CAPITAL PUNISHMENT:
RACE, POVERTY & DISADVANTAGE

Yale University
Professor Stephen B. Bright

Class Seven - Part Four:
Experts and Post-Conviction Representation

INVESTIGATIVE AND EXPERT ASSISTANCE

Glen Burton AKE, Petitioner
v.
OKLAHOMA.

United States Supreme Court
470 U.S. 68, 105 S.Ct. 1087 (1985)

Justice Marshall delivered the opinion of the Court. Chief Justice Burger issued an opinion, concurring in the judgment. Justice Rehnquist issued an opinion dissenting.

Justice MARSHALL delivered the opinion of the Court.

The issue in this case is whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question.

I

Late in 1979, Glen Burton Ake was arrested and charged with murdering a couple and wounding their two children. He was arraigned in the District Court for Canadian County, Okla., in February 1980. His behavior at arraignment, and in other prearraignment incidents at the jail, was so bizarre that the trial judge, *sua sponte*, ordered him to be examined by a psychiatrist "for the purpose of advising with the Court as to his impressions of whether the Defendant may need an extended period of mental observation." The examining psychiatrist reported: "At times [Ake] appears to be frankly delusional . . . . He claims to be the 'sword of vengeance' of the Lord and that he will sit at the left hand of God in heaven." He diagnosed Ake as a probable paranoid schizophrenic and recommended a prolonged psychiatric evaluation to determine whether Ake was competent to stand trial.

In March, Ake was committed to a state hospital to be examined with respect to his "present sanity," *i.e.*, his competency to stand trial. On April 10, less than six months after the incidents for which Ake was indicted, the chief forensic psychiatrist at the state hospital informed the court that Ake was not competent to stand trial. The court then held a competency hearing, at which a psychiatrist testified:

> [Ake] is a psychotic ... his psychiatric diagnosis was that of paranoid schizophrenia – chronic, with exacerbation, that is with current upset, and that in addition . . . he is dangerous. . . . [B]ecause of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within – I believe – the State Psychiatric Hospital system.

The court found Ake to be a "mentally ill person in need of care and treatment" and incompetent to stand trial, and ordered him committed to the state mental hospital.

Six weeks later, the chief forensic psychiatrist informed the court that Ake had become

competent to stand trial. At the time, Ake was receiving 200 milligrams of Thorazine, an antipsychotic drug, three times daily, and the psychiatrist indicated that, if Ake continued to receive that dosage, his condition would remain stable. The State then resumed proceedings against Ake.

At a pretrial conference in June, Ake's attorney informed the court that his client would raise an insanity defense. To enable him to prepare and present such a defense adequately, the attorney stated, a psychiatrist would have to examine Ake with respect to his mental condition at the time of the offense. During Ake's 3-month stay at the state hospital, no inquiry had been made into his sanity at the time of the offense, and, as an indigent, Ake could not afford to pay for a psychiatrist. Counsel asked the court either to arrange to have a psychiatrist perform the examination, or to provide funds to allow the defense to arrange one. The trial judge rejected counsel's argument that the Federal Constitution requires that an indigent defendant receive the assistance of a psychiatrist when that assistance is necessary to the defense, and he denied the motion for a psychiatric evaluation at state expense * * *.

Ake was tried for two counts of murder in the first degree, a crime punishable by death in Oklahoma, and for two counts of shooting with intent to kill. At the guilt phase of trial, his sole defense was insanity. Although defense counsel called to the stand and questioned each of the psychiatrists who had examined Ake at the state hospital, none testified about his mental state at the time of the offense because none had examined him on that point. The prosecution, in turn, asked each of these psychiatrists whether he had performed or seen the results of any examination diagnosing Ake's mental state at the time of the offense, and each doctor replied that he had not. *As a result, there was no expert testimony for either side on Ake's sanity at the time of the offense.* The jurors were then instructed that Ake could be found not guilty by reason of insanity if he did not have the ability to distinguish right from wrong at the time of the alleged offense. They were further told that Ake was to be presumed sane at the time of the crime unless he presented evidence sufficient to raise a reasonable doubt about his sanity at that time. If he raised such a doubt in their minds, the jurors were informed, the burden of proof shifted to the State to prove sanity beyond a reasonable doubt. The jury rejected Ake's insanity defense and returned a verdict of guilty on all counts.

At the sentencing proceeding, the State asked for the death penalty. No new evidence was presented. The prosecutor relied significantly on the testimony of the state psychiatrists who had examined Ake, and who had testified at the guilt phase that Ake was dangerous to society, to establish the likelihood of his future dangerous behavior. Ake had no expert witness to rebut this testimony or to introduce on his behalf evidence in mitigation of his punishment. The jury sentenced Ake to death on each of the two murder counts, and to 500 years' imprisonment on each of the two counts of shooting with intent to kill.

On appeal to the Oklahoma Court of Criminal Appeals, Ake argued that, as an indigent defendant, he should have been provided the services of a court-appointed psychiatrist. The court rejected this argument * * *. * * *

We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one. Accordingly, we reverse.

* * *

III

This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from

the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake. * * *

* * * We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," and we have required that such tools be provided to those defendants who cannot afford to pay for them.

To say that these basic tools must be provided is, of course, merely to begin our inquiry. In this case we must decide whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense. Three factors are relevant to this determination. The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. We turn, then, to apply this standard to the issue before us.

A

The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis.

We consider, next, the interest of the State. Oklahoma asserts that to provide Ake with psychiatric assistance on the record before us would result in a staggering burden to the State. We are unpersuaded by this assertion. Many States, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to preclude this assistance. This is especially so when the obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, and as we limit the right we recognize today. At the same time, it is difficult to identify any interest of the State, other than that in its economy, that weighs against recognition of this right. The State's interest in prevailing at trial – unlike that of a private litigant – is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases. Thus, also unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained. We therefore conclude that the governmental interest in denying Ake the assistance of a psychiatrist is not substantial, in light of the compelling interest of both the State and the individual in accurate dispositions.

