After All, We Are Professionals

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President's Message

It was a cool sunny morning as I rode the train from London's Gatwick Airport to Victoria Station. I caught a roomy cab from Victoria Station to Bow Street and heard about the local politics and news of the day from my driver – missing children, the need for tougher laws, the audacity of burglars suing homeowners. The same fare as here, in Anytown, USA.

A Solicitor, Peter Cadman, and Barrister with Queen's Counsel credentials, Jim Sturman, were waiting in the conference room of their chambers. We reviewed the bench briefs and prepared for court as the apprentice lawyers observed and assisted. In the Court of the Bow Street Magistrate, the client sat by himself in the center of the courtroom. The clerk spoke, repeating our words into a reverse megaphone attached to a recorder. In a centuries old tradition, the Barristers addressed his Lordship the Judge and the Solicitor and I advised the Barrister. This was a hotly contested extradition hearing. Texas sought to bring Dr. Kleason back from England for a retrial two decades after his death penalty case had been reversed on appeal for a bad search. The State had apparently dismissed his case with prejudice on remand, but Texas wanted another crack at trying Dr. Kleason for killing two Mormon Church missionaries in Austin in the 1970's. We were locked in a struggle over a man's life, but the tenor of the hearing and attitude of the participants was formal and cordial. The Barristers, who frequently change sides in criminal litigation, conceded points of law and kept the other side informed, in advance, of any arguments or evidence they intended to present. Failure to do so resulted in exclusion of the evidence or waiver of the argument. After the proceeding, like the sheep dog and wolf in Warner Brothers' cartoons, the lawyers and law enforcement agents met for coffee at the sidewalk café. We made dinner and theater plans and yet remained steadfast in our opposition to each other's positions.

It is the same here. Before court, I meet my colleagues to review our pleadings and prepare for court. We divide duties depending on the case. One of us typically takes the lead with the client, another with the witnesses, one with the exhibits and another with the pleadings and developing law. We too have apprentices of a sort, our law clerks, still in school, nevertheless attend hearings and help us prepare pleadings, evidence and witnesses. Most prosecutors we oppose are ethical and honorable, disclosing all discovery in advance of trial, negotiating in good faith and trying the case without hyperbole, letting the jury have room to exercise its discretion. We disagree about the appropriate outcome but share collegiality as members of the legal community.

Judges before whom we appear belong to the same community. Thus, they treat us as officers of the court and respect our efforts even if they do not decide in our favor. We all hail from a great profession. One which serves our government, the people, humanity, and history. We counsel the enforcement of constitutional and civil rights even during war and unrest. We struggle to improve the quality of justice on these and foreign shores. And, the

members of our profession work to correct wrong but popular sentiments. It is in this role as iconoclasts that we act in the highest tradition of our profession.

Therefore, as the one hundred and eleven exonerated persons were released from death row,[1] our brothers and sisters established innocence networks.[2] We championed the innocence protection act in the Texas legislature[3] and have promoted a similar federal act. The American Bar Association, reflecting concern that justice lacked integrity in death penalty cases, issued revised guidelines for counsel, urging state bar associations and courts to adopt them. And, the United States Supreme Court recognized the urgent need to improve the standard for death penalty defense counsel[4] by establishing an objective measure for their performance in *Wiggins v. Smith*, 123 S.Ct. 2527 (2003) rather than the subjective test regarding each lawyer's strategy decisions announced in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In *Wiggins*, the Court applied the ABA Guidelines as a benchmark for competent death penalty counsel.

However, the quality of justice will not improve by the mere imposition of standards on the lawyers who do this high stakes work. Not until states pay defense lawyers and provide expense money on a parity with the funds they expend to investigate and try death penalty cases will the most serious flaws in the system be repaired. Not until appellate judges and the executive branch seriously review the fairness, accuracy and appropriateness[5] of each death penalty case can the United States approach the caution and deliberation demanded when making the decision to take a human life. The reality in Texas is that at least one judge on our highest court has vowed never to reverse a death penalty case, thus abdicating the judicial role. Further, clemency review conducted by the executive branch has been cursory and slip shod. Alan Berlow with the *Atlantic Monthly* obtained the clemency memoranda prepared for then Governor Bush by his counsel, Alberto Gonzales. He discovered that "A close examination of the Gonzales memoranda suggests that Governor Bush frequently approved executions based on only the most cursory briefings on the issues in dispute.... In fact, in these documents Gonzales repeatedly failed to apprise the governor of crucial issues in the cases at hand: ineffective counsel, conflict of interest, mitigating evidence, even actual evidence of innocence." In one of the cases examined by Berlow, that of William Gardner, "Gonzales did not inform Bush that two witnesses to the shooting had testified that the killer had reddish-blond hair, while Gardner's hair was black. Gonzales also failed to inform Bush that Gardner's lawyer had failed to interview a key witness and had met with the defendant only once — for 15 minutes — before jury selection began."[6]

