

Death By Design: *Part 2*

THE WREN COLLECTIVE

DECEMBER 2023

Introduction

Sixty years ago, in *Gideon v. Wainwright*, the Supreme Court issued a landmark ruling that would ultimately ensure every person facing the possibility of having their liberty stripped away would get an attorney if they could not afford one. Poor defendants in Harris County, Texas, *do* get free lawyers, but too many are denied *effective* ones, especially in death penalty cases where their lives hang in the balance.

On the anniversary of *Gideon*, the Wren Collective investigated the state of court-appointed capital representation in Harris County—the death penalty capital of the world—to see whether poor defendants are receiving effective counsel. We interviewed judges, trial and postconviction attorneys, and mitigation specialists. We reviewed data on caseloads, jail visits, and billing records. We also read postconviction pleadings from the majority of Harris County capital cases that ended in death sentences over the last two decades. We focused primarily on those where individuals are still on death row and on a few who have had their sentences overturned. In total, we report on 28 cases.¹ All of the cases we examined involved men who were sentenced to death row, and an overwhelming majority of them—93%—were men of color. Our research shows a system of representation that is broken.

In every case that resulted in a death sentence, trial lawyers failed to uncover compelling evidence that could have convinced a district attorney to drop a death sentence or a jury to give life in prison rather than death

As we documented in part 1 of *Death by Design*, in every case that resulted in a death sentence, trial lawyers failed to uncover compelling evidence that could have convinced a district attorney to drop a death sentence or a jury to give life in prison rather than death. Attorneys failed to investigate and did not present evidence of their client’s mental illnesses and intellectual disabilities. They missed galling examples of physical and sexual abuse of their clients because they did not talk to family or witnesses. They did not prepare important experts to testify until the day that they were supposed to take the stand.

The first report largely dealt with the failings of the lawyers in capital cases. This report examines why that poor representation has thrived, and the ways that the judges overseeing those cases have enabled it to continue that way.

First, judges seemingly ignore the excessive caseloads that many attorneys have, even though they are in charge of appointing lawyers to cases.

Second, there is an inherent conflict of interest when judges are in control of both the appointments and the purse strings of a case because it means the attorney’s livelihood is dependent on pleasing the judge. If judges value quick resolution of cases over dedicated representation, a lawyer may feel, consciously or not, pressure to hurry the case along and ask for too little time and money, at the expense of the client. We have heard numerous examples of this occurring, especially when it comes to hiring experts and mitigation specialists, who are tasked with investigating a client’s life history for the punishment phase of trial.

Third, the judges in Harris County have never established meaningful training requirements for lawyers, or any requirements at all for the mitigation specialists. Therefore, many people perform their work without the training they need in mental health, trauma, or even interviewing skills.

In the end, we recommend a total overhaul to the system of capital representation for poor defendants, with either the public defender absorbing those cases or the judges establishing a new, freestanding capital public defender that is independent from judicial oversight. Such systems exist across the country and have been enormously effective in providing constitutionally compliant representation to individuals facing the ultimate punishment. Harris County should follow suit.

Part 1: How Capital Defense Operates in Harris County

Both judges and defense attorneys must treat every capital murder charge as if death will be sought, because the District Attorney's office does not make a decision on whether it will seek death right away

Harris County has a hybrid system of representation. While it has a public defender's office that handles many of the cases in the county, court-appointed private lawyers handle the bulk of the most serious cases (where a lawyer has not been retained). Court-appointed private lawyers handle all of the non-retained capital murder cases, which carry a sentence of either life without parole or death. Such a hybrid system is not uncommon across the country.

The District Attorney does not seek the death penalty in every capital murder case, and the county has seen a sharp decline in the number of death penalty sentences sought in the last decade.² But both judges and defense attorneys must treat every capital murder charge as if death will be sought, because the District Attorney's office does not make a decision right away on whether it will seek death. Sometimes, it can take years for them to make that choice. As of this writing, there are 418 pretrial pending capital murder cases.³

Because of the complexity of capital murder cases, judges must appoint two lawyers: one who sits "first chair" and one who sits "second chair." The requirements for a first chair attorney, discussed below, are more stringent, and include experience having introduced mitigation evidence in a death penalty trial. Judges select attorneys from a list of those who meet certain qualifications, which for first chair lawyers includes experience presenting mental health evidence.⁴ Those attorneys must in turn request funds to pay for an investigator, a mitigation specialist to examine the client's life and mental health, and any other necessary experts. Harris County has just 46⁵ individuals qualified to serve as first chair capital attorneys.

Part 2:

The Unique Job of Capital Defenders

Effective representation in a death penalty case requires vastly more time, effort, funding, and training than other cases. Jury selection alone can last a month or longer, as attorneys must probe whether jurors will automatically sentence a person to death if he or she is convicted of murder. The guilt phase of the trial largely mirrors any other murder trial, but if the jury convicts, that is where the similarities end.