Last, we inquire into the probable value of the psychiatric assistance sought, and the risk of error in the proceeding if such assistance is not offered. We begin by considering the pivotal role that psychiatry has come to play in criminal proceedings. More than 40 States, as well as the Federal Government, have decided either through legislation or judicial decision that indigent defendants are entitled, under certain circumstances, to the assistance of a psychiatrist's expertise. * * *

These statutes and court decisions reflect a reality that we recognize today, namely, that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.

Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party. When jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial and "a virtual necessity if an insanity plea is to have any chance of success." By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. It is for this reason that States rely on psychiatrists as examiners, consultants, and witnesses, and that private individuals do as well, when they can afford to do so. * * *

The foregoing leads inexorably to the conclusion that, without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination.

A defendant's mental condition is not necessarily at issue in every criminal proceeding, however, and it is unlikely that psychiatric assistance of the kind we have described would be of probable value in cases where it is not. * * * When the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent. It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success. In such a circumstance, where the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield.

* * * This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

B

Ake also was denied the means of presenting evidence to rebut the State's evidence of his future dangerousness. The foregoing discussion compels a similar conclusion in the context of a capital sentencing proceeding, when the State presents psychiatric evidence of the defendant's future dangerousness. * * * The variable on which we must focus is * * * the probable value that the assistance of a psychiatrist will have in this area, and the risk attendant on its absence.

* * *

IV

We turn now to apply these standards to the facts of this case. On the record before us, it is clear that Ake's mental state at the time of the offense was a substantial factor in his defense, and that the trial court was on notice of that fact when the request for a court-appointed psychiatrist was made. * * *

In addition, Ake's future dangerousness was a significant factor at the sentencing phase. * * * We therefore conclude that Ake also was entitled to the assistance of a psychiatrist on this issue and that the denial of that assistance deprived him of due process.[13]

Chief Justice BURGER, concurring in the judgment.

* * *

* * * In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases. Nothing in the Court's opinion reaches non-capital cases.

Justice REHNQUIST, dissenting.

The Court holds that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." I do not think that the facts of this case warrant the establishment of such a principle; and I think that even if the factual predicate of the Court's statement were established, the constitutional rule announced by the Court is far too broad. I would limit the rule to capital cases, and make clear that the entitlement is to an independent psychiatric evaluation, not to a defense consultant.

* * *

The Court's opinion states that before an indigent defendant is entitled to a state-appointed psychiatrist the defendant must make "a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial." But nowhere in the opinion does the Court elucidate how that requirement is satisfied in this particular case. Under Oklahoma law, the burden is initially on the defendant to raise a reasonable doubt as to his sanity at the time of the offense. Once that burden is satisfied, the burden shifts to the State to prove sanity beyond a reasonable doubt. Since the State introduced no evidence concerning Ake's sanity at the time of the offense, it seems clear that as a matter of state law Ake failed to carry the initial burden. * * *

* * *

Before holding that the State is obligated to furnish the services of a psychiatric witness to an indigent defendant who reasonably contests his sanity at the time of the offense, I would require a

13. Because we conclude that the Due Process Clause guaranteed to Ake the assistance he requested and was denied, we have no occasion to consider the applicability of the Equal Protection Clause, or the Sixth Amendment, in this context.

considerably greater showing than this. And even then I do not think due process is violated merely because an indigent lacks sufficient funds to pursue a state-law defense as thoroughly as he would like. * * * It is highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant, but in any event if such a defense is afforded the burden of proving insanity can be placed on the defendant. That is essentially what happened here, and Ake failed to carry his burden under state law. I do not believe the Due Process Clause superimposes a federal standard for determining how and when sanity can legitimately be placed in issue, and I would find no violation of due process under the circumstances.

* * *

Finally, even if I were to agree with the Court that some right to a state-appointed psychiatrist should be recognized here, I would not grant the broad right to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." A psychiatrist is not an attorney, whose job it is to advocate. His opinion is sought on a question that the State of Oklahoma treats as a question of fact. Since any "unfairness" in these cases would arise from the fact that the only competent witnesses on the question are being hired by the State, all the defendant should be entitled to is one competent opinion – whatever the witness' conclusion – from a psychiatrist who acts independently of the prosecutor's office. Although the independent psychiatrist should be available to answer defense counsel's questions prior to trial, and to testify if called, I see no reason why the defendant should be entitled to an opposing view, or to a "defense" advocate.

* * *

NO RIGHT TO COUNSEL IN APPELLATE AND POST-CONVICTION PROCEEDINGS

In *Douglas v. California*, 372 U.S. 353 (1963), the Supreme Court held that the right to state-paid counsel extends beyond the trial to the first level of appellate review. As previously noted, the Court relied on the due process and equal protection clauses of the Fourteenth Amendment and its decision in *Griffin v. Illinois*:

> In either case [denial of transcript or counsel] the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of appeal a man enjoys "depends upon the amount of money he has."

However, changes in the makeup of the Court, the Court held 11 years later that due process did not require that North Carolina provide indigent defendants with a lawyer to pursue discretionary appeals from the state intermediate appellate court to the state supreme court and applications for review in the U.S. Supreme Court. *Ross v. Moffitt*, 417 U.S. 600 (1974). North Carolina provided a lawyer for the initial appeal to the state's court of appeals, but not to petition the state supreme court for discretionary review. Justice Rehnquist, who had joined the Court since *Douglas*, wrote for the Court:

> We do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.

Id. at 615. Justice Douglas, joined by Justices Brennan and Marshall dissented, stating:

> *Douglas v. California* was grounded on concepts of fairness and equality. The right to seek discretionary review is a substantial one, and one where a lawyer can be of significant assistance to an indigent defendant. It was correctly perceived below that the "same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals."

Id. at 621 (quoting from the decision of the Court of Appeals below).

The Court held that prison authorities must at least give inmates a chance to litigate cases themselves in *Bounds v. Smith*, 430 U.S. 817(1977). In an opinion by Justice Marshall, the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."

Justice Powell concurred. Chief Justice Burger and Justices Stewart and Rehnquist each filed dissenting opinions taking issue with whether such a "right of access" exists. Justice Rehnquist wrote: "There is nothing in the United States Constitution which requires that a convict serving a term of imprisonment in a state penal institution pursuant to a final judgment of a court of competent jurisdiction have a 'right of access' to the federal courts in order to attack his sentence." *Id*. at 837.

