

SLOPPY LAWYERS FAILING CLIENTS ON DEATH ROW

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DATE: October 29, 2006
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Sheltered by an indifferent Texas Court of Criminal Appeals, lawyers appointed to handle appeals for death row inmates routinely bungle the job, submitting work that falls far below professional standards, frequently at taxpayer expense.

Some appeals are incomplete, incomprehensible or improperly argued. Others are duplicated, poorly, from previous appeals.

Whatever their condition, these pieces of shoddy legal work have been tolerated by the state's highest criminal court for 11 years - during which 273 men and women were executed - despite a state law requiring the court to ensure that the condemned receive competent legal help.

The court has failed in that obligation, allowing lawyers to submit sloppy, lazy and inferior work with little oversight and no fear of consequences, according to an Austin American-Statesman examination that raises troubling questions about the quality of death penalty justice in the nation's leading execution state.

"People aren't being executed; they're being murdered by their lawyers," said Don Vernay, a New Mexico appeals lawyer who represents several Texas death row inmates. "I've been doing this for 20 years. I'm no wet-behind-the-ears law school graduate, but I have never seen anything this bad."

Greenville attorney Toby Wilkinson, for instance, filed a nearly incoherent collection of statements lifted almost verbatim from his death row client's letters in a 2003 appeal. Wilkinson blamed deadline pressure for the condition of the writ, which cited only one precedent and made minimal legal arguments.

"I'm just about out of carbon paper," reads the bizarre appeal, which earned Wilkinson \$22,270 from the Texas treasury. "As soon as I get some more typing supplies I have about thirty more errors I want . . . in my appeal."

Assessing the legality and integrity of death sentences is among the Court of Criminal Appeals' most important tasks - a job accomplished largely by reviewing writs of habeas corpus, considered the most important of two simultaneous appeals provided to Texas death row inmates.

Done properly, a habeas writ reinvestigates every aspect of the case to ensure that a death sentence was properly levied. Did defense lawyers perform adequately? Was the jury properly picked? Had witnesses recanted? Did prosecutors hide evidence or police coerce a confession?

The answers should provide confidence - for death penalty supporters and opponents alike - that the right person will be executed, the wrong person won't be, and verdicts were obtained in accordance with the U.S. and Texas constitutions.

Instead, the American-Statesman's review of the state writ system found a pattern of feeble death penalty appeals, demonstrating little or none of the investigation or thoughtful effort required to do the job right.

The response from the court has been similarly feeble.

Every death penalty writ is scrutinized by the court's nine judges with help from staff research lawyers; a four-attorney "death squad" devoted to death row litigation; and the trial judge, who gets

first crack at the writ and recommends whether it deserves approval or dismissal. There is no time limit in which to render an opinion, and most are delivered within six months.

Yet, despite ample evidence of deficient work landing on the judges' desks, the court has made only modest attempts to correct the problem.

The lawyers whose work was examined by the American-Statesman appear on the court's list of about 100 attorneys eligible to submit, at state or county expense, writs of habeas corpus for death row inmates, virtually all of whom are indigent. Trial courts must select a listed lawyer to qualify for state money, capped at \$25,000 per writ, to pay for the lawyer and investigators.

The Court of Criminal Appeals conducts no formal review of the lawyers' job performance or quality of work, yet every lawyer on the list is assumed by the court to be a competent habeas practitioner. And without a doubt, a number of listed lawyers provide aggressive, conscientious representation and impressively researched writs.

But even if the judges identified a poorly performing lawyer, they could do little in response. Despite running the court-appointed habeas system for 11 years, the court has established no procedure to remove lawyers from its list - though that work has begun recently.

"There is no question that Texas is in the bottom five among death penalty states in the quality of (habeas) representation," said Eric Freedman, a law professor at Hofstra University in Hempstead, N.Y., and a leading expert on death penalty habeas law.

The lackluster showing should worry death penalty advocates and opponents, Freedman said.

Poorly done writs can propel an inmate toward execution, but they also can add years of delay as courts are forced to revisit issues that should have been raised in the initial writ.

