

LETHALLY DEFICIENT: DIRECT APPEALS IN TEXAS DEATH PENALTY CASES – SECTION IV(A)
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⁷⁴ TEXAS GUIDELINE 3.1(A)(1) (“The defense team should consist of no fewer than two attorneys[.]”); ABA GUIDELINE 4.1(a)(1) (same).

⁷⁵ TEX. CODE CRIM. PROC. ANN. art. 26.052(j) (Vernon 2015).

⁷⁶ Adrian Estrada and Manuel Velez were represented by *pro bono* counsel. Christian Olsen was represented by two appointed lawyers.

⁷⁷ 49 defendants in our survey were represented by counsel who did not list the assistance of other counsel on their briefs and who, according to the State Bar of Texas, are solo practitioners: Terence Andrus, Tyrone Armstrong, Tracy Beatty, Brent Brewer, James Broadnax, Micah Brown, Tyrone Cade, Kimberly Cargill, Kosul Chanthakoumanne, Billy Coble, Raul Cortez, Obel Cruz-Garcia, Rickey Cummings, Irving Davis, Selwyn Davis, Areli Escobar, Robert Fratta, James Freeman, John Gardner, Bartholomew Granger, Gary Green, Howard Guidry, Garland Harper, Roderick Harris, Joseph Jean, Dexter Johnson, Matthew Johnson, Juan Lizcano, Daniel Lopez, Melissa Lucio, Jerry Martin, Raymond Martinez, Hector Medina, Blaine Milam, Demontrell Miller, Naim Muhammad, Travis Mullis, John Ramirez, Mark Robertson, Cortne Robinson, John Rubio, Wesley Ruiz, Demetrius Smith, Roosevelt Smith, Robert Sparks, Adam Ward, and Thomas Whitaker, Christopher Wilkins, and Antonio Williams. *Find a Lawyer*, STATE BAR OF TEX.

https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&Template=/CustomSource/MemberDirectory/Search_Form_Client_Main.cfm (last visited Apr. 20, 2016) [hereinafter *State Bar of Texas Directory*].

Attorneys for defendants in eight other cases confirmed that they were solo practitioners when they handled the direct appeals included in our survey: Tilon Carter, Lisa Coleman, Paul Devoe, Milton Gobert, Randall Mays, Steven Nelson, Kwame Rockwell, and Richard Tabler. Memorandum from Amanda Marzullo to File, dated April 7, 2016 (copy on file with author).

⁷⁸ Lawyers for the following defendants did not designate a practice description or type in their profiles on the State Bar of Texas website: Christopher Jackson, Mabry Landor, and LeJames Norman. *See State Bar of Texas Directory, supra* note 77.

⁷⁹ Six defendants within our study had direct appeal counsel who did not list the assistance of other counsel on their briefs and who, according to the State Bar of Texas, practice in firms with two to five lawyers: Erik Davila, Ramiro Gonzales, Gregory Russeau, Mark Soliz, Paul Storey, and John Theusen. *State Bar of Texas Directory, supra* note 77.

⁸⁰ *See e.g.*, Alexander Y. Benikov, *Practice Management: The High Cost of High Overhead*, 79 TEX. BAR J. 313 (Apr. 2016) (stating that many solo practitioners and small firms fail due to the challenges of overhead including the high cost of support staff); ABA CRIMINAL JUSTICE STANDARDS, PROVIDING DEFENSE SERVICES 5-1.4 & cmt (3rd ed. 1992) (“A sine qua non of quality legal representation is the support personnel and equipment necessary for professional service.”), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services.authcheckdam.pdf.

⁸¹ The El Paso Public Defender Office represented Fabian Hernandez and David Renteria in their direct appeals. The Bexar County Appellate Defender Office represented Joseph Gamboa, Armando Leza, and Christopher Young in their direct appeals.

⁸² Ker’sean Ramey.

⁸³ Adrian Estrada, Max Soffar, and Manuel Velez.

