawyers challenged whether the Texas capital sentencing statute permitted appropriate consideration of mitigating factors such as his youth (Graham was 17 years old at the time of the crime). This legal issue – which involved no questions about Graham's guilt or innocence – eventually produced five opinions, three in the Fifth Circuit and two in the United States Supreme Court. *See* Graham v. Lynaugh, 854 F.2d 715 (5th Cir. 1988) (denying relief), *vacated and remanded*, Graham v. Lynaugh, 492 U.S. 915 (1989); *on remand,* Graham v. Collins, 896 F.2d 893 (5th Cir. 1990) (granting relief), *superseded on rehearing en banc*, Graham v. Collins, 950 F.2d 1009 (5th Cir 1992) (en banc) (denying relief), *cert. granted and aff'd on other grounds*, Graham v. Collins, 506 U.S. 461 (1993).

[3] *See* Graham v. Johnson, 94 F.3d 958 (5th Cir. 1996).

[4] *Id.*at 970-971.

[5] Graham v. Johnson, 168 F.3d 762 (5th Cir. 1999).

disputed factual allegations directly relevant to whether Gary Graham was innocent or guilty. Second, the federal courts never reviewed the merits of these particular claims *at all.*

Nevertheless, Texas officials repeatedly declared that Graham's case received "super due process" because his case was reviewed by "33 different judges" in separate proceedings. This colorful description was echoed by everyone from local prosecutors to the state Attorney General to Governor George W. Bush. It appears to have taken hold of the popular imagination as well; many people now accept the outcome in Graham precisely because they believe that the question of his innocence was repeatedly and carefully examined by judges at every level. This is simply not so.

To appreciate the growing inadequacy of appellate and post-conviction review of Texas death penalty cases, and how that system can produce a result like the one in Gary Graham's case, it is first necessary to understand the legal and political context in which that review takes place.

III. Legal Context

An overview of the three stages of review – direct appeal, state habeas, and federal habeas – which take place in Texas death penalty cases is set forth in Chapter One. Further details regarding its intricacies, and the invidious manner in which it provides the appearance, but not the substance of meaningful review, are set forth below.

IV. Political Context

The political context in which appellate and post-conviction review of Texas death penalty cases unfolds is at least as important as the legal context. Judges at both the trial and appellate level are elected, and the elections are partisan. Thus, Texas has Republican and Democratic judges, and the elections for judicial office are fiercer and more tendentious than those in non-partisan systems.

Equally important, Texas shares with only a handful of other states the distinction of having separate high courts for civil and criminal matters. The Texas Supreme Court hears no criminal cases; those cases, instead, are finally decided by the nine judges of the Texas Court of Criminal Appeals ("CCA"). Because the Court of Criminal Appeals deals only with criminal cases,[6] election campaigns for seats on the CCA frequently resemble local prosecutors' races, with each candidate vying for the mantle of "toughest on crime." In Texas, appearing "tough on crime" means expressing unqualified enthusiasm for the death penalty, denying or minimizing

[6] By virtue of its limited jurisdiction, open seats on the CCA tend to attract criminal law specialists who are experienced at politics and have a pre-existing institutional political base. As a practical matter, this means former county and district attorneys are better positioned than criminal defense lawyers to run and win such races. This may explain why five of the nine judges on the Court of Criminal Appeals today are former felony prosecutors, while only one is a former criminal defense attorney.

systemic problems with its administration, and resisting many reforms which might reduce death sentences or executions.[7] United States Supreme Court Justice John Paul Stevens has correctly pointed out that "present-day capital judges [face] a political climate in which judges who covet higher office – or who merely wish to remain judges – must constantly profess their fealty to the death penalty."[8]

The recent political history of the CCA confirms that even traditionally conservative judges may find themselves out of a job if they enforce the rights of unpopular defendants. After the CCA reversed a death penalty conviction in a notorious Houston murder case by enforcing a mandatory statute governing jury selection practices,[9] a former chairman of the state Republican Party called for Republicans to take over the Court in the 1994 election.[10] In the heated race that followed, an unknown attorney from Houston, Stephen W. Mansfield, unseated a long-time conservative incumbent on the CCA by emphasizing his own enthusiasm for capital punishment, promising increased use of the "harmless error" rule to affirm convictions and death sentences, and threatening sanctions for defense attorneys who file "frivolous appeals."[11]

The judges' fear of looking soft on the death penalty may help explain the CCA's refusal to correct its own previous incorrect rulings in capital cases. On at least two occasions, the Court has squarely acknowledged in a published opinion that its earlier decision to affirm a particular death sentence was mistaken, only to shrink from correcting that error when given an opportunity to do so at a later date when execution was imminent. For example, prior to his capital murder trial, Kenneth Granviel's attorneys had sought funds to hire a mental health expert to assist in presenting his insanity defense. The trial court instead ordered a "neutral" expert to examine Granviel and give his report to both Granviel's attorney and the prosecutor. Shortly thereafter, however, the CCA reversed its position and held in DeFreece v. State that the defendant – like the State – is indeed entitled to hire an independent expert.[12] But when Granviel returned to the CCA and asked for a new trial based on its conclusion in DeFreece, he was turned down in a one-page order saying that he had "abused the writ," without further explanation.[13] Granviel was then executed.

Troy Farris fared no better. Farris argued on direct appeal that the trial judge's rulings resulted in his being tried by a biased jury in violation of his Sixth Amendment rights. The CCA

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[7] *See generally* Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805 (June 2000).

[8] Harris v. Alabama, 513 U.S. 504, 519 (1995) (Stevens, J., dissenting).

[9] Rodriguez v. State, 848 S.W.2d 141 (Tex. Crim. App. 1993).