In addition, the U.S. Supreme Court has issued several opinions stating that competent trial lawyers are essential to a reliable death penalty system. If the high court extends that rationale to habeas lawyers, Texas could be forced to re-examine scores of writs and perhaps lose its ability to conduct executions, Freedman said.

"It's a rational prediction that, one bright day, a state like Texas could find itself with a really nasty systemwide crisis," he said.

Once a death sentence has been levied in a Texas courtroom, death row inmates have two legal paths to the higher courts.

The first is the direct appeal. The Court of Criminal Appeals is required by law to review every death penalty to make sure no glaring errors were committed during the trial. Rarely is a conviction or death sentence overturned on direct appeal.

The writ of habeas corpus is the second path. The odds are still long, but in the few instances where innocent men have been freed from Texas death row or cases have been sent back for a new trial, habeas writs were often the cause.

The trial court judge must appoint a habeas lawyer within 30 days after the judgment is entered. A direct appeal lawyer is typically appointed about the same time, even though that job can't begin until the record of trial testimony, motions and related hearings is printed, a process that can take six months.

The habeas lawyer also must read the voluminous trial record but can begin work almost immediately, tracking down jurors, witnesses and files from the prosecutor and defense lawyers.

Writ lawyers are looking for new information capable of changing a court's view of the crime or the defendant. By definition, those details will not be found in the trial record, yet many writs go no further than quoting that record, essentially dooming the appeals to failure.

The American-Statesman's review of the state's death penalty writ system began by identifying 12 leading lawyers within the state's small circle of habeas practitioners. Those attorneys, including law school professors and teachers of continuing legal education courses, were asked to identify lawyers whose habeas work, in their experience and opinion, fell below professional standards.

Fifteen such lawyers were mentioned at least three times, and copies of their writs were obtained from the Austin-based Court of Criminal Appeals or from other sources.

Some lawyers simply copied from their previous appeals or from other attorneys, whether the facts applied to their current case or not. Others recycled claims that have been denied time and again, ignoring obvious avenues of investigation.

The American-Statesman review eventually focused on Wilkinson and five other lawyers who had multiple examples of questionable writs - eliminating lawyers who had not filed a writ since the 1990s or who had filed only one or two appeals. The only exception was Mark Alexander of McAllen, whose lone writ was so poorly reasoned and riddled with errors that fellow attorneys filed a grievance with the State Bar of Texas. The grievance was dismissed.

"It's embarrassing to us, as capital litigators, that we have these slugs out there not doing the things they need to be doing," said Philip Wischkaemper, a Lubbock lawyer working to improve death row representation for the Texas Criminal Defense Lawyers Association.

"A lot of these guys are good (trial) lawyers. But post-conviction capital litigation is a black art. Not many people know it, and even fewer know it well," he said.

Other lawyers whose work was reviewed include:

- Richard Alley, a Fort Worth lawyer suspended for one year from practicing before his hometown federal court for repeated unprofessional and unethical behavior. A U.S. judge also removed Alley from a federal death row case, questioning his competence in habeas matters. Meanwhile, Alley remained eligible to handle habeas appeals in state court.
- Dick Wheelan of Houston, who has submitted a number of writs copied largely verbatim from a death row inmate's direct appeal, even though such claims cannot be considered in a writ of habeas corpus.
- Stephen Taylor of Conroe, who has often copied from previous writs and direct appeals. The combination allowed one judge to dismiss a writ by simply noting that Taylor "did not attach or reference new evidence in support of his claims."
- Sidney Crowley of Houston, who admitted that his first death row writ, a skimpy 10-page document, lacked substance because he didn't understand the rules of habeas corpus. Even so, Crowley's following writs were equally scant - seven, nine, 14 and 15 pages.
- James de Lee of Port Arthur, whose failure to even try to prove his habeas claims was noted by two separate state district courts. "Merely stating conclusions is not enough," one judge wrote in palpable exasperation.

