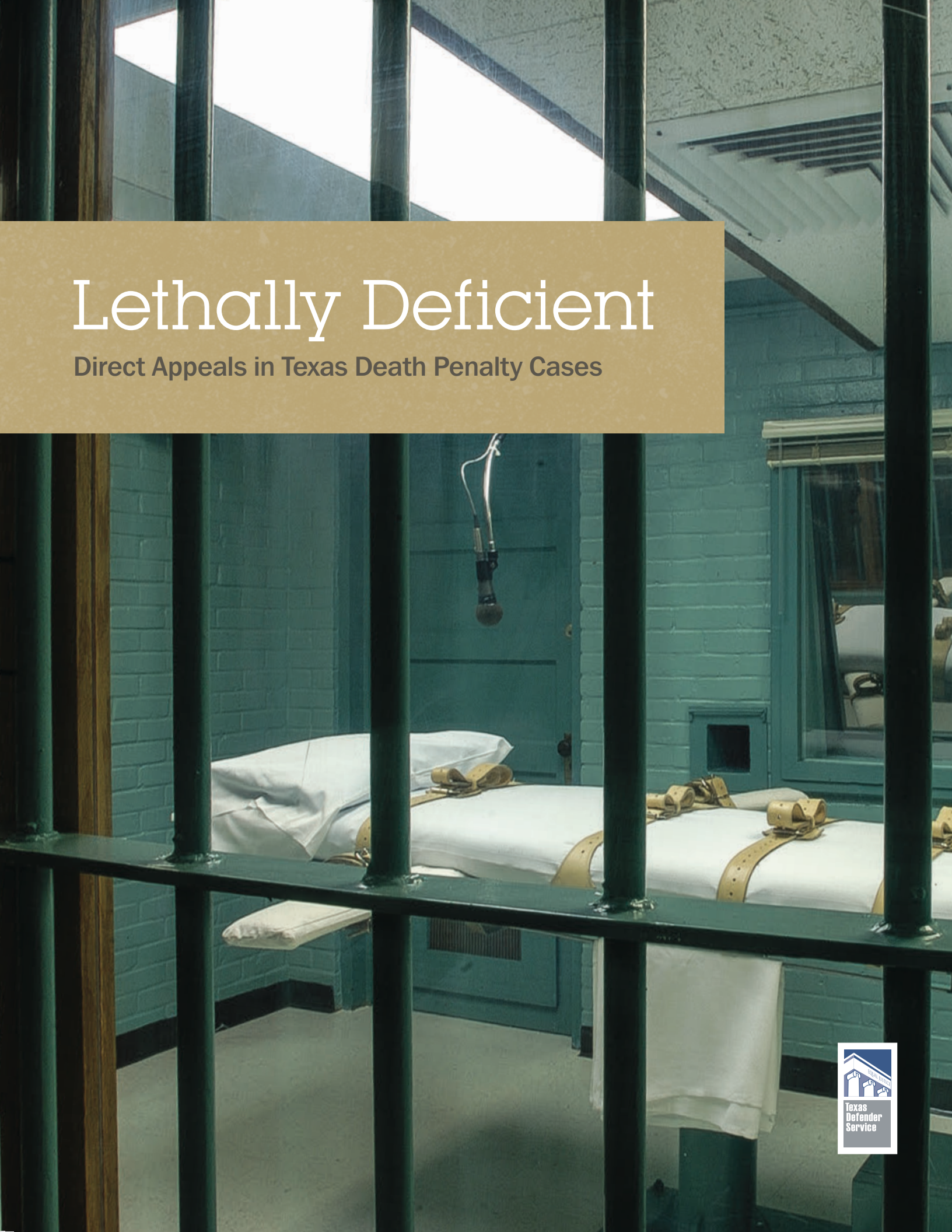


Lethally Deficient

Direct Appeals in Texas Death Penalty Cases

Texas Defender Service

Cover: Texas Department of Criminal Justice

ACKNOWLEDGMENTS

Texas Defender Service is grateful to the many people who worked tirelessly on this project, including Jodie Anderson, Rebecca Bernhardt, Anna Chestnut, Amelia Gerson, Eugene Haller, Rhiannon Hama, Daniel Hatoum, Brandon-Rashad Kenny, Jim Marcus, Catherine Morton, Julie Pennington, Ian Peterson, Raoul Schonemann, Ashley Steele, Jordan Steiker, and Brian Stull.

TDS sent Public Information Act requests to district attorney, county clerk, county treasurer, and county auditor offices across Texas and reviewed extensive records on file at the Court of Criminal Appeals. The cooperation of these institutions and their employees with TDS' research is appreciated.

The Initiative for Public Interest Law at Yale provided support to Fellow Ashley Steele to research and assist in drafting this report. TDS also received general support for policy work from Atlantic Philanthropies, Open Society Foundation, and Vital Projects Fund during the research and writing of this report. TDS thanks these institutions for their investment in its vital work.

TEXAS DEFENDER SERVICE

Texas Defender Service (TDS) is a nonprofit law firm with offices in Houston and Austin. Started in 1995, TDS' mission is to establish a fair and just criminal justice system in Texas, with an emphasis on improving the quality of justice afforded those facing the death penalty. There are four aspects of our work, each of which seek to advance reforms that impact the criminal justice system as a whole and to establish an indigent defense system in Texas that allows all those accused of a crime access to competent counsel: (a) direct representation of death-sentenced prisoners, (b) consulting, training, case-tracking, and policy reform at the post-conviction level, (c) consulting, training, and policy reform focused at the trial level, and (d) systemic research and publication of reports to guide public policy.

1927 Blodgett Street
Houston, Texas 77004
712-222-7788

510 S. Congress Avenue
Suite 304
Austin, Texas 78704
512-320-8300

www.texasdefender.org
Facebook.com/TexasDefender
@TexDefender

CONTENTS

Executive Summary

An indigent capital defendant's right to trial counsel has been a component of the State of Texas' criminal justice system since its inception. The state's first Code of Criminal Procedure in 1857 directed trial courts to appoint counsel to represent any indigent defendant charged with a capital offense. This enactment gave Texas death penalty defendants the right to trial counsel 75 years before the United States Supreme Court recognized this right in *Powell v. Alabama*, 247 U.S. 45 (1932).

Notwithstanding this history, Texas has failed to ensure that capital defendants receive effective representation throughout death penalty cases. During the 1990s and early 2000s, national news media and legal services organizations drew attention to pervasive problems with the performance of capital defense counsel in Texas, ranging from sleeping trial lawyers to post-conviction counsel who used the same writ for every client. Reform efforts focused on improving defense representation at trial and in state habeas corpus proceedings. In 2007, the Regional Public Defender for Capital Cases, which represents indigent capital defendants in more than 170 rural Texas counties, opened its doors. In 2009, the Texas Legislature created the Office of Capital Writs, which represents death-sentenced individuals in state post-conviction proceedings. Direct appeals, and the quality of representation provided to death row inmates in these proceedings, have remained unexamined.

The following report is the first evaluation of defense counsel performance in death penalty direct appeal cases in Texas. These proceedings are important because they allow for full and unencumbered review of record claims—*i.e.,* errors that are reflected in the trial record. Habeas proceedings, which typically follow direct appeal, might not permit review of record claims or might subject those claims to a more exacting standard before the death-sentenced inmate can vindicate his rights.

In preparing this report, Texas Defender Service (TDS) reviewed documents for each of the 84 death penalty direct appeals decided by the Court of Criminal Appeals between January 1, 2009 and December 31, 2015. In Spring 2014, TDS began examining the assigned counsel system's statutory framework, county indigent defense plans, regional attorney qualification criteria, and attorney caseload data. We further reviewed attorney bills (when available) and the appellate record of each death penalty direct appeal—*i.e.,* appellate briefs, motions filed with the Court of Criminal Appeals, orders on party motions, correspondence with the Court and among the parties, and opinions—decided during our survey window.

Our review uncovered multiple and severe deficits in the provision of capital direct appeal representation. The deficits include inadequate resources, excessive attorney caseloads, inadequate briefing, and routine avoidance by appointed counsel of "optional procedures" such as reply briefs and applications for review by the U.S. Supreme Court. These deficiencies reflect systemic problems with the state's indigent defense apparatus and not merely isolated failures by a handful of attorneys. Administrative and legislative reforms are necessary to ensure that the defense is adequately staffed with qualified counsel and preserve the integrity of the Texas criminal justice system.

Systemic Weaknesses in the Provision of Direct Appeal Representation in Death Penalty Cases

The Resource Disparity between the Prosecution and the Defense

Our survey revealed substantial inequities between the prosecution and the defense in access to staffing and ancillary support on direct appeal. As attorneys for the government, prosecutors have substantial institutional resources at their disposal. Fully 71% of the cases within our survey hail from urban counties where local district attorneys have specialized appellate teams and can assign lawyers to specific cases on an as-needed basis. District attorneys also can leverage their budgets to hire external counsel and can obtain assistance from the state government. Private members of the bar assisted the prosecution in at least four cases within our sample, and assistants from the Attorney General's Office served as co-counsel with local prosecutors in two other cases. Finally, the State Prosecuting Attorney's Office (SPA), which represents the State of Texas in proceedings before the CCA and which has no defense counterpart, provides the prosecution with an additional layer of representation—either by serving as co-counsel or through separate submissions to the Court. In two cases within our survey, the SPA filed post-submission *amicus curiae* briefs that raised new issues and served as a second attack on the defense's case.

Texas law requires the appointment of only one defense lawyer to represent an indigent death row inmate on direct appeal. This leaves the defense short-handed and runs counter to recommendations from the State Bar of Texas and the American Bar Association that two lawyers represent a defendant throughout a death penalty case. During a capital direct appeal, the defense shoulders a disproportionate share of the work compared to the prosecution. Defense counsel must review the trial record in its entirety, ensure its completeness, and identify issues that require further fact-finding before beginning the painstaking tasks of researching, analyzing, and briefing arguments for relief. Because prosecutors respond to issues raised by the defense, they can limit their trial record review and research to discrete issues.

Significantly, our survey found that two or more lawyers represented each of the three defendants whose death sentences were reversed on direct appeal and that a fourth defendant whose case was remanded also had two appellate counsel. Yet, single attorneys research, brief, and submit most direct appeals in death penalty cases in Texas. Fully two-thirds (66.7%) of the cases within our sample were handled by solo practitioners, who operate one-lawyer offices and, unlike larger counterparts, may lack ready access to direct supervision, consultation, or support staff. To ensure the fairness of and restore balance to its adversarial process, the State of Texas should appoint two appellate lawyers to each indigent defendant who is directly appealing a death penalty case and ensure that institutional resources, such as an analog to the SPA, are available to the defense.

Inadequate Attorney Screening, Case Distribution and Monitoring

Since 2001, the Texas Code of Criminal Procedure has required that attorneys who are appointed to defend death penalty cases meet minimum qualification criteria. However, the standards set by this statute and by regional attorney selection committees focus on objective benchmarks—*e.g.,* the number of years an attorney has practiced, the number of appellate briefs authored—and do not ensure that attorneys with the necessary skill, availability and knowledge are appointed to capital direct appeals. Factors that bear upon a lawyer's capability, such as her skill in legal analysis, drafting, and oral advocacy, are unaddressed in attorney screening procedures.

The appointment process does not ensure that qualified counsel is provided in every case, that appointments are evenly distributed, or that defense counsel is shielded from improper influences. Unqualified lawyers were appointed in three cases within our sample. Further, 10 of the 13 cases in our

sample from Dallas County were handled by the same lawyer, while five of Tarrant County's eight cases were apportioned among two lawyers. These uneven appointment practices raise questions of favoritism and bias in court appointments, and in some circumstances could rise to the level of an ethics violation for judges and counsel.

Finally, Texas' screening and appointment procedures do not provide an effective mechanism for removing attorneys from regional rosters when they fail to provide the high-quality legal representation that death penalty cases require. The sole ground for disqualification under the current system is a judicial finding of ineffectiveness. This standard, established by *Strickland v. Washington*, accords substantial deference to a defense lawyer's decisions and is triggered only when counsel utterly fails in her responsibilities, *and* the defendant can show prejudice–usually many years after imposition of the death sentence. This test does not screen for instances where counsel fails to provide high-quality representation and should not serve as a proxy for attorney accountability and oversight.

Inadequate Attorney Compensation and Caseload Controls

Adequate attorney compensation and caseload controls are essential to the provision of high-quality capital defense services. Even the most skilled and dedicated attorneys cannot provide clients with zealous representation without sufficient time and resources for each case. Our review found excessive caseloads and unsatisfactory attorney payment schemes, with the result that Texas defense lawyers spend substantially less time on direct appeals in death penalty cases than their colleagues in other states. Time studies in other jurisdictions have found that attorneys spend between 500 and 1,000 hours preparing a capital direct appeal. By comparison, the total hours billed for cases in our study ranged from 72.1 to 535.0 and averaged 275.9 (mean).

Flat fees and capped compensation schemes create a perverse incentive for lawyers to accept a high volume of appointments and reduce the number of hours expended on each case. Indigent defense plans in 12 counties show that defense counsel are paid flat fees ranging from $3,000 to $12,500 for a direct appeal in a death penalty case. Assuming that a lawyer works 500 hours on a direct appeal, a flat fee of $12,500 would pay her $25 an hour, while a $3,000 fee would compensate her at $6 an hour—well below the federal minimum wage before overhead is deducted. Thirty counties pay lawyers an hourly rate but cap compensation at an amount—*e.g.,* $15,000—that does not fully compensate an attorney who spends 500 hours or more preparing an appeal in a death penalty case. Hourly rates too frequently are inadequate. For example, many lawyers within our study were paid $100 per hour, which a State Bar of Texas study in 2000 found insufficient to cover a modern law practice's overhead. Today, this rate forces many lawyers to operate at a substantial deficit.

Texas defense lawyers spend substantially less time on direct appeals in death penalty cases than their colleagues in other states. Time studies in other jurisdictions have found that attorneys spend between 500 and 1000 hours preparing a capital direct appeal. By comparison, the total hours billed for cases in our study ranged from 72.1 to 535.0 and averaged 275.9 (mean).

The result of these practices is that capital defense lawyers appealing death penalty verdicts in Texas assume extraordinary caseloads. Motions for an extension of time filed in two-thirds (68.3%) of the cases in our study demonstrated that defense counsel struggled to provide effective representation amid other professional obligations. Lawyers reported stacked trial schedules, overlapping briefing deadlines, and the defense of multiple death penalty cases. One defense attorney wrote that he was counsel of record in six pending capital murder trials, while another advised the CCA that he could not appear for oral argument in his death row client's ap-

peal because he was scheduled to select a jury for a death penalty trial; his client's conviction and death sentence subsequently were affirmed.

Such demanding schedules also are reflected in the caseload data reported to the Texas Indigent Defense Commission. Information posted to TIDC's website shows that some attorneys who handled appeals in our survey had a capital and non-capital workload during the 2014 fiscal year that equaled the recommended workload for three or more lawyers.

Attorney billing statements reflect appellate lawyers in Texas death penalty cases who report working on a near-constant basis. One lawyer's bills in Dallas and Collin counties show that he worked 1,042 hours for the 100-day period between April 1 and July 10, 2014. Reaching this total would have required 10.4 productive hours of legal work every day during the period, without breaks for holidays and weekends. On his busiest day, the lawyer billed 21 hours, including eight hours preparing for a death penalty sentencing trial, eight hours in court on the last day of a four-day jury trial, and five hours preparing a murder case for trial.

Deficient Legal Representation

Inadequate Legal Briefing

Texas Rule of Appellate Procedure 38.1 deems appellants to have waived any issue on appeal that (1) does not encompass a single legal issue, and (2) is not supported by citations to the trial record and legal authority. Defense lawyers in our survey failed to brief one or more issues in compliance with this rule in 28 (33.7%) of the cases in our survey. Such inadequate briefing constitutes a substantial omission by defense counsel that may result in the loss of otherwise colorable claims. Federal courts have found that noncompliance with state briefing rules constitutes an independent procedural bar to habeas corpus relief. Inadequate briefing can, therefore, preclude relief on direct appeal and in subsequent federal habeas proceedings unless the defense can meet the rigorous standard established for an ineffective assistance of counsel claim.

Frequent Re-use of Boilerplate Arguments

Fully half of the briefs in our study contained text that was identical to text in other direct appeal briefs. While capital cases often share similar constitutional and procedural issues, defense counsel is obligated to analyze each case's unique facts and legal issues and engage in further research to ensure the accuracy of all statements of law in any recycled text.

Lawyers in other states have been sanctioned or otherwise disciplined for submitting briefs that are copied from unacknowledged sources on the grounds that such applications contain frivolous claims and plagiarism. No lawyer in our study was sanctioned for using recycled text. Yet, some of the briefs filed in our survey cases show that defense counsel did not independently analyze the case or potential avenues for relief. For example, one lawyer appointed as substitute counsel filed a brief that incorporated all of the prior lawyer's arguments without revision and added only three new claims. Another lawyer copied the trial lawyer's motion *in limine* into her brief without analyzing the trial court's decision or making her own argument in support of the client's appeal. And still another lawyer inserted a footnote that collectively discredited four of the brief's six points of error by stating, "Counsel for Appellant makes no claim that he drafted this argument [sic] rather Counsel expects that arguments of this type are boilerplate language in Appellate briefs in death penalty cases."

Minimal Client Communication

The Texas Disciplinary Rules of Professional Conduct, a litany of ethics advisory opinions, and standards for capital defense lawyers promulgated by the State Bar of Texas and the American Bar Association direct defense lawyers at all stages of a criminal case to regularly communicate with their clients. This requirement ensures that the client, who may be unable to read legal documents, understands and is able to make meaningful decisions about his case. It also ensures that attorneys consult their clients,

who may be important sources of information. It further comports with appellate counsel's obligation to monitor, and document changes in, the client's mental health for use in subsequent proceedings.

Notwithstanding the requirement of regular client communication, lawyers in 24 cases (48% of the cases where time records were provided) in our survey did not list any time in their itemized billing statements dedicated to client communications. Two defendants wrote to the CCA to report that they had not heard from their lawyer; three defendants wrote that their appellate lawyer filed a brief without consulting them. Billing statements filed by lawyers for two other defendants who sought to waive the right to appellate counsel do not show that counsel visited those clients in person in order to assess their reasoning or competence to enter this decision.

Routine Avoidance of Discretionary Legal Procedures

Guidelines issued by the State Bar of Texas and the American Bar Association direct capital defense attorneys to consider all claims potentially available to the client. Despite this mandate, defense counsel within our survey infrequently availed themselves of discretionary applications that provide important opportunities to obtain swift relief, reinforce the defense's case, or obtain federal review. Our survey found that 14.4% of the opening briefs were under 50 pages in length, and lawyers sought permission to file oversize briefs in just 7.2% of the cases in our survey. Reply briefs were filed in only 16.9% of the cases within our survey, and lawyers waived oral argument in 27.7% of those cases. Further, no reply brief was filed in any case where oral argument was waived, which meant appellants lost important opportunities to respond to the prosecution's arguments. While motions for new trial were filed in 59.6% of the cases in our sample, just 20.0% were supported by exhibits and some 40.0% were *pro forma* applications that did not provide an adequate basis for relief. Finally, review by the U.S. Supreme Court was not sought in 34.6% of the cases surveyed, meaning that defense lawyers waived the first opportunity for federal review in more than a third of Texas death penalty cases decided on direct appeal between 2009 and 2015.

Conclusion

Texas' system of providing direct appeal representation in death penalty cases is in dire need of reform. The major issues highlighted in this report—*e.g.,* defense understaffing, inadequate attorney screening and monitoring, poor representation, excessive caseloads—are vitally important to the provision of effective representation and preserving the integrity of the criminal justice system. In order to safeguard a condemned defendant's right to counsel as well as accuracy in its appellate review process, the Texas Legislature should consider reform efforts that (1) create a capital appellate defender office, (2) establish a statewide appointment system with effective caseload controls and uniform compensation, and (3) require the appointment of two qualified lawyers to each death penalty direct appeal. Together, these reforms will establish parity between the defense and prosecution when death penalty cases are on direct appeal in Texas and ensure the fair administration of justice.

Introduction

The State of Texas provided indigent capital defendants with a right to counsel soon after it joined the Union in 1845. In 1857, the 6th Texas Legislature adopted the state's first Code of Criminal Procedure, which directed courts to "appoint one or more practicing attorneys to defend" any indigent facing the death penalty at trial.[1] In doing so, Texas codified an indigent's right to capital trial counsel 75 years before the U.S. Supreme Court recognized this right in *Powell v. Alabama*.[2]

Notwithstanding this history, Texas has failed to ensure effective counsel throughout death penalty cases. Our capital justice system depends on the advocacy of skilled opponents who promote their party's interests without compromise. Experienced and knowledgeable defense advocacy is an integral part of such a system. The denial of effective defense representation profoundly weakens the integrity of a death penalty case's outcome and diminishes public confidence in the capital justice system.[3]

This inequity is particularly acute when cases are on direct appeal, a phase of the proceedings that has remained largely unexamined for decades. Throughout the 1990s and early 2000s, national news media and legal services organizations drew attention to pervasive problems with the performance of capital defense counsel in Texas, ranging from sleeping trial lawyers[4] to post-conviction counsel who used the same writ for every client.[5] Consequently, Texas focused reform efforts on improving defense representation at trial and in state habeas corpus proceedings. In 2007, the Texas Indigent Defense Commission provided grant funding to establish the Regional Public Defender for Capital Cases, which represents indigent capital defendants in more than 170 rural Texas counties. In 2009, the Texas Legislature created the Office of Capital Writs,[6] which represents death-sentenced individuals in state post-conviction proceedings.

Until now, defense representation in direct appeals of Texas death penalty cases has not been evaluated. Direct appeals are important because they provide the first and often last opportunity for full and unencum-

1. Tex. Code of Crim. Proc. art. 466 (1857), http://www.lrl.state.tx.us/scanned/statutes_and_codes/code_of_criminal_procedure.pdf. By contrast, Texas did not appoint lawyers to represent indigent death row inmates in state habeas corpus proceedings until 1995. *See* Tex. Code Crim. Proc. Ann. art. 11.071 § 2(d) (Vernon 2015), added by S.B. 440, 74th Leg., R. Sess. (Tex. 1995).

2. 247 U.S. 45 (1932).

3. *See generally* Douglas v. California, 372 U.S. 353, 357 (1963) ("Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, an unconstitutional line is drawn between rich and poor."); United States v. Vasquez, 7 F.3d 81, 85 (5th Cir. 1993) ("[I]t is difficult to accurately assess whether it was harmless error to deny counsel on the basis of a record developed . . . in the absence of that counsel. One can only speculate on what the record might have been had counsel been provided."); and Williams v. State, 252 S.W. 3d 353, 357 (Tex. Crim. App. 2008) ("When the right to trial counsel has been violated, prejudice is presumed because the trial has been rendered inherently unfair and unreliable.").

4. Linda Greenhouse, *Inmate Whose Lawyer Slept Gets New Trial*, N.Y. Times, June 4, 2002, http://www.nytimes.com/2002/06/04/us/inmate-whose-lawyer-slept-gets-new-trial.html.

5. *See, e.g.,* Texas Defender Service, A State of Denial: Texas Justice and the Death Penalty 107-8 (2000); Texas Defender Service, Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals 23-43 (2002); Texas Defender Service, Minimizing Risk: A Blueprint for Death Penalty Reform in Texas 53-61 (2005). All of these publications are available at http://texasdefender.org/tds-publications/.

6. This state agency is now known as the Office of Capital and Forensic Writs. In 2015, the Texas Legislature passed S.B. 1743, which renamed the organization and authorized its representation of defendants in Article 11.073 (junk science) writ proceedings when those defendants are referred by the Forensic Science Commission. *See* S.B. 1743, 84th Leg., R. Sess. (Tex. 2015).

FIGURE 1
Capital Direct Appeal Outcomes in U.S. Courts, 2005 to 2015

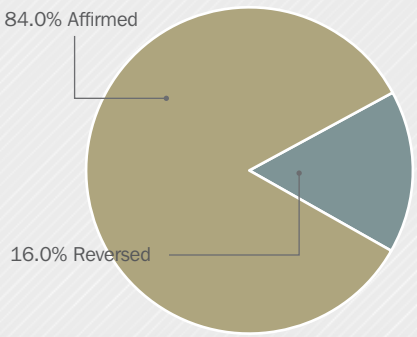
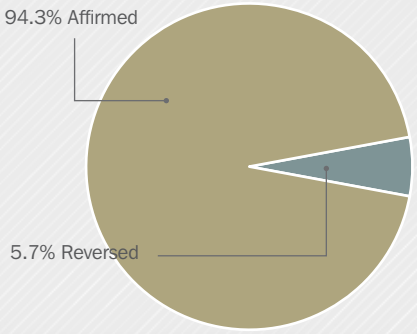


FIGURE 2
Capital Direct Appeal Outcomes in Texas, 2005 to 2015



bered review of record claims. Subsequent review of the inmate's conviction and sentence in state habeas or federal habeas might not permit review of record claims or might permit review but subject those claims to a more exacting standard for the death-sentenced inmate to vindicate his rights. Yet, nearly every direct appeal of a death penalty case in Texas is handled by a single court-appointed lawyer. No resource organization supports these appellate lawyers' needs, and there is virtually no oversight of their services.

Texas death penalty appellants fare far worse than their counterparts in other jurisdictions, which are 2.8 times more likely to reverse death penalty cases on direct appeal. Our review of 1,060 capital direct appeal decisions issued by the highest courts in the 30 other death penalty states revealed that, between 2005 and 2015, these courts collectively reversed 16.0% of all death sentences.[7] Fully 58.6% of those reversals overturned the sentence alone; 41.4% overturned the conviction and sentence.[8] By contrast, the Texas Court of Criminal Appeals (CCA)[9] reversed just 5.7% of the death penalty cases heard on direct appeal between 2005 and 2015; 60.0% percent of those reversals overturned the sentence alone and 40.0% overturned the conviction and sentence. (*See* Figure 3 for an annual comparison of the CCA's and national aggregate affirmance rates.)

In the years covered by our study, 2009 to 2015, the CCA did not reverse a single conviction in a death penalty case on direct appeal. The CCA affirmed the defendant's conviction and sentence in 79 cases, reversed the death sentences of just three defendants—Adrian Estrada, Manuel Velez, and Christian Olsen[10]—and abated and remanded Albert Turner's case for a determination of his competency to stand trial.[11]

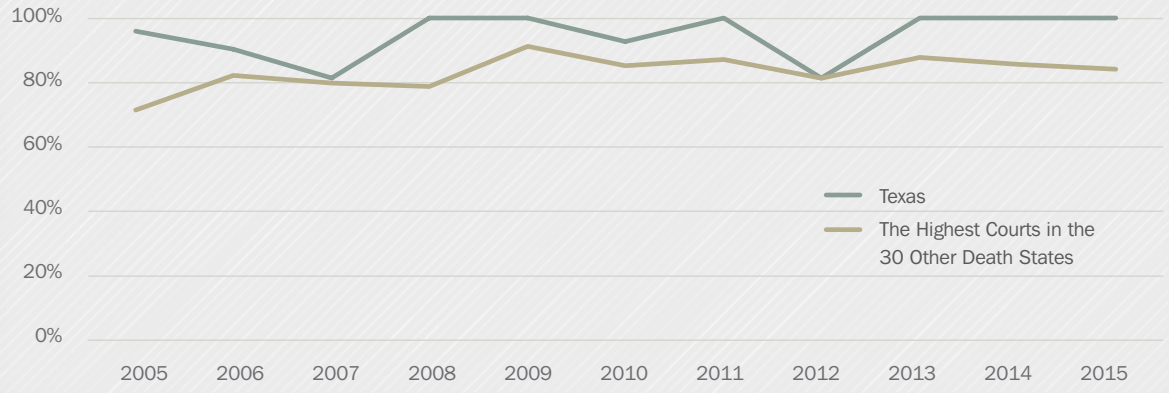
Study Overview and Methodology

THIS REPORT IS THE FIRST EXAMINATION OF THE representation provided to Texas death row inmates

7. The mean highest court reversal rate during the period from 2005 through 2015 was 20.3%.
8. Excluding Texas, courts in the 30 other death penalty states overturned 170 death sentences on direct appeal between 2005 and 2015. A total of 70 or 41% of these decisions overturned both the conviction and sentence. Studies of previous time periods have estimated higher reversal rates. See Barry Latzer & James Cauthen, *Justice Delayed? Time Consumption in Capital Appeals: A Multistate Study* 23 (March 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/217555.pdf (summarizing a survey of 1,676 decisions on capital direct appeals from fourteen death penalty states that found that the state courts of last resort reversed the trial court's sentence in 26.2% of all cases on direct appeal); NICOLE WATERS, ANNE GALLEGOS, JAMES GREEN AND MARTHA ROZSI, CRIMINAL APPEALS IN STATE COURTS (Sept. 2015), http://www.bjs.gov/content/pub/pdf/casc.pdf (stating that state courts resolved 134 death penalty appeals during 2010 and reversed the trial court in 26 cases). Other studies of the direct appeals process have found that state courts reverse as many as 41% of all death sentences at the direct appeal stage. JAMES LIEBMAN, JEFFREY FAGAN AND VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES 1973-1995 30 (2000), http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.
9. All appeals of cases where the defendant is sentenced to death are automatically reviewed by the Texas Court of Criminal Appeals.
10. Velez v. State, No. AP–76,051 *(Tex. Crim.* App. June 13, 2012) (not designated for publication); Olsen v. State, No. AP–76,175 (Tex. Crim. App. Apr. 25, 2012) (not designated for publication); Estrada v. State, 313 S.W.3d 274 (Tex. Crim. App. 2010).
11. Turner v. State, 422 S.W. 2d 676 (Tex. Crim. App. 2013).

FIGURE 3

Annual Capital Direct Appeal Affirmance Rates



on direct appeal. In the course of this study, the Texas Defender Service reviewed documents relating to each death penalty direct appeal that was decided by the CCA between January 1, 2009 and December 31, 2015. During this period, the CCA decided 84 cases[12] from 26 counties[13] and eight of Texas' nine administrative judicial regions.[14] In 83 cases, the defendant was represented by counsel; in one case, *Mullis v. State*,[15] the defendant waived his right to representation before an opening brief was filed on his behalf.

Texas death penalty appellants fare far worse than their counterparts in other jurisdictions, which are 2.8 times more likely to reverse death penalty cases on direct appeal.

Each case was assessed according to a survey of 130 questions regarding the quality and circumstances of defense representation on direct appeal.[16] These inquiries were based upon case law defining effective assistance of counsel and the practice standards in the State Bar of Texas' Guidelines and Standards for Texas Capital Counsel[17] and the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.[18] Drafted in recognition of the unique demands of capital defense representation, the Texas and ABA guidelines articulate accepted standards for high-quality legal representation and guided our analysis throughout the study.

Documents reviewed included local qualification criteria, attorney applications for death penalty appointment lists, county fee schedules, and attorney caseloads reported to the Texas Indigent Defense Commission for all 84 cases in our sample. We also reviewed each case's appellate record, appellate

12. A list of cases and the counties in which the underlying trials occurred are in Appendix A.

13. Bell, Bexar, Brazos, Cameron, Collin, Dallas, El Paso, Fort Bend, Harris, Harrison, Henderson, Hidalgo, Hunt, Jackson, Jefferson, Johnson, McLennan, Medina, Nueces, Randall, Rusk, Smith, Tarrant, Travis, Walker, and Wharton counties. Travis Mullis' case is the sole in our survey from Galveston County. To the extent this case was included in our review, our analysis spanned 27 counties.

14. The CCA did not decide a death penalty direct appeal from the Seventh Administrative Judicial Region during our survey window.

15. 2012 WL 1438685 (Tex. Crim. App. Apr. 25, 2012) (not designated for publication).

16. Our survey questions are listed in Appendix B.

17. State Bar of Texas, Guidelines and Standards for Texas Capital Counsel, 69 Tex. Bar J. 966 (2006), http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/State/TX_Bar_Association_adopted_version_of_ABA_Guidelines.authcheckdam.pdf [hereinafter Texas Guidelines].

18. American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Introduction (revised Feb. 2003), *published in* 31 Hofstra L. Rev. 913 (2003), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf [hereinafter ABA Guidelines].

briefs, motions filed with the CCA, orders on party motions, correspondence between the parties and the Court,[19] and all opinions. Because no direct appeal briefs were filed in Travis Mullis' case, his was excluded from most survey questions regarding the appellate record, leaving 83 cases in our sample. However, our evaluation of the use of motions for new trial included all 84 cases because Mr. Mullis' attorney filed a motion for new trial before his client waived the right to appellate counsel.

We submitted Public Information Act requests for attorney billing statements for all 84 cases. We received complete responses in 56 cases, of which 49 included itemized billing statements,[20] six stated the total hours billed, but did not provide an hourly breakdown of how the lawyer's work was performed,[21] and one, in *Mullis v. State*, stated that defense counsel conducted in-person meetings with his client, but did not charge the county for time spent for researching and preparing an appeal.[22] We excluded the billing records in the latter case, *Mullis,* from calculations concerning the time defense attorneys dedicate to death penalty direct appeals in Texas, but included the records in the group of 50 cases in which attorney-communications were analyzed.

Accordingly, this report captures the state of capital appellate defense in Texas from 2009 through the end of 2015, and identifies persistent deficits in the provision of counsel on direct appeal in death penalty cases. Specifically, the Texas capital defense delivery system:

- understaffs the defense in appellate proceedings;
- fails to meaningfully evaluate attorney qualifications before assignment to a direct appeal;
- subjects defense counsel to political pressures both within and outside the judicial system;
- contains wide disparities in attorney compensation and often fails to adequately compensate lawyers for their time; and
- does not control attorney workload to ensure that appointed lawyers have time to provide high-quality representation when pursuing direct appeal in a death penalty case.

These fundamental flaws in the Texas capital justice system led to multiple instances of defense briefs that failed to comply with the Texas Rules of Appellate Procedure, recycled failed arguments, and were filed without client consultation. Too often, defense counsel filed no reply brief and waived oral argument. As a result of these practices, poor-quality representation was replicated across direct appeals of death penalty cases, and attorney performance failed to comport with the high standards that the State Bar of Texas[23] and the American Bar Association[24] have adopted for defense representation in death penalty proceedings.

19. Our examination of case briefs evaluated their quality on their face, assessing whether issues were adequately briefed and accurately stated the law. Our review did not evaluate each case's trial record to determine whether additional claims should have been, but were not, raised on direct appeal.

20. Douglas Armstrong, Teddrick Batiste, Donald Bess, Brent Brewer, James Broadnax, Micah Brown, Tyrone Cade, Kimberly Cargill, Jaime Cole, Raul Cortez, Obel Cruz-Garcia, Rickey Cummings, Erick Davila, Irving Davis, Areli Escobar, Robert Fratta, James Freeman, Milton Gobert, Gary Green, Howard Guidry, Garland Harper, Roderick Harris, John Hummel, Christopher Jackson, Joseph Jean, Dexter Johnson, Matthew Johnson, Mabry Landor, Juan Lizcano, Daniel Lopez, Jerry Martin, Raymond Martinez, Randall Mays, Hector Medina, Naim Muhammad, Steven Nelson, Mark Robertson, Cortne Robinson, Rosendo Rodriguez, Kwame Rockwell, Wesley Ruiz, Demetrius Smith, Mark Soliz, Robert Sparks, Paul Storey, Richard Tabler, John Thuesen, Albert Turner, and Antonio Williams.

