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 Doy  
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 Charles Milton  
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# The Champion

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

JULY 1999

**"This Court is going to have blood on its hands"**  
*Judge Morris Overstreet, Texas Court of Criminal Appeals, disesteeming in Ex parte Kern*



Cemetery of Huntsville State Prison

**"The State of Texas decision to appoint an inexperienced attorney to represent the petitioner... constituted a cynical and reprehensible attempt to expedite petitioner's execution at the expense of all semblance of fairness and integrity"**

**U.S. District Judge Orlando L. Garcia in Kerr v. Johnson**

# DEATH IN TEXAS

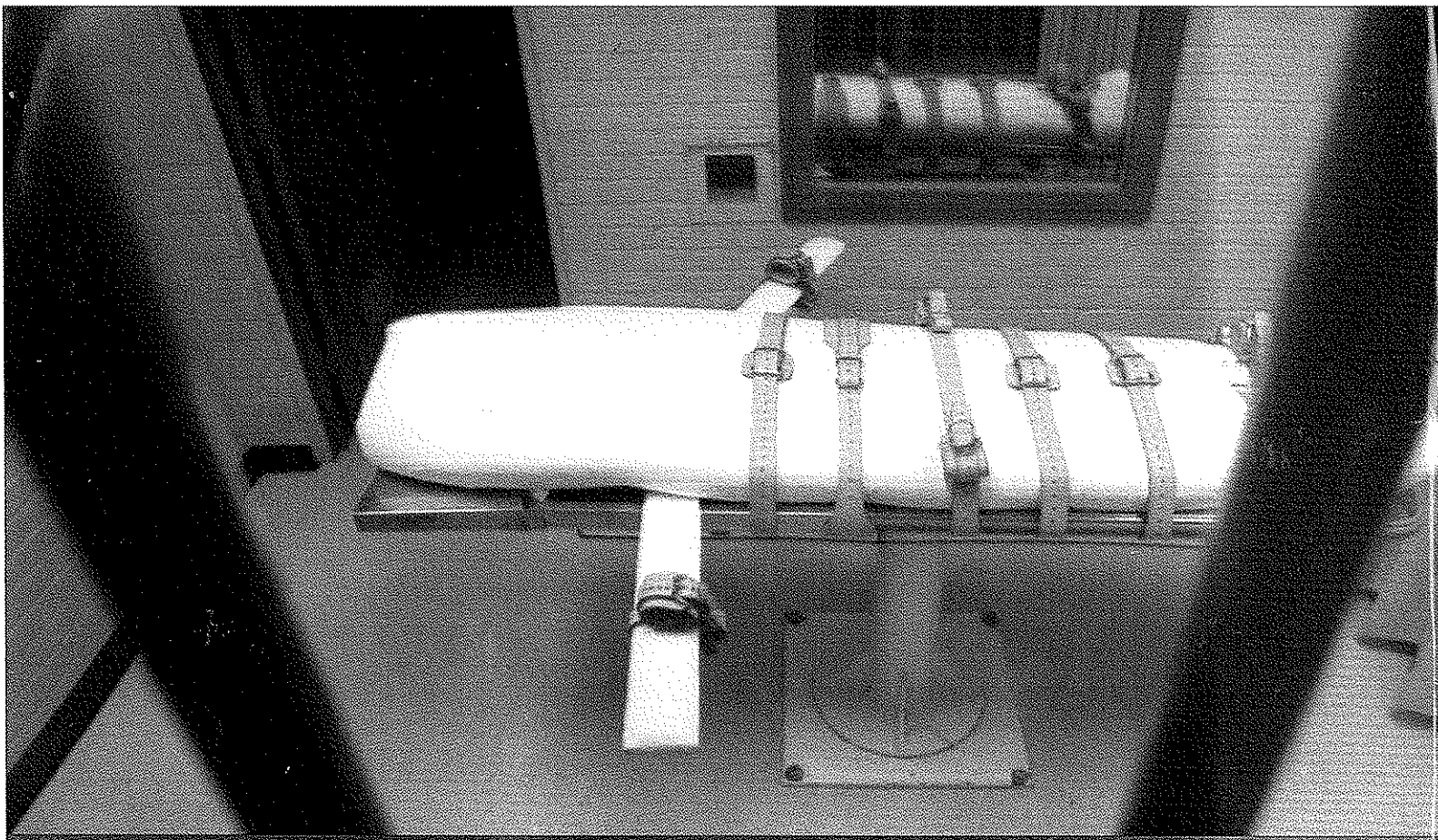
**... not even the pretense of fairness**