A decade later, the Court put access to legal materials and assistance out of reach in *Lewis v. Casey*, 518 U.S. 343 (1996). In an opinion by Justice Scalia the Court held that to enforce the right of access to libraries or legal assistance, inmates in order to have standing to bring such claims must prove "actual injury" from being denied access.

> * * * [A]n inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. * * * [T]he inmate * * * must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.

Id. at 351. This creates something of a Catch-22 for the inmate who, because of lack of access to legal materials, cannot show that he was unable to meet a technical requirement or had a valid basis for a complaint. The Court disclaimed any statements in *Bounds* that "appear to suggest that the State must enable the prisoner to *discover* grievances, and *to litigate effectively* once in court." *Id*. at 354.

Justice Thomas filed a concurring opinion expressing the view that "the right to law libraries and legal assistance created in *Bounds*" were invalid because the right of access to the courts is "a right not to be arbitrarily prevented from lodging a claimed violation of a federal right in a federal court[,]" but "[t]he State, however, is not constitutionally required to finance or otherwise assist the prisoner's efforts, either through law libraries or other legal assistance. *Id*. at 373, 381-82, 384-85.

Justice Souter issued an opinion concurring in part and dissenting in part. Justice Stevens dissented to "the Court's decision to use the case as an opportunity to meander through the laws of standing and access to the courts, expanding standing requirements here and limiting rights there" when it was not necessary to resolve the case. *Id*. at 411.

In *Pennsylvania v. Finley*, 481 U.S. 551 (1987),

the Court, in an opinion by Chief Justice Rehnquist, held, 6-3, that neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of "meaningful access" required the State to appoint counsel for indigent prisoners seeking state post-conviction relief.

Edward W. MURRAY, Director
v.
Joseph M. GIARRATANO

United States Supreme Court
492 U.S. 1, 109 S.Ct. 2765 (1989)

Rehnquist, C.J., announced the judgment of the Court and delivered an opinion, in which White, O'Connor, and Scalia, JJ., joined. O'Connor, J., filed a concurring opinion. Kennedy, J., filed an opinion concurring in the judgment, in which O' Connor, J., joined. Stevens, J., filed a dissenting opinion, in which Brennan, Marshall, and Blackmun, JJ., joined.

Chief Justice REHNQUIST announced the judgment of the Court and delivered an opinion, in which Justice WHITE, Justice O'CONNOR, and Justice SCALIA join.

Virginia death row inmates brought a civil rights suit against various officials of the Commonwealth of Virginia. The prisoners claimed, based on several theories, that the Constitution required that they be provided with counsel at the Commonwealth's expense for the purpose of pursuing collateral proceedings related to their convictions and sentences. The courts below ruled that appointment of counsel upon request was necessary for the prisoners to enjoy their constitutional right to access to the courts in pursuit of state habeas corpus relief. We think this holding is inconsistent with our decision two Terms ago in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and rests on a misreading of our decision in *Bounds v. Smith*, 430 U.S. 817 (1977).

Joseph M. Giarratano is a Virginia prisoner under a sentence of death. He initiated this action under 42 U.S.C. §1983, by pro se complaint in Federal District Court, against various state officials including Edward W. Murray who is the Director of the Virginia Department of Corrections. * * *

[The district court] found that death row inmates had a limited amount of time to prepare their petitions, that their cases were unusually complex, and that the shadow of impending execution would interfere with their ability to do legal work. These "considerations" led the court to believe that the "plaintiffs are incapable of effectively using lawbooks to raise their claims." As a result, it found that Virginia's policy of either allowing death row inmates time in the prison law library or permitting them to have lawbooks sent to their cells did "little to satisfy Virginia's obligation."[10] "Virginia must fulfill its duty by providing these inmates trained legal assistance."

The District Court [also] * * * found inadequate the availability of "unit attorneys" appointed by Virginia to the various penal institutions to assist inmates in incarceration-related litigation. Further, it found that "[e]ven if Virginia appointed additional institutional attorneys to service death row inmates, its duty under *Bounds* would not be fulfilled" because, acting "only as legal advisors," "[t]he scope of assistance these attorneys provide is simply too limited." Along the same lines, the District Court concluded that Virginia's provisions for appointment of counsel after a petition is filed did not cure the problem. This was primarily because "the timing of the appointment is a fatal defect" as the inmate "would not receive the attorney's assistance in the critical stages of developing his claims."

Even together, Virginia's efforts did not afford prisoners a meaningful right of access to the

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10. Virginia houses its death row inmates at the Mecklenberg Correctional Center, the Virginia State Penitentiary, and the Powhatan Correctional Center. Each of these three centers maintain law libraries. Inmates at Mecklenberg are allowed two library periods per week; inmates at the other facilities may borrow materials from the prison library for use in their cells.

courts, in the opinion of the District Court, because they did not guarantee them "the continuous assistance of counsel." * * * It therefore ordered Virginia to develop a program for the appointment of counsel, upon request, to indigent death row inmates wishing to pursue habeas corpus in state court. * * *

* * *

In *Finley* we ruled that neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of "meaningful access" required the State to appoint counsel for indigent prisoners seeking state postconviction relief. * * *

* * *

Respondents, like the courts below, believe that *Finley* does not dispose of respondents' constitutional claim to appointed counsel in habeas proceedings because *Finley* did not involve the death penalty. * * *

We have recognized on more than one occasion that the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death. * * * These holdings, however, have dealt with the trial stage of capital offense adjudication, where the court and jury hear testimony, receive evidence, and decide the questions of guilt and punishment. * * *

We have * * * refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus.

* * * [T]he rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases. State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal. The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed. * * *

* * *

Justice KENNEDY, with whom Justice O'CONNOR joins, concurring in the judgment.

It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death. * * *

The requirement of meaningful access can be satisfied in various ways, however. * * *

* * * While Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief. I am not prepared to say that this scheme violates the Constitution.

On the facts and record of this case, I concur in the judgment of the Court.

Justice STEVENS, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, dissenting.

* * *

* * * [T]he appropriate question in this case is not whether there is an absolute "right to counsel" in collateral proceedings, but whether due process requires that these respondents be appointed counsel in order to pursue legal remedies. Three critical differences between *Finley* and this case demonstrate that even if it is permissible to leave an ordinary prisoner to his own resources in collateral proceedings, it is fundamentally unfair to require an indigent death row inmate to initiate collateral review without counsel's guiding hand. I shall address each of these differences in turn.