As described in part 1 of our report, the trial then moves into the punishment phase, where the jury decides whether to sentence the person to life or death. First, the government presents any aggravating evidence to show that the individual will pose a future danger to society.⁶ Its presentation might include evidence of other offenses that were not at issue in the guilt phase of the trial, such as prior assaults or robberies. The defense, therefore, must essentially investigate and defend against an entirely new set of charges; sometimes, there are multiple criminal allegations.

The defense then presents their own case and tries to explain to the jury how the individual ended up where he or she did, committing a horrible and violent crime. This is where the defense introduces evidence of the accused's life history, including any evidence of physical or sexual abuse, neglect, or trauma. They present any evidence that exists showing mental illness, intellectual disability, and any brain damage. They must put on both witnesses who knew the defendant throughout his or her life, and experts who have interviewed those witnesses and examined the person facing a death sentence.

In this way, capital defense representation is very different from all other criminal defense work. To save their client's life, lawyers must convince people to share their most guarded secrets and to recount their most traumatic experiences. Developing that kind of trust can take months, if not years. Defense attorneys must also engage in a wide-ranging understanding of complex forensic evidence, mental health disorders, intellectual disability, trauma, and abuse.⁷

Capital defense lawyers, no matter how experienced, cannot perform this work alone. They must assemble a well-rounded defense team consisting of an investigator and a mitigation specialist who understands trauma and mental illness and can collect extensive life history records such as school, medical, birth, psychiatric, prison and jail, and often child protective services records. And the team must hire experts who can effectively evaluate the client for mental illness. The job of the capital defense lawyer is enormous, and the stakes are at their highest. There is nothing that compares to it in the justice system.⁸

Part 3:

The Problems with Capital Defense in Harris County

As our first report demonstrated, the culture of capital defense representation in Harris County is broken. In nearly every death sentence that occurred, lawyers largely abdicated their duty to conduct a robust, vigorous investigation into their client's life history. They missed clear signs of mental illness and sometimes intellectual disability. They prepared witnesses *in* the courthouse, immediately before they took the stand. At nearly every turn, they failed to do what was necessary to save their clients' lives. Below, we discuss why that culture has flourished.⁹

I. Lawyers' unmanageable caseloads and the judges who allow it

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lawyers qualified to serve as first chair and over 400 pending capital murder cases

One of the biggest problems we saw is that many capital lawyers in Harris County have unmanageable caseloads, a situation that judges have allowed to continue. Part of the problem is that there are not enough lawyers who are qualified to take on these cases: There are 46 lawyers qualified to serve as first chair and over 400 pending capital murder cases. But whatever the cause, historically, many attorneys on the capital list sometimes have upwards of 300 cases at a time (not all capital cases, of course), when the American Bar Association guidelines suggest that lawyers handling death penalty cases should spend thousands of hours on these cases even before trial.¹⁰ The Regional Public Defender Office, which handles death penalty cases in the rural parts of Texas, limits its attorneys' caseloads to around five.¹¹

Harris County judges have never enforced maximum caseload or workload caps. And although it does not evaluate death penalty cases, the RAND Corporation's recent workload study on indigent defense recommends attorneys handle no more than 7 felony cases that carry a life sentence, 8 murder cases, 21 felony-high cases, or 59 felony-low cases per year.¹²

The Texas Indigent Defense Commission only started tracking attorney caseloads in 2014, and it only tracks what attorneys have been paid, rather than the number of open cases that they have. This means that attorneys likely have far higher caseloads than is reflected in the TIDC payment data, because they will have open cases for which they were not paid that calendar year. The data we examined also does not include cases resolved and paid in neighboring counties, or cases where that attorney was retained by a private client who could pay them.