Carlos Deluna  
 Jerome Butler  
 Johnny R. Anderson  
 James Smith  
 Mikel Derrick  
 Lawrence Buxton  
 Ignacio Cuevas  
 Jerry Joe Bird  
 James Russell  
 G.W. Green  
 Joe Angel Cordova  
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 David Clark  
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 Freddie Webb, Sr.  
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Clifton Russell  
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 Jeffrey Motley  
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 Fletcher Mann  
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 Kenneth Harris  
 Earl Behringer  
 David Stoker  
 Eddie J. Johnson



# DEATH IN TEXAS

**By denying competent lawyers and suspending due process, the Texas Court of Criminal Appeals runs the fastest assembly line to the death chamber in the country.**

*AP Photo/David J. Phillip*

## By Stephen B. Bright



STEPHEN B. BRIGHT is Director of the Southern Center for Human Rights in Atlanta, GA. An NACDL Director, he has served people facing the death penalty at trials, on appeals and in post-conviction proceedings since 1979. He has taught courses on capital punishment, criminal procedure and international human rights at Yale, Harvard, Emory, Georgetown, Northeastern, Florida State, and St. Mary's law schools; and has testified extensively before the U.S. Congress and many state legislatures. Last year, he received the American Bar Association's Thurgood Marshall award. He's a member of The Champion Advisory Board.

A person may be condemned to die in Texas in a process that has the integrity of a professional wrestling match.

An accused may stand virtually defenseless — facing the death penalty, as his lawyer sleeps through trial; be condemned to die without any adversarial process to determine guilt and punishment; and be denied any post-conviction review, because a lawyer misses a deadline or fails to raise any issues.

The state's highest criminal court, the Texas Court of Criminal Appeals, is not only ignoring constitutional violations (as so many elected judges must do in order to stay in office), but is affirmatively engaged in denying rights to people. The court appoints lawyers incapable of preparing post-conviction petitions and filing them on time and then punishes the condemned inmates for the incompetence of the lawyers it appointed.

United States District Judge Orlando L. Garcia found that the appointment of an inexperienced lawyer with serious health problems to represent Ricky Kerr in post-conviction proceedings “constituted a cynical and reprehensible attempt to expedite [Kerr’s] execution at the expense of all semblance of fairness and integrity.”<sup>1</sup> Kerr’s lawyer had failed to raise a single issue in what one member of the Texas Court of Criminal Appeals, Judge Morris Overstreet, called a “non-application” for post-conviction relief.<sup>2</sup>

Judge Overstreet said that the failure to provide Kerr with a competent lawyer rendered the review of the case by the Court of Criminal Appeals a “farce,” a “travesty,” and a “charade,” and warned that the court would have “blood on its hands” if Kerr were executed.<sup>3</sup>

**B**y strictly enforcing a deadline, the Texas Court of Criminal Appeals blocked any hearing in a case in which the accused was defended by a lawyer who had previously prosecuted him, had a serious cocaine problem, and was paid by the judge who appointed him for his representation almost the same amount the lawyer had been assessed by the IRS.

competent lawyer, filmmaker, or journalist. As a result, wrongful convictions, constitutional violations and other serious injustices may never come to light and be remedied.

What is happening in Texas would have been unthinkable ten years ago. Then it was generally agreed, even by the proponents of capital punishment, that cases in which the death penalty was

imposed were different and should be subject to careful appellate and post-conviction review. But in Texas, capital cases have become so routine that courts process them in assembly-line fashion, instead of giving them the scrutiny that life-and-death matters deserve.

**No Requirement That Defense Counsel Be Awake**

The Texas Court of Criminal Appeals has made clear its indifference to the quality of legal representation of those facing death at trial by upholding at least three death sentences from Houston, in which the lawyer for the defendant *slept* during trial. One of those trials was described in the *Houston Chronicle* as follows:

Seated beside his client — a convicted capital murderer — defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.

His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.

When state District Judge Doug

Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.

"It's boring," the 72-year-old longtime Houston lawyer explained. . . . Court observers said Benn seems to have slept his way through virtually the entire trial.<sup>6</sup>

The judge presiding over McFarland's trial in Houston permitted the trial to continue on the theory that "[t]he Constitution doesn't say the lawyer has to be awake."

The Court of Criminal Appeals affirmed, over the dissent of Judges Baird and Overstreet.<sup>7</sup> Judge Baird wrote, "[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."