The Texas Legislature created today's court-appointed habeas system in 1995 as part of changes designed to speed the pace of executions.

To keep lawyers from stalling for time by filing one brief after another or piling up arguments that take years to resolve, lawmakers limited death row inmates to one state writ. Lawyers also were given a 180-day deadline with a 90-day extension; the clock starts ticking when prosecutors file their response stating why the direct appeal should be denied.

The limits made that first state writ exceedingly important, requiring the lawyer to include every argument that an inmate wants to raise. After that, except in rare cases where new evidence is discovered or a pertinent law or legal precedent is changed, no other issues may be raised as the writ works its way up the appellate ladder.

Federal courts, in turn, cannot consider most issues unless they were first raised in state court.

When a court-appointed habeas lawyer botches that first state writ, there is no going back. What was filed will determine an inmate's legal course all the way to the U.S. Supreme Court.

"Bad state writs tie your hands. You are up the creek when you get to federal court," said Gary Taylor, author of the "Texas Capital Habeas Corpus Manual," published by the Texas Criminal Defense Lawyers Association.

"I can handle the stress of death penalty work. But what I can't stand is having to sit across the table from my client with my hands tied behind my back," said Taylor, who has taken on several death row cases late in the game and found himself trying to salvage a bad writ. "I'm just saying give me an even playing field."

Despite the importance of that first state writ, however, lawyers are not called to account for their mistakes, leaving no recourse for inmates whose court-appointed lawyers failed to properly investigate the case or submitted boilerplate, copied claims.

"This is the great irony. As a lawyer, you risk more by screwing up a misdemeanor than you do on a death penalty writ," said Keith Hampton, a leading defense lawyer from Austin.

Four factors combine to give habeas lawyers what amounts to a free pass from disciplinary action.

First, the U.S. Supreme Court has determined that there is no constitutional right to "effective assistance" from a habeas lawyer, removing legal challenges based on the quality of a writ or other measures of performance.

Second, the State Bar of Texas, empowered by the Legislature to police lawyers, has been slow to act on complaints alleging poor representation by habeas lawyers, though there is pressure from within the State Bar to change that.

Third, the trial judges who appoint habeas lawyers traditionally fail to enforce standards of quality, even though they must read the writ and recommend whether the Court of Criminal Appeals should accept or reject the arguments.

Judges also have the power to reject an inferior writ and assign another lawyer, said Tarrant County Magistrate Court Judge Allan Butcher. However, several appellate lawyers and judges, including Court of Criminal Appeals Presiding Judge Sharon Keller, could not recall a trial judge doing so.

"The trial judge is the person who actually heard the case and therefore knows the facts," Butcher said. "And when he's faced with what he knows to be trash, he's got a responsibility to stop things and just say, 'Whoa.' He can call the attorney in and have a hearing. . . . He could stop it right there."

Finally, and most importantly, there is the Court of Criminal Appeals itself.

To compensate for strict deadlines and limits on the number of writs that can be filed, the Texas Legislature decided in 1995 to pay lawyers to help death row inmates file their petitions.

They put the Court of Criminal Appeals in charge of the new system and mandated that the court ensure that inmates are provided with "competent" lawyers.

The court responded by adopting a unique definition of competence.

The ruling came in response to a challenge by death row inmate Anthony Graves, who argued that he was entitled to file a new writ based on his first lawyer's incompetence.

(Graves, sentenced to die for the 1992 murders of a woman and five children in Somerville, was freed from prison last month after a U.S. judge found that prosecutors had suppressed two statements that could have changed the trial outcome.)

In 2002, the Court of Criminal Appeals disagreed with Graves, ruling that Texas law requires a habeas lawyer to be competent “at the time he is appointed.” The writ itself cannot be used to measure competence, the court reasoned.

An incredulous Judge Tom Price, one of three dissenters on the Graves opinion, wondered how a lawyer’s performance could be fairly evaluated when the final product is ignored.

“ ‘Competent counsel’ ought to require more than a human being with a law license and a pulse. Today the majority requires nothing more than that,” Price wrote.

