THE DEATH PENALTY IN TEXAS

The Mission to Texas on behalf of the
Human Rights Committee of
The Bar of England and Wales

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Barristers

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"In Texas we have the rule of law but we do not have a sense of justice[1]"

---

[1]the words of a Houston lawyer to the Committee

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8. **The Texas District and County Attorneys Association**; Tom Krampitz, Robert Kepple,

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I INTRODUCTION

In August 1993 the Bar of England and Wales Human Rights Committee were approached by friends of a prisoner on Death Row in Texas.

As a result of the information contained in the legal papers in the case and various reports dealing generally with the quality of legal representation for indigent defendants facing a capital charge in Texas, the Committee decided in February 1994 to send a delegation to Texas. Their task was to enquire into the perceived problems of representation in capital cases and in particular;

(a) the system of appointment of counsel to indigent defendants,

(b) the funding of representation by the individual counties within the state,

(c) the assignment and compensation of court appointed counsel,

(d) the state and federal habeas corpus appellate process,

(e) the "death row phenomenon" (so called because the delay between conviction and execution averages eight and a half years),

(f) the international obligations of the United States in respect of capital cases following the ratification by the United States on 6th June 1992 of the International Covenant on Civil and Political Rights.

As will be noted in the acknowledgements the Committee were fortunate to meet the various parties involved in the ongoing debate about the implementation of the death penalty in Texas. These meetings were of great benefit to us so that we obtained a

broad spectrum of views. It was made clear to those we met that the Committee holds no view on the issue of the death penalty. Our concern is with its implementation.

The Committee hopes that the conclusions set out below will have broad support. In fact a number of the conclusions have already been suggested by other parties including The Spangenberg Group and the State Bar of Texas. There are some attempts in Texas to address the issues contained in this report. On 1st June 1994 the Texas House Committee on Criminal Jurisprudence began looking into various issues relating to the death penalty including streamlining the appeals process, ensuring quality of counsel and examining how and when clemency should be exercised. Moreover trial Judges in Harris County, Houston are attempting to start a programme to identify who is properly qualified to act in the capital cases that appear before them.

The Committee believes that the situation in Texas is so serious that reform must take place immediately. We accept that politically the conclusions will be seen in some quarters as controversial but the Committee nevertheless hope that the new Texas Governor will give his urgent attention to the serious deficiencies present in the Texas criminal justice system.

Finally the authors of the report have where possible cited the source of a citation or statistic. The Texas authorities failed to provide the Committee with other statistics and sources that were requested.

II BACKGROUND

The State of Texas began formal executions by electric chair in 1924. The executions took place at the state prison in Huntsville. Prior to this the death penalty was carried out by the counties and administered by hanging. Between 1924 and 1964 Texas had a total of 506 persons on death row of which it executed 362.

The Death Penalty was re-established in Texas in 1973 after the Supreme Court ruled that the State's previous death penalty statute was unconstitutional[2]. The new statute was upheld in 1976. Since 1976 Texas has executed approximately one third of the country's population on death row[3].It is claimed that the pace of executions in Texas seems to be increasing. In Harris County, Houston, capital case filings are up from 50 in 1990 to 200 in 1992[4]. Since December 1992 Harris County juries have imposed 20 death penalties, compared with 7 in Los Angeles County. By the end of 1994 Harris County is expected to reach a new record in the number of capital cases tried in one year. The county is expected to have prosecuted 25 cases in which the death penalty is sought. In 1992 the number was 21 and in 1993 it was 18. This makes the county the busiest capital trial jurisdiction per capita in the country[5].

We were informed by the Texas Criminal Court of Appeals that as of May 1994 they

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[2]Furman v Georgia,408 U.S.238 (1972)

[3]NAACP Legal Defense and Educational Fund,Inc.,Death Row,U.S.A,10 Spring 1994

[4]The Houston Chronicle, April 9th 1992

[5]National Law Journal, October 10th, 1994

had a backlog of 140 capital cases awaiting hearing. This made this court the busiest appellate court in the country. In the whole of 1993 Texas set 100 execution dates at least 8 of which were set within 45 days of the close of the Direct Review. In 1993 the Texas Criminal Court of Appeals affirmed 56 cases; twice as many as the year before. In 1993 Texas executed 17 persons. As of December 1994 Texas has executed 11 people. There are presently 384 people on death row, four of whom are women.

Public opinion in Texas is increasingly supportive of the death penalty. Between 8 and 9 out of 10 Texans favour the death penalty[6] and there is little dispute that Texas is facing a serious crime problem. The pressure on the authorities "to do something" to curb the sharp rise in crime is intense. Moreover the death penalty has become an integral part of the Texas political culture with candidates campaigns fixated with pro death penalty slogans and speeches. In the recent Supreme Court campaign one of the candidates repeatedly expressed her pro death penalty views even though the Texas Supreme Court has no criminal jurisdiction. The Court of Criminal Appeals, which is composed of 9 judges is the final appellate jurisdiction in Texas for capital cases.

[6]The Houston Chronicle, February 22nd, 1992

III THE INTERNATIONAL APPROACH

On 2nd November, 1993, the Judicial Committee of the Privy Council (Lords Griffiths, Lane, Ackner, Goff of Chieveley, Lowry, Slynn of Hadley and Woolf) delivered a far reaching and landmark judgment in the case of **Earl Pratt & Ivan Morgan v The Attorney-General for Jamaica et al.** The Judicial Committee had not sat as a Board of 7 since the 1940s; but this was an exceptional constitutional challenge to the legality of hanging Commonwealth prisoners who have been on death row for more than 5 years. In delivering the judgment of the Board, Lord Griffiths stated;

"... The appellants, Earl Pratt and Ivan Morgan, were arrested 16 years ago for a murder committed on 6th October 1977 and have been held in custody ever since. On 15th January 1979 they were convicted of murder and sentenced to death. Since that date they have been imprisoned in that part of Saint Catherine's prison set aside to hold prisoners under sentence of death and commonly known as death row. On three occasions the death warrant has been read to them and they have been removed to the condemned cells immediately adjacent to the gallows. The last occasion was in February 1991 for execution on 7th March; a stay was granted on 6th March consequent upon the commencement of these proceedings. The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they have been in prison facing the gallows ...

... The death penalty in the United Kingdom has always been carried out expeditiously after sentence, within a matter of weeks or in the event of an appeal, even to the House of Lords within a matter of months. Delays in terms of years are unheard of ...

... It is difficult to envisage any circumstances in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of the life imprisonment. Prior to independence, applying the English common law, judges in Jamaica would have had the like power to stay a long delayed execution, as foreshadowed by Lord Diplock in **Abbott v Attorney-**

General of Trinidad and Tobago (1979) 1 WLR 1342 when he said at page 1348:- "In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not by due process of law."

... There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion ? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time. But before their Lordships condemn the act of execution as "inhuman or degrading punishment or other treatment" ... there are a number of factors which have to be balanced in weighing the delay. If delay is due entirely to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process the accused cannot be allowed to take advantage of that delay for to do so would be to permit the accused to use illegitimate means to escape the punishment inflicted upon him in the interest of protecting society against crime ...

... A much more difficult question is whether the delay occasioned by the legitimate resort of the accused to all available appellate procedures should be taken into account, or whether it is only delay that can be attributed to the shortcomings of the State that should be taken into account. There is a powerful argument that it cannot be inhuman or degrading to allow an accused every opportunity to prolong his life by resort to appellate procedures however extended may be the eventual time between sentence and execution. This is the view that currently prevails in some States in the United States and has resulted in what has become known as the death row phenomenon where men are held under sentence of death for many years while their lawyers pursue a multiplicity of appellate procedures. Powerful statements in support of this point of view appear in the opinion of Circuit Judge O'Scanlain in **Richmond v Lewis (1990) 948F.2d 1473,** a decision of the United States Court of Appeals for the Ninth Circuit, and in the judgment of La Forest J. in **Kindler v Canada (Minister of Justice) (1991) 67 C.C.C. (3d),** a decision of the Supreme Court of Canada...

... in their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve - It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not

become established as a part of our jurisprudence.

