A State of Denial:

Texas Justice and the Death Penalty

Texas Defender Service

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Texas Defender Service (TDS) is a private, 501(c)(3) non-profit organization. Since 1995, TDS has provided direct representation to indigent inmates on Texas' death row, consulted with other lawyers litigating such cases, and intervened in unusual cases where expert legal assistance was urgently needed. We strive to improve the quality of representation for Texas death row inmates in three ways:

Direct Representation of Death-Sentenced Prisoners

TDS' staff attorneys handle a limited number of cases and strive to provide thorough representation that will serve as a benchmark of quality. By restricting the number of cases we handle, TDS is able to ensure that staff attorneys can devote sufficient time to thoroughly investigate and brief each case. TDS focuses its attention on cases with broad significance to capital representation in Texas.

Consulting, Training and Case-Tracking

In 1999, TDS received a three-year grant from the Death Penalty Representation Project of the American Bar Association, which permits TDS to (1) develop a system to track Texas capital cases; (2) identify issues and cases appropriate for impact litigation; (3) develop sample pleadings and brief banks to be distributed through a national website; (4) identify and intervene in cases of complete system failure; (5) provide "on the ground" assistance to the ABA's efforts to recruit law firms to take death penalty cases on a *pro bono* basis, and consult with those attorneys; and (6) work with other state and national organizations to train attorneys representing inmates on death row.

Trial Project

TDS' Capital Trial Project, the first of its kind in Texas, seeks to raise the quality of indigent capital trial defense in Texas. Specifically, the project provides targeted support on issues critical to capital trials by developing and compiling training materials and legal pleadings, providing limited individual case consultation, developing a system to identify capital defendants and their attorneys as soon after indictment as possible, collecting case specific information for purposes of tracking capital cases, creating and maintaining a database of forensic experts, and working with community groups and state government to promote policy initiatives and to raise public awareness of the fundamental unfairness of capital trials in Texas.

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A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY

Executive Summary

The nation is embroiled in a debate over the death penalty. Each day brings fresh accounts of racial bias, incompetent counsel, and misconduct committed by police officers or prosecutors in capital cases. The public increasingly questions whether the ultimate penalty can be administered fairly – free from the taint of racism; free from the disgrace of counsel sleeping through a client's trial; free from the risk of executing an innocent person. Support for the death penalty is falling, and across the country, momentum gathers for a moratorium. Even death penalty supporters – such as Illinois Governor George Ryan – have acknowledged the need for fundamental reform.

In Texas, the call for reform has been deflected by state officials' aggressive defense of the Texas system. Repeatedly, Governor Bush and others have defended the administration of the death penalty. Texas Attorney General John Cornyn has gone so far as to describe the death penalty in Texas as "a model for the nation."

This report challenges that confident assessment. To show why Texas justice is not a model for anyone, we have undertaken a preliminary examination of the Texas death penalty system. We have conducted original research into the discriminatory charging practices of Texas prosecutors. We studied hundreds of cases, including every published decision (and many unpublished decisions) of the Texas Court of Criminal Appeals in capital cases in the modern death penalty era. We examined over half of the capital post-conviction appeals filed in Texas since 1995 – a stage of the appeals that has never before been systematically scrutinized – and we evaluated treatment given to those appeals by the state courts.

In this Report, we explain and lay bare many disturbing features of a thoroughly flawed system.

CHAPTER ONE
A Brief Overview

In this Chapter, we set forth a preliminary introduction to the Texas death penalty system: the death row population, the procedure by which people are sentenced to death, and the outlines of the torturous path of post-conviction appeals.

CHAPTER TWO
Official Misconduct: A Deliberate Attack on the Truth

We examined and assembled in this report numerous examples of Texas death penalty trials in which the prosecutors failed to discharge their duty to learn, disclose, and speak the truth. After an extensive review of Texas death penalty cases in the post-Furman era, we

identified 84 cases in which a Texas prosecutor or police officer deliberately presented false or misleading testimony, concealed exculpatory evidence, or used notoriously unreliable evidence from a jailhouse snitch.

- In 41 of these cases, state officials intentionally distorted the truth-seeking process by engaging in practices that resulted in the presentation, or serious risk of presentation, of false or misleading evidence.