Even without this data, some of the caseloads are astounding:¹³

- During Christopher Jackson’s trial, the first chair attorney had **313 active** felony cases. The second chair attorney had over **500 active felony cases** during her representation.¹⁴ They failed to put on evidence that Mr. Jackson was raped from the time he was 4 until he was 9 by a teen boy who lived in his house, and that his grandmother beat him into unconsciousness when he lived with her until she gave him up to Child Protective Services.
- During his representation of Obel Cruz-Garcia, first chair counsel was appointed to over **400 felony cases, and at the time of trial, he also had six active death penalty cases**. His attorneys failed to uncover that Mr. Cruz-Garcia grew up in abject poverty with no running water, that he stopped receiving education after he turned ten, and that he had seriously impaired cognitive and psychological functioning.
- One of Jeffrey Prevost’s attorneys was paid for **147 cases, including six capital cases, the year of his trial**. His defense team told the jury he grew up in a loving and happy home, when in reality, he was a victim of sustained sexual and physical abuse.
- In Warren Rivers’s case, second chair counsel was paid for **145 cases** during his resentencing. Counsel struggled to introduce evidence of severe physical abuse by his mother, who would whip him, tie him in a sack, and “smoke” him. They also put on little evidence of his mental illness.
- In Juan Balderas’s case, first chair counsel was paid for **330 cases**. Second chair was paid for **145, including five capital murder cases**. Another attorney appointed on the case at one point **was paid for 358 cases**. Counsel failed to put on evidence of the serious physical and sexual abuse that Mr. Balderas experienced as a child, and of the mental illness he suffered from.
- Billy Mason’s lawyer was paid for **99 cases** the year of his resentencing. His second chair attorney was paid for **444 felony cases**. A third attorney on the case was paid for **106 cases**. His lawyers failed to investigate clear signs of Fetal Alcohol Syndrome Disorder.
- Lucky Ward’s second chair attorney was paid for **242 felony cases** the year of his trial. His first chair attorney was paid for **53 cases, four of them capital**. Mr. Ward’s case involved multiple allegations of different murders that needed to be investigated. He has been diagnosed with bipolar disorder, schizo-affective bipolar disorder, schizophrenia, and paranoid ideation at various points throughout his life, but his lawyers did not put on a single mental health expert at trial.

From 2014 on, only two lawyers in the cases we evaluated had court appointments that fell within the new recommended workload range, as established by a recent workload study,¹⁵ but again, these numbers do not include any cases where paying clients retained them.

The problem with high caseloads persists today. Of the 40 lawyers paid for capital appointments in 2022 in Harris County:

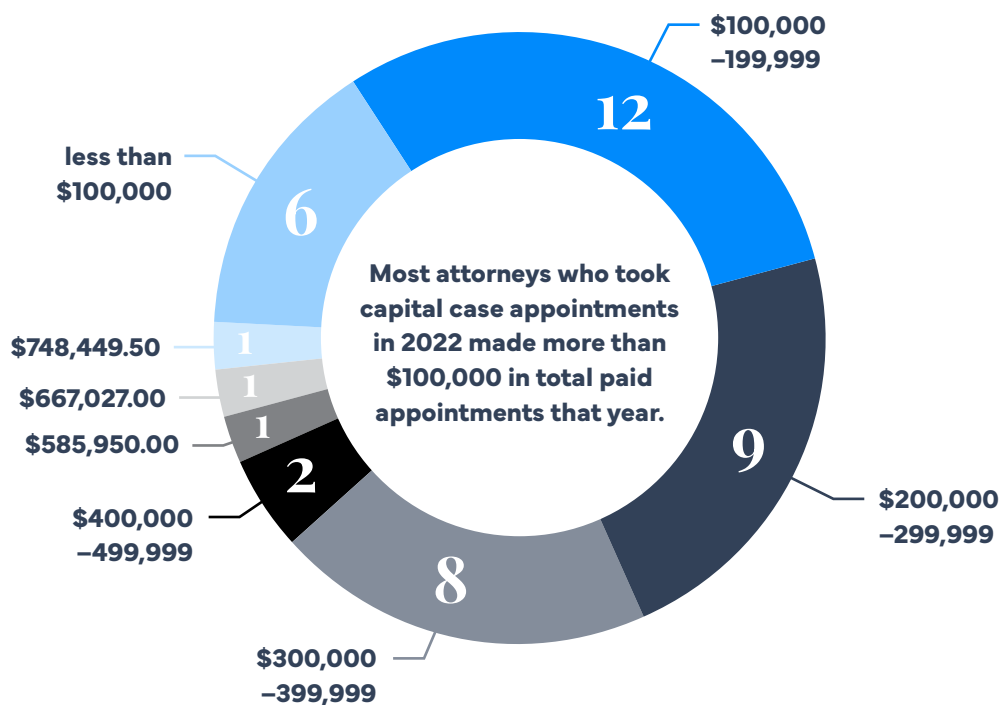
100–199
caseloads
6 lawyers

200–299
caseloads
4 lawyers

300–399
caseloads
1 lawyer

498
caseloads
1 lawyer

Capital cases are quite lucrative in Harris County, as are serious felonies. Those paid for capital appointments in Harris County received the following amounts from all criminal case appointments in 2022:



Again, those attorneys may well have earned more income from privately retained clients.

By comparison, the *head* public defender in Harris County earned \$176,000 in 2020. Public defenders in that office earn an average salary of \$115,000 (plus benefits).¹⁶

This problem of attorneys taking too many cases while making high salaries is not new, but it has also not improved over the years. As death penalty and civil rights attorney Stephen Bright recently stated in an interview with *The Houston Chronicle*: "It doesn't look like anyone is going to do anything about it no matter how bad it is."¹⁷

II. Conflicting interests in judicial control over appointments and resources

Judicial control of both the appointment of capital lawyers in Harris County, *and* the amount of money the lawyers and their defense team receive for their work means that lawyers may not always take the action that is in their client's best interest. Attorneys are supposed to have one duty: to zealously advocate on behalf of their clients.¹⁸ When judges control an attorney's livelihood by controlling their appointment to a case, that commitment is compromised. To please the judges who may not appoint them again if they are too demanding, attorneys may decline to ask for the time they need to adequately prepare a case. They may not ask for the resources they need to represent their client, and they may not be willing to file motions arguing, for example, that the judge has made errors in the case. Our stakeholder interviews suggest all of these things are happening in Harris County.