... The total period of delay in this case is shocking and now amounts to almost fourteen years. It is double the time that the European Court of Human Rights considered would be an infringement of Article 3 of the European Convention ... In the last resort the Courts have to accept the responsibility of saying whether the threshold has been passed in any given case and there may be difficult borderline decisions to be made ...

...It should be possible to complete the entire domestic appeal process within approximately two years...In any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment..."

On 8th June, 1992, the Secretary General of the United Nations received the Instrument of Ratification from the United States Senate of the International Covenant on Civil and Political Rights. The United States were thus bound in international law to ensure that sentence of death is carried out only in accordance with the law and not contrary to the provisions of the Covenant; procedural guarantees therein prescribed must be observed, including the right to a fair hearing, the presumption of innocence, the minimum guarantees for the defence, communication with Counsel of his own choosing, trial without undue delay and the right to review by a higher tribunal. The Human Rights Committee of the United Nations has repeatedly ruled that in Capital Punishment cases, the duty of States is to observe rigorously all the guarantees for a fair trial set out in the Covenant.

The United States Senate made a number of reservations upon ratification primarily concerning the continued practice of executing minors at the date of their conviction. International law recognizes the right of States parties to a

multilateral treaty to formulate objections to reservations; by early January, 1994 the following countries had deposited with the United Nations objections to the United States reservations, declarations and understandings:

(a) Finland
(b) Netherlands
(c) Germany
(d) Denmark
(e) France
(f) Norway
(g) Belgium
(h) Italy
(i) Portugal
(j) Spain.

International jurisprudence tends to the view that the United States reservations to the death penalty provisions of the International Covenant are illegal, as they are contrary to the object and purpose of the Treaty. Examining the matter narrowly, it would appear that the United States does not intend to be bound by articles 6 and 7 of the Covenant so far as the death penalty is concerned.

However, the objecting countries have quite correctly stated that under Article 4(2) there can be no derogation from Articles 6 & 7. It is likely therefore that one of the objecting countries will seek a ruling from the Human Rights Committee of the United Nations as to the effect and legality of the reservations.

Under Article 4 of the Treaty, in time of public emergency which threatens the life of the nation, States may derogate from certain of their international

obligations to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other international obligations. In particular, under Clause 2 of Article 4, there can be no derogation from Article 6 and the United States Government has evinced an intention to continue with the practice of executing minors which is against all international norms. It is almost alone in the civilised world in the carrying out of executions of juveniles. Although Nigeria, Pakistan, Iran, Iraq and Saudi Arabia are reported to have carried out executions of minors under the age of 18 at the time of the crime, we are reliably informed that the United States has more juveniles awaiting execution than any other country in the world. Eight juvenile offenders have been executed there since 1985 and five of these executions took place in the State of Texas.

IV PROCEDURE IN DEATH PENALTY CASES

Texas is one of the 37 states which currently has the death penalty for at least some category of homicide, though the use of the death penalty in practice varies extremely widely among those states.

The only crimes punishable by death in Texas are certain murders classified as "capital felonies". Not every homicide is a murder under the Texas Penal Code nor is every murder a capital murder. In a capital murder, the killer must have acted intentionally or knowingly to cause the death under specific circumstances. The list of circumstances was significantly expanded by the Legislature in 1993. Some crimes that might qualify as capital murders are instead prosecuted as lesser offences requiring different standards of proof and different procedural steps. The District Attorney will decide if a murder will be tried as a capital murder or as another offence.

The Texas Penal Code sec. 19.03 states that the following are capital felonies:

i. murder of a peace officer or a firefighter acting in an official capacity,

ii. murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault or arson,

iii. murder for hire or hiring another to commit murder,

iv. murder while escaping or attempting to escape from prison,

v. murder of a penal institution employee while incarcerated in a prison,

vi. murder while incarcerated and with intent to establish, maintain or participate in

a combination or the profits of a combination (added in 1993),

vii. murder while serving a life term or 99 years for murder, capital murder, indecency with a child, aggravated kidnapping, aggravated sexual assault or aggravated robbery (this provision was added in 1993 and from 1st September 1994 the provision on indecency with a child was dropped and the provision relating to murder and capital murder was replaced with a separate capital felony for murder while incarcerated for murder or capital murder),

viii. murder of more than one person during the same criminal transaction or scheme,

ix. murder of a child under 6 years old,

x. murder in the course of committing or attempting to commit obstruction or retaliation (added in September 1994).

A capital trial will begin in the District Court. It will consist of two phases. The "guilt phase" and the "punishment phase". Once convicted, the jury will decide if the defendant should receive the death penalty (by lethal injection) or be sentenced to life in prison (for offences post September 1993 this will mean serving a 35 year minimum, post September 1994 a 40 year minimum). In Texas the jury cannot be told about the above minimum sentence. This may change. In **Simmons v South Carolina**[7] the Supreme Court held by a 7 member majority that when the prosecution argues future dangerousness as reason for the imposition of the death penalty, the defendant has a due process right to inform the jury, either by argument or instruction, that life in prison means life without parole. The majority recognized the unfairness of preventing a defendant from rebutting or explaining evidence which the

[7]92-9059 (June. 17th, 1994)

prosecution utilizes to justify a death sentence.

At the "punishment phase" two questions are put to the jury;

a\ is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

b\ if the defendant is found guilty as a party to an offence or as responsible for the conduct of another, did the defendant intend or anticipate the loss of life?

A "yes" answer requires unanimity; a "no" answer can be by a majority of 10-12. If the jury unanimously answer "yes" to both questions then both the state and the defendant proceed to call evidence as to the defendant's background, character and antecedents; the circumstances surrounding the offence are also examined closely. The jury have to decide whether life imprisonment is more appropriate than execution; a "no" answer requires unanimity and a "yes" can be by a majority.

Once convicted and sentenced to death the defendant's avenues of appeal are as follows;

i. an automatic appeal from District Court to the Texas Criminal Court of Appeals (Direct Review). This court will decide whether or not certain errors occurred at trial which are limited to the trial record. According to the Texas Criminal Court of Appeals 25% of capital cases are "afforded relief" at this stage in the sense that convictions are quashed and a retrial is ordered or a life sentence is substituted. The

Texas Defense Lawyers Association and the Texas District and County Attorneys' Association (TDCA) claimed it was between 10%-15%.

ii. if the conviction and sentence are upheld the defendant may file a petition with the United States Supreme Court for a review of the trial record. If the Supreme Court upholds the lower court decision or denies a review THEN

iii. the defendant can file a State Habeas Corpus appeal with the trial court. This is sent to the Texas Criminal Court of Appeals for a review of issues outside the trial record. Points raised and rejected on Direct Review cannot be raised again, unless it relates to new evidence indicating innocence or is a constitutional issue. If the court upholds the conviction and sentence the defendant can appeal to the Supreme Court. If the Supreme Court upholds the lower court decision or denies a review THEN

iv. the defendant can file a Federal Habeas Corpus appeal in the United States Federal District Court. This court will review issues which are outside the trial record. The defendant can appeal this court's decision to the United States Federal Court of Appeals (5th Circuit).

This court and the district court beneath it afford Texas defendants collateral review **as of right** for violations of the federal constitution claimed and rejected in State proceedings. If the federal courts reject his claim the defendant can file a petition with the United States Supreme Court.

Review in the United States Supreme Court both of the Texas Criminal Court of Appeals (Direct Review and Habeas Corpus) and of the Federal Court of Appeals, is **discretionary** and is made by the filing of petition for a writ of certiorari.

If all appeals are exhausted then the defendant can request **clemency** from the State Governor through an application made to the Board of Pardons and Paroles.

V LEGAL REPRESENTATION

"the unique, bifurcated nature of capital trials and the special investigation into the defendant's personal history and background that may be required, the complexity and fluidity of the law, and the high, emotional stakes involved all make capital cases more costly and difficult to litigate than ordinary criminal trials, yet the attorney's assigned to represent indigent capital defendants at times are less qualified than those appointed in ordinary criminal cases". Justice Blackmun in McFarland v Scott, U.S.C No. 93-6497(1994)

In England and Wales an indigent defendant charged with homicide is entitled to be represented at State expense by three lawyers. The two trial lawyers will include a senior lawyer called Queen's Counsel and a junior lawyer referred to as Junior Counsel. The third lawyer is the Solicitor who will instruct counsel of his or her choice. The court does not appoint a lawyer.