Those fifteen minutes may illustrate the old adage that "you get what you pay for." Currently lawyers who expend the necessary time and resources to adequately defend death penalty cases often lose the remainder of their practices.[7] Others suffer greater harm because the work consumes their spirits as they fight two fronts, trying the case and struggling with the trial court concerning adequate funding. If Texas insists that killing in the name of the law is appropriate, then it ought to create a process of sufficient quality to assure that we are not convicting and ultimately executing the innocent. If the State wants a death penalty, it must pay for it. It is shameful that the community of defense lawyers must not only defend against a penalty with which they disagree but they must also pay out of their pockets and with their beings to eke out some modicum of fairness and proportionality in the imposition of death. It is an additional sign that the system is broken when the criminal defense community must raise money to help a defense lawyer pay back, under threat of contempt, the fees a court had already paid him for clemency work.[8] Criminal defense counsel should not have to finance a broken system in an attempt to make it fair, but they do. Men and women with compassionate hearts, a burning passion for justice and shoulders two ax handles wide insist, with their pocketbooks and their labor, upon fairness and mercy.[9]

Goldstein, Goldstein and Hilley. Left to right: William L. Anderson, Terry Kimball, Van G. Hilley, Diane Doege, Patrick T. Peranteau, Cynthia Eva Hujar Orr, Diego Bernal, Gerald H. Goldstein. Seated left to right: Beverly Elliott, Matthew O. Goldstein, Loretta Sorensen.

My firm, Goldstein, Goldstein and Hilley introduced me to this tradition – not just practicing, but also improving the law. I was a new lawyer, reading the opinion affirming my client's death sentence as it arrived page by agonizing page off of the fax machine onto the floor. It was late, the day before Thanksgiving and not a lawyer left the office. Each was reading the same opinion. The twenty-ninth floor of the Tower Life Building was silent, as I attempted to glare through watery eyes to make out the words on the pages. Though I read, I could not comprehend. Gerry read the opinion too, through wiser eyes. He knew that I feared I was not up to the task at hand. We spoke about lawyers who could do death penalty work and those who could not. With the luxury of knowing that my law firm and my assistant, Loretta, were behind me, it was up to me to decide. After years and tens of thousands of dollars of expense to the firm, that client is off of death row. The system which had allowed the conviction of a kid from the wrong side of the tracks based upon falsified evidence had been utilized to

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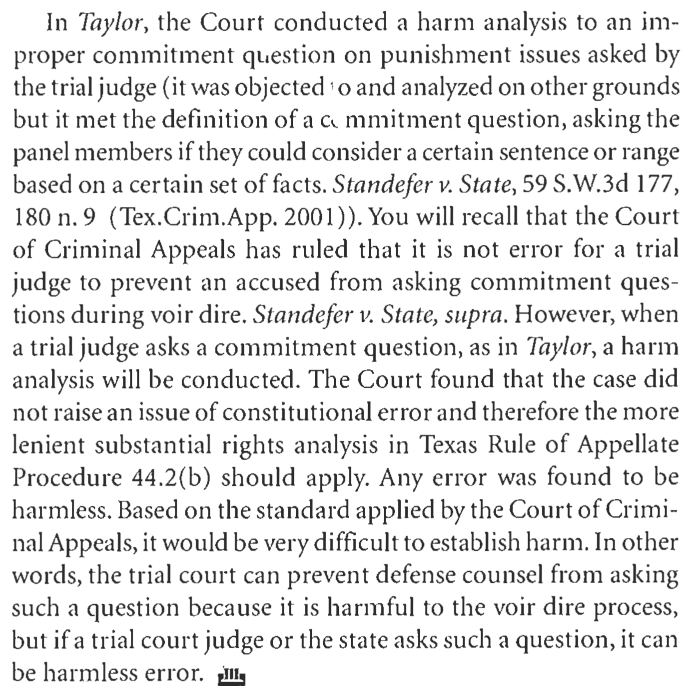
In *Taylor*, the Court conducted a harm analysis to an improper commitment question on punishment issues asked by the trial judge (it was objected to and analyzed on other grounds but it met the definition of a commitment question, asking the panel members if they could consider a certain sentence or range based on a certain set of facts. *Standefer v. State*, 59 S.W.3d 177, 180 n. 9 (Tex.Crim.App. 2001)). You will recall that the Court of Criminal Appeals has ruled that it is not error for a trial judge to prevent an accused from asking commitment questions during voir dire. *Standefer v. State, supra*. However, when a trial judge asks a commitment question, as in *Taylor*, a harm analysis will be conducted. The Court found that the case did not raise an issue of constitutional error and therefore the more lenient substantial rights analysis in Texas Rule of Appellate Procedure 44.2(b) should apply. Any error was found to be harmless. Based on the standard applied by the Court of Criminal Appeals, it would be very difficult to establish harm. In other words, the trial court can prevent defense counsel from asking such a question because it is harmful to the voir dire process, but if a trial court judge or the state asks such a question, it can be harmless error.