In theory, the Court of Criminal Appeals ensures that lawyers are competent when appointed by regulating access to its list of approved habeas lawyers.

In reality, however, the court offers no guarantee of competence.

Some names on the list date back to 1995-97, when a backlog forced judges to badger and strong-arm lawyers into handling habeas appeals, sometimes prizing availability over ability.

The court did not require lawyers on the list to receive special training until two years ago, when Judges Cheryl Johnson and Cathy Cochran took over managing the habeas list and mandated six hours of continuing legal education every two years.

And though several defense lawyers gave Johnson and Cochran high marks for checking references of lawyers applying to join the list, the vetting process is not foolproof.

“The assumption is we wouldn’t have added your name to the list if we didn’t think you were competent. The problem is we put people on the list based essentially on paper,” Johnson said. “We don’t require copies of prior (writ) applications, and maybe we should.”

Keller, the court’s presiding judge, said she believes the court is meeting its obligation to death row inmates. Still, Keller said she will be open to any improvements suggested by Johnson and Cochran.

“I’m satisfied that we’re doing a good job, but we’re always looking for ways to do a better job,” she said.

Declining to address specific cases, Keller said the court does not ignore poorly handled writs.

“If anyone on the staff or any judges think that there is any question about whether a lawyer has done what he is supposed to, we don’t just overlook it. We review the writ applications and the records . . . and everything that had been done,” Keller said. “If we think there’s an issue not raised quite correctly, we construe the pleadings liberally.”

Still, Keller acknowledged, it is impossible for judges to construe facts that aren’t presented in the first place. “There are occasions we have to depend on what the lawyer raises,” she said.

To date, only one lawyer has been kicked off the Court of Criminal Appeals habeas list for poor job performance: Robert Patrick Abbott of Coppell, a Dallas suburb.

Given the standard six to nine months to submit a writ for death row inmate Sheldon Ward, Abbott failed to submit any documents for three years. He was called before the appeals court last May to explain why.

Gasping for breath after running to avoid arriving late, Abbott told the court that he had done nothing on the case beyond meeting briefly with his client and obtaining the trial record. “Over the years my attitude toward work changed. Frankly, my practice slowed down,” he said, shrugging.

The court found Abbott in contempt, fined him \$500 and assigned a new lawyer to the writ. A few weeks later, Abbott’s name disappeared from the court’s habeas list.

Other underperforming lawyers need to be removed from the list as well, Cochran and Johnson acknowledged.

But when Johnson recently tried to remove a lawyer accused of lying to a judge, intimidating other lawyers and grandstanding, she ran into resistance from the nine-member court. Other judges balked, she said, because the court has no criteria for identifying and removing poor habeas lawyers.

“An individual judge does not have the authority. You have to get five votes,” Johnson said. “But if there is a protocol for getting on the list, there has to be a protocol for getting off.”

To get on the habeas list, a lawyer must have experience in death penalty cases, show proficiency with habeas law and provide references that Cochran and Johnson will check. (Cochran estimated that the vetting process has kept a half-dozen lawyers from joining the list since 2004.)

To stay on the list, a lawyer must take six hours of continuing legal education every two years - not an onerous task for such a difficult and rapidly changing field of law, but one the judges hope will weed out the less motivated lawyers.

Johnson and Cochran have been discussing other methods to whittle poor lawyers off the habeas list. Suggestions range from creating a complaint-driven review system to making everybody on the list reapply and re-establish habeas prowess, Johnson said.

The first significant weeding out will occur after Wednesday, the deadline for habeas lawyers to tell the court that they want to remain on the list. Lawyers who don't respond will be removed.

But developing long-term standards to judge habeas lawyers will be extremely challenging. Habeas law is notoriously arcane, requiring skills that have little to do with typical pursuits such as writing briefs.

“It's by far the most difficult area of criminal law,” Cochran said.

“We're not really firm yet on precisely what process we would use to eliminate those who want to stay on the list but perhaps ought not be,” she said. “But there is obviously a need to have monitoring.”