[10] *See* Stephen P. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 761-62 (1995) (hereafter Bright, *Politics of Death*).

[11] *Id.*

[12] 848 S.W.2d 150, 154 (Tex. Crim. App. 1993) (specifically criticizing the outcome in Granviel's trial).

[13] Ex parte Granviel (CCA No. 71,097).

disagreed and affirmed Farris's death sentence.[14] Three years later, however, faced with what it called a "factually indistinguishable" issue in a subsequent capital appeal, the Court realized its error and overruled Farris as "wrongly decided."[15] Farris then returned to the CCA and asked it to apply the same rule in his case, relying on an exception to the rule against repeated habeas appeals which allowed inmates to file additional writs when the "legal basis for [their] claim was unavailable" during their first trip through the appeals process.[16] The Court instead issued a one-page form order calling Farris's subsequent application for relief an "abuse of the writ," and allowed his execution to go forward without further explanation. When asked why the CCA had not explained its decision, Presiding Judge Michael McCormick said, "[T]hey should know they didn't satisfy the requirements [to file a second writ]. I don't know that we have to tell them why they didn't satisfy it."[17]

Troy Farris is believed to be the only defendant in the United States since Furman to be executed notwithstanding the existence of a formal court opinion expressly declaring his death sentence unconstitutional.

Some members of the court have played a role in proposed legislative reforms. For example, it was reported that CCA Presiding Judge McCormick worked behind the scenes in 1999 to defeat passage of a law which would have prohibited executing persons with mental retardation.[18] Ultimately the bill was scuttled in the Texas House of Representatives.

The effect of political pressures also appears obvious in cases where the Court actually *changed the law* to deny relief in some cases. Cesar Fierro's case is exemplary. Under interrogation after his arrest in El Paso, Fierro confessed to having killed a taxi driver. El Paso police officers had told Fierro, however, that his parents were being held across the border in a prison notorious for brutality and torture. They would be released, Fierro was told, only after he confessed. During the pretrial hearing, the chief investigating officer testified falsely that the El Paso police had not known, while they questioned Fierro, that his family was being held in Mexico. Lawyers for Fierro later discovered the truth and sought habeas relief based on the prosecution's knowing use of false testimony. The Court of Criminal Appeals denied relief by a five-to-four vote, but only by adopting a new standard for harmless error in habeas corpus proceedings.[19] Under previous law, it is clear Fierro would have received a new trial – indeed, at his state habeas hearing, the trial prosecutor himself urged that result.[20] But the CCA's majority

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[14] Farris v. State, 819 S.W.2d 490, 501 (Tex. Crim. App. 1990).

[15] Riley v. State, 889 S.W.2d 290, *aff'd on reh'g*, 889 S.W.2d 297, 298 (Tex. Crim. App. 1993).

[16] TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(1).

[17] John Council, *Writs and Wrongs; Farris Case Bolsters Concerns Over Subsequent Habeas Petitions*, TEXAS LAWYER, Feb. 15, 1999, at 1.

[18] Janet Elliot, *McCormick Critical of Ban on Death Sentences for Retarded*, TEXAS LAWYER, May 31, 1999, at 4. *See also* discussion in Chapter Five.

[19] Ex parte Fierro, 934 S.W.2d 370 (Tex. Crim. App. 1996). For further information about Fierro's case, see Chapter Two, supra.

[20] It is also noteworthy that the CCA justified its adoption of a new standard in Fierro by reference to United States Supreme Court decisions requiring a greater showing of harm to warrant reversal in habeas corpus

decided to change the law rather than grant relief.

Perhaps it is discomfort at this very public consequence of its decision-making that causes some of the judges to protest that their "hands are tied" by the law. Asked in an interview why the court did not simply grant Fierro a new trial, Presiding Judge McCormick responded:

> That arguably is the equitable thing to be done. But criminal law and equity law are two different matters. We have a set of rules that we have to follow. And in following those rules, sometimes the decision that is made is not the one that you and I and common sense would make.[21]

The CCA's written opinions sometimes suggest that the court is not reviewing cases with care in death penalty appeals. For example, in 1997 the CCA affirmed the conviction and death sentence of Jesus Ledesma Aguilar.[22] The Court's opinion, by Judge Sue Holland, described testimony that a man named Albino Garcia saw Aguilar with the murder weapon. Although such claims were asserted in the prosecutor's opening statement, they were never proved at trial. After defense counsel protested in a motion for rehearing, the CCA simply re-issued its opinion a few months later, omitting the reference to the never-presented testimony, but offering no explanation for its mistake.

In another instance, the Court botched its review of the case of condemned defendant Danny Lee Barber, who argued on direct appeal that the testimony of prosecution psychiatrist Clay Griffith, M.D., had been erroneously admitted at the punishment phase. The Court of Criminal Appeals held that Barber's rights were not violated because Griffith "did not testify [at trial] on the issue of future dangerousness."[23] That conclusion, however, was directly at odds with the trial record – because Griffith *did* testify at trial that Barber was a "future danger." When Barber sought habeas corpus relief, urging that the Court had made a serious mistake, the Court denied relief and refused to acknowledge its error. Had the CCA not misread the record when Barber originally raised this argument, he would likely have been awarded a new sentencing hearing. Despite the fact that the mistake was made by the *Court*, and not Barber, he was denied relief and eventually executed.