The Court of Criminal Appeals also upheld convictions and death sentences imposed on Calvin Burdine and Carl Johnson, even though Joe Frank Cannon, the lawyer appointed by the trial court to defend them at separate trials, slept during their trials.<sup>8</sup> Cannon is known for hurrying through capital trials like "greased lightning," occasionally falling asleep, and has had at least 10 clients sentenced to death.<sup>9</sup>

Michael J. McCormick, the presiding judge of the Court of Criminal Appeals and former director of the Texas District and County Attorneys Association, has lamented that Texas "lost its sovereignty in 'right to counsel' matters for indigent

**JURISDICTIONS THAT HAVE CARRIED OUT 10 OR MORE EXECUTIONS SINCE 1976:**

(As of May 26, 1999)

Texas . . . . .	176	Alabama . . . . .	17
Virginia . . . . .	67	Arizona . . . . .	17
Harris Co., TX . . . . .	55	Oklahoma . . . . .	15
Florida . . . . .	43	Bexas Co., TX . . . . .	14
Missouri . . . . .	38	Tarrant Co., TX . . . . .	14
Louisiana . . . . .	25	Illinois . . . . .	12
Georgia . . . . .	23	North Carolina . . . . .	12
South Carolina . . . . .	22	Dallas Co., TX . . . . .	12
Arkansas . . . . .	19		

defendants" the day the Supreme Court held in *Gideon v. Wainwright*<sup>10</sup> that states were required to provide counsel in felony cases.<sup>11</sup> McCormick has argued that a case-by-case assessment of whether the accused needed counsel in a given case, which the U.S. Supreme Court allowed before *Gideon* established a categorical right to counsel, was "better reasoned and more true to principles of federalism," and decried *Gideon's* "mischievous results."

However, it appears that under McCormick's leadership the Texas Court of Criminal Appeals has maintained what some would call "sovereignty" and others might call "lawlessness" in rendering the right to counsel all but meaningless. If a sleeping lawyer in a capital case is sufficient counsel, the Sixth Amendment's right to counsel has little force in the Lone Star State.

### Appointing Incompetent Lawyers; Punishing the Client

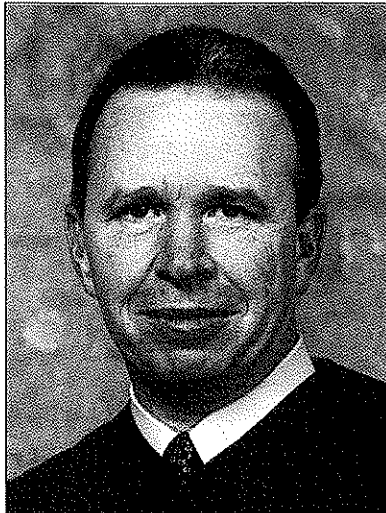
The Texas legislature provided, in a statute enacted in 1995, that the difficult and demanding task of representing those under death sentence in complex post-conviction proceedings be assigned to individual lawyers.<sup>12</sup> The legislature gave the Court of Criminal Appeals the duty under Texas law to "appoint competent counsel" to represent the condemned.

Previously, the Texas Resource Center, a federally-funded program made up of a small group of attorneys who specialized in capital post-conviction litigation, represented some inmates, recruited attorneys for others, and were available to help volunteer counsel.

The Texas Resource Center was attacked by politicians who said tax dollars should not be spent on defending murderers, and by prosecutors who felt the attorneys with the resource center were representing their clients too zealously. Congress eliminated all funding for all resource centers in 1995, and the Texas Resource Center closed shortly thereafter.

Since the Court of Criminal Appeals took over responsibility for finding lawyers for the condemned, it has, as the *Dallas Morning News* charitably put it, "done a less-than-stellar job."<sup>13</sup>

The court's lack of concern about the qualifications of the lawyers it appoints was apparent from the outset when the court, in suddenly conscripting 48 attorneys to handle cases, appointed a long-time federal prosecutor to represent one of the condemned. The court was not



**Judge Charles Baird** argued that speed should not be the court's only concern in reviewing death cases and urged his colleagues not to decide cases in which the defendant was not adequately represented. He lost a bid for re-election to the Court in 1998.



William Albrecht / Courtesy of Texas Lawyer

**Judge Morris Overstreet** argued in dissent that an inexperienced lawyer's failure to present a single issue on behalf of his client rendered the court's review a "farce," a "travesty" and a "charade," and warned that the court would have "blood on its hands." Like Judge Baird, Judge Overstreet is no longer on the Court of Criminal Appeals.



