

Attorney cuts, pastes convicted client's letter

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The appeal that Greenville attorney Toby Wilkinson filed for death row inmate Daniel Acker in 2003 reads as if it were written by someone with an eighth-grade education.

In fact, most of it was.

Wilkinson lifted 90 percent of the arguments in his writ of habeas corpus from a letter that Acker wrote from death row. In it Acker, a high school dropout convicted of killing his Hopkins County girlfriend, listed three dozen mistakes he believed his trial lawyers made. Riddled with misspellings, bad grammar and first-person rants, the writ features such turns of phrase as “trumped up bogus case,” and “applicant had to just sit quietly and let the D.A. railroad him.”

Wilkinson, a 26-year lawyer, even referred to the judge's gavel as a hammer, because that's how Acker's letter read.

Wilkinson's writ, which is still awaiting a ruling by the Court of Criminal Appeals, cited little precedent to bolster its arguments. Even the date of Acker's indictment was wrong.

“This is the worst I've ever seen,” said Richard Ellis, a California lawyer who is trying to take over Acker's case when it moves into the federal courts. “There's a mistake in every line. It's unbelievable. This guy needs to be disbarred.”

Wilkinson said he filed the writ under deadline pressure and that he independently confirmed “a lot of stuff that (Acker) brought up.”

“That was hitting the wall on deadline, and I was trying to make sure that anything (Acker) wanted claimed, I put in there,” Wilkinson said.

Wilkinson has submitted six habeas writs in death penalty cases since 1999, each taking the reader on its own sublime journey. Sentences are abandoned in midthought; claims are misnumbered; sections promising analysis, facts and law are left blank. Arguments promised in the index are never mentioned again.

In two cases, judges later found that Wilkinson's writs complained about trial events that never took place.

State taxpayers paid \$25,000 for the Acker writ - \$22,270 to Wilkinson and \$3,730 to a private investigator and medical expert, according to billing records from Hopkins County, where Acker was tried.

Records from the county, which paid Wilkinson before being reimbursed by the state, are incomplete, but the math is easy to do. The state pays \$100 an hour for habeas writs, suggesting that Wilkinson billed for almost 223 hours of work for a writ largely copied from a single letter from his client.

Wilkinson recently asked the Court of Criminal Appeals to remove his name from the list of lawyers eligible to handle habeas cases. Acker's writ, he said in an interview, will be his last.

“I didn't like doing those things, so I don't do them anymore,” he said.

Other legal briefs Wilkinson has filed reveal a lack of attention to detail.

The writ for Joseph Ries, convicted in a 1999 robbery and killing in Cumby, contained sections that “were obviously cut and pasted from another case without being revised to fit the facts of Mr. Ries’ case,” Austin lawyers Charles Palmer and Jim Terry Jr. charged in a later petition to federal court.

Wilkinson was paid \$19,208 for the Ries writ, but his most egregious cut-and-paste job among the writs examined occurred in a petition for Justin Fuller, convicted in the 1997 robbery and shooting death of a Tyler man.

Much of Fuller’s writ was copied from an appeal Wilkinson had submitted two years earlier for another client, Henry Dunn - a connection that becomes apparent when Dunn’s “pimp slapping” co-defendant, Donald Aldrich, suddenly appears in Fuller’s petition.

Wilkinson also neglected to change the name of Dunn’s judge, lawyer and trial exhibits when he copied from one writ to another, and numerous grammatical errors were left intact. His only substantial edit to the section was replacing Dunn’s name with Fuller’s.

Wilkinson also blamed time pressure for the Fuller mistakes.

“Here’s the thing that happened. Once again, I was running on deadline,” Wilkinson said. “I was going to, at some point, go back and delete those (references to Dunn), and between having cataracts - I was basically going blind and didn’t realize it - and starting up a capital murder trial, I didn’t go back and clean it up.”

Deadline pressure, however, is no excuse under the Texas Disciplinary Rules of Professional Conduct, which requires lawyers to control their workload “so that each matter can be handled with diligence and competence.”

In a written statement sent to the American-Statesman in response to questions about the Acker and Fuller writs, Wilkinson said he read the trial transcripts and defense lawyers’ files in both cases. He said he tried to contact jurors and witnesses and viewed evidence that was submitted and some that was not. “I obtained an investigator, and in one case a paid expert,” he wrote.

Wilkinson also took exception to a question that characterized the Acker writ as sloppy.

“In 1997 or 1998 an attorney completely missed the filing deadline in a death penalty writ,” Wilkinson wrote. “I guarantee if you asked (a defendant) if he cared if his writ was sloppy, the defendant wouldn’t care if it contained reference to Cinderella and Mickey Mouse.

“The fact is I got my application filed on time,” he wrote.

The Court of Criminal Appeals denied Fuller’s writ in 2001, giving Wilkinson 15 days to notify the U.S. courts that Fuller would file a federal writ. But when it took Wilkinson 5 1/2 months to file notice, the federal court appointed an experienced lawyer to help him, Don Bailey of Sherman.

Wilkinson’s writ, which cost Texas taxpayers \$18,463, left Bailey aghast. “What was he thinking? That nobody would care? Maybe so, and maybe he is right,” Bailey said.

Bailey returned Fuller’s case to the Texas courts in search of a proper hearing of several issues, including indications of trial lawyer ineptitude and the improper removal of black members of the jury pool.

The Court of Criminal Appeals, however, quickly declined to review the new petition, saying Texas law barred Fuller from filing a second writ. The federal courts also brushed aside arguments that Fuller was poorly represented by Wilkinson.

With Fuller’s execution date nearing, Bailey brought Wilkinson’s performance to the attention of Gov. Rick Perry and requested a 30-day reprieve.

“I am also asking that you send a message . . . that the state of Texas will not tolerate this kind of shoddy . . . treatment when we are subjecting its citizens to the ultimate punishment,” he wrote in a letter.

Perry refused. The U.S. Supreme Court also declined to step in, though two justices voted to grant a stay of execution.

Fuller was executed Aug. 24.

Interviewed on death row one month earlier, Fuller said he was more disgusted than angered by Wilkinson's effort.

"Did I get that one fair shot? I would say no," said Fuller, who proclaimed his innocence. "You become frustrated. Are you dealing with justice or just a process of elimination here?"

Writ gone wrong

Greenville lawyer Toby Wilkinson has filed death penalty habeas writs that abandon sentences in midthought, misnumber claims and leave blank entire sections promising analysis, facts and law. Most of a writ filed by Wilkinson in 2003 was taken from a letter Daniel Acker wrote from death row, with little or no editing. Here are excerpts:

- "The D.A. said that it takes two legs to make a change of venue stand: pretrial publicity and, applicant can't remember Long's exact words but the hate letter would have stood for the second leg.'
- 'It seems awfully, awfully strange to me that out of all these sttached reports the furors were not allowed to hear a single one of them simply because the D.A. coerced them all to testify differently.'
- 'I was a medical examiner and I read the attached notes I would think to myself that the deceased was drug, ran over, loaded back up in the vehicle, carried to a remote area, and dumped in front of a barn and I have a possible witness to support my homicidal violence opinion.'
- 'I'm not guilty and the facts of the case prove I'm not guilty. I'm just about out of carbon paper so before I run out I want to try and list everything that was added to and took from me to convict me on the next page then as soon as I get some more typing supplies I have about thirty more errors I want to tell you about.'