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proceedings. Although two leading United States Supreme Court cases on the prosecution's use of perjured testimony, Napue v. Illinois, 360 U.S. 264 (1959), and United States v. Bagley, 473 U.S. 667 (1985), clearly applied a more lenient harm standard than the CCA wanted to impose, the Fierro majority dismissed those opinions as irrelevant because "Napue and Bagley both involved direct [appeals] rather than collateral attacks." Fierro, 934 S.W.2d at 372. The majority was flatly mistaken – both Napue and Bagley involved post-conviction [collateral] attacks, and thus were directly relevant to the circumstances presented by Fierro. *See* Bagley, 473 U.S. at 671 (case arose when Bagley "moved under 28 U.S.C. § 2255 [the post-conviction statute for federal prisoners] to vacate his sentence"); Napue, 360 U.S. at 264 (noting that Napue brought his claim of perjured testimony via "a petition for a post-conviction hearing"). The Court's argument was thus based on an elementary legal mistake.

[21] Interview on ABC News Nightline (Sept. 15, 2000).

[22] Aguilar v. State, No. 72,470 (Tex. Crim. App. 1997) (unpub.).

[23] Barber v. State, 757 S.W.2d 359, 363-367 (Tex. Crim. App. 1988).

V. The Two Worst Flaws in the State Habeas Process

As we have seen above, there are significant problems with the CCA's review of capital cases on direct appeal. The flaws in the Court's review of death penalty habeas corpus matters, however, are more serious. Two features of the system in particular, however, deserve extended comment, because their consequences reach far beyond the state habeas proceeding itself: (1) the procedure by which most trial courts resolve the factual disputes that underlie capital habeas claims; and (2) the performance of appointed capital habeas counsel.

A. Manufacturing the "Facts"

As noted above, habeas corpus proceedings typically involve claims about the fairness of the original trial, which are based on facts outside the written record of that trial. Because the parties generally disagree about the accuracy of such allegations, it is almost always necessary during the habeas corpus process for some court to hear evidence and make findings about what *did* happen. In Texas, as in many states, that duty falls to the trial court.[24]

Most people, lawyers and laypersons alike, assume that a "hearing" is just what it says: a decision-maker hears testimony in court from live witnesses who are subject to questioning from both parties, and then makes up her mind based both on what the witnesses said and their demeanor while they testified. In Texas death penalty appeals, however, most trial courts resolve disputes of fact by means of a practice called a "paper hearing."[25]

In Texas capital cases, instead of having each party bring its witnesses to court, the trial judge simply allows the parties to file pieces of paper – documents, affidavits, reports by experts, and so on. Nobody testifies; no one is cross-examined, confronted, or impeached; and none of the traditional gauges of credibility (eye contact, vocal tone, body language) are available to assist the judge in deciding whom to believe and whom to disbelieve.

This practice runs contrary to the Anglo-American legal tradition, which regards cross-examination of live witnesses as essential to the accurate resolution of factual disputes. Moreover, the "paper hearing" is especially questionable when combined with the pervasive practice, followed by the vast majority of Texas trial courts reviewing capital cases in state habeas proceedings, of resolving the disputed facts by adopting the prosecutor's legal arguments and characterizations of the evidence wholesale.

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[24] Texas's state habeas statute for capital cases, TEX. CODE CRIM. PROC. art. 11.071, uses the term "convicting" court.

[25] In Texas, the ultimate power to grant a new trial or sentencing hearing in habeas corpus proceedings belongs solely to the Court of Criminal Appeals. Proceedings in the trial court are intended to identify an undisputed set of facts, upon which the CCA may rely in deciding whether to grant a new trial. Other states, by contrast, give trial courts themselves the power to grant a new trial on habeas corpus review, limiting the state's appellate courts to reviewing that decision. Because Texas law places this ultimate power in the hands of the Court of Criminal Appeals alone, that Court has an immediate and primary responsibility for ensuring the fairness and reliability of proceedings in the trial court, as well as in the CCA itself.

The scenario typically works this way: the defendant initiates the proceeding by filing a habeas application, which states why he believes his trial was unfair, supported by as much documentary evidence as he has to support the facts alleged in the application.[26] The prosecution files a written response, which may include comparable documentary evidence disputing the defendant's claims. At this point, Texas law obliges the trial judge to "determine whether [there exist] controverted, previously unresolved factual issues material to the legality of the applicant's confinement."[27] In other words, the judge must examine the pleadings and decide whether there are relevant facts about which the parties disagree.

If the trial judge decides that the written pleadings raise no such disputes, the parties must then file "proposed findings of fact and conclusions of law"[28] for the court to consider. If the court decides such issues do exist, it must decide how to resolve them. To that end, the court "may require affidavits, depositions, interrogatories, and evidentiary hearings," but it also can rely on its own "personal recollection."[29] After the court takes such evidence (frequently by the paper hearing method described *supra*), the parties must file proposed findings and conclusions.

Whether or not a hearing is held, the parties must submit "proposed findings" for the court to consider before it creates its own written findings of fact recommending that the Court of Criminal Appeals grant or deny relief. Each party proposes "findings" which reflect its view of the disputed evidence. In a dispute about the competency of trial counsel, for example, the defendant might submit a finding that said, "Trial counsel failed to contact any potential defense witnesses until the week immediately preceding trial." The prosecutor might respond with a proposed finding that "trial counsel conducted a timely investigation, including making phone contact with potential witnesses months before trial."

At this point one would expect the trial court to synthesize its own "findings of fact" from the evidence. A fair-minded observer might expect the court to approach this task by selectively choosing from among the parties' proposed findings where appropriate, but primarily by drafting its own findings to reflect its own view of the evidence. Given the adversarial nature of our legal system, one would naturally expect the parties' proposed findings to represent diametrically opposed views of the facts. Given human experience, however, we would expect that the truth underlying any such complex dispute might well lie somewhere in the middle.

Few Texas trial courts, however, write their own findings. Instead, they simply endorse the findings proposed by the prosecutor, then forward the case to the Court of Criminal Appeals for its decision. This practice – adopting wholesale the prosecutor's partisan claims about disputed facts – is pervasive in Texas capital habeas cases.[30]

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[26] *See generally* TEX. CODE CRIM. PROC. art. 11.071.