Kevin Virobik / Courtesy of Texas Lawyer

**Michael J. McCormick**, the presiding judge of the Court of Criminal Appeals and former director of the Texas District and County Attorneys Association, has lamented that Texas "lost its sovereignty" in right to counsel matters the day *Gideon v. Wainwright* was decided. However, the constitutional promise of *Gideon* has never been realized in Texas

**T**exas Court of Criminal Appeals has now made it clear . . . that it will not afford a citizen sentenced to death any meaningful review, and further that it will often refuse to pay necessary investigative and other expenses, forcing the appointed counsel to, in effect, finance the proceedings themselves.

**Texas Criminal Defense  
Lawyers Association**

even aware that the lawyer was an Assistant U.S. Attorney, and thus could not represent a death-sentenced inmate. Equally disturbing was the court's assignment of 14 capital post-conviction cases to two of its former law clerks, who were initially paid \$265,000, which was 13 percent of the first \$1.9 million paid to lawyers by the court. The two former clerks had no experience in representing people in such proceedings. Even the most experienced lawyers could not take

on so many clients and provide adequate representation to all of them.

The court assigned Ricky Kerr an attorney who had been a member of the bar only four years, had never been involved in the trial or appeal of a capital case (even as assistant counsel), and suffered severe health problems that kept him out of his office in the months before he was to file a *habeas corpus* application on behalf of Kerr. The lawyer so misunderstood *habeas corpus* law that he thought he was precluded from challenging Kerr's conviction and sentence<sup>14</sup> — the very purpose of a *habeas* petition — and thus failed to raise a single issue.

After he and his family were unable to contact the lawyer, Kerr wrote a letter to the court complaining about the lawyer and asking the court to appoint another lawyer to prepare a *habeas* petition. Even though prosecutors did not object to a stay, the Court of Criminal Appeals denied Kerr's motions for a stay of execution and for the appointment of competent counsel.<sup>15</sup>

Judge Morris Overstreet, warning that the court would have "blood on its hands" if Kerr was executed, dissented in order to "wash my hands of such repugnance," saying:

For this Court to approve of such and refuse to stay this scheduled execution is a farce and travesty of applicant's legal right to apply for *habeas* relief. It appears that the Court, in approving such a charade, is punishing the applicant, rewarding the State, and perhaps even encouraging other attorneys to file perfunctory "non-applications." Such a "non-application" certainly makes it easier on everyone — no need for the attorney, the State, or this Court to consider any potential challenges to anything that happened at trial.<sup>16</sup>

The Texas Criminal Defense Lawyers Association (TCDLA) noted that in its decision in *Kerr*, the court had made it clear "that the duty of defense counsel . . . is discharged by doing absolutely nothing."<sup>17</sup>

Other lawyers appointed by the court also have filed patently inadequate pleadings. The petition filed by a lawyer that the court appointed to represent Johnny Joe Martinez was described by one member of the court, Judge Charles Baird, as follows:

The instant application is five and one-half pages long and raises four challenges to the conviction. The trial record is never quoted. Only three cases are cited in the entire application, and no cases are cited for the remaining two claims for relief. Those claims comprise only 17 lines with three inches of margin.<sup>18</sup>

Although a report for a state bar committee found that handling a capital post-conviction case requires between 400 and 900 hours of attorney time, records indicated that the lawyer assigned to Martinez spent less than 50 hours preparing the application. The lawyer did not seek any reimbursement for travel or investigatory expenses or seek funds for expert assistance. The court denied the petition over a dissent by Judge Baird that urged the court to remand the case to the trial court to determine whether Martinez was adequately represented.

The court also denied what it treated as an "[a]pplication for writ of *habeas corpus*" filed by the lawyer it assigned to represent Bryan Wolfe,<sup>19</sup> even though the pleading filed "appear[ed] to be a motion for discovery."<sup>20</sup> Again, Judge Baird, in dissent, urged his colleagues to remand the case for a determination of whether the inmate was properly represented.

Andrew Cantu finally resorted to representing himself after the first two lawyers assigned by the court withdrew. The first lawyer assigned to represent him had represented his co-defendant. The second had been the head of the Attorney General's death unit that represented the state in capital *habeas corpus* cases. And the third failed even to show up to interview him.

