

LETHALLY DEFICIENT: DIRECT APPEALS IN TEXAS DEATH PENALTY CASES – SECTION IV(B)
INADEQUATE ATTORNEY SCREENING, CASE DISTRIBUTION AND MONITORING

¹¹³ TEXAS GUIDELINE 4.1(B); ABA GUIDELINE 5.1(B).

¹¹⁴ AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE TEXAS CAPITAL PUNISHMENT ASSESSMENT REPORT 159 (2013), http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf [hereinafter ABA Tex. Assessment].

¹¹⁵ TEXAS GUIDELINE 4.1(B)(2) Qualification of Defense Counsel (Attorney “qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated: (a) substantial knowledge and understanding of the relevant state, federal and international law both procedural and substantive, governing capital cases; (b) skill in the management and conduct of complex negotiations and litigation; (c) skill in legal research, analysis, and the drafting of litigation documents; (d) skill in oral advocacy; (e) skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence. . .”).

¹¹⁶ TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(3) (Vernon’s 2015).

¹¹⁷ The local selection committees in the four remaining administrative judicial regions require that an attorney attest compliance with Article 26.052’s requirements, and list the criminal cases she defended. THIRD ADMINISTRATIVE JUDICIAL REGION, APPLICATION FOR APPROVAL AS QUALIFIED COUNSEL IN DEATH PENALTY CASES (Jan. 1, 2013), <http://www.txcourts.gov/media/587366/attyappltrial2ndchair.pdf>; FOURTH ADMINISTRATIVE JUDICIAL REGION, APPLICATION/AFFIDAVIT FOR APPOINTMENT IN DEATH PENALTY APPEALS (last visited May 17, 2016), <http://www.txcourts.gov/media/614148/AppealsApplication.pdf>; FIFTH ADMINISTRATIVE JUDICIAL REGION, APPLICATION FOR APPROVAL AS QUALIFIED COUNSEL IN DEATH PENALTY CASES (Nov. 30, 2011), <http://www.txcourts.gov/media/614172/attyapp.pdf>; EIGHTH ADMINISTRATIVE JUDICIAL REGION, AMENDED STANDARDS FOR THE QUALIFICATION OF ATTORNEYS FOR APPOINTMENT TO DEATH PENALTY CASES (Aug. 24, 2011), <http://access.tarrantcounty.com/content/dam/main/criminal-courts/Documents/DeathPenaltyStandardQualification.pdf>.

¹¹⁸ SEVENTH ADMINISTRATIVE JUDICIAL REGION, APPLICATION TO BE PLACED ON THE LIST OF ATTORNEYS QUALIFIED FOR APPOINTMENT IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT (undated), http://www.txcourts.gov/media/614217/Application_to_be_Placed_on_List_of_Qualified_Attorneys.pdf (last visited May 23, 2016).

¹¹⁹ APPLICATION FOR PLACEMENT ON THE APPOINTMENT LIST FOR DEATH PENALTY CASES, FIRST ADMINISTRATIVE JUDICIAL REGION (April 2015), <http://www.txcourts.gov/media/938331/attorney-application-for-lead-trial-and-appellate-counsel-and-second-chair.pdf>; APPLICATION FOR APPROVAL AS QUALIFIED APPELLATE COUNSEL IN DEATH PENALTY CASES, SECOND ADMINISTRATIVE JUDICIAL REGION (May 20, 2015), http://www.mctx.org/courts/second_administrative_judicial_region/docs/Applications_for_Qualified_Counsel_in_Death_Penalty_Cases_2015.pdf; APPLICATION TO BE INCLUDED ON THE LIST OF ATTORNEYS QUALIFIED FOR APPOINTMENT IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT, SIXTH ADMINISTRATIVE JUDICIAL REGION (last visited Oct. 1, 2015), <http://www.txcourts.gov/media/614190/DeathPenaltyApplication.pdf>; and APPLICATION TO BE INCLUDED ON THE LIST OF ATTORNEYS QUALIFIED FOR APPOINTMENT IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT, NINTH ADMINISTRATIVE JUDICIAL REGION, <http://www.txcourts.gov/media/614483/application.pdf> (last visited Oct. 1, 2015).

¹²⁰ The Fourth, Fifth, and Eighth Administrative Judicial Regions.

¹²¹ The Third and Fifth Administrative Judicial Regions.

¹²² The Eighth Administrative Judicial Region.