\$620k

*the average cost of
a capital trial in the
federal system*

The largest problem revealed by our interviews is that judicial oversight chills many lawyers from asking for the resources that they need, as they are faced with judges who themselves are under perceived pressure by the county to minimize the indigent defense budget. Capital cases are expensive, or at least they should be. According to a 2008 study, in the federal system, the average cost of a capital trial is about \$620,932—eight times that of a regular federal, non-death murder trial.¹⁹

Failing to ask for or receive the financial resources needed to defend a person facing the death penalty has deadly consequences. That same study found that defendants with less than \$320,000 spent on their representation had a 44 percent chance of receiving a death sentence.²⁰ Those who had more than \$320,000 spent on their representation had a 19 percent chance of receiving a death sentence.²¹

*Spending less than \$320,000 doubled
the likelihood of a death sentence.*

Unfortunately, numerous mitigation specialists and attorneys reported that trial teams were reluctant to request significant funds from judges, especially for mitigation specialists. Several mitigation specialists—whose job it is to investigate a client's life history and mental health while assisting the attorneys to present that story at trial—reported to us that until recently, attorneys would not request more than \$50–\$75 an hour to compensate them despite the skill required in their work.²² Federal mitigation specialists, by comparison, make between \$125–\$175 an hour.²³ In at least one case we reviewed, however, the judge initially set a \$2,000 presumptive cap on mitigation work.²⁴ Mitigation specialists did report that financial support has dramatically improved in the county over time.

III. Inadequate training for capital defenders

Unfortunately, Harris County does not require that their attorneys receive the necessary and extensive training to perform the difficult work of defending capital cases. In order to qualify as first chair counsel in Harris County, an individual must have:

- at least five years of criminal law experience;
- significant experience in felony cases, including homicide trials;
- trial experience in using mental health or forensic evidence;
- trial experience in investigating and presenting mitigating evidence at the penalty phase of trial;
- no record of providing ineffective assistance of counsel; and
- completion of continuing legal education.

Unfortunately, Harris County's prerequisites for getting onto the capital list do not necessarily correlate with ability to provide a zealous defense in a death penalty trial. There are two ways that a lawyer might gain the requisite experience of presenting evidence at the penalty phase of a capital trial. The first is by having worked as a prosecuting attorney who handled death penalty cases. The challenge, though, is that these lawyers are trained to present evidence in *aggravation* of a sentence. They do not have the specialized training that is necessary to conduct a thorough mitigation investigation and present that evidence persuasively to a jury. When lawyers leave the prosecuting attorney's office and then seek to defend the criminally accused, they come to the defense practice with training that is in direct contradiction to the well-researched methods used by the most effective capital defense lawyers.

The second way that lawyers might gain experience presenting evidence during the penalty phase of trial is by working and training with lawyers who are already on the capital defense list. There is, however, no guarantee that the lawyers doing the training have been adequately trained or have the requisite skills themselves, or that their caseloads allow them to be effective mentors. Lawyers who have firmly fixed poor habits and long histories of failing their clients may be entrusted to train new additions to the capital defense list; they will most likely replicate the same ineffective trial skills and strategies.

Further, Harris County's qualifications to get on the appointment list may actually prevent lawyers from learning from the best attorneys in the county. The best capital defense lawyers make a good faith effort to settle their cases with a plea bargain for life without parole, or even a lesser sentence, by presenting the District Attorney with robust mitigating evidence or evidence of innocence.²⁵ That means that the most effective capital defense lawyers are likely not the ones teaching newer lawyers how to present mitigating and mental health evidence at trial, as they do not go to trial.

Simply requiring continuing legal education does not ensure that attorneys will have the skills necessary to provide quality representation; the content of the continuing legal education is crucial. For instance, at this time, Harris County does not require specific training in mental health or evolving areas of forensic science such as DNA or pattern matching, even though they are an essential part of adequate representation.

Moreover, there aren't enough avenues for continuing legal education in the state. There are two primary training conferences for criminal defense attorneys in Texas, of which only one focuses on capital defense specifically. This training program happens annually and includes only 8 hours of training.²⁶ And while there are many national trainings that delve into these issues, Harris County requires the private bar to pay for their own continuing legal education, disincentivizing lawyers from participating in them.