At a hearing held five months after the third lawyer was assigned to represent Cantu, the lawyer admitted he had not visited Cantu, claiming that he did not know where Cantu was. (Texas has only one death row, at Huntsville.) The lawyer also admitted that he had made no efforts to contact an investigator or an expert and was not familiar with the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>21</sup> which established a one-year statute of limitations for filing a federal *habeas corpus* petition. Cantu was executed on February 16, 1999, without any state or federal review of the issues in his case.<sup>22</sup>

The Court of Criminal Appeals has also appointed attorneys who did not

even file a petition within the 180-day deadline established by statute,<sup>23</sup> and then strictly enforced the deadlines to preclude any post-conviction review.<sup>24</sup>

In refusing to consider one untimely application from a lawyer it assigned, the court noted that the "screamingly obvious" intent of the Texas legislature in setting a time limit for the filing of post-conviction petitions has been "to speed up the *habeas corpus* process."<sup>25</sup> Judge Baird took issue with the majority's conclusion that "speed should be our only concern when interpreting the statute," and argued in dissent that the court had failed "to accept our statutory responsibility for appointing competent counsel."<sup>26</sup>

By strictly enforcing deadlines, the court sweeps questions of unjust convictions or sentences under the rug. Two days before Henry Skinner's application for post-conviction review was due to be filed, his lawyer filed a motion in the Court of Criminal Appeals to extend the time for filing.

On the day the application was due, the court ruled that the motion for an extension should have been filed in trial court. The motion was filed the following day in the trial court, which ultimately

held it untimely and refused to hear Skinner's claims.

The Court of Criminal Appeals upheld the trial's judge ruling that Skinner was barred from the post-conviction process because his lawyer had missed the deadline by one day. Judge Baird pointed out in dissent that dismissal of the application meant that no court would review the quality of representation provided to Skinner by a former district attorney who had twice prosecuted him, had cocaine problems, and whose relationship with the presiding judge raised serious questions:

Counsel [appointed to defend Skinner at trial] was the former district attorney who had prosecuted [Skinner] on at least two prior occasions. . . .

Moreover, when trial counsel [who represented Skinner at his capital trial] served as district attorney, it was well known he had a cocaine problem. Newspaper reports indicated trial counsel, on his way to a fundraiser for [the judge who appointed him to defend Skinner], was involved in an accident and later admitted to the hos-

pital for a drug overdose. Because of trial counsel's known drug addiction, there was a substantial investigation by the Attorney General's Office regarding missing funds from the district attorney's office. After leaving office, trial counsel was assessed a \$90,000 bill from the IRS. A few months later, trial counsel was appointed to the instant case and ultimately paid almost \$90,000. These facts demand a substantive evidentiary hearing before an impartial tribunal.<sup>27</sup>

The court also uses strict adherence to the Texas post-conviction statute to avoid correcting its own mistakes on direct appeal. The court explicitly overruled its holding affirming Troy Farris' conviction and death sentence in 1990,<sup>28</sup> but — despite recognizing that it decided the issue incorrectly — the court refused to reconsider the issue when Farris presented it on *habeas* and citing the court's decision overruling its decision in his case. Farris was executed January 13, 1999.

Judge Overstreet, dissenting from one of the court's refusals to hear a case



**W**hat is happening today in Texas would have been unthinkable ten years ago. Capital cases have become so routine that courts process them in assembly-line fashion, with little or no serious review.

because the lawyer failed to file within the 180-day deadline, said the court's action "borders on barbarism because such action punishes the applicant for his lawyer's tardiness."<sup>29</sup>

The *Austin American-Statesman* thought the court had crossed the border. An editorial expressed the view that "[b]arbarism is an appropriate description" of the court's refusal to hear a petition for review of a conviction and death sentence because the lawyer the court assigned to represent the condemned inmate missed a deadline.<sup>30</sup> The paper observed that the court's "disgraceful" action would "only heighten the state's deadly reputation and make its judiciary appear to be barbaric."

#### **Discouraging Lawyers from Representing the Condemned**

The Court of Criminal Appeals has not only appointed its cronies, the inexperienced, and the incompetent to represent those facing death. By limiting compensation to the lawyers appointed and denying necessary expert and investigative assistance it has also discouraged capable

lawyers from taking capital cases and devoting the time necessary to do an adequate job.

Despite the finding that 400 to 900 hours of an attorney's time is required to handle a post-conviction case, the Court of Criminal Appeals adopted a limit on fees that compensated counsel for only 150 hours at \$100 an hour.<sup>31</sup> The Texas Criminal Defense Lawyers Association warned lawyers who might be appointed:

[T]he Court's limitations [on fees] will place you in the untenable position of having to choose between competently representing your client and performing about 250-750 hours of uncompensated work or, if your practice precludes such a large number of *pro bono* hours, not being able to competently represent your client. You should also be aware that the Court has been routinely cutting vouchers without explanation, and seemingly without regard to the necessity of the work performed. Some attorneys have had vouchers reduced by more than \$10,000.

TCDLA passed a resolution finding that the Court of Criminal Appeals had "made it clear . . . that it will not afford a citizen sentenced to death any meaningful review, and further that it will often refuse to pay necessary investigative and other expenses, forcing the appointed counsel to, in effect, finance the proceedings themselves."