First. These respondents, like petitioners in

Powell but unlike respondent in *Finley*, have been condemned to die.

* * *

The unique nature of the death penalty not only necessitates additional protections during pretrial, guilt, and sentencing phases, but also enhances the importance of the appellate process. Generally there is no constitutional right to appeal a conviction. * * * "[M]eaningful appellate review" in capital cases, however, "serves as a check against the random or arbitrary imposition of the death penalty." * * * It is therefore an integral component of a State's "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." * * *

* * *

Second. In contrast to the collateral process discussed in *Finley*, Virginia law contemplates that some claims ordinarily heard on direct review will be relegated to postconviction proceedings. Claims that trial or appellate counsel provided constitutionally ineffective assistance, for instance, usually cannot be raised until this stage. * * * Furthermore, some irregularities, such as prosecutorial misconduct, may not surface until after the direct review is complete. * * * Occasionally, new evidence even may suggest that the defendant is innocent. * * * Given the irreversibility of capital punishment, such information deserves searching, adversarial scrutiny even if it is discovered after the close of direct review.

* * *

Third. As the District Court's findings reflect, the plight of the death row inmate constrains his ability to wage collateral attacks far more than does the lot of the ordinary inmate considered in *Finley*. The District Court found that the death row inmate has an extremely limited period to prepare and present his postconviction petition and any necessary applications for stays of execution. Unlike the ordinary inmate, who presumably has ample time to use and reuse the prison library and to seek guidance from other prisoners experienced in preparing pro se petitions, a grim deadline imposes a finite limit on the condemned person's capacity for useful research. * * *

Capital litigation, the District Court observed, is extremely complex. * * * A judgment that it is not unfair to require an ordinary inmate to rely on his own resources to prepare a petition for postconviction relief, does not justify the same conclusion for the death row inmate who must acquire an understanding of this specialized area of the law and prepare an application for stay of execution as well as a petition for collateral relief.

* * *

Death Penalty Resource Centers

In the mid 1980s, Congress provided for funding through the Administrative Office of U.S. Courts to organizations called "death penalty resource centers." The organizations, which were to be jointly funded by the state and the federal government, provided representation to people under sentence of death in state and federal post-conviction proceedings. Some states provided funding for the resources. Others, including Alabama, Mississippi and Texas, did not. In 1995, Congress eliminated funding for the resource centers, some of which were also known as post-conviction defender organizations. *See* Roscoe C. Howard, *The Defunding of the Post-Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863 (1996).

Facing Death Without a Lawyer

EXZAVIOUS GIBSON
v.
TONY TURPIN, Warden

Superior Court of Butts County, Ga.
Hearing held on Sept. 12, 1996

THE COURT: Okay. Mr. Gibson, do you want to proceed?

Gibson: I don't have an attorney.

THE COURT: I understand that.

Gibson: I am not waiving my rights.

THE COURT: I understand that. Do you have any evidence you want to put up?

Gibson: I don't know what to plead.

THE COURT: Huh?

Gibson: I don't know what to plead.

THE COURT: I am not asking you to plead anything. I am just asking you if you have anything you want to put up, anything you want to introduce to this Court.

Gibson: But I don't have an attorney.

* * *

[After the Assistant Attorney General presented the testimony of Gibson's trial attorney, Mr. Mullis, the judge addressed Gibson:]

THE COURT: Mr. Gibson, would you like to ask Mr. Mullis any questions?

Gibson: I don't have any counsel.

THE COURT: I understand that, but I am asking, can you tell me yes or no whether you want to ask him any questions or not?

Gibson: I'm not my own counsel.

THE COURT: I'm sorry, sir, I didn't understand you.

Gibson: I'm not my own counsel.

THE COURT: I understand, but do you want, do you, individually, want to ask him anything?

Gibson: I don't know.

THE COURT: Okay, sir. Okay, thank you, Mr. Mullis, you can go down.

Gibson tendered no evidence, examined no witnesses and made no objections. The judge denied Gibson relief. The Georgia Supreme Court, by a vote of 4-3, upheld the denial of habeas corpus relief, holding that there was no right to counsel in state post-conviction proceedings. *Gibson v. Turpin,* 513 S.E.2d 186 (Ga. 1999) , *cert. denied*, 120 S.Ct. 363 (1999).

The Mississippi Supreme Court has held that the state is required to appoint counsel for condemned persons in post-conviction proceedings. *Jackson v. State*, 732 So.2d 187 (Miss. 1999). The Court found that:

> [T]he reality [is] that indigent death row inmates are simply not able, on their own, to competently engage in this type of litigation. Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of [state habeas law]. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy.

Mississippi created a state-funded office which provides representation to death-sentenced inmates in post-conviction proceedings.

Facing Death Without Much of a Lawyer

In October 1997, the Texas Court of Criminal Appeals appointed a lawyer who had been out of law school for just under three years and had been licensed by the Texas Bar for just over two years to represent Anthony Charles Graves in bringing a state habeas corpus action. The lawyer filed an application for habeas corpus relief on June 19, 1998. The trial court recommended that it be denied. While the case was pending on appeal before the Court of Criminal Appeals, the attorney attempted to filed a "supplemental" application raising four claims. The Court of Criminal Appeals denied the first application on February 9, 2000, and denied the supplement as "untimely" on February 16, 2000.

Represented by new counsel, Graves sought to file a petition alleging that his first habeas counsel was not "competent" as required by the Texas statute providing for the appointment of counsel, because counsel failed to include the four claims that were in the "supplemental application" in the original application for a writ of habeas corpus. The Court's opinion follows.

Ex parte Anthony Charles GRAVES, Applicant.

Court of Criminal Appeals of Texas
70 S.W.3d 103 (2002).

COCHRAN, J., delivered the opinion of the Court, in which KELLER, P.J., MEYERS, WOMACK, KEASLER, and HERVEY, J.J., joined.