IV. Not enough trained mitigation specialists

Mitigation specialists play a critical role in capital cases, and the information that they provide often makes the difference between life in prison and a death sentence.²⁷ They investigate a client's psychological and social history, emotional well-being, and mental health. They provide clinical skills and information-gathering abilities that attorneys often do not have, and help flag indicators of serious mental illnesses, intellectual disability, or mental health or neuropsychological issues, which ensures the accused is evaluated for these mitigating conditions prior to trial. They compile extensive historical data through massive record collections, interview family and community members, and help select and facilitate expert testimony. They build a trusting relationship with the client as they explore some of the worst moments of his or her life.²⁸

Every single attorney we interviewed in Harris County told us that there were simply not enough well-trained mitigation specialists for hire, especially those trained in mental health. There are four primary reasons for this lack of mitigation specialists.

First, many qualified mitigation specialists do not want to work in Harris County, and if they do, they will only work for certain lawyers. Mitigation specialists we interviewed reported being historically underfunded in Harris County, causing them to seek work elsewhere. They reported that many attorneys refused to advocate for sufficient funds for them to competently do their work or to keep a manageable caseload.

Second, many also reported feeling undervalued by the attorneys there, who would not listen when they flagged a client's mental illness or stated that the team might need a different expert. In Pete Russell's case, for example, the mitigation specialist told the attorneys that Mr. Russell had serious mental health problems, but they simply ignored her.²⁹ The same thing happened in

“We’ve learned that having counsel [on a case] that doesn’t know mitigation is like working three cases.”

Christopher Jackson’s case, where the mitigation specialist told the attorneys he likely suffered from a serious mental illness, which they then did not explore.³⁰ Having lawyers who did not understand mitigation also left some feeling overworked. As one mitigation specialist stated: “We’ve learned that having counsel [on a case] that doesn’t know mitigation is like working three cases.”

Third, we heard reports that many attorneys sought out mitigation specialists too late in the case for them to be effective. These allegations are supported by what we reviewed in postconviction pleadings, where many mitigation specialists were brought on long after the attorneys had been appointed and were sometimes only empowered to work just before trial began. Lawyers hired a mitigation specialist in Pete Russell’s case six weeks before jury selection began. They had the mitigation specialist in Damon Matthew’s case start working four weeks before jury selection began. This delayed hiring may be correlated to attorneys waiting to see if the state is actually going to seek the death penalty before requesting mitigation funding. But by waiting, the mitigation investigation will inevitably come up short, crammed into the run-up to trial at a point where the team has lost serious time building trust with the client and his or her family.

Fourth, Harris County does not require any minimum qualifications for mitigation specialists, including training on identifying a client’s mental health issues, effectiveness in collecting records, or conducting difficult interviews. And unlike with attorneys, there is no required licensure or continuing education requirement. As a result, several mitigation specialists who end up taking cases in Harris County, however well-intentioned, are inexperienced and unqualified. And because some of them lack training in the depth of work required for a competent mitigation investigation, many take on too many cases to do competent work.

As one experienced mitigation specialist stated, “mitigators who have 15 or 20 cases at a time don’t have a frame of reference for what a compliant-based mitigation investigation looks like. It all functions like an echo chamber: bad lawyers who don’t understand mitigation end up working with the mitigation specialists who are well-intentioned but don’t know what they’re doing.”

Part 4: **Build an Institutional Capital Defender Office**

It is clear that Harris County’s current system of death penalty representation is not working. Lawyers receive inadequate training, have caseloads that are too high, and are accountable not just to their clients, but also to judges with an incentive to keep costs low and move their case calendars along. Judges,

tasked with overseeing the quality of appointments, have abdicated that duty for years. Our findings are not new; they have been documented over the years, and yet the system has failed to meaningfully improve.³¹

We want to be clear that our findings are also not an indictment of the judges who oversee the system. The reality is that judges are ill-equipped to oversee the capital defense system. Aside from the inherent conflict of interest that alone provides reason enough to create a defense system that is not administered by judges, judges have too many competing requirements to effectively oversee a system of capital representation. They have their own calendars to run and trials to oversee, and therefore lack the time to monitor things such as jail visits or even caseloads on a regular basis. The current system is simply unworkable.

Nor is this report intended as an indictment of all of the lawyers who handle these cases. Many of them truly care about their clients and the work. But handling death penalty cases is the most time-consuming and challenging work imaginable. These attorneys have never been given the resources needed to successfully do this work.

The problem is structural, and so the structure must change.

