Statement of

STEPHEN B. BRIGHT
President and Senior Counsel
Southern Center for Human Rights
83 Poplar Street, N.W., Atlanta, GA 30303
www.schr.org
(404) 688-1202
sbright@schr.org

regarding

The Innocence Protection Act

before the

SUBCOMMITTEE ON CRIME,
TERRORISM AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY,
UNITED STATES HOUSE OF REPRESENTATIVES

September 22, 2009

Statement of

STEPHEN B. BRIGHT[1]

REGARDING THE INNOCENCE PROTECTION ACT

**To the Subcommittee on Crime,
Terrorism and Homeland Security
of the Committee on the Judiciary,
United States House of Representatives**

September 22, 2009

MR. CHAIRMAN and members of the Subcommittee,

The best protection against conviction of the innocent is competent representation for those accused of crimes and a properly working adversary system. Unfortunately, a very substantial number of jurisdictions throughout the country do not have either one.

Poor legal representation is a major cause of conviction of the innocent. When the prosecution's case is not subject to adversarial testing, it increases the risk of a miscarriage of justice. *The New Yorker* recently provided a case study of how an innocent man, Todd Willingham, was sentenced to death and executed in Texas because the lawyers who represented him knew nothing about defending an arson case.[2]

Another man, Ernest Ray Willis, sentenced to death based on almost identical junk science in another arson case, had the good fortune to be represented in post-conviction proceedings by a New York law firm that spent what it took to get the forensic experts, fire consultants and other knowledgeable people to analyze the evidence scientifically and objectively. They found that the fire was not arson, but

---

1. President and Senior Counsel of the Southern Center for Human Rights in Atlanta since 2005; director of the Center from 1982 to 2005; teaches courses on capital punishment and criminal procedure at Yale and Georgetown Law Schools; has practiced law since 1975, representing people at all stages of capital and other criminal cases and in civil rights cases; has published articles and essays on the right to counsel, racial discrimination in the criminal justice system, judicial independence, and other topics. A brief biographical sketch is appended.

2. David Grann, "Trial by Fire: Did Texas Execute an Innocent Man?" *The New Yorker*, Sept. 7, 2009, page 42.

started accidentally. Among other things, juries had been told in both cases that certain patterns on glass recovered from the fires were caused by the use of an accelerant. Actually, the patterns were the result of water being used to put out the fires hitting the glass when it was hot from the fire. Willis was released. As we too often see, if you switch the lawyers in the two cases, you switch the outcomes of the cases.

Effective representation can often protect against the other main causes of conviction of the innocent: mistaken eyewitnesses identifications, self-interested informants whose testimony is not true, false confessions, and misconduct by law enforcement personnel and prosecutors. For example, last June defense lawyers in Louisville, Kentucky, discovered a videotape of court proceedings in which a prosecutor asked a judge for leniency on behalf of a witness who had testified against a defendant in a capital trial. When that same prosecutor had presented that same witness at the capital trial she had insisted there was no agreement to ask for leniency. As a result of defense counsel's diligence, the truth came to light with regard to the witnesses's credibility. The prosecutor resigned.[3] But in many cases such misconduct does not come to light until years after trial, if at all.

Some people believe that we can rely on DNA testing to protect the innocent, but DNA testing reveals only a few wrongful convictions. In most cases, there is no biological evidence that can be tested. In those cases, we must rely on a properly working adversary system to bring out all the facts and help the courts find the truth.

However, there is no working adversary system in much of this country, particularly in the jurisdictions that condemn the most people to death. The disparities between the prosecution and the defense are so immense in some places that the prosecution's case is not subject to adversarial testing. Some lawyers assigned to defend people accused of crimes are completely unqualified to do so because they are unaware of the governing law. Some lawyers work under such crushing workloads that no matter how conscientious and dedicated, they are unable to give their clients the individual attention they require. There is little or no investigation and presentation of evidence on behalf of the accused. This significantly increases the risk of wrongful convictions.

---

3. *See* Brett Barrouquere, "Prosecutor resigns after controversial plea deal," *USA Today*, June 11, 2009.

I.

Many people may not be aware of just how great the disparities are between the prosecution and the defense. How bad is it? It can't get any worse than the accused not having any legal representation at all, while the prosecution is fully staffed. We filed a brief in the Georgia Supreme Court on September 2 on behalf of a mentally ill man facing the death penalty in Georgia who had gone for over two years without funding for his defense and for over one year without a lawyer *while his capital case was pending trial.*[4] The client, who suffers from auditory and visual hallucinations, depression, and severe anxiety, reached such a state of despair during this time that he attempted suicide three times and repeatedly told both his lawyers and the prosecutor that he would just as soon give up and receive the death penalty.

Delay in funding for the defense of capital cases is not unusual in Georgia. The defense of some capital cases have not been funded for two or three years after arrest. For example, Stacey Sims was arrested in 2005 and the prosecution announced its intention to seek the death penalty. Two lawyers were appointed to represented Sims, but they moved to withdraw a year and a half later because they had not been paid. They were allowed to withdraw and two new lawyers were assigned to represent him. A year and a half later, they also moved to withdraw because they also had not been paid. The Court allowed them to withdraw as well.[5]

The pattern that has emerged in Georgia capital cases is that there is no funding for defense representation for a substantial period of time – often years – but as the date of trial approaches, the director of the indigent defense program comes up with some last-minute funding, the defense hurriedly tries to make up for months or years when nothing was or could be done because of lack of funds, and the case is forced to trial.[6] Questions of whether the last-minute funding was adequate and whether

---

4. *Weis v. State*, Ga. Supreme Court No. S09A1951, Brief for Appellant, available at www.schr.org.

5. *Sims v. State*, Superior Court of Tift County, Georgia, No. 2006-CR-91, Hearing of Dec. 22, 2008.

6. *See*, *e.g.*, Bill Rankin & Rhonda Cook, "Jury selection in Silver Comet case may be delayed," *Atlanta J.-Const.*, April 13, 2009 (funding issues were still being resolved during jury selection of capital trial); Julie Arrington, "Funds avert fears of 'constitutional crisis,'" www.forsythnews.com/news/article/2631/, May 31, 2009 (reporting that Mack Crawford, director of the state-wide indigent defense program, informed the judge that money was available for the defense of a capital case involving a murder that occurred on March 19, 2006; *the defense lawyers had not been paid since October, 2007* for their work on the case).

defense counsel were able to make up for lost time in a few weeks or months will be litigated in habeas corpus cases in the years to come.

On the other hand, throughout the pretrial period, the prosecution has lawyers and other staff, the support of various law enforcement agencies and the state crime laboratory and resources for any experts or consultants it needs to prosecute the cases. It is contrary to every notion of fairness, due process and the proper working of an adversary system for one side to be deprived of all resources for a substantial period of time before trial, while the opposing side is fully staffed, funded, and able to prepare for trial. This makes a mockery of the adversary system.

Of course, such enormous prosecutorial advantages are not limited to capital cases. Within the past year, our office filed a lawsuit against a five-county judicial circuit in Georgia which was not providing lawyers to indigent defendants charged with felony offenses who could not be represented by the public defender office because of conflicts of interest.[7] For example, in co-defendant cases, the public defender would represent one defendant, but often could not represent the co-defendants because they had conflicting defenses. No lawyers were appointed to defend the co-defendants because the indigent defense program in Atlanta failed to sign contracts with lawyers to represent them.