Most capable members of the legal profession do not take on the most complex, difficult and demanding cases for the sort of token amounts being paid to lawyers assigned to capital cases in Texas. The Texas legislature and the Court of Criminal Appeals have ensured deficient representation by paying so little that it discourages attorneys from taking cases, and discourages those assigned from devoting the time necessary to provide competent representation.

#### **Elected Judges and the Politics of Death**

How can a court whose members have taken an oath to uphold the Constitution and laws of the United States and Texas, including the right to counsel, play such a prominent role in denying the most fundamental right to those most in need of its protection?

How can any court be so indifferent to injustice?

Part of the answer is that the members of the court are elected in partisan elections. It has become apparent that a vote by any judge on the court to reverse a capital case, no matter how clear or egregious the error requiring reversal, carries with it the risk that the judge will be voted out of office in the next election.

After the court reversed the conviction in a particularly notorious capital case, *Rodriguez v. State*,<sup>32</sup> a former chairman of the state Republican Party called for Republicans to take over the court. The next year, Stephen W. Mansfield challenged the author of the *Rodriguez* decision, Judge Charles F. Campbell, a former prosecutor who served 12 years on the court. Mansfield campaigned on promises of greater use of the death penalty, greater use of the harmless-error doctrine, and sanctions for attorneys who file "frivolous appeals especially in death penalty cases."<sup>33</sup>

Before the election, it came to light that Mansfield had misrepresented his prior background, experience, and record. Mansfield admitted lying about his birthplace (he claimed to have been born in Texas, but was born in Massachusetts), his prior political experience (he portrayed himself as a political novice despite having twice unsuccessfully run for Congress), and the amount of time he had spent in Texas. It was disclosed that he had been fined for practicing law without a license in Florida, and that "contrary to his assertions that he had experience in criminal cases" and had "written extensively on criminal and civil justice issues" he had virtually no such experience.<sup>34</sup>

Nevertheless, Mansfield received 54 percent of the votes in the general election. The *Texas Lawyer* declared him an "unqualified success." It was later discovered that Mansfield had failed to report \$10,000 in past-due child support when he applied for his Texas law license in 1992. After assuming his seat on the bench, a complaint was filed against Mansfield with the Society for the Prevention of Cruelty to Animals for locking his two Pomeranian dogs in his car while he was at the court. Judge Mansfield was arrested on Thanksgiving Day 1998, on the University of Texas campus and charged with scalping the complimentary football tickets that members of the Court of Criminal Appeals receive. He was publicly reprimanded by the state judicial commission.

Although some have called Judge Mansfield an embarrassment to the court, Houston lawyer Kent Schaffer put things

in perspective in an open letter to Judge Mansfield in which he suggested that the judge "leap over the bench and into the well of the court" some morning during arguments and beseech his colleagues:

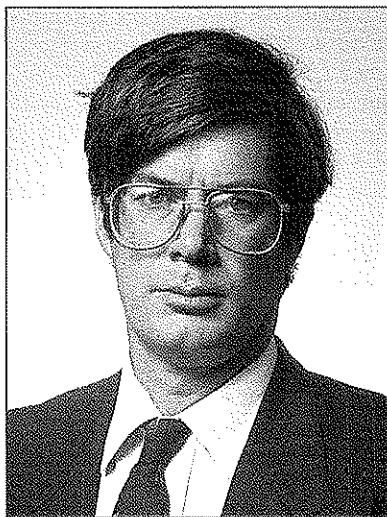
Who among you dares to call me an embarrassment to this court? I suppose it is not an embarrassment when we appoint inexperienced lawyers to handle death penalty writs and then refuse to pay them for the work they perform, or when we engage in intellectual game playing in order to uphold wrongfully obtained death penalties. None of you are embarrassed when we put someone to death or uphold some severe sentence because of a missed deadline, or when we pretend that a lawyer is not ineffective just because he slept through trial. Yet I get caught scalping a few lousy football tickets and suddenly, I am the embarrassment.

In case after case, you strip people of their freedom and liberty and ensure that the laws are used as the government's weapons against the people, rather than the people's protection against the government. . . . You wrestle the Goddess of Liberty to the ground and ram her own sword through her just heart while the citizens of the state watch in horror. And then you call me an embarrassment because I was trying to make a few extra bucks on Thanksgiving Day.<sup>35</sup>

Kent Schaffer assured Judge Mansfield "that if this court has any reason to be embarrassed, ticket scalping, trespassing or leaving your little Pomeranian dogs in your car are so far down the list that they are hardly worth mentioning."