* * *

Applicant contends that he was denied effective assistance of counsel during his initial habeas proceedings because his first habeas counsel failed to include claims in applicant's original habeas petition (namely, the claims that first habeas counsel raised in his second or "supplemental" habeas petition, which we dismissed). Applicant further contends that he is entitled to bring a third habeas petition to assert a claim of ineffective assistance by his first habeas counsel, which deprived him of his due process rights under both the United States and Texas constitutions. We reject his contention for a number of reasons.

A. There is no constitutional right to effective assistance of counsel on a writ of habeas corpus.

It is a well established principle of federal and state law that no constitutional right to effective assistance of counsel exists on a writ of habeas corpus. The Supreme Court explained in *Pennsylvania v. Finley* that because a defendant "has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction," then clearly, "he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process." Moreover, the Court explained, a convicted person has no constitutional right to *any* counsel, much less "constitutionally effective" counsel, in either discretionary appeals or on writs of habeas corpus.

* * *

In sum, simply because a state provides for the possibility of a particular procedure or remedy, it does not inexorably follow that the state must also provide legal counsel to one seeking to pursue that remedy. Here, the writ of habeas corpus is a constitutionally available remedy for instances of illegal restraint, but nothing in the federal or Texas constitution requires the State to appoint and pay for counsel to pursue that remedy.

* * *

If a convicted person has no constitutional right to appointment of *any* counsel in a post-conviction habeas corpus proceeding, it inevitably follows that he cannot claim constitutionally ineffective assistance of counsel

in that proceeding. * * *

* * *

B. The 1995 Habeas Corpus Reform Act did not create a constitutional right to effective assistance of counsel in death penalty cases.

Applicant also contends that even though the federal and Texas constitutions may not recognize a claim of ineffective assistance of counsel on a writ of habeas corpus, the 1995 [Texas] Habeas Corpus Reform Act creates a statutory right to "competent" counsel in habeas proceedings. We agree with that proposition. However, applicant then reasons that competent counsel's performance must be constitutionally effective in the specific habeas proceeding. Thus, according to applicant, if an inmate claims that his original habeas counsel was not constitutionally effective, he is entitled to bring a subsequent writ complaining of counsel's deficient performance. We disagree.

[Tex. Code Crim. Proc.] Article 11.071, section 2(a) provides that "[a]n applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se ..." Applicant argues that the phrase "competent counsel" signifies the final product of representation, rather than the initial qualifications for appointment. Applicant's position, however, does not comport with the statute's plain meaning, nor does it comport with the legislative intent behind the statute.

* * * As applicant correctly observes, it would seem an empty gesture to appoint incompetent counsel. We agree that a "potted plant" appointed as counsel is no better than no counsel at all. Our disagreement concerns the time at which counsel is deemed "competent" to represent the habeas applicant.

The words of the statute themselves state that counsel shall be "competent" at the time he is appointed. The reference to "competent counsel" * * * concerns habeas counsel's qualifications, experience, and abilities at the time of his appointment. All of these provisions concern the initial appointment of counsel and continuity of representation rather than the final product of representation.

Moreover, applicant's interpretation of 11.071 section 2 would eviscerate section 5 of the same statute, which generally bars successive petitions. The Legislature enacted the Habeas Corpus Reform Act of 1995 to prevent repetitious writs, including variations on claims which had been previously rejected or claims which could have been brought in the prior application. To accept the notion that the appointment of "competent counsel" means that the counsel appointed must render constitutionally effective assistance of counsel in the particular case would turn article 11.071 section 5 into a perpetual motion machine.

* * *

The Legislature has consistently shown a great interest in the appropriate appointment of competent counsel in these very serious cases. What the Legislature has not done, however, is evince any intention that its choice of the term "competent counsel" as it applies to the appointment of a habeas attorney *also* applies to the final product or services rendered by that otherwise experienced and competent counsel. To require the trial court to appoint "competent counsel who will render effective assistance to his client in this case" would legislatively mandate a degree of prescience that not even Texas trial judges can be expected to display. We cannot conclude that the Texas Legislature enacted a provision which requires trial judges to engage in such a clairvoyant exercise.

PRICE, J., filed a dissenting opinion, in which HOLCOMB, J., joined.

* * * "Competent counsel" ought to require more than a human being with a law license and a pulse. Today the majority requires nothing more than that to ensure society's interest in fundamental fairness. * * * Therefore, I respectfully dissent.

* * *

We are the guardians of the process. That we have been unclear in the past about what claims are reviewable, without more, is an insufficient reason for this Court to conclude that finality is a superior interest to the fundamental fairness in criminal proceedings in this instance.

* * *

I have grave concerns about dismissing claims like the applicant's. By its own hand, this Court appointed the applicants first habeas counsel, an attorney who by any reasonable assessment was not prepared to handle a case of this type.[4] Now the same Court washes its hands of applicants who wish to have heard the merits of claims ignored or undiscovered by the inexperienced habeas counsel that we appointed.

* * *

* * * [Under the majority opinion,] [c]ounsel is required to be competent up until just before the final product, the application, is prepared. At that point, counsel may go to pieces, and there is no recourse for the applicant. Even assuming that the reference to competent counsel in article 11.071 concerns counsel's qualifications and abilities, this reference is not inconsistent with requiring that the final product of counsel's representation be competent work.

The majority also claims that the applicant's interpretation of competent counsel would eviscerate section five's general bar to successive applications. Does the majority suggest that Texas is somehow incapable of appointing counsel who turn in competently prepared applications? * * *

* * *

Down the slippery slope we go, claims the majority. If we provide for competent counsel as the applicant envisions it, the floodgates will open with subsequent applications; there will be no end to the subsequent applications filed that allege ineffective assistance of prior habeas counsel. But once competent counsel is appointed to competently investigate and present the factual and legal claims available to the applicant, no subsequent application could or would be reviewed for ineffective assistance of habeas counsel.