As a result, people *with pending felony charges* were not provided lawyers. This has been patently unconstitutional since 1963, when the Supreme Court decided *Gideon v. Wainwright*, 372 U.S. 355 (1963). Yet all three Superior Court judges in that judicial circuit, with the acquiescence of the District Attorney – all of whom had taken an oath to uphold the Constitution – processed cases involving over 300 people without lawyers, detaining some in jail, calling upon all to enter pleas in clear violation of the United States Supreme Court's holding in *White v. Maryland*, 373 U.S. 59 (1963), that people accused of felonies are entitled to the advice of counsel before entering pleas, and ignoring the *Gideon* decision as if it did not exist. Again, it can't get any worse than no lawyer at all.

The fact that the director of the Georgia public defender program, a mule trader with no experience in indigent defense, was not fired for failing to renew the contacts and allowed this situation to continue even after it had been reported in the media

7. *Mitchell v. Crawford*, Superior Court of Elbert County, Georgia.

speaks volumes about how little regard Georgia officials have for the right to counsel.[8]

Even when contracts were signed the year before, two lawyers agreed to handle 175 cases for a flat rate of $50,000 or $285 per case. This amount was to cover all investigation, expert witnesses, and other necessary expenses for the defense of the conflict cases. Obviously, this is only enough to provide token representation.

Prosecutors do not contract to provide representation in a haphazard, cheaper-by-the-dozen manner – handling cases some years and not others. The prosecutors in that circuit, like the rest of the state, are organized in an office with full-time prosecutors and other employees who work year to year to carry out their responsibilities to prosecute cases in an organized and competent manner.

II.

The dismal failure to provide competent counsel in capital and other criminal cases since the *Gideon* decision in 1963 has been well documented by the American Bar Association, independent organizations, law professors, journalists and anyone else who has looked into it.[9] As Judge R. Guy Cole, Jr. of the United States Court of

---

8. The director of the Georgia Public Defender Standards Council, Mack Crawford, serves at the pleasure of the Governor.

9. *See*, *e.g.*, National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, issued April, 2009, available at www.tcpjusticedenied.org; Stephen Henderson, "Defense Often Inadequate In Four Death-Penalty States," McClatchy Newspapers, Jan. 16, 2007, and accompanying four articles in a series regarding the poor quality of legal representation found in a study of eighty death-penalty cases from Alabama, Georgia, Mississippi, and Virginia, available at www.mcclatchydc.com/201/story/15397.html; American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004), available at www.abanet.org/legalservices/sclaid/defender/ brokenpromise/fullreport.pdf; Kenneth Williams, *Ensuring the Capital Defendant's Right to Competent Counsel: It's Time for Some Standards!*, 51 WAYNE L. REV. 129, 140–141 (2005); William S. Geimer, *A Decade of* Strickland's *Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91 (1995); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835 (1994); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993); Jeffrey L. Kirshmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 455–60 (1996) (citing cases in which convictions were upheld even though defense lawyers were intoxicated, abusing drugs, or mentally ill). These are only a handful of the hundreds of studies and reports that document the failure to meet the constitutional requirement of the Sixth Amendment. We are well past the time when we should

Appeals for the Sixth Circuit pointed out in the case of Jeffrey Leonard, things may be getting worse. The lawyer who represented Leonard, a 20-year old, brain-damaged African American, in Kentucky did not even know his client's real name even though it was contained in the prosecution's file and in the trial court record in four different places. Leonard was tried and sentenced to death under the name of James Slaughter. Because he conducted no investigation, the lawyer did not find out that Leonard was brain-damaged and had a horrific childhood. When challenged about the quality of his work, the lawyer testified that he had tried six capital cases and headed an organized crime unit for a New York prosecutor's office.[10] Neither statement was true.[11]

The Sixth Circuit, still referring to Leonard as "Slaughter," concluded that the lawyer's performance was deficient, but, nevertheless, upheld the death sentence based upon its conclusion that the outcome would not have been different even if the lawyer had known his client's name and presented evidence of his brain damage, childhood abuse and other mitigating factors.[12] In dissent, Judge Cole summed up the sad state of the right to counsel:

> We are uneasy about executing anyone sentenced to die by a jury who knows nearly nothing about that person. But we have allowed it. We are also uneasy about executing those who commit their crime at a young age. But we have allowed that as well. We are particularly troubled about executing someone who likely suffers brain damage. We rarely, if ever, allow that – especially when the jury is not afforded the opportunity to even consider that evidence. Jeffrey Leonard, known to the jury only as "James Slaughter," approaches the execution chamber with all of these characteristics. Reaching this new chapter in our

---

have stopped studying the problem and started doing much more about it.

10. The lawyer was indicted for perjury. The charges were dismissed in exchange for him resigning from the bar. *See* Andrew Wolfson, "Lawyer Radolovich to give up license," *Courier-Journal*, Louisville, Ky., Feb. 6, 2007, at 1A.

11. *Id.*

12. *Slaughter v. Parker*, 450 F.3d 224 (6th Cir. 2006), *rehearing en banc denied*, 467 F.3d 511, *cert. denied sub nom. Leonard v. Parker*, 127 S.Ct. 2914 (2007).

death-penalty history, the majority decision cannot be reconciled with established precedent. . . .[13]

The Court of Appeals for the Eleventh Circuit upheld a capital case last year in which a lawyer who had been in practice only five months was primarily responsible for preparation for the penalty phase. The young lawyer and the other two lawyers on the case never obtained school records that were readily available – right there in town – or talked to their client's special education teachers who would have testified that his IQ was "low to mid 60s," and that he was "educable mentally retarded or trainable mentally retarded." They did not get an independent psychological examination. Nor did they review other documents from various agencies like the Department of Human Resources that they subpoenaed but never received. They presented nothing to the jury about the client's very limited intellectual functioning.[14] Fortunately, the Supreme Court has granted *certiorari* in the case and will hear argument on November 4.

Alabama, which has the largest number of people on death row per capita in the United States,[15] pays lawyers only $2000 per case for handling an appeal in a death penalty case. It is a two-stage appeal – to the Court of Criminal Appeals and then by application for *certiorari* to the Alabama Supreme Court. Although Alabama law provides that all death penalty cases must be "subject to review by the Alabama Supreme Court,"[16] the Alabama courts have held there is no right to counsel for this critical stage of the process.[17]

---

13. *Slaughter v. Parker*, 467 F.3d 511, 512 (6th Cir. 2006) (Cole, J., dissenting from denial of rehearing en banc). Leonard was not executed only because Ernie Fletcher, the Republican Governor of Kentucky, commuted his sentence before leaving office. Fletcher recognized the denial of the right to counsel, even though the courts did not.

14. *Wood v. Allen*, 542 F.3d 1281 (11th Cir. 2008), *cert. granted*, 129 S.Ct. 2389 (2009).