- In 43 documented cases prosecutors relied upon the inherently unreliable testimony of jailhouse informants, despite the obvious risk that inmates may fabricate testimony to curry favor with authorities. In many of those cases, such testimony was the primary evidence used to obtain a conviction.

Texas prosecutors freely engage in tactics that other jurisdictions have found violate due process. In multiple-defendant cases, for example, Texas prosecutors have presented irreconcilably inconsistent theories of the same crime: to the first jury, the prosecutor presents evidence and argument that 'A' shot the victim while 'B' stood by; in a later trial to a different jury, the same prosecutor presents evidence and argument that 'B' shot the victim, while 'A' stood by.

In other cases described in our report, police and prosecutors have suppressed evidence showing that someone other than the defendant committed the crime, have lost or destroyed potentially exculpatory evidence, have resisted the forensic examination of evidence that could exonerate the defendant, have manipulated witnesses' testimony to support the prosecution's theory despite contrary evidence, and have used threats against defendants or their family members to coerce confessions.

Several innocent men have been released from Texas's death row. These wrongful convictions usually stemmed from misconduct committed by prosecutors or police officers. In the overwhelming majority of these cases, the misconduct that sent these men to death row only came to light years after the trial had ended. Since official misconduct is by its nature hidden, it is always difficult to expose. Today, new procedures sharply limit a defendant's ability to secure review of his case in state and federal court, making it unlikely that the truth about the wrongful conviction of an innocent person will ever come to light.

CHAPTER THREE
A Danger to Society: Fooling the Jury with Phony Experts

We treat separately another kind of official misconduct: those cases involving junk science, including "predictions" of future dangerousness, hair comparison evidence, and bite mark testimony. Of the sample we examined, we found *160 cases* which contained some form of "scientific" evidence of dubious reliability.

- In 121 cases, an "expert"psychiatrist testified with absolute certainty that the defendant would be a danger in the future. In the majority of those cases, the

predictions were based on hypothetical questions, or only the most perfunctory interview with the defendant. These impossibly certain predictions of future behavior have been universally condemned as junk science. When the American Psychiatric Association expelled from its ranks the leading proponent of this testimony, he attacked the APA as "a bunch of liberals who think queers are normal."

- In 36 cases, the state relied upon hair comparison testimony – a practice which has been repeatedly proved to be inaccurate and misleading – to obtain a conviction. This "science" is fully replaceable by highly reliable mitochondrial DNA technology.

Because many case records and court opinions are unavailable, these numbers are extremely conservative, and likely represent only a fraction of the cases in which the state relied upon junk science to obtain a conviction and sentence of death.

CHAPTER FOUR
Race and the Death Penalty: The Inescapable Conclusion

In this Chapter, we studied the persistent racism in the Texas death penalty, interviewing practitioners across the state regarding the jury selection process, researching the effect of discrimination statewide, and conducting original research into the charging practices of one East Texas county.

Though more comprehensive statewide research must be done, our data reveals a clear pattern of disparity in the punishment meted out to those convicted of killing whites as compared to those convicted of killing non-whites, despite the fact that black males are the most likely murder victims. Our research indicates that the death penalty is used most often to punish those convicted for murdering white women, the least likely victims of murder.

- While a 1998 study indicates that 23% of all Texas murder victims were black men, only 0.4% of those executed since the reinstatement of the death penalty were condemned to die for killing a black man.

- Conversely, as of 1998, white women represented 0.8% of murder victims statewide, but 34.2% of those executed since reinstatement were sentenced to die for killing a white woman.

- Capital juries in the counties we profile are far "whiter" than the communities from which they are selected. The overall picture that emerges of the Texas death penalty is stark: non-whites are for the most part excluded from the process of assessing a punishment that is disproportionately visited upon them. African-American Texans are the least likely to serve on capital juries, but the most likely to be condemned to die.

Chapter Five
Executing the Mentally Retarded

Despite a growing national consensus that defendants with the mental age of a child should not be subject to the death penalty, Texas continues the practice of allowing the mentally retarded to be sentenced and put to death. Thirteen states and the federal government have banned the execution of the mentally retarded. Just last year, the Texas Senate passed a bill to ban the execution of the mentally retarded, but the bill was scuttled by the Texas House of Representatives.

