Thank You Sir, May I Have Another

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President's Message

Sara is a sought-after criminal defense lawyer these days. She's an experienced litigator, is dedicated and is no stranger to death penalty cases; some of the toughest around.Yet Sara will likely be found ineffective for a failing all of us have: the inability to predict the future. It is a truth that death penalty lawyers must accept just as they must accept that, in Texas, their clients will most likely die.

But don't stop reading this article because you are not a death penalty litigator. It contains a few golden nuggets for everyone interested in the quality of justice and mercy in the state.

It appears the long-stalled innocence protection act will soon come to fruition. The Act recently gained Republican support from House Judiciary Chairman James Sensenbrenner and Senate Judiciary Chairman Orrin Hatch. It is cloaked with the new title: "the DNA Testing Act"[1] and provides funding for the backlog of untested rape kits, money for states for DNA testing and grants to improve legal representation for indigent defendants in capital cases; all in all a one billion-dollar proposal over the next five years. While the administration seeks the same expenditure for its anti-drug media campaign,[2] one which its own study determined was ineffective and which was ridiculed by the public.

Folks are rightly concerned with protecting innocent people and holding the guilty accountable. Even U.S. Supreme Court justices are concerned that death penalty litigation is so flawed that it is likely innocent people have been executed. But Texas is falling behind.[3]

On the one hand, the Court of Criminal Appeals provided $1.2 million to train indigent defense counsel by funding TCDLA's grant and providing approximately $200,000 to the Center for American and International Law, a top-notch training facility for lawyers and law enforcement. The Legislature, even in these tough budgetary times, slightly increased funding for indigent defense counsel and ensured that the state would pay counties for capital murder habeas corpus work. The Legislature also provided that DNA evidence used by the state would not be admissible in court unless it was provided by a DPS accredited lab. But the problems in Texas are much larger than the money that the Legislature has dedicated to them.

The National Legal Aid and Defenders Association determined that Texas would require approximately $120 million to fund indigent defense. The Legislature, so far, has allotted some $19 million to the project. The names engraved on Texas' Wall of Shame, innocent persons who served time for crimes they did not commit, hailed from Houston, Mexico, Austin, Tyler, Cuba, Garland, Waxahachie; at least one of the cases was as a result of lab work out of San Antonio. Their lawyers put in money out of their own pockets and obtained support from members of the community to secure their exonerations. Their hard won freedom is not a testament to a system that works. The manner in which their freedom was obtained is an indictment of the system.

And the one failsafe, intended to correct injustices the system failed to correct, is inoperable. Instead of making an independent examination of cases, our Board of Pardons and Paroles has consistently relied upon the fact that the cases have been reviewed through the

courts as a reason to deny clemency or pardon. Further, there is no assurance that defendants will have counsel to represent them in clemency work as neither the federal or state courts will pay for it. More importantly, many wrongful convictions are secured through perjurious testimony, coerced confessions, mistaken eyewitness identification, suspect jailhouse informant testimony, prosecutorial misconduct and other compromised forensic science. Worse yet, Texas's Innocence Protection Provision has been interpreted in a manner that limits access to post-conviction DNA testing to only those who can actually prove their innocence before they even obtain the testing. An absurd result that the Legislature has attempted to remedy this last session, providing that: a convicted person can obtain DNA testing if he establishes by a preponderance that he could not have been convicted if exculpatory results had been obtained.

But additional reforms are needed. Even though new legislation provides that labs be accredited or must maintain evidence until convictions are final and all reviews exhausted, we must take further steps to assure ourselves that we are correcting wrongful convictions. We must be steadfast in pursuing these reforms where the punishment, once meted out, can never be remedied. All interrogation sessions should be recorded, non-suggestive identification procedures [double-blind] should be employed, the Texas accomplice witness rule should be extended to jailhouse informant testimony and crime labs and their personnel should be independently audited. One of the most simple and effective reform measures would be to create a new rule of evidence providing that evidence of innocence is always relevant.

