TEXAS: TOUGH ON MURDERERS OR ON FAIRNESS?

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I. INTRODUCTION

"Don't mess with Texas" is a popular slogan in Texas. Although it is

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officially used as an antilittering message along the state's highways,[1] its subliminal message is that Texas is tough on wrongdoers. No one promotes this message more than Texas prosecutors with their use of the death penalty. While the nation as a whole has become somewhat ambivalent about capital punishment,[2] Texas prosecutors continue to seek death sentences on a regular basis, and the state carries out more executions than any other.[3] However, the aggressiveness with which the death penalty is carried out in Texas raises troubling issues of fairness. This Article will discuss some of those concerns. In addition, as someone involved in representing death row inmates in Texas, I will share some of my litigation experiences as they relate to the issues discussed in this Article.

Not since the days of racial segregation has one state been allowed to act so out of conformity with the rest of the nation. Given the fact that so much is at stake in death penalty cases, including the possible execution of innocent persons, this is unacceptable. Therefore, this Article offers suggestions to improve the process and ensure that the death penalty in Texas is carried out in a manner that more closely comports with this nation's principles of fairness and due process.

II. OVERVIEW OF THE DEATH PENALTY PROCESS

According to recent studies, there has been a nationwide decline in the use of the death penalty.[4] Texas juries and courts, however, continue to

1. For more information on this campaign, see http://www.dontmesswithtexas.org.

2. *See, e.g.*, Hugo Adam Bedau et al., *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 DRAKE L. REV. 587, 591-96 (2004) (offering explanations for why criticism of the death penalty has declined in recent years).

3. *See* Adam Liptak & Ralph Blumenthal, *Death Sentences in Texas Cases Try Supreme Court's Patience*, N.Y. TIMES, Dec. 5, 2004, at A1 (noting that "Texas . . . leads the nation in executions, with . . . more than the next five states combined"); Andrew Tilghman, *Texas Bucks Trend on Death Sentences*, HOUS. CHRON., Nov. 15, 2004, at A1 (noting that Texas is the state with the highest number of executions per year).

4. *See, e.g.*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT (2003), *at* http://www.ojp.usdoj.gov/bjs/abstract/cp03.htm (last modified Nov. 14, 2004) (noting that in 2003, 188 fewer prisoners were sentenced to death than in 2002, and six fewer were executed); DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2004: YEAR END REPORT 1-4, *at* http://www.deathpenaltyinfo.org/DPICyer04.pdf (Dec. 2004) (detailing the rapid decline in death sentences and executions in the past five years).

sentence roughly the same number of defendants to death each year and the state continues to carry out more executions than the rest of the nation.[5] In fact, while many states have recently enacted statutory changes that limit the use of the death penalty,[6] and the highest courts in two states have found the death penalty to be a violation of their constitutions,[7] Texas not only continues to lead the nation in executions but is one of only two states that has expanded the offenses for which the punishment of death can be imposed.[8] There are several factors that contribute to the frequency with which the death penalty is used in Texas, including poor representation of the defendant by defense counsel and official misconduct.

A. *Poor Representation*

The quality of defense counsel is most likely the most important factor in determining whether a defendant will be sentenced to death.[9]

5. *See* Tilghman, *supra* note 3 (noting that, despite the low number of death sentences imposed across the nation, "Texas has continued to send convicted killers to death row at a comparatively steady rate").

6. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 905.5.1 (West Supp. 2004) (exempting mentally retarded defendants from the death penalty and setting out the requirements for a claim of mental retardation); UTAH CODE ANN. § 77-15a-101 (2003) (exempting mentally retarded defendants and defendants with subaverage intellectual functioning from the death penalty when certain conditions are met); VA. CODE ANN. § 19.2-264.3(A), (C) (Michie 2004) (mandating that an accused be afforded separate guilt and punishment proceedings when an offense is punishable by death).

7. *See* State v. Marsh, 102 P.3d 445, 457-59 (Kan. 2004) (finding unconstitutional a jury instruction requiring the death penalty if mitigating circumstances do not outweigh aggravating circumstances); People v. LaValle, 817 N.E.2d 341, 356-68 (N.Y. 2004) (finding New York's "deadlock instruction" unconstitutional because, among other flaws, it "g[ave] rise to an unconstitutionally palpable risk that one or more jurors who c[ould not] bear the thought that a defendant [could] walk the streets again after serving 20 to 25 years w[ould] join jurors favoring death in order to avoid the [more lenient] deadlock sentence").

8. The Texas definition of criminal homicide was recently expanded to include murder during the commission of a terroristic threat. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon Supp. 2004); *see also* COLO. REV. STAT. § 18-1.3-1201(5)(f), (p) (2004) (adding to the list of aggravating factors the commission of an "offense while lying in wait, from ambush, or by use of an explosive or incendiary device or a chemical, biological, or radiological weapon," and the intentional killing of "more than one person in more than one criminal episode").

9. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837 (1994) ("Arbitrary results, which are all too common in death penalty cases, frequently stem from inadequacy of counsel."); Charles Lane, *O'Connor Expresses Death Penalty*

While the quality of defense counsel in capital cases is a nationwide problem, it is especially acute in Texas. Capital defendants in Texas have received notoriously bad representation. There have been cases involving sleeping counsel,[10] and cases in which counsel's representation was clouded by conflicts of interest.[11] There have also been numerous cases in which counsel failed to conduct any investigation into the defendant's background for mitigating evidence,[12] and even cases in which counsel failed to pursue evidence that could have exonerated his client.[13] Given the manner in which Texas assigns attorneys to represent capital defendants, it is not surprising that they receive such poor representation. There is no statewide public defender system in Texas; therefore, in most counties, lawyers are typically appointed on a case-by-case basis by the trial judge from a list of "qualified" counsel.[14] Because Texas elects its judges in

Doubt, WASH. POST, July 4, 2001, at A1 (quoting Justice Ruth Bader Ginsburg: "'I have yet to see a death case, among the dozens coming to the Supreme Court on the eve of execution petitions, in which the defendant was well represented at trial' . . . ."); *see also* THE CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY 1 (2001), *available at* http://www.constitutionproject.org/dpi/MandatoryJustice.pdf. (arguing that all death penalty jurisdictions should establish minimum standards for lawyer performance in capital cases).

10. *See, e.g.*, Burdine v. Johnson, 262 F.3d 336, 339 (5th Cir. 2001) (recounting that defense counsel dozed off while prosecution questioned witnesses); McFarland v. State, 928 S.W.2d 482, 505 & n.19 (Tex. Crim. App. 1996) (noting, where defendant made an argument for ineffective assistance of counsel, that trial counsel testified at a motion for new trial hearing, "I'm 72 years old. I customarily take a short nap in the afternoon.").

11. *See, e.g.*, Lockhart v. Johnson, 104 F.3d 54, 58 (5th Cir. 1997) (holding that no prejudice arose when the defendant's counsel worked for a firm that also represented the trial judge in an unrelated civil action); Beets v. Scott, 65 F.3d 1258, 1274 (5th Cir. 1995) (ruling that counsel's son's retention of media and literary rights to defendant's highly publicized case constituted "a serious potential conflict of interest," but not an actual conflict of interest).

12. *See, e.g.*, Ransom v. Johnson, 126 F.3d 716, 721-22 (5th Cir. 1997) (noting that while counsel does have a duty to make a reasonable investigation, lack of inquiry will not overturn a verdict unless the ineffective assistance undermines the outcome) (citation omitted); Faulder v. Johnson, 81 F.3d 515, 519-20 (5th Cir. 1996) (ruling that defense counsel's failure to present evidence of defendant's mental history and reputation in the community did not prejudice the result of the case).

13. *See, e.g.*, Graham v. Collins, 829 F. Supp. 204, 209 (S.D. Tex. 1993) (finding that counsel's failure to ask certain questions, even "'the obvious questions[,]'" did not constitute prejudice), *vacated on other grounds sub nom.* Graham v. Johnson, 94 F.3d 958 (5th Cir. 1996).

14. TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 78-80 (2000), *available at* http://www.texasdefender.org/state%20of%20denial/Chap6.pdf [hereinafter A STATE OF DENIAL].

partisan elections, "qualified" counsel often include political supporters and contributors of the appointing judge.[15] Unfortunately, the situation does not improve once the defendant is convicted and subsequently challenges his death sentence.[16] Despite these problems, appellate courts in Texas rarely find that a capital defendant was rendered ineffective assistance of counsel.[17]

B. *Official Misconduct*

Another factor accounting for the frequency in which death sentences are meted out in Texas is the fact that those charged with enforcing the law have shown a willingness to do whatever is necessary to ensure that the death penalty is carried out. The following cases demonstrate that prosecutors and police in Texas have lied, withheld potentially exculpatory evidence, made inconsistent arguments, and presented knowingly false testimony and questionable physical evidence in order to secure a death sentence.

1. *Howard Guidry*

In 1997 I was appointed to represent Howard Guidry in his habeas corpus proceedings.[18] Representing Guidry provided me with a first-hand opportunity to witness official misconduct. Guidry had earlier been convicted of murdering the wife of a police officer for remuneration and sentenced to death.[19] The State obtained a conviction and death sentence based upon three crucial pieces of evidence: (1) Guidry's confession to the

15. *Id*. at 79 (footnote omitted).

16. *See* TEX. DEFENDER SERV., LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS IN TEXAS DEATH PENALTY APPEALS, at viii (2002), *available at* http://www.texasdefender.org/front.pdf (noting that "[t]he current emphasis on speed rather than careful appellate review" has resulted in a "haphazard system").

17. *See* Michael Hall, *And Justice for Some*, TEX. MONTHLY, Nov. 2004, at 154, 261 (stating that the Texas Court of Criminal Appeals "has sanctioned some really awful lawyering"); *see also* Liptak & Blumenthal, *supra* note 3 (noting that the Texas state appellate courts reverse only three percent of death penalty convictions, "the lowest of any state").

18. *See* Guidry v. Dretke, No. 03-20991, 2005 WL 78304, at *1 (5th Cir. Jan. 14, 2005) (noting that Guidry was eventually "granted conditional federal habeas relief" based on two grounds).

19. *See id.* (noting that Guidry was convicted of murder and sentenced to death after killing Officer Robert Fratta's wife for remuneration).

police;[20] (2) the testimony of the girlfriend of the individual accused of hiring Guidry;[21] and (3) the testimony of two neighbors of the victim who identified a black male as the individual they saw leave the victim's home during the time in which she was killed.[22] Given the apparent strength of the State's case, the chance of obtaining relief appeared to be remote.