15. Capital Punishment, 2007 - Statistical Table 4, Bureau of Justice Statistics *available at* http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/tables/cp07st04.htm; Death Sentences Per Capita by State, Death Penalty Information Center (2009), http://deathpenaltyinfo.org/death-sentences-capita-state. Alabama has over 200 people on its death row and has carried out over 40 executions.

16. Ala. Code § 13A-5-53 (a), (b), & (d); *see also* Ala. R. App. Pro. 39 (a) (2).

17. *State v. Carruth*, No. CR-06-1967, 2008 Westlaw 2223060 at *6 (Ala. Crim. App. May 30, 2008).

An Alabama lawyer recently filed an brief in a death penalty case which contained nothing except Justice Ginsburg's dissent in the Supreme Court's case upholding lethal injection. The dissent had nothing to do with any issue in his client's case. It could not have helped his client with regard to lethal injection because it was a *dissenting opinion*; the majority of the Court had ruled against him. This is gross incompetence on the part of an appellate lawyer. Another brief filed in an Alabama capital case in the Court of Criminal Appeals was only 10 pages long and cited seven cases.[18]

Michael David Carruth was simply abandoned by his lawyer during direct appeal of his capital case. After the Alabama Court of Criminal Appeals affirmed the conviction and sentence,[19] the lawyer did not petition the Alabama Supreme Court for certiorari review as he was required to do both to invoke that Court's review of the issues and to preserve those issues for review by the federal courts on habeas corpus review. Nor did he notify Carruth that he had not filed a petition. Not only did the time expire to petition the Alabama Supreme Court and United States Supreme Court for review, but 11 of the 12 months for filing a state post-conviction petition or a federal habeas corpus action had passed before Carruth learned what had happened. He found out when he received a letter from the Alabama Attorney General's office notifying him he had only a month remaining before those deadlines were to expire.

Texas has carried out 440 executions, by far the most of any state, and has over 350 on its death row. (Only one other state, Virginia, has executed over 100 people since 1976. It has executed 103.) Harris County alone accounts for well over 100 executions, more than any other state except Texas itself. The incompetence of lawyers assigned to represented people accused in capital cases in Texas is well established and well known. Three people were sentenced to death in Harris County at trials were their lawyers slept. One was granted habeas corpus relief by a 9-5 vote of the United States Court of Appeals,[20] one was executed,[21] and one is still on death row after the Texas Court of Criminal Appeals has twice upheld his conviction and

---

18. *Billups v. State*, Ala. Ct. Crim. App. No. 05-0773 (filed Dec. 1, 2006).

19. *Cattuth v. State*, 927 So. 2d 866 (Ala. Crim. App. 2005)

20. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc).

21. *See* David R. Dow, *The State, The Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694–95 (1996) (describing the case of Carl Johnson). Neither the Texas Court of Criminal Appeals nor the United States Court of Appeals for the Fifth Circuit published its opinion in Johnson's cases.

sentence despite his lawyer sleeping during trial.[22] These are only the most egregious examples of deficient representation.[23]

As in Alabama, many of those sentenced to death in Texas receive completely incompetent lawyers on appeal and in post-conviction representation.[24] For example, a lawyer assigned to represent Robert Gene Will filed the same brief for Will that he had filed for another inmate, Angel Resendiz, a year and a half earlier.[25] The lawyer missed the statute of limitations for filing Resendiz' federal habeas corpus petition. As a result, Resendiz was executed without any habeas review of his case. Will was denied relief based on the shoddy brief that had been filed earlier in Resendiz' case.

The brief filed on behalf of another man condemned to die in Texas, Justin Chaz Fuller, was incoherent, repetitious, and rambling. There too, the lawyer copied from an appeal filed seven years earlier for a different client, Henry Earl Dunn. As a result, the brief filed for Fuller contained complaints about testing for blood on a gun used by Dunn's co-defendant that had nothing to do with Fuller's case. The lawyer also copied some of Fuller's letters into the brief so that it contained unintelligible and irrelevant statements such as, "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."[26] Considering only this nonsensical brief, the Court of Criminal Appeals denied Fuller relief and he was executed.

There is no justification for a court accepting such briefs in any case. Without adequate briefing, a court cannot do its job in deciding a case. A court concerned

---

22. *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996) (upholding conviction and sentence over dissent which argued "[a] sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense"); *Ex Parte McFarland*, 163 S.W.3d 743 (Tex. Crim. App. 2005) (rejecting the claim again in post-conviction proceedings).

23. See the sources cited in note 9 for many more.

24. *See*, *e.g.*, Texas Defender Service, Lethal Indifference (December 2002) available at www.texasdefender.org/publications.asp (describing inadequacy of lawyers assigned to provide post-conviction representation in Texas).

25. *See* Chuck Lindell, "Lawyer Makes 1 Case for 2 Killers," *Austin American-Statesman*, Feb. 26, 2006, at A1. (I append it to this statement).

26. *See* Maro Robbins, "Convict's Odds Today May Rest on Gibberish," *San Antonio Express-News*, Aug. 24, 2006, at A1. (It is also appended.)

with justice would remove the lawyers from the cases, refer them to the bar for a determination of whether their licenses to practice law should be revoked, and appoint competent lawyers to brief the issues so that it could consider whatever issues were present in the cases. But this poor quality of lawyering is so common in these courts that they just deny the appeals based on briefs that would not receive a passing grade in a first-year legal writing course. It would completely disrupt the operation of these courts to require adequate briefing for indigent defendants in every case.

Six people in Texas have been executed *without any habeas corpus review because their lawyers missed the statute of limitations*. Attorneys have missed the statute of limitations in three other cases and those clients will be executed as well without review. As you know, habeas corpus review is critically important. It is the first time that life tenured federal judges instead of elected state judges determine the issues. It has been the stage where innocence has been established and where grievous constitutional violations have been found.

Yet six people have been executed without such review because their lawyers failed in their most basic responsibility – filing pleadings on time. Three people who were denied review due to failure to file on time *were represented by the same lawyer*, Jerome Godinich. They were three of at least 21 capital cases to which Godinich has been appointed, and among 1,638 cases involving 1,400 different defendants he has been appointed to represent from 2006 to March, 2009.[27]

Of course, if an assistant prosecutor missed a filing deadline even once, he or she would be fired. But it's unlikely that it would happen, because prosecutors are supervised. They practice in offices that are organized to avoid such mistakes. But in Alabama, Texas and many other jurisdictions throughout this country people facing the death penalty are represented by unsupervised solo practitioners, many of whom have no idea what they are doing.

United States District Judge Orlando Garcia described how "appalling inept" representation in state habeas corpus proceedings can prevent federal review of equally bad representation at trial, and pointed out the need for Congress to do something about it:

---

27. Lise Olsen, "Lawyers' late filings can be deadly for inmates," *Houston Chronicle*, March 22, 2009. (This article and others regarding the failure to file within the statute of limitations are appended.)

* * * Quite frankly, the quality of representation petitioner received during his state habeas corpus proceeding was appallingly inept. Petitioner's state habeas counsel made no apparent effort to investigate and present a host of potentially meritorious and readily available claims for state habeas relief. Furthermore, petitioner's state habeas counsel made virtually no effort to present the state habeas court with any evidence supporting the vast majority of the claims for state habeas relief which said counsel did present to the state habeas court. More specifically, petitioner's state habeas counsel not only inexplicably failed to present * * * allegedly mitigating evidence petitioner complains * * * his trial counsel should have presented during the punishment phase of petitioner's trial but petitioner's state habeas counsel failed to present the state habeas court with any claim for state habeas relief alleging this glaringly obvious failure by petitioner's trial counsel constituted ineffective representation.

