

## LETHALLY DEFICIENT: DIRECT APPEALS IN TEXAS DEATH PENALTY CASES – INTRODUCTION

<sup>1</sup> TEX. CODE OF CRIM. PROC. art. 466 (1857), [http://www.lrl.state.tx.us/scanned/statutes\\_and\\_codes/code\\_of\\_criminal\\_procedure.pdf](http://www.lrl.state.tx.us/scanned/statutes_and_codes/code_of_criminal_procedure.pdf). By contrast, Texas did not appoint lawyers to represent indigent death row inmates in state habeas corpus proceedings until 1995. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 2(d) (Vernon 2015).

<sup>2</sup> 247 U.S. 45 (1932).

<sup>3</sup> *See generally* Douglas v. California, 372 U.S. 353, 357 (1963) (“Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, an unconstitutional line is drawn between rich and poor.”); United States v. Vasquez, 7 F.3d 81, 85 (5th Cir. 1993) (“[I]t is difficult to accurately assess whether it was harmless error to deny counsel on the basis of a record developed . . . in the absence of that counsel. One can only speculate on what the record might have been had counsel been provided.”); and Williams v. State, 252 S.W. 3d 353, 357 (Tex. Crim. App. 2008) (“When the right to trial counsel has been violated, prejudice is presumed because the trial has been rendered inherently unfair and unreliable.”).

<sup>4</sup> Linda Greenhouse, *Inmate Whose Lawyer Slept Gets New Trial*, N.Y. TIMES, June 4, 2002, <http://www.nytimes.com/2002/06/04/us/inmate-whose-lawyer-slept-gets-new-trial.html>.

<sup>5</sup> *See, e.g.*, TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 107-8 (2000); TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS IN TEXAS DEATH PENALTY APPEALS 23-43 (2002); TEXAS DEFENDER SERVICE, MINIMIZING RISK: A BLUEPRINT FOR DEATH PENALTY REFORM IN TEXAS 53-61 (2005). All of these publications are available at <http://texasdefender.org/tds-publications/>.

<sup>6</sup> This state agency is now known as the Office of Capital and Forensic Writs. In 2015, the Texas Legislature passed S.B. 1743, which renamed the organization and authorized its representation of defendants in Article 11.073 (junk science) writ proceedings when those defendants are referred by the Forensic Science Commission. *See* S.B. 1743, 84th Leg., R. Sess. (Tex. 2015).

<sup>7</sup> The mean highest court reversal rate during the period from 2005 through 2015 was 20.3%.

<sup>8</sup> Excluding Texas, courts in the 30 other death penalty states overturned 170 death sentences on direct appeal between 2005 and 2015. A total of 70 or 41% of these decisions overturned both the conviction and sentence. Studies of previous time periods have estimated higher reversal rates. *See* BARRY LATZER & JAMES CAUTHEN, JUSTICE DELAYED? TIME CONSUMPTION IN CAPITAL APPEALS: A MULTISTATE STUDY 23 (March 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/217555.pdf> (summarizing a survey of 1,676 decisions on capital direct appeals from fourteen death penalty states that found that the state courts of last resort reversed the trial court’s sentence in 26.2% of all cases on direct appeal); NICOLE WATERS, ANNE GALLEGOS, JAMES GREEN AND MARTHA ROZSI, CRIMINAL APPEALS IN STATE COURTS (Sept. 2015), <http://www.bjs.gov/content/pub/pdf/casc.pdf> (stating that state courts resolved 134 death penalty appeals during 2010 and reversed the trial court in 26 cases). Other studies of the direct appeals process have found that state courts reverse as many as 41% of all death sentences at the direct appeal stage. JAMES LIEBMAN, JEFFREY FAGAN AND VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES 1973-1995 30 (2000), [http://www2.law.columbia.edu/instructionalservices/liebman/liebman\\_final.pdf](http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf).

<sup>9</sup> All appeals of cases where the defendant is sentenced to death are automatically reviewed by the Texas Court of Criminal Appeals.

<sup>10</sup> Velez v. State, No. AP–76,051 (Tex. Crim. App. June 13, 2012) (not designated for publication); Olsen v. State, No. AP–76,175 (Tex. Crim. App. Apr. 25, 2012) (not designated for publication); Estrada v. State, 313 S.W.3d 274 (Tex. Crim. App. 2010).