Under the current habeas system, the success or failure of death row appeals can hinge on the luck of the draw.

Many of the lawyers who file less than stellar writs are solo practitioners or work in small offices and divide their time among a number of legal pursuits. Lawyers who provide rigorous representation tend to specialize in writs of habeas corpus, mastering the nuances of a constantly changing area of law, Wischkaemper said.

“This is not a part-time endeavor. Capital litigation is so complex that it's extremely difficult . . . to do this work on a part-time basis and carry a full load of misdemeanors and felonies so you can pay the secretary,” he said.

The arbitrary nature has prompted the American Bar Association to recommend two alternatives for states that follow Texas' model of court oversight of habeas lawyers.

First, a state could create an independent authority that would establish a list of qualified lawyers, dole out assignments and monitor the quality of work performed. The authority should be run by defense lawyers, who are best situated to judge their peers, according to the State Bar's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

Second, a state-run agency can be established to hire professionals - from lawyers to investigators - who specialize in habeas writs.

Both courses, however, have acknowledged pitfalls.

A lawyer-run authority is open to questions of fairness and fears that a good old boy system will reward friends who would be allowed to run up excessive bills.

A state-run agency is subject to the whims and benevolence of legislators who control the budget, raising fears that an understaffed and poorly funded agency could make matters worse.

Cochran, the Court of Criminal Appeals judge who helps administer the court's habeas system, is in favor of stepping aside.

"I was always of the personal persuasion that we should not keep the list. It should be kept by an independent entity . . . to vet those applicants and maintain standards," she said.

The change, Cochran said, should be motivated by a simple requirement for justice.

"We need more (habeas) lawyers, quite frankly, who are dedicated and competent," she said.

The Great Writ

The writ of habeas corpus, known as the Great Writ, is meant to protect against illegal detention. A writ filed on behalf of an inmate asks the courts to re-examine the circumstances and legality of their confinement.

Taken from the Latin for 'you have the body,' habeas corpus is derived from seven centuries of British law that required authorities to bring incarcerated people to court so their sentence could be reviewed.

Writs of habeas corpus have been used to exonerate several men on Texas death row and led to U.S. Supreme Court decisions that fundamentally altered death penalty law across the nation.

Some examples:

Exonerations

Ernest Willis: Freed in 2004 after 17 years on death row when a federal writ established that prosecutors withheld favorable evidence, that arson could not be proved in the 1986 fire that killed two Iraan women, and that prison doctors improperly gave Willis antipsychotic drugs that made him appear unemotional during trial.

Ricardo Aldape Guerra: A federal writ, pursued by the Vinson & Elkins law firm for an estimated \$3 million pro bono, established that prosecutors intimidated witnesses, relied on false evidence and conducted a suggestive lineup. Charges were dropped in 1997 after Guerra spent 15 years on death row for the murder of a Houston police officer.

Federico Macias: Released in 1993 after nine years on death row when a federal writ established that Macias received abysmal representation by his trial attorney. After a U.S. judge ordered a new trial, an El Paso grand jury declined to reindict, citing a lack of evidence in the killing of a man during a burglary.

Clarence Brandley: An evidentiary hearing for his state writ produced information that eventually led to Brandley being granted a new trial in 1990 after nine years on death row. His murder charges were later dropped. Brandley, a black man, had been convicted after a white investigator hid information pointing to a white man as the murderer of a Belleville high school girl. Subject of the book 'White Lies.'

Randall Dale Adams: A state habeas writ established that prosecutors withheld favorable evidence and knowingly used perjured testimony to convict Adams in the shooting death of a Dallas police officer. David Harris confessed to the shooting during a hearing on the writ. Adams, the subject of the documentary 'The Thin Blue Line,' served 12 years on death row. Charges were dismissed in 1989.

Death sentences decline in Texas	
2001	31
2002	36
2003	29
2004	25
2005	15
2006	7*

*Year to date

Source: Texas Department of Criminal Justice

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