Petitioner's state habeas counsel did little more than (1) assert a set of boilerplate, frivolous, claims which had repeatedly been rejected by both the state and federal courts and (2) fail to support even these claims with any substantial evidence. Insofar as petitioner contends his state habeas counsel merely "went through the motions" and "mailed in" a frivolous state habeas corpus application which said counsel failed to support with evidence, those complaints have merit. Wholly inept though it may have been * * * the egregiously deficient performance of petitioner's state habeas counsel does not excuse the procedural defaults arising therefrom * * *

In sum, unless and until either the Supreme Court or Congress address the inherent unfairness of a state habeas system which permits elected officials of a party-at-interest (*i.e.*, elected trial judges of the State of Texas) to (1) select wholly incompetent counsel to represent indigent prisoners in the one forum in which those prisoners have the opportunity to challenge the performance of their state-court-appointed trial counsel (*i.e.*, the prisoner's state habeas corpus proceeding) and (2) effectively insulate from federal judicial review the allegedly incompetent performance of the prisoner's state trial counsel through the egregiously inept failure of the same prisoner's state habeas counsel to present claims for state habeas relief addressing obvious ineffective assistance by the prisoner's state trial counsel, Texas prisoners will continue to be put to death without a federal habeas court ever reaching

> the merits of what are often those prisoner's most substantial federal constitutional claims.

Ruiz v. Dretke, 2005 Westlaw 2620193, *2-*3 (W.D.Tex., 2005).[28]

These are just a handful of the most recent examples of the kind of deplorable representation poor people accused of crimes receive in capital and non-capital cases. It is particularly bad in the states that sentence the most people to death and carry out the most executions. Georgia provides no compensation for representation in state post-conviction proceedings; Alabama pays only $1,000; and Texas pays a flat rate of $25,000 to lawyers appointed to a state habeas case.

The compensation for trial representation in many jurisdictions is so low that, while a few dedicated lawyers may take some cases, they cannot make a living representing poor people accused of crimes. The compensation is so far below what lawyers receive for any other kind of work, such as real estate closings, title searches and drawing up wills, that a lawyer cannot meet overhead expenses and still make enough to live on. There are long delays in paying lawyers. Many Georgia lawyers will no longer take court-appointed cases because the state's Public Defender Standards Council has such a bad reputation for arbitrarily cutting payments to lawyers,[29] delaying payments for long periods of time and, on occasion, not paying at all.[30]

---

28. After first affirming a denial of relief for *Ruiz*, the United States Court of Appeals for the Fifth Circuit later held that the "balance of equities" required consideration of his ineffectiveness claim. *Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007).

29. The Council employee responsible for making payments to private lawyers, in explaining to a legislative committee how he paid the lawyers even though there was not enough money to cover the costs, repeatedly used the word "arbitrary" in explaining that he cut the amounts paid to lawyers even though he had no reason to question the time they spent on the cases and they were being paid well below market rates.

30. The Council spent over $40,000 in a futile effort to avoid paying lawyers $69,000 for representing an indigent defendant in a capital trial. *Georgia Public Defender Standards Council v. State*, 285 Ga. 169, 675 S.E.2d 25 (2009). Remarkably, the director of the Public Defender Standards Council had recruited the lawyers to represent the defendant in the case and promised to compensate them, but the Council later refused to pay them anything at all for their work on the case. The trial court ordered the lawyers paid, but the Council appealed in an effort to avoid payment, paying a private attorney $40,000 to represent it *at twice the hourly rate it pays lawyers to represent people facing the death penalty*. The Georgia Supreme Court affirmed the trial court's order to pay the lawyers for the work they had done. *Id.*

As a result, many cases are handled by lawyers who are unable to get any other work. These lawyers are usually not capable of handling capital cases. In jurisdictions where lawyers are appointed by judges, lawyers are loyal to the judges whom they depend upon for their livelihood, not to their clients. These two factors – low compensation and loyalty to the judge – skew representation in ways that are adverse to the client. A lawyer who is dependent upon the judge for his or her livelihood may be unwilling to ask for a continuance even though unprepared, to challenge a prosecutor's strike of a juror even though it appears to be racially motivated,[31] or to apply for funds for experts and investigators and make a record of the need for those funds to preserve the issues for appeal.[32]

I know this from first hand experience. In teaching at training programs on both the local and national level over the last 30 years, I have been told point blank by lawyers that if they follow advice from me and others and admit they are not ready and need a continuance to investigate their cases they will not get any more appointments. I have also seen many lawyers who are indifferent or even hostile to the fate of their clients.

One of the most outstanding examples is the lawyer who represented James T. Fisher, who was sentenced to death in Oklahoma. At a hearing two months after he was appointed, the lawyer called Mr. Fisher a "little bitch" and asked the deputies to remove his handcuffs to the lawyer could "kick his ass right now." As a result of this threat from his own defense lawyer, Mr. Fisher refused to attend his own trial. The jury never saw him or heard any explanation of why he was not there. The lawyer failed to conduct any investigation, despite being provided around 18 boxes of valuable information. He simply never went through them. The lawyer was drinking heavily before and during trial.[33]

The tolerance of the kind of indefensible representation I have described is indicative of the indifference of the judicial, legislative and executive branches of government and the bar in those states to the quality of representation provided to poor people accused of crimes, the lack of structure in many of those states (*i.e.,* the

---

31. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008).

32. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).

33. *Fisher v. State*, Oka. Crim. App. No. D-2005-460, Okla. Co. No. CF-1983-137, Findings of Fact and Conclusions of Law filed May 21, 2008.

absence of public defender and/or capital defenders offices), the lack of independence of indigent defense programs, the lack of training for the lawyers who represent the accused, and, the crippling lack of resources for the defense.

III.

The prosecution suffers from none of these problems. Prosecutors are independent and organized by judicial circuit. Most prosecutors have full-time staffs of well trained lawyers and professionals, assisted by local and state law enforcement agencies staffed with full-time employees. They have expert witnesses on call at the state crime laboratories and, if needed, the FBI laboratory. Prosecutors divide their offices into divisions so that complex cases like capital cases and arson cases are tried by attorneys who know what they are doing. But people facing the death penalty or accused of arson may be represented by a lawyer who does not even specialize in criminal law.

Prosecutor's offices also usually have lawyers who specialize in appeals. They don't file 10-page briefs, briefs full of irrelevant information or gibberish, or briefs from old cases. It is unlikely they will abandon their client, the State, but if they do, someone else will step in immediately. This is because they are supervised. If an assistant prosecutor should fail to practice competently, he will get training until his performance improves sufficiently to meet the standards of the office or the person will be dismissed.