21. Tilon Carter, Billie Coble, Lisa Coleman, Paul Devoe, LeJames Norman, and Roosevelt Smith.

22. Attorney Fee Voucher, State v. Mullis, No. 08 CR 0333 (122nd Dist. Ct., Galveston County, Tex. May 20, 2011).

23. Texas Guidelines.

24. ABA Guidelines.

I. Death Penalty Case Review Process

All cases resulting in a death sentence in Texas state court are subject to three levels of post-trial review: direct appeal to the CCA, state habeas corpus review (before the trial court and the CCA), and federal habeas corpus review.[25] *See* Figure 4. During the direct appeal, counsel must litigate all constitutional, statutory, and procedural infirmities that are apparent from the trial record. This proceeding is the defendant's first and often last opportunity for full and unencumbered review of record claims. Subsequent review of the inmate's conviction and sentence in state habeas or federal habeas might not permit review of record claims or might permit review but subject those claims to a more exacting standard for the death-sentenced inmate to vindicate his rights.

State habeas corpus review is a collateral action in which counsel litigates jurisdictional and constitutional claims based on facts and evidence *outside* the trial record. It has been an important mechanism for relief where there is prosecutorial misconduct, the discovery of crucial new evidence, or other claims that require new fact finding. The CCA has repeatedly ruled that habeas relief is an "extraordinary remedy that is available only when there is no other adequate remedy at law."[26] Defendants are deemed to waive certain types of claims such as statutory violations,[27] search and seizure violations,[28] inadequate *Miranda* warnings,[29] and challenges to the sufficiency of the state's evidence[30] if they are not raised in a direct appeal.

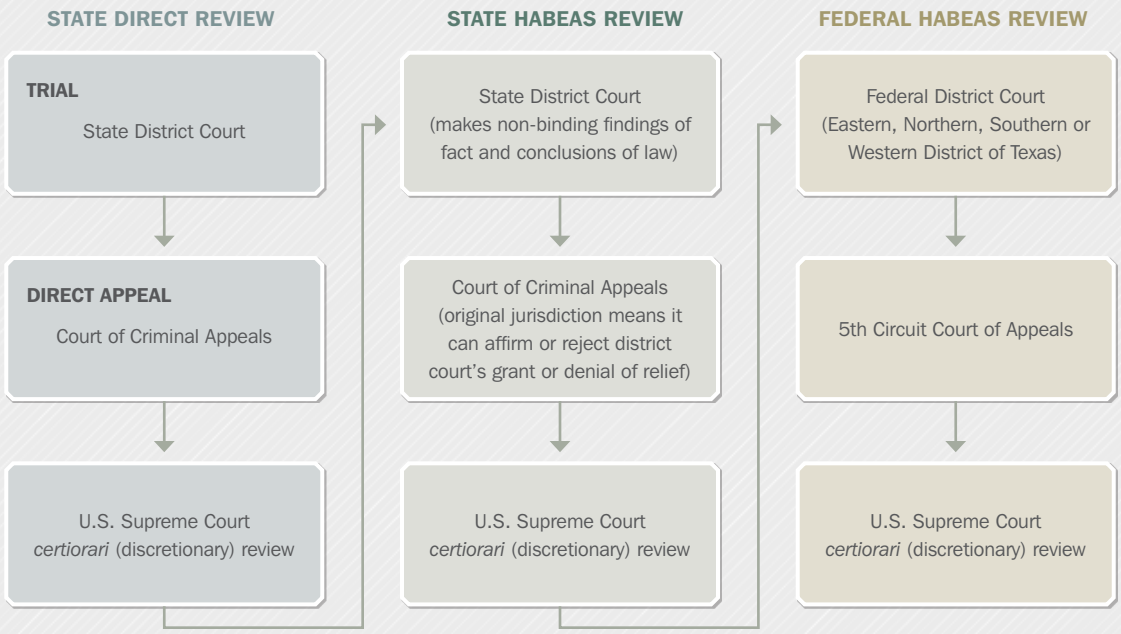
Federal habeas corpus review is similar in that it allows defendants to obtain relief for violations of the U.S. Constitution or other federal law, but is restricted by rulings of the U.S. Supreme Court and a number of procedural rules. The latter include a one-year statute of limitations,[31] a requirement that defendants exhaust state judicial remedies for a claim before raising it in a federal habeas proceeding,[32] and, in some instances, that federal courts defer to state court determinations that the U.S. Constitution was not violated, even when a federal court concludes that the state court's ruling was erroneous.[33]

An attorney's failure to litigate an issue on direct appeal may form the basis of an ineffective assis-

25. In theory, all criminal convictions are subject to direct appeal, state habeas corpus and federal habeas corpus review. However, because indigent prisoners have no right to counsel in non-capital state and federal habeas proceedings, the vast majority of state inmates not on death row do not seek state or federal habeas relief.
26. *Ex parte* Cruzata, 220 S.W.3d 518, 520 (Tex. Crim. App. 2007).
27. *Ex parte* Graves, 70 S.W.3d 103, 109 (Tex. Crim. App. 2002) ("[B]oth federal and Texas courts have confined the scope of post-conviction writs of habeas corpus to jurisdictional or fundamental defects and constitutional claims. Violations of statutes, rules, or other non-constitutional doctrines are not recognized.") (internal citations omitted); *see also Ex parte* Douthit, 232 S.W.3d 69, 75 (Tex. Crim. App. 2007) (violations of Articles 1.13 and 1.14 of the Tex. Code of Criminal Procedure, which prohibited capital murder defendants indicted before Sept. 1, 1991 from waiving a jury trial, are statutory violations and not cognizable in state habeas proceedings).
28. *Ex parte* Kirby, 492 S.W.2d 579, 581 (Tex. Crim. App. 1973).
29. *Ex parte* Gardner, 959 S.W.2d 189, 199 (Tex. Crim. App. 1998) (op. on reh'g) ("There is no valid reason why applicant could not have raised on direct appeal the [Fifth Amendment] claim he asserts in this proceeding. It is well-settled that the writ of habeas corpus should not be used to litigate matters which should have been raised on direct appeal.")
30. *Ex parte* Easter, 615 S.W.2d 719, 721 (Tex. Crim. App. 1981) (attack on sufficiency of the evidence at trial may not be raised in habeas proceedings).
31. 28 U.S. § 2244 (d) (West 2013).
32. 28 U.S.C. §§ 2254 (b) & (c) (West 2013); *see also* Cullen v. Pinholster, 563 U.S. 170 (2011).
33. *See* 28 U.S.C. §§ 2244, 2254 (2013); *see also* Cullen v. Pinholster, 563 U.S. 170 (2011).

FIGURE 4

The Death Penalty Case Review Process



tance of counsel claim in state and/or federal habeas proceedings. However, this safety net is not a reliable substitute for competent representation on direct appeal. In order to prevail on an ineffectiveness claim, a defendant must meet a rigorous standard[34] that requires a demonstration that (1) the attorney's representation fell below an objective standard of reasonableness—overcoming a strong presumption that the conduct was reasonable—and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.[35] Moreover, prompt vindication of a defendant's rights on direct appeal may avoid years of unnecessary litigation and the prolonged incarceration of a wrongfully convicted individual. Most often, however, direct appeal counsel's omissions irrevocably waive all state and federal review of the issues, regardless of their potential merit.

Texas Direct Appeal Procedures

TEXAS LAW SUBJECTS ALL DEATH SENTENCES handed down within the state to automatic, direct review by the CCA. Unlike other criminal cases, the trial court's conviction and sentence are not assessed by an intermediate court of appeals, no notice of appeal is necessary, and the CCA's review is not a matter of discretion.

The Texas Legislature codified this direct appeal procedure in 1973[36] following the U.S. Supreme

34. Padilla v. Kentucky, 559 U.S. 356, 371 (2010) ("Surmounting Strickland's high bar is never an easy task."); *see also Ex parte* Garcia, 2016 WL 1358947 (Tex. Crim. App. Apr. 6, 2016) (Alcala, J. dissenting) (discussing the demands of establishing an ineffective assistance of counsel claim).

35. Under the U.S. Supreme Court's holding in Strickland v. Washington, 466 U.S. 668 (1984), a defendant must demonstrate (1) that the attorney's representation fell below an objective standard of reasonableness—overcoming a strong presumption that the conduct was reasonable—and (2) that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

36. H.B. 200, 63rd Leg., Reg. Sess. (Tex. 1973), ch. 426, art. 3, §1 (eff. June 14, 1973) (amending the Texas Code of Criminal Procedure by adding Article 37.071, Procedure in Capital Case, which provided *inter alia* "(f) the judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals[.] . . . Such review . . . shall have priority over all other cases."). At the time of this enactment, the Court of Criminal Appeals had jurisdiction over all criminal appeals. However, it did not preside over a death penalty case unless the defense filed an appeal. TEX. CODE CRIM. PROC. ANN. art. 44.08 (Vernon 1966) (setting forth deadlines for filing a notice of appeal in all criminal cases

Court's ruling in *Furman v. Georgia*,[37] which held that the imposition of the death penalty under Georgia and Texas law[38] "constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[39] Although the Court did not issue a majority opinion in this case, a plurality of justices reasoned that the statutory structures in both states failed to ensure that executions were not arbitrarily, "wantonly and . . . freakishly imposed."[40] Enacted in the wake of the *Furman* decision,[41] the right to an automatic direct appeal was intended to ensure that death sentences were imposed in an even, rational, and non-arbitrary manner throughout Texas.[42]

All claims for relief on direct appeal must be based on the trial record, which consists of a clerk's record—the indictment, docket sheet, jury charge and verdict, and any written pleadings, motions or other submissions to the trial court—and a reporter's record, composed of a transcription of all proceedings and a copy of all exhibits that were admitted into evidence.[43] Once both records are filed with the CCA, the defense—now known as the appellant—has 30 days to submit its brief.[44] Due to the length of records in death penalty cases, the CCA frequently grants defense requests to extend the deadline for submitting the appellant's brief.

The appellant's brief should itemize all arguments for remanding the case for further proceedings at the trial level and for reversing the conviction or death sentence. For each point of error listed, the rules require that the appellant's brief state:

- the relevant facts;
- whether the error was preserved and, if not, an explanation of why the CCA should consider it;
- the legal argument, with citations to relevant law;
- the standard of review; and
- why the error is harmful—*i.e.,* why it is important enough to merit reversal of the conviction or sentence.[45]

The state must file a response to the appellant's brief within 30 days,[46] although extensions of time are frequent here, too. Once the state's brief is filed, the defense may file a reply.[47] Either party may ask to orally argue the case to the CCA.

The standard of review employed by the CCA depends on the type of error claimed and whether that error was effectively preserved at the trial level. Generally, questions of law are accorded *de novo* review, which entails full reexamination of the issue presented. Questions regarding the legal sufficiency of the evidence—a frequent claim cognizable only on direct appeal—are reviewed according to "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[48] Other common standards of review include: automatic reversible error, which applies to fundamental error or a structural defect that "affects the very framework within which

including cases in which the defendant has been sentenced to death), *repealed by* S.B. 854, 69th Leg., Reg. Sess. (Tex.1985) ch. 685, § 4 (eff. Sept. 1, 1985).

37. 408 U.S. 238 (1972) (per curiam).

38. The U.S. Supreme Court granted *certiorari* for three cases that were decided in *Furman*. Two cases were from Georgia, Furman v. State, 167 S.E.2d 628 (Ga. 1969) and Jackson v. State, 171 S.E.2d 501 (Ga. 1969). The third case was from Texas, Branch v. State, 447 S.W.2d 932 (Tex. Crim. App. 1969).

39. 408 U.S. at 238.

40. *Id*. at 310 (Stewart, J. concurring).

41. *See* Debate on Tex. H.B. 64 on the Floor of the Senate, 63rd Leg., Reg. Sess. (May 23, 1973) (Statements of Sens. Ogg, Adams, and Meier regarding the *Furman* decision and debate over whether H.B. 64 or H.B. 200 contained the best response to this ruling) (transcript available from the Texas Legislative Resource Library).

42. *See* Jurek v. Texas, 428 U.S. 262, 276 (1976) ("By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law."); *see also* McGinn v. State, 961 S.W.2d 161, 175 (Tex. Crim. App. 1998) ("Meaningful appellate review plays the crucial role of ensuring that the death penalty is not imposed arbitrarily or irrationally.").

43. Tex. R. App. P. 34.1, 34.5 & 34.6.

44. *Id*. at 38.6 (a) ("an appellant must file a brief within 30 days . . . after the later of (1) the date the clerk's record was filed; or (2) the date the reporter's record was filed").

45. *See* Tex. R. App. P. 38.1 & 44.

46. *Id*. at 38.6(b).

47. *Id*. at 38.6(c).

48. Jackson v. Virginia, 431 U.S. 307, 319 (1979); *see also* McCain v. State, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000) (en banc); and Brooks v. State, 323 S.W.3d 893 (Tex. Crim. App. 2010).

the trial proceeds, rather than a simple error in the trial process"[49]; clearly erroneous review, which applies when the trial court enters findings of fact and requires that these findings be upheld unless they resulted from "clear error"[50]; and abuse of discretion, which applies to a trial court's discretionary rulings—*e.g.,* extending a deadline, allowing an optional amendment to the pleadings—and requires that the trial court's decision be upheld "if it [is] correct under any theory of law applicable to the case, even if the trial court gave an incorrect reason for its decision."[51]

Following the conclusion of briefing and any oral argument, the CCA issues a written decision. Where the conviction or death sentence is affirmed, the appellant may move for rehearing. The losing party also may seek review of the decision in the U.S. Supreme Court. Where *certiorari* is not granted or the death sentence is upheld, the case proceeds to state habeas review.

49. Charles F. Baird, *Standards of Appellate Review in Criminal Cases*, 42 S. Tex. L. Rev. 707, 723 (2001) (explaining that "five fundamental errors exist: (1) total deprivation of counsel; (2) a biased judge or jury; (3) the unlawful exclusion of the venire members from the jury on the basis or race or gender; (4) denial of the right to self-representation; and (5) the denial of the right to a public trial.") [hereinafter Baird, *Standards of Appellate Review*]; *see also* Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991) (explaining that automatic reversible error applies to "constitutional deprivations . . . affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself . . . [such that] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair").

50. Baird, *Standards of Appellate Review*, *supra* note 49 at 724.

51. *Id.* (citing Jones v. State, 944 S.W.2d 642, 651 (Tex. Crim. App. 1996)).

II. The Right to Counsel in Death Penalty Proceedings

The U.S. Supreme Court first recognized a defendant's Sixth Amendment right to counsel at his death penalty trial in *Powell v. Alabama,* stating:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one**.** *He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.* [52]

As *Powell* explains, defense representation is among the most important safeguards for ensuring a reliable determination of guilt and appropriate sentence in a death penalty case. Defendants often are unaware of their rights in a criminal proceeding and depend on their lawyers to advise them. Once adversarial judicial proceedings have begun, the constitutional right to effective representation extends to all critical phases of the case,[53] including the defendant's direct appeal,[54] during which "virtually every layman" requires a lawyer's services "to present an appeal in a form suitable for appellate consideration on the merits."[55]

Providing competent representation to a condemned death row inmate is an important and rigorous enterprise on direct appeal. Nearly every aspect of defense representation is "more difficult and time-consuming when the defendant is facing execution."[56] In addition to shouldering the tremendous emotional and psychological pressure associated with representing an individual who faces execution, lawyers handling these cases must have the knowledge, time and resources to properly brief and present complex legal arguments. They must review voluminous trial records, master Texas rules for issue presentation and briefing, and be "intimately familiar" with federal and state rules concerning the administration of a death sentence.[57]

52. 287 U.S. 45, 69-71 (1932) (emphasis added). The U.S. Supreme extended the right to representation to non-death penalty cases in its landmark decision in Gideon v. Wainwright, 372 U.S. 335 (1963).
53. United States v. Cronic, 466 U.S. 648, 658 (1984) (holding that the denial of counsel during a critical stage of the defendant's trial violated his rights under the Sixth Amendment).
54. Douglas, 372 U.S. at 357 (holding that defendants have right to counsel in any appeal as a right).
55. Evitts v. Lucey, 469 U.S. 387, 393 (1985) (citing Griffin v. Illinois, 351 U.S. 12, 20 (1956)).
56. Douglas Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 329, 357 (1995).
57. ABA Guidelines, Introduction (Direct appeal counsel "must be intimately familiar with technical rules of issue preservation and presentation, as well as the substantive state, federal, and international law governing death penalty cases, including issues which are 'percolating' in the lower courts but have not yet been authoritatively resolved by the Supreme Court.").

In the 83 years since *Powell* was decided, capital litigation has evolved into a highly specialized area of the law. The U.S. Supreme Court has issued a series of decisions that define the circumstances under which administration of the death penalty comports with the Eighth Amendment's requirement that a death sentence be neither cruel nor unusual. For example, a death sentence must be proportional to the conviction,[58] execution must serve the penological objectives of retribution and/or deterrence,[59] an offender must be competent for execution—*i.e.,* understand the reasons why the state imposed a death sentence[60] —and the execution of juvenile offenders[61] and individuals with an intellectual disability[62] is prohibited. In addition, Texas has promulgated its own statutory procedures and case law specific to capital proceedings.[63]

Counsel for a death row inmate on direct appeal must be well-versed with each of these substantive areas of the law, "including issues which are 'percolating' in the lower courts but have not yet been authoritatively resolved by the [U.S.] Supreme Court."[64] In addition, they must be thoroughly conversant with the Texas rules governing evidence and criminal procedure, and with state and federal constitutional provisions. They must also make strategic decisions that "maximize" the defendant's prospects for success in subsequent proceedings if the appeal is not resolved favorably, and bear the psychological strain associated with defending an individual the state is seeking to execute.

58. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) ("[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense.") (internal citations omitted).

59. Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("There must be a valid penological reason for choosing from the many criminal defendants the few who are sentenced to death.").

60. *See, e.g.,* Panetti v. Quarterman, 551 U.S. 930 (2007); and Ford v. Wainwright, 477 U.S. 399, 409-10 (1986) ("[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.").

61. Roper v. Simmons, 543 U.S. 551 (2005).

62. Hall v. Florida, 134 S. Ct. 1986 (2014); and Atkins v. Virginia, 536 U.S. 304 (2002).

63. *See e.g.,* Tex. Code Crim. Proc. Ann. art. 26.052 (Vernon 2015) (setting the procedure for assigning defense counsel on direct appeal and in state habeas proceedings, and identifying minimum attorney qualifications); *In re* Dow, Nos. WR-61,939-01 & WR-61,939-02, slip op. at 3 (Tex. Crim. App. Jan. 14, 2015) (holding lawyer in contempt for violating CCA rule limiting when stay of execution can be filed); Watkins v. Cruezot, 352 S.W.3d 493 (Tex. Crim. App. 2011) (trial judge could not, due to unavailability of mitigating evidence and passage of time, prevent prosecution from re-seeking death penalty at retrial); *Ex parte* Kerr, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002) (permitting a second state habeas application because the first was not a "true writ" that attacked the conviction or death sentence).

64. Smith v. Murray, 477 U.S. 527, 536-37 (1986) (finding appellate counsel in a Virginia capital case had waived novel legal issue by not raising claim at an earlier stage of appeal).

III. Indigent Direct Appeal Representation in Texas

The overwhelming majority of Texas death row inmates are represented on direct appeal by a single court-appointed lawyer. Few defendants can afford to privately retain counsel, and currently,[65] only two institutional defender offices—the Bexar County Public Defender and El Paso County Public Defender—handle direct appeals in death penalty cases. Nearly all defendants in our study who were convicted outside Bexar and El Paso counties were represented on appeal by lawyers assigned *via* a flawed screening, appointment, and compensation process that remains in place today.[66]

The Texas Government Code divides the state's judiciary into nine geographical regions for managing court operations, including maintenance of regional lists of lawyers eligible for capital representation.[67] Committees in each region:

1. establish regional qualification criteria that meet minimum standards set by the Texas Legislature;
2. review attorney applications;
3. publish lists of qualified counsel—including appellate counsel—for appointment in death penalty cases; and
4. update these lists of approved counsel on a regular basis to ensure that approved lawyers remain qualified to handle capital cases.

Once a death sentence is entered, the convicting court appoints appellate counsel "as soon as practicable" from the region's list of qualified attorneys.[68] The trial court cannot appoint either of the defendant's trial attorneys to handle the direct appeal unless the defendant or counsel make that request on the record, and the court finds good cause to make the appointment. Although the direct appeal is heard by a court with statewide jurisdiction (the CCA), the lawyer's fee is the responsibility of local government. Appellate defense lawyers are paid from the prosecuting county's coffers[69] at a rate that is established by the district court judges in that county.[70]

65. The Bexar County Appellate Public Defender Office, which represented three defendants in our study, now is known as the Bexar County Public Defender. *See* Bexar Cty. Public Def., https://www.bexar.org/1041/Public-Defenders-Office (last visited July 6, 2016).

66. A total of 78.6% of the cases in our sample were handled by a single court-appointed defense attorney.

67. Regional presiding judges are appointed by the governor for a four-year term.

68. Tex. Code Crim. Proc. Ann. art. 26.052(j) (Vernon 2015). In some instances, trial courts appoint lawyers who are approved in neighboring administrative judicial regions. For example, in Ramiro Gonzales' case, the 38th District Court, which is in the Sixth Administrative Judicial Region, appointed Michael Gross to represent Mr. Gonzales on direct appeal. At the time, Mr. Gross was not on the Sixth Administrative Judicial Region's list of approved counsel, but was qualified for appointment to death penalty cases by the Fourth Administrative Judicial Region. *See* Order Appointing Lead Appellate Counsel, No. 04-02-9091-CR (38th Dist. Ct., Medina County, Tex. Oct. 3, 2006) (stating that the appointed lawyer was qualified for assignment to death penalty direct appeals by the Fourth Administrative Judicial Region).

69. Tex. Code Crim. Proc. Ann. art. 26.052(1) (Vernon 2015) (requiring appellate counsel to be compensated from county funds).

70. *Id.* at art. 26.05(b) (charging county and district court judges with adopting fee schedules for defense attorney services that are paid out of county funds).

IV. Systemic Weaknesses in the Provision of Direct Appeal Representation to Texas Death Row Inmates

Texas' assigned counsel system has been described as a "hodgepodge" of regional and county procedures[71] that provides insufficient accountability for the quality of defense representation. That is true of defense representation in the direct appeal of death penalty cases. The Texas capital defense apparatus fails to provide lawyers with the resources and staffing needed to provide high quality legal services required by the Texas[72] and ABA guidelines.[73] The current system routinely fails to ensure that qualified lawyers are appointed, understaffs the defense on direct appeal, lacks caseload controls, and permits inadequate compensation. Accordingly, appellate representation varies dramatically between cases and provides few assurances that the death penalty is proportionately implemented in Texas.

71. Andrea Marsh & Susanne Pringle, The Way Forward: Recommendations for Improving Indigent Defense in Texas on the Fiftieth Anniversary of Gideon v. Wainwright 5 (2013), http://www.fairdefense.org/wp-content/uploads/media/The-Way-Forward.pdf.
72. Texas Guidelines 2.1 & 3.1.
73. ABA Guideline 2.1.

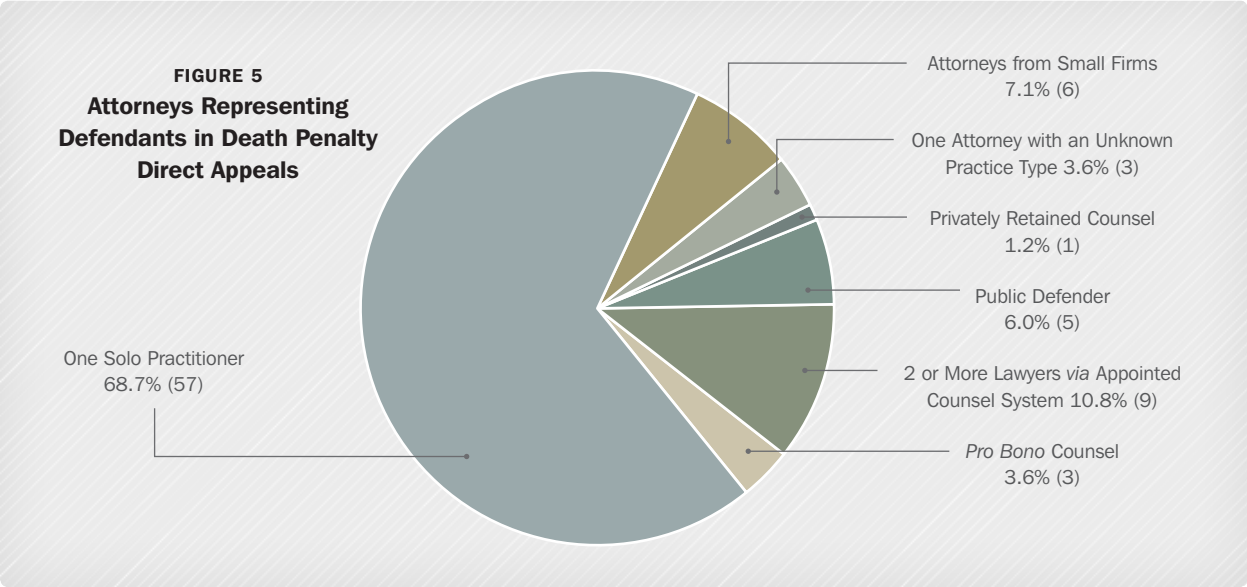
A. The Resource Disparity between the Prosecution and the Defense

Texas' indigent defense system provides death row inmates with an inadequately resourced lawyer to represent them on direct appeal, while prosecutors enjoy ready access to auxiliary staffing and institutional resources in these proceedings. Although both the Texas and the ABA guidelines call for the participation of two defense lawyers throughout a death penalty case,[74] state law allows the appointment of just one attorney to represent an indigent condemned inmate on direct appeal.[75] Such staffing leaves the defense short-handed while facing a disproportionate share of work compared to the prosecution. The defense attorney must review the trial record in its entirety, ensure its completeness—*i.e.,* that all hearings are transcribed and exhibits are filed with the CCA—and identify issues that require further fact-finding and litigation. This work occurs before the lawyer begins the painstaking task of researching, analyzing, and briefing arguments for relief. Prosecutors respond to issues raised by the defense in its brief, and can narrow their review of the trial record and legal research to those discrete issues.

Each of the three defendants in our study whose death sentences were vacated on direct appeal were represented by teams of two or more attorneys.[76] Albert Turner, whose case was remanded for a retrospective determination of his competence to stand trial, also was represented by two lawyers, at least one of whom was appointed by the district court.

Most direct appeals in Texas death penalty cases are researched, briefed and submitted by single attorneys. At least 57 cases (68.7%) in our sample were handled by solo practitioners, who manage one-man operations, and unlike their larger firm counterparts, may lack ready access to oversight, training, or support staff.[77] *See* Figure 5. Three defendants were represented by a single lawyer with an unknown practice type,[78] and defense attorneys in six other cases—7.1%—practiced in firms of between 2 and 5 attorneys,[79] which can face similar challenges accessing feedback and administrative assistance.[80]

74. Texas Guideline 3.1(A)(1) ("The defense team should consist of no fewer than two attorneys[.]"); ABA Guideline 4.1(a)(1) (same).
75. Tex. Code Crim. Proc. Ann. art. 26.052(j) (Vernon 2015).
76. Adrian Estrada and Manuel Velez were represented by *pro bono* counsel. Christian Olsen was represented by two appointed lawyers.
77. 49 defendants in our survey were represented by counsel who did not list the assistance of other counsel on their briefs and who, according to the State Bar of Texas, are solo practitioners: Terence Andrus, Tyrone Armstrong, Tracy Beatty, Brent Brewer, James Broadnax, Micah Brown, Tyrone Cade, Kimberly Cargill, Kosul Chanthakoumanne, Billy Coble, Raul Cortez, Obel Cruz-Garcia, Rickey Cummings, Irving Davis, Selwyn Davis, Areli Escobar, Robert Fratta, James Freeman, John Gardner, Bartholomew Granger, Gary Green, Howard Guidry, Garland Harper, Roderick Harris, Joseph Jean, Dexter Johnson, Matthew Johnson, Juan Lizcano, Daniel Lopez, Melissa Lucio, Jerry Martin, Raymond Martinez, Hector Medina, Blaine Milam, Demontrell Miller, Naim Muhammad, Travis Mullis, John Ramirez, Mark Robertson, Cortne Robinson, John Allen Rubio, Wesley Ruiz, Demetrius Smith, Roosevelt Smith, Robert Sparks, Adam Ward, and Thomas Whitaker, Christopher Wilkins, and Antonio Williams. *Find a Lawyer*, State Bar of Tex. https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&Template=/CustomSource/MemberDirectory/Search_Form_Client_Main.cfm (last visited Apr. 20, 2016) [hereinafter *State Bar of Texas Directory*]. Attorneys for defendants in eight other cases confirmed that they were solo practitioners when they handled the direct appeals included in our survey: Tilon Carter, Lisa Coleman, Paul Devoe, Milton Gobert, Randall Mays, Steven Nelson, Kwame Rockwell, and Richard Tabler. Memorandum from Amanda Marzullo to File, dated April 7, 2016 (copy on file with author).
78. Lawyers for the following defendants did not designate a practice description or type in their profiles on the State Bar of Texas website: Christopher Jackson, Mabry Landor, LeJames Norman. *See State Bar of Texas Directory*, *supra* note 77.
79. Six defendants within our study had direct appeal counsel who did not list the assistance of other counsel on their briefs and who, according to the State Bar of Texas, practice in firms with two to five lawyers: Erik Davila, Ramiro Gonzales, John Hummel, Gregory Russeau, Mark Soliz, Paul Storey, and John Theusen. *State Bar of Texas Directory*, *supra* note 77.
80. *See e.g.,* Alexander Y. Benikov, *Practice Management: The High Cost of High Overhead*, 79 Tex. Bar J. 313 (Apr. 2016) (stating that many



A second or third defense attorney represented defendants in just 18—21.6%—of the cases within our survey. Among these cases, just five—6.0%—were handled by public defender offices that have internal resources and staffing that compare to the prosecution.[81] One defendant privately retained appellate counsel,[82] and nonprofits that specialize in capital defense provided counsel on a *pro bono* basis in at least three other appeals.[83]

The nature and level of the second attorney's involvement is difficult to discern in the nine remaining cases,[84] where counsel was provided *via* the local appointment system. For example, in *Hummel v. State*, the defense brief lists a second lawyer as counsel to Mr. Hummel. According to her State Bar of Texas profile, the second lawyer was not admitted to practice in Texas when the trial court appointed counsel to represent Mr. Hummel on direct appeal: she graduated from law school in 2011, the same year that Mr. Hummel was sentenced to death, and was admitted to practice just 10 months before his brief was filed.[85] Additionally, the Tarrant County Auditor, in response to a Public Information Act request, found no record of her receiving payment from Tarrant County for her services.[86] In *Davis (Brian) v. State,* a second attorney, R.P. "Skip" Cornelius, who has extensive capital defense experience, is listed as "of counsel" on the appellant's brief.[87] While Mr. Cornelius was lead counsel for Mr. Davis' trial, neither the Harris County Courts' Administrative Office nor the Harris County Auditor's Office has a record of his appointment or payment for appellate representation.[88]

In addition to this understaffing, Texas defense attorneys are further disadvantaged by a dearth of

solo practitioners and small firms fail due to the challenges of overhead including the high cost of support staff); ABA Criminal Justice Standards, Providing Defense Services 5-1.4 & cmt (3rd ed. 1992) ("A sine qua non of quality legal representation is the support personnel and equipment necessary for professional service."), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services.authcheckdam.pdf.

81. The El Paso Public Defender Office represented Fabian Hernandez and David Renteria in their direct appeals. The Bexar County Appellate Defender Office represented Joseph Gamboa, Armando Leza, and Christopher Young in their direct appeals.

82. Ker'sean Ramey.

83. Adrian Estrada, Max Soffar, and Manuel Velez.

84. Teddrick Batiste, Donald Bess, Jaime Cole, Brian Davis, James Freeman, John Hummel, Steven Long, Christian Olsen, and Albert Turner.

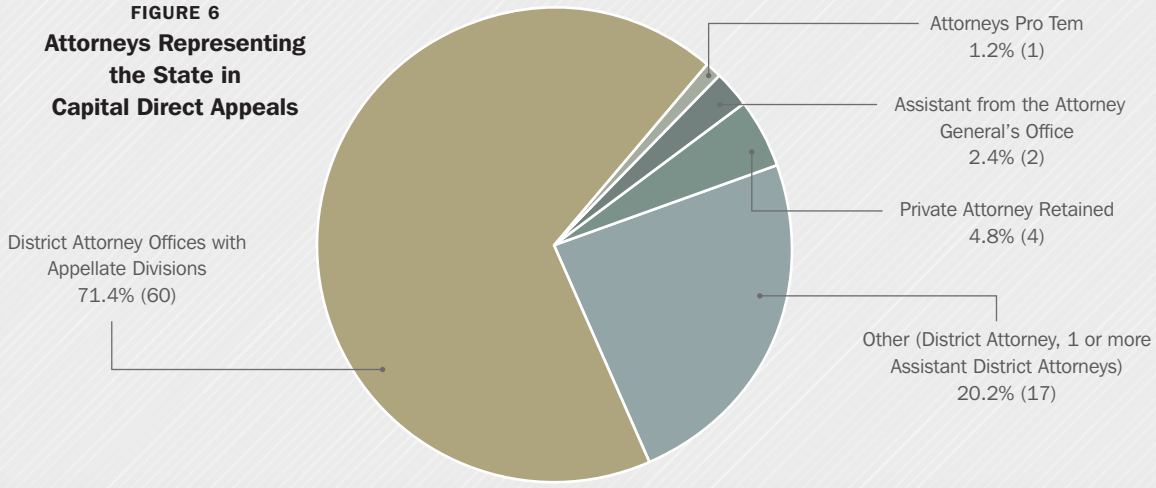
85. *State Bar of Texas Directory, supra* note 77, and Appellant's Brief on Appeal, Hummel v. State, No. AP-76,596 (Tex. Crim. App. Aug. 21, 2012).

86. Email from Stefanye V. Adkins, Legal Assistant, Tarrant County District Attorney's Office, Civil Division to Amanda Marzullo, Texas Defender Service (Apr. 11, 2016) (copy on file with author).

87. Appellant's Brief, Davis (Brian) v. State, No. AP-76,521 (Tex. Crim. App. Feb. 28, 2012).

88. Email from the Harris County Auditor's Office to Amanda Marzullo, Texas Defender Service (Apr. 20, 2015) ("Based on our records and confirmation from the Harris County District Courts Administrative Office, R. P. Cornelius was not the appellate attorney on the case.") (copy on file with author).