* * *

The majority claims that the legislature could not have meant for competent counsel to apply to the final product because it would require convicting court judges to be prescient and clairvoyant. I wonder how much clairvoyance is required to determine that an attorney is not qualified and able if, by the time he received his first appointment in an 11.071 case, he had been out of law school for only two years, had been licensed to practice law for only a year-and-a-half, and had never been counsel in a capital murder case but had assisted in two non-capital murder cases. * * *

* * *

* * * If a criminal defendant's trial counsel is ineffective, he is almost always forced to challenge counsel's ineffectiveness in a post-conviction writ application. * * * If the defendant's habeas counsel performs deficiently, a meritorious claim may not be adequately raised or investigated. Applicants only get one shot at habeas corpus relief. If the attorney appointed on his first writ is incompetent, then a defendant, who was deprived of effective assistance of counsel at trial, has no means to enforce his constitutional right to affective assistance of counsel at trial.

IV. Conclusion

The crime for which the applicant was convicted is unimaginably horrific. I do not dispute that. But we need to keep in mind that every criminal defendant, be he virtuous,

4. We appointed applicant's first habeas counsel in October 1997. At that time, counsel had been out of law school for just under three years and had been licensed by the Texas Bar for just over two years.

depraved, innocent, or guilty, is entitled to the same constitutional protections. The majority's analysis and cited authority do not support its conclusion that we should dismiss the application. I respectfully dissent.

JOHNSON, J., filed a dissenting opinion. * * *

* * * Based on similar statutory requirements, several other jurisdictions have determined that a right to *habeas* counsel necessarily entails that such counsel be effective. * * * [T]he Supreme Court of Iowa concluded in 1985:

> We believe the statutory grant of a postconviction applicant's right to court-appointed counsel [in postconviction proceedings arising out of prison disciplinary hearings] necessarily implies that that counsel be effective. . . . Nothing in our postconviction act indicates an intent on the part of the legislature that a different rule would apply. It would seem to be an empty gesture to provide counsel without any implied requirement of effectiveness.

Patchette v. State, 374 N.W.2d 397, 398-9 (Iowa 1985).

* * * Similarly, the Supreme Court of Connecticut has reasoned that a statutory right to *habeas* counsel "would become an empty shell if it did not embrace the right to have the assistance of a competent counsel." *Lozada v. Warden,* 223 Conn. 834, 613 A.2d 818, 821-2 (1992) * * *. [T]he Supreme Court of South Dakota reached the same conclusion when it held that "[w]e will not presume that our legislature has mandated some useless formality requiring the mere physical presence of counsel as opposed to effective and competent counsel." *Jackson v. Weber,* 623 N.W.2d 71, 74 (S.D.2001) * * *.

Section 2(a) of art. 11.071 mandates not only the appointment of counsel, it specifically mandates the appointment of *competent* counsel. Thus, the rationale of the above-cited cases applies even more forcefully here; the use of such language by the legislature indicates a requirement of the effective assistance of *habeas* counsel. Moreover, unlike the federal *habeas* statute, our legislature has not specifically precluded a claim of ineffective assistance of *habeas* counsel. Thus, under the terms of the statute, applicant has a statutory right to effective assistance of *habeas* counsel.

HOLCOMB, J., delivered a dissenting opinion, in which PRICE and JOHNSON, JJ., joined.

* * *

The only sensible interpretation of "competent counsel" is the traditional one: counsel reasonably likely to render, and rendering, effective assistance. This is so for several reasons. First, the guarantee of the effective assistance of counsel is what makes the one-application limitation comport with traditional notions of fair play and substantial justice. Second, nothing is more firmly established in our law than that the right to counsel means the right to the effective assistance of counsel. * * * Article 11.071's guarantee of "competent counsel" would be a cruel joke if it did not comprehend the right to the effective assistance of counsel. The Legislature could not have intended a cruel joke.

Anthony Graves obtained federal habeas corpus relief because of the prosecution's failure to disclose exculpatory evidence. Graves v. Dretke*,442 F.3d 334 (5th Cir. 2006). When the case return to the trial court, the new prosecutor, after an investigation, dismissed the case against Graves, announcing, "He's an innocent man. There is nothing that connects Anthony Graves to this crime." Graves was released after 18 years of incarceration, 12 of them on death row. He was the 138th person released from death row due to innocence since 1973. A number of videos of Graves discussing his experiences are available on YouTube.*

Failure to File Within the Statute of Limitations

The federal courts refused to consider a petition for a writ of habeas corpus filed on behalf of Leonard Uresti Rojas because it was not filed within the one-year statute of limitations established by the Antiterrorism and Effective Death Penalty Act.

Rojas sought a stay of execution in the Texas courts and relief to enable him to seek federal review. The Texas Court of Criminal Appeals denied the motion. Rojas was executed on December 4, 2002. Three months later, the Texas Court of Criminal Appeals issued the following opinions with regard to the Court's denial of a stay.

Ex parte Leonard
Uresti ROJAS, Applicant.

Court of Criminal Appeals of Texas.
2003 WL 1825617 (2003) (unpublished)

Motion to protect applicants federal habeas review denied.

PRICE, J., filed a statement dissenting to the denial of the Motion to Protect Applicant's Federal Habeas Review, in which JOHNSON and HOLCOMB, J.J., joined.

This Court should have granted relief to the applicant because it appointed an attorney who should not have been appointed to represent a capital defendant in his one opportunity to raise claims not based solely on the record.

The applicant was convicted of capital murder and sentenced to death by lethal injection. This Court affirmed his conviction on direct appeal. We appointed counsel to file an application for writ of habeas corpus under Texas Code of Criminal Procedure article 11.071 on March 18, 1997. We received the application September 18, 1998. We denied relief without written order December 9, 1998. The one- year statute of limitations for filing a petition for federal habeas relief under the Antiterrorism and Effective Death Penalty Act began February 2, 1999.

After relief was denied under [the Texas statute], habeas counsel had a duty to preserve the applicant's right to federal habeas review. Article 11.071 Section 2(g), then in effect, required that habeas counsel file either a motion to be appointed federal habeas counsel or a motion to have a substitute appointed.

> If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move to be appointed as counsel in federal habeas review under 21 U.S.C. Section 848(q) or equivalent provision or, if necessary, move for the appointment of other counsel under 21 U.S.C. Section 848(q) or equivalent provision.

Tex. Code Crim. Pro. 11.071 § 2(e). In order to preserve an applicant's right to federal habeas review, state habeas counsel must take action.