Court-appointed lawyers, on the other hand, are free to make the same mistakes over and over. Their clients pay for their mistakes. Joe Frank Canon, known for trying cases like "greased lightening," slept during at least two capital trials, was notoriously incompetent, and yet was appointed over and over by trial judges in Houston. Ten of his clients were sentenced to death; hundreds were sent to prison. A court-appointed lawyer can miss the statute-of-limitations over and over – not even get into court on behalf of his client – and keep right on practicing *and getting paid*[34] because no one in a position to do anything about it cares about the quality of representation his clients are receiving. After all, Sharon Keller, the presiding judge of the Texas Court of Criminal Appeals, closed the courthouse at 5 p.m. to prevent

34. Lise Olsen, "Death row lawyers get paid while messing up," *Houston Chronicle*, April 20, 2009.

a petition from being filed on behalf of a man who was to be executed at 6 p.m. that day.[35]

We should be ashamed the first time it happens. We should be deeply ashamed the second time. And we should be both ashamed and outraged that it happens all the time. But instead, in much of the country, jurisdictions have developed a culture that readily accepts such representation of the poor.

A great chief justice of Georgia, Harold Clarke, once observed in his state of the judiciary address to the state legislature,

> [W]e set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question. Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice, and one-half injustice is no justice at all.

In my efforts to establish and improve indigent defense systems, I have been told over and over in state after state, "We don't need a Cadillac, we just want a Chevy." Someone recently said in Georgia that those accused of crimes are not entitled to *zealous* representation; they are only entitled to "adequate" representation. This is a poverty of vision. Why shouldn't we have a Cadillac? This is the United States of America. This is our Constitution. Life and liberty are at stake. How can we risk the loss of the life or the liberty of an innocent person?

I understand that funding for the defense of people accused of crimes is not the least bit popular. As Attorney General Robert F. Kennedy observed in 1963 after *Gideon* was decided, the poor person accused of a crime has no lobby. Actually, at that time the Attorney General of the United States as well as several state attorneys general, including Walter Mondale, then attorney general of Minnesota and later Senator and Vice President, constituted a powerful lobby for the right to counsel. Under Mondale's leadership, Minnesota was one of 22 states that an filed *amicus* brief in support of Clarence Earl Gideon's right to counsel in *Gideon v. Wainwright*.[36]

---

35. Chuck Lindell, "Judge says she would do 'nothing different,'" *Austin American-Statesman*, Aug. 20, 2009; "Keller is unsuited for top court job," *San Antonio Express News*, Aug. 26, 2009 (editorial); "Judge Keller's disappointing testimony," *Dallas Morning News*, Aug. 24, 2009 (editorial); Michael Hall, "Motion to Dismiss," *Texas Monthly*, Dec. 2007.

36. Only two states filed *amicus* briefs in *Gideon* in support of Florida in opposing providing counsel to those accused of felonies.

We need that kind of leadership in the executive and legislative branches of government today.

Despite its lack of popularity, the defense of poor people accused of crimes is constitutionally required and essential to the proper working of the adversary system. It is essential to protection of the innocent.

IV.

What goes on in the criminal courts – the processing of the poor in vast numbers from the community to death rows and prisons – is out of sight and out of mind for almost everyone except those involved. We have a duty to know about it. Every law student, every lawyer, every elected official, every policy maker should go to a busy criminal court, unannounced, and see the "cattle call" and some of the other proceedings. I just sent my students as a new semester started at Georgetown. They were shocked at how casually human beings were treated, and the vast difference between the professionalism and competence of the prosecutors, who were fully in control, and some of the hapless court-appointed lawyers, who did not seem to know who their clients were and could not answer the most basic questions asked them by the judge.

If we are going to have an adversary system, there must be an independent defense component that has structure and the resources necessary to provide competent representation. Public defender offices need to be organized along the same lines that prosecutors offices are organized – with full-time staffs, specialization in complex cases and appeals, reasonable workloads, and independence so their loyalty is to their clients not to judges, bureaucrats or some other public official.

In states that continue to impose the death penalty with frequency, there must be capital defender programs – programs, like those in Colorado and Connecticut, staffed by full-time lawyers who specialize in capital litigation who employ experienced investigators and mitigation specialists qualified to work on capital cases. Those states do not have capital trials that are travesties of justice. They have minimized the risk of executing innocent people by providing good representation which helps restrict the imposition of the death penalty to the most aggravating cases with the clearest proof.

Virginia, which is second only to Texas in the number of executions in the last 35 years, has improved the representation in capital cases significantly by establishing three regional capital defender offices. The number of death sentence has dropped

dramatically, which suggests that people were previously being sentenced to death because of inadequate representation, not the crimes they committed.

Congress and the Department of Justice share some of the responsibility for the immense disparities between prosecution and defense. The prosecution and law enforcement agencies have receive millions and millions of federal dollars in various grants and programs, while defense programs have received no federal funding and have been woefully underfunded at the state and local level. The prosecution has accumulated an enormous advantage in structure, independence, training, and resources over the years.

Congress and the Department of Justice must recognize the need for indigent defense spending in all of its funding of state and local law enforcement and prosecution. Byrne Grant money, drug task force dollars and all of the dollars that are spent on local law enforcement projects should also have some percentage assigned to the management of those cases for both prosecution and defense. For example, federally-funded drug task force projects result in many arrests. Those people are entitled to defense counsel. The federal funding the states have been receiving for law enforcement projects has contributed to the crushing workloads that make it impossible for public defenders to provide individual representation to their clients.

The Innocence Protection Act has provided funding for training. Some states, like Colorado and Kentucky, have very serious and good training programs, while others are adverse to training and to any change in the way things have always been done. Where there are independent public defender or capital defender programs with sufficient resources and structure, training is essential. However, where there is no system, as in Alabama, Texas, and some other states, or there are structural defects in the systems as in Georgia and some other states, training will have much less impact unless it is very focused. Lawyers assigned to capital cases whose livelihoods depend upon the judge who appointed them will probably not be able to implement lessons learned at a training session. In those states independent, well functioning public defender and capital defender offices must be the first priority. Congress must find a way – probably outside of the Innocence Protection Act – to make the right to counsel a reality in those jurisdictions.

Indiana and North Carolina provide examples of the kind of training that can be provided by capable programs. Indiana has a full-time trainer who meets with lawyers about their cases and gives them one-on-one training about how to handle their cases, how to conduct the mitigation investigation, how to plea bargain, how to

develop a theory for a life sentence, etc. She may even attend some trials. In North Carolina, where capital cases are assigned to lawyers by an independent capital defender, every lawyer who has a capital case must meet with one of two outstanding veteran capital lawyers and go over his or her case point by point before trial. The result of this kind of training is that many cases that would otherwise go to trial, are resolved with plea bargains. The few cases that do go to trial are tried well and appropriate resources are devoted to them.

Any money awarded for grants should go only to programs that are independent and have structure, sufficient resources and excellent training capabilities to provide this kind of training. In the initial appropriation, training was allocated equally between prosecution and defense, but, as I have demonstrated, there is an urgent need to close the immense gap between the capabilities of the defense and prosecution. A broad coalition of groups has stated:

> Congress needs to re-authorize the Justice for All/Innocence Protection Act to meet its original intent by eliminating the 50/50 split between defense and prosecution so that all funding goes to the defense and that money be authorized to hire defenders rather than for more limited purposes as currently set out in the Innocence Protection Act.[37]

I agree with this assessment. The two sides are not evenly matched. Even at 100%, funding for training will not come close to closing the gap. Greater resources and structural change are essential.