FIGURE 6
Attorneys Representing the State in Capital Direct Appeals



training opportunities and institutional resources. As the National Legal Aid and Defender Association recently stated in a report for the Texas Indigent Defense Commission:

> Unlike other states with centralized indigent defense delivery systems, such as a statewide public defender program, it is difficult in Texas for new attorneys hoping to do indigent defense work to gain experience under the guidance and supervision of experienced attorneys.[89]

Moreover, no single advocacy group in Texas is devoted solely to training or consulting with lawyers representing death row inmates on direct appeal. Most continuing legal education (CLE) in Texas for capital defense counsel focuses on trial and post-conviction proceedings. The last CLE program devoted exclusively to direct appeals of death penalty cases appears to have been held in 2010 at the Center for American and International Law in Plano.[90] Texas appellate lawyers deserve regular continuing education that addresses issues germane to the representation of death row inmates on direct appeal.

By contrast, prosecutors enjoy ready access to resources—*e.g.*, auxiliary staff, third-party assistance—and training opportunities. A substantial portion—71.4%—of the cases in our sample hail from urban counties where the local district attorney's office has an appellate division.[91] *See* Figure 6. In these offic-

89. National Legal Aid and Defender Association, Indigent Defense Attorney Mentoring in Texas 1 (Dec. 2015) (discussing the challenges to entering the legal profession as a defense attorney in Texas where "new prosecutors,. . . join a department of county government under the supervision of experienced attorneys" and defense lawyers "simply 'hang a shingle' and begin as a solo practitioner, learning on whatever cases they manage to land"), http://www.nlada100years.org/sites/default/files/TIDC_NLADA_mentoring_indigent_defense_attorneys.pdf.

90. Agenda, *Appellate Training/Capital Specific: A Program for the Defense*, Center for American and International Law, Plano, Tex., Nov. 12, 2010 (copy on file with author).

91. A total of 60 cases in our sample were from 12 district attorney offices whose websites listed an appellate division. *Divisions*, Bexar Cty. Dist. Att'y Office, http://www.bexar.org/1744/Divisions (last visited Jan. 3, 2016); *DA Divisions*, Cameron Cty. Dist. Att'y, http://www.cameroncountyda.com/DA-Divisions.htm (last visited Jan. 4, 2016); *Divisions*, Collin Cty. Crim. Dist. Att'y, http://collincountyda.com/divisions-2/ (last visited Jan. 7, 2016); *The Appellate Division*, Dallas Cty. Dist. Att'y. http://www.dallascounty.org/department/da/appellate_division.php (last visited Jan. 6, 2016); *About the Office*, El Paso Cty. Dist. Att'y, http://www.epcounty.com/da/about.htm (last visited Jan. 6, 2016); *Employee Directory,* Fort Bend County, Texas, http://www.fortbendcountytx.gov/index.aspx?page=570 (last visited Aug. 29, 2016) (listing John J. Harrity as Chief Appellate Prosecutor); *District Attorney Staff Directory*, Galveston Cty. Dist. Att'y, http://www.galvestoncountytx.gov/da/Pages/OfficeDirectory.aspx (last visited Jan. 6, 2015); *Contacts*, Harris Cty. Dist. Att'y Office, http://app.dao.hctx.net/OurOffice/Contacts.aspx (last visited Jan. 6, 2015); *CDA Staff*, Lubbock Cty. Crim. Dist. Att'y, http://www.co.lubbock.tx.us/egov/docs/1286048313404.htm (last visited Jan. 7, 2016); *Post-Conviction Division*, Tarrant Cty. Crim. Dist. Att'y, http://access.tarrantcounty.com/en/criminal-district-attorney/criminal-division/post-conviction.html (last visited Jan. 7, 2016); and *Divisions*, Travis Cty. Dist. Att'y, https://www.traviscountytx.gov/district-attorney/divisions (last visited Jan. 7, 2016). The McLennan County District Attorney's Office stated in its brief in Ricky Cummings' case that the chief of its appellate division was

es, supervising attorneys can assist with trial record review, a second legal opinion, editing, and provide a forum to moot the case before oral argument. They also can assign additional attorneys to complex cases. In Dallas County, for example, the number of prosecutors listed on the case brief varied among cases. Often, one assistant district attorney's name was listed as counsel of record, but as many as three different assistant prosecutors were listed on the office's briefs.[92]

Texas district attorneys also may leverage their budgets to hire external counsel or obtain assistance from state prosecutors. Private members of the bar assisted the State in at least four cases within our sample,[93] and assistants from the Attorney General's Office served as co-counsel with local prosecutors in two cases.[94] The lawyers in the latter two cases were listed on the state's brief as both assistant attorneys general and assistant district attorneys, but their Austin addresses revealed that they were not regular members of the local prosecution team.

The resource disparity between prosecutors and appellate defense counsel is more pronounced due to the Office of the State Prosecuting Attorney's (SPA) advocacy before the CCA. Established in 1923, the SPA represents the State of Texas in all proceedings before the CCA,[95] and may represent the state before the lower appellate courts at its discretion.[96] It furthers the interests of the State in individual cases, and engages in strategic litigation intended to develop case law favorable to the prosecution. The SPA lawyers—consisting of the State Prosecuting Attorney and two assistants—monitor legal developments throughout Texas and review opinions by the CCA and the intermediate appellate courts. SPA lawyers also "submit petitions, briefs and oral argument in cases of the greatest importance to the State's criminal jurisprudence; and work closely with local district and county attorneys across the State on emerging criminal law issues."[97] They appear before the CCA on a regular basis, have expertise in appellate litigation, and perhaps most important, understand the temperament of each member of the Court. By design, the SPA and its staff are equipped to zealously advocate for the State of Texas, and to "provide the highest level of legal advice and counsel to prosecu-

handling the case. State's Brief, Cummings v. State, No. AP-76,923 (Tex. Crim. App. May 1, 2014) (listing Alex J. Bell as Chief, Appellate Division). This report includes *Cumming*s in the list of cases where the district attorney's office has a special appellate division, but excludes other McLennan County cases where no specific department or division was listed as the source of counsel on the brief.

92. *Compare* State's Brief, Muhammad v. State, No. AP-77,021 (Tex. Crim. App. Feb. 3, 2015) (listing three assistant district attorneys as counsel of record on brief's cover); and State's Brief, Long v. State, No. AP-75,539 (Tex. Crim. App. Feb. 1, 2008)(listing one assistant district attorney as counsel of record on brief's cover).

93. In James Freeman's case, the State's Brief listed Robins C. Ramsey as well as Joshua W. McCowen and Kelly Siegler as Attorneys for the State of Texas. State's Brief, Freeman v. State, No. AP-76,052 (Tex. Crim. App. July 10, 2010). The address provided for Mr. Ramsey, Trinity Plaza II, Suite 900, 745 E. Mulberry, San Antonio, TX 78212, is the address for Langley & Banack, Inc. This law firm and address are also listed on Mr. Ramey's profile on the State Bar of Texas' website, indicating that he was employed in private practice at the time the brief was filed. *Locations,* Langley & Banack, http://www.langleybanack.com/locations/ (last visited July 6, 2016); Robinson C. Ramey, *State Bar of Texas Directory*, *supra* note 77. For the remaining three cases, LeJames Norman, Ramiro Gonzales, and Ker'sean Ramey, TDS obtained billing records that documented payments to retained lawyers for their services to the prosecution. State's Reply Brief, Norman v. State, No. AP-76,063 (Tex. Crim. App. May 7, 2010) (listing Jim Vollers and Robert E. Bell as Attorneys for the State); Letter from Jim Vollers, Attorney-at Law to Robert Bell, Jackson County Criminal District Attorney (Feb. 2, 2015) (enclosing an invoice for work performed in Norman v. State); Brief for the Appellee, Gonzales v. State, No. AP-75,540 (Tex. Crim. App. May 12, 2008) (listing Anton E. Hackebeil, District Attorney, 38th Judicial District, and Edward F. Shaughnessy, III as Attorneys for the State of Texas); Email from Debra Southwell, Medina County Auditor to Amanda Marzullo, Texas Defender Service (Dec. 21, 2015) (attaching an index of payments to Edward Shaughnessy for work relating to *Gonzalez v. State*); State's Brief, Ramey v. State, No. AP-75,678 (Tex. Crim. App. Jan. 2008) (listing Jim Vollers and Robert Bell as Attorneys for the State); Letter from Jim Vollers, Attorney-at-Law to Robert Bell, Jackson County Criminal District Attorney (Feb. 10, 2015) (bill for work performed in Ramey v. State).

94. *See* State's Brief, Mays v. State, No. AP-75,924 (dated Feb. 27, 2012) (listing Scott McKee, Henderson County District Attorney, and Wesley H. Mau, Assist. Attorney General/Assist. Henderson Co. District Attorney, as Attorneys for the State); State's Brief, Milam v. State, No. AP-76,379 (Tex. Crim. App. Jan. 3, 2012) (listing Michael Jimerson, Rusk County Attorney, as well as Lisa Tanner and Tomee M. Heinig as Assistant County Attorneys/Assistant Attorneys General, as Counsel for the Appellee).

95. Tex. Gov't Code Ann. § 42.001(a) (Vernon 2015) ("The court of criminal appeals shall appoint a state prosecuting attorney to represent the state in all proceedings before the court.").

96. *Id.* at §42.005 ("(a) The state prosecuting attorney may assist a district or a county attorney in representing the state before a court of appeals if requested to do so by the district or county attorney. (b) A district or county attorney may assist the state prosecuting attorney in representing the state before the court of criminal appeals.").

97. *About Us*, Office of State Prosecuting Att'y, http://www.spa.state.tx.us/about/about-us.aspx (last visited Jan. 6, 2016).

tors [.]"[98] Yet, the SPA has no defense counterpart.

The resulting institutional asymmetry leaves defense attorneys further outnumbered in appellate proceedings. For example, in *Cruz-Garcia v. State,* the Harris County District Attorney's response brief identified State Prosecuting Attorney Lisa McMinn as co-counsel,[99] which straightforwardly signaled that the two offices were working together. In two other cases, *Cade v. State,*[100] and *Martin v. State,* however, the SPA engaged in a maneuver unavailable to the defense by waiting until after the appellate issues had been joined to file post-submission briefs that effectively gave the state additional representation.

In *Cade*, the appellant argued that the trial judge improperly excluded testimony that the defendant did not pose a continuing threat to public safety during his incarceration. Texas law requires that a capital jury conclude that the defendant poses "a continuing threat to society," before considering whether to impose a death sentence.[101] Mr. Cade, in turn, asserted the trial judge should have allowed jurors to hear testimony from two witnesses who would have provided important information bearing upon this assessment: (1) an expert who would have testified that the Texas Department of Criminal Justice could contain Mr. Cade if he were incarcerated for life without parole, and (2) an academic who would have summarized his research finding that inmates convicted of intimate-partner violence—a category that included Mr. Cade —are less likely to commit acts of violence in prison than other inmates. The Dallas County District Attorney responded to these arguments by defending the trial court's decision that the witness' testimony was inadmissible under the Texas Rules of Evidence. It did not provide further support for this ruling.

It was at this point that the SPA entered *Cade,* purportedly as an *amicus curiae,* but in fact as an additional prosecutorial combatant. Although the SPA's stated purpose in filing its brief was to provide the CCA with a "re-examination of . . . cases on the future dangerousness special issue [that] assist the Court in resolving Appellant's eighth and ninth issues presented,"[102] the document was submitted under an appellate rule allowing for additional briefs by a party[103] and served as a second, more comprehensive attack on the defense's arguments for relief. The SPA *amicus* brief did not "re-examine" case law already before the court, but raised new issues concerning the propriety of the proposed testimony, arguing that the jury must decide the future dangerous question without considering the length or circumstances of a defendant's incarceration.[104]

In *Martin,* the appellant sought to overturn his conviction for capital murder "while escaping or attempting to escape from a penal institution" by arguing that his escape was complete before the decedent was killed.[105] He asserted that Texas' capital murder statute incorporates the offense of escape defined in Texas Penal Code § 38.06 and relied on CCA precedent finding that escape is not a continuing offense, but is complete upon an "unauthorized departure from custody."[106] Thus, according to Mr. Martin's theory, his escape ended when he exited the prison grounds. The Walker County Criminal District Attorney responded by contending that neither

98. *Id.*

99. State's Appellate Brief at i, Cruz-Garcia v. State, No. AP-76,703 (Tex. Crim. App. July 24, 2013).

100. *See* State Prosecuting Attorney's Post-Submission Brief as *Amicus Curiae*, Cade v. State, No. AP-76,883 (Tex. Crim. App. June 20, 2014) [hereinafter Cade *amicus curiae*].

101. *See* Tex. Code Crim. Proc. Ann. art. 37.071(b)-(g) (Vernon 2015) (providing that a jury must unanimously vote "yes" in response to the following question in order to proceed to the question of whether there is a mitigating circumstance such that the defendant should be sentenced to life without parole or death: "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society[.]").

102. Motion for Leave to File the State Prosecuting Attorney's Post-Submission Brief as *Amicus Curiae* at 1, Cade v. State, No. AP-76,883 (Tex. Crim. App. June 20, 2014).

103. *See* Tex. R. App. P. 71.4.

104. Cade *amicus curiae*, *supra* note 100, at 1 ("The future dangerousness questions ask 'whether a capital defendant would be dangerous whether in or out of prison with regard to how long this defendant would actually spend in prison if sentenced to life. Consideration of the time a defendant would spend in prison is not even proper.") (internal citations omitted).

105. Appellant's Brief at 19, Martin v. State, No. AP-76,317 (Tex. Crim. App. June 2, 2011).

106. *Id.* at 19-26 (citing Fitzgerald v. State, 782 S.W.2d 876 (Tex. Crim. App. 1990)).

the statute nor Texas common law "impose a physical boundary as an element of escape."[107] In so doing, the prosecution did not dispute the premise of Mr. Martin's argument—that the capital murder statute should be interpreted in light of the offense of escape as defined by the Legislature and the CCA.

A month later, the SPA filed a brief on behalf of the State of Texas as *amicus curiae* and argued that the word "escaping" in the capital murder statute should be read according to the "common-sense definition of escaping rather than the elements of the offense of escape."[108] This second strike was fatal to Mr. Martin's claim. The CCA applied the SPA's reasoning, holding that under "the common-sense definition of 'escape,' . . . the evidence [was] sufficient to show that appellant killed [the complainant] while escaping from" a prison, and affirmed Mr. Martin's conviction and death sentence.[109]

Traditionally, *amicus curiae* are bystanders who do not have a stake in the proceedings at hand and "whose mission is to aid the court and to act only for the personal benefit of the court."[110] *Amici* typically advocate for or against a party's positions, but by definition do not represent a party in the proceedings. Because the CCA recognizes that the SPA has the sole authority to represent the State of Texas in proceedings pending before it,[111] it had to have known that the SPA was not a bystander to either proceeding. In fact, the SPA's interest was reflected in its prayers for relief, the section of a legal pleading that summarizes the result sought. Here, the SPA stated in both briefs: "State of Texas"—a party represented by the Dallas County District Attorney and the Walker County Criminal District Attorney—"prays that [the CCA] affirm appellant's conviction and sentence for capital murder."[112] The defense in had no corresponding institutional office on its side.

The defense is understaffed on direct appeal in death penalty cases and contends with opponents with an abundance of institutional resources. *Cade* and *Martin* underscore that one of those resources–the SPA–provides the State with additional representation in appellate proceedings. To ensure fairness and balance when a defendant is facing the ultimate punishment, Texas courts should appoint two appellate lawyers to the defense team and ensure that institutional resources, such as a corollary to the SPA, are available to defense attorneys.

107. Brief for the State of Texas at 8-10, Martin v. State, No. AP-76,317 (Tex. Crim. App. Feb. 9, 2012).
108. State Prosecuting Attorney's Post-Submission Brief as *Amicus Curiae* at 2, Martin v. State, No. AP-76,317 (Tex. Crim. App. Mar. 9, 2012) [hereinafter Martin *amicus curiae*]. This brief also took issue with Mr. Martin's fourth and fifth points of error, which stemmed from a juror's negative response to a question concerning whether she, any friends or family members worked for law enforcement or a prison. In fact, the juror's husband worked as a prison guard for an 18-month period and had been stabbed in the course of this employment.
109. Martin v. State, No. AP-76,317, 2012 WL 5358862, at *5 (Tex. Crim. App. Oct. 31, 2012).
110. Burger v. Burger, 156 Tex. 584, 586 (1957).
111. *Ex parte* Taylor, 36 S.W.3d 883, 887 (Tex. Crim. App. 2001) (per curiam). *Taylor* held that the Legislature vested the SPA with the sole authority to represent the State in criminal proceedings before the CCA. Where the SPA exercises its powers by filing a petition for discretionary review, a duplicative petition from the district attorney's office that handled the matter in the lower courts is received as an *amicus curiae* brief. *Taylor* states that amicus briefs often are filed by the SPA or local prosecutors in the intermediate appellate courts and the CCA. However common this practice may be, it does not comport with traditional notions of *amici* and their appellate roles.
112. Cade *amicus curiae*, *supra* note 100, at 18; Martin *amicus curiae, supra* note 108, at 12.

B. Inadequate Attorney Screening, Case Distribution and Monitoring

Although the Texas indigent defense system was modified in 2001 to require minimum attorney qualifications for capital appointments, 15 years of experience demonstrate that the criteria fail to ensure that attorneys with the necessary skill, knowledge, and availability are appointed to direct appeals in death penalty cases. Both the Texas and ABA guidelines are clear in their directives that the state must have mechanisms for ensuring that death penalty lawyers provide high-quality representation at all stages of a defendant's case.[113] But the standards codified under Article 26.052 of the Texas Code of Criminal Procedure focus on objective criteria—*e.g.,* the number of years an attorney has practiced law, the number of appellate briefs drafted—that alone do not provide "a sufficient basis to determine an attorney's qualifications for the task of representing capital clients."[114] Factors that bear upon a lawyer's capabilities, such as his or her "skill in legal research, analysis," legal drafting and oral advocacy,[115] require qualitative assessments that are unaddressed in each local selection committee's screening and re-certification procedures. Moreover, when a qualified lawyer is assigned to an appeal, the rules do not require the appointing judge to determine whether the assignment is appropriate in light of the attorney's other obligations, and no entity is charged with monitoring the lawyer's performance.

Screening Process

Each of the nine local selection committees have established criteria for appellate counsel that closely adhere to Article 26.052's baseline requirements that each lawyer:

- is a member of the State Bar of Texas;
- exhibits proficiency and commitment to providing quality representation to defendants in death penalty cases;
- has not rendered ineffective assistance of counsel during a capital trial or appeal, unless the selection committee determines that the underlying conduct no longer accurately reflects the attorney's ability to provide effective representation;
- has at least five years of criminal law experience;
- has briefed a significant number of appeals and, in particular, for homicide and other capital or first-degree felony cases;
- has trial or appellate experience in:
  - using and challenging mental health or forensic expert witnesses; and
  - using mitigating evidence at the penalty phase of a death penalty trial.
- has participated in continuing legal education (CLE) or other criminal defense-related training about appealing death penalty cases.[116]

113. Texas Guideline 4.1(B); ABA Guideline 5.1(B).

114. American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report 159 (2013), http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf [hereinafter ABA Tex. Assessment].

115. Texas Guideline 4.1(B)(2) Qualification of Defense Counsel (Attorney "qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated: (a) substantial knowledge and understanding of the relevant state, federal and international law both procedural and substantive, governing capital cases; (b) skill in the management and conduct of complex negotiations and litigation; (c) skill in legal research, analysis, and the drafting of litigation documents; (d) skill in oral advocacy; (e) skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence. . . .").

116. Tex. Code Crim. Proc. Ann. art. 26.052(d)(3) (Vernon's 2015).

Although these threshold requirements emphasize experience relevant to assessment of a lawyer's abilities, counsel's performance is considered only when she has been found ineffective in past capital proceedings. Key information, such as the lawyer's written communications, oral advocacy, and record of success, is neither gathered nor formally considered. Among the statute's seven criteria, just one—that the applicant "exhibit proficiency and commitment to providing quality representation to defendants in death penalty"—addresses the lawyer's understanding of the law that bears on capital proceedings and her ability to present these issues to an appellate court. The rules do not require that local selection committees review a lawyer's work to assess her proficiency in death penalty jurisprudence and commitment to capital representation.

Five regions[117] implement the proficiency and commitment requirement through a referral process that renders the selection committee's assessment vulnerable to incomplete information. For example, the Seventh Administrative Judicial Region requires that the attorney receive approval from the local administrative judge in the district in which she practices.[118] Depending upon the size of the county/district or the quality of its caseload, a judge may have no firsthand knowledge of the lawyer's work. Further, a binary approval/disapproval requirement does not allow a judge to provide background information to the committee. The four other regions require references from judges and other criminal lawyers within the district.[119] Assuming that these references are contacted, the applicant's freedom to select her references means the selection committee still may lack complete information for assessing an attorney's performance.

When qualification criteria in the administrative regions deviate from the statute, they do so only with respect to certain objective metrics:

- the number of CLE hours an attorney must complete each year;[120]
- the disqualification of attorneys subject to an ineffectiveness finding in any criminal proceeding;[121]
- a specific number of past cases;[122]
- experience as counsel in a death penalty case;[123] and
- years of experience in criminal and/or appellate law.[124]

These metrics do not allow local selection committees to meaningfully assess an attorney's ability to represent a defendant facing the ultimate punishment. They warrant revision.

Selection panels in other states have established more rigorous procedures that parallel the hiring process at a law firm or public defender office. For

117. The local selection committees in the four remaining administrative judicial regions require that an attorney attest compliance with Article 26.052's requirements, and list the criminal cases she defended. Third Administrative Judicial Region, Application for Approval as Qualified Counsel in Death Penalty Cases (Jan. 1, 2013), http://www.txcourts.gov/media/587366/attyappltrial2ndchair.pdf; Fourth Administrative Judicial Region, Application/Affidavit for Appointment in Death Penalty Appeals (last visited May 17, 2016), http://www.txcourts.gov/media/614148/AppealsApplication.pdf; Fifth Administrative Judicial Region, Application for Approval as Qualified Counsel in Death Penalty Cases (Nov. 30, 2011), http://www.txcourts.gov/media/614172/attyapp.pdf; Eighth Administrative Judicial Region, Amended Standards for the Qualification of Attorneys for Appointment to Death Penalty Cases (Aug. 24, 2011), http://access.tarrantcounty.com/content/dam/main/criminal-courts/Documents/DeathPenaltyStandardQualification.pdf.

118. Seventh Administrative Judicial Region, Application To Be Placed on the List of Attorneys Qualified for Appointment in Capital Cases in which the Death Penalty Is Sought (undated), http://www.txcourts.gov/media/614217/Application_to_be_Placed_on_List_of_Qualified_Attorneys.pdf (last visited May 23, 2016).

119. Application for Placement on the Appointment List for Death Penalty Cases, First Administrative Judicial Region (April 2015), http://www.txcourts.gov/media/938331/attorney-application-for-lead-trial-and-appellate-counsel-and-second-chair.pdf; Application for Approval as Qualified Appellate Counsel in Death Penalty Cases, Second Administrative Judicial Region (May 20, 2015), http://www.mctx.org/courts/second_administrative_judicial_region/docs/Applications_for_Qualified_Counsel_in_Death_Penalty_Cases_2015.pdf; Application to be Included on the List of Attorneys Qualified for Appointment in Capital Cases in which the Death Penalty is Sought, Sixth Administrative Judicial Region (last visited Oct. 1, 2015), http://www.txcourts.gov/media/614190/DeathPenaltyApplication.pdf; and Application to be Included on the List of Attorneys Qualified for Appointment in Capital Cases in which the Death Penalty is Sought, Ninth Administrative Judicial Region (last visited Oct. 1, 2015), http://www.txcourts.gov/media/614483/application.pdf.

120. The Fourth, Fifth, and Eighth Administrative Judicial Regions.

121. The Third and Fifth Administrative Judicial Regions.

122. The Eighth Administrative Judicial Region.

123. The Fifth and Eighth Administrative Judicial Regions.

124. The Seventh and Eighth Administrative Judicial Regions.

example, the Superior Court of Maricopa County, Arizona, requires attorneys to provide writing samples, references from judges, co-counsel and opposing counsel, as well as the contact information for all non-attorney capital defense team members, and to appear for an in-person interview before they are approved for capital appointments.[125] Similarly, the Louisiana Public Defender Board requires that lawyers submit "at least two writing samples of substantial written legal work product including analysis of complex legal issues . . . and a written statement" outlining experience and training as a criminal defense advocate.[126]

In the absence of information that provides a more complete picture of an attorney's skills, the process for approving capital appellate attorneys in Texas is weighted towards those who have had the most cases, rather than those who are the most talented, knowledgeable, and committed to providing high-quality appellate representation in a death penalty case. Eligibility for capital appellate assignments should not be based on such perfunctory assessments. The addition of qualitative criteria would better ensure that death-sentenced inmates receive high-quality representation on direct appeal from skilled, knowledgeable, and available lawyers.

The Appointment Process

THE PROVISION OF QUALIFIED COUNSEL IS FURther complicated by the assignment process in Texas, which is out of step with the Texas Guidelines' call for a legal representation plan in which "counsel defending death penalty cases are able to do so *free from political* influence and under conditions that enable them to provide zealous advocacy in accordance with professional standards."[127] The Texas Code of Criminal Procedure charges district judges, who preside over capital and other felony trial proceedings,[128] with managing the local indigent defense budget. The duties include setting lawyer fee schedules for indigent defense cases, approving payments for defense services,[129] and assigning attorneys to specific cases.[130] This structure gives the convicting court control of the defense attorney's legal fees, expense reimbursements, and future employment.

Texas' systemic practice of giving the appointment and payment power to judges undermines the independence of the defense function and counsel's ability to "advanc[e] 'the undivided interests of [her] client.'"[131] Defense lawyers who depend on the court system for assignments may hesitate to criticize the trial judge in order to preserve their livelihoods. Counsel also may feel pressure to limit the hours billed for a particular case in order to control costs, move cases quickly, and curry favor with the district judge, who often is under political pressure to minimize the county's indigent defense budget.[132]

This conflict is heightened in death penalty cases because judges are not statutorily required to evenly distribute appointments among qualified counsel within an administrative judicial region.[133] For

125. MARICOPA CNTY. SUPERIOR CT., ADMINISTRATIVE ORDER NO. 2012-008: IN THE MATTER OF ADOPTING A PLAN FOR REVIEW OF APPOINTED COUNSEL 3-4 (adopted Jan. 11, 2012).

126. La. Pub. Defender Bd., Capital Defense Guidelines §915 (c) (Qualifications of Defense Counsel).

127. TEXAS GUIDELINE 2.1(C) (emphasis added).

128. TEX. CODE CRIM. PROC. ANN. art. 4.05 ("District courts and criminal district courts shall have original jurisdiction in criminal cases of the grade of felony, of all misdemeanors involving official misconduct, and of misdemeanor cases transferred to the district court[.]").

129. *See supra* notes 68 to 70 and text.

130. TEX. CODE CRIM. PROC. ANN. art. 26.052 (Vernon's 2015).

131. Polk County v. Dodson, 454 U.S. 312, 318-19 (1981) (quoting Ferri v. Ackerman, 44 U.S. 193, 204 (1979)).

132. *See, e.g.,* Emily DePrang, *Poor Judgment,* TEX. OBSERVER, Oct. 15, 2015 (reporting a defense lawyer's statements that in Harris County "official and cultural bias toward small dockets can pressure judges to appoint attorneys who clear cases quickly, regardless of the quality of counsel they provide. . . . [A] certain number of court-appointed lawyers who appear to be appointed primarily for their ability to move the docket[.] . . . The trade-off is that the judge is appointing Lawyer X to lots of cases, and in return for the appointments, Lawyer X is moving those cases, which meets the judge's objective."), https://www.texasobserver.org/poor-judgment/; *see also* AMERICAN BAR ASSOCIATION, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1 (2002) ("The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. . . . Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense."), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

133. *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(j) (Vernon's 2015)

example, of 13 cases within our study from Dallas County, 10 were handled by a single lawyer, despite an abundance of qualified lawyers within the district.[134] The First Administrative Judicial Region's list of lawyers approved for appointment in direct appeals of death penalty cases includes nine attorneys from Dallas County.[135] Meanwhile, in Tarrant County, five of the county's eight appeals were divided among two attorneys,[136] even though five lawyers were approved for direct appeal appointments at the time these cases were pending.[137]

The resulting system resurrects the concerns regarding patronage and the appearance of impropriety that in 2001 prompted the Texas Legislature to revise the appointment procedures for non-capital cases.[138] The system also runs afoul of the Texas Guidelines for capital cases,[139] the ABA's longstanding call for an independent defense,[140] and may violate state ethics rules. The Texas Code of Judicial Conduct directs judges to avoid even the appearance of impropriety. Canon 2(B) states that "[a] judge shall not allow any relationships to influence judicial conduct or judgment. A judge shall not . . . convey or permit others to convey the impression that they are in a special position to influence the judge."[141] Canon 3C(4) requires that a judge: "exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism."[142] The disproportionate allocation of death penalty cases to certain lawyers gives the appearance of judicial favoritism.[143]

In practice, the appointment process provides few assurances that qualified lawyers always are assigned to direct appeals in death penalty cases. Our survey revealed that district judges deviate from the regional lists of qualified attorneys on occasion. Unqualified lawyers were appointed to represent defendants in three cases in our sample.[144] Substitute counsel was provided in two cases and the appointment error would have remained undiscovered had the defense not drawn the issue to the courts' attention.[145]

The case of Adam Ward was particularly fraught. The appellate lawyer initially appointed by the trial judge filed a brief that raised just two issues and ignored all challenges to the administration and constitutionality of the death penalty.[146] After this filing, Mr. Ward's state post-conviction lawyer advised the CCA of appellate counsel's lack of qualifications. The CCA then directed the trial court to appoint substi-

(stating the presiding judge of the convicting court shall appoint appellate counsel as soon as practical after a death sentence is imposed, without specifying how the court is to select among the lawyers deemed qualified by the local selection committee).

134. The same lawyer represented these death row inmates from Dallas County on direct appeal: Donald Bess, James Broadnax, Gary Green, Roderick Harris, Matthew Johnson, Juan Lizcano, Hector Medina, Naim Muhammad, Mark Robertson, and Robert Sparks.

135. First Administrative Judicial Region of Texas, List of Attorneys Qualified to Represent Indigent Defendants in Death Penalty Cases as of October 12, 2015, http://www.txcourts.gov/media/1047584/death-penalty-approved-attorneys-list.pdf.

136. Tilon Carter, Lisa Coleman, and Kwame Rockwell were represented by the same attorney. Another lawyer represented Paul Storey and John Hummel.

137. Eighth Administrative Judicial Region of Texas, 8th Administrative Judicial Region Death Penalty Counsel (amended Jan. 2008) (copy on file with author).

138. *See* S.B. 7 § 6, 77th Leg., Reg. Sess. (Tex. 2001) (requiring that judges appoint attorneys to represent indigent defendants in non-capital felonies and misdemeanors from a public appointment list "using a system of rotation").

139. Texas Guideline 2(C).

140. ABA Guideline 4.1(B)(1); ABA Standing Committee on Legal Aid and Indigent Defendants, Ten Principles of a Public Defense Delivery System (2002) (Principle 1: "The public defense function, including the selection, funding, and payment of defense counsel, is independent."), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

141. Tex. Code of Judicial Conduct Canon 2(B).

142. *Id.* at 3(C)(4).

143. For a further discussion of the ethical implications of this system, *see* State Bar of Texas Committee on Legal Services to the Poor, Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas 15 (2000) [hereinafter State Bar of Tex., Muting Gideon's Trumpet].

144. John Gardner, Mabry Landor, III, and Adam Ward.

145. *See* Ward v. The Hon. Richard A. Beacom, No. WR-70,651-01 (Tex. Crim. App. Nov. 19, 2008) (denying Ward's petition for a writ of mandamus declaring the order appointing direct appeal counsel null and void because Ward's habeas counsel, his direct appeal lawyer, and the prosecution subsequently filed an agreed motion to disqualify Ward's direct appeal lawyer because he was not on the list of approved counsel); State v. Gardner, No. 219-81121-06 (219th Dist. Ct., Collin County, Tex. Mar. 24, 2008) (removing direct appeal counsel pursuant to a request by the defendant and appointing substitute counsel); Letter from John Gardner to Judge Curt Henderson, 219th District Court, Midland, Tex. (Mar. 12, 2008) (informing the trial court that his appointed direct appeal lawyer was not on the list of approved lawyers for death penalty cases).

146. Brief of Appellant at X, Ward v. State, No. AP-75,750 (Tex. Crim. App. Aug. 8, 2008) (Issues presented: (1) Whether the trial court reversibly erred in excluding the evidence of mental impairment offered through forensic psychologist Kristi Compton. (2) Whether the trial court reversibly erred in excluding evidence of mental impairment by limited the testimony of psychiatrist Dr. Heidi Vermette.) [hereinafter First Ward Brief].

tute counsel.[147] However, Mr. Ward's new lawyer filed a brief that was substantially similar to the original filing[148] and consisted of 63 pages, 35 of which contained text identical to text in the first brief. The remaining 23 substantive pages raised just three new points of error.[149] Mr. Ward's conviction and death sentence were upheld on direct appeal.[150]

In *Landor v. State,* records show that the direct appeal lawyer was approved to represent defendants in death penalty cases in 2007,[151] but was not on the Second Administrative Judicial Region's list of approved counsel when he was appointed on April 12, 2010, to represent Mabry Landor on appeal.[152] Mr. Landor's is the only case within our sample in which the direct appeal lawyer did not seek an extension of time to file an opening brief. [153] Instead, Mr. Landor's opening brief was filed a bare 15 days after the reporter's record was made available.[154] The brief raised six issues premised on Mr. Landor's purported confession and on arguments that it was improperly admitted.[155] The brief did not contest any other aspect of the merits phase of Mr. Landor's trial, nor did it take issue with any part of the sentencing trial, let alone summarize the sentencing evidence in the statement of facts.[156] Mr. Landor's conviction and sentence were upheld on direct appeal.[157]

Removal

THE ATTORNEY SCREENING AND APPOINTMENT procedures under the Texas Code of Criminal Procedure do not provide an effective mechanism for removing attorneys from local rosters when they fail to provide the high-quality representation required in capital cases. The Texas Guidelines call for an assignment system where:

> The rosters of attorneys who have been certified to accept appointments in capital cases [are] periodically reviewed to ensure that those attorneys remain capable of providing high quality legal representation. Where there is evidence that an attorney has failed to provide high quality legal representation, the attorney should not receive additional appointments and should be removed from the roster.[158]

Article 26.052 requires each local selection committee to review its list of qualified counsel on a regular basis, and obliges attorneys to submit documents demonstrating that they continue to meet local qualification criteria. However, these re-certi-

147. Order on Agreed Motion to Disqualify Appellant's Counsel on Direct Appeal, Ward v. State, No. AP-75,750 (Tex. Crim. App. Nov. 19, 2008) (per curiam).
148. *Compare* First Ward Brief, *supra* note 146; and Brief of Appellant, Adam Kelly Ward, Ward v. State, No. AP-75,750 (Tex. Crim. App. Apr. 22, 2009).
149. *Id.*
150. Ward v. State, No. AP-75,750, 2010 WL 454980, at *1 (Tex. Crim. App. Feb. 10, 2010) ("We conclude that Ward's five points of error are without merit. Consequently, we affirm the trial court's judgment.").
151. Letter from Judge Olen Underwood to Counsel (July 30, 2007) (showing that counsel was approved for appointment as appellate, first and second chair counsel in death penalty cases).
152. *Cf.* Order, State v. Landor, No. 1194597 (209th Dist. Ct., Harris County, Tex. Apr. 12, 2010) (appointing direct appeal counsel); SECOND ADMINISTRATIVE JUDICIAL REGION LIST OF APPROVED LAWYERS IN DEATH PENALTY CASES (Mar. 23, 2010) (copy on file with author); and SECOND ADMINISTRATIVE JUDICIAL REGION LIST OF APPROVED LAWYERS IN DEATH PENALTY CASES (Mar. 10, 2011) (copy on file with author).
153. Tex. R. App. P. 38.6(b) (requiring that the appellant's brief is filed no later than 30 days after the clerk's and reporter's record are submitted).
154. *Landor v. State*, TEX. COURT OF CRIMINAL APPEALS, http://www.search.txcourts.gov/Case.aspx?cn=AP-76,328&coa=coscca (last visited July 6, 2016) (stating that the court reporter's record was received on Aug. 17, 2010 and the appellant's brief was filed on Sept. 1, 2010). The trial transcripts in this case were estimated to be 3,500 to 4,000 pages. Letter from Valdeane Wainwright, Official Court Reporter, 209th District Court to Abel Acosta re: Mabry J. Landor (May 18, 2010) ("The trial was 21 days including *voir dire* and is approximately 3500-4000 pages in length."). The CCA affirmed Mr. Landor's conviction and sentence on direct appeal. Landor v. State, No. AP-76,328, slip op. at 1 (Tex. Crim. App. June 29, 2011) (italics added).
155. Appellant's Brief at 2-4, Landor v. State, No. AP-76,328 (Tex. Crim. App. Sept. 1, 2010) (Point of Error 1 – Appellant's uncontroverted allegations of coercion rendered his custodial statement inadmissible as a matter of law; Point of Error 2 – Exclusion of testimony concerning coercion by the police deprived appellant of his due process right to a fair opportunity to present his defense; Point of Error 3 – Exclusion of testimony concerning coercion by the police violated appellant's right to offer evidence before the jury as to the voluntariness of his confession; Point of Error 4 – Appellant suffered egregious harm as a result of the omission of a general instruction on voluntariness under Article 38.22(6) of the Code of Criminal Procedure; Point of Error 5 – Appellant suffered egregious harm as a result of the omission of a specific exclusionary-rule instruction under Article 38.23(a) of the Code of Criminal Procedure; Point of Error 6 – Appellant was denied effective assistance of counsel at the guilt phase of his trial).
156. *Id.* at 5-29.
157. Landor v. State, No. AP-76,328, slip op. at 1 (Tex. Crim. App. June 29, 2011) (not designated for publication) ("Appellant raises six points of error. Finding no reversible error, we affirm the conviction and sentence.").
158. TEXAS GUIDELINE 6.1(C).

fication procedures replicate an initial application process that is insufficient to assess attorney performance. For example, when the CCA found that two lawyers had inadequately briefed at least one issue in a capital direct appeal, both lawyers continued to be assigned to death penalty cases.[159] By and large, attorneys are removed from a local roster only if they are found ineffective in a death penalty proceeding or fail to fulfill the region's CLE credit requirement. Neither of those grounds for disqualification constitutes an adequate quality control.

