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Victims' Rights and the Death-Sentenced Inmate: Some Observations and Thoughts Symposium: Thoughts on Death Penalty Issues 25 Years after *Furman v. Georgia*.

Susan L. Karamanian

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VICTIMS' RIGHTS AND THE DEATH-SENTENCED INMATE: SOME OBSERVATIONS AND THOUGHTS

SUSAN L. KARAMANIAN*

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I. THE SETTING

After six years as volunteer habeas counsel for Texas death row inmate Patrick F. Rogers I had the opportunity, so I thought, to explain to a broader audience the importance of the habeas process in death cases and the specific problems associated with Texas's sentencing scheme. Dateline NBC had decided to air an hour-long story about Patrick's case. It wanted to interview me, presumably about my area of expertise, the law. Patrick's case indeed had raised important issues concerning the scope and effect of *Penry v. Lynaugh*,¹ and of the new federal and Texas habeas laws.²

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1. 492 U.S. 302 (1989). Shortly before Patrick filed his original habeas petition, the United States Supreme Court held that the two special issues submitted to Penry's sentencing jury (which were identical to those submitted to Patrick's jury) were unconstitutional as applied. *See id.* at 328. Patrick's original habeas petition focused on *Penry* issues.

2. On April 24, 1996, while Patrick's original habeas petition was on appeal to the United States Supreme Court, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title I, § 101 *et seq.*, 110 Stat. 1214 (1996) (hereafter, the "1996 Death Penalty Act"). Effective September 1, 1995, Texas's post-conviction proceedings statute was amended. *See TEX. CODE CRIM. PROC.* art. 11.071 (Vernon Supp. 1997) (hereafter, "Article 11.071").

II. THE EVENTS

My hope that the program would analyze our involvement from the perspective of relevant legal issues was not realized.³ In my initial interview, Dateline's chief West Coast correspondent asked the defining question: "In the eyes of the Roberts family [the victim's family], you guys, the appeals lawyers, are the devil incarnate. You're the ones who put off this execution month after month, year after year. What do you say to that?"⁴ When this question was aired, it was prefaced by the statement: "And the Roberts are angry at the appeal lawyer, who, for seven years lost every single decision, but kept appealing."⁵

The program then referred to habeas counsel's "trying for one more delay."⁶ The correspondent later mentioned that even though Texas had enacted a new law that limited a death-sentenced inmate's appeal rights (referring to Article 11.071), we as Patrick's counsel still were not "giving up," suggesting that "yet another" habeas petition had been filed.⁷ Interestingly, the conduct at issue was unrelated to a court filing. It referred to

3. My comments here are not intended to be critical of Dateline. In *The Last Mile*, NBC elected to analyze the death penalty from the perspective of the human toll on all the participants. Its account is indeed valuable and insightful.

4. *Dateline NBC: The Last Mile* (NBC television broadcast, Jan. 9, 1998), available in 1998 WL 6615039. This question carried forward a theme expressed by Danny Roberts, the brother of Patrick's victim, more than a year before Patrick's execution. In a passionate letter to the editor of *The Dallas Morning News*, Mr. Roberts, after describing Patrick's crime in vivid detail, asked: "All of Mr. Rogers' appeals to date have been denied. As I am writing this, we are supporting this murderer on death row in Huntsville. The question that burns in my heart and mind minute-by-minute is 'WHY?'" Danny Roberts, *How Much Longer?*, DALLAS MORNING NEWS, Apr. 14, 1996, at 4J.