Queen's Counsel are appointed by Her Majesty The Queen upon the recommendation of the Lord Chancellor. The appointment will be based on that lawyer's ability and expertise in a particular field, for example crime. Lawyers applying for such a prestigious appointment will usually have been practising for approximately 15-20 years. Junior Counsel will usually have at least 10 years experience in a particular field. The third lawyer, the solicitor, presently has no rights of audience. The task of the third lawyer is to prepare the defence case which will include undertaking investigations and obtaining expert or other specialist testimony if relevant.

The lawyer's reasonable fees and expenses are paid for by the State, out of the Legal Aid Fund. The State will make interim payments if requested.

The level of fees is determined by a court official. In general, Legal Aid fees for this category of case are considered adequate. Qualified counsel are under a professional obligation to accept any such case offered them. In practice, fully qualified and experienced counsel are always obtainable for homicide cases.

In Texas the trial court will appoint counsel to represent indigent defendants facing a capital charge. The State must provide an indigent defendant facing a capital offence with one counsel at every proceeding except for state habeas corpus proceedings[8]. This means that the defendant must have a lawyer until the charges are dismissed, the defendant is acquitted, appeals are exhausted or the lawyer is relieved of any duties by the court or replaced by other counsel. This obligation ceases once the conviction is affirmed on Direct Review.

Texas is the only death penalty state that makes no use of a state-wide public defenders office for providing representation in capital trials or the direct appeal. The majority of the other death penalty states rely upon specially trained, full-time public defenders in order to ensure that they provide more consistent and competent capital representation.

In Texas there are no state-wide qualifications or eligibility guidelines to meet in order to be appointed by the court as trial counsel in a capital case. The only qualification required is that you are a member of the Texas State Bar. In 1977 the Texas State Bar adopted a board certification process which certifies the applicant as being of "special competence" in his or her field of practice. This is not a requirement in a capital case.

It became clear throughout the Committee's discussions with the various parties that there is widespread disagreement in Texas regarding the quality of representation in capital cases and whether the state should impose minimum standards before counsel can be appointed. The prosecution authorities in Texas informed us that defence counsel in capital cases "were excellent" and that claims that counsel were underpaid were "exaggerated". The TDCA stated that "eighty percent of death penalty cases come out of the six major counties and these are blessed with a competent criminal defense bar...I cannot think of why any judge in any of these counties would have any reason for putting incompetent lawyers to defend a death penalty case if he knows

[8]arts. 1.051 and 24.04 of the Texas Code of Criminal Procedure

the case will come back...I do not know that stories we hear about poor lawyers representing people at trial is really on the mark". The Association stated that it did not think that "experience was necessarily the measure of qualified counsel". From our examination of various appeals before the Texas Criminal Court of Appeals and discussions with the judges it was clear that the majority of them were satisfied with quality of defence counsel. The Attorney-General's Office expressed more concern over the quality of prosecuting counsel in rural areas.

The Committee were informed by the TDCA that the acquittal rate in death penalty cases in Texas was "almost nil". This view was confirmed by various defence lawyers who specialize in capital murder trials. In fact the Association infomed us that in Texas as a whole the acquittal rate in felony cases was equally low. This information we find astonishing. According to the prosecution authorities we spoke to, the above "statistics" had no correlation to the quality of defence counsel.

These views seem to be contrary to detailed studies on the issue. The American Bar Association in its report of 1990 entitled **"Towards a More Just and Effective System of Review in State Death Penalty Cases"** stated that "the inadequacy and inadequate compensation of counsel at trial was one of the principal failings of the capital punishment system in the States today". The Spangenberg Group in its report **"A Study of Representation in Capital Cases in Texas"** which was commissioned by the Texas Bar Association and the Texas Bar Foundation to study indigent criminal defence and published in March 1993 concluded that "Texas had already reached the crisis stage in capital representation...and the problem is substantially worse than that faced by any other state with the death penalty".

Defence counsel in Texas and a prominent District Judge who frequently tries capital cases confirmed the crisis in capital representation in Texas. Although "Harris County (Houston) did possess 30 to 40 lawyers who set a high standard in criminal defense" Houston lawyers informed us that the majority were not up to the task but nevertheless would be appointed by the trial judge. According to them the acquittal rate in death penalty cases was 1 in 100. The major causes of the problems raised in

The Spangenberg study were still present, namely judicial control and poor funding. In their experience a trial judge would "rarely dismiss the lawyer even if obviously incompetent".

They recommended that appointment of defence counsel should be made by a State Bar Criminal Defense Committee so as to ensure that "the judiciary are out of the picture". They endorsed the State Bar recommendation regarding the requirement for "qualifications". Presently in Texas there are no qualifications required before counsel can be appointed in a capital case. Nor does the Texas State Bar provide any structure for training or supervising counsel who are involved in defending capital cases.

VI COMPENSATION

"...the prospect that hours spent in trial preparation or funds expended hiring psychiatrists or ballistics experts will be uncompensated unquestionably chills even a qualified attorney's zealous representation of his client". Justice Blackmun in McFarland

Article 26.05 of the Texas Code of Criminal Procedure states that "counsel appointed to represent a defendant in criminal proceedings shall be reimbursed for "reasonable expenses" and "reasonable attorney's fees" ". The burden is placed upon the individual counties to fund the payments. The State of Texas provides no funds. The trial judge in each respective county will establish their own rates of compensation based upon what they feel is "reasonable".

The Spangenberg Report which conducted an extensive survey of both defence counsel and judges in Texas found that compensation for court appointed counsel was "inadequate" and reimbursement schedules used by the courts to determine counsel's fees varied widely from county to county. Some counties imposed a maximum arbitrary fee, others a negotiated flat fee. The report stated that the hourly rate for out of court fees ranged from $30 to $100 and the daily rate for in court fees ranged from $50 to $600. The median rate for compensation was $35 per hour. One of the study's conclusions was that compensation seemed to be no higher for capital cases than for non-capital felony cases. The majority of the judges responding to the survey agreed with this view.

In **Martinez-Macias v Collins**[9], a Texas case, the defendant was convicted of the capital murder of Robert Haney. The court appointed three lawyers to represent the defendant at trial. The three lawyers spent a total of 540.50 hours on the case and were paid a total of $6,400 in lawyers fees resulting in an hourly rate of $11.64. The Federal Court of Appeal held that due to numerous errors "...that occurred in this case (which) are inherent in a system which paid attorneys such a meager amount"

[9]979 F. 2d 1067 (5th Cir. 1992)

the defendant was denied his constitutional right to adequate counsel. The court stated that "the state (Texas) paid defense counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for".

The Spangenberg Report also found that trial judges regularly imposed a cap on the amount of funds the court would allocate the defence to instruct experts and investigators. The report stated this was $500. We were informed that court-awarded funds for the appointment of investigators and experts were often unavailable, severely limited or not approved of by the courts. This would mean that counsel would have to expend his or her own resources to obtain an expert's report with little hope of being reimbursed for it.

As stated above the funds used to compensate the lawyer and to reimburse them for any expenses will come out of the general funds of the county. A long or complicated capital case in a small county could have a dramatic effect upon that county's yearly expenditure. In fact many of the judges who responded to the Spangenberg survey stated that they did feel pressure to preserve local funds and they felt this was a barrier to obtaining qualified and competent counsel.

In Texas, this system of county based appointment and compensation of counsel seems to result in a lack of uniform quality of representation. Inadequate compensation means that fewer counsel are willing to take on time consuming and complex capital cases. Inadequate compensation leads inevitably to inadequate representation.

As Stephen Bright stated "adequate representation and fairness will never be achieved as long as it is accepted that the state can pay to prosecute a capital case without paying to defend one"[10].

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[10]Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but the Worst Lawyer, 103 Yale L.J 835 1994

Ineffective Assistance of Counsel

Common to most death penalty post-conviction appeals in Texas is a ground of appeal that the defendant was rendered "ineffective assistance of counsel" at his trial in violation of the 6th Amendment to the United States Constitution. This ground of appeal is rarely raised at Direct Review. According to the Texas Resource Center this is because "a proper understanding of ineffectiveness requires additional development of fact and the first appeal as of right is exclusively based on the trial record and only involves the legal rulings that were made at trial".