Under the standard articulated under *Strickland v. Washington*, a lawyer is ineffective when her performance falls below an objective standard of reasonableness and there is a reasonable probability that, had counsel performed competently, the outcome would have been different.[160] This standard gives substantial deference to the lawyer's work and is triggered solely when counsel utterly fails in her responsibilities and the defendant can meet the high burden of showing prejudice.[161] Moreover, because an ineffectiveness finding too often occurs years after counsel's representation, it does not serve as a prompt basis for screening unqualified appellate lawyers from death penalty defense rosters.

159. In Storey v. State, No. AP-76,018, 2010 WL 3901416, at *11 (Tex. Crim. App. Oct. 6, 2010), the CCA declined to address an issue raised in the appellant's brief because it was inadequately briefed. Mr. Story's appellate attorney was subsequently appointed to represent death row inmates John Hummel and Anthony Soliz in the direct appeals of their death penalty cases. *See Hummel v. State,* Tex. Court of Criminal Appeals, http://www.search.txcourts.gov/Case.aspx?cn=AP-76,596&coa=coscca&p=1 (last visited July 6, 2016) (stating that Mr. Hummel was sentenced to death around July 18, 2011); and *Soliz v. State*, Tex. Ct. Crim. App , http://www.search.txcourts.gov/Case.aspx?cn=AP-76,768&coa=coscca (last visited July 6, 2016) (stating that Mr. Soliz was sentenced to death around April 5, 2012). The CCA also found that issues were insufficiently briefed in both Messrs. Hummel and Soliz's appellate briefs. Soliz v. State, 432 S.W.3d 895, 900-01 (Tex. Crim. App. 2014); Hummel v. State, No. AP-76,596, 2013 WL 6123283, at *6 (Tex. Crim. App. Nov. 20, 2013). Further, while the CCA found that appellant improperly briefed issues in Lizcano v. State, No. AP-75,879, 2010 WL 1817772, at *22 (Tex. Crim. App. May 5, 2010) and Sparks v. State, No. AP-76,099, 2010 WL 4132769, at *26-27 (Tex. Crim. App. Oct. 20, 2010), appellate counsel for Messrs. Lizcano and Sparks subsequently was appointed to represent a number of death row inmates on direct appeal, including Roderick Harris. Order Appointing Counsel on Appeal, State v. Harris, No. F09-00409-Y (Crim. Dist. Ct. 7, Dallas County, Tex. May 23, 2013). The CCA later found that an issue was improperly presented in Mr. Harris's appellate brief. Harris v. State, No. AP-76,810, 2014 WL 2155395, at *19 (Tex. Crim. App. May 21, 2014). Both lawyers remain on their region's list of counsel qualified to represent indigent defendants in death penalty proceedings. First Administrative Judicial Region, List of Attorneys Qualified to Represent Indigent Defendants in Death Penalty Cases 4 & 6 (Feb. 24, 2016), http://www.txcourts.gov/media/1047584/death-penalty-approved-attorneys-list.pdf; Eighth Administrative Judicial Region, List of Death Penalty Approved Attorneys (eff. Oct. 1, 2015).

160. 466 U.S. 668 (1984).

161. Patrick S. Metze, *Speaking Truth to Power: The Obligation of the Courts to Enforce the Right to Counsel at Trial*, 45 Tex. Tech L. Rev. 163, 215 (2012) (explaining how the two-prong test enumerated under *Strickland* requires a showing that counsel's deficient performance yielded a result that "would . . . shock the conscience of the observer").

C. Inadequate Attorney Caseload Control and Compensation

Because Texas relies on the appointment of lawyers in private practice to provide representation in all direct appeals of death penalty cases, it is proper to inquire whether these lawyers have enough time and money to provide high-quality representation to their clients. Underfunded assigned counsel systems incentivize high caseloads, and leave attorneys without sufficient time to allocate to each client's case.[162] Our evaluation of caseloads and compensation reveals significant systemic deficiencies that make it difficult, if not impossible, for appointed counsel to provide effective representation in direct appeals of death penalty cases.

The Role of Caseload Management

Even the most skilled and dedicated attorneys cannot provide competent and zealous representation if they do not have enough time to devote to each case. When caseloads are not controlled, attorneys "are forced to choose among their clients, spending their time in court handling emergencies and other matters that cannot be postponed. Thus, they are prevented from performing such essential tasks as conducting client interviews, performing legal research,"[163] reviewing the trial record and preparing an appellate brief. It is with this harm in mind that the Texas Guidelines explicitly call upon the state to establish effective mechanisms "to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation."[164]

Caseload management is particularly important in the context of capital direct appeals, which absorb an exorbitant portion of an attorney's time. Time studies demonstrate that direct appeals in death penalty cases are far more work intensive than the average appellate effort.[165] Defense attorneys in other jurisdictions have been found to spend between 500 and 1,000 hours preparing and presenting a capital direct appeal.[166] Assuming that a lawyer works 2,087 hours per year in compliance with federal standards,[167] the time needed for one capital direct appeal constitutes one-quarter to one-half of a lawyer's annual workload. This is consistent with Nebraska's caseload

162. For a general discussion of inadequate defense funding and its impact on the public defense system see National Association of Criminal Defense Lawyers, Gideon at 50-Part 1 - Rationing of Justice: The Underfunding of Assigned Counsel Systems (2013), https://www.nacdl.org/gideonat50/.

163. The Constitution Project, Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel 65 (2009), http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf.

164. Texas Guideline 5.1 (Workload).

165. National Advisory Commission on Criminal Justice Standards and Goals: Courts 276 (1973) (recommending that a single lawyer handle no more than 25 direct appeal cases in a year). As the Constitution Project stated in a 2009 report, these standards are disjunctive and cumulative. An individual attorney's pending caseload should be lower than these figures.

166. *See* Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences,* 43 Buff. L. Rev. 329, 375 (1995) (estimating that hours billed on direct appeals average between 700 and 1,000 hours); *see also* Washington State Bar Association, Final Report of the Death Penalty Subcommittee of the Committee on Public Defense 20 (Dec. 2006), http://www.wsba.org/~/media/Files/WSBA-wide%20Documents/wsba%20death%20penalty%20report.ashx (reporting that during the period from 1996 to 2005, defense attorneys billed between 472 and 1375 hours for capital direct appeals), and Urban Institute, The Cost of the Death Penalty in Maryland 52 (Mar. 2008), http://www.deathpenaltyinfo.org/CostsDPMaryland.pdf (stating that defense attorneys spend on average 600 hours on a capital direct appeal).

167. *See Fact Sheet: Computing Hourly Rates of Pay Using the 2,087-Hour Divisor*, U.S. Office of Pers. Mgmt, https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/computing-hourly-rates-of-pay-using-the-2087-hour-divisor/ (last visited Oct. 5, 2015). Texas' weighted caseload study for non-capital cases also uses the 2,087-hour work year for assessing attorney workload. *See* Public Policy Research Institute, Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission, Pursuant to HB 1318, 83rd Legislature 29 & n.68 (2014), http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf [hereinafter TIDC, Texas Caseload Report].

standards, which limit a direct appeal lawyer's workload to no more than three cases at a given time,[168] and aligns with the Spangenberg Group's recommendation that attorneys handle no more than three capital direct appeal cases per year.[169]

Texas' assigned counsel system does not contain any mechanism for limiting attorney workloads. When district court judge select appellate lawyers to represent death-sentenced defendants, they do so without formal reports regarding the attorneys' contemporaneous commitments.[170] In locales where judges pay careful attention to case assignments, they still possess only partial information. Texas defense lawyers frequently receive appointments across county, district and administrative judicial regions in addition to representing fee-paying clients. Without knowledge of counsels' then-existing caseloads, district judges cannot determine whether the lawyers they select have the necessary time and resources to provide high quality representation to the death-sentenced defendants when appointing them to capital direct appeals.

Caseload management is left to the discretion of individual attorneys. The Texas Disciplinary Rules of Professional Conduct[171] and the Texas Guidelines[172] direct lawyers to refuse representation when they cannot devote sufficient time to the research and preparation of a client's case. However, refusing appointed cases often runs counter to an attorney's pecuniary interests. This is especially true when lawyers are subject to flat fees and to presumptive fee caps. When such payment schemes are in place, as they are in some Texas counties, lawyers are incentivized to accept a larger number of appointments and minimize the time spent on each case.

Indeed, attorney billing records show that capital direct appeal lawyers in Texas spend far less time on their cases than their counterparts in other states. Payment requests in the 55 cases where complete records are available[173] demonstrate that lawyers billed for between 72.1[174] and 535.0[175] hours of work for each capital direct appeal. And the average (mean) amount of time spent was a mere 275.9 hours per case.[176] These low figures reflect how the current appointment system incentivizes attorneys to accept multiple cases at low rates while risking the effective representation of their clients. As one attorney wrote in his request for payment, devoting the necessary time to a capital direct appeal often entails a substantial hardship for assigned counsel:

168. U.S. Department of Justice, Compendium of Standards for Indigent Defense Systems Vol. III: Standards for Capital Case Representation E3 (2000).

169. Nat'l Ctr. for State Courts & Spangenberg Group, Workload and Productivity Standards: A Report to the Office of the State Public Defender 82-93 (1989) (assigning capital direct appeal cases nine work credit units and recommending that experienced staff attorneys handle no more than 26 work credit units a year).

170. Legislation passed in 2013, H.B 1318, requires that each county report the number of appointments each attorney receives in its district. However, this information is provided at the end of the fiscal year, after most cases have been resolved, and typically includes only the cases for which payment has been issued.

171. Tex. Disc. R. Prof'l Conduct 1.1 & cmt. (outlining a lawyer's obligation to refuse or discontinue where she is incapable of furnishing competent representation—considering the complexity of the legal issues at stake and the attention and preparation the engagement would require).

172. Texas Guideline 9.3 (Obligations of Counsel Respecting Workload) ("A. Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high quality representation in accordance with these Guidelines. . . . C. In the event that counsel's caseload becomes overextended after acceptance of a death penalty case, so that reasonable time is not available to properly complete the tasks necessary for providing maximum quality representation, counsel should notify the court and request additional legal assistance, or seek to withdraw, or take steps to reduce other caseload matters which conflict with his death penalty representation.").

173. Full itemized billing statements were available in the following cases: Douglas Armstrong, Teddrick Batiste, Donald Bess, Brent Brewer, James Broadnax, Micah Brown, Tyrone Cade, Kimberly Cargill, Jaime Cole, Raul Cortez, Obel Cruz-Garcia, Rickey Cummings, Erick Davila, Irving Davis, Areli Escobar, Robert Fratta, James Freeman, Milton Gobert, Gary Green, Howard Guidry, Garland Harper, Roderick Harris, John Hummel, Christopher Jackson, Joseph Jean, Dexter Johnson, Matthew Johnson, Mabry Landor, Juan Lizcano, Daniel Lopez, Jerry Martin, Raymond Martinez, Randall Mays, Hector Medina, Naim Muhammad, Steven Nelson, Mark Robertson, Cortne Robinson, Kwame Rockwell, Rosendo Rodriguez, Wesley Ruiz, Demetrius Smith, Mark Soliz, Robert Sparks, Paul Storey, Richard Tabler, John Thuesen, Albert Turner, and Antonio Williams. Voucher statements in six other cases stated the amount of time expended on legal services, but did not include an itemized list of attorney time: Tilon Carter, Billie Coble, Lisa Coleman, Paul Devoe, LeJames Norman, and Roosevelt Smith. Attorney billing statements for Travis Mullis' case were excluded from this question.

174. Attorney Fee Voucher, State v. Lopez, No. 09-CR-0787-B (117th Dist. Ct., Nueces County, Tex. June 2, 2011).

175. Requests for Payment by Appointed Counsel, Harris v. State, No. F09-00409 (Crim. Dist. Ct. 2, Dallas County, Tex. Apr. 24, 2013-Aug. 18, 2014).

176. These time estimates do not include any time billed for work performed prior to the jury verdict in cases where counsel was appointed during the pendency of the trial.

> Although I have itemized over 300 hours of work relating to the appeal, the actual number of hours expended was greater.
>
> The Court of Criminal Appeals apparently expects counsel to stop other work and tend to the preparation of the brief. I base this on several comments made by the Court threatening to issue a contempt citation if I did not timely complete the brief. I could have easily used another year to prepare this brief. I would have preferred to maintain my practice and a stream of income, while preparing the brief on evenings and weekends.[177]

Effective case management requires workload controls that assess at the time of appointment whether an attorney is able to take on the direct appeal of a death penalty case. Lawyers also should not be incentivized to minimize the time spent on the representation of their condemned clients.

Payment Structures

Nearly every county fails to compensate direct appeal lawyers for "the actual time and service [they] perform[] at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel[.]"[178] The most common hourly rate in our study, $100,[179] was inadequate when the State Bar of Texas conducted a cost study more than 15 years ago.[180] According to the study, lawyers in the year 2000 spent an average of $71.36 per hour in overhead, and charged an average hourly rate of $135.98 for non-capital retained cases.[181] Although the State Bar has not updated its study, a federal price index calculator shows that average lawyer overhead would have been inflated to $78.28 per hour in 2004, when the first lawyer was appointed in our survey,[182] and $98.22 in 2015.[183] To have kept pace with hourly overhead and ensure some profit for the court-appointed lawyer, the average non-capital hourly fee should have been inflated to $149.17 per hour in 2004 and to $197.16 in 2015.[184] Because hourly fees for appointed counsel have not kept pace with inflation, lawyers who accepted appointment in death penalty appeals between 2004 and 2015 at a $100 hourly rate would have operated at a profit margin of $21.72 per hour in 2004 that declined to $1.78 per hour in 2015.

Attorney compensation for death penalty appeals varies dramatically among jurisdictions.

Our survey revealed that total legal fees ranged from $10,041.38 to $80,025[185] for a death penalty appeal and that indigent defense plans heightened county and regional fee differences. For example, Dallas, Nueces, and Tarrant counties pay lawyers hourly rates ($125 to $225) without any presumptive fee cap,[186] a compensation structure that allows lawyers to realize some profit, however marginal, while allocating sufficient time to their cases. Within our survey defense attorneys billed for more than 400 hours of work in just 11 cases,[187] seven of which

177. Letter from defense counsel to Hon. Travis Bryan, III, 272nd Dist. Ct., re: State v. John Thuesen, No. 09-02136-CRF-272 (Jan. 5, 2012) (copy on file with author).
178. Texas Guideline 8.1(B).
179. This rate was paid in 24 cases: Terence Andrus, Teddrick Batiste, Kimberly Cargill, Tilon Carter, Obel Cruz-Garcia, Rickey Cummings, Areli Escobar, Robert Fratta, Howard Guidry, Garland Harper, Christopher Jackson, Joseph Jean, Dexter Johnson, Mabry Landor, Raymond Martinez, Cortne Robinson, Rosendo Rodriguez, Demetrius Smith, Roosevelt Smith, Paul Storey, John Thuesen, Albert Turner, Adam Ward, and Antonio Williams.
180. State Bar of Tex., Muting Gideon's Trumpet, *supra* note 143, at 15.
181. *Id.*
182. Notice of Trial and Appellate Counsel for Defendant, State v. Beatty, No. 241-0978-04 (241st Dist. Ct., Smith County, Tex. Aug. 27, 2004).
183. *See CPI Inflation Calculator*, U.S. Bureau of Labor Statistics, http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=135.98&year1=2000&year2=2016 (last visited April 16, 2016).
184. *Id.*
185. *Cf.* Request for Payment by Appointed Counsel, State v. Harris, No. F09-00409 (Crim. Dist. Ct. 7, Dallas County, Tex. May 2013-Sept. 2014); and Request for Payment for Services Rendered as Court Appointed Counsel, State v. Gobert, No. 06-904006 (331st Dist. Ct., Travis County, Tex. Apr. 4, 2011).
186. *See, e.g.,* Request for Payment by Appointed Counsel, State v. Muhammad, F11-00698 (204th Dist. Ct., Dallas County, Tex. May 15, 2014) (approving payment of attorney fees at the rate of $150 per hour); Capital Defense Claim for Fee Payment/ Expenses, State v. Davila, No. 1108359D (Crim. Dist. Ct. 1, Tarrant County, Tex. July 10, 2010) (approving an attorney fee that was based on a rate of $150 per hour); Attorney Fee Voucher, State v. Lopez, No. 09-Cr0787-B (117th Dist. Ct., Nueces County, Tex. Sept. 2, 2011) (explaining that an additional payment was necessary because the Fifth Administrative Judicial Region guidelines provide for an hourly fee of $200).
187. Requests for Payment by Appointed Counsel, State v. Johnson, No. F12-23749-W (363rd Dist. Ct., Dallas County, Tex. 2014-2015) (billing for 433 hours of work); Requests for Payment by Appointed Counsel,

hailed from Dallas County and were handled by the same lawyer.[188]

Meanwhile, several counties continue to pay flat fees or to limit compensation for direct appeals of death penalty cases. Neither the flat fees nor the fee caps are rooted in time estimates for conducting such representation. According to indigent defense plans posted on the Texas Indigent Defense Commission website, 11 counties pay attorneys flat fees ranging from $3,000 to $12,500 for a direct appeal in a death penalty case.[189] If an attorney works 500 hours on the appeal—a figure at the low end, according to other jurisdictions[190]— a flat fee of $12,500 equals $25 an hour, while a $3,000 fee equals $6 an hour. In both instances, the lawyer would earn well below the minimum wage[191] and operate at a substantial deficit if her hourly overhead met the state average of $98.22/hour. Twenty-seven other counties[192] pay an hourly rate between $70 and $100, for a maximum of $5,000 to $15,000 per death penalty appeal.[193] Under these payment schemes, an attorney ceases to be paid after expending less than half the expected minimum time on the appeal. An attorney who is paid $70 per hour will hit a $15,000 billing maximum after 214 hours. Such fee limits ignore the research regarding the time necessary to bring a direct appeal in a death penalty case and penalize lawyers who recognize that high-quality representation requires much more time than these capped compensation schemes reimburse.

How Caseloads Impact Representation

As the State Bar of Texas has observed, "lawyers are human and will respond to the very same economic realities that affect those employed in other lines of work."[194] Flat fees and presumptive caps encourage defense lawyers to accept a higher volume of cases and to reduce the hours devoted to each client.

Our review shows that direct appeal lawyers in death penalty cases assume extraordinary workloads that cannot be handled competently by a single lawyer. Defense counsel filed one or more motions for an extension of time to file the appellant's

Harris v. State, No. F09-00409 (Crim. Dist. Ct. 2, Dallas County, Tex. Apr. 24, 2013-Aug. 18, 2014) (requesting payment for 535 hours of work); Requests for Payment for Services Rendered, State v. Escobar, No. DC-093301250 (167th Dist. Ct., Travis County, Tex. 2013-2014) (requesting payment for 422.5 hours of work); Attorney Fees Expense Claims, State v. Cole, No. 1250754 (230th Dist. Ct. Harris County, Tex. 2012-2014) (submitting statements for a total of 403.5 hours of work); Defense Claims for Fee Payment, State v. Rockwell, No. 1195088, (Crim. Dist. Ct. 4, Tarrant County, Tex. 2012-2014) (submitting a request for payment for 414.5 hours of work); Attorney Fees Expense Claims, State v. Armstrong, No. CR-2095-06 (370th Dist. Ct., Hidalgo County, Tex. 2006-2013) (billing for 423 hours of work); Requests for Payment by Appointed Counsel, State v. Medina, No. F07-32923 (282nd Dist. Ct., Dallas County, Tex. 2008-2014) (billing 448.5 hours for the appeal); Requests for Payment by Appointed Counsel, State v. Broadnax, No. F08-24667 (Crim. Dist. Ct. 7, Dallas County, Tex. 2011-12) (requesting payment for 420 hours of work); Appointed Counsel Hourly Worksheets, State v. Turner, No. 54233 (268th Dist. Ct., Fort Bend County, Tex. 2011-2012) (submitting payment requests for a total of 452.25 hours of work); Requests for Payment by Appointed Counsel, State v. Green, No. F09-59380 (282nd Dist. Ct., Dallas County, Tex. 2011-2012) (billing for 508.3 hours of work); and Request for Payment by Appointed Counsel, State v. Robertson, No. F89-85961 (Crim. Dist. Ct. 5, Dallas County, Tex. 2009-2010) (billing for 476 hours of work).

188. James Broadnax, Gary Green, Roderick Harris, Matthew Lee Johnson, Juan Lizcano, Hector Medina, and Mark Robertson were represented by the same lawyer. Two other defendants, Jaime Cole and Albert Turner, in the group of 12 cases in which over 400 hours were billed were represented by the same attorney.

189. Anderson, Brazos, Calhoun, Chambers, DeWitt, Goliad, Hardin, Jackson, Jefferson, Refugio, and Victoria. Although Brazos County's attorney fee schedule lists a flat fee for the appeal of capital felony convictions. Billing records from *Thuesen v. State*, which concerned a Brazos County conviction, reflect that defense counsel was paid an hourly rate. Billing records from the other Brazos County case in our survey, *Olsen v. State*, were unavailable.

190. *See supra* notes 166 to 169 and text.

191. *Minimum Wage*, U.S. Dep't of Labor, https://www.dol.gov/general/topic/wages/minimumwage ("The federal minimum wage for covered nonexempt employees is $7.25 per hour effective July 24, 2009.") (last visited Apr. 18, 2016).

192. Atacosta, Bandera, Bexar, Cass, Carson, Cherokee, Childress, Collingsworth, Donley, Duval, Edwards, Falls, Frio, Gillespie, Hall, Jim Hogg, Johnson, Karnes, Kendall, Kerr, Kimble, La Salle, McCullough, Mason, Menard, Robertson, Starr, and Wilson. Although Johnson County's indigent defense plan caps a direct appeal lawyer's compensation in death cases at $15,000, an attorney handling a case from this jurisdiction applied for and was paid approximately $30,000 for his services. *See* Johnson County, Third Amended Compensation of Court Appointed Counsel and Related Expenses Pursuant to Articles 26.05 and 26.052, Texas Code of Criminal Procedure, http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=165; and Requests for Defense Counsel Payment, *State v. Soliz,* F45059 (413th Dist. Ct., Johnson County, Tex. 2013-2015).

193. Harris County, the jurisdiction with the highest frequency of death sentences in Texas, is an anomaly. Its attorney fee schedule states that direct appeal lawyers are paid $100/hour with a presumptive cap of 180 hours. Harris County Auditor's Office, Attorney Fees Claim Form (rev. Sept. 14, 2015), http://tidc.tamu.edu/IDPlanDocuments/Harris/Harris%20District%20Court%20Attorney%20Fee%20Schedule.pdf. However, direct appeal lawyers handling Harris County cases in our survey billed and received an average (mean) $25,788 per case.

194. State Bar of Tex., Muting Gideon's Trumpet, *supra* note 143, at 14.

brief or a motion for rehearing in every case in our study except two.[195] The majority of these motions, 68.3%, demonstrated that the defense counsel had difficulty providing effective representation because of obligations to other clients.[196] Lawyers reported overlapping briefing deadlines[197]—*e.g.,* one attorney reported having had six briefs due in the 30 preceding days[198]—stacked trial schedules[199]— *e.g.,* one lawyer tried seven felony jury trials, including two non-death-penalty capital murder cases, while preparing his client's brief[200]—and handling multiple death penalty cases at the same time.[201]

195. Travis Mullis waived his right to counsel on direct appeal, thus no extension motion was filed in his case. Counsel for Mabry Landor did not move to extend the deadline to file the appellant's brief. The brief in this case was filed 15 days after the court reporter's record was received and filed by the CCA. *See Landor v. State*, TEX. COURT OF CRIMINAL APPEALS, http://www.search.txcourts.gov/Case.aspx?cn=AP-76,328&coa=coscca (last visited July 6, 2016) (stating that the court reporter's record was received on Aug. 17, 2010 and the appellant's brief was filed on Sept. 1, 2010). The trial transcripts in this case were estimated to be 3,500 to 4,000 pages. Letter from Valdeane Wainwright, Official Court Reporter, 209th District Court to Abel Acosta re: Mabry J. Landor (May 18, 2010) (copy on file with author) ("The trial was 21 days including *voir dire* and is approximately 3500-4000 pages in length."). The CCA affirmed Mr. Landor's conviction and sentence on direct appeal. Landor v. State, No. AP-76,328, slip op. at 1 (Tex. Crim. App. June 29, 2011).

196. Terence Andrus, Douglas Armstrong, Tracy Beatty, Donald Bess, Brent Brewer, Micah Brown, Tyrone Cade, Kimberly Cargill, Tilon Carter, Kosul Chanthakoummane, Billie Coble, Jaime Cole, Lisa Coleman, Raul Cortez, Obel Cruz-Garcia, Rickey Cummings, Erik Davila, Brian Davis, Irving Davis, Paul Devoe, Areli Escobar, Robert Fratta, James Freeman, Joseph Gamboa, John Gardner, Milton Gobert, Ramiro Gonzales, Bartholomew Granger, Gary Green, Howard Guidry, Garland Harper, Roderick Harris, Fabian Hernandez, John Hummel, Joseph Jean, Dexter Johnson, Armando Leza, Juan Lizcano, Steven Long, Daniel Lopez, Melissa Lucio, Raymond Martinez, Hector Medina, Blaine Milam, Demontrell Miller, Steven Nelson, Christian Olsen, Ker'sean Ramey, David Renteria, Cortne Robinson, Kwame Rockwell, Wesley Ruiz, Demetrius Smith, Roosevelt Smith, Mark Soliz, Robert Sparks, Paul Storey, Richard Tabler, Albert Turner, Adam Ward, Christopher Wilkins, Thomas Whitaker, Antonio Williams, and Christopher Young.

197. Appellant's Motion to Extend Time for Filing a Motion for Rehearing, Brewer v. State, No. AP-76,378 (Tex. Crim. App. Dec. 12, 2011) [hereinafter Brewer Extension Motion]; Appellant's Motion for Extension of Time to File Motion for Rehearing at 2, Lucio v. State, No. AP-76,020 (Tex. Crim. App. Sept. 29, 2011) (requesting an extension due to the attorney's obligations in another appeal); Motion for Extension of Time to File Brief on the Merits at § III, Leza v. State, No. AP-76,157 (Tex. Crim. App. Nov. 17, 2009) (outlining several appellate case commitments); Motion for Extension of Time to File Appellant's Brief at § III, Gamboa v. State, No. AP-75,635 (Tex. Crim. App. Oct. 2, 2009) (outlining defense counsel's commitments in other appellate cases); Appellant's First Motion for Extension of Time to File Brief at § II, Tabler v. State, No. AP-75, 677 (Tex. Crim. App. July 10, 2008) (stating that counsel was unable to meet the filing deadline because she had "[a] cert. perition due in a murder case in the United States Supreme Court on July 1; A writ of habeas corpus that had to be filed to beat the AEDPA deadline; Numerous discovery deadlines . . . as well as other cases" on her docket); Appellant's Motion for Extension of Time to File Brief on the Merits at § III, Carter v. State, No. AP-75,603 (Tex. Crim. App. May 16, 2007) ("An extension of time is necessary because counsel has been inundated with appellate work in other pending appeals and trial court settings[.]"); Motion to Extend Time for Filing Appellant's Brief at § V, Long v. State, No. AP-75, 539 (Tex. Crim. App. May 17, 2007) (stating that during the previous 30 days, the appellant's lawyer filed appellate briefs in four cases, a petition for discretionary review in one case, an application for a writ of habeas corpus in a non-capital case, and an application for federal habeas corpus relief); Motion to Extend Time to File Appellant's Brief at § III, Ramey v. State, No. AP-75,678 (Tex. Crim. App. Sept. 19, 2007) (stating that an extension was necessary because counsel was previously working on an appellate brief for another case and was recalled by the U.S. Navy to conduct an investigation into possible violations of the Uniform Code of Military Justice).

198. Brewer Extension Motion, *supra* note 197, at § II.

199. First Motion for Extension of Time to File Brief for Appellant, Andrus v. State, No. AP-76,335 (Tex. Crim. App. Dec. 9, 2013) ("counsel has been involved in trial; and additional and separate appellate cases"); Appellant's Motion for Extension of Time to File Brief at 2, Jean v. State, No. AP-76,601 (Tex. Crim. App. Mar. 27, 2012) ("the undersigned has a number of capital murder cases pending during 2012 and 2013 which will require continuing investigation and preparation . . . including a non-death capital appeal"); Third Motion for Extension of Time to File Appellant's Brief, Death Penalty Case at 2, Lopez v. State, No. AP-76,327 (Tex. Crim. App. May 17, 2011) (describing the defense counsel's work in a three week federal trial that absorbed most of his time from March 1, 2011 through April 20, 2011); Second Motion for Extension of Time to File Appellant's Brief at § V, Davila v. State, No. AP-76,105 (Tex. Crim. App. June 1, 2010) (outlining defense counsel's exorbitant workload despite declining appointments in order to devote maximum time to Mr. Davila's case); Motion for an Extension of Time to File Appellant's Brief, Fratta v. State, No. AP-76,188 (Tex. Crim. App. Dec. 9, 2009) (stating that defense counsel was on trial from Nov. 12 to Nov. 24, 2009 and was preparing to begin another trial set for Dec. 7, 2009); Motion for Extension of Time to File Appellant's Brief, Gardner v. State, No. AP-75,582 (Tex. Crim. App. Oct. 30, 2008) (Counsel required an extension due to a "heavy docket schedule in both criminal and civil matters."); Appellant's Motion for Extension of Time to File Brief, Johnson (Dexter) v. State, No. AP-75,749 (Tex. Crim. App. Nov. 4, 2008) [hereafter Johnson Extension Motion]; Appellant's Motion for Extension of Time to File Brief at § III, Smith (Roosevelt) v. State, No. AP-75,793 (Tex. Crim. App. Aug. 4, 2008) (stating that counsel had obligations in other cases including five recently filed appellate briefs, two state capital murder (trial) cases, and three cases pending in federal court); Appellant's Motion for Extension of Time to File Appellate Brief at § VIII, Smith (Demetrius) v. State, No. AP-75,479 (Tex. Crim. App. Aug. 3, 2007) (outlining a vigorous felony trial schedule which included a murder trial that was carried –day-to-day during the preceding five weeks even though the defense notified the trial judge that the case was "seriously impairing counsel's ability to work on a death penalty appeal").

200. Johnson Extension Motion, *supra* note 199, at ¶¶ 5-6. This motion was denied. Clerk's Notice, Johnson (Dexter) v. State, No. AP-75,749 (Tex. Crim. App. Nov. 4, 2008) ("The Court has this day DENIED the Appellant's motion for extension of time to file appellant's brief." (emphasis in original).