Once habeas relief was denied by this Court, habeas counsel failed to take *any* action to preserve the applicant's right to federal habeas review. Indeed, he did not even notify his client that the Court had denied relief in his case. He claims he was unaware that he was responsible for filing in federal district court for the appointment of counsel or a motion to substitute counsel.[1]

As a result of habeas counsel's omission, the

1. The duty to file one of the two motions in federal court is found in article 11.071, under which habeas counsel was appointed. It seems that competent counsel, that is, counsel who is qualified, experienced, and able at the time of appointment, would have read the applicable article that set out the requirements of his representation.

applicant's federal habeas petition was not heard on the merits. The federal district court that reviewed the applicant's federal petition denied relief on the basis that the petition was filed too late. The Fifth Circuit panel that reviewed the applicant's case affirmed on the same basis.

The facts of which the Court should have been aware when it appointed habeas counsel show that counsel was not competent to represent the applicant in this case. The attorney we appointed to represent the applicant had received two probated suspensions from the State Bar of Texas. Two weeks after his appointment, he received another probated suspension. He was under treatment for bipolar disorder, which he admits affected his representation of the applicant and was the cause of the omissions that gave rise to his suspensions.

Habeas counsel has since explained that he had never represented a capital defendant in habeas proceedings. He did not consult with his client except for a short get-acquainted session when he was first appointed. He failed to conduct an investigation and filed a habeas application alleging three claims with twelve sub-claims that could have been raised on direct appeal, and thus were procedurally barred and not reviewable on the merits. The argument section of the application took up only five pages with no subject headings separating the claims.

The State argues the three probated suspensions are not relevant to the goals of Article 11.071. The State notes competent counsel under Article 11.071 means that counsel must possess the qualifications, experience, and ability at the time of appointment. *Graves,* 70 S.W.3d at 114. The State claims habeas counsel met these requirements. This denies reality. Would those who protest that habeas counsel was qualified desire to have him represent them in *any* proceeding while under a probated sentence for failing to take care of his clients? A capital murder habeas proceeding is no place for a green attorney or an attorney with multiple suspensions from the State Bar, whether probated or not.

At the time habeas counsel was appointed he was under two probated suspensions because he (1) neglected legal matters, (2) failed to carry out the obligations of his clients, (3) failed to keep his clients informed about the status of matters, (4) failed to respond to reasonable requests for information, and (5) failed to withdraw from representing a client after his psychological condition materially impaired his fitness to represent his client. That is quite an indictment.

Although the State Bar probated the suspensions allowing counsel to continue to practice law, the representation of a criminal defendant under a sentence of death should not be left to those who have demonstrated an inability to effectively represent clients, especially when counsel had never represented anyone in Article 11.071 proceedings before. Counsel's performance was found to be deficient. He neglected his duties. It is hard to imagine that there was no one more able or better qualified on the list. Counsel should have been removed from the list until he demonstrated that he was able to represent his clients in the manner prescribed by the Texas Disciplinary Rules of Professional Conduct.

The State contends this attorney was qualified, experienced, and able at the time of his appointment to competently represent the applicant in habeas proceedings for a death penalty case although he had never done so before. Counsel must be competent when appointed but need not represent the client competently. *See Graves,* 70 S.W.3d at 114. The applicant's attorney did not meet even the low standards set by the Court in *Graves.*

Habeas counsel claims not to have known that he was required by law to file a motion to be appointed counsel or a motion for a substitution of counsel. Article 11.071, the article under which habeas counsel was appointed, explains that appointed habeas counsel must file one of the two motions. To be considered competent, at a minimum, counsel should be required to be knowledgeable about the contents of Article 11.071.

A habeas application must do no more than seek relief from the underlying judgment. But the issues ought to be, at a minimum, cognizable. And competent counsel ought to understand the difference between claims that must be raised on direct appeal or are waived and claims that are cognizable in habeas proceedings. Either habeas counsel understood and disregarded the requirement, or counsel did not understand the requirement

The State adds that habeas counsel wrote and presented a paper on habeas corpus law at an Advanced Criminal Law seminar held in 1998.[2] One would expect that an expert on habeas law would have understood that habeas is reserved for claims based on jurisdictional, constitutional, and fundamental rights that may not be raised on direct appeal. If counsel possessed this knowledge, he failed to apply it.

The State also claims that habeas counsel's affidavit shows that he understood what to look for in habeas review. He spoke with his client on one occasion. He read the trial record. He talked to one of the applicant's trial attorneys. *That is all.* As counsel explains in his affidavit, the list of things he *did not do* is much longer.

> I spoke with Leonard Rojas on only one occasion, for a short period of time, when he was in the Johnson County Courthouse for a proceeding related to his capital murder case. I introduced myself, gave him my business card, and briefly explained the habeas corpus process to him. As I recall – and this is my normal practice – I explained in detail but in lay terms – how his habeas corpus situation fit within the overall picture of the criminal proceedings against him. This would not have been a long explanation, lest the listener be lost in the details of what is, especially to a lay person, a complex procedure. I also remember briefly trying to ask Mr. Rojas if he knew anything outside the trial record that could help me, and he responded negatively. I never spoke with Mr. Rojas again. I never met with him on death row. I never wrote to him. *I never consulted with Mr. Rojas about his case during my representation of his state habeas petition.*
>
> I did not raise any claims in the petition that relied on facts outside of the trial record. I did not interview Mr. Rojas to obtain a social history from him because I knew this was not pertinent in Texas habeas corpus law. I did not explore his background by interviewing family members, close relatives, friends, or teachers for the same reason. I did not seek funds from the Texas Court of Criminal Appeals for investigative or expert assistance. I did not obtain releases from Mr. Rojas to facilitate the gathering of school records or mental health or other records, because I had met Mr. Rojas and, like everyone else, saw no sign that such information would be helpful on habeas corpus. I did not review any records pertaining to Mr. Rojas's mental health for the same reason. I did not file any Open Records Act requests seeking police reports and jail records because, once again, that did not, does not, seem pertinent under Texas habeas requirements, much as I might disagree with them. I did not interview the police officers who investigated the case and questioned Mr. Rojas. I did not review the district attorney's file on Mr. Rojas's case but much of that record was available to me through appellate counsel. I was very aware of the facts of the case and felt, in light of Texas habeas corpus law, that these areas of inquiry would not be fruitful avenues to explore. When I refer to Texas habeas corpus law, I mean the body of it as I know it, but also the primary rule of it, which is that the applicant must show facts and harm.