¹²³ The Fifth and Eighth Administrative Judicial Regions.

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¹²⁴ The Seventh and Eighth Administrative Judicial Regions.

¹²⁵ [MARICOPA CNTY. SUPERIOR CT., ADMINISTRATIVE ORDER NO. 2012-008: IN THE MATTER OF ADOPTING A PLAN FOR REVIEW OF APPOINTED COUNSEL 3-4 \(adopted Jan. 11, 2012\).](#)

¹²⁶ [La. Pub. Defender Bd., Capital Defense Guidelines §915 \(c\) \(Qualifications of Defense Counsel\).](#)

¹²⁷ TEXAS GUIDELINE 2.1(C) (emphasis added).

¹²⁸ *Id.* at art. 4.05 (“District courts and criminal district courts shall have original jurisdiction in criminal cases of the grade of felony, of all misdemeanors involving official misconduct, and of misdemeanor cases transferred to the district court[.]”).

¹²⁹ *See supra* notes 68 to 70 and text.

¹³⁰ TEX. CODE CRIM. PROC. ANN. art. 26.052 (Vernon’s 2015).

¹³¹ *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981) (quoting *Ferri v. Ackerman*, 44 U.S. 193, 204 (1979)).

¹³² *See, e.g.*, Emily DePrang, *Poor Judgment*, TEX. OBSERVER, Oct. 15, 2015 (reporting a defense lawyer’s statements that in Harris County “official and cultural bias toward small dockets can pressure judges to appoint attorneys who clear cases quickly, regardless of the quality of counsel they provide. . . . [A] certain number of court-appointed lawyers who appear to be appointed primarily for their ability to move the docket[.] . . . The trade-off is that the judge is appointing Lawyer X to lots of cases, and in return for the appointments, Lawyer X is moving those cases, which meets the judge’s objective.”), <https://www.texasobserver.org/poor-judgment/>; *see also* AMERICAN BAR ASSOCIATION, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1 (2002) (“The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. . . . Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.”), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/l_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

¹³³ *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(j) (Vernon’s 2015) (stating the presiding judge of the convicting court shall appoint appellate counsel as soon as practical after a death sentence is imposed, without specifying how the court is to select among the lawyers deemed qualified by the local selection committee).

¹³⁴ The same lawyer represented these death row inmates from Dallas County on direct appeal: Donald Bess, James Broadnax, Gary Green, Roderick Harris, Matthew Johnson, Juan Lizcano, Hector Medina, Naim Muhammad, Mark Robertson, and Robert Sparks.

¹³⁵ FIRST ADMINISTRATIVE JUDICIAL REGION OF TEXAS, LIST OF ATTORNEYS QUALIFIED TO REPRESENT INDIGENT DEFENDANTS IN DEATH PENALTY CASES AS OF OCTOBER 12, 2015, <http://www.txcourts.gov/media/1047584/death-penalty-approved-attorneys-list.pdf>.

¹³⁶ Tilon Carter, Lisa Coleman, and Kwame Rockwell were represented by the same attorney. Another lawyer represented Paul Storey and John Hummel.

¹³⁷ [EIGHTH ADMINISTRATIVE JUDICIAL REGION OF TEXAS, 8TH ADMINISTRATIVE JUDICIAL REGION DEATH PENALTY COUNSEL \(amended Jan. 2008\)](#) (copy on file with author).

¹³⁸ *See* S.B. 7 § 6, 77th Leg., Reg. Sess. (Tex. 2001) (requiring that judges appoint attorneys to represent indigent defendants in non-capital felonies and misdemeanors from a public appointment list “using a system of rotation”).

¹³⁹ TEXAS GUIDELINE 2(C).

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¹⁴⁰ ABA GUIDELINE 4.1(B)(1); ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002) (Principle 1: “The public defense function, including the selection, funding, and payment of defense counsel, is independent.”), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

¹⁴¹ TEX. CODE OF JUDICIAL CONDUCT CANON 2(B).

¹⁴² *Id.* at 3(C)(4).

¹⁴³ For a further discussion of the ethical implications of this system, *see* STATE BAR OF TEXAS COMMITTEE ON LEGAL SERVICES TO THE POOR, MUTING GIDEON’S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS 15 (2000), <http://www.prisonpolicy.org/scans/last.pdf> [hereinafter STATE BAR OF TEX., MUTING GIDEON’S TRUMPET].