201. Motion for Extension of Time at ¶ 8, Granger v. State, No. AP-77,017 (Tex. Crim. App. Apr. 29, 2014)[hereinafter Granger Extension Motion]; Appellant's Second Motion for Extension of Time within which to File Brief at § III, Brown v. State, No. AP-77,019 (Tex. Crim. App. Mar. 31, 2014) ("undersigned attorney was recently appointed to represent a

death eligible defendant in a case . . . in the United States District Court for the Western District of Arkansas[,] . . . had to prepare for oral argument in a case [pending] . . . in the Court of Appeals for the Sixth Supreme Judicial District of the State of Texas[,] . . . had to prepare a complex sentencing memorandum [for a federal case], . . . [and] has been preparing" a case scheduled for trial in the 102nd District Court in Bowie County and a case scheduled for trial in the Eastern District of Texas); Appellant's Motion for Extension of Time to File Brief at § VII, Cruz-Garcia v. State, No. AP-77,025 (Tex. Crim. App. Dec. 18, 2013) ("The undersigned has also been appointed to a number of appellate cases which have required extensions of time due to the voluminous appellate records. The undersigned recently filed a Petition for a Writ of *Certiorari* in the Supreme Court of the United States on a Texas death penalty case."); Second Motion for Extension of Time to File Appellant's Brief at ¶ 12, Cade v. State, No. AP-76,883 (Tex. Crim. App. Oct. 11, 2013) (citing the case's voluminous appellate record and stating that the appellant's counsel is lead trial counsel in a death penalty trial that is scheduled to begin at the end of the month); Motion for Extension of Time to File Appellant's Brief at § V, Cargill v. State, No. AP-76,819 (Tex. Crim. App. Oct. 3, 2013) (explaining that appellant's counsel has spent considerable time in *voir dire* and preparation for a capital murder trial in which the state was seeking the death penalty that was scheduled to begin on Nov. 4, 2013, and "other capital murder cases" including a Dallas County case where the prosecution was seeking the death penalty); Motion for Extension of Time to File Brief at § II, Soliz v. State, No. AP-76,768 (Tex. Crim. App. June 11, 2013) (stating that appellant's lawyer also represents death row inmate Lisa Coleman in post-conviction proceedings pending in the U.S. Court of Appeals for the Fifth Circuit); Appellant's Second Motion for Extension of Time to File Brief in Capital Appeal at § II, Rockwell v. State, No. AP-76,737 (Tex. Crim. App. Oct. 5, 2012) ("An extension is necessary because during the previous extension granted by this court the undersigned attorney has been involved in several other appeals including a death penalty writ hearing and numerous trial court settings[,] one [of] which is being held on this same day."); Appellant's Motion for Extension of Time at § III, Turner v. State, No. AP-76,580 (Tex. Crim. App. July 12, 2012) (stating that appellant's counsel was working on a death penalty direct appeal, a capital murder case in which the state was seeking death in the 252nd District Court in Jefferson County, a federal capital case pending in the Southern District of Texas, and two capital murder trials in Harris County); Motion for Extension of Time to File Brief at 2-3, Hummel v. State, No. AP-76,596 (Tex. Crim. App. June 6, 2012) (stating that the appellant's lawyer was representing a death row inmate in a competency proceeding pending before the Court of Appeals for the Fifth Circuit); Appellant's Motion for Extension of Time within which to File Appellant's Brief at ¶ 11, Cole v. State, No. AP-76,703 (Tex. Crim. App. Apr. 13, 2012) ("Counsel is currently working on another Death Penalty Appeal, Cause No. AP-76,580 Albert James Turner v. The State of Texas. Counsel is also preparing for a Death Penalty trial in September 2012, Cause No. 10-10213, The State of Texas v. Joseph Kenneth Colone on the 252nd District Court of Jefferson County."); Motion for Third Extension of Time to File Appellant Brief at § III, Robinson v. State, No. AP-76,535 (Tex. Crim. App. Mar. 5, 2012) ("Appellant's Counsel has spent an inordinate amount of time preparing for jury trials during the preceding month[,]" which included preparing a first degree case for trial and preparing a capital murder case in which the state was seeking death in Smith County. The lawyer also was in the process of researching and preparing state habeas applications in two death penalty cases: State v. Cortez and State v. Milam.); Motion for Extension of Time to File Appellate Brief at § III, Escobar v. State, No. AP-76,751 (Tex. Crim. App. Feb. 22, 2012) ("Counsel has . . . a very busy docket, and . . . is currently embroiled in four capital cases in central Texas, which have further delayed finishing this appeal."); Motion for Extension of Time for Filing Appellant's Brief, Davis (Brian) v. State, No. AP-76,521 (Tex. Crim. App. Nov. 9, 2011) (outlining defense counsel's extraordinary workload including three murder cases, including one capital murder trial scheduled to begin in the next sixty days, as well as an infant death case, a petition for discretionary review, and 26 recently resolved cases); Appellant's Second Motion for Extension of Time to File Appellant's Brief at §§ IV to VI, Harper v. State, No. AP-76,452 (Tex. Crim. App. Oct. 28, 2011) (stating that counsel's workload included two federal habeas corpus writs in death penalty cases, preparing for a non-death capital murder trial and three cases scheduled for trial before Thanksgiving); Motion for Extension of Time to File Brief at 2, Green v. State, No. AP-76,458 (Tex. Crim. App. Apr. 21, 2011)("counsel has a heavy workload including another death penalty direct appeal with a voluminous record"); Appellant's Motion for Extending Time to File Brief at 2, Gobert, v. State, No. AP-76,345 (Tex. Crim. App. Dec. 9, 2010) (requesting an extension due to counsel's heavy caseload that included another death penalty direct appeal); Appellant's Second Motion for Extension of Time to File Appellant's Brief at 2-3, Martin v. State, No. AP-76,317 (Tex. Crim. App. Mar. 25, 2011) ("In 2009 and 2010, [counsel] tried three capital murders, each trial lasting at least two months-one being this case-and the state was seeking the death penalty in each case. . . . Additionally, in February of 2010, he was involved in State of Texas vs. Jonathan Damuth in the 12th Judicial District of Grimes County, Texas, and in October of 2010, he was involved in State vs. Brandon Harris in the 85th Judicial District in Brazos County, Texas. Both of which were murder cases. In the summer of 2010, he prepared the Appellant's Brief in Christian Olsen vs. State of Texas [a capital direct appeal] which was filed in this Court in September of 2010."); Motion for Extension of Time to File Appellant's Brief at 2, Milam v. State, No. AP-76,379 (Tex. Crim. App. Apr. 27, 2011) ("On February 14, 2011, Appellant's counsel started individual *voir dire* in [a case] wherein the defendant is charged with capital murder and the State is seeking death. A panel of forty-eight (48) qualified jurors were selected on April 21, 2011, only four days before this brief is due. Individual *voir dire* in [this] case commenced on February 14, 2011.") (italics added); Second Motion for Extension of Time to File Appellant's Brief, Hernandez v. State, No. AP-76,275 (Tex. Crim. App. Mar. 4, 2011) (stating that counsel had a number of trial cases including a two week murder trial that concluded on Feb. 11, 2011); Third Motion for Extension of Time to File the Appellant's Brief at § III, Miller v. State, No. AP-76,270 (Tex. Crim. App. Jan. 27, 2011) ("[c]ounsel for the Appellant, in the proceeding months has been researching and preparing" state habeas petitions for three death penalty cases); Appellant's Third Motion for Extension of Time to File Brief at 2, Devoe v. State, No. AP-76,289 (Tex. Crim. App. Aug. 16, 2010) (defense counsel was handling *inter alia* "three other death penalty cases in various stages of briefing[,] and a federal habeas case requiring an evidentiary hearing in San Antonio last week"); First Motion for Extension of Time to File Appellant's Brief at § V, Cortez v. State, No. AP-76, 101 (Tex. Crim. App. Feb. 17, 2010) ("Appellant's counsel is presently dealing with two capital murder cases, both set for trial in the spring . . . Additionally, Appellant's counsel has an active practice in Wood County, Texas."); Appellant's Motion for Extension of Time to File Brief at 1-2, Freeman v. State, No. AP-76,052 (Tex. Crim. App. Nov. 23, 2009) ("In addition to a full trial and appellate practice . . . the undersigned counsel has filed [three] original state capital habeas applications in the past six months . . . has ·filed five subsequent capital writs[,] . . . [fought] two execution dates"); Motion for Extension of Time to File Appellant's Brief at ¶ 6, Chanthakoummane v. State, No. AP-75,794 (Tex. Crim. App. Nov. 4, 2009) (stating that "counsel was in trial in two felony cases after the filing of the record . . . [and was] set for trial in seven felony cases in the next seven months including two capital murder cases, in which the

state may seek the death penalty"); Second Motion for Extension of Time to File Appellant's Brief, Olsen v. State, No. AP-76,175 (Tex. Crim. App. Feb. 22, 2010) (stating that counsel recently filed a brief in a death penalty direct appeal and was scheduled to begin two murder trials within the next two months, the state sought the death penalty in one of these cases); Second Motion for Extension of Time to File Appellant's Brief, Renteria v. State, No. AP-74,829 (Tex. Crim. App. Oct. 5, 2009) (stating that counsel was scheduled to try 10 felony jury trials between July and December 2009); Motion for Extension of Time to File Brief at 1, Medina v. State, AP-76,036 (Tex. Crim. App. Aug. 25, 2009) [hereinafter Medina Extension Motion]; Motion for Extension of Time to File Appellant's Brief at § V, Ruiz v. State, No. AP-75, 968 (Tex. Crim. App. July 9, 2009) [hereinafter Ruiz Extension Motion]; Motion for Extension of Time to File Brief at 1, Sparks v. State, No. AP-76,099 (Tex. Crim. App. July 1, 2009) ("Appellate Counsel has a very heavy workload. Appellate Counsel is presently in the Capital Murder- Death trial of Mark Robertson, Cause Nos. F07-56955, F07-56954 & F07-56931 in Criminal District Court No. 5."); Motion for Extension of Time to File Appellate Brief at § III, Storey v. State, No. AP -76,018 (Tex. Crim. App. May 5, 2009) ("Appellant's request for an extension is based on the following facts: The undersigned attorney has been preparing a brief for filing in cause number 02-08-00060-CR in the Second Court of Appeals - Fort Worth, Tracy Denise Roberson v. State, preparing Applicant's findings of fact and conclusions of Law in Cause Number C-297-008439-1016470-A, Ex Parte: Lisa Coleman (a death penalty case), and preparing Appellant's Brief for filing in Will Gasaway v. The United States of America, in the United States Court of Appeals - Fifth Circuit."); Motion for Extension of Time to File Brief at 1-2, Lizcano v. State, No. AP-75,879 (Tex. Crim. App. Jan. 7, 2009) ("Appellate Counsel has recently submitted a Motion for Rehearing on an appeal in another death case. . . a Motion for New Trial and evidentiary hearing . . . in a recently completed death penalty trial, and has just completed jury selection in . . . a death penalty case in Collin County, Texas."); Motion for Extension of Time to File Appellate Brief at § IV, Williams v. State, No. AP-75,811 (Tex. Crim. App. Nov. 21, 2008) ("An extension of time is necessary because the undersigned counsel has just completed a capital murder case in the 262 District Court in Harris County, Texas and has been required to prepare numerous appeals in the last 30 days, including the appeal of a 4-week trial in the 184th District Court."); Second Motion to Extend Time for Filing Appellant's Brief at § III, Whitaker v. State, No. AP-75,654 (Tex. Crim. App. June 6, 2008) (stating that counsel was scheduled to begin a death penalty trial in one month); Motion for an Extension of Time to File Appellant's Brief at 2-3, Guidry v. State, No. AP-75,633 (Jan. 7, 2008) (stating that counsel was on trial in a capital murder case where the prosecution sought the death penalty during the previous two and a half months and had worked through the December holidays); Motion to Extend Time to File Appellant's Brief at ¶ 11, Armstrong v. State, No. AP-75,706 (Tex. Crim. App. Jan. 4, 2008) (stating that counsel was working on an appellate brief for another case and was scheduled to begin a non-death capital murder trial in four days); Motion for Extension of Time to File Appellant's Brief at § III, Gonzales v. State, No. AP-75,540 (Tex. Crim. App. June 11, 2007) (stating that during the period from June to October 2007, counsel was scheduled to try two capital murder cases, one murder case, one sexual assault case in state court, as well as two federal drug cases, and to file two petitions for habeas corpus relief for death penalty cases—one in federal and one in state court); Appellant's First Motion for Extension of Time to File Brief on Merits on Automatic Appeal from Sentence of Death at § III, Coleman v. State, No. AP-75,478 (Tex. Crim. App. Feb. 23, 2007) ("counsel has been inundated with appellate work in other pending appeals and trial court settings, including a federal post-conviction writ in a death penalty case").

For example, in *Granger v. State*, the defense lawyer wrote that he was counsel of record in six pending capital murder trials, and bore a heavy workload because just three lawyers in Jefferson County were certified as lead counsel in death penalty cases.[202] In *Medina v. State*, the CCA issued a notice stating that the appellant's counsel failed to file a brief.[203] Mr. Medina's lawyer responded 12 days later with a request for a six-month extension, explaining that he had "just completed the Capital Murder-Death trial of Mark Robertson . . . [and was] working on the appellate brief in the death penalty case of Robert Sparks v. State of Texas, Cause No. AP-76,099, which is due October 6, 2009."[204] Similarly, in *Ruiz v. State*, appellant's counsel wrote on July 9, 2009, that he could not submit his client's brief, then due on December 14, 2009, because he was:

> injury [sic] selection . . . in The State of Texas v. James Garfield Broadnax, wherein the defendant is charged with capital murder and the State is seeking death. Testimony in that trial is scheduled to begin August 10, 2009 and will take approximately two weeks. . . . On August 26, 2009, Appellant's counsel is set for hearing in Cause No. 3 :06-CV-320, in the Federal District Court for the Northern District of Texas, Dallas Division, styled Bobby Lee Hines v. Nathanal [sic] Quarterman, on Petitioner's Atkins claim under his successor writ of habeas corpus [an issue litigated only in death penalty cases]. . . . Appellant's counsel is presently set to begin jury selection on September 14, 2009, in Cause No. 2007F00118, in the 5th Judicial District Court of Cass County, Texas, in a case styled The State of Texas v. Michael Kevin Hailey. Mr. Hailey is

202. Granger Extension Motion, *supra* note 201, at 8.
203. Clerk's Notice, Medina v. State, No. AP-76,036 (Tex. Crim. App. Aug. 13, 2009).
204. Medina Extension Motion, *supra* note 201, at ¶ 2. The CCA granted an extension until December 12, 2009. Clerk's Notice, Medina v. State, (Tex. Crim. App. Aug. 27, 2009). Mr. Medina's lawyer submitted a subsequent request for an extension the day before the deadline on December 18, 2009, requesting an extension until January 18, 2010, the date requested in his original motion for an extension. Motion for Extension of Time to File Brief, Medina v. State, No. AP-76,036 (Tex. Crim. App. Dec. 17, 2009). The CCA gave him a three day extension to December 21, 2009. Clerk's Notice, *Medina v. State*, No. AP-76-036 (Dec. 21, 2009).

> charged with capital murder and the State is seeking the death penalty. It is expected that it will take several weeks to select a jury and try the case.[205]

Five years later, this same lawyer waived oral argument for his client, Kimberly Cargill, advising the CCA that he was to:

> begin individual *voir dire* in Cause No. 32021-422, styled The State of Texas v. Eric Williams, [a capital murder trial where the death penalty was sought][206] on June 2, 2014, in Rockwall County, Texas, on change of venue from Kaufman County. Therefore, [he] . . . chose[] to notify the Court that [he] w[ould] not appear for oral argument on June 4. N[or would he] file a motion to postpone argument, as jury selection w[ould] take several weeks and [he] d[id] not wish to delay the consideration of Ms. Cargill's appeal.[207]

As these applications demonstrate, Texas appellate lawyers often assume caseloads that make it impossible to discharge their professional obligations to their clients. And, in fact, the convictions and death sentences of Bartholomew Granger, Hector Medina, Wesley Ruiz and Kimberly Cargill were upheld by the CCA on direct appeal.[208] Due to the depth and complexity of death penalty representation, Texas must ensure that defense lawyer workloads are controlled so that lawyers have the necessary time to provide the high-quality representation required for a direct appeal in a death penalty case.

Caseload Data and Billing Statements

THE DEMANDING WORKLOADS UNDERTAKEN BY many capital direct appeal lawyers also are reflected in caseload information reported to the Texas Indigent Defense Commission. According to the TIDC website, some attorneys within our survey handled a combination of capital and non-capital caseloads during the 2014 and 2015 fiscal years[209] that equaled the recommended caseloads for three or more lawyers. A billing study conducted by the Spangenberg Group recommended that lawyers handle no more than three capital direct appeals in a single year and Nebraska has limited attorneys to no more than three direct appeals at one time.[210] In addition, TIDC recommends that, to ensure "the delivery of reasonably competent and effective representation," attorneys carry an annual full-time equivalent caseload of no more than:

- 236 Class B Misdemeanors,
- 216 Class A Misdemeanors,
- 174 State Jail Felonies,
- 144 Third Degree Felonies,
- 105 Second Degree Felonies, [or]
- 77 First Degree Felonies.[211]

Lawyers who handle several types of cases are advised to do so on a pro-rated basis.[212] To date, there are no Texas appellate caseload standards.

The caseloads assumed by the lawyers in our study reveal that they greatly exceed these baselines. According to information available on TIDC's website, the five attorneys who handled three or more

205. Ruiz Extension Motion, *supra* note 201, at § V (italics added).
206. Tanya Eiserer, *Ex-Judge Sentenced to Death in Texas Revenge Plot*, USA TODAY (Dec. 17, 2014), http://www.usatoday.com/story/news/nation/2014/12/17/texas-prosecutors-murder-sentence/20537451/.
207. Letter from Appellant's Counsel to Abel Acosta, Clerk of Court, Court of Criminal Appeals (May 7, 2014) (copy on file with author) (italics added).
208. Granger v. State, No. AP-77,017, 2015 WL 1875907, at *1 (Tex. Crim. App. Apr. 22, 2015) ("Appellant raises seven points of error. After reviewing appellant's points of error, we find them to be without merit. Consequently, we affirm the trial court's judgment and sentence of death."); Cargill v. State, No. AP-76,819, 2014 WL 6477109, at *1 (Tex. Crim. App. Nov. 19, 2014) ("After reviewing appellant's eighteen points of error, we find them to be without merit. Consequently, we affirm the trial court's judgment and sentence of death."); Ruiz v. State, No. AP-75,968, 2011 WL 1168414, at *9 (Tex. Crim. App. Mar. 2, 2011) ("The judgment of the trial court is affirmed."); Medina v. State, No. AP-76,036, 2011 WL 378785, at *1 (Tex. Crim. App. Jan. 12, 2011) ("The appellant now raises fifty-three points of error on direct appeal to this Court. Finding no reversible error, we shall affirm the judgment and sentence of the trial court.").
209. Texas law requires that counties report the number of appointments each lawyer accepting indigent defense cases in the county receives each fiscal year (Oct. 1st to Sept. 30th). *See* Tex. Gov't Code § 79.036. This requirement was enacted by the Texas Legislature in 2013. H.B. 1381, 83rd Leg., R.Sess. (Tex. 2013), ch. 912, art. 3 (eff. Sept. 1, 2013).
210. *See supra* note 168 and text.
211. PUBLIC POLICY RESEARCH INSTITUTE, GUIDELINES FOR INDIGENT DEFENSE CASELOADS: A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION PURSUANT TO HB 1318, 83RD LEGISLATURE 34 (2014), http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf.
212. *Id.*

cases in our survey also were paid to handle during the 2014 fiscal year—September 1, 2013 to August 31, 2014—the following cases:[213]

	Capital Murder Cases	Adult Felony (Trial) Cases	Adult Misdemeanor Cases	Adult Felony Appeals	Juvenile Cases
Attorney 1	8	66	5	18	0
Attorney 2	8	8	0	1	0
Attorney 3	8	4	0	1	0
Attorney 4	2	58	54	12	0
Attorney 5	0	113	52	18	1

Managing such caseloads requires an extraordinary time commitment and near-constant work. For example, invoices submitted by Attorney 1 show that he billed 1,030 hours for criminal defense representation in Dallas and Collin counties between April 1, 2014, and July 10, 2014.[214] Based on these records he would have had to have worked, on average, 10.3 productive hours[215] for every day of this 100-day period, without breaks for holidays and weekends.[216] During this same 100-day period, the lawyer also handled 13 felony case dispositions,[217] a bond forfeiture proceeding, a competency hearing, and billed 51 hours for a capital direct appeal that he worked on between June 1 and August 14, 2014.[218]

Attorney 1 also worked far more than 10 hours on certain days. On his most productive day of the period, June 19, 2014, he worked more than 21 hours. This included eight hours preparing for a capital sentencing hearing—at which the defendant subse-

213. Attorney 1 (paid a total of $273,345.00), Attorney 2 (paid a total of $140,463.71), Attorney 3 (paid a total of $182,952.28), Attorney 4 (paid a total of $152,752.16), and Attorney 5 (paid a total of $188,892.50). Statewide Attorney Caseload Report, Tex. Indigent Def. Comm'n, http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx (last visited Jan. 31, 2016).

214. Requests for Payment by Appointed Counsel submitted in the following proceedings: State v. Thomas, No. F-86-85539 (194th Dist. Ct., Dallas County, Tex. Mar. 10, 2015-Dec.17, 2015); State v. Johnson, No. F12-23749-W (363rd Dist. Ct., Dallas County, Tex. Mar. 25, 2014-Mar. 18, 2015); State v. Muhammad, No. F11-00698 (204th Dist. Ct., Dallas County, Tex. May 15, 2014-Apr.15 2015);Harris v. State, No. F09-00409 (Crim. Dist. Ct. 2, Dallas County, Tex. Apr. 24, 2013-Aug. 18, 2014); State v. Reyes, Nos. F11-35901, 13-34158, 13-34208, 13-34209 (291st Dist. Ct., Dallas County, Tex. Aug. 6, 2014);State v. Ramey, No. F12-53925 (Crim. Dist. Ct. 2, Dallas County, Tex. Aug. 1, 2014); State v. Burch, No. F14-00319 (204th Dist. Ct., Dallas County, Tex. July 23, 2014); State v. Cabrera, No. F-10-57867-1 (195th Dist. Ct., Dallas County, Tex. July 22, 2014); State v. Torres, No. F10-587769 (265th Dist. Ct., Dallas County, Tex. July 7, 2014); State v. King, No. F11-00838 (363rd Dist. Ct., Dallas County, Tex. July 3, 2014); State v. Denver, No. F14-00186 (194th Dist. Ct., Dallas County, Tex. June 24, 2014); State v. Guthrie-Nail, No.80635-2012 (401st Dist. Ct., Collin County, Tex. May 30, 2014); *Ex parte* Cloninger, No. WX13-90036U (292d Dist. Ct., Dallas County, Tex. May 20, 2014) (defendant name illegible); State v. Henry, No. F09-59736 (363rd Dist. Ct., Dallas County, Tex. May 19, 2014); State v. Theron, No. F13-24890 (195th Dist. Ct., Dallas County, Tex. May 15, 2014); State v. Johnson, No. W11-27104 (Crim. Dist. Ct. 6, Dallas County, Tex. May 14, 2014); State v. Williams, No. F13-72201 (Crim. Dist. Ct. 6, Dallas County, Tex. May 13, 2014); State v. Young, No. 81844-2013 (401st Dist. Ct., Collin County, Tex. May 6, 2014); State v. Longrum, No. F11-60330 (265th Dist. Ct., Dallas County, Tex. May 6, 2014); State v. Mosley, No. F11-57352 (Crim. Dist. Ct.2, Dallas County, Tex. May 5, 2014); State v. Roberts, No. F13-70669 (Crim. Dist. Ct. 7, Dallas County, Tex. Apr. 30, 2014); State v. Pineda, No. F12-34923 (202nd Dist. Ct., Dallas County, Tex. Apr. 14, 2014); State v. Clark, No. F08-33150 (265th Dist. Ct., Dallas County, Tex. Apr. 4, 2014).

215. A "billable hour" is distinct from the number of hours a lawyer spends at the office, and includes the time spent on a case. Attorneys cannot bill for time at lunch, getting coffee, handling personal calls, or taking a cigarette break. It is not uncommon for a lawyer to spend 60 hours a week at the office (working 8:00 am to 8:00 pm, Monday through Friday) and still bill only 42 of those hours to client work. *See* The Truth About the Billable Hour, Yale Law School, https://www.law.yale.edu/student-life/career-development/students/career-guides-advice/truth-about-billable-hour (updated May 2015).

216. If Attorney 1 took breaks for federal holidays and weekends, he would have averaged 14.5 hours a day. Some of his statements do not itemize the specific days on which he performed certain services. For example, the payment request relating to *State v. Guthrie-Nail* shows only that he worked 40 hours on the case between April 30, 2014 and May 30, 2014.

217. Appointed Counsel Request for Compensation, State v. Saenz, No. 82492-2007 (380th Dist. Ct., Collin County, Tex. July 7, 2014); Request for Payment by Appointed Counsel, State v. Lofton, No F13-51567 (291st Dist. Ct., Dallas County, Tex. June 30, 2014); Request for Payment by Appointed Counsel, State v. Baldin, Nos. F13-61758 & F14-45168 (Crim. Dist. Ct. 7, Dallas County, Tex. June 24, 2014); Request for Payment by Appointed Counsel, State v. Henderson, No. F13-71850 (265th Dist. Ct., Dallas County, Tex. May 22, 2014); Request for Payment by Appointed Counsel, No.13-03098 (292nd Dist. Ct., Dallas County, Tex. May 15, 2014) (defendant's name illegible); Request for Payment by Appointed Counsel, State v. Garrett, No. F14-70320 (283rd Dist. Ct., Dallas County, Tex. May 14, 2014); Request for Payment by Appointed Counsel, State v. Louis, No. F13-57514 (Crim. Dist. Ct. 3, Dallas County, Tex. May 12, 2014); Request for Payment by Appointed Counsel, State v. Gonzales, No. 13-12905 (363rd Dist. Ct., Dallas County, Tex. May 9, 2014); Appointed Counsel Request for Compensation, State v. Bynum, No. 199-80443-2104 (195th Dist. Ct., Collin County, Tex. May 5, 2014); Request for Payment by Appointed Counsel, State v. Clark, No. F13-63007 (Crim. Dist. Ct. 1, Dallas County, Tex. Apr. 18, 2014); Request for Payment by Appointed Counsel, State v. Sauls, Nos. F13-58991, F13-70758 (194th Dist. Ct., Dallas County, Tex. Apr. 10, 2014); Request for Payment by Appointed Counsel, State v. Stidham, F13-11880 (363rd Dist. Ct., Dallas County, Tex. Apr. 8, 2014); Request for Payment by Appointed Counsel, State v. King, No. F13-721721 (282nd Dist. Ct., Dallas County, Tex. Apr. 4, 2014).

218. Requests for Payment by Appointed Counsel, Harris v. State, No. F09-00409 (Crim. Dist. Ct. 7, Dallas County, Apr. 24, 2013-Aug. 18, 2014).

quently was re-sentenced to death[219] — appearing in court for eight hours during the last day of a four-day jury trial,[220] and five hours preparing for trial in a murder case.[221] It is hard to imagine how a sole practitioner can sustain the attention and focus necessary to handle such a volume of work effectively, much less provide the high-quality representation that death penalty appeals require.

Texas should limit the workloads of assigned direct appeal lawyers in death penalty cases. It should do this either by creating a uniform fee schedule and caseload limits or by establishing a capital appellate defender office with workload standards.

219. Request for Payment by Appointed Counsel, State v. Thomas, F86-85539 (194th Dist. Ct. Dallas County, Tex. May 21, 2015); Judgment of Conviction by Jury, State v. Thomas, F86-85539 (194th Dist. Ct. Dallas County, Tex. July 23, 2014).
220. Request for Payment by Appointed Counsel, State v. Denver, No. F14-00186 (194th Dist. Ct., Dallas County, Tex. June 24, 2014).
221. Request for Payment by Appointed Counsel, State v. Torres, No. F10-587769 (265th Dist. Ct., Dallas County, Tex. July 7, 2014).

V. Deficient Legal Representation

REVIEW OF THE APPELLATE RECORD IN EACH CASE IN OUR STUDY, THE ATTORNEY'S itemized billing statements and all supplemental filings with the district court revealed that direct appeal lawyers frequently failed to provide their clients with competent representation in death penalty cases. A substantial number of the defense lawyers in our survey inadequately briefed legal issues, recycled legal arguments across cases, and did not meet with or otherwise communicate with their clients. In extreme cases, defense counsel revealed an astonishing unfamiliarity with Texas capital punishment procedures.

Too often, the deficient representation in a direct death penalty appeal remains undiscovered and unremedied. In such cases, incompetent appellate representation wastes scarce criminal justice resources and constitutes a lost opportunity to ensure the reliable and proportionate use of capital punishment in Texas.

A. Inadequate Legal Briefing

The CCA's authority to review and grant relief to defendants is "limited only by its own discretion or a valid restrictive statute."[222] It may consider issues known as "unassigned errors"—that are neither properly preserved, nor briefed by the parties. However, the Court rarely "assigns" error on its own motion and has stated that "many, if not most, of the types of error that would prompt *sua sponte* attention . . . constitute[] an obvious violation of established rules. *Novel constitutional issues are a different matter*."[223]

It thus falls to appellants in death penalty cases, where the governing legal principles are specialized and new legal developments are frequent, to properly present claimed errors. Appellants waive any issue on appeal not presented in compliance with the Texas Rules of Appellate Procedure. Rule 38.1(i) requires that the appellant's brief present each claim so that it: (1) encompasses a single legal issue, and (2) is supported by citations to the trial record and the legal authority/basis for the claim.[224]

Appellants must meet both requirements in Rule 38.1 to obtain the CCA's review. The Court has held that a "complaint renders nothing for review if it combines more than one contention into a single point."[225] Issues presented without legal authority are presumptively without merit, and appellate courts "may not reverse a trial court on a theory that the trial court did not have the opportunity to rule upon and upon which the non-appealing party did not have an opportunity to develop a complete factual record."[226]

Despite the Court's explicit guidance in rule and its opinions, defense attorneys in our survey failed to adequately brief and present issues to the Court at an alarming rate. In 33.3%—28—of the surveyed decisions, the Court found that appellants had failed to adequately brief one or more claims.[227] In 75%—

222. Carter v. State, 656 S.W.2d 468, 468-69 (Tex. Crim. App. 1983).
223. Pena v. State, 191 S.W.3d 133, 136 (Tex. Crim. App. 2006) (emphasis added).
224. Tex. R. App. P. 38.1(i).
225. Sterling v. State, 800 S.W.2d 513, 521 (Tex. Crim. App. 1990), *cert. denied,* 501 U.S. 1213 (1991).
226. Hailey v. State, 87 S.W.3d 118, 122 (Tex. Crim. App. 2002); *see also* State v. Mercado, 972 S.W.2d 75, 76 (Tex. Crim. App. 1998) (holding that a trial court order granting a motion to suppress could not be overturned on the basis of an argument that was raised for the first time on appeal). Rule 38.1's record citation requirement does not apply to rights that "must be implemented by the [legal] system unless expressly waived" and therefore are not subject to the contemporaneous objection requirement. Marin v. State, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993).

227. Andrus v. State, No. AP-76,936, 2015 WL 9486133, at *10 (Tex. Crim. App. Dec. 9, 2015); Johnson (Matthew) v. State, No. AP-77030, 2015 WL 7354609, at *33-36 (Tex. Crim. App. Nov. 18, 2015); Cade v. State, No. AP-76,883, 2015 WL 832421, at *8 (Tex. Crim. App. Feb. 25, 2015); Soliz v. State, 432 S.W.3d 895, 900-1 (Tex. Crim. App. 2014); Cargill v. State, No. AP-76,819, 2014 WL 6477109, at *8 (Tex. Crim. App. Nov. 19, 2014); Harris v. State, No. AP-76,810, 2014 WL 2155395, at *19 (Tex. Crim. App. May 21, 2014); Thuesen v. State, No. AP-76,375, 2014 WL 792038, at *33 (Tex. Crim. App. Feb. 26, 2014); Hummel v. State, No. AP-76,596, 2013 WL 6123283, at *6 (Tex. Crim. App. Nov. 20, 2013); Robinson v. State, No. AP-76,535, 2013 WL 2424133, at *7 (Tex. Crim. App. June 5, 2013); Lopez v. State, No. AP-76,327, 2012 WL 5358863, at *9 (Tex. Crim. App. Oct. 31, 2012); Miller v. State, No. AP-76,270, 2012 WL 1868406, at *9 (Tex. Crim. App. May 23, 2012); Broadnax v. State, No. AP-76,207, 2011 WL 6225399, at *11 n. 60 (Tex. Crim. App. Dec. 14, 2011); Leza v. State, 351 S.W.3d 344, 358 (Tex. Crim. App. 2011); Lucio v. State, 351 S.W.3d 878, 896-97 (Tex. Crim. App. 2011); Renteria v. State, No. AP-74,829, 2011 WL 1734067, at *38 (Tex. Crim. App. May 4, 2011); Ramirez v. State, No. AP-76,100, 2011 WL 1196886, at *6 (Tex. Crim. App. Mar. 16, 2011). Freeman v. State, 340 S.W.3d 717, 730 (Tex. Crim. App. 2011); Sparks v. State, No. AP-76,099, 2010 WL 4132769, at *26-27 (Tex. Crim. App. Oct. 20, 2010); Storey v. State, No. AP-76,018, 2010 WL 3901416, at *11 (Tex. Crim. App. Oct. 6, 2010); Lizcano v. State, No. AP-75,879, 2010 WL 1817772, at *22 (Tex. Crim. App. May 5, 2010); Chanthakoummane v. State, No. AP-75,794, 2010 WL 1696789, at *18-19 nn.5 & 6 (Tex. Crim. App. Apr. 28, 2010); Johnson (Dexter) v. State, No. AP-75,749, 2010 WL 359018, at *4 (Tex. Crim. App. Jan. 27, 2010); Jackson v. State, No. AP-75,707, 2010 WL 114409, at *2 (Tex. Crim. App. Jan. 13, 2010); Mays v. State, 318 S.W.3d 368, 385 (Tex. Crim. App. 2010); Davis v. State, 329 S.W.3d 798, 802-03 (Tex. Crim. App. 2010); Williams v. State, 301 S.W.3d 675, 683-85 n. 5 (Tex. Crim. App. 2009); Soffar v. State, No. AP-75,363, 2009 WL 3839012, at *12 (Tex. Crim. App. Nov. 18, 2009); Ramey v. State, No. AP-75,678, 2009

21—of these cases the Court denied relief on the basis of inadequate briefing alone—because the claim included too many diverse legal issues,[228] because there was no proof the claim was properly preserved in the trial record or because the appellant cited no legal authority in support of the claimed error.[229]

For example, in *Ramey v. State*, the appellant's lawyers (who were retained and were not on the administrative list of qualified death penalty counsel)[230] submitted a 26-page brief that did not fully explain his theories of relief. The third point of error contended:

> The trial court erred by not including the instructions and lesser included offenses requested by the Defendant in the Charge of the Court.[231]

This point of error was multifarious—that is, it included too many legal issues—because it encompassed two or more requested jury instructions, each of which constituted a separate claim of error on appeal. In addition, the attorneys' argument regarding the trial court's failure to properly instruct the jury consisted of a single sentence:

> The defendant further contends that the testimony of LeJames Norman, Bradford Butler, and Cortney Hardaway proffers enough evidence that the defendant did not shoot anybody to require lesser included offense to be submitted to the jury.[232]

WL 335276, at *12 (Tex. Crim. App. Feb. 11, 2009).

228. Harris, 2014 WL 2155395 at *19 (rejecting the defendant's argument that the trial court erred in overruling a motion to quash because it was multifarious); and *Soliz*, 432 S.W.3d at 900-01 (Tex. Crim. App. 2014) ("To the extent that appellant intends to argue that there was no evidence to corroborate his confession, his point of error is multifarious as well as inadequately briefed.").