The problem is structural, and so the structure must change. We recommend Harris County do away with the current judicially administered appointment system. Instead, the county should invest in an institutional capital defender office that operates independently from judicial influence, either within or outside of the public defender. Minor tweaks will not fix the problem. The judges cannot control the appointments and cases, and Harris County must build a culture where lawyers, mitigation specialists, and experts are well-resourced and supported.³²

There are good reasons to believe that an institutional capital defender office will best serve those facing the death penalty. Several studies comparing indigent defense delivery services show that institutional defenders consistently outperform private defense attorneys and appointed counsel.³³ A 2012 study in Philadelphia, for example, found that representation by a public defender as opposed to appointed counsel reduced a person's likelihood of receiving a life sentence in a murder case by 62 percent, and reduced the length of a prison sentence by 24 percent.³⁴ An evaluation of Texas' Regional Public Defender for Capital Cases (RPDO), which handles death penalty cases across rural Texas, showed that RPDO consistently achieves better outcomes than privately assigned counsel while also saving the county's money.³⁵

Independent public defender offices offer a number of advantages over the court appointment system. First, they house mitigation specialists and investigators who are specifically trained to work on capital cases. Lawyers do not need to go to judges every time they need someone to work on a case. The mitigation specialist and investigator are both employed by the office and receive a salary there. The head of the office can better oversee the work of the lawyers; he or she can make sure the investigation happens right away,

that lawyers are paying regular visits to the client and his or her family, and that they are doing the hard work of hiring experts, filing motions, reviewing discovery, and preparing for the case. The head of the office can also build an internal training program focused on lawyers developing the necessary skills needed to represent clients in life-or-death cases.

Virginia provides a case study for how effective it can be to move to a centralized capital defender office. In 2004, the state created regional capital defense resource centers to handle capital cases, in part to save money, but in part because the threat of litigation over systemic ineffective representation created by fee limitations loomed large. Following the opening of the offices, prosecutors started to lose at trial, with half of the death penalty trials ending in a life sentence. As Duke Law Professor Brandon Garrett documented, attorneys started presenting more and more mitigating evidence, and jurors found it persuasive. In turn, prosecutors' use of the death penalty dwindled dramatically, paving the way for the state's eventual abolition of it in 2021.³⁶

An institutional capital defender office can also help improve the overall quality of defense in Harris County, providing regular trainings for court-appointed attorneys and mitigation specialists who will inevitably need to exist to take cases where the office has a conflict—for example, where there are two co-defendants and so the office can only represent one. Quality public defender offices regularly open their trainings and expertise up to the private bar, as they are committed to elevating the representation for every poor person accused of a crime, not just those who they represent.

Conclusion

We recognize that our recommendation, if adopted, will mean a massive change in Harris County. It may be unpopular with many of the lawyers there. But lawyers who want to keep doing capital work can apply to the institutional capital defender, and if they show enough skill and commitment, may be hired there. Others will still receive conflict cases.

We also realize that there are an enormous number of capital cases in Harris County, and that while many of them will not end in a death penalty trial, it is virtually impossible to predict which ones will and which ones will not. The outcome of that decision often hinges on the capital lawyer's ability to make a compelling case for life in plea negotiations. It will take some time to staff and train an office that can handle such a large number of cases. But just because something is difficult does not mean that it cannot be done.

The alternative route—to continue as is or make some small tweaks to the system—is not only untenable, but also a betrayal of the promise of *Gideon*. The county cannot keep sending people to death row simply because their lawyer has not done the hard work of defending them. Without making a radical change to the system of representation, that is exactly what will occur.

Endnotes

¹ We relied largely on postconviction proceedings because, unlike in direct appeals, this is where counsel can conduct additional investigation and introduce previously undiscovered evidence. Because at the time of our review, postconviction pleadings had not been filed in two of the most recent death sentences in Harris County (Dennis Haskell and Robert Solis), we did not include them. We also did not include a few cases where postconviction litigation provided no meaningful insight into what occurred at trial, or where cases were so old that postconviction pleadings were difficult to find. In one case, for example, litigation halted because the accused died. In another, an individual's death sentence was overturned because he was 17 at the time of the case. In another, the postconviction judge stayed an execution date because he had "troubling concerns" about postconviction counsel. Other cases similarly lacked any detail about what happened at trial or about subsequent investigations. It is certainly possible that trial counsel performed incredibly thorough mitigation investigations in those cases, but we have no evidence to support or dispute that belief. We believe our findings are sufficiently consistent enough to support our conclusions.

² Brian Rogers, *Harris County Stands Out for Death Penalty Cases, Study Finds*, Hous. CHRON. (Aug. 26, 2016), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-stands-out-for-death-penalty-cases-9187154.php#:~:text=Harris%20County%20has%20sent%20more,2003%20to%2010%20since%202010>.

³ TEX. CTS., OFF. OF CT. ADMIN., DISTRICT COURT REPORT: ACTIVITY DETAIL FROM MAY 1, 2023 TO MAY 31, 2023, https://card.txcourts.gov/oca_ReportViewer.aspx?ReportName=District_Court_Data_Reports/DC_Activity_Detail_N.rpt&ddlFromMonth=5&ddlFromYear=2023&txtFromMonthField=@FromMonth&txtFromYearField=@FromYear&ddlToMonth=5&ddlToYear=2023&txtToMonthField=@ToMonth&txtToYearField=@ToYear&ddlCountyPostBack=101&txtCountyPostBackField=@CountyID&ddlCourtAfterPostBack=0&txtCourtAfterPostBackField=@CourtID&chkAggregateMonthlyReport=0&export=1706.