The legal standard for what will qualify as an "ineffective assistance of counsel" claim is governed by the two-pronged test set out in **Strickland v Washington**[11]. In order to prevail the defendant must show that his lawyer's performance was deficient, known as the "performance prong" AND that the lawyer's error prejudiced the defendant's case, known as the "prejudice prong".

Under the first requirement the question is whether the lawyer's assistance "was reasonable considering all the circumstances". The circumstances to be considered are those existing at the time of counsel's performance without interference from the "distorting effects of hindsight". The court is required to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance".

The second requirement is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". The Court stated that "a reasonable probability is a probability sufficient to undermine confidence in the outcome". A verdict, the Court said that has weak support is more likely to be affected by lawyer error than one with strong support. The Court said that finally, the relevant question is whether the adversary system worked in the case. The purpose of the inquiry is not to grade the lawyer's performance but to determine whether the defendant was accorded due process.

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[11]466 U.S 668, 104 S.Ct.2052,80 L.Ed.2d 674 (1984)

The Supreme Court decision does not require the defendant to be represented by able and effective counsel but rather "not legally ineffective" counsel.

In order to obtain an "objective" view of the quality of representation in capital cases we read numerous trial transcripts contained in post-conviction appeal briefs, we also heard oral argument in four capital appeal cases before the Texas Court of Criminal Appeals and spoke to numerous defence counsel in Texas. The accounts gave rise to considerable concern. To see how the Strickland test was being applied in the appellate courts we considered recent decisions in the Federal Court of Appeals, 5th Circuit and the United States Supreme Court.

Martinez-Macias v Collins set out above is an example of a case where poor compensation led to poor representation. The killing occurred on 7th December 1983. The defendant was indicted for capital murder on 5th January 1984. On 10th January 1984 he was appointed a lawyer. In due course two further lawyers were appointed to assist in the case, one ended his involvement in March 1984 (save for one and a half hours spent doing legal research regarding confessions in June), while the other lawyer began working on the case one month prior to trial.

The defendant's case was that he was not present at the murder. The evidence connecting him to the crime was the testimony of an accomplice who admitted participating in the murder, a prisoner who claimed to have overheard the defendant confess to the crime, evidence of a young girl and 3 pieces of circumstantial evidence.

The accomplice evidence regarding the defendant's involvement was full of inconsistencies. The prisoner stated that he overheard the defendant confess to another prisoner whom the prosecution never called. The nine year old girl testified that she saw the defendant on the evening of the killing carrying a gun and wearing a shirt spotted with blood. She had previously told a defence investigator that she was sure it was on the 6th December 1983. The circumstantial evidence consisted of evidence of a tire tread shoe print next to the body of the victim. The accomplice stated that

the defendant was wearing work boots the night of the killing. The first police officers who arrived on the murder scene were wearing shoes with a similar tread to that found next to the body. No shoes with similar soles were recovered from the defendant.

The other circumstantial evidence is as follows. The defendant left Texas for California on 19th December 1983. The prosecution argued successfully that this constituted "a flight from the scene of the crime" indicating guilt. Secondly there was evidence that the defendant had worked for the victim as "handy man" in the past.

There was no physical evidence linking the defendant to the crime. Between 10am and 11:15am on the day of the murder a vehicle containing two men was seen by two witnesses driving around the area, including driving down an alley behind the victim's house. The vehicle stopped and the driver spoke to these witnesses. The witnesses identified the accomplice as the driver. They failed to identify the defendant as the passenger in an identification parade. They also stated that the passenger did not wear glasses. The defendant has worn glasses since he was ten or twelve years old.

The defence lawyer failed to call an alibi witness because of his misunderstanding of the law; in fact the Court stated there was no indication that counsel even researched the point (similar fact evidence). The accomplice had told the jury that on the day of the murder he was with the defendant between 9am and 2pm and the killing took place around 12 noon. The evidence of the alibi witness, an employee of a convenience store was that the defendant left the store at 9:30am and returned at 11:30 or 11:45am. The above two witnesses stated that the conversation with the accomplice occurred between 11:15 or 11:30am. The Court stated that because of the distances between the store and the address it would have been impossible for the defendant to have participated in the murder.

The Court held that for a number of reasons the defendant had been rendered "ineffective assistance of counsel". Firstly "because (the) alibi testimony was consistent with the (witnesses) failure to identify Petitioner as the passenger and

because (alibi) testimony rebutted (the accomplice) identification of the petitioner as the perpetrator, there is a "reasonable probability" that (alibi) testimony would have resulted in a verdict of not guilty". Secondly defence counsel failed to call a defence investigator who had obtained a different account from the young girl wholly inconsistent with her trial evidence. Thirdly during the punishment phase defence counsel failed to investigate and present any evidence from the defendant's family about the defendant's background or his "good character traits". The Court also stated that the jury should never have been informed during the trial that the defendant had "a past record for violence". Defence counsel during the trial did not object to this being before the jury until closing arguments.

The Texas Criminal Court of Appeals had rejected the defendant's petition. The Federal Court of Appeal reached a different conclusion and granted the defendant a writ of habeas corpus stating "we are left with the firm conviction that Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question". The Committee were reliably informed that the prominent United States east coast firm of Skadden Arps expended some $4.5 million in conducting the successful appellate hearings.

Other capital defendant's in the United States have not been so fortunate[12]. Capital defendants have been sentenced to death when represented by counsel who never bothered to read the state death penalty statute[13], slept through or otherwise were not present during trial, or failed to investigate or present any mitigating evidence at the penalty phase[14]. In one case defence counsel had been admitted to the bar only six months before and had never conducted a criminal trial[15]. In **Romero v Lynaugh**[16]

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[12]Bright, supra note 8

[13]State v Smith, 581 So. 2d 497, Ala.Crim.App. (1990)

[14]Mitchell v Kemp, 483 U.S 1026 (1987)

[15]Paradis v Arave,20 F. 3d.959 (1994)

[16]494 U.S 1012 (1990)

defence counsel failed to introduce any evidence about the defendant at the penalty phase and made the following closing remarks which were brief and to the point. "You are an extremely intelligent jury, you've got that man's life in your hands, you can take it or not. That's all I have to say". In **Messer v Kemp**[17] defence counsel presented no defence during the trial, made no objections to the introduction of any of the prosecution evidence and in fact emphasized the horror of the crime in his closing speech. During the penalty phase counsel presented no substantial mitigation and repeatedly suggested that death was the appropriate punishment. One defence counsel who could only name two criminal cases, **Miranda v Arizona** and **Dredd Scott v Sandford** (which is not a criminal case) has survived two ineffective assistance challenges[18].

All the above men were executed and their counsel were deemed by the appellate courts to have provided effective legal assistance.

Incompetence of counsel at trial level reverberates throughout the appellate process. Trial counsel who fail to object to the introduction of evidence or erroneous rulings forever waive the defendant's right to raise the issue on appeal. Therefore counsel who fail to recognize and preserve an issue due to ignorance, neglect or failure to discover and rely upon proper grounds, will bar appellate review of that issue. Justice Blackmun stated in **McFarland** that "even the best lawyers cannot rectify a meritorious constitutional claim that has been procedurally defaulted or waived by prior inadequate counsel".

In most death penalty states "new" fresh evidence of innocence must be presented before a court within a set period usually 28 or 30 days post conviction. In **Coleman v Thompson**[19] trial counsel introduced compelling evidence of Roger Keith

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[17]760 F. 2d 1080 (1985)

[18]Birt v Montgomery, 725 F. 2d.587 (1984)

[19]111 S.Ct. 2546 (1991)

Coleman's innocence three days late. The Supreme Court held that "attorney ignorance or inadvertance is not cause to excuse filing of notice of appeal 3 days late as the **indigent prisoner must bear the risk of attorney error**". The defendant was executed. Counsel's failure to recognize issues and raise them is not considered by the courts as ineffective assistance of counsel.

Justice Blackmun stated in the **McFarland** that the Strickland test was "impotent ...(and) 10 years after the articulation of that standard, practical experience establishes that the Strickland test in application has failed to protect a defendant's right to be represented by something more than a "person who happens to be a lawyer."