229. Johnson, 2015 WL 7354609 at *33-36 (stating that two of the defendant's arguments were multifarious and that his briefing was inadequate because he did "not apply the law to the facts and relie[d] solely on conclusory statements); Thuesen, 2014 WL 792038 at *("[A]ppellant does not direct us to any authority for his position that the "amount of evidence" could have had an adverse effect on the jury's ability to follow the trial court's instructions. Therefore, this complaint is inadequately briefed and presents nothing for review."); Hummel 2013 WL 6123283, at *6 ("Appellant does not provide separate authority or argument for his state constitutional claim, we decline to address it."); Robinson, 2013 WL 2424133 at *7 ("In a footnote, appellant asserts that the parties either were or should have been aware that this spectator could 'act out' during the trial. Elsewhere, he asserts that the outburst 'perhaps could or should have been anticipated by the State.' If appellant intends by these assertions to claim ineffective assistance of counsel and/or prosecutorial misconduct in failing to prevent the outburst, his claims are inadequately briefed. Additionally, they are not supported by the record."); Lopez, 2012 WL 5358863 at *9 ("Lopez fails to cite any authority supporting this contention and fails to articulate a legal argument why a sua sponte instruction was required. Because this issue is inadequately briefed, we decline to consider it. Point of error three is overruled."); Miller, 2012 WL 1868406 at *9 ("Furthermore, his claims are inadequately briefed because appellant provides no legal argument for his complaints that the summary is inadmissible hearsay and that its admission violated the Confrontation Clause."); Leza, 351 S.W.3d at 358 ("we regard his arguments under this point of error as inadequately briefed and decline to reach their merits."); Lucio, 351 S.W.3d at 896-97 ("We decide that this point of error is inadequately briefed and presents nothing for review as this Court is under no obligation to make appellant's arguments for her."); Freeman, 340 S.W.3d at 731 (overruling the defendant's challenge to the Texas death penalty scheme as inadequately briefed); Sparks, 2010 WL 4132769 at *26-27 (noting that the defendant's citations preceded the new statute); Renteria, 2011 WL 1734067 at *46 (Tex. Crim. App. May 4, 2011) ("Renteria makes two distinct arguments in one point of error, and he fails to provide legal authority in support of this particular claim. Thus, we decline to address this portion of his argument because it is multifarious and inadequately briefed."); Storey, 2010 WL 3901416 at *11 (Tex. Crim. App. Oct. 6, 2010) (noting that the defendant's summary statements that his Sixth and Fourteenth Amendment rights were violated failed to cite to an adequate legal authority); Lizcano, 2010 WL 1817772 at *22 ("None of the issues raised in this multifarious point of error is adequately briefed.. . Point of error thirty-five is overruled."); Chanthakoummane, 2010 WL 1696789, at *18-19 n.5 & 6 ("In one sentence at the end of his discussion of point of error seven, he mentions that the trial court's ruling also violates Rule 403 of the Texas Rules of Evidence. In point of error eight, he merely 'incorporate[s] by reference the authorities cited in Issue No. 7.' He does not provide any additional argument or authority in support of his Rule 403 argument."); Johnson, 2010 WL 359018 at *4 (defendant's Fifth Amendment argument was inadequately briefed and dismissed); Jackson, 2010 WL 114409 at *2 ("An appealing party has the duty to cite to the relevant portions of the record. Appellant's claim is inadequately briefed and subject to rejection on that ground alone."); Soffar v. State, No. AP-75,363, 2009 WL 3839012 at *12 (declining to address claim "because he does not provide separate authority or argument for it"); Ramey, 2009 WL 335276 at *12 (overruling the defendant's claim because he did not cite to a legal authority supporting it); Williams, 301 S.W.3d at 683-85 & n.5 (overruling the defendant's point of error as multifarious).

230. Correspondence between the convicting court and the CCA states that Mr. Ramey was represented on direct appeal by his retained trial lawyers. Letter from Hon. Kemper Stephen Williams, District Judge, 135th Judicial District to Abel Acosta, Clerk of Court, Court of Criminal Appeals (May 10, 2007) (copy on file with author) ("attached hereto is that portion of the record in which the Defendant agreed that his retained counsel, Dr. Joseph Willie and Mr. James Evans, would handle the appeal of this case"). Mr. Ramey's lawyer was not on the Fourth Administrative Judicial Region's list of counsel approved for death penalty appointments in effect at the time of Mr. Ramey's conviction. Email from Melissa Barlow Fischer, General Administrative Counsel for the Criminal District Courts of Bexar County to Amanda Marzullo, Texas Defender Service (May 9, 2016) (attaching the Fourth Administrative Judicial Region's list of approved lawyers that was in effect between January and May 2007).

231. Brief of Appellant at 8, Ramey v. State, No. AP-75,678 (Tex. Crim. App. Oct. 15, 2007) [hereinafter Ramey Brief].

232. *Id.*

The CCA found that appellate counsel did not identify which lesser-included offenses were sought for the jury charge, they cited no case law specifically supporting the claimed error, and made no reference to testimony that supported the claim.[233] Instead, they referred to cases that generally described the doctrine of lesser-included offenses and summarily argued that "since the State charged the Defendant with capital murder in four disjunctive ways, he is entitled to any and all lesser included offenses raised by the evidence."[234] Such insufficient briefing provides no cognizable argument for review. The CCA upheld Mr. Ramey's conviction and death sentence on direct appeal.[235]

Similarly, in *Storey v. State,* the second and third points of error argued that the trial court violated appellant's state and federal constitutional rights and statutory rules by allowing the bailiff to accept juror information cards and to determine juror disqualifications and excuses outside the presence of the defendant and his counsel.[236] Yet, appellate counsel did not describe precisely how the defendant's constitutional rights were violated, provide any additional legal authority, or explain why relief was appropriate. The sole legal argument consisted of a conclusory statement following a description of how the court's juror-selection procedures deviated from statutory requirements:

> As urged in Appellant's Motion No. 70, the failure to provide Appellant and his attorneys the right to be present violated his rights under the Sixth and Fourteenth amendments [sic] to the U.S. Constitution and Article I, XIV of the Texas Constitution. In addition to the U.S. and Texas Constitutional [sic] violations, the procedure used to empanel Appellant's jury violated the provisions of Chapter 35 of the Texas Code of Criminal Procedure. These violations harmed Appellant because potential jurors were excluded without proper verification and in violation of specific jury qualification statutes. In effect, the integrity of Appellant's jury was compromised because of the methods used to disqualify jurors. As a result, the trial court erred when it overruled Appellant's motion 70[.][237]

The Court rejected these constitutional claims as inadequately briefed and did not reach the merits.[238] Mr. Storey's conviction and death sentence were upheld on direct appeal.[239]

In *Lizcano v. State*, the CCA highlighted the inadequate briefing of appellant's thirty-fifth point of error by quoting the entire argument:

> Appellant respectfully directs this Honorable Court's attention to Reporter's Record Volume 48 pages 123–154 at which the trial court allowed the State to question Officer Robert Wilcox concerning the initiation of questioning of Appellant about an extraneous offense of driving while intoxicated. The State sought to have Officer Wilcox testify about his initial conversation with Appellant through a translator concerning whether Appellant had any medical or mental disability that would present [sic] him from performing field sobriety tests contrary to Art. 38.22 C.C.P. and objection to hearsay evidence from the translator. (RR48:135–137). The Court overruled Appellant's objection. See *Miffleton v. State,* 777 S.W.2d 76 (Tex. Crim. App.1989) for support of issue that no audio conversation between officer and suspect is admissible. Additionally, the trial court allowed the State to violate Appellant's fifth amendment of U.S. Constitution right to remain silent by allowing such testimony. Appellant is entitled to a new trial based on this constitutional error that denied him a fair trial.[240]

As the CCA went on to explain, appellant's counsel failed to: (1) state why the police officer's testimony

233. Ramey, 2009 WL 335276 at *12.
234. Ramey Brief, *supra* note 231, at 8-9.
235. Ramey, 2009 WL 335276 at *1 ("The appellant raises eight points of error in direct appeal to this court. Finding no reversible error, we affirm.").
236. Appellant's Brief on Appeal at 15-20, Storey v. State, No. AP-76,018 (Tex. Crim. App. July 15, 2009).
237. *Id.* at 19-20.
238. *Storey,* 2010 WL 3901416, at *11.
239. *Id.* at *1.
240. Lizcano, 2010 WL 181722, at *22 (Tex. Crim. App. May 5, 2010).

was objectionable; and (2) cite to add a relevant legal authority. The case cited in this claim, *Miffleton v. State*, does not stand for the proposition that all "audio conversation[s]" between a law enforcement officer and a detained suspect are inadmissible. Rather, *Miffleton* holds that an audio recording of an in-custody interrogation is admissible "where it does not include compelled testimony resulting from interrogation."[241] Mr. Lizcano's conviction and death sentence were upheld by the CCA on direct appeal.[242]

In addition to these errors, our survey found three cases in which defense counsel relied on the wrong facts or law governing capital punishment in Texas. Two attorneys submitted briefs citing statutory provisions no longer in effect,[243] while a third lawyer's brief submitted in October 2013 incorrectly described Texas' lethal injection protocol as a three-drug cocktail.[244] (Texas has used a single drug, pentobarbital, in executions since July 18, 2012.) In the latter case, the factual basis for the lawyer's argument regarding the likelihood of pain and suffering at execution was simply wrong.[245] The convictions and death sentences in all three cases were upheld on appeal and local selection committees appear not to have taken any action to remediate these lawyers' demonstrated unfamiliarity with Texas death penalty law or procedure.

Recurrent failures to properly frame "issues, facts, and arguments with appropriate citations to authorities and to the record"[246] demonstrate substantial omissions on the part of defense counsel in death penalty appeals and likely forfeited otherwise colorable claims. Federal courts in the Fifth Circuit have found that noncompliance with state briefing rules constitutes an independent and adequate procedural bar to federal habeas relief. This means that inadequate briefing precludes relief not only on direct appeal, but also in subsequent federal habeas proceedings.[247]

Texas should ensure that lawyers who routinely submit briefs with these shortcomings do not receive appointments for direct appeals in death penalty cases. Accordingly, the state should modify the current appointment system, which provides weak, if any, oversight of attorney performance, to instill accountability.

241. 77 S.W.2d 76, 81 (Tex. Crim. App. 1989) (citing Jones v. State, 742 S.W.2d 398, 407 (Tex. Cr. App. 1987)).
242. Lizcano, 2010 WL 1817772, at *1.
243. Appellant's Original Brief at 36-45, Rockwell v. State, No. AP-76,737 (Tex. Crim. App. Dec. 3, 2012) (citations for a description of Texas' death penalty scheme included Tex. Code Crim. Proc. art. 37.011, which applies only to offenses that occurred before Sept. 1, 1991); and Brief of Appellant at 2-3, Devoe v. State, No. AP-76,289 (Tex. Crim. App. Nov. 8, 2010) (incorrectly citing Tex. Pen. Code §§ 19.01 and 19.04 as the capital murder statute).
244. Appellant's Opening Brief on Appeal at 99-115, Soliz v. State, No. AP-76,768 (Tex. Crim. App. Oct. 8, 2013).
245. In addition, the CCA has ruled that challenges to the state's lethal injection protocol are premature on direct appeal. *See* Gallo v. State, 239 S.W.3d 757 (Tex. Crim. App. 2007) (holding that a challenge to the state's lethal injection protocol was not ripe for litigation on direct appeal because the defendant's execution date was not imminent).
246. Busby v. State, 253 S.W.3d 661, 673 (Tex. Crim. App. 2008).
247. Roberts v. Thaler, 681 F.3d 597, 607 (5th Cir. 2012) ("if the TCCA did invoke the briefing requirements Texas Rule of Appellate Procedure 38.1 to bar Roberts's claim, then its determination constituted an independent and adequate ground for denial of relief that procedurally bars federal habeas review"); Woodward v. Thaler, 702 F.Supp.2d 738, 750-51 & n. 9 (S.D. Tex. 2010) (holding that the direct appeal lawyer's inadequate briefing of the defendant's Fourth Amendment claims was a procedural bar to federal habeas relief); *see also House v. Hatch*, 527 F.3d 1010, 1029-30 (10th Cir. 2008) (holding that New Mexico's adequate briefing requirement is an independent and adequate procedural bar to federal habeas relief); Clay v. Norris, 485 F.3d 1037, 1040-41 (8th Cir. 2007) (Arkansas's proper abstracting rule is an independent and adequate procedural bar to federal habeas relief). The demanding standard under *Strickland* and its progeny also poses a substantial barrier to relief on the grounds that counsel was ineffective, due both to the deference accorded to defense attorneys under this test and the prejudice requirement. *And see, e.g.,* Olalumade v. Johnson, 220 F.3d 588 (5th Cir. 2000)("Olalumade has not shown any probability that the result of the appeal would have been different had his counsel cited authority on that one of his five points of error."); Isenberger v. Thaler, No. 3:12-CV-113, 2013 WL 792150, at *5 (S.D. Tex. Mar. 4, 2013), *vacated sub nom. on other grounds by* Isenberger v. Stephens, 575 F. App'x 548 (5th Cir. 2014) (rejecting the petitioner's claim that his direct appeal lawyer was ineffective in failing to file an adequate brief because he "fail[ed] to show how the outcome of his direct appeal would have been different but for counsel's actions"); Woodard, 702 F. Supp. at 779 (rejecting Woodward's claim that his direct appeal lawyer was ineffective by insufficiently briefing his Fourth Amendment claims on the grounds that the Sixth Amendment right to counsel does not require that counsel research and present all non-frivolous claims).

B. Frequent Re-Use of Boilerplate Arguments

FULLY HALF THE BRIEFS IN OUR SURVEY CONTAINED TEXT THAT WAS IDENTICAL TO TEXT IN OTHER DIRECT APPEAL briefs. This recycling of legal arguments commonly occurs in criminal cases because the same constitutional and evidentiary issues often arise. However, this practice should not substitute for the attorney's analysis of the case's unique facts and legal issues and must be accompanied by further legal research to ensure that all statements of the law are accurate.

Failure to tailor legal arguments to a specific case may result in ineffective assistance of counsel—*i.e.,* the waiver of appellate remedies—and rise to the level of an ethics violation in extreme instances. The Texas Standards of Appellate Conduct direct lawyers to present the "legal issues raised by the record while persuading the court that an interpretation or application favored by the lawyer's clients is in the best interest of the administration of equal justice under the law" and to pursue remedies only when they "believe in good faith that an error has been committed."[248] Adherence to these standards requires that lawyers apply independent professional judgment to each case. Cutting and pasting text from different cases without engaging in such analysis fails to fulfill this mandate.

Lawyers in New York, Iowa, Ohio and California have been sanctioned or otherwise disciplined for submitting briefs that are copied "nearly verbatim" from unacknowledged sources because the copied material contained frivolous claims and plagiarism.[249] In *Columbus Bar Ass'n v. Farmer*, the Ohio Supreme Court suspended an attorney's license for failing to independently analyze the client's legal options. Lawyer Farmer took over an appeal from predecessor counsel, but instead of filing original work, submitted a brief that was "a near[] verbatim recasting of his predecessor's . . . brief. [He] added no new assignments of error and tracked the analysis of the two assignments in the first brief almost word for word."[250] The Ohio Supreme Court found the lawyer violated several rules of professional conduct, including the prohibition against handling a legal matter without adequate preparation.[251]

Direct Appeal Briefing: Déjà Vu All Over Again

THE VAST MAJORITY OF RECYCLED TEXT WITHIN our survey consisted of string citations, blanket statements of the law or other non-specific entries that were not tailored to the case on appeal. Too often, lawyers failed to integrate the text into the surrounding document. Obvious copying errors—such as incorrect error numbering, erroneous page numbers or citations to the wrong statute—were apparent in 12% of all briefs.[252]

248. Misc. Dkt. 99-9912 (Feb. 1, 1999) (Order of the Supreme Court of Texas and the Texas Court of Criminal Appeals adopting the Standards of Appellate Conduct), http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/99/99-9012.pdf.

249. Lohan v. Perez, 924 F. Supp.2d 447 (E.D.N.Y., 2013) (sanctioning a lawyer for submitting a motion in opposition that was based, almost entirely, on unattributed articles), Iowa Sup. Ct. Att'y Disc. Bd. v. Cannon, 789 N.W.2d 756, 759 (Iowa 2010) (reprimanding a lawyer for "wholesale copying" a law review article into his case brief and suspending his license for six months for this conduct and his lack of candor in the proceedings); Columbus B. Ass'n v. Farmer, 855.N.E.2d 462, 465 (Ohio 2006), *reinstatement granted*, 884 N.E.2d 1098 (Ohio 2008); and *In re* White, Nos. C045684, C046271, C046677, slip op. (Ca. Ct. App. 2004) (sanctioning an attorney for filing three frivolous habeas petitions that he did not review and two of which were substantially similar to or "plagiarized" from previous submissions in the clients' cases).

250. Farmer, 855 N.E.2d at 465.

251. *Id.*

252. Brief for the Appellant at 95-96, Cargill v. State, No. AP-76,819 (Tex. Crim. App. Nov. 5, 2013) (text in multiple fonts); Brief of Appellant at 77, Robinson v. State, No. AP-76,535 (Tex. Crim. App. Mar. 19, 2012) (page

As discussed previously in section IV(B) above, one appellate attorney engaged in conduct that closely mirrors the *Farmer* case by submitting a brief that incorporated all of the original attorney's arguments without revision and added just three more claims. Similarly, the lawyer in *Devoe v. State* copied part of trial counsels' motion *in limine* into her brief without making her own argument in support of Mr. Devoe's first and second points of error.[253] Although appellate counsel cited trial counsels' motion, the copied briefing did not independently analyze the trial court's judgment or the evidence later admitted at trial. Mr. Devoe's conviction and death sentence were affirmed on direct appeal.[254]

Another lawyer copied three pages of a 1989 CCA decision without attribution into his brief and without updating its case law citations.[255] He further recycled a two-page argument, without success, in seven separate briefs.[256] The argument, which concerned the legal standard for striking a juror for cause, united two stale appellate decisions, copied verbatim from a 1992 intermediate appellate decision in *Nelson v. State,*[257] and spent three paragraphs on a CCA decision from 1988.[258] Nowhere did the lawyer distinguish more recent rulings, including *Threadgill v. State*[259] and *Feldman v. State*,[260] which the Dallas County District Attorney's Office cited in each of its response briefs[261] and the CCA relied on in the seven decisions

numbers from unidentified documents); Appellant's Original Brief at 36-44, Rockwell v. State, No. AP-76,737 (Tex. Crim. App. Jan. 17, 2012) (citing the wrong capital murder sentencing statute); Brief for Appellant at 113, Green v. State, No. AP-76,458 (Tex. Crim. App. Aug. 23, 2011)(listing Issue 34 as Issue 44 in text that is identical to Issue 44 in the appellate brief filed for James Broadnax); Brief of Appellant at 119-39, Miller v. State, No. AP-76,270 (Tex. Crim. App. Feb. 23, 2011)(using different spacing for constitutional arguments than for the rest of the brief); Brief on Appeal at 203, Devoe v. State, No. AP-76,289 (Tex. Crim. App. Nov. 8, 2010) (incorrect citations to the capital murder statute); Appellant's Brief at iii & 96, Martinez v. State (Tex. Crim. App. Dec. 30, 2009) (listing the capital murder statute as CCP 37.0721 instead of 37.071 in its heading and entry in the Table of Contents for point of error seven); Brief of Appellant at vi, Williams v. Texas, No. AP-75,811 (Tex. Crim. App. Nov. 17, 2008) (listing point of error 15 twice in the Table of Contents); Brief of Appellant at 15, Russeau v. State, No. AP-74,466 (Tex. Crim. App. July 14, 2008) (skipping issues 13-15); Brief for Appellant at 45-48, Smith (Demetrius) v. State, No. AP-75,47, (Tex. Crim. App. Jan. 31, 2008) (arguing that the CCA should sustain the appellant's 18th, 19th and 20th points of error at the conclusion of a section that discusses issues 18 and 19).

253. Brief of Appellant at 6-10, Devoe v. State, No. AP-76,289 (Tex. Crim. App. Nov. 8, 2010).

254. Devoe v. State, 354 S.W.3d 457, 461 (Tex. Crim. App. 2011) ("Consequently, we affirm the trial court's judgment and sentence of death.").

255. *E.g.,* Amended Brief for Appellant at 55-57, Johnson v. State, No. AP-77,030 (Tex. Crim. App. Aug. 1, 2014).

256. Amended Brief for Appellant at 65-67, Johnson v. State, No. AP-77,030 (Tex. Crim. App. Aug. 21, 2014); Brief for Appellant at 23-26, Muhammad v. State, No. AP-77,021 (Tex. Crim. App. Aug. 21, 2014); Brief for Appellant at 58-59, Harris v. State, No. AP-76,810 (Tex. Crim. App. Sept. 3, 2013); Brief for Appellant at 33-34, Bess v. State, No. AP-76,377 (Tex. Crim. App. July 5, 2011); Brief for Appellant at 29-30, Green v. State, No. AP-76,458 (Tex. Crim. App. Aug. 23, 2011); Brief for Appellant at 44-45, Broadnax v. State, No. AP-76,207 (Tex. Crim. App. Feb. 9, 2011); Brief for Appellant at 24-25, Medina v. State, No. AP-76,036 (Tex. Crim. App. Dec. 21, 2009).

257. 832 S.W.2d 762 (Tex. App.—Houston [1st Dist.] 1992). This is the section from *Nelson* that the appellant's brief quoted:

> It is fundamental that in all criminal prosecutions, an accused is entitled to an impartial jury composed of people who are unprejudiced, disinterested, equitable, and just who have not prejudged the merits of the case. *Shaver v. State,* 280 S.W.2d 740, 742 (Tex.Crim.App.1955); Tex. Const. art. I, § 10. The *voir dire* process is intended to ensure empanelment of an impartial jury. *Salazar v. State,* 562 S.W.2d 480, 482 (Tex.Crim.App.1978).
>
> Article 35.16(c)(2) of the Texas Code of Criminal Procedure, allows the defense to challenge for cause any prospective juror who has a bias or prejudice against any law applicable to the case upon which the defense is entitled to rely, either as a defense to the offense being prosecuted or as mitigation of the punishment therefor. *Clark v. State,* 717 S.W.2d 910, 916–17 (Tex.Crim.App.1986); Tex. Code Crim. P. art. 35.16(c)(2) (Vernon Supp.1992). When a prospective juror is biased against the law, or shown to be biased as a matter of law, he must be excused when challenged, even if he states that he can set his bias aside and be a fair and impartial juror. *Clark,* 717 S.W.2d at 917; *Anderson v. State,* 633 S.W.2d 851, 854 (Tex.Crim.App.1982).

Id. at 765.

258. Cumbo v. State, 760 S.W.2d 251 (Tex. Crim. App. 1988).

259. 146 S.W.3d 654, 667-70 (Tex. Crim. App. 2004) (holding that the trial court did not err in denying the defense's challenge to a panel member who stated in her juror questionnaire that "no one be allowed to live for killing someone else" and emotionally responded to questions about her brother-in-law's murder by stating that she would not want someone with her mindset on the jury if she were on trial for murder, because she also stated during *voir dire* that she could be fair and impartial, would listen to the evidence in answering issues, and when asked by the trial court if she would follow the law and base her decision solely on the evidence, she agreed she would).

260. 71 S.W.3d 738 (Tex. Crim. App. 2002), *overruled by statute on other grounds, Coleman v. State,* No. AP-75,478, 2009 WL 4696064 (Tex. Crim. App. Dec. 9, 2009) (per curiam).

261. State's Brief at 40, Muhammad v. State, No. AP-77,021 (Tex. Crim. App. Feb. 3, 2015); Amended Brief for Appellant at 65-66, Johnson v. State, No. AP-77,030 (Tex. Crim. App. Aug. 1, 2014); State's Brief at 53-54, Harris v. State, No. AP-76,810 (Tex. Crim. App. Jan. 28, 2014); State's Brief at 34-35, Green v. State, No. AP-76,458 (Tex. Crim. App. Feb. 1, 2012); State's Brief at 54, Bess v. State, No. AP-76,377 (Tex. Crim. App. Jan. 5, 2012); State's Brief at 45, Broadnax v. State, No. AP-76,207 (Tex. Crim. App. Aug. 5, 2011); State's Brief at 106, Medina v. State, No. AP-76,036 (Tex. Crim. App. Jun 21, 2010).

rejecting the lawyer's recycled point of error.[262] The CCA further upheld the convictions and death sentences of all seven defendants on direct appeal.[263]

Cortne Robinson's counsel utilized recycled text in a different way. His brief listed, then disavowed, five of the six points of error. This left one issue—whether the trial court erred in denying a motion for mistrial after an incensed victim survivor tried to assault the defendant in the jury's presence—for the court's review.[264] One section of the brief listed four constitutional challenges, in which a footnote that recanted all four claims:

> [9] Appellant recognizes that said arguments have been addressed repeatedly by this Honorable Court and have been summarily rejected. However, in order to preserve any federal claims Appellant feels it's necessary to present these grounds of error in this brief. See *Escamillo* 143 [sic] 814 (2004) and Threadgill v. State 146 S.W. 2d 654 (Tex. Crim. App. 2004)[265]

On the next page, after the heading, "Arguments," counsel inserted another footnote that unequivocally communicated a lack of original work on Mr. Robinson's brief:[266]

> [10] Counsel for the Appellant makes no claim that he drafted this argument rather Counsel expects that arguments of this type are boiler plate language in Appellate briefs in death penalty cases. [267]

Later discussion in the Arguments section made clear the briefing was hastily cobbled from other sources. It also contained grammatical errors, page numbers from unidentified documents, and incomplete sentences. One entry read:

> 42 The principle behind *Caldwell* is that courts must ensure that jurors are not invited to place their individual responsibility onto anyone else. Just as it is impermissible to lead jurors to place that responsibility upon the appellate courts, it is impermissible to lead 41 As if the juror would say, "It is their fault that the Appellant will be killed because by not joining me, they prevent us from reaching the required minimum of ten votes." 42 As if the same juror would say, "It is the fault of the Texas statute because unless I can get at least ten votes for life, I myself may not vote for Iif e." 99 them to place it upon their fell ow jurors, or upon a restrictive sentencing statute. The[268]

The CCA affirmed Mr. Robinson's conviction and death sentence on direct appeal.[269]

262. Johnson v. State, No. AP-77,030, 2015 WL 7354609, at *20-29 (Tex. Crim. App. Nov. 18, 2015) (denying the defendant's points of error twenty to twenty-seven and citing *Feldman*); Muhammad v. State, No. AP-77,021, 2015 WL 6749922, at *6-22 (Tex. Crim. App. Nov. 4, 2015) (citing *Threadgill* and stating that "appellant has not shown that the trial court erroneously denied his challenges for cause to at least three prospective jurors," the CCA "need not address his points of error one and eight, concerning his challenges to *voir dire* members Milton Powell and Anthony Morrison. Points of error one and eight are overruled[]"); Harris v. State, No. AP-76,810, 2014 WL 2155395, at *10 (Tex. Crim. App. May 21, 2014) (citing *Threadgill and Feldman* and denying the appellant's points of error five to ten because *inter alia* did not establish that the trial judge erred denying any of his challenges for cause); Bess v. State, No. AP-76377, 2013 WL 827479, at *25 (Tex. Crim. App. Mar. 6, 2013) (citing *Threadgill* and denying the appellant's second point of error due to the prospective juror's statements that "she would keep an open mind and consider all evidence"); Green v. State, No. AP-76,458, 2012 WL 4673756, at *4-21 (Tex. Crim. App. Oct. 3, 2012) (citing *Threadgill* and *Feldman* and denying the defendant's points of error one through fourteen); Broadnax v. State, No. AP-76,207, 2011 WL 6225399, at *5-9 (Tex. Crim. App. Dec. 14, 2011) (citing *Threadgill* and *Feldman* and denying the appellant's arguments that the trial court erred in denying his challenges to sixteen jury panel members); and Medina v. State, No. AP-76,036, 2011 WL 378785, at *4-13 (Tex. Crim. App. Jan. 12, 2011) (overruling the appellant's points of error concerning 18 veniremen and citing *Threadgill and Feldman*).

263. Johnson, 2015 WL 7354609, at *1; Muhammad, 2015 WL 6749922, at *1; Harris, 2014 WL 2155395, at *1; Bess, No, 2013 WL 827479, at *1; Green, 2012 WL 4673756, at *1; Broadnax, 2011 WL 6225399, at *1; Medina, 2011 WL 378785, at *1.

264. Brief of Appellant, Robinson v. State, No. AP-76,535 (Tex. Crim. App. Mar. 19, 2012).

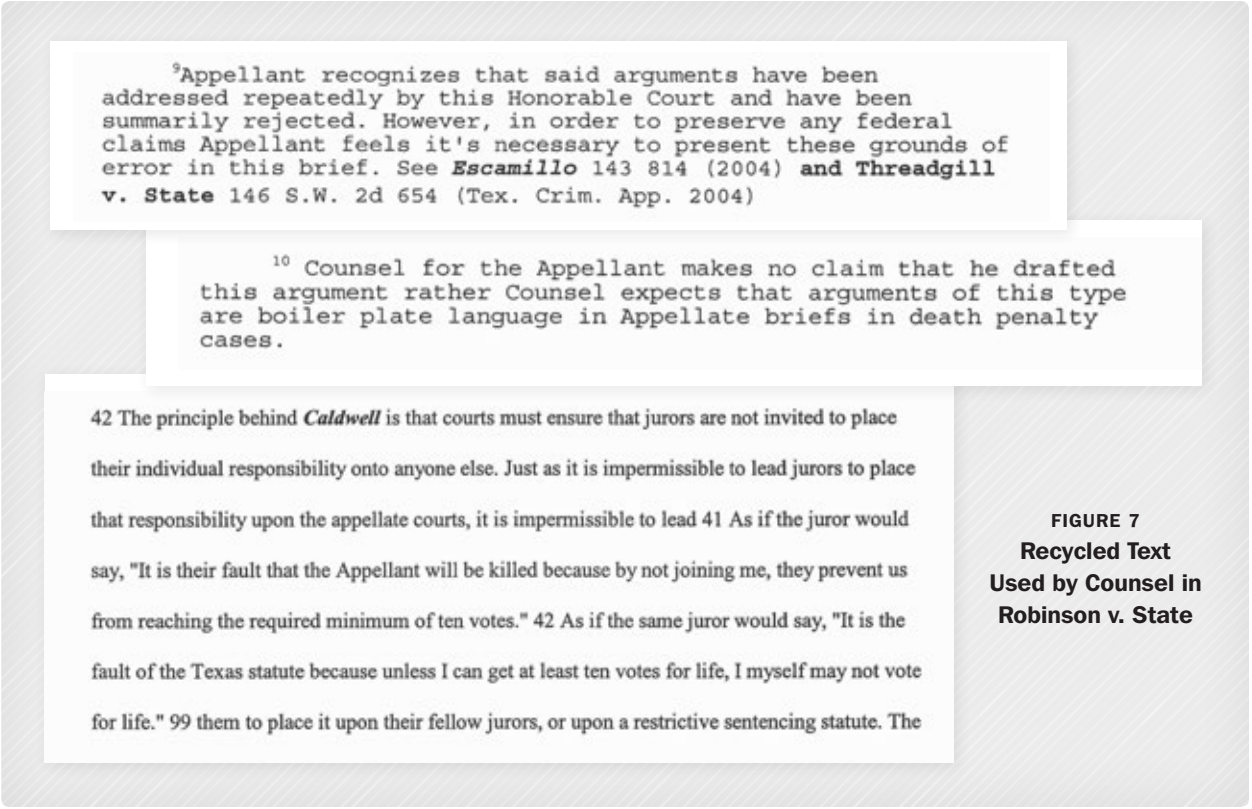
265. *Id.* at 70. Lawyers often raise issues on direct appeal that the CCA has rejected in other cases so that the issues are preserved for litigation in later proceedings. In these situations, lawyers frequently cite case-specific facts or cite to recently decided cases to explain why they are briefing an argument that the court previously has rejected. However, in this case, the lawyer utilized this disclaimer to disown over 80% of the errors raised, thus giving the impression that there were no worthwhile claims to be made on direct appeal.

266. The fifth constitutional challenge was discussed separately. It argued that the defendant's sentence was unconstitutional due to his age—just over 18 years—at the time of the offense. Although the lawyer did not state that the argument was pulled from another source, he acknowledged in a footnote that the CCA had rejected the argument he was making.

267. *Id.* at 71.

268. *Id.* at 77.

269. Robinson v. State, No. AP-76,535, 2013 WL 2424133 (Tex. Crim.



[9]Appellant recognizes that said arguments have been addressed repeatedly by this Honorable Court and have been summarily rejected. However, in order to preserve any federal claims Appellant feels it's necessary to present these grounds of error in this brief. See ***Escamillo*** 143 814 (2004) **and Threadgill v. State** 146 S.W. 2d 654 (Tex. Crim. App. 2004)

[10] Counsel for the Appellant makes no claim that he drafted this argument rather Counsel expects that arguments of this type are boiler plate language in Appellate briefs in death penalty cases.

42 The principle behind ***Caldwell*** is that courts must ensure that jurors are not invited to place their individual responsibility onto anyone else. Just as it is impermissible to lead jurors to place that responsibility upon the appellate courts, it is impermissible to lead 41 As if the juror would say, "It is their fault that the Appellant will be killed because by not joining me, they prevent us from reaching the required minimum of ten votes." 42 As if the same juror would say, "It is the fault of the Texas statute because unless I can get at least ten votes for life, I myself may not vote for life." 99 them to place it upon their fellow jurors, or upon a restrictive sentencing statute. The

FIGURE 7
Recycled Text Used by Counsel in Robinson v. State

Condemned inmates receive deficient lawyering when their appellate counsel submit briefs that rely on recycled text that does not reflect current law or the facts of the case. Texas must ensure that counsel engage in original work as part of the delivery of high-quality legal representation in direct appeals of death penalty cases. All of the appointed lawyers in this section represented more than one client in our survey. All of these clients had their convictions and death sentences upheld on direct appeal. Meanwhile, two of the lawyers remain on their region's list of qualified appellate counsel in death penalty proceedings;[270] the third has retired from capital representation.[271]

App. June 6, 2013).

270. Counsel for Cortne Robinson and the lawyer who represented Donald Bess, James Broadnax, Gary Green, Roderick Harris, Matthew Johnson, and Naim Muhammad are on the First Administrative Judicial Region's List of Attorneys Qualified to Represent Indigent Defendants in Death Penalty Cases (Feb. 26, 2016), http://www.txcourts.gov/media/1047584/death-penalty-approved-attorneys-list.pdf.

271. Memorandum from Amanda Marzullo to File (Apr. 6, 2016) (copy on file with author).

C. Minimal Client Communication

The establishment of rapport and an ongoing exchange between an attorney and her client are fundamental to representation. The Texas Disciplinary Rules of Professional Conduct,[272] multiple advisory opinions from the State Bar of Texas, as well as the ABA and Texas guidelines direct lawyers at all stages of the case to regularly communicate with their clients about "all matters that might reasonably be expected to have a material impact on the case, such as: . . . current or potential legal issues; litigation deadlines and the projected schedule of case-related events[.]"[273] This requirement ensures that: (1) the client, who may be unable to read written communications, understands and is able to make meaningful decisions about his case; and (2) attorneys consult the client, who can be an important source of information.