⁸⁴ Teddrick Batiste, Donald Bess, Jaime Cole, Brian Davis, James Freeman, John Hummel, Steven Long, Christian Olsen, and Albert Turner.

⁸⁵ *State Bar of Texas Directory, supra* note 77, and [Appellant’s Brief on Appeal, Hummel v. State, No. AP-76,596 \(Tex. Crim. App. Aug. 21, 2012\)](#).

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⁸⁶ [Email from Stefanye V. Adkins, Legal Assistant, Tarrant County District Attorney’s Office, Civil Division to Amanda Marzullo, Texas Defender Service \(Apr. 11, 2016\) \(copy on file with author\).](#)

⁸⁷ [Appellant’s Brief, Davis \(Brian\) v. State, No. AP-76,521 \(Tex. Crim. App. Feb. 28, 2012\).](#)

⁸⁸ [Email from the Harris County Auditor’s Office to Amanda Marzullo, Texas Defender Service \(Apr. 20, 2015\)](#) (“Based on our records and confirmation from the Harris County District Courts Administrative Office, R. P. Cornelius was not the appellate attorney on the case.”) (copy on file with author).

⁸⁹ NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, INDIGENT DEFENSE ATTORNEY MENTORING IN TEXAS I (Dec. 2015) (discussing the challenges to entering the legal profession as a defense attorney in Texas where “new prosecutors, . . . join a department of county government under the supervision of experienced attorneys” and defense lawyers “simply ‘hang a shingle’ and begin as a solo practitioner, learning on whatever cases they manage to land”), http://www.nlada100years.org/sites/default/files/TIDC_NLADA_mentoring_indigent_defense_attorneys.pdf.

⁹⁰ Agenda, *Appellate Training/Capital Specific: A Program for the Defense*, Center for American and International Law, Plano, Tex., Nov. 12, 2010 (copy on file with author).

⁹¹ A total of 60 cases in our sample were from 12 district attorney offices whose websites listed an appellate division. *Divisions*, BEXAR CTY. DIST. ATT’Y OFFICE, <http://www.bexar.org/1744/Divisions> (last visited Jan. 3, 2016); *DA Divisions*, CAMERON CTY. DIST. ATT’Y, <http://www.cameroncountyda.com/DA-Divisions.htm> (last visited Jan. 4, 2016); *Divisions*, COLLIN CTY. CRIM. DIST. ATT’Y, <http://collincountyda.com/divisions-2/> (last visited Jan. 7, 2016); *The Appellate Division*, DALLAS CTY. DIST. ATT’Y, http://www.dallascounty.org/department/da/appellate_division.php (last visited Jan. 6, 2016); *About the Office*, EL PASO CTY. DIST. ATT’Y, <http://www.epcounty.com/da/about.htm> (last visited Jan. 6, 2016); *Employee Directory*, FORT BEND COUNTY, TEXAS, <http://www.fortbendcountytx.gov/index.aspx?page=570> (last visited Aug. 29, 2016) (listing John J. Harrity as Chief Appellate Prosecutor); *District Attorney Staff Directory*, GALVESTON CTY. DIST. ATT’Y, <http://www.galvestoncountytx.gov/da/Pages/OfficeDirectory.aspx> (last visited Jan. 6, 2015); *Contacts*, HARRIS CTY. DIST. ATT’Y OFFICE, <http://app.dao.hctx.net/OurOffice/Contacts.aspx> (last visited Jan. 6, 2015); *CDA Staff*, LUBBOCK CTY. CRIM. DIST. ATT’Y, <http://www.co.lubbock.tx.us/egov/docs/1286048313404.htm> (last visited Jan. 7, 2016); *Post-Conviction Division*, TARRANT CTY. CRIM. DIST. ATT’Y, <http://access.tarrantcounty.com/en/criminal-district-attorney/criminal-division/post-conviction.html> (last visited Jan. 7, 2016); and *Divisions*, TRAVIS CTY. DIST. ATT’Y, <https://www.traviscountytx.gov/district-attorney/divisions> (last visited Jan. 7, 2016). The McLennan County District Attorney’s Office stated in its brief in Ricky Cummings’ case that the chief of its appellate division was handling the case. [State’s Brief, Cummings v. State, No. AP-76,923 \(Tex. Crim. App. May 1, 2014\)](#) (listing Alex J. Bell as Chief, Appellate Division). This report includes *Cummings* in the list of cases where the district attorney’s office has a special appellate division, but excludes other McLennan County cases where no specific department or division was listed as the source of counsel on the brief.