<sup>11</sup> Turner v. State, 422 S.W. 2d 676 (Tex. Crim. App. 2013).

<sup>12</sup> A list of cases and the counties in which the underlying trials occurred are in Appendix A.

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<sup>13</sup> Bell, Bexar, Brazos, Cameron, Collin, Dallas, El Paso, Fort Bend, Harris, Harrison, Henderson, Hidalgo, Hunt, Jackson, Jefferson, Johnson, McLennan, Medina, Nueces, Randall, Rusk, Smith, Tarrant, Travis, Walker, and Wharton counties. Travis Mullis' case is the sole in our survey from Galveston County. To the extent this case was included in our review, our analysis spanned 27 counties.

<sup>14</sup> The CCA did not decide a death penalty direct appeal from the Seventh Administrative Judicial Region during our survey window.

<sup>15</sup> 2012 WL 1438685 (Tex. Crim. App. Apr. 25, 2012) (not designated for publication).

<sup>16</sup> Our survey questions are listed in Appendix B.

<sup>17</sup> STATE BAR OF TEXAS, GUIDELINES AND STANDARDS FOR TEXAS CAPITAL COUNSEL, 69 TEX. BAR J. 966 (2006), [http://www.americanbar.org/content/dam/aba/uncategorized/Death\\_Penalty\\_Representation/Standards/State/TX\\_Bar\\_Association\\_adopted\\_version\\_of\\_ABA\\_Guidelines.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/State/TX_Bar_Association_adopted_version_of_ABA_Guidelines.authcheckdam.pdf) [hereinafter TEXAS GUIDELINES].

<sup>18</sup> AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, INTRODUCTION (revised Feb. 2003), *published in* 31 HOFSTRA L. REV. 913 (2003), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/death\\_penalty\\_representation/2003guidelines.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf) [hereinafter ABA GUIDELINES].

<sup>19</sup> Our examination of case briefs evaluated their quality on their face, assessing whether issues were adequately briefed and accurately stated the law. Our review did not evaluate each case's trial record to determine whether additional claims should have been, but were not, raised on direct appeal.

<sup>20</sup> [Douglas Armstrong](#), [Teddrick Batiste](#), [Donald Bess](#), [Brent Brewer](#), [James Broadnax](#), [Micah Brown](#), [Tyrone Cade](#), [Kimberly Cargill](#), [Jaime Cole](#), [Raul Cortez](#), [Obel Cruz-Garcia](#), [Rickey Cummings](#), [Erick Davila](#), [Irving Davis](#), [Areli Escobar](#), [Robert Fratta](#), [James Freeman](#), [Milton Gobert](#), [Gary Green](#), [Howard Guidry](#), [Garland Harper](#), [Roderick Harris](#), [John Hummel](#), [Christopher Jackson](#), [Joseph Jean](#), [Dexter Johnson](#), [Matthew Johnson](#), [Mabry Landor](#), [Juan Lizcano](#), [Daniel Lopez](#), [Jerry Martin](#), [Raymond Martinez](#), [Randall Mays](#), [Hector Medina](#), [Naim Muhammad](#), [Steven Nelson](#), [Mark Robertson](#), [Cortne Robinson](#), [Rosendo Rodriguez](#), [Kwame Rockwell](#), [Wesley Ruiz](#), [Demetrius Smith](#), [Mark Soliz](#), [Robert Sparks](#), [Paul Storey](#), [Richard Tabler](#), [John Thuesen](#), [Albert Turner](#), and [Antonio Williams](#).

<sup>21</sup> [Tilon Carter](#), [Billie Coble](#), [Lisa Coleman](#), [Paul Devoe](#), [LeJames Norman](#), and [Roosevelt Smith](#).

<sup>22</sup> [Attorney Fee Voucher, State v. Mullis, No. 08 CR 0333 \(122nd Dist. Ct., Galveston County, Tex. May 20, 2011\)](#).

<sup>23</sup> TEXAS GUIDELINES.

<sup>24</sup> ABA GUIDELINES.