Judges Baird and Overstreet, who dissented when the court upheld death sentences in cases in which the defense lawyer slept, or the post-conviction lawyer failed to present any issues or missed the filing deadline, are no longer on the court. Judge Baird was defeated in the election of 1998. Judge Overstreet unsuccessfully sought another office. With their departure, the previous defeat of other Democrats on the court, and Presiding Judge McCormick's switch to the Republican Party, the Republican goal of taking over the Court of Criminal Appeals was achieved in 1998. For the first time in its history, all of the judges

Tom Collins / Courtesy of Texas Lawyer



**Stephen Mansfield** defeated a three-term incumbent to be elected to the Court of Criminal Appeals by promising to uphold death penalty cases. Although it came to light before the election that he had misrepresented his background, had been born, and even where he had been born, and had been fined for practicing law without a license in Florida, he received 54 percent of the vote. The TEXAS LAWYER called him an "unqualified success." He was recently arrested and charged with scalping his complimentary football tickets.

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on the court are Republicans. Just six years earlier, all the judges were Democrats.

In the absence of Judges Baird and Overstreet, no one remains on the Court of Criminal Appeals to raise a voice of dissent as Judge McCormick, Judge Mansfield and their colleagues continue to appoint inexperienced and incapable lawyers to represent death-sentenced inmates and dispatch the condemned to the execution chamber, without any hesitation or concern that such poor representation may keep serious injustices from coming to their attention.

### An Example Not To Be Followed

Those who argue for more executions and faster and less review of capital cases should look at Texas.

Are other states willing to have their courts sacrifice fairness to engage in what Judge Garcia aptly called "cynical and reprehensible" attempts to expedite the execution of some poor people to show how tough we can be on crime?

The actions of Texas Court of Criminal Appeals in expediting executions have served one valuable purpose: they have exposed for all to see that the process by which poor people are condemned to death in that state is, in many cases, as Judge Overstreet pointed out a "farce" and "travesty", and a disgrace to the legal system and the legal profession. It has revealed that Texas has neither an independent judiciary nor an independent and adequate system for providing representation to poor people accused of crimes.

But the lethal virus that infects the Texas Court of Criminal Appeals is not limited to the courts of the Lone Star State.

Poor people accused of crimes are denied adequate legal representation in both capital and non-capital cases in many jurisdictions throughout the United States. Virginia, which ranks second to Texas, provides the same quality of counsel as Texas at trial in many cases and its judges give the same cursory review in affirming death sentences and denials of post-conviction relief as judges in Texas.

Judges have been voted off courts in other states and the newly-constituted courts have abruptly changed course and found ways to affirm cases that previously would have been reversed.

Some states do even less than Texas to provide lawyers for the condemned in post-conviction review. For example, Georgia, Louisiana and Wyoming make no provision at all for counsel in post-

conviction review. Alabama pays at most \$600, if anything, to a lawyer appointed to defend a post-conviction case.<sup>36</sup> The Georgia Supreme Court upheld the denial of state *habeas corpus* relief in a capital case in which a bewildered man with an IQ in the 80s had no lawyer at all.<sup>37</sup>

Texas shows what can happen when fairness is sacrificed to speed up capital cases and increase executions. Unless judges are insulated from political pressures, unless independent indigent defense programs are created and adequately funded, and unless the bar and others reaffirm the need for the rule of law and the enforcement of the Bill of Rights, more and more people will be executed. Fairness will continue to be sacrificed to achieve that result, and the courts will, as Judge Overstreet warned, have blood on their hands.

### NOTES

1. Kerr v. Johnson, Order of Feb. 24, 1999 at 20 (W. D. Tex. No. SA-98-CA-151-OG (Feb. 24, 1999).

2. *Ex parte Kerr*, 977 S.W.2d 585, 585 (Tex. Crim. App. 1998) (Overstreet, J., dissenting).

3. *Id.*

4. *Ex parte Smith*, 977 S.W.2d 610, 611, 614 (Tex. Crim. App. 1998) (Overstreet, J., dissenting).

5. *Ex parte Smith*, 977 S.W.2d 589, 613, 614 (Tex. Crim. App. 1998) (Baird, J., dissenting).

6. John Makeig, *Asleep on the Job; Slay Trial Boring, Lawyer Said*, HOUS. CHRON., Aug. 14, 1992, at A35.

7. *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996).

8. *Ex parte Burdine*, 901 S.W.2d 456 (Tex. Crim. App. 1995); David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691 (1996) (describing the case of Carl Johnson; the Court of Criminal Appeals did not publish its opinion in Johnson's case).

9. Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at A1.

10. 372 U.S. 335 (1963).