In addition to these omissions, counsel failed to deliver a copy of the habeas application to his client and even failed to notify his client when this Court denied relief.

Habeas counsel is required by Article 11.071 to

2. A cursory glance at the title page of the paper included with the State's response indicates that habeas counsel edited and presented the paper, which was written by another attorney.

conduct a thorough investigation. Article 11.071, section 3 states: "On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus." Habeas counsel did no more than is required by appellate counsel on direct appeal. In effect, the applicant received two direct appeals, one of which was not reviewed on the merits, and no habeas review of his conviction.

The Court is in an awkward position, to be sure. We maintain the list of qualified attorneys for Article 11.071 proceedings. It is difficult to admit that mistakes have been made. Indeed, it is rare for a trial attorney to file a motion for new trial alleging that he was ineffective at trial. This potential conflict begs the question, should we really be maintaining this list? * * *

* * *

Under the current system in Texas, a capital murder defendant is entitled to an attorney of a certain level of competence at trial and on direct appeal, but he is not so entitled in his habeas proceedings. There is a certain disturbing irony in the fact that habeas proceedings are where he may enforce his right to competent and effective counsel in the prior proceedings. Because the administrative districts already deal with appointments in death penalty cases for trial and direct appeal, it makes sense for the legislature to relieve this Court of the burden.

These arguments were presented to the Court by the applicant in pleadings filed *only nine days after* the United States Supreme Court denied certiorari in his federal case. A majority of the Court chose to deny the applicant's motion without, at the time, explaining why in a written opinion. No arguments the majority has presented convince me that the motion should have been denied. Judges on this Court have a right to disagree with the majority and to explain their reasons for doing so.

* * *

The Court incorrectly denied relief in *Graves.* It did so again in this case. I dissent.

KELLER, P.J., filed a concurring opinion in which KEASLER, J., joined.

I file this concurring opinion in response to Judge Price's dissenting statement.

* * *

The dissent's contention regarding counsel's actual representation of applicant is not availing. The statutory reference to competent counsel in Article 11.071 applies only to the attorney's initial qualifications and does not apply to the final product of representation. * * *

As for the dissent's contention that counsel was not competent due to his probated suspensions, the fact that the suspensions were *probated* indicates that the State Bar still found counsel to be competent to practice law, and the dissent does not offer any reason why counsel, if competent to practice law in general, would be incompetent to practice criminal law. Nor can one conclude that counsel was not competent from the fact that he had never before handled an Article 11.071 matter, as every attorney who handles Article 11.071 matters must at some point have handled one for the first time. The dissent concedes that counsel had presented a paper on habeas corpus at an advanced criminal law seminar in 1998.

* * *

The dissent has not shown that we erred in initially appointing counsel in applicant's case, and to the extent that subsequent events reflect on counsel's ability, such events were not brought to this Court's attention until mere days before applicant's scheduled execution, despite the fact that the federal district court handed down its order time-barring applicant's federal petition over a year earlier, and the Fifth Circuit affirmed that order over five months before applicant was executed.

* * *

Importantly, any jurisdiction this Court might

have arguably had over applicant's claims expired upon his execution.

* * *

Lawyers had missed the statute of limitations for filing federal habeas in at least nine capital cases in Texas by early 2009, depriving their clients of any review of their convictions and death sentences by life-tenured federal judges. *See* Lise Olsen, *Lawyers' late filings can be deadly for inmates*, HOUSTON CHRONICLE, March 21, 2009.

Judge Beverly Martin pointed out that at lawyers had filed to file within the statute of limitations for at least 33 condemned inmates in Florida. *See Lugo v. Secretary*, 750 F.3d 1198, 1215-26 (11th Cir. 2014) (Martin, concurring).

Ruiz v. Dretke

In *Ruiz v. Dretke*, United States District Judge Orlando Garcia made the following observation regarding how the representation that Ruiz received in state post-conviction proceedings insulated issues from federal habeas corpus review:

> * * * Quite frankly, the quality of representation petitioner received during his state habeas corpus proceeding was appallingly inept. Petitioner's state habeas counsel made no apparent effort to investigate and present a host of potentially meritorious and readily available claims for state habeas relief. Furthermore, petitioner's state habeas counsel made virtually no effort to present the state habeas court with any evidence supporting the vast majority of the claims for state habeas relief which said counsel did present to the state habeas court. More specifically, petitioner's state habeas counsel not only inexplicably failed to present * * * allegedly mitigating evidence petitioner complains * * * his trial counsel should have presented during the punishment phase of petitioner's trial but petitioner's state habeas counsel failed to present the state habeas court with any claim for state habeas relief alleging this glaringly obvious failure by petitioner's trial counsel constituted ineffective representation. Petitioner's state habeas counsel did little more than (1) assert a set of boilerplate, frivolous, claims which had repeatedly been rejected by both the state and federal courts and (2) fail to support even these claims with any substantial evidence. Insofar as petitioner contends his state habeas counsel merely "went through the motions" and "mailed in" a frivolous state habeas corpus application which said counsel failed to support with evidence, those complaints have merit. Wholly inept though it may have been * * * the egregiously deficient performance of petitioner's state habeas counsel does not excuse the procedural defaults arising therefrom * * *
>
> In sum, unless and until either the Supreme Court or Congress address the inherent unfairness of a state habeas system which permits elected officials of a party-at-interest (*i.e.*, elected trial judges of the State of Texas) to (1) select wholly incompetent counsel to represent indigent prisoners in the one forum in which those prisoners have the opportunity to challenge the performance of their state-court-appointed trial counsel (*i.e.*, the prisoner's state habeas corpus proceeding) and (2) effectively insulate from federal judicial review the allegedly incompetent performance of the prisoner's state trial counsel through the egregiously inept failure of the same prisoner's state habeas counsel to present claims for state habeas relief addressing obvious ineffective assistance by the prisoner's state trial counsel, Texas prisoners will continue to be put to death without a federal habeas court ever reaching the merits of what are often those prisoner's most substantial federal constitutional claims.

2005 WL 2620193, *2-*3 (W.D.Tex., 2005).

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