⁹² Compare [State’s Brief, Muhammad v. State, No. AP-77,021 \(Tex. Crim. App. Feb. 3, 2015\)](#) (listing three assistant district attorneys as counsel of record on brief’s cover); and [State’s Brief, Long v. State, No. AP-75,539 \(Tex. Crim. App. Feb 1, 2008\)](#) (listing one assistant district attorney as counsel of record on brief’s cover).

⁹³ In James Freeman’s case, the State’s Brief listed Robins C. Ramsey as well as Joshua W. McCowen and Kelly Siegler as Attorneys for the State of Texas. [State’s Brief, Freeman v. State, No. AP-76,052 \(Tex. Crim. App. July 10, 2010\)](#). The address provided for Mr. Ramsey, Trinity Plaza II, Suite 900, 745 E. Mulberry, San Antonio, TX 78212, is the address for Langley & Banack, Inc. This law firm and address are also listed on Mr. Ramey’s profile on the State Bar of Texas’ website, indicating that he was employed in private practice at the time the brief was filed. *Locations*, LANGLEY & BANACK, <http://www.langleybanack.com/locations/> (last visited July 6, 2016); Robinson C. Ramey, *State Bar of Texas Directory*, *supra* note 77. For the remaining three cases, LeJames Norman, Ramiro Gonzales, and Ker’sean Ramey, TDS obtained billing records that documented payments to retained lawyers for their services to the prosecution. [State’s Reply Brief, Norman v. State, No. AP-76,063 \(Tex. Crim. App. May 7, 2010\)](#) (listing Jim Vollers and Robert E. Bell as Attorneys for the State); [Letter from Jim Vollers, Attorney-at Law to Robert Bell, Jackson County Criminal District Attorney \(Feb. 2, 2015\)](#) (billing for work performed in

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Norman v. State); [Brief for the Appellee, Gonzales v. State, No. AP-75,540 \(Tex. Crim. App. May 12, 2008\)](#) (listing Anton E. Hackebeil, District Attorney, 38th Judicial District, and Edward F. Shaughnessy, III as Attorneys for the State of Texas); [Email from Debra Southwell, Medina County Auditor to Amanda Marzullo, Texas Defender Service \(Dec. 21, 2015\)](#) (attaching an index of payments to Edward Shaughnessy for work relating to *Gonzalez v. State*); [State’s Brief, Ramey v. State, No. AP-75,678 \(Tex. Crim. App. Jan. 2008\)](#) (listing Jim Vollers and Robert Bell as Attorneys for the State); [Letter from Jim Vollers, Attorney-at-Law to Robert Bell, Jackson County Criminal District Attorney \(Feb. 10, 2015\)](#) (bill for work performed in *Ramey v. State*).

⁹⁴ See [State’s Brief, Mays v. State, No. AP-75,924 \(dated Feb. 27, 2012\)](#) (listing Scott McKee, Henderson County District Attorney, and Wesley H. Mau, Assist. Attorney General/Assist. Henderson Co. District Attorney, as Attorneys for the State); [State’s Brief, Milam v. State, No. AP-76,379 \(Tex. Crim. App. Jan. 3, 2012\)](#) (listing Michael Jimerson, Rusk County Attorney, as well as Lisa Tanner and Tomee M. Heinig as Assistant County Attorneys/Assistant Attorneys General, as Counsel for the Appellee).

⁹⁵ TEX. GOV’T CODE ANN. § 42.001(a) (Vernon 2015) (“The court of criminal appeals shall appoint a state prosecuting attorney to represent the state in all proceedings before the court.”).