CONCLUSION

If we want to protect innocence, we must admit that the representation provided to poor people accused of crimes in much of the country is a disgrace and do something about it.

---

37. "Briefing Paper: Federal Action to Ensure the Right to Counsel in the United States" issued by the National Indigent Defense Collaboration (NIDC) – made up of the American Civil Liberties Union, the Brennan Center, the Constitution Project, the Innocence Project, the NAACP Legal Defense and Educational Fund, National Association of Criminal Defense Lawyers and National Legal Aid and Defender Association – dated August 2009.

APPENDIX:
Biographical sketch of Stephen B. Bright

Stephen B. Bright is president and senior counsel of the Southern Center for Human Rights in Atlanta and teaches at Yale and Georgetown law schools. He served as director of the Center from 1982 through 2005. He has been teaching at Yale since 1993.

His work at the Center has included representation of people facing the death penalty at trials and on appeals in the state and federal courts, class action lawsuits to remedy human rights violations in prisons and jails; and challenges to inadequate representation provided to poor people accused of crimes. Before coming to the Center he was a legal services lawyer in the coal fields of Appalachia, a public defender in Washington, DC, and director of a law school clinical program in Washington, DC.

He has taught at the law schools of Yale, Georgetown, Harvard, Chicago, Emory and other universities; written essays and articles on the right to counsel, racial discrimination in the criminal justice system, judicial independence, and other topics that have appeared in scholarly publications, books, magazines and newspapers; and testified on these subjects before committees of both the U.S. Senate and House of Representatives.

His and the Center's work have been the subject of a documentary film, *Fighting for Life in the Death Belt*, (EM Productions 2005), and two books, *Proximity to Death* by William McFeely (Norton 1999) and *Finding Life on Death Row* by Katya Lezin (Northeastern University Press 1999). He received the American Bar Association's Thurgood Marshall Award in 1998 and the National Association of Criminal Defense Lawyers' Lifetime Achievement Award in 2008. The *Fulton Daily Law Report*, Georgia's legal newspaper, named him "Newsmaker of the Year" in 2003 for his contribution in bringing about creation of a public defender system in Georgia.

Southern Center for Human Rights
83 Poplar Street, N.W.
Atlanta, GA 30303-2122
www.schr.org
404/ 688-1202
Fax 688-9440
www.schr.org
sbright@schr.org

Yale Law School
P. O. Box 208215
New Haven, CT 06520-8215
203/ 432-7430
stephen.bright@yale.edu

Georgetown University Law Center
410 McDonough Hall
600 New Jersey Avenue, N.W.
Washington, DC 20001
(202) 661-6508
(202) 662-9408 (fax)
sbb36@law.georgetown.edu

APPENDIX
Articles Regarding Representation in Texas

Lawyers' late filings can be deadly for inmates

Tardy paperwork takes away final appeals for nine men, six of whom have been executed

By LISE OLSEN
Houston Chronicle, March 22, 2009

Three men on Texas' death row – and six others already executed – lost their federal appeals because attorneys failed to meet life-or-death deadlines, essentially waiving the last constitutionally required review before a death sentence is carried out.

Johnny Johnson, executed in February for a Houston murder, was the most recent: His lawyers missed a federally mandated filing deadline by 24 hours.

One of his attorneys made the same mistake in the case of death row inmate Keith Steven Thurmond, a former Montgomery County mechanic now on death row awaiting execution, according to case records.

In both cases, the lawyer waited until after business hours on the last day an appeal could be filed and then blamed a malfunctioning filing machine for his tardiness, according to a 5th Circuit Court of Appeals opinion issued last week. The court chastised the attorney for using the same excuse twice.

The opinion pointed out that based on the problems in the previous capital case, the lawyer already knew the machine was broken and could have easily filed electronically by using his computer.

Most of the late filings came in death row cases overseen by federal judges in the Southern District of Texas. In an interview, U.S. District Judge Hayden Head, the Corpus Christi-based chief judge of the Southern District, said he was unaware of the problem and could not comment.

The Houston Chronicle reviewed records in nine appeals that were filed too late. In some cases, lawyers or judges appear to have miscalculated or misunderstood the dates of the deadlines, which generally fall one year after state appeals are concluded. In others, computer failures or human foibles are blamed, records show.

* * *

One last chance

A federal writ of habeas corpus – a right guaranteed by the Constitution – usually gives an inmate a last chance to have the courts review errors or overlooked evidence that could invalidate a conviction or death sentence.

Jerome Godinich, the attorney in both Johnson and Thurmond's cases, appears to be the only Texas attorney to have filed too late in more than one recent death row appeal, based on the nine cases reviewed. He also filed late in a third Texas death row case, records show.

In the third case, however, a Houston-based U.S. district judge took so long to appoint Godinich that the appellate deadline already had lapsed. Court records show Godinich requested more time but took 162 days to file the appeal. The judge then ruled that it, too, was too late to be considered, records show

Godinich did not respond to several telephone and e-mail requests for an interview. He has faced no fines or other public penalties from the Houston-based federal judges who both appointed and paid him to represent the three men.

Late appeals not tracked

In the case of Johnson, the inmate executed in February for a 1995 rape and murder, Harris County Assistant District Attorney Roe Wilson said the federal district judge considered other legal arguments, though the appeal ultimately was rejected for being filed too late. She said such mistakes were rare in Harris County cases.

The Texas Attorney General's Office, which handles federal appeals, has moved aggressively in several cases to get late filings dismissed on behalf of the state. But spokesman Jerry Strickland said the office does not keep track of how often or how many federal appeals have been filed too late.

Thurmond, a Montgomery County mechanic on death row for the murders of his estranged wife and his neighbor, said Wednesday he had never been told that his federal appeals had been denied both by the U.S. District Court in Houston last year and by the 5th Circuit last week.

He said he hadn't seen or heard from his attorney in more than a year.

"So what am I supposed to do now?" he asked.

A jury concluded that Thurmond, who had no previous criminal history, shot and killed his wife and neighbor in 2001, the same day that his wife sought a protective order and took their son to live with the neighbor.

Thurmond says he is innocent. But the only issues raised by his lawyer in his appeal, filed too late, were that his trial attorney failed to investigate allegations that Thurmond was abused as a child and a jury might have spared his life because of it.

* * *

Sought new attorney

Quintin Phillippe Jones, another Texas death row inmate who also recently lost his federal appeal because of an attorney's tardiness, said he did everything he could to alert the federal courts to report problems months before his Fort Worth attorney blew his federal deadline. Jones wrote letters to the judge, filed two motions with the help of other prisoners in an attempt to get another attorney, and even sent two separate complaints to the state bar. Nothing worked.

"I heard he didn't file (on time) through another lawyer," Jones said. "I'm the one who pays for his mistake. It cost a lot, and I'm paying for it."

Death row lawyers get paid while messing up

Attorneys who continue to miss appeal dates are still getting cases

By LISE OLSEN
Houston Chronicle, April 20, 2009

Texas lawyers have repeatedly missed deadlines for appeals on behalf of more than a dozen death row inmates in the last two years – yet judges continue to assign life-or-death capital cases and pay hundreds of thousands in fees to those attorneys, a *Chronicle* records review shows.