⁴ To qualify as a first chair counsel in Harris County, an individual must have at least five years of criminal law experience, have tried a significant number of felony cases to verdict, and have experience in using and challenging mental health or forensic expert witnesses. The first chair attorney must also have experience in investigating and presenting mitigating evidence at the penalty phase of a death penalty trial—a qualification that is increasingly difficult to meet given the dwindling number of death penalty cases across the state. Each attorney must also participate in continuing legal representation.

The qualifications for second chair appointments are similar, except that the individual need not have presented mitigating evidence at the penalty phase of a death penalty trial.

See Second Amended Standards for the Qualification of Attorneys for Appointment to Death Penalty Cases in the Eighth Administrative Judicial Region of Texas Pursuant to Article 26.052 of the Texas Code of Criminal Procedure, Loc. SELECTION COMM. OF THE EIGHTH ADMIN. JUD. REGION 2023, <https://www.txcourts.gov/media/1437292/standards-for-attorney-appointment-to-death-penalty-cases-8th-ajr.pdf>.

⁵ DIST. CTS. OF HARRIS CNTY., ELEVENTH ADMINISTRATIVE JUDICIAL REGION CAPITAL ATTORNEY

List (2023), <https://www.justex.net/dca/JustexDocuments/76/Capital%20Attorney%20List%204.19.23.pdf>.

⁶ See generally Drew M. Padley, *Death by Lethal Instruction*, 57 Hous. L. Rev. 1101 (2020).

⁷ See Meredith M. Rountree & Robert C. Owen, *Overlooked Guidelines: Using the Guidelines to Address the Defense Need for Time and Money*, 41 HOFSTRA L. REV. 623 (2013).

⁸ See generally American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003) [hereinafter *ABA Death Penalty Defense Counsel Guidelines*].

⁹ We did not evaluate the one case in the last twenty years we are aware of where a jury returned a life sentence, or, more commonly, the cases where the district attorney elected to drop the death penalty. In many of those cases, lawyers undoubtedly did quality work for their clients. But there is a consistent and troubling pattern we found across death sentences in Harris County, and our stakeholder interviews indicated, that many of the problematic practices that we discuss permeate all capital representation. We also did not include a few cases where the postconviction pleadings did not allow us to draw any conclusions about the trial representation in either direction. Those cases included Anthony Francois, Dexter Johnson, and Antonio Williams's. Postconviction pleadings had not been filed in Robert Solis or Dennis Haskell's case at the time of our review, and so they are also not included here.

¹⁰ See *Sufficient Time to Ensure Quality Representation - ABA Principle 4*, SIXTH AMEND. CTR., <https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/sufficient-time-to-ensure-quality-representation-aba-principle-4/#easy-footnote-bottom-1-6480> (last visited Sept. 28, 2023).

¹¹ DOTTIE CARMICHAEL & HEATHER CASPERS, *Judgment and Justice: An Evaluation of the Texas Regional Defender for Capital Cases* (June 2013), https://ppri.tamu.edu/wp-content/uploads/2021/10/Capital_Defender_Report.pdf.

¹² Nicholas M. Pace, Malia N. Brink, Cynthia G. Lee & Stephen F. Hanlon, *National Public Defense Workload Study*, RAND CORP. (2023), https://www.rand.org/pubs/research_reports/RRA2559-1.html.

¹³ See *Death By Design: Part 1*.

¹⁴ First Am. Pet. for a Writ of Hab. Corpus at 13, 41, Jackson v. Davis, 4:15-cv-00208 (S.D. Tex. May 12, 2017) [hereinafter *Jackson Fed. Habeas Pet.*].

¹⁵ *Statewide Attorney Caseload Report*, TEX. INDIGENT DEF. COMM'N, <http://tidc.tamu.edu/Public.Net/Reports/AttorneyCaseLoad.aspx> (noting attorney caseloads in 2022 for Harris County, Texas).

¹⁶ See Neena Satija, *Houston Leaders Demand Reform over Attorneys' Giant Salaries, Caseloads: "Whole Damn Thing's Broken,"* Hous. CHRON. (Mar. 11, 2023), <https://www.houstonchronicle.com/news/investigations/article/houston-defense-lawyers-salaries-caseloads-reforms-17824432.php>.

¹⁷ Neena Satija, *Despite Years of Client Complaints, Houston Lawyer Made \$586,000 in 2022 on Indigent Defense*, Hous. CHRON. (Aug. 3, 2023), <https://www.houstonchronicle.com/news/investigations/article/godinich-houston-lawyer-indigent-cases-18189694.php>.