¹⁴⁴ John Gardner, Mabry Landor, III, and Adam Ward.

¹⁴⁵ *See* [Ward v. The Hon. Richard A. Beacom, No. WR-70,651-01 \(Tex. Crim. App. Nov. 19, 2008\)](#) (denying Ward’s petition for a writ of mandamus declaring the order appointing direct appeal counsel null and void because Ward’s habeas counsel, his direct appeal lawyer, and the prosecution subsequently filed an agreed motion to disqualify Ward’s direct appeal lawyer because he was not on the list of approved counsel); [State v. Gardner, No. 219-81121-06 \(219th Dist. Ct., Collin County, Tex. Mar. 28, 2008\)](#) (removing direct appeal counsel pursuant to a request by the defendant and appointing substitute counsel); [Letter from John Gardner to Judge Curt Henderson, 219th District Court, Midland, Tex. \(Mar. 12, 2008\)](#) (informing the trial court that his appointed direct appeal lawyer was not on the list of approved lawyers for death penalty cases).

¹⁴⁶ [Brief of Appellant at X, Ward v. State, No. AP-75,750 \(Tex. Crim. App. Aug. 8, 2008\)](#) (Issues presented: (1) Whether the trial court reversibly erred in excluding the evidence of mental impairment offered through forensic psychologist Kristi Compton. (2) Whether the trial court reversibly erred in excluding evidence of mental impairment by limited the testimony of psychiatrist Dr. Heidi Vermette.) [hereinafter First Ward Brief].

¹⁴⁷ [Order on Agreed Motion to Disqualify Appellant’s Counsel on Direct Appeal, Ward v. State, No. AP-75,750 \(Tex. Crim. App. Nov. 19, 2008\) \(per curiam\)](#).

¹⁴⁸ *Compare* First Ward Brief, *supra* note 146; and [Brief of Appellant, Adam Kelly Ward, Ward v. State, No. AP-75,750 \(Tex. Crim. App. Apr. 22, 2009\)](#).

¹⁴⁹ *Id.*

¹⁵⁰ *Ward v. State*, No. No. AP-75,750, 2010 WL 454980, at *1 (Tex. Crim. App. Feb. 10, 2010) (“We conclude that Ward’s five points of error are without merit. Consequently, we affirm the trial court’s judgment.”).

¹⁵¹ [Letter from Judge Olen Underwood to Counsel \(July 30, 2007\)](#) (showing that counsel was approved for appointment as appellate, first and second chair counsel in death penalty cases).

¹⁵² *Cf.* [Order, State v. Landor, No. 1194597 \(209th Dist. Ct., Harris County, Tex. Apr. 12, 2010\)](#) (appointing direct appeal counsel); [SECOND ADMINISTRATIVE JUDICIAL REGION LIST OF APPROVED LAWYERS IN DEATH PENALTY CASES \(Mar. 23, 2010\)](#) (copy on file with author); and [SECOND ADMINISTRATIVE JUDICIAL REGION LIST OF APPROVED LAWYERS IN DEATH PENALTY CASES \(Mar. 10, 2011\)](#) (copy on file with author).

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¹⁵³ Tex. R. App. P. 38.6(b) (requiring that the appellant’s brief is filed no later than 30 days after the clerk’s and reporter’s record are submitted).

¹⁵⁴ *Landor v. State*, TEX. COURT OF CRIMINAL APPEALS, <http://www.search.txcourts.gov/Case.aspx?cn=AP-76,328&coa=coscca> (last visited July 6, 2016) (stating that the court reporter’s record was received on Aug. 17, 2010 and the appellant’s brief was filed on Sept. 1, 2010). The trial transcripts in this case were estimated to be 3,500 to 4,000 pages. [Letter from Valdeane Wainwright, Official Court Reporter, 209th District Court to Abel Acosta re: Mabry J. Landor \(May 18, 2010\)](#) (“The trial was 21 days including *voir dire* and is approximately 3500-4000 pages in length.”). The CCA affirmed Mr. Landor’s conviction and sentence on direct appeal. *Landor v. State*, No. AP-76,328, slip op. at 1 (Tex. Crim. App. June 29, 2011) (italics added).