Missing deadlines means their clients can be automatically denied constitutionally mandated reviews before their execution. Houston lawyer Jerome Godinich missed three recent federal deadlines, the *Chronicle* reported in March. One client was executed in February after the federal appeal was filed too late. In March, the 5th Circuit Court of Appeals chastened Godinich for using the same excuse – a malfunctioning after-hours filing machine – for missing another deadline for a man still on death row.

A recent review of the Harris County Auditor's billing records and district court records shows Godinich remains one of the county's busiest appointed criminal attorneys, billing for $713,248, including fees for 21 capital cases.

He was appointed to handle 1,638 Harris County cases involving 1,400 different defendants from 2006-March 2009, court records show.

He refused comment.

Godinich is not the only attorney to miss death row deadlines. A San Antonio lawyer failed to file four state appeals on time, according to opinions last year by the Texas Court of Criminal Appeals. A Fort Worth lawyer has missed both state and federal deadlines in at least five recent cases, though he sought and was granted more time to prepare on four of them, according to court records reviewed by the *Chronicle*.

The failure to file such appeals, called writs of habeas corpus, means death row inmates risk

missing their last chance to submit new claims of innocence or evidence that could alter their conviction – or death sentence. State judges can be flexible, but federal judges follow tight and sometimes confusing deadlines.

Only one of three Texas lawyers who repeatedly missed such death row deadlines has faced fines or been forced to forgo fees by judges.

Suzanne Kramer, of San Antonio, was removed in October 2008 from three state appeals she failed to file on time and was fined $750 by the Texas Court of Criminal Appeals. She is handling a fourth case over protests.

"I know if this lawyer stays on my case I'll definitely get executed," death row inmate Juan Castillo wrote the *Chronicle*. "She's refused to respond to any of my letters. She's never come to see me to discuss my case (and) my writ was due Dec. 11, 2006 and she never filed it."

Appeal filed incorrectly

The CCA allowed Kramer to continue representing Castillo after criticizing her claim that she mailed in his appeal on a Saturday to the office of a Bexar County judge. The appeal was never filed with the county clerk, as required.

"Judges don't file lawsuits. I guess that would go on her credibility as a lawyer," said Gerry Rickhoff, district court clerk in Bexar County.

Kramer, who did not return phone calls to her office, has been paid $86,577 in fees by Bexar County since 2007, but went unpaid for the three late appeals by CCA order.

Jack V. Strickland Jr., a Fort Worth lawyer who specializes in capital case law, also has repeatedly missed death row deadlines. However, judges accepted his explanations and allowed late filings for four of five appeals.

Being overwhelmed on capital cases was the excuse for two late 2008 filings.

Strickland told the court that he'd been hospitalized several months before the appeals were due, then "began a new death penalty trial right after his recuperation period, was in the process of preparing another death penalty writ application which was due mid-September, was preparing for trial in another case, and had presented five lectures and papers in the previous sixty days," according to a CCA opinion.

In another case, Strickland missed both state and then federal deadlines for the death row inmate, Quintin Jones. Before losing his federal appeal due to lateness, Jones repeatedly tried to get another attorney.

Strickland said he "almost begged the magistrate judge to appoint someone else. Jones and I had a very unpleasant relationship." He was left on the case anyway.

Strickland blamed the deadline error on miscalculating the due date.

He earned $428,850.62 in court-appointed fees in Tarrant County from 2006-2009. More than a quarter were bills for late appeals, auditor's records show.

Attorneys overworked in capital cases

About one-third are over recommended limit on felonies

By LISE OLSEN
Houston Chronicle, May 25, 2009

Lawyer Jerome Godinich, chastised by the 5th Circuit Court of Appeals this year for repeatedly failing to meet federal death penalty deadlines, has represented an average of 360 felony clients per year in Harris County – a caseload that surpasses every other similar attorney.

But even among other Harris County attorneys approved for death penalty cases, his heavy workload is no exception.

In all, 10 of 32 Harris County lawyers approved by judges to represent clients facing life or death sentences regularly exceeded the recommended limit of 150 felony clients per year – a standard established in 1973 and adopted by the National Legal Aid and Defender Association, the *Houston Chronicle* found. The lawyers, each assigned anywhere from one to 10 capital cases, simultaneously juggled 160 to 360 other felony

clients each year, according to an analysis of official district court appointments from 2004-2009.

* * *

Some felony cases are resolved in minutes, while death cases can take a year. Heavy caseloads limit the time an attorney can devote to each indigent defendant, a job paid for with tax dollars.

Harris County District Court judges do not monitor caseloads of attorneys they appoint, even for death penalty cases. Through their rules, judges attempt to restrict how frequently felony and capital cases are assigned. Even those rules, adopted after one overloaded capital attorney committed suicide, have been repeatedly violated, the analysis showed.

How rules violated

The Chronicle review found 220 days in which capital-approved attorneys appear to have accepted more than the limit of five assignments per day. Some took as many as 10 cases. It also found a dozen examples where judges violated their own requirement that capital murder case appointments be spaced at least 60 days apart. In some cases, judges knowingly broke their own rule because of unusual circumstances. In others, there were "glitches" in an internal tracking system used to prevent that.

One lawyer twice accepted two capital cases on the same day. The first time, Attorney Laine Lindsey said he accepted two appointments from the same judge to replace a lawyer stricken with cancer. Later, two different judges asked him to take cases on the same day. Lindsey said he didn't know about the rule and no one mentioned it.

Godinich took three capital appointments in less than one 60-day period in 2008. One client was found incompetent to stand trial after drinking toilet water, disrobing and claiming he was Jesus Christ II while in the Harris County jail; another was a 15-year-old who pleaded guilty to felony murder charges and accepted a life sentence without possibility of appeal; the third hired another lawyer.

Godinich has agreed to take as many as 10 simultaneous capital cases over the past five years, though only a few were death penalty cases.

Only one other attorney, Robert Morrow, has recently taken as many simultaneous capital cases, records show. But Morrow uses a team of legal interns and lawyers involved in a mentorship program to help with his assignments and specializes almost exclusively in capital work.

Two of the Harris County judges, Belinda Hill and Shawna Reagin, said it might help judges to receive reports on caseloads before making capital appointments, though both said numbers alone should not govern decisions.

* * *

Godinich, who juggles federal cases and misdemeanors along with his 360 felonies, has refused interview requests. But in a letter to the Chronicle, he defended his indigent defense record, saying he aims to defend his clients "to the best of my ability."

"That entails working seven days a week and investing countless hours in preparation to ensure that my clients receive their rightful due process," Godinich wrote. " It is not an easy job, but it is work that is challenging and has given me enormous personal satisfaction. That is why my clients know who I am and depend on me to stay invested in the process."

One of his hundreds of Harris County clients, Phillip Hernandez, has been awaiting trial for 18 months on child sexual abuse charges and claims Godinich has never visited him in jail to discuss his innocence claim. Hernandez's pre-trial hearing was scheduled earlier this month, but the inmate said he learned it had been postponed at the last minute from a bailiff. Godinich did not attend court that day, records show.