This case is a perfect illustration of what happens when the police and prosecutors are under pressure to solve a crime. Because the victim was a police officer's wife, and her husband was a prime suspect, this case was certain to receive plenty of local publicity. About four months passed without arrest until the police got the break they were hoping for: Guidry was arrested on an unrelated bank robbery charge.[23] His connection to the murder became a focus after the police received a tip.[24] The police questioned Guidry, and during this interrogation he "gave a statement confessing to [the murder]."[25]

Guidry, however, maintained that he asked to speak to his robbery-charge-attorney during this interrogation.[26] Guidry further claimed that the two interrogating detectives left the room for a period of time, and upon returning, told Guidry that they had spoken to Guidry's attorney and that the attorney permitted Guidry to speak to the officers.[27] The law is clear that when a suspect makes a request to speak with his attorney, this request must be honored, and only the client can reinitiate communication.[28] Guidry's trial counsel moved to suppress his confession.[29] These motions are rarely granted under such circumstances because typically the only evidence that such a request was made comes from the suspect, and courts almost uniformly resolve credibility disputes in favor of law enforcement officers.[30] Guidry, however, had evidence to

20. *See id.* at *2; *id.* at *25 ("Without the confession . . . , there is insufficient evidence to convict Guidry of murder for remuneration . . . .").

21. *See id.* at *1, *24, *25 (noting that without the girlfriend's hearsay testimony against Guidry, "there [was] little evidence of Guidry's participation in the murder").

22. *See id.* at *24. *But see infra* note 43 and accompanying text.

23. *Id*. at *1.

24. *Id*.

25. *Id*. at *2.

26. *Id.* at *2, *3.

27. *Id*. at *3.

28. Edwards v. Arizona, 451 U.S. 477, 481 (1981) (citation omitted).

29. *See* Guidry v. Dretke, 2005 WL 78304, at *2.

30. *See, e.g.*, Davis v. United States, 512 U.S. 452, 474 n.7 (1994) (Souter, J., concurring) (noting that, as a practical matter, the courts will look to the officer to

corroborate that he made such a request. Several weeks after he was appointed to represent Guidry, trial counsel had a conversation in a judge's chambers with the officers who had obtained Guidry's confession.[31] After one of the officers indicated that he had obtained the confession, he was asked by trial counsel why he would interrogate a suspect whom he knew was represented by counsel.[32] The officer replied, "I talked to his lawyer, and his lawyer said it was okay to talk to him," confirming in effect that Guidry had requested to speak with his lawyer during the interrogation.[33] Another attorney present at the time who had no connection to the case overheard this conversation.[34]

At the suppression motion hearing, Guidry's two former trial attorneys testified to the details of their conversation with the officers, and the third attorney confirmed the details of this conversation.[35] The attorney representing Guidry on the bank robbery charge, whom the officers claimed had given them permission to speak with Guidry, testified that he instructed Guidry not to speak with any officers.[36] Furthermore, he denied having any conversation with the officers and testified that he did not give anyone permission to speak with Guidry.[37] Most remarkably, the officers denied having the conversation in question—in effect, accusing four members of the bar of committing perjury.[38] The trial judge summarily denied the motion to suppress, providing no explanation for why four members of the bar would risk their livelihood for Guidry.[39] The confession was subsequently offered as evidence against Guidry.[40]

The State also presented the testimony of the girlfriend of one of Guidry's codefendants.[41] According to this witness, the codefendant implicated Guidry in the murder.[42] Finally, the State presented two

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determine the words that were used by the defendant and that "officers rarely lose 'swearing matches' . . . at suppression hearings").

31. Guidry v. Dretke, 2005 WL 78304, at *4-5.

32. *Id*. at *5.

33. *Id*.

34. *Id*. at *4-5.

35. *Id.* at *5-6. Because Guidry's initial trial counsel were witnesses to the conversation in the court's chambers, they had to withdraw from the case. *Id*. at *5.

36. *Id*.

37. *Id*.

38. *Id*.

39. *Id*. at *6.

40. *Id*.

41. *Id*. at *1.

42. *See id*. at *24 (summarizing the girlfriend's testimony and noting that her

neighbors of the decedent who implicated Guidry as the assailant but who admitted on cross-examination that they were not certain of the race of the assailant.[43] The Texas Court of Criminal Appeals affirmed Guidry's conviction and death sentence.[44]

As a result of the trial judge's total failure to resolve the conflicting testimony as to whether Guidry requested to speak with counsel during the interrogation, the federal district court conducted an evidentiary hearing.[45] At this hearing, the officer who conducted the interrogation contradicted his earlier testimony and testified that he recalled having a conversation with Guidry's trial counsel but that he did not recall the substance of the conversation.[46] The federal district judge subsequently found that Guidry had presented clear and convincing evidence that he had invoked his right to counsel and that the police ignored that assertion.[47] Specifically, the district court found that Guidry's account of the interrogation was credible and that the officers' was not, and that Guidry had been tricked into confessing in violation of the law.[48] In addition, the district court found that the hearsay testimony violated Guidry's Confrontation Clause rights.[49] Both determinations were upheld on appeal.[50]

Guidry's case provides an excellent illustration of the depth of official misconduct in capital cases. In order to convict Guidry, the police tricked him into confessing.[51] Furthermore, the prosecutors presented hearsay

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statements implicating Guidry in the murder constituted important evidence of his participation).

43. *See id*. ("Although the neighbor's testified they observed a black male at the scene, they could *not* positively identify Guidry and told police they thought the assailant could be white.").

44. Guidry v. State, 9 S.W.3d 133, 138, 155 (Tex. Crim. App. 1999); *see also id.* at 151 (noting that although the codefendant's girlfriend's hearsay testimony should not have been admitted, its admission was harmless).