¹⁵⁵ [Appellant’s Brief at 2-4, Landor v. State, No. AP-76,328 \(Tex. Crim. App. Sept. 1, 2010\)](#) (Point of Error 1 – Appellant’s uncontroverted allegations of coercion rendered his custodial statement inadmissible as a matter of law; Point of Error 2 – Exclusion of testimony concerning coercion by the police deprived appellant of his due process right to a fair opportunity to present his defense; Point of Error 3 – Exclusion of testimony concerning coercion by the police violated appellant’s right to offer evidence before the jury as to the voluntariness of his confession; Point of Error 4 – Appellant suffered egregious harm as a result of the omission of a general instruction on voluntariness under Article 38.22(6) of the Code of Criminal Procedure; Point of Error 5 – Appellant suffered egregious harm as a result of the omission of a specific exclusionary-rule instruction under Article 38.23(a) of the Code of Criminal Procedure; Point of Error 6 – Appellant was denied effective assistance of counsel at the guilt phase of his trial).

¹⁵⁶ *Id.* at 5-29.

¹⁵⁷ *Landor v. State*, No. AP-76,328, slip op. at 1 (Tex. Crim. App. June 29, 2011) (not designated for publication) (“Appellant raises six points of error. Finding no reversible error, we affirm the conviction and sentence.”).

¹⁵⁸ TEXAS GUIDELINE 6.1(C).

¹⁵⁹ In *Storey v. State*, No. AP-76,018, 2010 WL 3901416, at *11 (Tex. Crim. App. Oct. 6, 2010), the CCA declined to address an issue raised in the appellant’s brief because it was inadequately briefed. Mr. Storey’s appellate attorney was subsequently appointed to represent death row inmates John Hummel and Anthony Soliz in the direct appeals of their death penalty cases. See *Hummel v. State*, TEX. COURT OF CRIMINAL APPEALS, <http://www.search.txcourts.gov/Case.aspx?cn=AP-76,596&coa=coscca&p=1> (last visited July 6, 2016) (stating that Mr. Hummel was sentenced to death around July 18, 2011); and *Soliz v. State*, TEX. CT. CRIM. APP., <http://www.search.txcourts.gov/Case.aspx?cn=AP-76,768&coa=coscca> (last visited July 6, 2016) (stating that Mr. Soliz was sentenced to death around April 5, 2012). The CCA also found that issues were insufficiently briefed in both Messrs. Hummel and Soliz’s appellate briefs. *Soliz v. State*, 432 S.W.3d 895, 900-01 (Tex. Crim. App. 2014); *Hummel v. State*, No. AP-76,596, 2013 WL 6123283, at *6 (Tex. Crim. App. Nov. 20, 2013). Further, while the CCA found that appellant improperly briefed issues in *Lizcano v. State*, No. AP-75,879, 2010 WL 1817772, at *22 (Tex. Crim. App. May 5, 2010) and *Sparks v. State*, No. AP-76,099, 2010 WL 4132769, at *26-27 (Tex. Crim. App. Oct. 20, 2010), appellate counsel for Messrs. Lizcano and Sparks subsequently was appointed to represent a number of death row inmates on direct appeal, including Roderick Harris. Order Appointing Counsel on Appeal, *State v. Harris*, No. F09-00409-Y (Crim. Dist. Ct. 7, Dallas County, Tex. May 23, 2013). The CCA later found that an issue was improperly presented in Mr. Harris’s appellate brief. *Harris v. State*, No. AP-76,810, 2014 WL 2155395, at *19 (Tex. Crim. App. May 21, 2014). Both lawyers remain on their region’s list of counsel qualified to represent indigent defendants in death penalty proceedings. FIRST ADMINISTRATIVE JUDICIAL REGION, LIST OF ATTORNEYS QUALIFIED TO REPRESENT INDIGENT DEFENDANTS IN DEATH PENALTY CASES 4 & 6 (Feb. 24, 2016), <http://www.txcourts.gov/media/1047584/death-penalty-approved-attorneys-list.pdf>; EIGHTH ADMINISTRATIVE JUDICIAL REGION, LIST OF DEATH PENALTY APPROVED ATTORNEYS (2016).

¹⁶⁰ 466 U.S. 668 (1984).

¹⁶¹ Patrick S. Metzger, *Speaking Truth to Power: The Obligation of the Courts to Enforce the Right to Counsel at Trial*, 45 TEX. TECH L. REV. 163, 215 (2012) (explaining how the two-prong test enumerated under *Strickland*

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requires a showing that counsel’s deficient performance yielded a result that “would . . . shock the conscience of the observer”).