The reality seems that in Texas the appointment of inadequate counsel at trial both increases the likelihood of obtaining a conviction and death sentence and also reduces the scope for appellate review.

VII STATE HABEAS CORPUS

"state habeas corpus proceedings are a vital link in the capital review process, not the least because all federal claims first must be adequately raised in state court"
Justice Blackmun in McFarland

In United States there is no right to counsel in state habeas corpus proceedings[20]. Texas is the only death penalty state that has not enacted legislation to ensure compulsory appointment. Although the Texas Code of Criminal Procedure, articles 11.07, 26.04, 26.05, give state courts discretion to appoint and compensate counsel for state habeas corpus proceedings this according to the Spangenberg Group Study is "almost never done" and funds for experts and other expenses "are almost never approved" because "no funds are allocated for payment of counsel or litigation expenses at the state habeas level". Therefore defendants are wholly reliant upon volunteer counsel.

Texas Resource Center

The Texas Resource Center (TRC) is one of 19 non-profit resource centers created in 1988 and funded by the Federal Government. The center, which employs 14 lawyers, is not involved in the trial or Direct Review but recruits and assists private lawyers for the post-conviction appeals of death row inmates.

Because of the rapidly increasing number of death row prisoners having their sentences affirmed by the Texas Criminal Court of Appeals and the rapid pace of scheduled executions, the TRC is finding it impossible to recruit sufficient number of lawyers to volunteer their services. In 1993 the TRC estimated that at least 75 men on death row were without legal representation. Some of these men were scheduled for execution.

According to the TRC the lawyers who do volunteer their services tend to be drawn

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[20]Murray v Giarratano,4932 U.S 1 (1989)

from large civil law firms. This is because it is only these firms that can afford the personnel and resources to investigate complex and time consuming appeals. Lawyers involved in one case informed the Committee that they had spent thus far $100,000 on an appeal, not unusual according to the TRC and for which they will not be reimbursed for. The Committee were also informed by the TRC that due to the immense financial and emotional strain it is rare for these firms to do more than one post-conviction appeal.

The work being carried out by the TRC has come under attack from politicians and the prosecuting authorities. It is alleged that the TRC's real agenda is political, namely an attempt to abolish the death penalty. In order to achieve this they allegedly use unethical tactics including "misrepresentations" about lack of appellate counsel and making "spurious" claims in appellate briefs to delay impending executions which simply waste taxpayers money. The Attorney General's Office informed the Committee that they face dilatory tactics by the TRC who they claimed constantly abuse time limits on the filing of motions set down by the court. They stated that a typical example would be the TRC filing a 300 page motion near the end of a set time limit which means that the Attorney-General's Office will have to file for an extension to reply.

There was also complaint about the size of the federal grant to the TRC (approximately $4 million per year). The Attorney-General's Office stated that their own budget for habeas corpus appeals was $250,000. Their office consisted of 7 lawyers handling 40-50 death penalty cases each.

As for "reforming" the system they stated that in January 1993 they introduced a bill which would provide for prompt appointment of paid counsel in habeas corpus appeals, limit the length of habeas corpus appeals and set time limits on appeals generally. They were keen to "streamline the process" but were hindered by the TRC and the "liberals in the (Texas) legislature" which resulted in the defeat of the bill.

The TRC reject these allegations. They state that there are a large number of death

row inmates without legal representation with execution dates pending. There is also a lack of volunteer lawyers who are prepared to take these cases on at short notice with an execution date already set. This is because it leaves the lawyer understandably more concerned with setting aside the execution date than dealing with the more substantive appellate issues arising from the conviction and sentence. The TRC stated that "we find it really hard to find firms to take these cases, very few approach us, law firms are not hiring as much as before and they are cutting back on their **pro bono** work". The economics and "politics" of their work is making it very difficult to find lawyers to volunteer which results in the TRC working from one crisis to another.

This bleak assessment was confirmed by the Spangenberg Group Study which stated that "the large volunteer force of attorneys representing indigent defendants in state habeas corpus appeals is not large enough to ensure that the growing death row population receives timely and qualified representation" and concluded that "the reality is that the state (Texas) is running out of lawyers who are willing to represent indigent defendants on a volunteer pro bono basis"

As for the Attorney-General's proposals for federal habeas corpus reform, the TRC state that the "reforms" were an attempt to shorten considerably the avenues of appeal so that the only ground of appeal would be a "gross denial of procedural fairness in the lower court". The TRC say that the appellate court "would not look at the substance of the state court decision as long as you received a fair opportunity to present your claims".

There is little doubt that the TRC is working in a hostile enviroment. Their "clients" in the eyes of the public are convicted killers attempting to abuse the legal process and waste taxpayers money. The defence lawyers the Committee spoke to in Texas thought that the criticism directed towards the TRC was misplaced and distracted attention from the fundamental problems which arise out of the Texas criminal justice system itself, namely the unavailability of qualified counsel at trial and the unwillingness of trial judges to appoint and pay counsel in habeas corpus proceedings.

The lawyers stated that "they (TRC) were an extraordinarily valuable resource to lawyers...because of the quality of counsel they appoint and the quality of advice they give us regarding constitutional issues". There in fact seems to be a broad consensus in Texas among the legal establishment the Committee spoke to, including the judiciary that the TRC is the force behind the emergence of a much higher standard of advocacy in death penalty habeas corpus proceedings.

The only observation which we would wish to make is to express our concern at the delay in referring cases to the TRC within the appellate system. Once a defendant is represented by an attorney funded by the state, he should not be able to withdraw from the case unless this has been approved by the appointing court. If withdrawal is approved then consideration should be given to the appointment of the TRC at the earliest opportunity.

VIII FEDERAL HABEAS CORPUS

"The accumulating and often byzantine restrictions this Court has imposed on federal habeas corpus review make it even less likely that future capital defendants who receive qualified legal counsel in federal habeas corpus actually will obtain relief".
Justice Blackmun in McFarland

Defendants under a state imposed death sentence must exhaust state remedies before they are entitled to file for federal relief. Once they have satisfied the above, federal law grants indigent defendants in capital cases a **mandatory right to qualified counsel and related services** in any federal post conviction proceeding[21]. This mandatory right to counsel attaches once a defendant files a motion requesting appointment of counsel for his federal habeas corpus proceeding. As soon as the motion is filed the federal district court has jurisdiction to stay the execution **(McFarland)**[22]

A defendant who wishes to appeal a federal district court decision must obtain a "certificate of probable cause" which is provided by either the district or circuit court. According to the TRC, the above courts "routinely deny them".

As will be noted above federal law requires appointed counsel to be "qualified". At least one lawyer appointed must have been authorized to practise before the "relevant court" for at least 5 years and must have had at least 3 years experience in handling felony cases in that court[23]. The Supreme Court stated in **McFarland** that the right to counsel in federal habeas corpus proceedings reflected a determination that quality legal representation was necessary in capital habeas corpus proceedings in light of the

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[21]Title 21 U.S.C 848 (q)(4)(B)

[22]Note that the Supreme Court decision had four dissenters including Justices Scalia and Thomas who stated that the right to counsel did not attach until the petitioner had first filed the petition to seek habeas relief.

[23]Title 21 U.S.C 848(q)(6)

"seriousness of the possible penalty and...the unique and complex nature of the litigation"[24].

It seems incongruous that the state courts have failed to impose similar stringent standards (or any standards) for representation in the capital trial itself or the state appeal.

In the federal court the defence are entitled to a full evidentiary hearing which includes factual disputes where the state habeas court had not conducted "a full and fair evidentiary hearing"[25]. Under Title 28 U.S.C section 2254(d) no full and fair evidentiary hearing has occurred if the material facts were not adequately developed at the state court habeas hearing. The section defines material facts as those facts crucial to a fair, rounded consideration of a petitioner's claim. According to the TRC "you are more likely to get a fairer hearing in the federal court because they are not elected" and therefore less tainted by political considerations.