¹⁸ See *ABA Death Penalty Defense Counsel Guidelines*, *supra* note 7, at 939 (Guideline 2.1) (noting that a jurisdiction's legal representation plan "should be structured to ensure that counsel defending death penalty cases are able to do so free from political influence and under conditions that enable them to provide zealous advocacy in accordance with professional standards."). See also AM. BAR ASS'N, *ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES* 13 (3d ed. 1992), https://www.americanbar.org/groups/criminal_justice/publications/

[criminal_justice_section_archive/crimjust_standards_defsvcs_blk/#5.3](#) (Standard 5-1.3).

¹⁹ See JON B. GOULD & LISA GREENMAN, OFF. OF DEF. SERVS. OF THE ADMIN. OFF. OF THE U.S. CTS., UPDATE ON COST, QUALITY, AND AVAILABILITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES (2008). The Wren Collective requested data on the total amount spent on the defense in Harris County for each trial. We only received data from 2013 on, however, and cannot be certain that the amount reported is the total amount spent, as there may have been vouchers paid prior to that period. Spending in Harris County, however, seems to vary wildly. According to records provided, the County spent just \$259,345.94 on Jeffrey Prevost's case, and that may include money spent on post-conviction. Records show the County spent just \$194,069 on Obel-Cruz's case. Conversely, the County spent over \$800,000 on Lucky Ward's case and nearly a million dollars on Ali Irsan's case.

²⁰ *Id.*

²¹ *Id.*

²² See generally Sean O'Brien, *When Life Depends On It: Supplementary Guidelines For the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008). Until around 2013, defense attorneys received a flat-fee for their representation in capital cases.

²³ See Memorandum from the Jud. Conf. of the U.S., Comm. on Defender Servs., Revised Experience-Based Hourly Rate Ranges For Experts And Service Providers In CJA Mega Cases (Dec. 10, 2019) (on file with the Wren Collective).

²⁴ Pet. for a Writ of Hab. Corpus at 20, *Mabry Landor III v. Davis*, 4:16-cv-03384 (S.D. Tex. Oct. 31, 2017).

²⁵ See *ABA Death Penalty Defense Counsel Guidelines*, *supra* note 7, at 1035–43 (Guideline 10.9.1 cmt.).

²⁶ See TEX. CRIM. DEF. LAWS. ASS'N, CAPITAL DEFENSE AND MENTAL HEALTH (2002), https://www.tcdla.com/TCDLA/cleandevents/docs/P102722_Reg%20Mental_Capital.pdf.

²⁷ See *ABA Death Penalty Defense Counsel Guidelines*, *supra* note 7, at 952 (Guideline 4.1).

²⁸ See *id.* at 959–60 (Guideline 4.1 cmt.).

²⁹ App. for Writ of Habeas Corpus at 8, 20, 38, Ex Parte Russell, No. 898795-A at 25 (D. Ct. 262d Harris Cnty., Tex. Oct. 7, 2004) [hereinafter Russell State Habeas App.].

³⁰ First Am. Pet. for a Writ of Hab. Corpus at 9–10, *Jackson v. Davis*, No. 4:15-cv-00208 (S.D. Tex. May 12, 2017).

³¹ SCOTT PHILLIPS, AM. CONST. SOC'Y, HIRE A LAWYER, ESCAPE THE DEATH PENALTY? 9 (2010), https://www.acslaw.org/wp-content/uploads/2018/04/Phillips_Hire_Lawyer_Death_Penalty.pdf.

³² We are not the first to recommend an institutional capital defender office. Thirteen years ago, a study on indigent capital defense in Harris County made the same recommendation. Despite its findings, for example, that 38 of the 41 executed defendants up until 2010 had appointed counsel, nothing was changed. See PHILLIPS, *supra* note 30, at 9.

³³ MAGGIE BAILEY, UNC SCH. OF GOV'T CRIM. JUST. INNOVATION LAB, EMPIRICAL RESEARCH ON THE EFFECTIVENESS OF INDIGENT DEFENSE DELIVERY SYSTEMS (2021), <https://cjl.sog.unc.edu/wp-content/uploads/sites/19452/2021/02/Research-on-Indigent-Defense-2.19.20.pdf>.

³⁴ *Id.* at 1 n.2, 2 (citing James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 166–67, 197 (2012)).

³⁵ CARMICHAEL & CASPERS, *supra* note 10 (finding that RPDO was in conformance with Texas' Capital Defense Guidelines, was independent from judicial influence,

provided more prompt and more frequent capital team appointment, provided better non-attorney defense team services, invested significantly more in mitigation work, had significantly less cases ending in a death sentence, and resulted in lower average cost per case).

³⁶ Brandon L. Garrett, *How Virginia Ended the Death Penalty*, WASH. POST (Mar. 24, 2021), <https://www.washingtonpost.com/crime-law/2021/03/24/va-ends-death/>.



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