11. *See Ex parte Jordan*, 879 S.W.2d 61, 64 (Tex. Crim. App. 1994) (McCormick, P.J., dissenting).

12. Tex. Crim. P. Code Ann. art. 11.071 § 2(a) (West 1998).

13. *Death Penalty Reforms Are Needed for the System To Be Fair*, DALLAS MORNING NEWS, Dec. 20, 1998, at 2J (editorial).

14. *Ex parte Ricky Eugene Kerr*, 977 S.W.2d 585, 585 (Tex. Crim. App. 1998) (Overstreet, J., dissenting).

15. *Ex parte Kerr*, 977 S.W.2d 585 (Tex. Crim. App. 1998).

16. *Id.* at 585 (Overstreet, J., dissenting).

17. *TCDLA Urges Members to Pass on Accepting Habeas Cases*, TEX. LAW., June 22, 1998, at 4 (citing Resolution passed by the Board of Directors of the Texas Criminal Defense Lawyers Association on June 6, 1998).

18. *Ex parte Martinez*, 977 S.W.2d 589, 589 (Tex. Crim. App. 1998) (Baird, J., dissenting).

19. *Ex parte Wolfe*, 977 S.W.2d 603 (Tex. Crim. App. 1998).

20. *Id.* at 603 (Baird, J., dissenting). Judge Baird described the application as follows: "The instant application appears to allege ineffective assistance of trial counsel, but also includes a wish list of discovery, research, and hearings necessary to represent applicant. No cases are cited. No analysis of the law is presented. Indeed, even the State recognizes this 'application' appears to be a motion for discovery." *Id.*

21. Pub. L. 104-132, 110 Stat. 1214, amending 28 U.S.C. Title 153.

22. *See Cantu-Tzin v. Johnson*, 162 F.3d 295 (5th Cir.) (holding that because petition was time-barred, district court was not required to appoint counsel pursuant to 21 U.S.C. § 848(q)(4)(B)).

23. Tex. Crim. P. Code Ann. art. 11.071 § 4(a) (West 1998).

24. *See Ex parte Smith*, 977 S.W.2d 589 (Tex. Crim. App. 1998) (petition dismissed because filed nine days late); *Ex parte Colella*, 977 S.W.2d 621 (Tex. Crim. App. 1998) (petition dismissed because 37 days late). *See also Ex parte Skinner*, No. 20,203 (Tex. Crim. App. Dec. 2, 1998) (after earlier ruling that a motion for extension of time for filing a post-conviction petition was filed in the wrong court, affirming dismissal because the motion for an extension was filed in the designated court one day later, a day beyond the deadline).

25. *Ex parte Smith*, 977 S.W.2d at 611.

26. *Id.* at 613, 614 (Baird, J., dissenting).

27. *Id.* at 5 (Baird, J., dissenting).

28. *Riley v. State*, 889 S.W.2d 290, 298 (Tex. Crim. App. 1993), *overruling Farris v. State*, 819 S.W.2d 490 (Tex. Crim. App. 1990).

29. *Ex parte Smith*, 977 S.W.2d 589, 614 (Tex. Crim. App. 1998) (Overstreet, J., dissenting).

30. *A Disgraceful Vote*, AUSTIN AM.-STATESMAN, Apr. 27, 1998, at A1 (editorial).

31. Cynthia Orr & E.G. "Gerry" Morris, *Dear 11.071 Appointed Counsel: VOICE FOR THE DEFENSE*, published by the Texas Criminal Defense Lawyers Association, April 1998, at 23, 24 n.1.

32. 848 S.W.2d 141 (Tex. Crim. App. 1993).

33. Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn't What It Seems*, TEX. LAWYER, Oct. 3, 1994, at 1, 32.

34. Janet Elliott, *Unqualified Success: Mansfield's Mandate; Vote Makes a Case for Merit Selection*, TEX. LAWYER, Nov. 14, 1994, at 1 (reporting that Mansfield was unable to verify campaign claims regarding the number of criminal cases he had handled); Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn't What It Seems*, TEX. LAWYER, Oct. 3, 1994, at 1, 32.

35. Kent Alan Schaffer, *An Open Letter to Judge Stephen W. Mansfield*, VOICE FOR THE DEFENSE, Jan.-Feb., 1999, at 6, 7, *reprinted in*, TEX. LAWYER, Mar. 1, 1999, at 22.

36. Ala. Code § 15-12-23 (providing for compensation of \$40 per hour for court time and \$20 per hours for out-of-court time, up to a limit of \$600).

37. *Gibson v. Turpin*, 513 S.E. 2d 186 (Ga. 1999). ◀

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