[27] *See* TEX. CODE CRIM. PROC. art. 11.071 § 8.

[28] *See* TEX. CODE CRIM. PROC. art. 11.071 § 8.

[29] *See* Article 11.071 §§ 8, 9.

[30] There is no capital case of which we are aware in which a Texas trial court has ever adopted the findings proposed by the defendant seeking a new trial. Indeed, there are only a handful of cases in which a trial court has ever adopted *any* of the findings urged by the defendant.

A recent study conducted by the Texas Defender Service of the pleadings and orders in over one hundred post-1995 state habeas proceedings revealed that the trial court's findings were identical or virtually identical to those submitted by the prosecutor *in 83.7% of the cases* examined.[31] It strains credulity to suppose that well over *three-quarters* of the time, the entirety of the prosecutor's version of the disputed facts (and no fact whatsoever urged by the defendant) was true.

What this record actually demonstrates is that in Texas capital habeas cases, the judge is not applying any independent review of the evidence to reach the "findings" which often will dictate the outcome of the case at every subsequent stage of the process. Instead, the vast majority of trial judges are simply acting as a rubber stamp for the prosecutor's version of events.[32]

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It is difficult to exaggerate the significance of this feature of the Texas state habeas procedure in death penalty cases.[33] Under current law, the facts which are found by the state trial court will guide – and often

[31] Out of the 103 randomly selected state habeas case files reviewed, 92 contained findings available for examination. Of those 92 sets of trial court findings, 77, or 83.7%, were identical or virtually identical to the findings proposed by the prosecutor.

[32] Prior to the enactment of TEX. CODE CRIM. PROC. art. 11.071, which formalized the submission of proposed findings by both parties, the fundamentally one-sided and summary character of state habeas proceedings in Texas trial courts was often illustrated by the speed with which trial courts adopted the prosecutor's "findings." For example, in the case of Texas death row inmate David Spence, the state habeas trial court issued a one-page order adopting the prosecutor's answer to Mr. Spence's habeas petition as its "findings," and did so *before* Spence's lawyers had even seen the document. Thus, by the time Mr. Spence learned the content of the prosecutor's answer, it had already become the final order of the trial court. In light of the substantial evidence that Mr. Spence did not commit the crime for which he was ultimately executed, *see* Chapter Nine, this breakdown of the adversarial process in his case is particularly unsettling.

[33] Countless courts have strongly criticized the practice of adopting verbatim the findings of fact and conclusions of law proposed by one litigant. *See, e.g.*, United States v. El Paso Natural Gas Co., 376 U.S. 651, 656-657 (1964); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 615 n.13 (1974); FMC Corp. v. Varco Internat'l, 677 F.2d 500, 501 n.2 (5th Cir. 1982) ("We have consistently expressed our disapproval of the practice of unconditionally adopting findings submitted by one of the parties to a litigation."); Cuthbertson v. Biggers Bros., Inc., 702 F.2d 454, 458-59 (4th Cir. 1984) (and cases cited therein); Ramey Construction Co. v. Apache Tribe, 616 F.2d 464, 466-69 (10th Cir. 1980); Tyler v. Swenson, 427 F.2d 412 (8th Cir. 1970); Holbrook v. Institutional Insur. Co., 369 F.2d 236 (7th Cir. 1966); Roberts v. Ross, 344 F.2d 747, 750-752 (3rd Cir. 1965); Huff v. State, 622 So. 2d 982 (Fla. 1993); Rose v. State, 601 So. 2d 1181 (Fla. 1992); Phillips v. Phillips, 464 P.2d 876, 878 (Colo. 1970); Kentucky Milk Marketing & Anti-Monopoly Com. v. Borden Co., 456 S.W.2d 831, 834-35 (Ky. 1969); Krupp v. Krupp, 236 A.2d 653 (Vt. 1967); Nashville , C. & S. L. Ry. v. Price, 148 S.W. 219 (Tenn. 1911); *see generally* Judge Skelly Wright, *The Non-Jury Trial – Preparing Findings of Facts, Conclusions of Law and Opinions*, Seminars for Newly Appointed United States District Judges, at 166 (1963); Judge Gunnar Norbye, *Improvements in Statements of Findings of Fact and Conclusions of Law*, 1 F.R.D. 25, 30 (1940); Henry Monaghan, *Constitutional Fact Review*, 86 COLUM. L. REV. 229, 272 (1986); Annotation, *Propriety and Effect of Trial Court's Adoption of Findings Prepared by Prevailing Party*, 54 A.L.R.3rd 868 (& Supp.) (collecting state cases). Texas, however, remains indifferent to this chorus of condemnation.

determine – the decision of every subsequent court in the entire process, from the CCA to the federal district court to the Fifth Circuit to the United States Supreme Court. Once the trial court "decides" an important factual dispute, that decision will almost invariably bind any judge who examines the case in the future (*e.g.*, in federal habeas proceedings). The evidence shows that most Texas trial judges are making these pivotal decisions reflexively, simply by signing whatever the prosecutors hand them. As one respected commentator concluded, "the adoption of such orders has the appearance of impropriety and shows, at the very least, not only lack of independence, but also complete indifference on the part of many judges to what should be the most important work of the judiciary."[34]

In 72 of the 92 (78.2%) cases with findings of fact, the final product of the state habeas process was authored by the district attorney.