5. *Dateline NBC: The Last Mile* (NBC television broadcast, Jan. 9, 1998), available in 1998 WL 6615039. The program never mentioned *Penry*. Further, it did not mention that even though the original habeas petition was filed in April 1990, it was not until November 1995 that the Fifth Circuit denied relief and it was not until June 1996 that the United States Supreme Court denied the petition for writ of certiorari. See *Rogers v. Scott*, 70 F.3d 340 (5th Cir. 1995), cert. denied, *Rogers v. Johnson*, 116 S. Ct. 1881 (1996). A second habeas petition was filed in April 1996 based on the Supreme Court's review of *State v. Egelhoff*, 900 P.2d 260 (Mont. 1995), cert. granted, *Montana v. Egelhoff*, 116 S. Ct. 593 (1995), rev'd, 518 U.S. 37 (1996). Based on the second habeas petition, the Texas Court of Criminal Appeals stayed a scheduled May 15, 1996 execution pending its review in *Ex parte James Carl Lee Davis*, 947 S.W.2d 216 (Tex. Crim. App. 1996) (en banc) of the constitutionality of Article 11.071.

6. *Dateline NBC: The Last Mile* (NBC television broadcast, Jan. 9, 1998), available in 1998 WL 6615039.

7. *Id.*

our request to Governor George W. Bush that he grant Patrick a 30-day reprieve under Texas Constitution, Article IV, § 11.⁸

Near the end of the program, which reached its crescendo with Patrick's execution on June 2, 1997, the correspondent asked the mother of Patrick's victim, Mrs. Patsy Roberts, how she would have felt if the lawyers postponed the execution one more time. She said: "Oh, just have a room ready at the nearest hospital. That's where I'll be."⁹

III. THE ISSUES

Mrs. Roberts's last statement, when coupled with the correspondent's earlier remarks, caused me to think long and hard. Is the public's perception of the habeas process (particularly given the inevitable delay it causes) and of the role of habeas counsel so negative that NBC could neglect the substantive legal issues? Have we as a society forgotten that the lawyer, as an entrusted guardian of the law, as the defender of rights and liberties, in representing the death-sentenced inmate plays a role that is vital to preserving our very society?¹⁰ Has the post-conviction process, which usually culminates in an execution, truly become a means by which the victim's family uses the death itself as the ultimate therapy? Finally, given the sweeping changes in federal and state habeas laws, is there any hope for the death-sentenced inmate, and how can the inmate be assured of competent legal counsel when the public is so insistent on having the condemned executed swiftly while expending as few resources as possible?

These questions are posed for discussion purposes and not with the expectation that any of them has a clear answer. Any effort at trying to analyze the questions must have a realistic assessment of the role of the victims' rights in the modern-day death process. This Article is a very modest effort at assessing victims' rights after the condemned is sentenced to death.

8. See TEX. CONST. art. IV, § 11. This right to executive review, as the Supreme Court has noted, is "deeply rooted in our Anglo-American tradition of law"; it is the "fail safe" in our criminal justice system. See *Herrera v. Collins*, 506 U.S. 390, 411-13, 415 (1993).

9. *Dateline NBC: The Last Mile* (NBC television broadcast, Jan. 9, 1998), available in 1998 WL 6615039.

10. Paragraph 1 of "The Preamble: A Lawyer's Responsibilities" to the Texas Disciplinary Rules of Professional Conduct states: "Lawyers, as guardians of the law, play a *vital role* in the *preservation of society*." TEX. GOV'T CODE ANN. title 2, subpart G, app. A, art. 10, § 9 (Vernon Supp. 1998) (emphasis added).

IV. VICTIMS' RIGHTS AND THE DEATH PENALTY

The concept of "victims' rights" commonly refers to the movement in the United States beginning in the 1950's that focuses on enhancing the role of the victim in the criminal process.¹¹ The stated reasons for the movement are many. They range from the basic concern that "the law [has] evolved too far in the direction of protecting the defendant"¹² to the less-defined, but just as compelling notion that a meaningful role for a victim in the criminal justice process helps the victim "regain a sense of control over her life" and fulfills the desire for retributive justice.¹³

The movement has changed dramatically the manner in which capital cases are investigated and prosecuted. Prosecutors may work directly with victims' families in deciding whether to seek the death penalty.¹⁴ Prosecutors may confer with the family in deciding whether to accept a plea bargain.¹⁵ And of recent importance, the victim's family now has the ability through victim impact statements to let their own suffering influence the jury during the all-important sentencing phase.¹⁶ In the trial of

11. See Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 867 (1996); Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 944 n.36 (1985).

12. Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 868 (1996). In a similar vein, Justice Scalia summarized the movement as "an outpouring of popular concern for . . . what its proponents feel is the failure of the courts of justice to take into account in the sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society." *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting).

13. Michael Ira Oberlander, Note, *The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621, 1624-25 (1992).

14. For example, in the recent highly-publicized case of Diane Zamora, the midshipman from the U.S. Naval Academy who was convicted of the capital murder of her high school classmate, Adrienne Jones, the victim's family requested that the prosecutor not seek the death penalty. Members of Jones's family said that they would prefer that Ms. Zamora spend years in prison repenting for her crime. The prosecution followed the Jones's recommendation and did not seek the death penalty. See Selwyn Crawford, *Ex-Cadets Indicted in Student's Slaying*, DALLAS MORNING NEWS, Nov. 12, 1996, at B2, available in 1996 WL 10994888.

15. See Katie Long, Note, *Community Input at Sentencing: Victim's Right or Victim's Revenge*, 75 B.U. L. REV. 187, 190 n.22 (1995) (describing victim input at various stages of a criminal case and the various forms of victim input).

16. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (holding "that if the state chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar"). The Supreme Court stated that it granted certiorari to "reconsider" its decisions in *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989) in which the Court held "that the Eighth Amendment bars the admission of victim impact evidence during the penalty phase of a capital trial." *Payne*, 501 U.S. at 811. The Court expressly concluded that *Booth* and *Gathers* "were wrongly decided and should be, and now are, overruled." *Id.* at 830.

the Oklahoma City bomber, Timothy McVeigh, due to the last-minute enactment of the Victim Rights Clarification Act of 1997,¹⁷ the victims' families were allowed to remain in the courtroom while the trial was conducted even though they would be material witnesses during sentencing.¹⁸

The right of the victim's family to have a say in the process does not end with the return of a death verdict. In Texas, for instance, the Texas Department of Criminal Justice has a Victims Services unit, which informs the victim's family about the status of the condemned. Effective September 26, 1995, Texas joined numerous other states in allowing the victim's family to witness an execution.¹⁹ Witnessing, according to some of the victims' families, would satisfy their need "to gain peace of mind through [the condemned's] death."²⁰ The NBC program on the Patrick Rogers case documented why, many years after a death sentence had been handed down, a victim's family would elect to participate in the death process, and it evidenced the important role afforded the family in the death process. NBC reported that Mrs. Roberts wanted to watch Patrick suffer and that she wanted revenge and justice.²¹ Her son, Danny Roberts, expressed the same feelings, indicating that he thought about Patrick every day that Patrick was alive and "living off of tax money, eating three meals a day and watching television."²² For Danny Roberts, receiving a call from Huntsville that Patrick had been executed would not have been enough: he said that the execution would give him "a mental picture of [Patrick] taking his last breath."²³

NBC documented how a few weeks in advance of the scheduled execution, Texas Victims Services visited the Roberts's home.²⁴ The family was

17. Victim Rights Clarification Act of 1997, Pub. L. No. 105-06, § 2, 111 Stat. 12 (1997).

18. See *United States v. McVeigh*, 958 F. Supp. 512, 514-15 (D. Col. 1997) (holding that the new legislation would not apply to fact witnesses who would be testifying at McVeigh's trial). The court reasoned that it could "protect against any prejudicial effect from victim impact witnesses' attendance at the trial" by conducting voir dire questioning of victim witnesses before they testify. *Id.* at 514-15.

19. See Christy Hoppe, *Victims' Families Can View Executions: Up to 5 Relatives Allowed to Watch, Justice Board Decides*, DALLAS MORNING NEWS, Nov. 18, 1995, at 40A (discussing the rule adopted by the Texas Board of Criminal Justice whereby the families of murder victims would be permitted to observe the execution of the condemned), available in 1995 WL 9073188.

20. Shannon Brownlee et al., *The Place for Vengeance*, U.S. NEWS & WORLD REP., June 16, 1997, available in 1997 WL 8332196.