45. *See* Guidry v. Dretke, 2005 WL 78304, at *9 (noting the district court determined that further factual development in an evidentiary hearing "would aid . . . in determining whether clear and convincing evidence rebuts the trial finding that Guidry did not request counsel") (citation omitted).

46. *See id*. at *2, *3-5 (noting that the detective initially denied that he spoke with Guidry's attorney, but that he later indicated he had "*talked to the attorney and got permission to talk to Mr. Guidry*").

47. *Id*. at *18.

48. *Id*. at *21 (citation omitted).

49. *Id*. at *24-25 (citation omitted).

50. *See id.* at *21-25 (affirming the district court's decision concerning the induced confession and that the hearsay testimony violated the Confrontation Clause).

51. *See* Guidry v. Dretke, 2005 WL 78304, at *21.

testimony that any law student and most citizens would know should not have been offered. Because of the unusual circumstance that allowed Guidry to corroborate his allegations of official misconduct, and because he was ably represented by trial counsel, the police and prosecutors have not been able to get away with their misconduct in his case. Most capital defendants in Texas, however, are not so fortunate.

2. *Walter Bell, Jr.*

In 1994, there was no per se bar against executing the mentally retarded.[52] The Supreme Court had merely required that such persons be allowed to present their mental retardation as a mitigating factor,[53] which Bell did during the sentencing phase of his trial.[54] The prosecutor made the following argument to the jury regarding Bell's retardation:

> "What did the doctors and counselors tell you about mental retardation or people that were on the border? . . . Well, they cause more trouble. They adjust to life on the outside [with] more difficulty . . . and they are more susceptible to be led into committing more crimes. So, if you believe [Bell] is mentally retarded, you have to believe that, too. Folks, you have to believe that somewhere down the road he's going to snap again."[55]

While Bell's case was on appeal, the legal landscape changed considerably. The Supreme Court held that it was unconstitutional for states to execute mentally retarded individuals.[56] In response, despite low childhood IQ tests, an inability to read, and speech which school officials described as "'almost unintelligible,'" the prosecutor repudiated his earlier position and now argued that Bell was not mentally retarded.[57] Yet again,

52. *See* Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (explaining that the Eighth Amendment does not preclude the execution of a mentally retarded person "simply by virtue of his or her mental retardation alone"), *overruled by* Atkins v. Virginia, 536 U.S. 304 (2002).

53. Penry v. Lynaugh, 492 U.S. at 327-28.

54. *See Ex parte* Bell, 152 S.W.3d 103, 104 (Tex. Crim. App. 2004) (per curiam) (noting defendant's presentation of mitigating factors and trial court's findings in an evidentiary hearing).

55. David Pasztor, *28 Years on Death Row, Still Alive*, AUSTIN AM.-STATESMAN, Nov. 24, 2003, at A1 (quoting Jefferson County prosecutor's closing argument in the 1994 murder trial of Bell) (alterations in original).

56. Atkins v. Virginia, 536 U.S. at 321.

57. *See* Pasztor, *supra* note 55 (explaining that the district attorney's office would take a new approach to try to show that Bell "is not impaired enough to be

a Texas prosecutor demonstrates that he is not above misleading the court if that is what is necessary to get a murderer executed.[58]

3. *Delma Banks*

Prior to his capital murder trial, the prosecution informed Banks that they would, "'without necessity of motions[,] provide [him] with all the discovery to which [he is] entitled.'"[59] Despite that assurance, the prosecution withheld evidence that precluded Banks from discrediting two key prosecution witnesses.[60] In addition, the prosecution failed to correct the false testimony of these witnesses, who stated that they had no connection to the State, and even told the jury that one of the witnesses "ha[d] been open and honest with you in every way."[61] On the eve of his scheduled execution, three retired federal judges and a retired U.S. Attorney filed an amicus brief with the Supreme Court urging it to review Banks's case.[62] Seven members of the Court held that the prosecution had an affirmative duty to disclose exculpatory evidence to the defendant.[63]

4. *Andrea Yates*

After suffering for years with serious mental illness, including postpartum psychosis, delusions of violence, auditory hallucinations, and at

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spared").

58. Bell was ultimately found to be mentally retarded and his death sentence was reformed to a life sentence as a result. *Ex parte* Bell, 152 S.W.3d at 104.

59. Banks v. Dretke, 540 U.S. 668, 675 (2004) (first alteration in original) (citation omitted).

60. *Id*.

61. *Id*. (alteration in original) (citation omitted).

62. The brief was submitted by the Honorable John J. Gibbons, who "served as a judge of the United States Court of Appeals for the Third Circuit from 1970 to 1987, and as Chief Judge of that court from 1987 to 1990"; the Honorable Timothy K. Lewis, who "served as a judge of the United States Court of Appeals for the Third Circuit from 1992 to 1999, and of the United States District Court of the Western District of Pennsylvania from 1991 to 1992"; the Honorable William Sessions, who "served as a judge for the United States District Court for the Western District of Texas from 1974 to 1980, . . . as Chief Judge of that court from 1980 to 1987[,] . . . as Director of the Federal Bureau of Investigation from 1987 to 1993, and as U.S. Attorney for the Western District of Texas from 1971 to 1974"; and Thomas P. Sullivan, who "served as the U.S. Attorney for the Northern District of Illinois from 1977 to 1981." Brief of Amici Curiae Honorable John J. Gibbons et al. at 1-2 & n.2, Banks v. Cockrell, 540 U.S. 668 (2004) (No. 02-8286).