Although there are many inmates – both those executed and those who are still on death row – who have never undergone even preliminary I.Q. testing, we know that, to date, Texas has executed at least six mentally retarded inmates. In this section, we profile two such men: one who has been executed; one who is still on death row.

- Mario Marquez, whose jury never heard he was retarded, with an I.Q. of 66. When the trial judge and prosecutor learned the extent of Marquez's impairment, they joined his new lawyer in asking that he be spared. Their plea fell on deaf ears and Marquez was executed the day George W. Bush was inaugurated Governor.

- Doil Lane, who may soon be executed by the State of Texas. After Lane gave a confession to a Texas Ranger, he crawled into the officer's lap and began to cry. Throughout his life, Lane's I.Q. has measured consistently between 62 and 70.

Chapters six and Seven
The Right to Counsel in Texas: You Get What You Pay For; and Sham Appeals: The Appearance of Representation in State Habeas Corpus

Recent publicity has focused the nation's attention on Texas defense lawyers who slept through capital trials, ignored obvious exculpatory evidence, suffered discipline for ethical lapses, or used drugs or alcohol while representing an indigent capital defendant at trial. Defenders of the system dismiss these cases as an aberration. Our research indicates otherwise.

- In some cases, counsel's performance was the product of his own greed or ineptitude. Joe Lee Guy was represented at trial by an attorney who ingested cocaine on the way to trial, and consumed alcohol during court breaks. Guy's state habeas attorneys failed to investigate the misconduct – which means those facts may never be considered by either a state or federal court.

- In other cases, blame lies with the State's refusal to both appoint lawyers with sufficient experience and training and to fund an adequate defense. For example, despite knowing about his client's history of mental illness, Paul Colella's lawyer failed to make any inquiry into his client's psychiatric history. The only evidence

Colella's jury heard about his background before sentencing him to death was a brief plea from his mother.

Further, the Texas Court of Criminal Appeals routinely denies any remedy to inmates whose court-appointed lawyers performed poorly. The Court has forced lawyers to remain on capital cases even when the lawyers themselves expressed doubts about their ability to handle such cases, and it has denied relief to two death row inmates whose lawyers slept through trial. The Court's rationale in these two cases – that the inmate failed to show that he was harmed by counsel's sleeping – reflects a profound disregard for the constitutionally-guaranteed right to effective assistance of counsel.

When the truth has been hidden by the State or ignored by defense counsel at trial, post-conviction appeals are the only opportunity an inmate has to set the record straight. Yet the quality of counsel in these appellate proceedings has received almost no attention. To evaluate whether post-conviction counsel in Texas are providing the representation demanded by a capital case, we examined over half the post-conviction appeals filed in Texas since 1995 (187) – a study never before conducted. Our findings are deeply unsettling.

- In 42% of the appeals, post-conviction counsel appeared to have conducted no new investigation, and raised no extra-record claims – even though this is the only type of claim that can be considered for review in such a proceeding.

- In many cases, appointed attorneys merely repeated, sometimes word-for-word, claims which had already been rejected by the courts in a previous appeal-practically guaranteeing that there would be nothing for the courts to review in state *or* federal court.

- In approximately one-third of the cases reviewed, the post-conviction application was under 30 pages long. In 17%, the application was under fifteen pages long. Such short applications can barely contain the requisite procedural formalities, let alone the legal arguments and factual assertions that are necessary to present a constitutional claim of error.

- In a number of cases where patently inadequate state habeas applications were filed, subsequent investigation has revealed significant constitutional errors – including an alcoholic trial attorney and a possible claim of innocence – that were not reflected in the habeas application, and would have remained undiscovered if they had continued on the normal track of Texas habeas appeals.

Further, the Court of Criminal Appeals has displayed disgraceful indifference to these problems. The Court has taken no action to protect the rights of defendants – who were promised "competent" counsel by the Texas Legislature – even when the post-conviction lawyers it appoints have displayed obvious signs of inexperience and incompetence. Not only is there no standard of review for these appointed attorneys, there also is no oversight of their work.