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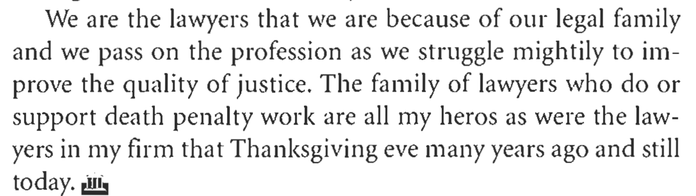

correct that injustice. However, my firm first expended substantial resources to ensure that it did so. The result obtained is a badge of honor, one which my firm shares.

We are the lawyers that we are because of our legal family and we pass on the profession as we struggle mightily to improve the quality of justice. The family of lawyers who do or support death penalty work are all my heros as were the lawyers in my firm that Thanksgiving eve many years ago and still today.

1 Innocence: Freed From Death Row, http://www.deathpenaltyinfo.org/article.php?scid=6&did=110.

2 TCDLA established a volunteer based innocence network in 2000.

3 Codified at Article 64.01 of the Texas Code of Criminal Procedure.

4 In fact, the high Court appears concerned with the quality of the entire process. Justice O'Connor wrote the opinion in *Atkins v. Virginia*, 00-8542 (June 20, 2003) which held that the execution of the mentally retarded constitutes cruel and unusual punishment. O'Connor also noted in a public speech that statistics indicate the system may be allowing the execution of innocent persons. In addition, in 2003 the Court is slated to decide whether the death penalty may constitutionally be imposed on the mentally ill.

5 Out of eighteen federal death penalty trials authorized by Attorney General John Ashcroft, only one trial resulted in a verdict of death. Thus, instead of building a national death penalty, Ashcroft is unwittingly building a record that contemporary community sentiment is in opposition to death as an appropriate punishment.

6 Peter Carlson, "Justice Executed, Texas-Style," *Washington Post*, July 29, 2003. Gonzales' lawyer defended his memorandum and the Governor's dedication of one half hour to review them and make a decision by explaining that impending executions were also discussed at informal bull sessions. In response to this explanation Peter Carlson concludes: "After reading Berlow's article, and Wassdorf's letter, it's hard not to conclude that both Gonzales and Bush were rather callous, even cavalier, about the most profound decision any government official can make — the decision to kill another human being."

7 Most recently, Carlos Garcia is rebuilding his practice after trying and winning a life sentence in the Yogurt Shop murders. His co-counsel was Dexter Gilford.

8 Under the leadership of Mike Charlton, the members of TCDLA raised money to pay back the fees a court paid to Philip Wischkaemper for clemency work. The court insisted upon return of the fees or threatened to hold Philip in contempt of court.

9 "The quality of mercy is not strained. It droppeth as the gentle rain from heaven Upon the place beneath. It is twice blest: It blesseth him that gives, and him that takes. 'Tis mightiest in the mightiest. It becomes The thronèd monarch better than his crown."
Shakespeare, The Merchant of Venice, Act 4, sc.1, l. 181-86 (1600).