63. *See* Banks v. Dretke, 540 U.S. at 675-76, 694-98; *see also id.* at 675-76, 694 (discussing the prosecution's failure to correct false testimony).

least two suicide attempts, Andrea Yates drowned all of her children, one by one, in a bathtub.[64] At her capital murder trial, Yates raised the defense of insanity.[65] Although the State did not dispute the fact that she was mentally ill, it did challenge her claim that she was insane at the time she killed her children.[66] To counter her defense, the State presented the testimony of Dr. Park Dietz.[67] "Dietz is considered one of the most 'prominent and provocative' psychiatric expert witnesses in the country."[68] He has testified in several notorious murder cases, including those involving John Hinckley, Jr., Susan Smith, Jeffrey Dahmer, Melissa Drexler, and Ted Kacynski, usually as a prosecution witness.[69] He interviewed and videotaped Yates and subsequently testified about his evaluation of her.[70]

Dietz testified that Yates knew right from wrong and thus was not insane at the time she killed her children.[71] Dietz was also "a technical advisor to two television shows: *Law & Order* and *Law & Order Criminal Intent*."[72] During the trial, he "testified that, shortly before Andrea killed her children, Law & Order aired an episode involving a postpartum depressed mother who successfully won an insanity appeal."[73] During

64. *See* Deborah W. Denno, *Who Is Andrea Yates? A Short Story About Insanity*, 10 DUKE J. GENDER L. & POL'Y 1, 27-35 (2003).

65. *Id*. at 8-9.

66. *Id*. at 42-43 (indicating that despite Yates's mental illness, she still knew right from wrong).

67. *Id*. at 4.

68. *Id*. at 18.

69. *Id*.

70. *Id*.; *see also id.* at 97-139 (setting out portions of Dietz's testimony).

71. *Id*. at 20.

72. *Id*. at 23 (emphases added).

73. *Id.* Dietz testified as follows about his work with the television show *Law & Order*:

> Q: Now, you are a consultant, are you not, on the television program known as Law & Order?
>
> A: Two of them.
>
> Q: Okay. Did either one of those deal with postpartum depression or women's mental health?
>
> A: As a matter of fact, there was a show of a woman with postpartum depression who drowned her children in the bathtub and was found insane and it was aired shortly before the crime occurred.

closing arguments, prosecutors honed in on Dietz's testimony. In particular, the prosecutors argued that Yates had watched the *Law & Order* episode in question, drowned her children, and concocted the insanity defense as "a way out."[74] Yates's insanity defense was rejected and she was convicted of capital murder.[75] Shortly thereafter, the defense discovered that no such *Law & Order* episode existed.[76] Dietz then contacted the prosecution and indicated that he had made a mistake and agreed that no such episode existed.[77] Despite this serious "mistake," the trial judge refused to grant a mistrial and the prosecution continued to seek the death penalty and fought aggressively to uphold Yates's conviction.[78] A state appellate court later overturned her conviction.[79]

5. *Houston Crime Lab*

A November 2002 independent audit of the DNA Division of the Houston Police Department Crime Laboratory "exposed widespread problems with the lab."[80] Auditors found that evidence had been jeopardized due to the fact that "lab examiners were insufficiently trained, equipment was not maintained[,] and the roof leaked."[81] Prosecutors have ordered retesting in numerous cases, which have resulted in the discovery that several defendants, including death row inmates, were prosecuted and convicted as a result of erroneous test results.[82] A former FBI director and a former judge of the state's highest criminal court have called for a moratorium on executions in cases where testing was done by the crime lab until the previous tests can be independently confirmed.[83] The Houston Police Chief has stated, "'I think it would be very prudent for us as a

Id. at 127.

74. *See* Yates v. State, Nos. 01-02-00462-CR, 01-02-00463-CR, 2005 WL 20416, at *4 (Tex. App. Jan. 6, 2005).

75. *Id*. at *1.

76. *Id*. at *6.

77. *Id*. at *4.

78. *Id*. at *5-6.

79. *Id.* at *7 (holding that the trial court abused its discretion and finding "a reasonable likelihood that Dr. Dietz's false testimony could have affected the judgment of the jury").

80. *See* Roma Khanna & Steve McVicker, *DA Rejects Judges' Request for Recusal from Lab Probe*, HOUS. CHRON., Apr. 12, 2003, at A1.

81. *Id*.

82. *Id*.

83. *See* DEATH PENALTY INFO. CTR., NEW VOICES: FORMER FBI CHIEF AND TEXAS JUDGE CALL FOR HALT TO TEXAS EXECUTIONS, *at* http://www.deathpenaltyinfo.org/article.php?did=1228&scid=64 (last visited Mar. 16, 2005).

criminal justice system to delay further executions until we have had time to review the evidence.'"[84] Despite these calls for a moratorium on executions, Texas has continued to carry out executions from Houston involving the discredited crime lab.[85]

III. THE JUDICIARY

Judges are undoubtedly part of the death penalty machinery. However, they also perform an important oversight function. Judges, especially life-tenured federal judges, are supposed to serve as a check on the excesses of the State and ensure that every defendant, including the most vile criminal, receives a fair trial. Unfortunately, Texas courts, including the federal courts, have all too often abdicated their responsibilities.[86] The instances of misconduct described earlier would not occur as frequently if state and federal courts were properly performing their functions.[87] Texas officials know that their "mistakes" and even their most egregious misconduct is likely to be tolerated.[88] Thus, they are not deterred from violating a suspect's rights and doing whatever it takes to receive a conviction and death sentence.[89] A review of a few Texas cases illustrates this point.