CHAPTER EIGHT
The Myth of Meaningful Review

Officials in Texas insist that redundant levels of appellate review will prevent wrongful convictions, and that deficiencies at trial will be corrected in post-conviction appeals. This rhetoric of "super due process" is meant to reassure the public that, despite the astounding number of executions in Texas, each case has received close scrutiny in the state and federal courts. In many cases, however, the notion of careful and meaningful review is a myth. For example, our study found that:

- In the great majority (79% of the 103 cases studied) of post-conviction cases, the judge never held an actual hearing on the inmate's claims of constitutional error, but instead relied merely on whatever documents were submitted.
- In 83.7% of the cases reviewed, the trial court's factual findings were identical or virtually identical to those filed by the prosecutor. In 93% of these cases, the Court of Criminal Appeals summarily adopted the trial court's "opinion." In all but the most unusual cases, the opinion then binds the federal court.

Few cases illustrate the myth better than Gary Graham's. After Graham's initial post-conviction proceedings proved unsuccessful, his new post-conviction attorneys found compelling evidence to support Graham's longstanding claim of innocence. Graham spent the next seven years trying to secure an evidentiary hearing – in state and federal courts – at which the strength of his newly developed evidence of innocence could be measured against the prosecution's single eyewitness. He never got it. The state courts adopted "findings" penned by the prosecutor assessing Graham's innocence claims as if there had been a hearing where witnesses testified – but there was no such hearing. The prosecutor's version of the facts controlled the litigation in subsequent proceedings, and no federal court ever reviewed the merits of Graham's claims.

CHAPTER NINE
A Bitter Harvest

In our final chapter, we profile the cases of six men executed despite substantial and compelling doubt about their guilt. Some of these cases received widespread national attention, like the case of Gary Graham. Others were executed in obscurity. These six men, however, have at least two things in common. In each case, the truth came to light long after the trial – long after it had been suppressed by the State of Texas, ignored by defense counsel at trial, or dismissed by the courts. And in each case, the truth came too late.

Conclusion

Five years ago, the State of Texas implemented several changes in the system of review of death penalty convictions. These changes, however, have done very little to repair a system that needs fundamental reform. Indeed, some of the changes have backfired. The reforms to state post-conviction appeals were intended to speed up the process, while ensuring fairness by granting defendants a right to competent legal assistance. However, many of the lawyers appointed under the law do not know how to provide effective representation in state habeas proceedings and end up grossly mishandling this critical stage of the case. Thus, the 1995 reforms created merely an appearance of review, and thwarted meaningful access to the state and federal courts. Neither this reform, nor any other, has slowed the Texas death penalty system's powerful but flawed rush to execution.

In this report, we have assembled an unprecedented volume of objective evidence that raises profound questions about the fairness of how and when the death penalty is applied. We articulate the scope and breadth of the underlying problems, and offer preliminary recommendations for change. We confirm the critical need for a thorough investigation of every capital case, and we show that all too often, such an investigation either does not take place, or takes place too late for the courts to consider it. In short, we lay bare a system in desperate need of reform. We urge all who are committed to justice to read our report thoughtfully. It compels the conclusion, reached by increasing numbers of Americans, that our current method of enforcing the death penalty does violence to the ideal of basic fairness that is supposed to be the foundation of our criminal justice system.

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PREFACE

Texas leads the nation in executions, and has the second largest death row in the country. While anecdotes about Texas's administration of the death penalty are legion, there is relatively little concrete statistical data about the system as a whole. Due in large part to the problems identified in this report – especially the lack of competent trial and post-conviction counsel, and state misconduct – it is impossible to know the extent to which the fundamental fairness of many Texas death penalty cases has been compromised without first conducting a thorough investigation of each case. In fact, some of the cases discussed in this report only came to our attention by pure chance, usually when a crisis arose that required immediate intervention.

Thus, our report, while representing a careful and time-consuming examination of a number of issues vital to the administration of the death penalty in Texas, merely scratches the surface. What is clearly visible through this window into the system, however, is that an intolerably high number of people are being sentenced to death and propelled through the appellate courts in a process that lacks the integrity to reliably identify the guilty or meaningfully distinguish those among them who deserve a sentence of death.