Because of the lack of mandatory right to counsel in state habeas corpus proceedings federal habeas corpus plays a vital role in ensuring that constitutional errors are corrected. Justice Stevens stated in **Murray v Giarratano** that there was "a high incidence of uncorrected error" in capital habeas corpus proceedings. A study by James Liebman, a professor at Columbia University Law School, showed that between 1976 and 1991 42% of capital cases were found to have a constitutional error with the total reverse rate in capital cases **AT ALL STAGES** of review during the same period estimated to be 60% or more[26]. The study stated that a finding of reversible constitutional error was true in fewer than 5% of cases involving noncapital crimes.

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[24]Title 848(q)(7)

[25]as required by Townsend v Sain, 372 U.S 293, 83 S.Ct 745, 9 L. Ed. 2d.770 (1963)

[26]Liebman, More than Slightly Retro: The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v Lane,18 N.Y.U Rev.L. & Soc.Change 537 (1990-1)

IX REFORM OF HABEAS CORPUS PROCEDURES

Post-conviction habeas corpus in Texas is governed by Article 11.07. This provides for collateral attack of a conviction where Texas or federal constitutional infirmities are perceived, not the least of which may have been ineffective assistance of counsel at the two preceding stages. Many think that one review is sufficient but statistics suggest otherwise. In Texas, a shockingly high percentage of death penalty convictions are overturned after direct appeal. As we have observed, there is no requirement for a Texas district judge to appoint a lawyer pursuant to Art.11.07. Furthermore, State Habeas appeal is a pre-requisite to Federal Habeas Corpus. As Justice Antonin Scalia told the Committee:-

> **"... an appreciation of the role of the United States Supreme Court in the Texas capital process is infinitely less important than an appreciation of the role of the United States Court of Appeals for the Fifth Circuit. That Court, and the District Courts beneath it, afford Texas prisoners collateral review as of right - through Writ of Habeas - for violations of the federal Constitution claimed and rejected in State proceedings. Review in the United States Supreme Court, on the other hand, both of the Texas Court of Criminal Appeals decisions (direct appeal and habeas), and of the Fifth Circuit decisions (habeas), is discretionary, by petition for writ of certiorari ... I know many of the Fifth Circuit judges have strong views on how the Texas scheme for representation functions."**

The concept that an admission ticket to the Federal Courts where a lawyer is appointed, is dependent upon a failed State Habeas Appeal where a lawyer is not, disturbed the Committee greatly. The federal funding of representation was largely achieved by the lobbying of the American Bar Association and

Congress has generously provided remuneration in the region of $75-$125 per hour.

In July, 1993 the American Bar Association Journal reported:

> **"... with a few notable exceptions, the system is forced to rely on a decreasing supply of volunteer lawyers to handle an ever-growing volume of death row appeals ... the State's reliance on volunteer lawyers in life and death matters is unacceptable. There are some good lawyers out there doing some awfully fine work, but we are using a band aid approach when the system needs an overhaul ..."**

However the Texas Legislature was considering a bill that would provide state-funded lawyers for death row inmates while setting a 180 day time limit for the filing of State post-conviction appeals. The measure had the backing of the Attorney-General, Dan Morales, but the legislation was opposed by many defence lawyers who objected to any time limits on "habeas corpus claims."

It seemed to be without doubt to the Committee that the discretionary "habeas corpus" procedures unduly delayed the sentence of the Court being carried into effect. The Committee's concern is with implementation following the acceptance on 8th June, 1992 by the United States Government of international rules governing the carrying out of the death penalty.

The House Research Organisation of the Texas Legislature reported in April, 1994:

> **"... some proponents of change have said that if the State does not**

adopt some standard procedures for habeas corpus appeals, such as filing deadlines and the mandatory appointment of counsel, the State's capital appeals procedures could be superseded by federal mandates and all executions blocked until Texas makes the necessary changes ..."

The Committee has concluded that there should be a consolidated appeal process; in effect this means that counsel at trial would be professionally bound to file a Notice of Appeal within 28 days of the passing of sentence of death. We could not see any valid reason advanced to await sight of the full transcript of the trial before a Notice of Appeal is filed. When the full transcript has been made available, an opportunity should be afforded to Counsel on the record to perfect those grounds of appeal which he has set out in the Notice of Appeal.

Counsel at trial is best equipped to give notice of what he then perceives as the principal errors arising immediately after the trial; if he is funded by the State to represent the defendant at trial, he should not be permitted to withdraw from the case except with the leave of the trial Judge. Courts should be slow to relieve a state funded counsel from his professional responsibilities to his client until after he has filed and perfected his Grounds of Appeal. It is said that inspiration is better coming late rather than never; there can be no objection in principle to other lawyers arguing the appeal, but the Notice and Grounds of Appeal should be filed by the trial Counsel within 28 days of the conclusion of the trial.

A State which wishes to retain capital punishment should accept the

responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of clemency. As Lord Griffiths observed in **Pratt:**

> **"... it is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it ..."**

The present appellate system permits a multiplicity of habeas corpus appeal petitions; the effect is to postpone executions indefinitely and critics say are designed to achieve just that. In other words legitimate constitutional issues are not raised therein.

The House Research Organisation reported that a Bill revising habeas corpus proceedings in capital cases failed to get through a Senate Committee, after being passed by 73rd Legislature in 1993. The Bill set out certain procedural guidelines for Habeas Corpus appeals which would have required simultaneous filing with direct appeals. Furthermore, certain specific time limits were imposed for the filing of habeas corpus appeals. The issues usually raised in these appeals (e.g. ineffective assistance of Counsel or misconduct on the part of the prosecuting authorities) require the availability of witnesses. Consideration of these issues years after the trial is difficult. The grounds for virtually all habeas corpus appeals are apparent after the trial; these are rarely discovered during the appellate procedure.

Opponents of reform argue that errors of procedure are revealed only during the direct appeals process and forcing counsel to prepare pleadings for a Habeas Corpus appeal would be wasted if a death sentence is set aside during the direct appeal. Imposing time limits and restricting an appeal to one unitary Habeas Corpus appeal would lessen the effect of the death row phenomenon. But opponents argue that evidence in support of alibi or innocence may surface a decade later as in the cases of Randall Adams and Clarence Brandley.

The former Governor of Texas, Ann Richards, has called for legislation setting time limits on death row appeals. She said:-

> **"... I am not proposing that we remove the legal options currently available to Texans sentenced to death but I do believe that we should carry out the laws of this state in a more timely fashion. The truth is nothing is gained by keeping condemned inmates, their families and the families of crime victims on a 10 or 11 year death watch. If someone has been wrongly convicted, we should find out as quickly as possible. If not, we should carry out the sentence imposed by the jury and move on."**

Probably the single factor which perpetuates the concept of the "death row phenomenon" is the setting of the execution date by the trial Judge. During the appellate process, some stages of which are won, a stay of execution is granted. However, when an appeal is lost, the District Judge re-sets the execution date and this alternation of hope and despair in the mind of a condemned man has been condemned by international jurisprudence as cruel, inhuman and degrading treatment. Furthermore it seems that some Texas

courts modify execution dates by granting a stay and then re-set the date solely for the purpose of nominating appellate Counsel to file a habeas corpus petition.

The Committee has concluded that the setting of the execution date should be an executive function of the Governor to be exercised only when all domestic appeals have been exhausted and a decision not to grant clemency has been taken. We can see no compelling reason whatsoever to inform a defendant of exactly when he is to be put to death. Counsel on the record can be kept fully informed of the day to day situation by General Counsel to the Governor after the decision on clemency has been taken.

X CLEMENCY

If all appeals are exhausted then a defendant can request clemency from the State Governor through the Board of Pardons and Paroles. The Governor is allowed to grant one 30 day reprieve without a recommendation from the Board. This has happened in only two cases, Gary Graham and Johnny Frank Garratt. Garratt was eventually executed (see appendix).

The procedure in capital cases is that the Board will receive a formal clemency request for a pardon based on innocence, a temporary reprieve or commutation of sentence to life in prison. This request must come from the applicant, his family or his lawyers. The Board can grant clemency or deny it. The Board can if it so wishes order a hearing into the issue. A recommendation by the Board for clemency is forwarded to the Governor.