A. Medellin v. Dretke[90]

Jose Medellin was sentenced to death for the high profile killings of two Houston teenage girls during a gang initiation.[91] Medellin was a Mexican national.[92] Article 36 of the Vienna Convention "'requires an arresting government to notify a foreign national of his right to contact his consul.'"[93] The purpose of Article 36 is to enable a foreign national, who

84. *Id.* (quoting statement of Police Chief Harold Hurtt).

85. *See id*.

86. *See supra* note 17 and accompanying text.

87. *See infra* note 141 and accompanying text.

88. *See, e.g.*, Guidry v. Dretke, No. 03-20991, 2005 WL 78304, at *16-17 (5th Cir. Jan. 14, 2005) (affirming suppression of Guidry's confession as a result of the interrogating officer falsely telling Guidry that his attorney gave him permission to speak with the officer).

89. *See, e.g.*, Banks v. Dretke, 540 U.S. 668, 674-75 (2004) (finding the prosecution withheld evidence that would have allowed the defendant to discredit two key prosecution witnesses).

90. Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004).

91. *Id*. at 273-74.

92. *Id*. at 273.

93. *Id*. at 279 (quoting United States v. Jimenez-Nava, 243 F.3d 192, 195 n.2

may be unfamiliar with the laws and legal system of the arresting state, to seek assistance from his government and to allow the foreign government to assist its citizens if it so chooses.[94]

"Medellin filed a petition for a writ of habeas corpus [claiming that] his rights as a foreign national to consular access under the Vienna Convention" were violated.[95] The federal district court denied his claim.[96] He subsequently sought relief from the United States Court of Appeals for the Fifth Circuit.[97] Under the Antiterrorism and Effective Death Penalty Act (AEDPA), Medellin was required to obtain a Certificate of Appealability (COA) before a federal appellate court could consider the merits of his claim.[98] A COA is granted if a petitioner makes "'a substantial showing of the denial of a constitutional right.'"[99] This standard is not quite as onerous as it sounds. It is satisfied if a petitioner "demonstrat[es] that jurists of reason could disagree with the district court's resolution of his constitutional claims."[100] "The question is the debatability of the underlying claim, not the resolution of that debate."[101] A COA should issue as long as it is debatable among jurists of reason, "even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail."[102] Finally, any doubt "as to whether a COA should issue must be resolved in [the petitioner's] favor."[103]

(5th Cir. 2001) (citation omitted)).

94. *See* Cara S. O'Driscoll, Comment, *The Execution of Foreign Nationals in Arizona: Violations of the Vienna Convention on Consular Relations*, 32 ARIZ. ST. L.J. 323, 326-28 (2000).

95. Medellin v. Dretke, 371 F.3d at 274.

96. *See id*. at 279-80 (noting the disposition below).

97. *See id.* at 274.

98. The Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), recently summarized this initial requirement as follows:

> As mandated by federal statute, a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA from a circuit justice or judge.

Id. at 335-36 (citing 28 U.S.C. § 2253 (2000)).

99. *Id*. at 336 (quoting 28 U.S.C. § 2253(c)(2)).

100. *Id*. at 327.

101. *Id*. at 342.

102. *Id*. at 338.

103. Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir. 2000).

The Fifth Circuit denied Medellin's request for a COA on two grounds: (1) that his claim had been procedurally defaulted as a result of trial counsel's failure to raise the issue at trial, and (2) that the Vienna Convention did "not confer an individually enforceable right."[104] The International Court of Justice has reached opposite conclusions on both issues.[105] The contrasting positions of the two courts would appear to satisfy the COA "debatable among jurists of reason" standard.[106] The Fifth Circuit, however, failed to issue a COA so that the merits of Medellin's claim could be considered.[107]

B. Miller-El v. Cockrell[108]

During the voir dire stage of Thomas Joe Miller-El's capital murder trial, "two Dallas County assistant district attorneys used peremptory strikes to exclude 10 of the 11 African-Americans eligible to serve on the jury" that tried Miller-El.[109] In contrast, the prosecutors struck only four out of thirty-one eligible non-African-American prospective jurors.[110] Miller-El challenged his conviction and death sentence—his primary claim being that the prosecution engaged in racial discrimination during the jury selection process.[111] In support of his claim of racial discrimination, Miller-El offered, in addition to the statistical evidence concerning the prosecution's peremptory strikes, evidence "that the manner in which members of the venire were questioned varied by race."[112] Most African-Americans were initially "given a detailed description of the mechanics of an execution in Texas."[113] Only after being given this description were the

104. Medellin v. Dretke, 371 F.3d 270, 279-80 (5th Cir. 2004).

105. Avena and Other Mexican Nationals (Mex. v. United States), No. 128, 2004 WL 2450913, ¶¶ 110-13, 153 (I.C.J. Mar. 31, 2004); LaGrand Case (F.R.G. v. United States), No. 104, 2001 WL 34607609, at *482-83 (I.C.J. June 27, 2001). Furthermore, although not cited by the Fifth Circuit, the Oklahoma Court of Criminal Appeals agreed with the International Court of Justice. *See* Torres v. Oklahoma, Order Granting Stay of Execution and Remanding Case for Evidentiary Hearing, Case No. PCD-04-442 (concurring opinion) (on file with author).

106. *See* Miller-El v. Cockrell, 537 U.S. at 327, 338, 342.

107. Medellin v. Dretke, 371 F.3d at 279 ("Because no reasonable jurists could debate the district court's resolution of this claim, we may not issue a COA . . . .").