After the trial court makes its findings of fact and conclusions of law, its recommendations are sent to the CCA for review.[35] The results of the our study, however, do not reveal a very thorough examination by the Court. An order from the CCA disposing of the case was present in 97 of the cases reviewed. *Of these 97 orders, in 90 cases (92.7%) the CCA made no changes and adopted the trial court's fact findings in their entirety.* Changes were made to the lower court's findings in only five of the cases.[36] Not one case granted relief.[37] Of those cases studied in which the district attorney authored the findings of fact and conclusions of law, the CCA modified the lower court's conclusions in only 5 of 77 cases (6.4%). Therefore, in 72 of 92 (78.2%) cases reviewed which contained findings of fact to compare, the final product of the state habeas process was authored by the district attorney.

To be sure, the CCA is not bound by the findings of the trial court.[38] As a practical matter, however, the CCA has abdicated any role in monitoring the integrity of the fact-finding process in the trial courts or scrutinizing the extent to which the facts "found" are genuinely

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[34] Bright, *Politics of Death*, at 811.

[35] *See* TEX. CODE CRIM. PROC. art. 11.071 §§ 8, 9.

[36] Although the CCA did not adopt the trial court's findings in these cases, *only one of these orders was more than a summary two-page order*. Furthermore, when the Court declined to adopt the trial court's findings, it failed to make its own and merely stated in its denial that it did not adopt the findings justifying the denial. *See* Ex parte Willingham (CCA No. 35,162).

[37] One order did file the case and set it for submission. No further pleadings and orders were present in the file. *See* Ex parte Varelas (CCA No. 42,722). The absence of any reversals in the sample is also of concern. According to a recent study of reversal rates in capital cases from 1973-1995, Texas reversed 6% of state post-conviction cases prior to the enactment of Article 11.071. *See* James S. Liebman, Simon H. Rifkind, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases*, 1973-1995, *at* http://justice.policy.net/proactive/newsroom/release.vtml?id=18200.

[38] *See* Ex parte Adams, 768 S.W.2d 281, 287 (Tex. Crim. App. 1989) (while trial court findings should be "considered" if supported by the record, "[i]t is a fundamental principle of our habeas corpus law and regularly stated that under the procedure authorized by [statute], if the trial court convenes a hearing, elicits testimony and thereby develops facts, the Court of Criminal Appeals is not bound by the trial court's findings and conclusions of law") (citation omitted); Ex parte Turner, 545 S.W.2d 470, 473 (Tex. Crim. App. 1977) (while trial court findings should "generally" be accepted if supported by the record, "this Court has the ultimate power to decide matters of fact in habeas corpus proceedings").

supported by the evidentiary record in the case. In a handful of cases, the CCA has refused to adopt certain findings of the trial court, but the Court has never written an opinion explaining why. On the rare occasions in recent years in which the CCA has received trial court findings in favor of the defendant, the Court has rejected them outright and denied relief with little or no explanation.[39]

For example, in Ex parte Westley, a special master appointed by the trial court held a hearing at which ten live witnesses testified and roughly one hundred exhibits were introduced, generating a nine-volume record spanning 1,500 pages.[39] The special master made 230 separate findings of fact relating to Westley's claim that his lawyers had failed to provide him reasonably effective assistance.[40] Upon reviewing this formidable record, the CCA simply denied relief (over four dissents) in an unsigned opinion.[41] It ordered no further hearing of any kind; did not make any new or additional findings of fact; did not identify which, if any, of the findings in the state trial judge's report were wrong; and did not divine any errors of law in the state trial judge's report.[42] Westley's case does not inspire confidence that the CCA is taking seriously its responsibilities as ultimate fact-finder. Anthony Westley was executed on May 13, 1997.

B. The Court of Criminal Appeals's Failure to Ensure Adequate Performance By Appointed Counsel in State Habeas Cases

One of the most profoundly troubling aspects of the Texas state habeas procedure is the CCA's utter failure to enforce the right to "competent counsel" guaranteed by state statute since 1995. This is detailed fully in the previous chapter. In a number of high-profile cases, and several more which have not received such public attention, the CCA has ignored incontrovertible evidence that the attorneys it has appointed have failed to perform at a level of even minimal competence. Given the lethal consequences of counsel's errors and omissions in later appeals, it is no exaggeration to say that the Court of Criminal Appeals, by tolerating cases of grossly incompetent state habeas representation, is robbing indigent condemned defendants of *any* meaningful post-conviction review.

VI. Federal Habeas Review: The Ultimate Triumph of Form Over Substance

The belief that federal habeas corpus review will "catch" fundamental errors before a state defendant can be executed is another myth of meaningful appellate review. Because federal judges are insulated from some of the political pressures that influence state court judges, it is thought that they can closely and thoroughly examine each case before permitting the state to proceed with an execution. To understand why that promise is broken with increasing frequency in the federal courts of the Fifth Circuit, it is necessary to review how the legal

[39] Ex parte Westley, Writ No. 22,911-01 (Tex. Crim. App. May 6, 1992) (unpub.).

[40] *Id.*

[41] *Id.*

[42] *Id.*

protections afforded by the federal habeas statutes have eroded in recent years.