At the appellate stage, the client can alert counsel to events at trial that were omitted from the record and provide context for the trial lawyers' decisions. In-person meetings also provide defense lawyers with essential information regarding their clients. As New York's guidelines state:

> By visiting clients, counsel may learn far more from them and convey far more to them than otherwise would be possible. Although appellate briefs may not contain facts outside the record, gaining information through in-person meetings can be crucial to litigating post-judgment claims. For example, if counsel learns that a client has a history of mental illness and was suffering from such condition during the proceedings below, a motion to vacate the conviction may be viable.[274]

Gathering mental health information is particularly important in death penalty cases. Although competence-to-be-executed is not cognizable on direct appeal, an attorney is obliged to monitor and document changes to the client's condition for use in subsequent proceedings.[275] Many death row inmates deteriorate mentally when subjected to the severe and isolating conditions of detention and the inherent stress of an eventual execution date. Visiting the client allows appellate counsel to gather and preserve evidence regarding a client's increasing incompetence to be executed.[276]

Despite these responsibilities, our survey found that direct appeal lawyers engaged in minimal communication with their condemned clients. Of the 50 cases for which itemized billing statements are available,[277] just 18, 36.0%, identified in-person visits

272. Tex. Disciplinary R. Prof'l Conduct 1.03 ("(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

273. Texas Guideline 10.2(c).

274. New York Office of Indigent Legal Services, Appellate Standards and Best Practices IX & cmt (effective Jan. 5, 2015), https://www.ils.ny.gov/files/Appellate%20Standards%20Final%20010515.pdf.

275. ABA Guideline 10.15.1(E)(2) & cmt "Counsel's ongoing monitoring of the client's status, required by Subsection E(2), also has a strictly legal purpose. . . . [Deterioration of] the client's mental condition may directly affect the legal posture of the case and the lawyer needs to be aware of developments. For example, the case establishing the proposition that insane persons cannot be executed was heavily based on notes on the client's mental status that counsel had kept over a period of months.") (internal citations omitted).

276. ABA Guideline 10.5 & cmt ("The Temporal Scope of Counsel's Duties").

277. These 50 cases include 49 cases where the defendant was represented by counsel on direct appeal and TDS obtained copy of the defense counsel's itemized billing statement, and Travis Mullis' case where billing records indicate that he waived his right to counsel after his attorney conducted in-person meetings with him. The 49 "full" records are for the following cases: Douglas Armstrong, Teddrick Batiste, Donald Bess, Brent Brewer, James Broadnax, Micah Brown, Tyrone Cade, Kimberly Cargill, Jaime Cole, Raul Cortez, Obel Cruz-Garcia, Rickey Cummings, Erick Davila, Irving Davis, Areli Escobar, Robert Fratta, James Freeman, Milton Gobert, Gary Green, Howard Guidry, Garland Harper, Roderick Harris, John

to clients;[278] lawyers in 12 cases (24.0%) billed only for sending a copy of the appellate brief to the client or copying the defendant on communications to the CCA, and attorneys in 8 cases (16.0%) did not bill any time dedicated to client communications or correspondence.[279]

Texas must ensure that appointed appellate counsel comply with the duty to regularly communicate with their death-row clients. Because Texas has not enforced this duty, the capital justice system has had to grapple with fallout that subjects the system to deserved criticism.

Seeking Court Intervention

SEVEN APPELLANTS[280] (8.3%) IN OUR SURVEY WERE so dissatisfied with their lawyers that they complained in writing to the CCA or the convicting court. These appellants' overriding concern was that their attorneys were unresponsive and did not provide information regarding the status of their cases.

In one case, the attorney did not confer with his client at any point in the appellate process. Dexter Johnson first wrote to the CCA two months after his death sentence, stating that he had not heard from his appellate and post-conviction lawyers and requesting their identities.[281] A month later, Mr. Johnson advised the Court that he still had not heard from his lawyers and requested their addresses.[282] Two months after that, he sent the Court a third letter expressing alarm that his appellate brief had not been timely filed.[283] Christopher Wilkins wrote to inquire whether his attorney had died because he had not heard from the lawyer despite repeated requests for information and status updates.[284] The convictions and death sentences of Mr. Johnson and Mr. Wilkins were upheld on direct appeal.[285]

Failure to Raise Issues

A NUMBER OF APPELLANTS COMPLAINED THAT their lawyers did not raise what they viewed as key issues on direct appeal. Although counsel is obligated to limit appellate arguments to meritorious claims, there is a corresponding duty to thoroughly review the trial record and analyze the client's legal

Hummel, Christopher Jackson, Joseph Jean, Dexter Johnson, Matthew Johnson, Mabry Landor, Juan Lizcano, Daniel Lopez, Jerry Martin, Raymond Martinez, Randall Mays, Hector Medina, Naim Muhammad, Steven Nelson, Mark Robertson, Cortne Robinson, Kwame Rockwell, Rosendo Rodriguez, Wesley Ruiz, Demetrius Smith, Mark Soliz, Robert Sparks, Paul Storey, Richard Tabler, John Thuesen, Albert Turner, and Antonio Williams.

278. Douglas Armstrong, Brent Brewer, Tyrone Cade, Jaime Cole, Obel Cruz-Garcia, Rickey Cummings, Erick Davila, Irving Davis, John Hummel, Joseph Jean, Mabry Landor, Randall Mays, Travis Mullis, Kwame Rockwell, Rosendo Rodriguez, Demetrius Smith, Mark Anthony Soliz, and Albert Turner. TDS sought to verify this dearth of attorney-client visits through public information requests to the Texas Department of Criminal Justice that sought copies of attorney visitation applications for each inmate within our survey.TDCJ initially responded to our requests by stating that it had no record of an attorney visit to any of the three women detained at the Mountain View Unit. (This response did not include Kim Cargill because the CCA had not ruled on her direct appeal at the time of the request.) TDCJ subsequently withheld visitation records concerning the male death row inmates in our survey under a claim of constitutional privilege.

279. Counsel billed for sending an appellate brief or copying their client on correspondence with the CCA in the following cases. James Broadnax, Micah Brown, Kimberly Cargill, Garland Harper, Roderick Harris, Matthew Johnson, Juan Lizcano, Daniel Lopez, Hector Medina, Mark Robertson, Cortne Robinson and Robert Sparks. Lawyers did not bill for any time dedicated to client communications in the cases of: Teddrick Batiste, Donald Bess, James Freeman, Milton Gobert, Gary Green, Jerry Martin, Raymond Martinez, and Naim Muhammad. It is possible that counsel corresponded with their clients in these cases but did not request payment for these services. However, correspondence with a client is an important part of representation. Attorneys should be compensated for the time expended advising clients of case developments and answering their questions.

280. Letter from Kosul Chanthakoumanne to Court of Criminal Appeals (July 23, 2009) (copy on file with author) [hereinafter Chantakoumanne Complaint]; Emergency Motion for Appointment of Different Counsel to File Supplemental Brief to Direct Appeal, Fratta v. State, No. AP-76,188 (Tex. Crim. App. June 22, 2010) [hereinafter Fratta Motion]; Letter from John Steven Gardner to Hon. Curt Henderson, 219th Dist. Ct. (Mar. 12, 2008) (copy on file with author) (requesting the appointment of new counsel); Letter from Dwayne Gobert to Clerk of the CCA (dated Jan. 6, 2012) (requesting the appointment of counsel to file a petition for writ of *certiorari* due to his lawyer's illness); Letter from Mabry J. Landor, III to Court of Criminal Appeals (Apr. 10, 2013) (complaining that his direct appeal lawyer didn't raise certain issues in his brief) [hereinafter Landor Complaint]; Letter from Dexter Johnson to Court of Criminal Appeals (Sept. 23, 2007) (stating that he had not heard from his lawyer) [hereinafter D. Johnson Complaint]; Letter from Christopher Wilkins to Louise Pearson, Clerk of Court, Court of Criminal Appeals (Dec. 12, 2008)[hereinafter Wilkins Complaint].

281. Letter from Dexter Johnson to Louise Pearson, Clerk of Court, Court of Criminal Appeals (Aug. 15, 2007).

282. D. Johnson Complaint, *supra* note 280.

283. Letter from Dexter Johnson to the Court of Criminal Appeals (Nov. 19, 2008).

284. Wilkins Complaint, *supra* note 280.

285. Johnson (Dexter) v. State, No. AP-75,749, 2010 WL 359018, at *1 (Tex. Crim. App. Jan. 27, 2010) ("[P]oints of error one and two are moot. After reviewing appellant's three remaining points of error, we find them to be without merit and affirm the trial court's judgment and sentence of death."); Wilkins v. State, No. AP-75,878, 2010 WL 4117677, at *1 (Tex. Crim. App. Oct. 20, 2010) ("[W]e affirm the judgment and sentence of the trial court.").

options.[286] It is ineffective to fail to raise an issue on appeal that would entitle the client to relief if presented to the appellate courts.[287] At least three appellants advised the CCA that their attorneys did not consult with them before submitting appellate briefs on their behalf.[288] Many of the alternative claims, such as the sufficiency of the State's evidence, that these appellants identified in their correspondence are commonly raised in capital appeals and warrant consideration by defense counsel.[289] The convictions and death sentences of each of these death row inmates were affirmed by the CCA on direct appeal.[290]

Waiver of the Right to Counsel

Our review revealed that some lawyers did not visit their clients, even when the client sought to forgo appellate representation and volunteer for execution. In our survey, five defendants—John Ramirez,[291] Richard Tabler,[292] Daniel Lopez,[293] Selwyn Davis,[294] and Travis Mullis[295]—advised the Court by mail that they wished to discontinue further legal challenges to their death sentences.[296] Under the Texas death penalty statute, a direct appeal is automatic; it cannot be waived by the defendant. However, appellants can waive their right to representation in this proceeding, leaving the CCA to affirm the conviction and sentence unless its own review identifies a reversible error.[297] Only one defendant in our study, Travis Mullis, waived representation on direct appeal.[298] Richard Tabler and Selwyn Davis subsequently sought to have their appeals "reinstated."[299] Appellate briefs were filed on behalf of Daniel Lopez[300] and John Ramirez.[301]

Although a defendant may relinquish his right to an attorney, the lawyer must investigate the reasoning for the decision, determine whether the client is competent to make it and seek medical attention where appropriate.[302] It is not uncommon for a death row inmate to seek to expedite his execution. Experts who have studied this phenomenon have attributed it to a myriad of causes, including lingering guilt over crimes the inmate may have committed, the conditions of confinement, and the failure

286. McCoy v. Court of Appeals, 486 U.S. 429, 438 (1988); *see also* Douglas v. California, 372 U.S. 353, 357 (1963).
287. *See e.g., Ex parte* Miller, 330 S.W.3d 610 (Tex. Crim. App. 2012) (holding that the defendant's appellate counsel was ineffective for failing to assert a "lead pipe" legal claim concerning the sufficiency of the evidence).
288. Chanthakoummane Complaint, *supra* note 280; Landor Complaint, *supra* note 280; Fratta Motion, *supra* note 280.
289. At the time this report was drafted the CCA reversed Stanley Griffin's capital murder conviction because the evidence admitted during his trial was insufficient to prove that he committed capital murder. Griffin v. State, No. AP-76,834, 2016 WL 335025 at *6 (Tex. Crim. App. Jan. 27, 2016).
290. Fratta v. State, No. AP-76,188, 2011 WL 4582498 (Tex. Crim. App. Oct. 5, 2011); Landor v. State, No. AP-76,328, slip op. at 1 (Tex. Crim. App. June 29, 2011); Chanthakoummane v. State, No. AP-75,794, 2010 WL 1696789 (Tex. Crim. App. Apr. 28, 2010).
291. Letter from John Ramirez to Hon. Bobby Galvan, 94th Dist. Ct. (Mar. 11, 2011) (copy on file with author) ("I'm writing to inform the court that I've decided to drop/waive all my appeals!").
292. Letter from Richard L. Tabler to Hon. Mary Trudo, 264th Dist. Ct. (May 24, 2010) (copy on file with author) (stating that he waived his appeals and requesting that the district court reinstate his execution date).
293. Motion for Assertion of Pro Se Right, State v. Lopez, No. 090-CR-0787B (17th Dist. Ct., Nueces County, Tex. Apr. 5, 2010).
294. Letter from Selwyn Davis to the Court of Criminal Appeals (Jan. 11, 2010) (copy on file with author) (stating that he would like to drop his appeals).
295. Waiver of Rights and Invocation of Defendant's Right to Proceed *Pro Se*, State v. Mullis, No. 08-CR-0333 (122nd Dist. Ct., Galveston County, Tex. May 16, 2011).
296. Court records obtained by TDS found that the CCA responded to Travis Mullis and Selwyn Davis' requests to waive their direct appeals by abating the appeals and directing the trial courts to conduct a hearing on each defendant's psychological condition and the voluntariness of his waiver. In Daniel Lopez's case, the trial court conducted a hearing on the voluntariness of his waiver of a state post-conviction lawyer, but does not appear to have conducted a similar hearing regarding his representation on direct appeal. Lopez's lawyer billed one hour for this hearing without additional time to meet with his client. Letter from Laura Garza Jimenez, Nueces County Attorney to Julie Pennington, Texas Defender Service (dated Aug. 14, 2014) (enclosing information regarding Nueces County's payments for defense services in Lopez v. State, No. AP-76, 327) [hereinafter Lopez Attorney Bill].
297. *See* Mullis v. State, No. AP-76,525, 2012 WL 1438685, at *1 (Tex. Crim. App. Apr. 25, 2012) (upholding the defendant's conviction and sentence on direct appeal and stating that at a hearing "expressed his desire to dismiss his court-appointed appellate counsel, raise no points of error," and entered a valid waiver of his right to counsel).
298. Voluntary Dismissal of Appeal, State v. Mullis, No. 08-CR-0333 (122nd Dist. Ct., Nueces County, Tex. undated).
299. Letter from Hon. Martha Trudo, 264th District Court, to Louise Pearson, Court of Criminal Appeals (June 24, 2009) (attaching Richard Tabler's letter seeking to reinstate his appeals); Letter from Selwyn Davis to the Court of Criminal Appeals (Apr. 19, 2010) (copy on file with author).
300. Letter from Abel Acosta, Court of Criminal Appeals, to Hon. Sandra Watts, 17th Dist. Ct. (Aug. 8, 2011) (attaching a second letter from the defendant waiving his appeals but noting that defense counsel filed a brief on the defendant's behalf).
301. Brief, Ramirez v. State, No. AP-76,100 (Tex. Crim. App. Apr. 8, 2010).
302. *See* ABA Guideline 10.5 cmt. at 1010 (stating that it is ineffectiveness for a lawyer to "simply acquiesce to [volunteering client's] wishes, which usually reflect distorting effectives of overwhelming feelings of guilt and despair rather than a rational decision in favor of state-assisted suicide").

of counsel to maintain contact with the client.[303] As one researcher observed, "the relentless regime of lockdown, loneliness, isolation, and hopelessness, while one awaits death, exact[s] a terrible psychic, spiritual . . . and familial toll."[304] Even individuals who maintained that they did not commit their purported crimes have elected to forego their appeals.[305]

Despite these concerns, billing records from the lawyers for at least two, Daniel Lopez[306] and Richard Tabler,[307] of the five defendants who sought to expedite their appeals reveal that the lawyers did not visit their clients after they made this decision.[308] Instead, the lawyers' invoices show that they drafted letters to their clients and met with other lawyers, but no billing reflected visits with their clients before or after they were transferred to death row.[309] Mr. Tabler's appellate lawyer did not speak to Mr. Tabler in person after he attempted suicide. According to itemized billing, Mr. Tabler's lawyer wrote her suicidal client a letter and held a conference call with TDCJ officials.[310]

The Role of Payment Structures

In addition to lawyer disinterest, county payment structures contribute to the failure of direct appeal counsel to visit their condemned clients.[311] Travel to Livingston, where death row is sited, can be expensive and time consuming. Receipts from the few lawyers in our survey who submitted reimbursement requests for such visits demonstrate that these trips frequently require a plane ticket, a hotel stay, and a car rental. At the same time, defense lawyers are under intense pressure to curtail costs to curry favor with the judges who approve their payments and will assign them to future cases. In some jurisdictions, presumptive fee maximums and flat fees essentially mean that counsel must pay for in-person meetings with death row clients out of their own pockets.

The mandate of high quality legal representation on direct appeal obligates appellate counsel to meet with condemned clients in person and to maintain communication so that the client understands the posture and progress of the case. The obligation of communication is never more important than when a death-sentenced inmate wishes to waive his right to appellate counsel in order to expedite his appeals. Texas should take steps to ensure that direct appeal counsel visit and communicate with their appointed clients on death row, and it should further ensure that lawyer compensation schemes do not prevent lawyers from meeting this obligation.

303. *Id.*

304. Robert Johnson, Condemned to Die: Life Under a Sentence of Death 105 (1989).

305. *See e.g.,* Melvin I. Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J. Crim. L & Criminology 553, 558 (Fall 1984) (describing the case of Frank J. Coppola, "[a] former policeman and seminarian, Coppola insisted he was innocent, but after the state's highest court found no error in his trial and the Supreme Court denied *certiorari*, he decided to drop his appeal. He was ready to die, he said, 'to preserve his dignity and spare his family further agony[.]'") (internal citations omitted).

306. Attorney Fee Voucher, State v. Lopez, No. 09-CR-0787-B (117th Dist. Ct., Nueces County, Tex. Jun. 2, 2011). An attachment to the lawyer's payment voucher in Mr. Lopez's case itemizes 72.5 hours of work from "opening the file" on March 3, 2010 through mailing a copy of the filed brief to the defendant on June 2, 2011. This billing period overlaps with Mr. Lopez's first application to proceed *pro se* on April 5, 2010. Letter from Daniel Lopez to Judge Watts (April 5, 2010) (copy on file with author) (attaching a handwritten motion to proceed *pro se*). After an appellate brief was filed in his case, Mr. Lopez again wrote to the CCA to state that he had waived his appeals. Letter from Abel Acosta, Chief Deputy Clerk, Court of Criminal Appeals to Hon. Sandra Watts, 17th Dist. Ct. (Aug. 8, 2011) (copy on file with author) (attaching a letter from the defendant dated Aug. 1, 2011). The billing records collected by TDS do not state what (if any) action defense counsel took following this request.

307. Request for Payment, State v. Tabler, No. 57382 (264th Dist. Ct., Bell County, Tex. Nov. 5, 2010) [hereinafter Tabler Attorney Bill].

308. Itemized billing records are unavailable for the Selwyn Davis and John Henry Ramirez cases. *See* Requests for payment for Services Rendered as Court Appointed Counsel, State v. Davis, No. 06-904119 (390th Dist. Ct., Travis County, Tex. Sept. 2, 2009 & Oct. 22, 2009) (copy on file with author) (stating lump sums without itemized attachments); and Letter from Laura Garza Jimenez, Nueces County Attorney to Ashley Steele, Texas Defender Service (Nov. 20, 2014) (copy on file with author) (stating that Nueces County does not have any itemized timesheets or billing statements relating to Ramirez v. State, which were destroyed pursuant to the County's document retention schedule). In his letter seeking to "waive" his appeals, Ramirez stated that he wrote to his counsel and asked that the lawyer file motions to give effect to this request but that "[h]e's never answer [his] letters in the past so [Ramirez didn't] expect a reply this time either." Letter from John Henry Ramirez to District Judge Bobby Galvan (Mar. 11, 2011). By contrast, the billing statement for Travis Mullis' case shows that his assigned counsel met with him on at least five occasions prior to his hearing during which he waived his rights to counsel. Motion for Payment, State v. Mullis, No. 08-Cr-0333 (122nd Dist. Ct., Galveston County, Tex. undated).

309. *See supra* notes 306 & 307.

310. Tabler Attorney Bill, *supra* note 307, at entry dated Feb. 26, 2009.

311. *See supra* section IV.C.

D. Routine Avoidance of Discretionary Legal Procedures

THE TEXAS GUIDELINES DIRECT DEFENSE LAWYERS AT ALL PHASES OF THE PROCEEDINGS TO CONSIDER ALL LEGAL options available to the client, including the advantages of "asserting legal claims whose basis has only recently become known or available[,] and . . . supplementing claims previously made with additional factual or legal information."[312] Within the context of a direct appeal, this mandate requires consideration of discretionary procedures such as motions for new trial, motions to file an oversized brief, reply briefs, requests for oral argument, or petitions for *certiorari*. Each of these applications is subject to the lawyer's discretion, but provides important opportunities for swift relief, to reinforce the defense case, or seek discretionary review from the U.S. Supreme Court. These discretionary efforts are within the standard of practice and ensure the procedural fairness of the appellate process by allowing litigants to fully and adequately present their arguments.

Our review discovered that use of these procedures varied according to the defendant's county of conviction, and at times, the lawyer(s) assigned to the case. Even within our short survey window, wide disparities in the use of these proceedings emerged, suggesting that their use is driven by external factors—*e.g.,* local practice, attorney temperament—rather than a professional assessment of the client's legal remedies. For example, attorneys from Smith County were 29 times more likely to provide the minimum level of representation—*i.e.,* declining to file reply briefs, or petitions for *certiorari*, and waiving oral argument—than defense counsel for cases outside Smith County.[313] At the other end of the spectrum, two lawyers—one who represented defendants on a *pro bono* basis[314] while the other served as assigned counsel for two defendants[315] —were 11 times more likely than the average lawyer in our survey to file a reply brief, appear for oral argument, and seek U.S. Supreme Court review. We further found that lawyers handling cases from the same county often made similar decisions about filing a substantive motion for new trial, brief length, whether to respond to the prosecution's counterarguments, and whether to seek discretionary review from the U.S. Supreme Court. These regional disparities in appellate practice raise troubling questions regarding equal justice and the quality of representation in Texas death penalty cases.

Motions for New Trial

A MOTION FOR A NEW TRIAL IS A WRITTEN REQUEST that the trial court set aside the defendant's conviction and/or sentence and grant retrial of the case. It is not a prerequisite to the presentation of a point of error on appeal, unless the claim is dependent upon "facts not in the record."[316] However, it provides the defense with an avenue for immediate relief in a number of circumstances and is a means of supplementing the record and bolstering claims on appeal.

Within our study, lawyers filed motions for new trial in a substantial percentage—59.6%—of all cas-

312. TEXAS GUIDELINE 11.2 (The Duty to Assert Legal Claims).

313. This inactivity occurred in five cases within our sample: Kimberly Cargill, Daniel Lopez, Demontrell Miller, Cortne Robinson, and Gregory Russeau. Three of these cases hail from Smith County: Kimberly Cargill, Demontrell Miller, and Gregory Russeau. A lawyer pursued discretionary procedures in just one case from Smith County, *Beatty v. State*, in which assigned counsel filed a reply brief and appeared for oral argument.

314. This attorney represented Adrian Estrada and Manuel Velez, and also served as co-counsel for Max Soffar.

315. Teddrick Batiste and James Freeman.

316. Tex. R. App. P. 21.2.

es.[317] However, only a minority, 20%,[318] of these applications were supported with exhibits, and at least 40.0% of all motions were *pro forma* submissions that did not provide an adequate basis for relief.[319] In Dallas County, in particular, many case files contained a motion for new trial that consisted of two sentences:

> Now comes the Defendant in the above cause and by his Attorney, and moves the Court to grant him a New Trial herein for the good and sufficient reason that the verdict is contrary to the law and the evidence.
>
> Wherefore Defendant prays the Court grant a new trial herein.[320]

Although this form states the criteria for granting a new trial, it does not specify the factual basis for vacating the conviction or sentence. The Texas Rules of Appellate Procedure list eight grounds that immediately entitle a defendant to a new trial as a matter of law.[321] Some grounds constitute extraordinary circumstances, such as government witness tampering or jury tampering. Two concern issues that frequently are raised on direct appeal: "the court has misdirected the jury about the law or committed some other material error likely to injure the defendant's rights."[322]

Motions for new trial may be filed by trial counsel to preserve a defendant's opportunity for relief and with the intent that appellate counsel will amend the motion later.[323] However, this strategy risks the trial court ruling before appellate counsel can investigate the bases listed in Rule 21.2 and amend the pleading. In such cases, a precipitous trial court ruling forecloses relief on the motion for new trial.

Speedy appointment of qualified appellate counsel and that lawyer's robust investigation of a potential motion for new trial are superior ways to protect a death row defendant's rights on appeal.

Motions to Submit Oversized Briefs

LAWYERS FAILED TO SEEK AUTHORIZATION FOR AN oversized brief, let alone avail themselves of the

317. Motions for New Trial were filed in 50 cases: Douglas Armstrong, Donald Bess, James Broadnax, Micah Brown, Tyrone Cade, Tilon Carter, Kosul Chanthakoummane, Billie Coble, Lisa Coleman, Raul Cortez, Obel Cruz-Garcia, Rickey Cummings, Erick Davila, Irving Davis, Selwyn Davis, Paul Devoe, Areli Escobar, Alan Fratta, Joseph Gamboa, John Gardner, Ramiro Gonzales, Bartholomew Granger, Gary Green, Roderick Harris, Fabian Hernandez, John Hummel, Matthew Johnson, Armando Leza, Juan Lizcano, Steven Long, Melissa Lucio, Jerry Martin, Randall Mays, Blaine Milam, Naim Muhammad, Travis Mullis, Steven Nelson, LeJames Norman, Christian Olsen, John Ramirez, David Renteria, Mark Robertson, Kwame Rockwell, Rosendo Rodriguez, Wesley Ruiz, Robert Sparks, Paul Storey, Albert Turner, Thomas Whitaker, and Christopher Wilkins. and

318. Motions for New Trial were supported by exhibits in the following cases: Douglas Armstrong, Donald Bess, Tilon Carter, Obel Cruz-Garcia, Paul Devoe, Bartholomew Granger, John Ramirez, Rosendo Rodriguez, and Albert Turner. TDS was able to verify that Motions for New Trial were filed in the following cases but was unable to obtain a copy of the motion and any exhibits: Jerry Martin, Robert Fratta, Joseph Gamboa, Melissa Lucio, Travis Mullis, Christian Olsen, Mark Robertson, and Irving Davis.

319. Lawyers filed *pro forma* motions for new trial in 20 cases. Defendant's Motion for New Trial, State v. Johnson (Matthew), No. F12-23749 (363rd Dist. Ct., Dallas County, Tex. Nov. 26, 2013); Motion for New Trial and Motion in Arrest of Judgment, State v. Brown, No. 27,742 (354th Dist. Ct., Hunt County, Tex. Aug. 27, 2013); Defendant's Motion for New Trial, State v. Cade, No. F-11-33962 (265th Dist. Ct., Dallas County, Tex. Sept. 7, 2013); Defendant's Motion for New Trial, State v. Muhammad, No. F11-00698 (Crim. Dist. Ct. 4, Dallas County, Tex. May 23, 2013); Motion for New Trial, State v. Nelson, No. 12322507D (Crim. Dist. Ct. #4, Tarrant County, Tex, Nov. 8, 2012); Defendant's Motion for New Trial, State v. Harris, No. F09-00409 (Crim. Dist. Ct. 7, Dallas County, Tex. June 15, 2012); Motion for New Trial, State v. Hummel, No. 1184294 (432nd Dist. Ct., Tarrant County, Tex. July 21, 2011); Defendant's Motion for New Trial and Reconsideration, State v. Escobar, No. 09-301250 (167th Dist. Ct., Travis County, Tex. June 14, 2011); Motion for New Trial, State v. Milam, No. 09-66 (4th Dist. Ct., Rusk County, Tex. June 16, 2010); Defendant's Motion for New Trial, State v. Broadnax, No F08-24667-Y (Crim. Dist. Ct. 7, Dallas County, Tex. Aug. 21, 2009); Motion for New Trial, State v. Leza, No. 2007-CR04563A (187th Dist. Ct. Bexar County, Tex. June 11, 2009); Motion for New Trial, State v. Davila, No. 1108359D (Crim. Dist. Ct. 1, Tarrant, County, Tex. Mar. 23, 2009); Defendant's Motion for New Trial, State v. Sparks, No. F08-01020J (Crim. Dist. Ct. 3, Dallas County, Tex., Dec. 30, 2008); Defendant's Motion for New Trial, State v. Norman, No. 06-1-7346 (24th Dist. Ct., Jackson County, Tex. Dec. 29, 2008); Defendant's Motion for New Trial, State v. Ruiz, No. F07-50318-M (194th Dist. Ct., Dallas County, Tex. Sept. 8, 2008); State v. Rodriguez, No. 2005-410 (140th Dist. Ct., Lubbock County, Tex. Apr. 22, 2008); Motion for New Trial, Motion for New Trial, State v. Wilkins, No. 1002038 (297th Dist. Ct. Tarrant County, Tex. Apr. 3, 2008); Defendant's Motion for New Trial and Reconsideration, State v. Davis (Selwyn), No. D1DC06-904119 (390th Dist. Ct., Travis County, Tex. Oct. 17, 2007); Defendant's Motion for New Trial, State v. Long, No. F-05-52918 (265th Dist. Ct., Dallas County, Tex. Oct. 13, 2006); Motion for New Trial, State v. Gonzales, No. 04-02-9091 (38th Dist. Ct., Medina County, Tex. Oct. 6, 2006).

320. This form was filed used in the motions filed in the following cases: James Broadnax, Tyrone Cade, Matthew Lee Johnson, Steven Long, Naim Muhammad, Wesley Ruiz, and Robert Sparks.

321. Tex. R. App. P. 21.3 ("The defendant must be granted a new trial, or a new trial on punishment, for any of the following reasons . . . ").

322. Id. at §§ (b) & (h).

323. Counsel filed an amended motion for new trial on behalf of Rosendo Rodriguez. The form motion for new trial in Robert Sparks' case requests that the trial court hold the defendant in Dallas County to facilitate defense counsel's investigation. TDS was unable to locate an amended motion for new trial in this case.

space allotted to them under the Texas Rules of Appellate Procedure, in most cases within our survey. Motions for an oversized brief were filed in just six (7.22%) cases.[324] Three of these motions were filed by *pro bono* counsel who specialize in capital representation and who submitted briefs up to 54.7% longer[325] than the average brief in our survey. The average brief was 99 pages (mean), exactly 23%[326] under the CCA's 125-page limit for appellate briefs in death penalty cases.[327] Briefs were more than five pages under the 125-page limit for death penalty appellate briefings[328] in 54 cases, 65.0% of our survey,[329] and the opening brief in 12 cases was fewer than 50 pages in length.[330] Two of these 12 briefs were prepared by the same lawyer, who filed a 59-page brief in a third case in our survey.[331]

The length and complexity of death penalty cases at the trial level make slim appellate briefs a cause for concern. Pretrial litigation and trials last longer, and more legal and factual issues are raised. And Texas trial records reflect this trend. The average reporter's record for a subset of 23 cases in our survey[332] spanned 48 volumes and more than 6,300 pages, while the clerk's record typically included dozens of pretrial motions. Appellate briefs should have expanded to encompass the many grounds for relief and to accord with the Texas and ABA guidelines' directive that lawyers assert all available legal claims.[333] Yet, briefs within our survey raised on average (median) just 15 claims and briefs in 26 cases, 31.3%, asserted 10 or fewer grounds for relief.[334]

Extensive appellate briefs have become the norm in death penalty cases in other states. The Washington State Office of Court Administration, for example, reports that direct appeal briefs filed in death penalty cases have become substantially longer in recent years. Briefs that "averaged 50 pages ten years ago, now number 250 pages."[335]

Slim briefs risk waiver of legal issues on direct appeal and in future proceedings. As counsel for Max Soffar—who had a robust claim of innocence—observed in his motion for an oversized brief, "Although the 125-page limit . . . may allow for adequate briefing in some cases, it certainly does not" in every case.[336] As the ABA recognizes, "Winnowing issues in a capital appeal can have fatal consequences. Issues abandoned by counsel in one case, pursued by

324. Adrian Estrada, Armando Leza, Randall Mays, David Renteria, Max Soffar, and Manuel Velez. TDS' review of the appellate record did not uncover a motion for an extended brief in four cases: Tyrone Cade, Roderick Harris, Matthew Johnson, and Naim Muhammad. However, the opening briefs in these cases exceeded the 125 page limit.
325. The mean number of pages included in opening briefs in our survey was 99 pages in length. *Pro bono* counsel submitted briefs that numbered 151 -175 pages and raised 21-46 points of error.
326. *E.g.*, Appellant's Brief, Velez v. State, No. AP-76,051 (Tex. Crim. App. Mar. 3, 2011) (raising 46 points of error in a 175-page brief).
327. Tex. R. App. P. 9.4(i) (2) (A).
328. *See e.g.,* Coleman v. Thomas, 501 U.S. 722 (1991) (reviewing procedural default rule in federal habeas); Picard v. Connor, 404 U.S. 270 (1971) ("Once a federal claim has been fairly presented to the state courts, the [federal habeas] exhaustion requirement is satisfied.").
329. Terence Andrus, Douglas Armstrong, Teddrick Batiste, Tracy Beatty, Brent Brewer, Micah Brown, Tilon Carter, Kosul Chanthakoumanne, Jaime Cole, Lisa Coleman, Obel Cruz-Garcia, Rickey Cummings, Erick Davila, Brian Davis, Irving Davis, Selwyn Davis, Paul Devoe, Areli Escobar, James Freeman, John Gardner, Milton Gobert, Ramiro Gonzales, Bartholomew Granger, Howard Guidry, Garland Harper, Fabian Hernandez, John Hummel, Christopher Jackson, Joseph Jean, Dexter Johnson, Mabry Landor, Steven Long, Daniel Lopez, Raymond Martinez, Hector Medina, Blaine Milam, LeJames Norman, Ker'sean Ramey, Cortne Robinson, Kwame Rockwell, Rosendo Rodriguez, John Rubio, Welsey Ruiz, Gregory Russeau, Demetrius Smith, Mark Soliz, Paul Storey, Richard Tabler, John Thuesen, Adam Ward, Thomas Whitaker, Christopher Wilkins, Antonio Williams, and Christopher Young.
330. Micah Brown, Irving Davis, Paul Devoe, Milton Gobert, Ramiro Gonzales, Bartholomew Granger, Dexter Johnson, Daniel Lopez, LeJames Norman, Ker'sean Ramey, Thomas Whitaker, and Antonio Williams.
331. First Amended Brief on Appeal, Devoe v. Texas, AP-76,289 (Nov. 1, 2009) (37 pages); Brief on Appeal, Gobert v. State, AP-76,345 (Tex. Crim. App. Apr. 8, 2011) (37 pages); and Brief on Appeal, Tabler v. State, AP-75,677 (Tex. Crim. App. July 10, 2008) (59 pages).
332. Terence Andrus, Teddrick Batiste, Micah Brown, Tyrone Cade, Kimberly Cargill, Jaime Cole, Obel Cruz-Garcia, Rickey Cummings, Brian Davis, Areli Escobar, Bartholomew Granger, Gary Green, Garland Harper, Roderick Harris, John Hummel, Joseph Jean, Matthew Johnson, Naim Muhammad, Travis Mullis, Cortne Robinson, Kwame Rockwell, Mark Soliz, and John Thuesen.
333. Texas Guideline 11.2(A); ABA Guideline 10.8(A), Commentary at 89 ("Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case.").
334. Brent Brewer, Micah Brown, Tilon Carter, Rickey Cummings, Brian Davis, Irving Davis, Paul Devoe, Robert Fratta, Milton Gobert, Ramiro Gonzales, Bartholomew Granger, Garland Harper, Christopher Jackson, Dexter Johnson, Mabry Landor, Steven Long, Daniel Lopez, Raymond Martinez, LeJames Norman, Ker'sean Ramey, John Ramirez, Cortne Robinson, John Rubio, Richard Tabler, Adam Ward, and Thomas Whitaker.
335. State Appellate Review Proceedings: Length and Cost, WASH. COURTS, https://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displayContent&theFile=content/deathPenalty/staterev (last visited July 11, 2016).
336. Motion for Leave to File an Oversized Brief at 9, Soffar v. State, No. AP-75,363 (Tex. Crim. App. Dec. 7, 2006).

different counsel in another case and ultimately successful, cannot necessarily be reclaimed later."[337] It is troubling that a significant number of the death penalty appeals within our survey did not use all of the allotted space for briefing all available issues nor seek authorization for the filing of an oversize brief.