108. Miller-El v. Cockrell, 537 U.S. 322 (2003).

109. *Id*. at 326.

110. *Id*. at 331.

111. *Id*. at 328-29. The Equal Protection Clause of the Fourteenth Amendment forbids prosecutors from striking potential jurors solely on the basis of race. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986).

112. Miller-El v. Cockrell, 537 U.S. at 332.

113. *Id.* Most African-American venire members were told the following by

African-American jurors "asked whether they could render a decision leading to a sentence of death."[114] Very few prospective Caucasian jurors were given a similar description of an execution prior to being asked their views on the death penalty.[115] Miller-El also presented evidence that "[o]n at least two occasions the prosecution requested [jury] shuffles when there were a predominate number of African-Americans in the front of the [jury] panel."[116] In further support of his claim, Miller-El presented evidence of historical discrimination in jury selection by the Dallas District Attorney's Office.[117] Despite this powerful evidence, the Texas Court of Criminal Appeals denied Miller-El's claim.[118]

Miller-El filed a writ of habeas corpus in federal court alleging that his conviction and death sentence were obtained as a result of a racially discriminatory jury selection.[119] The federal district court denied his claim.[120] In order to have the merits of his claim considered by the Fifth Circuit, Miller-El had to "demonstrate that reasonable jurists would find the district court's assessment of [his] constitutional claims debatable or wrong."[121] The Fifth Circuit held that Miller-El's claim of racial discrimination in jury selection was not even "debatable among jurists of

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the prosecution:

> "[I]f those three [sentencing] questions were answered yes, at some point[,] Thomas Joe Miller-El will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death . . . as the result of the verdict in this case if those three questions are answered yes."

Id. (alterations in original) (citation omitted).

114. *Id*.

115. *Id*.

116. *Id.* at 334. "Jury shuffling" is a practice that "permits parties to rearrange the order in which members of the venire are examined so as to increase the likelihood that visually preferable venire members will be moved forward and empaneled." *Id*. at 333.

117. *Id*. at 334-35 (noting that, among other tactics, the district attorney's office published and provided materials to prosecutors encouraging the exercise of peremptory strikes against minorities).

118. *Id*. at 329 (noting state court disposition).

119. *Id*.

120. Miller-El v. Johnson, No. CIV. 3:96-CV-1992-H, 2000 WL 724534, at *3 (N.D. Tex. June 5, 2000).

121. Miller-El v. Cockrell, 537 U.S. at 338 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

reason" and therefore it did not consider the merits of his claim.[122] The Supreme Court reversed, holding that the merits of his claim should have been considered.[123] According to the Supreme Court, reasonable jurists could debate whether prosecutors, who struck 91% of eligible African-American venire members but only 13% of non-black venire members, had engaged in racially discriminatory jury selection.[124] The Court stated that "[h]appenstance is unlikely to produce this disparity."[125]

C. Tennard v. Dretke[126]

During the sentencing phase of his capital murder trial, Robert Tennard introduced evidence that measured his IQ at 67.[127] The Government introduced evidence regarding Tennard's prior conviction for rape.[128] "The rape victim testified that she had escaped through a window after Tennard permitted her to go to the bathroom to take a bath, promising him she wouldn't run away."[129] Tennard argued that both his IQ and the testimony of the rape victim established that his "limited mental faculties and gullible nature mitigated his culpability."[130] Tennard's jury was instructed that it had to answer two special issues: (1) whether Tennard deliberately caused the deceased's death, and (2) whether there was a probability that he would pose "a continuing threat to society."[131] Affirmative answers to both special issues resulted in a death sentence.[132] The Supreme Court had previously held that these special issues provided an inadequate vehicle for jurors to consider and give effect to a defendant's

122. Miller-El v. Johnson, 261 F.3d 445, 452 (5th Cir. 2001), *rev'd sub nom.* Miller-El v. Cockrell, 537 U.S. 322 (2003), *remanded sub nom.* Miller-El v. Dretke, 361 F.3d 849 (5th Cir. 2004), *cert. granted*, 124 S. Ct. 2908 (2004).

123. Miller-El v. Cockrell, 537 U.S. at 348.

124. *Id*. at 331, 342.

125. *Id*. at 342. The Supreme Court's strong language failed to convince the Fifth Circuit on remand that the Dallas District Attorney's Office had engaged in racially discriminatory jury selection, as it denied Miller-El's claim on the merits. *See* Miller-El v. Dretke, 361 F.3d at 862 (holding that Miller-El failed to show purposeful discrimination occurred "by clear and convincing evidence"). Shortly thereafter, the Supreme Court granted Miller-El's petition for a writ of certiorari. Miller-El v. Dretke, 124 S. Ct. 2908.

126. Tennard v. Dretke, 124 S. Ct. 2562 (2004).

127. *Id*. at 2566.

128. *Id*.

129. *Id*. (citation omitted).

130. *Id*.

131. *Id*.