Kyle Johnson, an attorney who shares an office with Godinich, said any criminal defense lawyer gets occasional complaints. Both he and Morrow praised Godinich's work.

"I think he's excellent," Johnson said. "This job is Jerome's life."

Death row inmates share identical appeals

20 pages of death row inmates' appeals are identical, even errors

By Chuck Lindell
Austin American-Statesman, Feb. 28, 2006

Angel Maturino Resendiz, the train-hopping "Railroad Killer" from Mexico, randomly murdered at least nine people in gruesome fashion in the late 1990s.

Robert Gene Will, a young car thief sporting tattoos of a handgun and the Grim Reaper, was convicted of fatally shooting a Harris County deputy in the face.

The two men have little in common beyond an address on Texas' death row – and one other curious detail. The bulk of their legal briefs, filed 1½ years apart by a Houston lawyer appointed to appeal their cases, are word-for-word identical, right down to a capitalization error on page 17.

Labeled "generic" and "lackluster" by another death-penalty defense lawyer in court documents, the relatively brief appeals avoid common death-penalty arguments: questions of mental illness, mitigating circumstances or other specifics designed to show why a defendant should be spared execution.

Instead, the appeals focus primarily on a single technical challenge to Texas law on death-penalty jury instructions, without mentioning Resendiz or Will by name or referring to their trials. Both also list incorrect conviction dates for the men.

What's more, the appeals' author, Leslie Ribnik, missed routine filing deadlines to move Resendiz's case into the federal appeals courts. Deprived of a full federal review of his appeal, Resendiz [was executed June 27, 2006].

Critics call Ribnik's effort, or lack of it, another blot on Texas' capital punishment system, which relies on court-appointed defense lawyers of varying experience, skill and motivation.

* * *

Ribnik, 52, defended his duplicate appeals, known as writs of habeas corpus, saying they raise a valid and intriguing constitutional point germane to both cases.

"I do not apologize for it. I think it's a good argument. If I got another habeas case today and had the same issue, I would do it again, because the law has not changed," he said.

Resendiz's 20-page writ is identical to the first 20 pages of Will's writ, except for the inmates' names and legal histories. Will's writ adds eight pages challenging the prosecution's attempt to link his tattoos with gang symbols.

Ribnik said that a thorough review of the cases found no other legitimate issues to pursue.

* * *

Even so, Resendiz has new lawyers. Will might follow suit.

'Abdication of duty'

In Texas, a death sentence is followed by a direct appeal, in which lawyers ask the Court of Criminal Appeals to review perceived legal errors in the trial. These limited procedural appeals rarely succeed.

Next is the habeas review, * * * where new issues can be introduced, including claims of innocence.

If rejected by the Texas Court of Criminal Appeals, the habeas writ may proceed to the federal courts, then the 5th U.S. Circuit Court of Appeals and the U.S. Supreme Court.

Properly done, a habeas writ requires a lawyer to reinvestigate the case in search of mitigating issues such as mental illness or childhood abuse. From DNA to witness tampering to evidence withheld by the prosecution, it's all fair game.

* * *

Ribnik did not represent Resendiz or Will during his trial but was appointed later to pursue appeals. He was replaced as Resendiz's lawyer in

December after a federal judge in Houston deemed his performance poor and ineffective.

Resendiz's new legal team went farther, calling Ribnik's petition generic and his work "an abdication of duty, worse than no representation at all."

* * *

Because Ribnik blew several filing deadlines, Resendiz's federal appeal has been dismissed.

* * *

Ribnik said he apologized directly to Resendiz for his procedural mistakes.

"This is terribly embarrassing, not my usual work," he said. "Mr. Resendiz and the public deserve better."

* * *

[H]is new lawyers * * * contend that Resendiz is mentally ill, a well-established mitigating factor that can lead to reversal of death sentences.

That argument might never be heard by any court, because Ribnik did not include it in his original writ.

* * *

Ribnik said he hired no outside investigators or experts to review Will's case but denied that it indicates a lack of effort. He said his review of the trial record found that potentially mitigating evidence, including childhood sexual abuse, was adequately introduced and considered at trial.

"I will own up to my screw-ups; I'll take my lumps. I certainly deserve them in Resendiz," Ribnik said. As for Will, he said, "I think I did a good job on that one."

Convict's odds today may rest on gibberish

By Maro Robbins
San Anton io Express-News, August 24, 2006

Texas is scheduled to execute a convict today whose lawyer filed an appeal with incoherent repetitions, rambling arguments and language clearly lifted from one of his previous cases, so that at one point it described the wrong crime.

While inmate Justin Chaz Fuller's last hope for a temporary reprieve now waits on the U.S. Supreme Court and the governor, his case is being cited as an example of the state's failure to adequately examine death penalty convictions.

The same lawyer, in another pending capital case, apparently copied his client's letters so that, instead of citing legal cases, the filed documents echo the inmate's unintelligible arguments, flawed grammar and even his complaint that he was about to run out of paper.

For his work in these two appeals, the state paid the attorney Toby C. Wilkinson of Greenville about $18,000 in each case, for a total of $36,514. Wilkinson did not return repeated calls.

State law requires that death row inmates receive "competent counsel" for their post-conviction challenges known as applications for writ of habeas corpus. In May 2001, the state's highest criminal court tapped Wilkinson to work for Fuller, a Dallas native convicted of killing a 21-year-old man, Donald Whittington III.

At first glance, Wilkinson's 111-page motion appears unremarkable. But by Page 3, it starts quoting long passages from trial testimony without clearly explaining their relevance. Page 5 spends half a page repeating the exact passages quoted a page earlier. A similar repetition follows on Page 6.

The numbering of arguments doesn't maintain a logical sequence. Typos obscure some quotes, as in, "i &tilde hus, we diseeni no ab &tilde tse of discretion in th i &tilde coult &tilde s denial."

Perhaps most striking, the pleadings for Fuller copied wording from an appeal Wilkinson filed for a different client, Henry Earl Dunn, in an unrelated case. As a result, it complains about testing for blood on a gun used by Dunn's co-defendant seven years earlier.

* * *

About three years after filing Fuller's claim, Wilkinson was chosen by a Hopkins County district judge to file a similar habeas petition on behalf of Daniel Clate Acker.

Wilkinson's legal brief spends 13 pages naming seemingly every document filed in the case. It then makes five claims that are almost word-for-word identical to claims in Fuller's case. The next 24 pages seem copied from his client's letters, so that they seldom if ever cite case law and occasionally lapse into first-person narrative.

Claim No. 36 concludes: "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 and have brought up in my appeal."

* * *

The court of criminal appeals decides which lawyers can handle death penalty appeals. Presiding Judge Sharon Keller said she couldn't comment on individual cases, but the court's staff carefully screens attorneys. Then it relies on trial judges to appoint tried-and-tested counsel.

"If we thought somebody should be taken off the list because he's not doing a good job, we'd take him off the list," she said, "or we'd consider taking him off the list."

Wilkinson isn't known to have been given any more death penalty work since 2003, but his name is still on the list. And though the count might shrink by day's end, six of his clients are still on death row.

Justin Chaz Fuller was executed by Texas on August 24, 2006.