Prior to 1996, the federal habeas scheme instructed federal courts to provide independent review of a state defendant's claims that he received an unfair trial. While findings of fact made by the state courts generally were binding on the federal courts, the federal court was duty-bound to determine for itself whether the defendant had received a fair trial. Since the late 1970s, however, the exercise of this core federal power had become increasingly conditioned on the defendant's strict compliance with a complex tangle of technical procedural requirements. As more defendants were sent to Death Row, habeas law grew increasingly arcane and esoteric.[43] By the early 1990s, the regime the Court had created for habeas cases was "a narrow treacherous roadway full of holes and tortuous turns."[44]

Notwithstanding the morass of procedural technicalities that faced death-sentenced defendants in federal court, it was still possible to maintain some confidence in federal habeas review as a meaningful safeguard – that is, until Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA turned federal habeas corpus upside down. Under this legislation, a federal court considering a defendant's claims is not permitted simply to ask whether the defendant received a fundamentally fair trial – even if the defendant has diligently complied with all the complex technical prerequisites to obtain review. Instead, the federal court must focus its attention on the state court's decision denying relief. The question is no longer, "Did this defendant get a fair trial? but "Did the state court, in denying relief, act *unreasonably*?"[45]

The AEDPA's standard of "unreasonableness" is, to put it mildly, difficult to satisfy. As an initial matter, this standard creates an imposing psychological barrier. It is much more difficult for a federal judge to declare a previous decision "unreasonable," rather than simply

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[43] *See*, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977) (no federal habeas review of claim not properly objected to at trial); Smith v. Murray, 477 U.S. 527 (1986) (no federal habeas review of claim not properly raised on direct appeal; appellate counsel should have known that similar claims were "percolating" in intermediate courts of appeal in other states); Coleman v. Thompson, 501 U.S. 722 (1991) (no federal habeas review where defendant's counsel was three days late in filing state court appeal of denial of post-conviction relief; counsel's error cannot excuse this default because there is no right to effective counsel in state post-conviction proceedings); Barefoot v. Estelle, 463 U.S. 880 (1983) (approving Fifth Circuit's expedited treatment of federal habeas petition by condemned defendant; no right to "automatic" stay of execution for purposes of seeking review of denial of initial habeas petition); Penry v. Lynaugh, 492 U.S. 302, 313-14 (1989) (anti-retroactivity rule of Teague v. Lane applies to death penalty cases; federal court may not announce or apply "new rule of law" on habeas review of state court judgment); Sawyer v. Whitley, 505 U.S. 333 (1992) (condemned defendant attempting to avoid default of sentencing-phase issue must demonstrate conceptually complex "innocence of the death penalty"); Brecht v. Abrahamson, 507 U.S. 619 (1992) (stricter "harmless error" standard to be applied in federal habeas proceedings, requiring much greater showing of harm to warrant relief).

[44] Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 625 (1994); *see also, e.g.*, Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 54 (1991) (habeas under the Burger/Rehnquist Court was characterized by "an immensely complex morass of procedural rules and legal obstacles").

[45] 28 U.S.C. §2254(d).

"mistaken." Many cases equate "unreasonableness" with irrationality.[46] Federal judges are thus reluctant to grant relief under the AEDPA. At the same time, the AEDPA creates a "path of least resistance" for federal judges who are hostile to death-sentenced defendants or simply weary of spending time on their appeals. The prevailing view is that Congress intended the "reasonableness" standard to limit grants of federal habeas relief to a very small number of cases. Hostile judges can accordingly regard their review of state death penalty cases largely as a formality.

A second feature of the AEDPA which often renders federal review essentially meaningless is the presumption it requires that state court findings of fact are correct, unless the defendant proves otherwise by "clear and convincing" evidence.[47] The former qualification that such findings cannot bind the federal court unless they resulted from a fair and reliable process has been eliminated from the statute entirely. Under the AEDPA, findings which were the result of an unreliable and unfair process, like the paper hearing so frequently seen in Texas state habeas cases, nevertheless form the backdrop against which the federal court measures the "reasonableness" of the state court's decision denying relief.[48] Moreover, it will frequently be impossible for the defendant to show "clearly and convincingly" that the state court's "findings" are mistaken, unless the federal court gives him the power to develop additional facts through discovery (issuing subpoenas, deposing witnesses, and so on). Few Texas district courts do so. Thus, although the AEDPA contemplates that the defendant may have a fair chance to rebut the state court's findings, in practice the federal courts simply reaffirm the result reached in the previous state habeas proceeding.[49]

The formal constraints imposed by the AEDPA and other complex federal procedural law notwithstanding, the practical reality is that the federal courts in the Fifth Circuit often subject the cases passing before them to relatively little scrutiny.

In the past, Texas federal courts have foreshortened their consideration of death penalty cases to accommodate pending execution dates. In other Circuits, federal courts routinely stay execution dates to permit reasoned examination of capital cases, which are inevitably factually and legally complex.[50] In the Fifth Circuit, however, habeas review frequently has been compressed to meet the State's execution schedule.

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[46] It is this conception of "reasonableness" which animates statements like the Seventh Circuit's explanation in Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997), that "[a] state court's application of Supreme Court precedent is reasonable if it is at least minimally consistent with the facts and circumstances of the case."

[47] 28 U.S.C. §2254(e).

[48] Even before the AEDPA, the Fifth Circuit had staked out an extreme position by declaring that the former federal habeas statute's requirement that findings must result from a "hearing" was satisfied by Texas's "paper hearing" practice. *See*, e.g., May v. Collins, 955 F.2d 299 (5th Cir. 1992); James v. Collins, 987 F.2d 1116 (5th Cir. 1993); Spence v. Johnson, 80 F.3d 989 (5th Cir. 1996). No other federal Circuit ever followed suit.

[49] *See, e.g.*, Clark v. Johnson, 202 F.3d 760, 768 (5th Cir. 2000), *cert. denied*. 513 U.S. 1156 (2000) (upholding state court findings based on "paper hearing" and finding that "the district court did not abuse its discretion in denying [Clark] additional discovery, a continuance, or an evidentiary hearing."); Soria v. Johnson, 207 F.3d 232 (5th Cir. 2000), *cert. denied*, 520 U.S. 1253 (2000) (same).

[50] *See* 28 U.S.C. § 225.