132. *Id*.

mitigating evidence.[133] Tennard argued that the special issues likewise precluded the jury from considering and giving effect to the mitigating evidence he proffered regarding his mental faculties.[134]

The Fifth Circuit, however, "invoked its own restrictive gloss" on this issue.[135] It held that the mitigating evidence had to be "constitutionally relevant" before the court would consider whether the evidence was "beyond the effective reach of the jury."[136] According to the Fifth Circuit, evidence was constitutionally relevant if it showed "'(1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, . . . and (2) that the criminal act was attributable to this severe permanent condition.'"[137] The Supreme Court, in a stinging rebuke, held that "[t]he Fifth Circuit's test has no foundation in the decisions of this Court" since "[n]either *Penry I* nor its progeny screened mitigating evidence for 'constitutional relevance' before considering whether the jury instructions comported with the Eighth Amendment."[138] The Supreme Court held instead that mitigating evidence was relevant if it "'tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'"[139] It concluded that the Fifth Circuit's test, in contrast, "has no basis in our precedents and, indeed, is inconsistent with the standard we have adopted for relevance in the capital sentencing context."[140]

IV. CONCLUSION

The fundamental problem in Texas is the lack of meaningful

133. *See* Penry v. Lynaugh, 492 U.S. 302, 322-24 (1989) (explaining that such issues fail to guarantee that a sentence of death contemplates an appropriate reaction to mitigating evidence).

134. Tennard v. Dretke, 124 S. Ct. at 2566-67.

135. *Id*. at 2569.

136. Tennard v. Cockrell, 284 F.3d 591, 595 (5th Cir. 2002) (citing Davis v. Scott, 51 F.3d 457, 460 (5th Cir. 1995)), *rev'd sub nom.* Tennard v. Dretke, 124 S. Ct. 2562 (2004).

137. *Id.* (quoting Davis v. Scott, 51 F.3d at 460-61), *rev'd sub nom.* Tennard v. Dretke, 124 S. Ct. 2562; *see also* Robertson v. Cockrell, 325 F.3d 243, 251 (5th Cir. 2003) (explaining the pertinent inquiry is whether the criminal act was "due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own"), *overruled by* Tennard v. Dretke, 124 S. Ct. 2562.

138. Tennard v. Dretke, 124 S. Ct. at 2570.

139. *Id.* (quoting McKoy v. North Carolina, 494 U.S. 433, 440 (1990) (quoting State v. McKoy, 372 S.E.2d 12, 45 (N.C. 1988)).

140. *Id*. at 2572.

appellate review by both state and federal courts.[141] If the courts indicated that they would not tolerate the appointment of incompetent lawyers, official misconduct, and other instances of unfairness by tossing out more convictions and death sentences, this could influence the actions of public officials in Texas because they would want to avoid costly retrials. The question, therefore, is what can be done to improve the appellate review process in Texas?

Ideally, Texas would reform its judicial selection process. Presently, voters in Texes select judges in partisan elections.[142] The adoption of some type of nonpartisan process would be most helpful. The Texas legislature, however, has rejected very modest death penalty reforms, so the likelihood of it revamping the state's judicial system is practically nonexistent.[143]

The most effective course of action would be to continue to bring public attention to the situation in Texas. For instance, the enormous amount of attention that Andrea Yates's case received likely had an effect on the appellate court's decision to overturn her conviction. Finally, the

141. *See, e.g.*, Hall, *supra* note 17, at 154, 154-57 (discussing the disregard of evidence and political support for reconsideration of certain criminal cases by the Texas Criminal Court of Appeals due to its zeal for upholding convictions); *Judicial Defiance*, WASH. POST, Dec. 7, 2004, at A24 (discussing Texas courts' failure "to seriously examine evidence of racial bias in the jury's selection"); Liptak & Blumenthal, *supra* note 3 ("Justice Sandra Day O'Connor wrote in June that the Fifth Circuit was 'paying lip service to principles' of appellate law in issuing death penalty rulings with 'no foundation in the decisions of this court.'"); Allen Pusey, *Taking the Fifth to Task*, DALLAS MORNING NEWS, July 25, 2004, at 1H (noting that the Fifth Circuit's overly tolerant approach to prosecutorial prejudice and misconduct has resulted, as of late, in a high number of Supreme Court reversals); A STATE OF DENIAL, *supra* note 14, at 121 ("[C]hanges in appeal procedures have limited both the opportunities for review and the depth of scrutiny traditionally applied to such judgments by the courts, both at the state and federal level.").

142. Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1808 (2000) (noting that Texas elects its judges—as do thirty-two of the thirty-eight states with the death penalty—and explaining that, in these states, "[t]he removal of judges perceived as 'soft on crime' has made it clear to those remaining on the bench that upholding the law in capital cases comes at their own peril").

143. Joseph Rosenbloom, *The Unique Brutality of Texas: Why the Lone Star State Leads the Nation in Executions*, AM. PROSPECT, July 2004, at A11, A12. During the last session of the Texas Legislature, legislators failed to enact legislation to comply with a United States Supreme Court decision barring the execution of the mentally retarded, rejected bills to establish a consular notification procedure to allow juries to impose life imprisonment without a possibility of parole as an alternative to a death sentence, and failed to create a death penalty study commission. *Id*.

United States Supreme Court has shown a willingness to scrutinize capital cases coming out of Texas, and it should continue to do so. The Court is somewhat constrained, however, by AEDPA, which mandates deference to state court judgments,[144] and by the fact that it only accepts a small number of cases for review each year. While AEDPA does require deference to state court determinations, deference does not mean abdication.[145] As to the fact that the Court only reviews a certain number of cases, nothing prevents it from accepting more cases than it presently does. The Court should accept as many cases as necessary to reassert its authority and to ensure that lower courts are correctly applying the law. The integrity of the criminal justice system, the courts, and many lives are at risk if it does not.

144. *See* 28 U.S.C. § 2254(d) (2000) (limiting a federal court's ability to review a state court's determination of a factual issue in a writ of habeas corpus proceeding).

145. *See* Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) ("Deference does not by definition preclude relief.").