Reply Briefs

LAWYERS FILED REPLY BRIEFS IN JUST 14,[338] OR 16.9%, of the cases within our study. This figure is disturbingly low given this filing's function in the appellate process. The Texas Rules of Appellate Procedure permit an appellant to submit a reply up to 20 days after the State's brief was filed.[339] More time may be granted if appellate counsel seeks an extension.[340] A reply brief allows the defense to correct misstatements (whether by the state or the defense), to distinguish the prosecution's citations to legal authorities and the record, and to have the last word in the briefing process. An "appellee is bound to make *some* halfway decent points in rebuttal[.]"[341] The opportunity to respond to the State's arguments should not be squandered absent an extraordinary strategic reason to do so.[342]

Within our survey, the submission of reply briefs varied according the county of conviction. Attorneys filed reply briefs in every case from Bexar County, where a public defender office represents defendants in capital direct appeals.[343] By contrast, defense counsel did not file a single reply brief in cases from El Paso,[344] Tarrant,[345] Fort Bend,[346] and Dallas[347] counties as well and the Ninth Administrative Judicial Region.[348]

These trends held, even when the prosecution raised responsive issues warranting rebuttal. For example, in *Robinson v. State*, the defendant argued that the trial court erred in denying a mistrial after the victim's son-in-law tried to attack the defendant in the jury's presence while shouting, "So you wanted to kill her" and repeated the defendant's statement (which had just been presented to jurors) that he "should have shot the old bitch."[349] The defense argued that the timing of the son-in-law's disruption at the beginning of the trial, as well as the content of his outcry, was inherently prejudicial.[350] In response, the prosecution argued that the defense hadn't established prejudice because the son-in-law had merely repeated the defendant's own words. Defense counsel did not submit a reply brief. Had he done so, he could have explained that the prosecution's response did not fully reflect the son-in-law's statements and that the son-in-law's conclusion that Mr. Robinson "wanted to kill" the victim prejudiced Mr. Robinson by contradicting the defense that Mr. Robinson lacked intent to commit murder. In upholding Mr. Robinson's conviction and death sentence, the CCA reasoned that "[a]lthough [the bystander's] outburst was verbal, he merely repeated appellant's own recorded statements. His outburst did not contradict appellant's defense that he did not intentionally kill [the complainant], and it did not add any information about

337.ABA Guideline 10.15.1 cmt.
338. Teddrick Batiste, Tracy Beatty, Paul Devoe, Areli Escobar, Adrian Estrada, James Freeman, Joseph Gamboa, Armando Leza, Melissa Lucio, Ker'sean Ramey, Roosevelt Smith, Jr., Max Soffar, Manuel Velez, Christopher Young.
339. Tex. R. App. P. 38.3.
340. *Id.* at R. 38.6(c).
341. Hon. Richard A. Posner, *Effective Appellate Brief Writing*, AM. BAR ASS'N, https://apps.americanbar.org/litigation/litigationnews/trial_skills/appellate-brief-writing-posner.html (last visited July 12, 2016).
342. ABA GUIDELINE 6.1 & cmt.; *see also* Damon Thayer, *How to Write an Effective Reply Brief,* AM. BAR ASS'N (Feb. 6, 2012), http://apps.americanbar.org/litigation/committees/pretrial/email/winter2012/winter2012-ten-commandments-writing-effective-reply-brief.html.
343. Reply briefs were filed on behalf of Adrian Estrada, Joseph Gamboa, Armando Leza, Ker'sean Ramey, and Christopher Young. Among these cases, Adrian Estrada was represented by *pro bono* counsel, the Bexar County Public Defender Office represented Joseph Gamboa, Armando Leza, and Christopher Young.
344. Irving Davis, Ramiro Gonzales, Fabian Hernandez, and David Renteria. Irving Davis and Ramiro Gonzales were represented by private members of the bar. Fabian Hernandez and David Renteria were represented by lawyers from the El Paso County Public Defender Office.
345. Tilon Carter, Lisa Coleman, Erick Davila, John Hummel, Steven Nelson, Kwame Rockwell, Paul Storey, and Christopher Wilkins.
346. Terence Andrus, Albert Turner, and Thomas Whitaker.
347. Donald Bess, James Broadnax, Tyrone Cade, Gary Green, Roderick Harris, Matthew Johnson, Juan Lizcano, Steven Long, Hector Medina, Naim Muhammad, Mark Robertson, Wesley Ruiz, and Robert Sparks.
348. Rosendo Rodriguez and Brent Brewer.
349. Appellant Brief at 65, Robinson v. State, No. AP-76,535 (Tex. Crim. Crim. App. Mar. 19, 2012).
350. *Id.* at 65-69.

appellant that was not already before the jury."[351]

Clients suffer when death penalty lawyers fail to utilize all opportunities for advocacy on appeal. The failure to file a reply briefs in the majority of death penalty appeals within our survey is a disturbing trend that should not continue.

Oral Argument

ORAL ARGUMENT CONSTITUTES A SIGNIFICANT OPportunity to present a client's case that is too frequently waived by direct appeal lawyers in Texas death penalty cases. As Justice Antonin Scalia and Bryan Garner observed in their book on appellate advocacy, judges often are undecided about a case after reviewing the parties' briefs and "oral argument makes the difference . . . because it provides information that briefs don't and can't contain."[352] Oral argument allows lawyers to put their arguments in perspective, highlight important issues and answer the reviewing judges' questions.[353] Under the Texas Rules of Appellate Procedure, oral argument is scheduled at the CCA's discretion.[354] However, it frequently sets oral argument upon a request from the parties in death penalty cases.

Yet, appellate lawyers did not appear before the CCA for oral argument in 27.7% of the death penalty cases in our survey.[355] When oral argument occurred, it too often was invoked instead of, rather than in addition to, submission of a reply brief. This practice disadvantages the defense at oral argument by requiring counsel to expend valuable argument time responding to the State's argument rather than to questions from the bench. Lawyers filed a reply brief and appeared before the Court for oral argument in a mere 16.9%[356] of the cases within our survey.

Local practices also played a role in the use of oral argument. Lawyers appeared before the CCA for oral argument in every case from El Paso and Bexar counties, where public defender offices represented the majority of the defendants on direct appeal, all cases from Fort Bend,[357] and in substantial percentage, 92.3%, of the cases from Dallas County. And in Tarrant County, lawyers argued 62.5% of their client's cases on direct appeal, but these appearances were made by two lawyers who represented defendants in multiple cases from that county. By contrast, counsel appeared for argument in just 25% of cases from Travis[358] and Smith counties.[359] In addition, counsel did not file a reply brief in any of the cases where oral argument was waived[360]—thus leav-

351. Robinson v. State, No. AP-76,535, 2013 WL 2424133, at *6 (Tex. Crim. App. June 5, 2013).

352. ANTONIN SCALIA AND BRYAN GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 139 (2008). CCA Judge Elsa Alcala agrees that oral argument is important. On May 21, 2016, Judge Alcala tweeted, "New record at CCA? Oral Arg on 4 out of 5 weeks: 5/18 5/25 6/8 6/15. Arg does make a diff. no matter what anyone else tries to tell you!" *See* Hon. Elsa Alcala (@TexasElsa), TWITTER (May 21, 2016, 11:08 a.m.), https://twitter.com/TexasElsa/status/734053168661700608.

353. ANTONIN SCALIA AND BRYAN GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 140 (2008).

354. Tex. R. App. P. 39.1 ("A party who has filed a brief and who has timely requested oral argument may argue the case to the court unless the court, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons:")

355. No oral argument occurred in 23 cases (excluding Travis Mullis who waived his right to representation). In 12 of these cases, defense counsel wrote to the court, stating that oral argument was waived: Micah Brown, Kimberly Cargill, Obel Cruz Garcia, Garland Harper, Christopher Jackson, Joseph Jean, Steven Long, Demontrell Miller, Steven Nelson, Cortne Robinson, Rosendo Rodriguez, and Mark Soliz. It is unclear why oral argument did not occur in the remaining cases—*i.e.,* whether the CCA denied oral argument pursuant to Tex. R. App. P. 39 or whether the parties failed to request oral argument: Kosoul Chanthakoummane, Erik Davila, Paul Devoe, Milton Gobert, Daniel Lopez, Blaine Milam, LeJames Norman, Gregory Russeau, and Antonio Williams. Oral argument was not permitted in Selwyn Davis' and Christopher Wilkins' cases. Letter from Louise Pearson, Clerk, Chief Deputy Clerk, Court of Criminal Appeals to Rosemary Lehmberg and Defense Counsel Re: Davis v. State (Jan. 14. 2010) (copy on file with author); and Letter from Louise Pearson, Chief Deputy Clerk, Court of Criminal Appeals to Tim Curry and Defense Counsel re: Wilkins v. State (Feb. 8, 2010) (copy on file with author).

356. Teddrick Batiste, Tracy Beatty, Areli Escobar, Adrian Estrada, James Freeman, Joseph Gamboa, Armando Leza, Melissa Lucio, Randall Mays, Ker'sean Ramey, Roosevelt Smith, Max Soffar, Manuel Velez, and Christopher Young.

357. Terence Andrus, Albert Turner, and Thomas Whitaker.

358. Lawyers did not appear for oral argument in Selwyn Davis, Milton Gobert, and Paul Devoe's cases. Counsel for Areli Escobar argued his case before the CCA.

359. The following Smith County cases were not argued before the CCA: Kimberly Cargill, Demontrell Miller, and Gregory Russeau. TDS confirmed that oral argument was scheduled for the case of Tracy Beatty, who was tried in Smith County, but was unable to confirm that counsel appeared before the Court. Letter from Abel Acosta to Counsel re: Beatty v. State (Oct. 23, 2006) (notifying the parties that oral argument was scheduled for Dec. 13, 2006).

360. Micah Brown, Kimberly Cargill, Kosul Chanthakoummane, Obel Cruz-Garcia, Erick Davila, Selwyn Davis, Paul Devoe, Milton Gobert, Garland Harper, Christopher Jackson, Joseph Jean, Steven Long, Blaine Milam, Demontrell Miller, Steven Nelson, LeJames Norman, John Ramirez, Cortne Robinson, Rosendo Rodriguez, Gregory Russeau, Mark

ing the prosecution's responses wholly unanswered and forgoing important opportunities to strengthen clients' cases. Regional variation should not account for whether oral argument occurs on direct appeal of a death penalty case.

Petitions for Certiorari

Where the CCA denies relief to an appellant, defense counsel may petition for *certiorari—i.e.,* for review by the U.S. Supreme Court. Both the ABA and the Texas guidelines strongly suggest that appellate counsel seek *certiorari* following an adverse direct appeal decision in a death penalty case.[361] Moreover, the Texas Code of Criminal Procedure states that counties must reasonably compensate appellate lawyers for seeking *certiorari."*[362] *Certiorari* gives death row inmates a first opportunity for *de novo* review of constitutional issues by a federal court. The U.S. Supreme Court has clarified the constitutional standards governing the Texas death penalty following grants of *certiorari* in direct appeal cases.[363] And, the denial of relief at this stage in the proceedings, does not disadvantage the defendant. It merely indicates that the conviction and sentence remain in place, making it a risk-free enterprise for the defense. For these reasons, whenever the CCA rejects relief in a death penalty case, defense counsel should seek *certiorari* review.

Certiorari was not sought in 36.1.1% of the cases within our survey.[364] Attorney practices varied according to the county of conviction. Lawyers representing appellants from counties with 250,000 or fewer residents declined to file petitions in 70% of death penalty cases[365] while counsel for appellants from urban counties failed to do so in 24.6% of their cases.[366] In other words, lawyers from urban jurisdictions were 2.8 times more likely to petition the U.S. Supreme Court for discretionary review than lawyers handling cases from rural jurisdictions.

This discrepancy likely is owed to local practice and to differences in the compensation schemes. Within our study, at least three lawyers handling cases from rural communities were paid flat or capped fees of $15,000 or less.[367] In one of these cases, *Granger v. State,* defense counsel submitted a separate voucher and was paid an additional $1,312.50 for arguing his client's case before the CCA; it is unclear whether additional funds were available for an application to the U.S. Supreme Court.[368] In contrast, jurisdictions with populations over 250,000 often paid lawyers an uncapped hourly rate. Among the 13 Dallas County cases in our study, lawyers did not seek Supreme Court review in only one case (7.7%),[369] and an application was filed in all eight cas-

Soliz, Christopher Wilkins, and Antonio Williams.

361. ABA Guideline 10.15.1(D); Texas Guideline 12.2(12).

362. Tex. Code Crim. Proc. Ann. art. 26.052(a).

363. *See e.g.,* Hurst v. Florida, 136 S.Ct. 616 (2016) (allowing judges to decide facts related to sentencing a defendant to death violates the Sixth Amendment*),* Hall v. Florida, 134 S.Ct. 1986 (2014) (state standards for a defendant's eligibility for execution under *Atkins* must provide a defendant with the opportunity to present essential evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime); Kennedy v. Louisiana, 554 U.S. 407, 437 (2008) (states may not impose the death penalty for a crime against the person "where the victim's life was not taken"); Branch v. Texas, 408 U.S. 238, 239-40, (1972) (companion case to Furman v. Georgia).

364. This figure was calculated using a pool of 82 cases because Travis Mullis waived his right to representation on direct appeal, and Albert Turner's case was remanded to the trial court for a retrospective determination of his competence to stand trial. The 29 cases where a petition for *certiorari* was not filed include: Terence Andrus, Douglas Armstrong, Tracy Beatty, Brent Brewer, Micah Brown, Kimberly Cargill, Raul Cortez, Rickey Cummings, Irving Davis, Paul Devoe, Joseph Gamboa, Bartholomew Granger, Howard Guidry, Garland Harper, Mabry Landor, Armando Leza, Steven Long, Daniel Lopez, Jerry Martin, Blaine Milam, Demontrell Miller, LeJames Norman, Christian Olsen, John Ramirez, Cortne Robinson, Gregory Russeau, John Thuesen, Adam Ward, and Thomas Whitaker.

365. Petitions for *certiorari* were not filed in 14 of the 20 cases from small counties: Tracy Beatty, Brent Brewer, Micah Brown, Kimberly Cargill, Rickey Cummings, Jerry Martin, Blaine Milam, Demontrell Miller, LeJames Norman, Christian Olsen, Cortne Robinson, Gregory Russeau, and John Thuesen.

366. Petitions for *certiorari* were not filed in 15 of the 61 cases from large counties: Terence Andrus, Douglas Armstrong, Raul Cortez, Irving Davis, Paul Devoe, Joseph Gamboa, Bartholomew Granger, Howard Guidry, Garland Harper, Mabry Landor, Armando Leza, Steven Long, Daniel Lopez, John Ramirez, and Thomas Whitaker.

367. Court-Appointed Attorney Requisition, State v. Cummings, No. 2011-1513-C1 (19th Dist. Ct.,McLennan County, Tex. 2015) (listing an approved $15,000 cap); Attorney Fee and Expenses, State v. Granger, No. 12-16388 (58th Dist. Ct., Jefferson County, Tex. May 22, 2014) ($10,000 payment for a death penalty direct appeal); Attorney's Fees Expense Claim Form, State v. Norman, No. 06-01-7346 (24th Dist. Ct., Jackson County, Tex. Mar. 10, 2010) (approving payment of $15,000 for defense services in a capital direct appeal).

368. Attorney Fee and Expenses, State v. Granger, No. 12-16388 (58th Dist. Ct., Jefferson County, Tex.Oct. 20, 2014).

369. Steven Long. Petitions for *certiorari* were filed on half of Donald Bess, James Broadnax, Tyrone Cade, Gary Green, Roderick Harris, Mat-

es from Tarrant County.[370] Just as the submission of reply briefs and the seeking of oral argument should not vary according to county of conviction in a death penalty case, neither should the seeking of *certiorari* from the denial of direct appellate relief in the CCA.

thew Johnson, Juan Lizcano, Hector Medina, Naim Muhammad, Mark Robertson, Wesley Ruiz, and Robert Sparks.
370. Tilon Carter, Lisa Coleman, Erick Davila, John Hummel, Steven Nelson, Kwame Rockwell, Paul Storey, and Christopher Wilkins.

Conclusion

The direct appeal framework for Texas death penalty cases is fraught with structural weaknesses that heighten the likelihood of affirmance of convictions and death sentences. The defects include resource disparities that benefit the prosecution, poor defense lawyer quality controls, regional disparities in attorney compensation, and the absence of limits on defense counsel caseloads. As a result, many appellate defense lawyers do not allocate sufficient time to effectively review, brief, and present their death row clients' cases before the CCA. Texas defense lawyers have submitted appellate briefs that fall well below accepted standards for defense performance in death penalty cases. Insufficient legal briefing, pervasive use of boilerplate, and inadequate client communication are just a few of the fundamentally unsound practices our study uncovered. Deficient representation squanders scarce criminal justice resources, undermines the integrity of the Texas criminal justice system, and warrants immediate attention from stakeholders.

Three key reforms can address the majority of the unsound practices now plaguing direct appeals in Texas death penalty cases:

1. **Establish a statewide capital appellate defender office to represent death-sentenced defendants before the Court of Criminal Appeals.** The experience of Texas and other states demonstrates that institutional defender offices substantially improve the quality of defense legal services and that they do so cost-effectively.[371] A capital appellate defender office could enact internal policies to address many of the issues identified in this report, including heightened lawyer standards, supervision, and caseload controls. The steady decline in death sentences in Texas since 1999[372] also means that a capital appellate defender office could be established at minimum cost to taxpayers. At the projected rate of 5-to-10 death sentences annually, a capital appellate defender office could handle all direct death penalty appeals in Texas with a handful of attorneys. In addition, the office could provide appointed appellate defense counsel in death penalty cases with an institutional resource roughly equivalent to the support the State Prosecuting Attorney provides to district and county attorneys across Texas. The office also could train appointed appellate counsel and monitor legal developments that affect capital and non-capital defendants alike.

2. **Create a statewide appointment system with effective caseload controls**

371. Council of State Governments Justice Center, Improving Indigent Defense: Evaluation of the Harris County Public Defender (September 2013), http://harriscountypublicdefender.org/wp-content/uploads/2013/10/JCHCPDFinalReport.pdf; Public Policy Research Institute, An Evaluation of the Texas Regional Public Defender For Capital Cases (June 2013), http://ppri.tamu.edu/files/Capital_Defender_Report.pdf.

372. New death sentences in Texas have dropped nearly 80% since the late 1990s. Death sentences peaked in 1999, when juries sent 48 people to death row. In 2015, Texas juries sentenced only three defendants to death, the lowest number since the U.S. Supreme Court upheld Texas' revised death penalty statute in 1976. Just two of those three death sentences became final in 2015. The third death sentence, that of Mark Anthony Gonzalez, involved a competency challenge that was not resolved until January 2016.

and uniform attorney compensation. Instead of nine regional lists of qualified counsel, the Office of Court Administration should screen defense counsel for inclusion on a single, statewide list of attorneys qualified to handle direct appeals in death penalty cases and impose a uniform system of adequate compensation. Screening should include an application and interview process that accurately assesses written and oral advocacy, as well as substantive legal knowledge. Qualified lawyers on this list would represent defendants in direct appeals whenever a conflict or caseload controls caused the capital appellate defender office to decline representation. Payment should be according to an hourly rate that adequately compensates counsel for their skill and time.

3. **Appoint two lawyers to represent death-sentenced defendants on direct appeal.** Given the volume of material that lawyers must review on direct appeal as well as the staffing available to the prosecution on an as-needed basis, trial courts should appoint two attorneys to represent death-sentenced individuals on direct appeal. This would enable defense lawyers to effectively represent their clients according to the ABA and Texas guidelines and create parity with the prosecution. At a minimum, Texas courts should provide a mechanism for appointing additional counsel to death penalty cases where the complexity of the issues and voluminous trial records require additional staffing.

Documents cited in this report are
accessible online at:
http://texasdefender.org/lethally-deficient-footnotes.

Death Penalty Direct Appeal Cases Decided by the Court of Criminal Appeals 2009 to 2015

Client	Appellate case number	County	County population (2010 census)	Region	Date of direct appeal decision
Andrus, Terence Tremaine,	AP-76,936	Fort Bend	585,375	2nd	12/9/2015
Armstrong, Douglas	AP-75,706	Hidalgo	780,030	5th	1/27/2010
Batiste, Teddrick	AP-76,600	Harris	4,109,362	2nd	6/5/2013
Beatty, Tracy	AP-75,010	Smith	210,489	1st	3/11/2009
Bess, Donald	AP-76,377	Dallas	2,375,207	1st	3/6/2013
Brewer, Brent	AP-76,378	Randall	121,233	9th	11/23/2011
Broadnax, James	AP-76,207	Dallas	2,375,207	1st	12/14/2011
Brown, Micah Crofford	AP-77,019	Hunt	86,359	1st	9/16/2015
Cade, Tyrone	AP-76,883	Dallas	2,375,207	1st	2/25/2015
Cargill, Kimberly	AP-76,819	Smith	210,489	1st	11/19/2014
Carter, Tilon	AP-75,603	Tarrant	1,816,850	8th	1/14/2009
Chanthakoummane, Kosoul	AP-75,794	Collin	788,511	1st	4/20/2010
Coble, Billie Wayne	AP-76,019	McLennan	235,959	3rd	10/13/2010
Cole, Jaime Piero	AP-76,703	Harris	4,109,362	2nd	6/18/2014
Coleman, Lisa Ann	AP-75,478	Tarrant	1,816,850	8th	12/9/2009
Cortez, Raul	AP-76,101	Collin	788,511	1st	9/14/2011
Cruz-Garcia, Obel	AP-77,025	Harris	4,109,362	2nd	10/28/2015
Cummings, Rickey Donnell	AP-76,923	McLennan	235,977	3rd	12/14/2014
Davila, Erick Daniel	AP-76,105	Tarrant	1,816,850	8th	1/26/2011
Davis, Brian Edward	AP-76,521	Harris	4,109,362	2nd	10/23/2013
Davis, Irving Alvin	AP-74,393	El Paso	803,995	6th	9/29/2010
Davis, Selwyn Preston	AP-75,796	Travis	1,030,588	3rd	6/16/2010
Devoe, Paul Gilbert	AP-76,289	Travis	1,030,588	3rd	12/14/2011
Escobar, Areli Carbajal	AP-76,571	Travis	1,030,588	3rd	11/20/2013
Estrada, Adrian	AP-75,634	Bexar	1,723,561	4th	6/16/2010
Fratta, Robert Alan	AP-76,188	Harris	4,109,362	2nd	10/5/2011
Freeman, James Garrett	AP-76,052	Wharton	41,364	2nd	3/16/2011
Gamboa, Joseph	AP-75,635	Bexar	1,723,561	4th	4/8/2009
Gardner, John Steven	AP-75,582	Collin	788,511	1st	10/21/2009
Gobert, Milton Dwayne	AP-76,345	Travis	1,030,588	3rd	11/23/2011
Gonzales, Ramiro Felix	AP-75,540	Medina	46,116	6th	6/17/2009
Granger, Bartholomew	AP-77,017	Jefferson	252,273	2nd	4/22/2015
Green, Gary	AP-76,458	Dallas	2,375,207	1st	10/3/2012
Guidry, Howard Paul	AP-75,633	Harris	4,109,362	2nd	10/21/2009
Harper, Garland Bernell	AP-76,452	Harris	4,109,362	2nd	10/10/2012
Harris, Roderick	AP-76,810	Dallas	2,375,207	1st	5/21/2014
Hernandez, Fabian	AP-76,275	El Paso	803,995	6th	11/21/2012
Hummel, John William	AP-76,596	Tarrant	1,816,850	8th	11/20/2013
Jackson, Christopher Devon	AP-75,707	Harris	4,109,362	2nd	1/3/2010
Jean, Joseph Francois	AP-76,601	Harris	4,109,362	2nd	6/26/2013

Client	Appellate case number	County	County population (2010 census)	Region	Date of direct appeal decision
Johnson, Dexter Darnell	AP-75,749	Harris	4,109,362	2nd	1/27/2010
Johnson, Matthew Lee	AP-77,030	Dallas	2,375,207	1st	11/18/2015
Landor, Mabry J., III	AP-76,328	Harris	4,109,362	2nd	6/29/2011
Leza, Armando	AP-76,157	Bexar	1,723,561	4th	10/12/2011
Lizcano, Juan	AP-75,879	Dallas	2,375,207	1st	5/20/2010
Long, Steven L.	AP-75,539	Dallas	2,375,207	1st	4/8/2009
Lopez, Daniel	AP-76,327	Nueces	340,373	5th	10/31/2012
Lucio, Melissa Elizabeth	AP-76,020	Cameron	407,928	5th	9/14/2011
Martin, Jerry Duane	AP-76,317	Walker	68,088	2nd	10/31/2012
Martinez, Raymond Deleon	AP-76,140	Harris	4,109,362	2nd	12/15/2010
Mays, Randall Wayne	AP-75,924	Henderson	78,702	1st	4/28/2010
Medina, Hector Rolando	AP-76,036	Dallas	2,375,207	1st	1/12/2011
Milam, Blaine Keith	AP-76,379	Rusk	53,394	1st	5/23/2012
Miller, Demontrell	AP-76,270	Smith	210,489	1st	5/23/2012
Muhammad, Naim	AP-77,021	Dallas	2,375,207	1st	11/4/2015
Mullis, Travis James	AP-76,525	Galveston	292,704	2nd	4/25/2012
Nelson, Steven LeWayne	AP-76,924	Tarrant	1,816,850	8th	4/15/2015
Norman, LeJames	AP-76,063	Jackson	14,074	4th	2/16/2011
Olsen, Christian	AP-76,175	Brazos	195,655	2nd	4/25/2012
Ramey, Ker'sean Olajuwa	AP-75,678	Jackson	14,074	4th	2/11/2009
Ramirez, John Henry	AP-76,100	Nueces	340,373	5th	3/16/2011
Renteria, David Santiago	AP-74,829	El Paso	803,995	6th+2:27	5/4/2011
Robertson, Mark	AP-71,224	Dallas	2,375,207	1st	3/9/2011
Robinson, Cortne	AP-76,535	Harrison	65,746	1st	6/5/2013
Rockwell, Kwame	AP-76,737	Tarrant	1,816,850	8th	12/11/2013
Rodriguez, Rosendo, III	AP-75,901	Lubbock	280,221	9th	3/16/2011
Rubio, John Allen	AP-76,383	Cameron	407,928	5th	10/10/2012
Ruiz, Wesley Lynn	AP-75,968	Dallas	2,375,207	1st	3/2/2011
Russeau, Gregory	AP-74,466	Smith	210,489	1st	7/1/2009
Smith, Demetrius DeWayne	AP-75,479	Harris	4,109,362	2nd	5/6/2009
Smith, Roosevelt, Jr.	AP-75,793	Harris	4,109,362	2nd	9/29/2010
Soffar, Max Alexander	AP-75,363	Harris	4,109,362	2nd	11/17/2009
Soliz, Mark Anthony	AP-76,768	Johnson	150,934	8th	6/18/2014
Sparks, Robert	AP-76,099	Dallas	2,375,207	1st	10/20/2010
Storey, Paul David	AP-76,018	Tarrant	1,816,850	8th	10/6/2010
Tabler, Richard Lee	AP-75,677	Bell	312,859	3rd	12/16/2009
Thuesen, John	AP-76,375	Brazos	195,655	2nd	2/26/2014
Turner, Albert James	AP-76,580	Fort Bend	590,871	2nd	10/30/2013
Velez, Manuel	AP-76,051	Cameron	407,928	5th	3/3/2011
Ward, Adam Kelly	AP-75,750	Hunt	86,359	1st	2/10/2010
Whitaker, Thomas Bartlett	AP-75,654	Fort Bend	590,871	2nd	6/24/2009
Wilkins, Christopher	AP-75,878	Tarrant	1,816,850	8th	10/20/2010
Williams, Antonio Lee	AP-75,811	Harris	4,109,362	2nd	12/16/2009
Young, Christopher Anthony	AP-75,352	Bexar	1,723,561	4th	4/22/2009

Direct Appeal Project Survey

1. Name of Client

2. Appellate case number

3. Date of direct appeal decision

FIRST APPELLATE COUNSEL APPOINTMENT & QUALIFICATIONS

4. Name of first appellate counsel

5. Years practicing law for first appellate counsel (at time appeal filed)

6. Prior experience representing defendants in capital cases of first appellate counsel?

7. Prior experience representing capital defendants on direct appeal of first appellate counsel?

8. Did first appellate counsel meet the qualifications for capital appellate appointment?

9. On what date was first appellate counsel appointed?

10. At what stage of the proceedings was appellate counsel appointed?

11. If first appellate counsel was appointed pre-trial or during trial proceedings, how did appellate counsel assist trial counsel?

FIRST APPELLATE COUNSEL BILLING

12. How was first appellate counsel paid?

13. Did first appellate counsel file an itemized voucher or fee statement reflecting how much time was spent on each task involved in the representation?

14. Based upon the attorney time records, how much time did first appellate counsel spend on client contact?

15. Based upon the attorney time records, how much time did first appellate counsel spend on expanding the record?

16. Based upon the attorney time records, how much time did first appellate counsel spend on legal research?

17. Based upon the attorney time records, how much time did first appellate counsel spend on legal drafting?

18. Based upon the attorney time records, how much time did first appellate counsel spend on oral argument?

19. Based upon the attorney time records, how much time did first appellate counsel spend on other billable activities?

20. How much did first appellate counsel bill for all the work?

21. How much was s/he paid?

22. Was there litigation about the failure to pay first appellate counsel for the full fee sought?

SECOND APPELLATE COUNSEL APPOINTMENT & QUALIFICATIONS

23 – 40 [Same questions for second appellate counsel qualifications and billing]

MOTION FOR NEW TRIAL

41. Did appellate counsel file a motion for a new trial?

42. If appellate counsel did not, did trial counsel?

43. Did the motion for new trial contain exhibits in support of it?

44. What kinds of exhibits were included?

45. Was there a hearing on the motion for a new trial?

46. Was it an evidentiary hearing?

47. How did the court rule on the motion for a new trial?

OTHER MOTIONS

48. Was a motion to expand the record filed?

49. Was there a hearing on the motion to expand the trial record?

50. How did the court rule on the motion to expand the trial record?

51. Were additional motions filed by appellate counsel?

52. If there were additional motions filed, what were they?

53. Were hearings held on these motions?

54. How did the court rule on the motions?

PARTNERSHIPS

55. Did appellate counsel partner with post-conviction counsel in any way?

56. If appellate counsel did partner with post-conviction counsel, in what ways did they partner?

TIMELY FILING

57. Was the reporter's record timely filed by the court reporter?

58. On what date was the reporter's record filed?

59. If the reporter's record was not timely filed, did appellate counsel take any actions?

60. If appellate counsel took action regarding untimely filing of reporter's, what was it?

CLIENT RELATIONSHIP

61. Was the client consulted by appellate counsel before the brief was filed?

62. How was consultation done?

63. How many times did counsel consult with the client?

64. How many times did counsel go to jail or death row to visit the client?

65. Did appellate counsel include issues requested by the client in the appeal brief?

66. If issues requested by the client were included in the appeal brief, what were they?

67. Did the client complain about appellate counsel?

68. If the client complained, to whom did he / she direct the complaints?

69. If the client complained, what were the substance of the complaints?

70. What, if anything, did the court do in response to the complaints?

WAIVER OF APPELLATE REVIEW

71. Did the client waive appellate review?

72. If appellate review was waived by the court, why was it waived?

73. Did appellate counsel file a motion to correct or supplement the appellate record in any way?

74. Are there any apparent problems or omissions in the appellate record?

75. Were any requests for extensions of time to file the opening brief on appeal made?

76. If requests for extensions were made, how many motions for extension were filed all together?

77. What was the total number of additional days granted to file the opening brief?

78. Was the appellate brief filed in a timely manner?

79. Did the brief spell the client's name correctly?

80. Did the brief include errors, like the failure to find and replace references to another client or person not associated with this case, that indicated some or the entire brief had been cut and pasted from an unrelated brief)?

81. List page numbers and briefly describe incidents of cut and pasting errors.

82. How many pages was the opening brief, not including the table of contents, table of authorities, or prayer for relief?

APPELLATE ISSUES

83. How many appellate issues were briefed?

84. List the appellate issues raised in the opening brief.

85. Of the issues briefed, how many were "boilerplate"?

86. Of the issues briefed, how many were based upon references to the trial transcript or otherwise based upon specific facts in the client's case?

BOILERPLATE

87. Is there an identifiable section(s) of this brief that is/are identical to section(s) of another brief filed by the same counsel in another direct appeal?

88. If yes, list the page numbers for each section and reference the matching brief and page number.

89. Was a motion for an oversized brief filed?

ADDITIONAL BRIEFING

90. Was a brief containing additional appellate issues filed?

91. If an additional brief was filed, list the issues briefed.

92. Was a reply brief filed?

93. Were any requests for extensions of time to file the reply brief made?

94. If requests were made, how many motions for extensions were filed?

95. What was the total number of additional days granted to file the reply brief?

96. Was the reply brief timely filed?

97. How many pages was the reply brief, not including the table of contents and table of authorities?

98. How many issues did the reply brief raise?

99. List the issues raised in the reply brief.

CLIENT BRIEFING?

100. Did the client submit his own appellate brief?

101. Why did the client submit his own brief?

102. Did the client's brief raise any issues not raised in counsel's brief?

103. List any issues raised in the client's brief, but not in counsel's brief.

104. Did appellate counsel respond in any way to the client's brief?

105. If there was a response, what was it?

106. How did the appellate court treat the client's brief?

ORAL ARGUMENT

107. Was oral argument requested?

108. If yes, was a specific amount of time for oral argument requested?

109. How much time was requested?

110. Did counsel make an oral argument?

111. How long was the oral argument?

112. What issues did the oral argument cover?

113. Where the client submitted an appellate brief, were any of the issues raised in the client's brief covered in oral argument?

114. Which issues were covered?

115. Where the client submitted an appellate brief, were any of the issues raised in the client's brief covered in oral argument?

SUPPLEMENTARY BRIEFING

116. How many pages of supplementary briefing was filed?

117. What was the form of the supplementary briefing?

118. Which issues were raised in the supplemental briefing?

CCA RULING

119. How did the CCA rule on the appeal?

120. Did the CCA find that any of the issues were inadequately briefed?

121. If there was a finding that some issues were inadequately briefed, what were those issues?

122. Did the CCA opinion include any dissents or concurrences?

PETITIONS

123. Was a petition for rehearing filed?

124. How many issues were raised in the petition for rehearing?

125. List the issues raised in the petition for rehearing.

CERT PETITION

126. Was a cert petition filed?

127. Was it submitted in a timely manner?

128. How many issues were raised in the cert?

129. List the issues raised in the cert.

130. How many pages was the cert petition, not including the table of contents and table of authorities?

TEXAS DEFENDER SERVICE
1927 Blodgett Street
Houston, TX 77004
713-222-7788

510 S. Congress Avenue, Suite 304
Austin, TX 78704
512-320-8300

www.texasdefender.org
www.facebook.com/texasdefender
@TexDefender