The Court of Criminal Appeals will admit evidence that another perpetrator committed an offense only if one has been able to identify the perpetrator. But, the Court has been unwilling to do so when the evidence points to persons not matching the defendant's description.[4]

The United States Supreme Court has apparently gotten the message and strengthened its resolve to improve criminal litigation in the death penalty arena. The performance standards to which it holds counsel are rising. It defines prevailing professional norms by specific references to the American Bar Association's capital defense work standards. No longer will "attorney strategy decision" act as a talisman to excuse the failure to investigate and prepare. *See Wiggins v. Smith*, 123 S.Ct. 2527 (2003). The U.S. Supreme Court recently granted certiorari in two death penalty cases, one in Texas. In *Smith v. Dretke*, No. 02-11309 (Sept. 30, 2003), the Supreme Court will re-examine what evidence and jury instructions concerning mental retardation should have been presented to a jury in the Texas death penalty trial.[5] The current administration's bloodlust is out of step with the public who has no stomach for it. One hundred and thirty-six people have been exonerated from death row. The federal government has sought the death penalty 75 percent of the time against minority defendants. Eighty-five percent of inmates on federal death row are minorities.[6] And although Ashcroft has authorized the death penalty in 21 federal trials, juries have rejected the death penalty for 20 of these.[7]

Death is irrevocable. Thus, we have the highest duty when we take on this grueling litigation. The decision should not be entered into lightly. Counsel should not accept or continue employment unless they are competent[8] and unless they are fairly decent at predicting the future. Judges may dismiss your efforts to raise developing areas in the law or to press those issues that appear to be foregone. But, if you are like Sara, you will hold your head up high, stick your chin out and say, "I could have done more." I cannot think of words praiseworthy enough for my brothers and sisters that labor in the killing fields.

ENDNOTES

1. H.R. 1046. Also known as the "Debbie Smith Act of 2003."
2. *See* H.R. 2086, Office of National Drug Control Policy Reauthorization Act.
3. Texas Fair Defense Act Implementation Report No. 2. (Texas Death Penalty Practices: Quality of Regional Standards & County Plans Governing Indigent Defense in Capital Cases, October 2003) [only two counties apply with the Fair Defense Act]
4. *Wiley v. State,* 74 S.W. 3d 399, Tex.Crim.App.
5. Please see William Anderson's article on page 35 for a more in depth look at *Smith v. Cockrell,* 01-21209, (11/4/2002), now cited as *Smith v. Dretke,* 2003 WL 21523869.
6. Federal Death Penalty Counsel Resource Project, 3/14/01.
7. The 20 defendants are: 1)*United States v. Bass* (E.D. MI CR No. 97-80235); 2 & 3)*United States v. Martinez & Alejandro* (D. PR CR No. 99-044 (SEC)), 4) *United States v. Haynes* (W.D. TN CR No. 01-CR-20247-ALL), 5)*United States v. Davis* (E.D. LA CR No. 01-CR-282-ALL); 6) *United States v. Denis* (S.D. FL CR No. 99-00714 CR (KING)); 7) & 8) *United States v. Matthews and Tucker* (N.D. NY CR No. 00-CR-269-ALL); 9) *United States v. Regan* (E.D. VA CR No. 01-CR-405-ALL); 10) *United States v. O'Driscoll* (M.D. PA CR No. 4:CR-01-277), 11) *United States v. Britt* (N.D. TX CR No. 00-CR-260-ALL), 12) *United States v. Waldon* (M.D. FL CR No. 3:00-CR-436-J25-TJC), 13) *United States v. Haskell* (W.D. MO CR No. 00-CR-395-ALL), 14) *United States v. Ealy* (W.D. VA CR No. 00-CR-104-ALL), 15) *United States v. Cooper* (S.D. MS CR No. 01-CR-8-ALL), 16)*United States v. Minerd* (W.D. PA CR No. 99-215), 17 & 18)*United States v. Moore and Gray* (D. DC CR No. 1:00CR00157); 19) *United States v. Wills* (E.D. VA CR No.99-00396); 20) *United States v. Lyon* (W.D. KY CR No. 4:99-CR-11-M). Source: Federal Death Penalty Resource Counsel Project, 2003.
8. Rule 1.01 of the Texas Rules of Professional Responsibility.