⁹⁶ *Id.* at §42.005 (“(a) The state prosecuting attorney may assist a district or a county attorney in representing the state before a court of appeals if requested to do so by the district or county attorney. (b) A district or county attorney may assist the state prosecuting attorney in representing the state before the court of criminal appeals.”).

⁹⁷ *About Us*, OFFICE OF STATE PROSECUTING ATT’Y, <http://www.spa.state.tx.us/about/about-us.aspx> (last visited Jan. 6, 2016).

⁹⁸ *Id.*

⁹⁹ [State’s Appellate Brief at i, Cruz-Garcia v. State, No. AP-76,703 \(Tex. Crim. App. July 24, 2013\)](#).

¹⁰⁰ See [State Prosecuting Attorney’s Post-Submission Brief as Amicus Curiae, Cade v. State, No. AP-76,883 \(Tex. Crim. App. June 20, 2014\)](#) [hereinafter *Cade amicus curiae*].

¹⁰¹ See TEX. CODE CRIM. PROC. ANN. art. 37.071(b)-(g) (Vernon 2015) (providing that a jury must unanimously vote “yes” in response to the following question in order to proceed to the question of whether there is a mitigating circumstance such that the defendant should be sentenced to life without parole or death: “Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society[.]”).

¹⁰² [Motion for Leave to File the State Prosecuting Attorney’s Post-Submission Brief as Amicus Curiae at 1, Cade v. State, No. AP-76,883 \(Tex. Crim. App. June 20, 2014\)](#).

¹⁰³ See Tex. R. App. P. 71.4.

¹⁰⁴ [Cade amicus curiae, supra note 100, at 1](#) (“The future dangerousness questions ask ‘whether a capital defendant would be dangerous whether in or out of prison with regard to how long this defendant would actually spend in prison if sentenced to life. Consideration of the time a defendant would spend in prison is not even proper.’”) (internal citations omitted).

¹⁰⁵ [Appellant’s Brief at 19, Martin v. State, No. AP-76,317 \(Tex. Crim. App. June 2, 2011\)](#).

¹⁰⁶ [Id. at 19-26](#) (citing *Fitzgerald v. State*, 782 S.W.2d 876 (Tex. Crim. App. 1990)).

¹⁰⁷ See [State Prosecuting Attorney’s Post-Submission Brief as Amicus Curiae, Cade v. State, No. AP-76,883 \(Tex. Crim. App. June 20, 2014\)](#) [hereinafter *Cade amicus curiae*].

¹⁰⁸ [State Prosecuting Attorney’s Post-Submission Brief as Amicus Curiae, Martin v. State, No. AP-76,317, at 2 \(Tex. Crim. App. Mar. 9, 2012\)](#) [hereinafter *Martin amicus curiae*]. This brief also took issue with Mr. Martin’s fourth and fifth points of error, which stemmed from a juror’s negative response to a question concerning whether she, any

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friends or family members worked for law enforcement or a prison. In fact, the juror's husband worked as a prison guard for an 18-month period and had been stabbed in the course of this employment.

¹⁰⁹ *Martin v. State*, No. AP-76,317, 2012 WL 5358862, at *5 (Tex. Crim. App. Oct. 31, 2012).

¹¹⁰ *Burger v. Burger*, 156 Tex. 584, 586 (1957).

¹¹¹ *Ex parte Taylor*, 36 S.W.3d 883, 887 (Tex. Crim. App. 2001) (per curiam). *Taylor* held that the Legislature vested the SPA with the sole authority to represent the State in criminal proceedings before the CCA. Where the SPA exercises its powers by filing a petition for discretionary review, a duplicative petition from the district attorney's office that handled the matter in the lower courts is received as an *amicus curiae* brief. *Taylor* states that amicus briefs often are filed by the SPA or local prosecutors in the intermediate appellate courts and the CCA. However common this practice may be, it does not comport with traditional notions of *amici* and their appellate roles.

¹¹² [Cade *amicus curiae*, supra note 100](#), at 18; *Martin amicus curiae, supra note 108*, at 12.