21. *Dateline NBC: The Last Mile* (NBC television broadcast, Jan. 9, 1998), available in 1998 WL 6615039.

22. *Id.*

23. *Id.*

24. See *id.*

provided a package of material that detailed what the family should expect to see at the execution.²⁵ The family was told that the execution, even though by lethal injection, could be gruesome.²⁶

A representative of Texas Victims Services also greeted members of the Roberts family when they arrived at the TDC main administrative building shortly before the execution.²⁷ The Victims Services representative would also witness the execution.²⁸ After the execution, the Roberts family had the opportunity to speak at a press conference. In describing the execution, Danny Roberts would later tell the national media: "we came out, and it was like, 'Is that it?'"²⁹ He also expressed concern that witnessing Patrick's death was not enough: "I really wanted to see them bring [Patrick Rogers] into the room and strap him down. They should have let us see a little bit of the terror in Rogers's face that my brother must have felt."³⁰ His comments express disappointment similar to that expressed by other victims' family members who have witnessed executions.³¹ The death, it seems, does not live up to expectations.

The media coverage associated with the events leading to an execution and of the execution itself also provides another opportunity for the victims' families, friends, and neighbors, and even those remotely aware of the crime, to feel that they are participating in the death process. Texas allows reporters from the community where the crime was committed to "have first choice to witness [the] execution."³² In Patrick's case, a reporter from *The Paris News* (the crime occurred in Paris, Texas) witnessed the execution. Notably, on the day after Patrick's execution, that paper's front page carried the headline "Day of Justice."

25. *See id.*

26. *Dateline NBC: The Last Mile* (NBC television broadcast, Jan. 9, 1998), available in 1998 WL 6615039.

27. *See id.*

28. *See id.*

29. Shannon Brownlee et al., *The Place for Vengeance*, U.S. NEWS & WORLD REP., June 16, 1997, available in 1997 WL 8332196.

30. *Id.*

31. *See id.* (noting that months after witnessing the execution, the mother of the victim stated: "I keep thinking, 'What can I do for Jennifer now?'""); *id.* (reporting that Linda Kelley, the first victims' family member to witness an execution in Texas, left the death chamber unsatisfied: "'You stand there and you watch a man take two gasps and it's over . . . I would like to have seen him humiliated a little bit. I think that he should have been brought in and strapped down in front of us.'").

32. This statement is taken from the press materials that the Texas Department of Corrections distributed at Patrick's execution (on file with the *St. Mary's Law Journal*).

V. VICTIMS' RIGHTS AND CHANGES IN FEDERAL AND STATE HABEAS

While the victims' rights movement would affect significantly the ability of a victim's family to assume the role of a stakeholder in the death process, its greatest and perhaps most long-lasting influence may very well rest in a completely different realm, on the legislative front. For years, proponents of capital punishment have echoed the pleas of the Roberts family that the appeals process is making a mockery of the death penalty.³³ The necessary delay associated with habeas appeals is alleged to have offended at least two of the goals of capital punishment, swift retribution and deterrence. In addition, from the perspective of the victim's family, a delay in the execution prevents any meaningful closure. The *Dateline* program depicted this notion vividly. A few days after Patrick's execution, Mrs. Roberts was seen speaking to the tombstone over her dead son's grave: "David, we finally got rid of that terrible killer that took you away from us. He finally got what's coming to him."³⁴

With the enactment of the 1996 Death Penalty Act,³⁵ the federal government streamlined the federal habeas process. Filing deadlines for federal habeas petitions were imposed.³⁶ The number of petitions is now limited.³⁷ The review afforded the petition is narrowed.³⁸ Even though the new federal law has been in effect for only two years, in certain cases it already has produced the intended results. The recent events involving Lesley Lee Gosch of Texas demonstrate the law's mighty force. Mr. Gosch faced an execution date in mid-January 1998.³⁹ The Federal District Court had denied the writ, deferring to the state court evidence and findings as now required under 28 U.S.C. § 2254 (e).⁴⁰ The Fifth Circuit

33. See Daniel P. Blank, Book Note, *Mumia Abu-Jamal and the "Death Row Phenomenon,"* 48 STAN. L. REV. 1625, 1650 n.195 (1996) (quoting Dan Morain, *Governor OKs Vote to Expand Executions*, L.A. TIMES, Sept. 27, 1995, at A3, with respect to California Governor Pete Wilson's call for limiting death penalty appeals). This book note analyzed Mumia Abu-Jamal's collection of essays titled *Live From Death Row*. *Id.* at 1625.