According to the Governor's Office between 1982 and 1993 the State Governor upon the recommendation of the Board has commuted 31 death sentences to life in prison. In fact according to a study in the the Yale Law Journal[27]the number is 36, 35 of which were forced upon the Board following court decisions requiring new sentencing proceedings[28]. Since 1982 the Board has held 8 clemency hearings but declined to recommend clemency in any of them. Nor has the Board during the same period recommended a pardon or temporary reprieve.

The Board consists of 18 full time members who have a six year tenure. The Board never meets as a whole but rather in groups of three. Each member of the Board will receive a "package" to review a case under consideration. Voting is usually by fax and a majority of at least two thirds of the vote (of the 18 members) is required in order for the clemency application to succeed. There is no limit to the number of applications for clemency.

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[27]99 Yale L.J 389 (1989)

[28]Adams v Texas, 448 U.S. 38 (1980)

As stated above the State Governor can recommend a 30 day reprieve. This can be done once per applicant. The Governor will review each case in which an execution is imminent. There will be consultation with the applicant's lawyers, the TRC, the prosecution and the victim's family.

If the Governor issues a reprieve it will quash the execution warrant. The prosecution will then return to the trial court requesting a further warrant. The Governor's office informed us that a reprieve would be granted at the last minute before an execution was scheduled so as to give the courts time to stay the execution and thus not waste unnecessarily a 30 day reprieve. The Committee were informed that no one is executed if a claim for clemency is pending.

Recently the Board's role and efficacy has been at the centre of a debate in Texas over whether it is a proper forum for claims of innocence. The Supreme Court stated in **Gregg v Georgia** (1976) that a system without executive clemency "would be totally alien to our notions of criminal justice" and bearing in mind any criminal justice system is liable to human error the safeguards surrounding the process must be of the highest order. Executive clemency has been seen by the courts as a fail safe to ensure that innocent people are not executed.

In Texas a defendant must present new evidence of innocence within 30 days of his sentence. If the defendant is outside this period he must present his evidence to the Board of Pardons and Paroles. Bearing in mind the Board record since 1982 defendants are continuing to press their claims through the courts. In **Herrera v Collins**[29] the Supreme Court held that a defendant presenting evidence of innocence was not ordinarily entitled to a hearing before a federal court considering habeas corpus relief because a presumption of innocence disappears upon conviction in a procedurally fair trial. State executive clemency proceedings would provide the "historic" remedy for hearing any new evidence indicating innocence.

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[29]113, S.Ct.853 (1993)

The Supreme Court went on to say that federal habeas corpus proceedings were designed to determine if persons had been unconstitutionally imprisoned and not to correct or re-examine facts. The exception would be a "truly pursuasive demonstration of actual innocence" made after trial which would render the execution unconstitutional. The court stated that the threshold for such an assumed right would necessarily be extraordinarily high.

Gary Graham was convicted in 1981, aged 17 of a murder committed during the course of a robbery. He was convicted solely upon the testimony of a single witness who stated that she had seen the killer's face for no more than a second. Since the trial, six witnesses have come forward to swear that the killer they saw could not have been Gary Graham; five more have placed him elsewhere at the time of the murder. No other evidence, no fingerprints, no ballistics and no informant linked him to the killing.

Gary Graham felt that money played a vital role the rather poor representation of his case. He was appointed two counsel by the court. He stated that he had little contact with his lawyers before, during and post trial. He has faced 4 execution dates. His lawyers claim to have evidence of his innocence. His application for clemency was denied without a hearing. Therefore his lawyers filed a civil action seeking an order to compel the Board to hold a clemency hearing. After a number of lower court hearings the matter reached the appellate court. In **State of Texas ex rel. John B. Holmes, District Attorney of Harris County, Texas v Third Court of Appeals of Texas, and Texas Board of Pardons and Paroles v Third Court of Appeals of Texas**[30] the Texas Criminal Court of Appeals held that Graham could pursue his claims of innocence in state habeas corpus proceedings because this was the appropriate forum to raise a claim of newly discovered evidence in a capital case. The court held that the execution of an innocent person would violate the United States Constitution. It would also be a violation of Article 1, Section 13 of the Texas Constitution.

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[30]S.W.2d.(Tex.Crim.App.April 20th,1994)

The general reaction among defence counsel was positive. The Board of Pardons and Paroles did not provide a proper forum for raising substantive issues such as new evidence and has a decision-making process directed by politics alone. But many lawyers are concerned though that the threshold set is too high. One lawyer told the Committee it "would require a video recording of the killing, showing someone else committing the murder" to satisfy the test laid down.

In examining the case their fears seem to be well founded. The Texas Criminal Court of Appeals adopting the procedure recommended in **Herrera** said the evidence must undermine confidence in the verdict and show that it is "probable" that the verdict would be different. In defining a "truly persuasive demonstration of actual innocence" the court adopted the burden of proof set out in **Herrera** namely "in order to be entitled to relief on a claim of factual innocence the applicant must show that based on the newly discovered evidence **and** the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt".

Thus the defendant must not only produce evidence of innocence but secondly show that the jury's verdict was irrational. Once the test has been met then the habeas court must afford the applicant a forum and an opportunity to present his case. The court went on to say that "credibility" determinations regarding the newly discovered evidence cannot be made on the basis of legal argument; a hearing must be held.

If the habeas court refuses to hear the petition of innocence claim, the defendant can appeal to the Texas Criminal Court of Appeals. The Appeal Court can order the judge to undertake a hearing. If the court refuses to order a hearing the defendant can appeal in the ordinary way.

Because of it apparent total lack of accountability and the secrecy of its process the Committee urge the authorities to look at alternatives to the Board with a view to it having no role to play in capital cases. Public confidence requires a much greater degree of openness in line with the principles of transparency and accountability which are common in administrative law and decision-making.

The Committee would wish to encourage the creation of a body similar to what JUSTICE recommend for Britain namely a criminal cases reviewing authority[31]. Firstly its remit would be to review those cases in which wrongful convictions are alleged **and** which have exhausted the appeal procedures. Secondly there should be a merits test, namely "is there some new evidence, issue or consideration relevant to the case which, if proved to be true and put into the context of the case as a whole, would cast doubt on the safety of the conviction"[32]. If after examining the totality of the case it finds that there is prima facie evidence of a miscarriage of justice it should refer the case for consideration to the appellate court.

It seems to the Committee that applications for clemency as to sentence should be made directly to the State Governor. To ensure fairness the Governor or legislature should create a relatively small "review board". It should be comprised of both lay persons and lawyers (selected by the State Bar) who would consider each application and advise the Governor of its recommendation. The committee could hear evidence from the relevant parties and their decisions with reasons should be made public.

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[31]see JUSTICE, Remedying Miscarriages of Justice, September 1994. JUSTICE is the British Section of the International Commission of Jurists

[32]page vii

XI RECOMMENDATIONS

The Committee has endorsed and adopts recommendations already suggested by The Spangenberg Group and other bodies.

Ideally the State of Texas should set up a publicly funded state-wide public defender programme which among its many tasks would be to recruit, select and monitor qualified attorneys in capital cases.

Alternatively the state should designate a body which will be responsible for performing all duties in connection with the appointment of counsel. This body should devise standards (see examples set out below) and procedures for the provision of counsel in capital cases, should be comprised of members of the criminal bar with experience in death penalty cases and should compile an "approved list" of counsel available for capital cases. Judges should appoint counsel from this list only.

1. COUNSEL

Appointment of "qualified" counsel

TRIAL

The Committee would wish to encourage the adoption of the standards set out below, the majority of which were recommended by the National Legal Aid and Defender Association in their paper "Standards for the Appointment and Performance of Counsel in Death Penalty Cases"[33]. Upon a finding of indigence it should be the duty of the trial judge to name two qualified counsel to represent the defendant where the death sentence is sought.

First counsel should have at least five years experience in criminal litigation and have been involved in no fewer than nine felony jury trials which were tried to conclusion.

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[33]adopted 1st December 1987 and amended 16th November 1988

Counsel must also have done at least one death penalty case and completed within one year prior to the appointment at least 12 hours of training in the defence of capital cases in a course approved by the State Bar of Texas.

Trial co-counsel must have three years criminal trial experience and been involved in at least three felony jury trials to completion at least two of which included a charge of murder or aggravated murder. Counsel must also complete the above 12 hours of training in the defense of capital cases in a course approved by the State Bar of Texas.