Take the case of Texas death row inmate Robert V. Black, a decorated Vietnam veteran who faced execution on May 22, 1992, for having hired someone to kill his wife. On May 8th, while Mr. Black's case was still pending before the CCA, his attorneys received an order from a federal judge in Houston, ordering Mr. Black to file his federal habeas petition within 48 hours after the CCA ruled. The order startled Mr. Black's attorneys, since they had never filed any documents in federal court and thus had never had a judge assigned to the case. Their protests were unavailing, and so Mr. Black's attorneys filed his federal habeas petition on Friday, May 15, 1992. Rather than stay the execution, the federal district judge labored through the weekend to produce an opinion denying all relief on Tuesday, May 19th. Mr. Black's attorneys appealed to the Fifth Circuit, filing a lengthy brief on May 20th. Without oral argument (even by telephone), the Fifth Circuit issued a 34-page opinion denying all relief on Thursday, May 21st. A few hours later, just after midnight on Friday morning, May 22nd, Mr. Black was executed.

It is likely that this headlong rush to execution, with federal courts working around the clock to accommodate a deadline arbitrarily set by the State, is not what most people have in mind when they picture federal judges giving dispassionate, thorough review to state imposed death sentences. On the contrary, given how rapidly the federal courts ruled, it is doubtful that the judges involved even had an opportunity to read the entire record of Mr. Black's trial and post-conviction proceedings, much less give reasoned consideration to the arguments on his behalf.

In some cases it is not even necessary to wonder whether the judges reviewed the record – because it is apparent they did not. When Texas death row prisoner David Clark sought habeas review in 1992, his entire post-conviction process, from initial filing in the state trial court to denial by the United States Supreme Court, took less than 72 hours. In October 1991, the trial court set Mr. Clark's execution for January 17, 1992. On January 3, 1992, two Houston attorneys who had no previous involvement with Mr. Clark's case agreed to represent him and asked for time to prepare the case. Their request was denied on January 11th. Four days later, without having completed a review of the record or performing any investigation, Mr. Clark's volunteer lawyers filed a habeas application in the trial court and asked for a stay of execution. On January 16th, four separate courts purported to consider and deny Mr. Clark's claims: the State trial court, the Court of Criminal Appeals, the federal district court, and the Fifth Circuit. The CCA and the federal district court each took *less than an hour* to decide the case, the latter refusing to grant a stay even though the state did not oppose one and filed no answer to the petition. The lone dissenting voice came from Judge Davis of the Fifth Circuit, who protested that court's refusal to stay Mr. Clark's execution. His reason? "I am unable to adequately assess Clark's claim of ineffective assistance of counsel without reviewing the pertinent portions of the trial record, *which are not now available to me.*"[51]

[51] Clark v. Collins, No. 92-2036 (5th Cir. Jan. 16, 1992) (unpub. slip op. at 7) (Davis, J., dissenting) (emphasis added). After the Fifth Circuit had denied relief without even examining the trial record, Mr. Clark asked the United States Supreme Court to intervene. In the early morning hours of January 17th, Justice Scalia entered a stay of execution. Later the same day, however, the full Court vacated the stay and denied review, bringing to an end Mr. Clark's 72 hour journey through state and federal habeas corpus proceedings. No evidentiary hearing of any kind was conducted in any court. Justice Stevens noted his dissent from the denial of certiorari, calling the case an "extreme example" of why courts should be required to stay pending execution dates in order to review initial

This racetrack review is not limited to older cases. In October 1997, the state trial court scheduled Lesley Lee Gosch's execution for January 15, 1998, before he had received any substantive federal habeas review. On December 30th, Mr. Gosch filed his federal habeas petition with the district court, which denied relief on January 12, 1998, and refused to stay the execution date. Attorneys for Mr. Gosch appealed this decision to the Fifth Circuit the next day. Despite the fact that they had only one day to review the factually complex issues presented, a panel of three judges of the Fifth Circuit decided in less than 24 hours that Mr. Gosch's claims had no merit. According to the dissenting opinion of one judge, none of the panel members had even reviewed the state court record. That judge noted: "This matter, reviewed and decided in less than a day, is a prime example of the tail of a pending execution wagging this panel's dog. . . . [T]his court should be more reticent in deciding any death penalty case so quickly – especially one in which the merits have not been previously reviewed by an appellate court."[52]

Thus, contrary to the popular perception that death penalty appeals invariably drag on for years, many in the Fifth Circuit do not. Some inmates were lucky if the appeals "dragged on" for more than a week, receiving only the most superficial review in the process.

Another indicator of the Fifth Circuit's attitude toward capital habeas cases is the decreasing frequency with which the court hears oral argument in such appeals. Oral argument is "an essential ingredient of appellate decision-making" because it represents "the single opportunity that the advocate has to address the decision-makers face-to-face," where she can dispel "unfounded impressions [and] misconceptions," and "remind[] the judges that real life interests are involved in the case."[53] Since the passage of the AEDPA, the Fifth Circuit has heard oral argument in far fewer death penalty habeas appeals than it did prior to 1996. It currently is not uncommon for the court to decide such cases without ever having given the defendant's counsel an opportunity to be heard. For example, in the past three months the Fifth Circuit has issued eight published opinions in Texas capital habeas cases in which oral argument was not permitted, while handing down fewer than half that number in which oral argument was heard.[54] RJR Nabisco, Caterpillar, Southern Pacific

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federal habeas petitions, and pointing out that "it is doubtful that counsel has had a fair opportunity to discharge his professional obligations." Clark v. Collins, 502 U.S. 1052 (1992). Mr. Clark was executed within a few weeks.

[52] Gosch v. Johnson, 136 F.3d 138 (Table) (5th Cir. Jan. 15, 1998) (Garza, J., dissenting). Minutes before Mr. Gosch was scheduled to be executed the evening of January 15, 1998, he received a stay of execution from the U.S. Supreme Court. His request that the Court review the hasty decision of the Fifth Circuit was eventually denied, and Mr. Gosch was executed on April 24, 1998.