34. *Dateline NBC: The Last Mile* (NBC television broadcast, Jan. 9, 1998), available in 1998 WL 6615039.

35. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214 (1996).

36. See *id.*

37. See *id.*

38. See *id.*

39. See *Gosch v. Johnson*, 118 S. Ct. 750 (1998) (referring to Gosch's application for stay of execution of a death sentence).

40. See 28 U.S.C. § 2254(e) (1996). Justice Souter's statement regarding the denial of the petition for writ of certiorari explained that the grounds for relief raised by Gosch included claims upon which there were evidentiary issues dependent on the state court record which were subject to deference under 28 U.S.C. § 2254(e). See *Gosch v. Johnson*, 118 S. Ct. 1072 (1998) (statement of Souter, J.).

reviewed the case in a few hours and refused to grant any relief.⁴¹ While on January 15, 1998 the United States Supreme Court granted a stay of execution pending disposition of the writ of certiorari,⁴² that same Court just over a month later denied certiorari.⁴³ In concurring in the denial of certiorari, Justice Souter felt obligated to explain the basis for the Supreme Court's earlier decision to stay the execution. His comments are insightful. He wrote that given the disagreement in the Fifth Circuit as to whether that court even had the appropriate time to "review the soundness of the District Court's reliance on the state court evidence and findings" and given "the importance of adequate review on a first (and, presumably, only) federal habeas petition, I voted to stay the execution."⁴⁴ Hence, Mr. Gosch's federal habeas petition (and as Justice Souter noted, probably his only federal habeas petition) spent less than a few hours in the Fifth Circuit and less than a month in the United States Supreme Court, and all the while, these courts were only assuring that the District Court had relied properly on the state court evidence and findings.⁴⁵

Shortly before the 1996 Death Penalty Act went into effect, the State of Texas through Article 11.071 of the Texas Code of Criminal Procedure enacted its own broadsweeping measures aimed at shortening the state habeas process.⁴⁶ Under these legislative amendments to Texas's habeas procedures, the death-sentenced inmate is now required to file his habeas petition no later than forty-five days after filing the original brief on direct appeal.⁴⁷ This concurrent running of appeals will likely eliminate at least a few years from the review process for each case.⁴⁸

41. See *Gosch v. Johnson*, 136 F.3d 138 (5th Cir. 1998), *cert. denied*, 118 S. Ct. 1072 (1998) (dismissing the appeal of the district court's denial of a writ of habeas corpus).

42. See *Gosch v. Johnson*, 118 S. Ct. 750 (1998).

43. See *Gosch v. Johnson*, 118 S. Ct. 1072 (1998).

44. *Id.* at 1072 (statement of Souter, J.).

45. See *supra* notes 39-44 and accompanying text. In contrast, in Patrick Rogers's case, the Federal District Court issued its opinion on September 7, 1994. See *Rogers v. Director*, 864 F. Supp. 584 (E.D. Tex. 1994). The Fifth Circuit adhered to its usual briefing schedule. Oral argument was held in early November 1995. The Fifth Circuit decision was issued on November 21, 1995 and the Supreme Court denied certiorari in June 1996. *Rogers v. Scott*, 70 F.3d 340 (5th Cir. 1995), *cert. denied*, *Rogers v. Johnson*, 116 S. Ct. 1881 (1996).

46. For a discussion of constitutional challenges to Article 11.071, see James C. Harrington & Anne More Burnham, *Texas's New Habeas Corpus Procedure For Death-Row Inmates: Kafkaesque—and Probably Unconstitutional*, 27 ST. MARY'S L.J. 69 (1995).