APPEAL

i. Direct Review

Once the trial court imposes the death sentence it should immediately enter a written order specifically naming counsel for the appeal. Counsel must have at least five years experience as appellate counsel in no fewer than three felony convictions in the Federal or State Courts including at least three years experience in criminal litigation, at least one of which was an appeal of murder or aggravated murder conviction.

ii. Post Conviction

Unless the defendant is represented by retained counsel the Court of Criminal Appeals shall appoint counsel at the earliest practicable time. Counsel must have the same experience as stated for appellate counsel on Direct Review.

2. COMPENSATION

"Adequate" compensation should be paid to defence counsel AT ALL LEVELS of the criminal proceedings with a minimum $100 per hour.

Counsel should be provided with "adequate" funds for investigative, expert and other services necessary to prepare and present an adequate defence at every stage of the proceedings. Periodic billing and payment during the course of counsel's representation should also be provided for.

If the State of Texas does not implement a public defender program then it should reimburse counties at no less than 50% of the cost of appointing counsel at trial and Direct Review and should provide 100% of the funds required to provide court appointed counsel at state habeas corpus proceedings.

3. TRAINING

We recommend that the State of Texas create a body similar to the Indiana Public Defender Council which is a state funded agency providing research, training and other assistance to defence counsel in capital cases.

4. HABEAS CORPUS REFORM

State Habeas Corpus and Federal Habeas Corpus appellate procedures can quite easily be consolidated within the direct the direct appeal process. It should be made a professional duty of counsel at trial to file a consolidated Notice of Appeal within 28 days of conviction and sentence; sight of a full transcript of the trial should not be a requirement to the filing of a Notice of Appeal, as there should be an opportunity to perfect the grounds of appeal prior to any appellate hearing.

5. SETTING THE DATE OF EXECUTION

This should no longer be a function of a trial judge; European jurisprudence condemns the present practice within the State of Texas of continually re-setting the date of execution as cruel, inhuman and degrading treatment. It is the foremost factor in contributing to the concept of the "death row phenomenon". There is no compelling need to keep a condemned man informed of when he is to die. The date of execution should be set by the Governor to take place immediately after all domestic appeals have been exhausted and the Governor has decided against clemency.

6. CLEMENCY

The role of the Texas Board of Pardons and Paroles should be limited to non-capital cases. The Committee would recommend the creation of a criminal cases reviewing authority. Its role would be to review those cases in which wrongful convictions are

alleged and which have exhausted the appeal procedures. If after examining the totality of the case it finds that there is prima facie evidence of a miscarriage of justice it should refer the case for consideration to the appellate court.

Clemency applications relating to sentence in capital cases should be considered by a committee consisting of lawyers and lay persons who will advise the Governor of its recommendation. The committee members should be appointed by the Governor after consultation with the State Bar.

XII EPILOGUE

The execution of Stephen Nethery was announced in the Press as we flew out of Texas on our return to London. He was executed on the night of 26th May and we visited Ellis One Unit at Huntsville earlier in the day. We saw Stephen Nethery just before he was taken away to be put to death. We were speaking to another condemned man, Robert Drew, at the time. Drew turned to Nethery and said "Haven't you got a stay yet ?" to which Nethery replied "No, not yet." Stephen Nethery's family were reading the Bible to him nearby. The Attorney-General, Dan Morales' team first mentioned the forthcoming execution of a young white male (apparently aged only 20 at the time of the offence) and enquiries we made did not reveal any details of his case; his name was not shown on any pending execution schedule and little was known as to how this young man came to meet his death so suddenly.

The Press later reported that he had been executed for shooting a Dallas policeman who found him having sex with a woman in a car. Subsequent research by the Committee revealed that his lawyer had to withdraw at the last moment because he was simply unable to devote the necessary time to the case. Thus Stephen Nethery was without a lawyer only a few weeks before his scheduled execution. The Committee is trying to establish at the time of publishing its report who was able to assist him with legal advice in his final hours.

As stated, the Committee had the opportunity to interview Robert Drew when they visited Ellis 1 unit at Huntsville on 26th May, 1994. His case attracted international attention when Judge Charles J. Hearn, a retired Texas State Judge, issued an order setting an execution date and drew a smiling face next to his signature. A native of Vermont, Robert Drew, 35 was convicted of capital murder in connection with the killing of 17 year old Jeffrey Leon Mays.

On 5th August, 1994, the "Houston Chronicle" reported his execution stating that he wept and maintained his innocence. His execution was the 42nd since Governor Ann Richards had assumed office. Robert Drew's alleged accomplice, Ernest Puralewski, is currently serving a 60 year sentence of imprisonment.

In the early hours of 14th October, 1993, Robert Drew had already eaten his last meal when an earlier execution date was stayed just shortly before he was to be taken to the chamber.

The road from Austin to Huntsville runs past oil rigs and tin-roofed homes; the town is surrounded by seven prisons that house 11,800 inmates where just under 400 are locked in 5 x 9 cells awaiting execution called Ellis Unit 1.

Built in 1849, Ellis 1 is built of brick and is flanked with 40' walls topped

with razor wire. It costs $71.50 to provide the chemical ingredients for the lethal injection; sodium thiopental, pancuronium bromide (to relax and anaesthetize) and potassium chloride to stop the heartbeat.

January 1995

PROCLAMATION

BY THE

Governor of the State of Texas

41-2517

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, Johnny Frank Garrett was convicted in the 181st Judicial District, Potter County, Judge George E. Dowlen, and on September 2, 1982 was sentenced to death for the crime of capital murder; and

WHEREAS, the court has set the date of execution for January 7, 1992; and

WHEREAS, Article 4, Section 11 of the Texas Constitution provides that "The Governor shall have the power to grant one reprieve in any capital case for a period not to exceed thirty (30) days";

NOW THEREFORE, I, Ann W. Richards, Governor of Texas, in accordance with Article 4, Section 11 of the Texas Constitution, do hereby grant to Johnny Frank Garrett a reprieve of thirty (30) days and order that the execution be stayed for thirty (30) days from January 7, 1992 to February 6, 1992.

This thirty (30) day reprieve is granted in response to the appeals I have received from the Apostolic Pro-Nuncio, on behalf of His Holiness Pope John Paul II, and the Bishop of the Diocese of Amarillo and the Order of the Franciscan Sisters of Mary Immaculate of Amarillo, of which the victim, Sister Tadea Benz, was a member.

I am granting this thirty (30) day reprieve so that defense counsel for Johnny Frank Garrett may fully develop any unresolved issues related to mitigating circumstances surrounding the crime or his background.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 6th day of January, 1992.

Ann W. Richards

ANN W. RICHARDS
GOVERNOR OF TEXAS

Filed in the Office of the
Secretary of State of the
State of Texas

John Hannah Jr.

JOHN HANNAH, JR.

Filed in the Office of
Secretary of State

JAN 7 1992

Statutory Filings Division

APR 2 6 1993

PROCLAMATION

BY THE

Governor of the State of Texas

41-2551

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, Gary Graham was convicted in the 182nd State Judicial District Court, Harris County, and in October 1981 was sentenced to death for the crime of capital murder; and

WHEREAS, the court has set the date of execution for April 29, 1993; and

WHEREAS, Article 4, Section 11 of the Texas Constitution provides that "The Governor shall have the power to grant one reprieve in any capital case for a period not to exceed thirty (30) days";

NOW THEREFORE, I, Ann W. Richards, Governor of Texas, in accordance with Article 4, Section 11 of the Texas Constitution, do hereby grant to Gary Graham a reprieve of thirty (30) days and order that the execution be stayed for thirty (30) days from April 29, 1993 to May 28, 1993.

I believe questions have been raised that warrant further examination in this case. However, in granting this thirty (30) day reprieve, I pass no judgment on the guilt or innocence of Gary Graham.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 28th day of April, 1993.

Ann W. Richards

ANN W. RICHARDS
GOVERNOR OF TEXAS

Filed in the Office of the Secretary of State of the State of Texas

John Hannah Jr.

JOHN HANNAH, JR.
SECRETARY OF STATE

OFFICE OF THE GOVERNOR

MAY 07 1993

GENERAL COUNSEL