[53] Michael R. Fontham, *Preparing the Oral Argument*, a paper presented to the panel on "Oral Argument: Practicalities, Procedures, Preparation and Presentation" at the 13th Annual Fifth Circuit Appellate Practice and Advocacy Seminar in New Orleans (Feb. 5-6, 1998).

[54] From the information available on the Fifth Circuit's website, www.ca5.uscourts.gov, it appears that the court issued published opinions in the following Texas death penalty habeas cases from late May to mid-September, 2000: Hernandez v. Johnson, No. 99-10446 (May 30, 2000); In re McGinn, No. 00-10367 (June 1, 2000); Penry v. Johnson, No. 99-20868 (June 20, 2000); Chambers v. Johnson, No. 99-40896 (June 20, 2000); Barrientes v. Johnson, No. 98-40348 (August 7, 2000); In re Gibbs, No. 00-20540 (August 15/21, 2000); Goodwin v. Johnson, No. 99-20976 (August 17, 2000); Knox v. Johnson, No. 99-41068 (August 21, 2000); Moore v. Johnson, No. 99-50927 (August 23, 2000); Caldwell v. Johnson, No. 00-10934 (August 30, 2000); and Clark v. Johnson, No. 00-40061 (September 12, 2000). Oral argument was heard in Barrientes, Knox, and Penry. An unknown number of unpublished opinions were issued in Texas death penalty cases during the same period; in at least one of those cases,

Railway, U.S. Fidelity, Morgan Stanley, Southwestern Bell, Metropolitan Life Insurance Co., American Tobacco, Brown & Root, and the National Gypsum Co., to name just a few, were parties to published cases decided in the same period. The Fifth Circuit heard oral argument in *every one* of those appeals.

Recently, some of the judges of the Fifth Circuit have proselytized other appellate courts to join in speeding up the review of death penalty cases. At an Eleventh Circuit[55] judicial conference in the summer of 1999, Fifth Circuit Judge Edith H. Jones – "a death penalty champion who unabashedly favors curtailment of post-conviction review"[56] – was a featured speaker on the topic of death penalty habeas appeals. According to the Southern Center for Human Rights, one of whose representatives attended the conference, the agenda for her presentation "included sessions on how courts could avoid deciding issues on the merits by invocation of procedural bars and refusing to give new decisions retroactive application, and on deference by federal courts to state court fact findings."[57]

VII. Conclusion

The unreliable and unfair process of trial court "fact-finding" and the inadequacies of appointed habeas counsel do not exhaust the substantial flaws in the Texas state habeas system. They do, however, illustrate the gulf between the State's claim that Texas death row inmates receive "super due process," and the frequent reality of superficial, slipshod, politically motivated review. Although a recent careful study of reversal rates in capital cases found the Court of Criminal Appeals in the mainstream of appellate courts reviewing death penalty cases nationwide (indicating that the Court of Criminal Appeals had found reversible error in 35% of the cases it reviewed between 1973 and 1995), that result is misleading because it considered only cases decided prior to 1995.[58] Since 1995, the CCA has reversed only eight of 256 capital cases it has reviewed – at just 3%, the lowest reversal rate in

Since 1995, the CCA has reversed only eight of the 256 capital cases it has reviewed – at just 3%, the lowest reversal rate in the country.

Cruz v. Johnson, No. 00-50027 (July 21, 2000), no oral argument was permitted.

[55] The Eleventh Federal Judicial Circuit consists of the federal courts in Georgia, Florida, and Alabama.

[56] Bob Herbert, *Death Takes a Holiday*, N.Y. TIMES, Aug. 22, 1999.

[57] *See* Southern Center for Human Rights, *Texas Judges Featured at Eleventh Circuit Program On Capital Cases; Center Asks That Conference Be Canceled*, *at* www.schr.org.; *see also* David Firestone, *Judges Criticized Over Death-Penalty Conference*, N.Y. TIMES, Aug. 19, 1999.

[58] *See* Liebman, *A Broken System: Error Rates in Capital Cases*, 1973-1995, at 57 (Table 6) ("State-by-State Comparisons of Rates of Error Detected By All State Courts (State Direct Appeal and State Post-Conviction)"), *at* http://justice.policy.net/proactive/newsroom/release.vtml?id=18200.

the country.[59] If the quality of counsel provided and the integrity of the procedures employed were sufficiently high, it is conceivable that the public could feel confidence in a 97% affirmance rate. Given Texas's miserable record in both those areas, however, the likelihood that profound miscarriages of justice are slipping uncorrected past the CCA is unacceptably great.

State officials routinely claim that death penalty cases are "carefully" reviewed by the state and federal courts as proof that Texas's death penalty process is fair. The facts set forth above reveal that nothing could be further from the truth. However, the paucity of Texas's appellate system and the quality of the legal representation and judicial review provided make it easy for Texas to hide its mistakes. Many inmates are being executed after appeals which are so superficial and poorly done that they might as well not have occurred at all. Inmates are being denied the careful review of their cases required by the Constitution, and those who may be innocent or who have been unconstitutionally convicted or sentenced are being executed, and the truth about their cases is buried with them. Consequently, we are becoming increasingly unable to evaluate the validity of the system by which we convict and sentence people to death. In Texas, the judicial review that we rely upon to reassure ourselves that we do not execute the innocent breaks down more and more frequently. It is disheartening but true that in capital cases, where the need for heightened reliability is so acute, judicial review in Texas is conducted in a manner that practically guarantees that reliability cannot be achieved at all.

[59] Sara Rimer & Raymond Bonner, *Bush Candidacy puts Focus on Executions*, N.Y. TIMES, May 14, 2000 at A1.