47. See TEX. CODE CRIM. PROC. art. 11.071, § 4(a) (Vernon Supp. 1997).

48. In Patrick's case, the direct appeal took three years, from January 1986 to November 1989. His state habeas process took almost two years, from April 1990 to January 1991.

The amendments in Article 11.071 also limits the circumstances in which a subsequent application for habeas corpus can be filed.⁴⁹ The subsequent application must show that (1) the new claims and issues were not and could not have been raised earlier “because the factual or legal basis for the claim was unavailable;” (2) “by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt;” or (3) “by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state’s favor one or more of the special issues that were submitted to the jury” during sentencing.⁵⁰ In effect, only the rare case will now be considered a “proper” subsequent application.

And finally, yet not of least significance, Article 11.071 attempted to tackle the perennial problem of the lack of competent counsel to represent death-sentenced inmates in their habeas appeals. One may ask how this issue fits within a discussion of “victims’ rights.” The new procedure for appointing and compensating habeas counsel arose as a result of the federal budget cuts that ended funding for the various resource centers. This effort was motivated, in part, by supporters of victims’ rights who sought to minimize the delay between the death sentence and the execution. Once it became apparent that the State of Texas could no longer rely on resource center attorneys and other volunteer attorneys to handle the habeas appeals, it had no choice but to take the counsel issue into its own hands.

Under Article 11.071, each habeas applicant “shall” be represented by competent counsel.⁵¹ The Texas Court of Criminal Appeals (hereafter, “CCA”) appoints the attorneys.⁵² No competency standards are set forth in Article 11.071.⁵³ The statute refers to the CCA’s adopting “rules and standards” for the appointment process, but the CCA has failed to publish guidelines and rules that have any meaningful detail.⁵⁴ Since 1995, the CCA has issued various sets of guidelines, which practice has made the standards themselves a veritable moving target. While under Article 11.071, the court-appointed attorney is entitled to reasonable compensa-

49. See TEX. CODE CRIM. PROC. art. 11.071 (Vernon Supp. 1997).

50. *Id.* § 5(a)(1)–(3).

51. *Id.* § 2(a).

52. See *id.* § 2(d).

53. See TEX. CODE CRIM. PROC. art. 11.071 *passim* (Vernon Supp. 1997).

54. The Fifth Circuit has held that Texas has failed to develop the appropriate standards for habeas counsel to be eligible for the opt-in benefits under the 1996 Death Penalty Act. See *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in part on reh’g*, 105 F.3d 209 (5th Cir. 1997).

tion from state funds, the CCA decides what is reasonable.⁵⁵ The CCA reportedly does not routinely compensate counsel for all work and expenses that were reasonably necessary in preparing the habeas petition.⁵⁶ In fact, since January 1, 1998, the CCA has imposed a cap of \$15,000 for pre-filing work on a habeas petition.⁵⁷

One of the problems with the existing appointment process under Article 11.071 is that the CCA, the final arbiter of the state habeas petition, is also responsible for appointing competent counsel and paying that counsel compensation for his reasonable and necessary work.⁵⁸ The fund from which payment is to be made is extremely limited, thus necessitating an unreasonable cap.⁵⁹

On its face the appointment scheme has obvious problems. In practice it has proven ineffective for assuring that the death-sentenced inmate is receiving competent counsel. The example of Ricky Eugene Kerr, who was scheduled to be executed on February 25, 1998,⁶⁰ evidences the problems inherent in the system. Kerr's habeas attorney had been appointed under Article 11.071.⁶¹ That attorney had only been licensed for three years.⁶² The attorney wrongly assumed that he could not challenge Kerr's conviction or sentence until direct appeal had been exhausted; hence, in the habeas proceeding, Kerr's attorney raised only one claim for relief.⁶³ The CCA denied that claim for relief,⁶⁴ leaving Kerr virtually

55. See Janet Elliott, *CCA Starts new Habeas System—But (Almost) Nobody Comes*, TEX. LAW., Apr. 22, 1996, at 7 (discussing the "arbitrary payment cap of \$7,500" set by the Court of Criminal Appeals).

56. See *id.*

57. Cf. *Death Penalty: Legal System Reforms Would Improve Fairness*, DALLAS MORNING NEWS, Dec. 28, 1997, at 2J (explaining that the Texas Legislature has increased funding for court-appointed attorneys to handle inmate appeals), available in 1997 WL 16187622.

58. See Janet Elliott, *CCA Starts New Habeas System—But (Almost) Nobody Comes*, TEX. LAW., Apr. 22, 1996, at 7; *Death Penalty: Legal System Reforms Would Improve Fairness*, DALLAS MORNING NEWS, Dec. 28, 1997, at 2J, available in 1997 WL 16187622.

59. See Janet Elliott, *CCA Starts New Habeas System—But (Almost) Nobody Comes*, TEX. LAW., Apr. 22, 1996, at 7 (quoting Justice McCormack that "[i]f we had made 150 to 200 appointments, we'd already be out of money").

60. See *Ex parte Kerr*, No. 35,065-02, slip op. at 1 (Tex. Crim. App. Feb. 23, 1998) (Overstreet, J., dissenting).

61. See *id.*

62. See *Death Penalty: Court of Criminal Appeals Makes an Almost Fatal Mistake*, DALLAS MORNING NEWS, Mar. 9, 1998, at 10A, available in 1998 WL 2519043. Kerr's attorney admitted in an affidavit that he completely misunderstood habeas corpus procedure and that he had never tried or appealed a capital case. See *id.*

63. See *Ex parte Kerr*, No. 35,065-02, slip op. at 1 (Tex. Crim. App. Feb. 23, 1998) (Overstreet, J., dissenting).

64. *Ex parte Kerr*, No. 35,065-02, slip op. at 1 (Tex. Crim. App. Feb. 23, 1998).

with nothing to raise on federal habeas. Volunteer habeas attorneys who learned of the situation moved on behalf of Kerr in the CCA for leave to file a new writ and to be substituted as counsel, but the CCA denied the motion.⁶⁵

But in a blistering dissent, Judge Overstreet asked the single question that perhaps many have asked over the years: "Must the applicant suffer the ultimate punishment, death, because of his attorney's mistake?"⁶⁶ He then said that "[f]or this Court to approve of such and refuse to stay this scheduled execution is a *farce* and *travesty* of applicant's legal right to apply for habeas relief. It appears that this Court, in approving such a *charade*, is punishing applicant, rewarding the State, and perhaps even encouraging other attorneys to file perfunctory 'non-applications.'"⁶⁷ Then Judge Overstreet made perhaps one of the strongest indictments of the new system: "Such a 'non-application' certainly makes it easier on everyone—no need for the attorney, the State, or this Court to consider any potential challenges to anything that happened at trial."⁶⁸

VI. SOME FINAL THOUGHTS

Judge Overstreet's powerful words brought back to mind many of the questions that came to my mind after first watching the Dateline program. The system by which the State puts someone to death should not be based on ease, as the victims' families and many others advocate. If ease were the guiding factor, then the "non-application" would become the habeas application of choice. The system should not be dictated by emotion. If that were the case, those who could best express their anger, frustration or outrage and who have the means to convey that emotion effectively and efficiently to the rest of the world would seize the day. The master of the sound-bite, so to speak, would prevail. The work of habeas counsel, in representing the death-sentenced inmate, is not susceptible to sound-bites. Our actions are based on rules, and those rules, in turn, are grounded in the gravest of principles, constitutional rights.

In only a few short years, under the guise of eliminating delay, the victims' rights movement succeeded in dismantling an already problem-plagued habeas process. In its place, a new system has emerged that at its core is fundamentally flawed. We as lawyers should not remain idle while the death process risks everyone's important constitutional rights.

65. *See id.* (Overstreet, J., dissenting).

66. *Id.*

67. *Id.* (emphasis added).

68. *Id.*

