

# When \$25,000 is the limit on a life

**BYLINE:** Chuck Lindell

**DATE:** October 30, 2006

**PAGE:** A01

At least eight men lived, waiting to die, on Texas' death row before appellate lawyers uncovered the mistakes that led to their freedom.

Witnesses lied, prosecutors hid evidence or scientists flubbed their analyses - malicious or accidental errors that, however rare, had potentially fatal consequences. But when Texas imposes the ultimate, irreversible penalty, the process of finding and correcting those mistakes falls to lawyers who are providing, in some cases, what amounts to charity work.

A few lucky inmates attract deep-pocket law firms, including Ernest Willis, who was freed in 2004 after a New York firm spent more than \$3 million to establish his innocence.

But the majority of death row inmates depend on court-appointed lawyers who are expected to do the job for \$100 an hour, capped at about \$25,000, the amount Texas sets aside for each writ of habeas corpus, a condemned inmate's last chance to challenge improperly administered justice.

Aggressive, conscientious lawyers frequently work for far less than \$25,000, and some lose money on the deal, said Gary Taylor, a well-regarded appeals lawyer who wrote the "Texas Capital Habeas Corpus Manual" in 2005.

Beyond legal fees, the \$25,000 also must pay for any private investigator, mitigation specialist, medical doctor and psychologist needed to fully investigate everything from the trial evidence to the inmate's mental health.

"I know attorneys who are paying out of their own pocket to try to do some of this stuff," said Taylor, a former Austin resident now with the Federal Defender Service's law office in Nevada.

The Legislature set the \$25,000 cap, up from \$15,000, in 1999. Lawmakers also gave counties authority to exceed the cap with county money, but "many are loath to go into their own budgets to pay for these when they've got them already convicted and on death row," said Philip Wischkaemper, a Lubbock lawyer with the Texas Criminal Defense Lawyers Association.

Once appointed, each habeas lawyer must decide what kind of professional help is needed to fully investigate the case. But by capping fees and making lawyers and investigators compete for the same pot of money, the Legislature created an unintentional conflict that can lead habeas lawyers to cut corners, Houston lawyer Mandy Welch said.

"If a lawyer hires an investigator and an expert to do what really needs to be done, that decreases dollar for dollar the amount of money for attorney fees," said Welch, who organizes and teaches continuing education courses on death penalty habeas law. "That money comes directly out of their pocket."

In difficult cases, habeas lawyers could be working for less than \$50 an hour, "and that won't pay overhead," Welch said.

Yet habeas writs cannot succeed without information that has never been presented to the courts, and professional investigators are often necessary to unearth new details needed to reverse a conviction or death sentence.

However, an Austin American-Statesman review of the Texas death penalty writ system found numerous appeals that included no information from outside the trial transcript. Some were copied from previously filed writs or from other appeals with little or no reference to the current case.

Others relied on arguments not meant for writs or were too brief to fully explore the issues presented.

Inadequately and improperly presented, such writs are quickly dismissed.

The lackadaisical work is tolerated by the Texas Court of Criminal Appeals, which manages a list of lawyers eligible for court-appointed habeas work but does not review their legal work for quality or competence.

State Bar of Texas grievance committees, which discipline lawyers under rules created by the Legislature, also have failed to reprimand habeas lawyers whose work has fallen short of professional standards.

Both the court and the bar have begun working to improve the quality of habeas representation in Texas.

But defense lawyers place additional blame for bad writs on the state's \$25,000 cap.

Lydia Brandt, a Richardson lawyer who has worked on six state death penalty writs, said that hiring competent investigators could easily eat up \$15,000, "and that's low-balling it." Complicated investigations that seek to establish mental retardation or brain disease, for example, can cost far more, she said.

"Some of those experts charge \$300 to \$400 an hour," Brandt said.

Under Brandt's example, investigators who charge \$15,000 would allow a lawyer to bill for 100 hours of work, but writs can easily take two or three times longer to complete, she said.

Habeas lawyers must read hundreds, if not thousands, of pages of trial transcripts and court records. They must interview their client and family members, examine trial lawyer and prosecutor files, locate police reports and examine evidence, whether or not it was submitted at trial, according to State Bar of Texas guidelines.

A rule of thumb among lawyers is that each page of a writ will take about an hour to complete. For attorneys such as Brandt, whose writs typically run between 100 and 200 pages, the hours begin racking up quickly.

Even after the writ is filed, a conscientious lawyer will answer the prosecutor's motions, ask the court for a hearing on the evidence and keep the client informed on the process, Brandt said.

"This is the reason why a lot of very good habeas lawyers aren't doing the work," Brandt said. "I work at home, do everything on a shoestring, and I still end up doing pro bono work."

When the Texas Legislature was debating whether to begin spending state money on habeas lawyers in the mid-1990s, a State Bar committee that focused on death penalty issues held a series of intense meetings on the appropriate level of funding.

The final number was "a conservative estimate" of \$35,000 per writ (about \$43,500 in 2005 dollars), including investigative expenses, said Dallas lawyer Vincent Perini, who ran the committee at the time.

"That was not a flip of the coin (number). That was the result of some really hot discussions" between judges, prosecutors and defense lawyers, he said.

The Legislature adopted the new habeas system in 1995. Although the Court of Criminal Appeals estimated that it needed \$4 million to get the new system running, lawmakers set aside only \$2 million. The court initially capped writs at \$7,500 and later raised the cap to \$15,000, pushing many qualified lawyers to opt out of the system.

"Lo and behold, that's when the trouble really began," Perini said. "I actually thought I could shut down my committee. We finally had appointed, paid lawyers. I never dreamed it would go downhill from there, but it did."

The American Bar Association strongly disapproves of compensation caps and flat fees in death penalty cases.

“When assigned counsel is paid a predetermined fee for the case regardless of the number of hours of work actually demanded by the representation, there is an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee,” bar guidelines state.

Taylor said the stress of balancing finances with quality legal work led him to leave Austin to become a federal public defender in Las Vegas, doing the same work but with greater resources.

“In Texas, you prioritize your investigation with how much investigation you can afford. The problem with prioritizing is, what if I did the priorities wrong? What if the fifth thing on the list developed the evidence?” Taylor said.

“Now I have an investigator to do work for me, and a paralegal. I don’t have to cry to anybody to get an investigator. I filed a writ the other day; I think I used five experts, maybe six. That would have been unheard of in Texas,” he said.

Since 2004, the Legislature has allocated \$500,000 a year to pay for death penalty writs, spending \$338,742 last year and \$615,896 in 2004, according to the state comptroller’s office.

Habeas costs are expected to continue declining, following a statewide trend toward fewer death sentences. This year, only seven death sentences have been handed out, down from 15 last year and 25 in 2004.

The decline means Texas can proceed with a relatively small number of competent habeas lawyers, Wischkaemper said.

More important, the decline means a smaller financial hit if Texas raised levels of compensation for habeas lawyers to the neighborhood of \$50,000, a more reasonable estimate of the costs involved, he said.

But making the case for more habeas money is complicated by lawyers who bill for substantially less than \$25,000, Brandt said.

“If you start pulling vouchers, you’ll see some writ writers who do cut-and-paste and use the same boilerplate claims are not even spending the \$25,000,” she said. “When I say \$25,000 isn’t enough, the response from judges is, ‘These people are doing it for \$6,000; why can’t you do it for that?’

“When you have writs being done like that, you really don’t have any habeas. It’s a sham,” Brandt said.

Perini has been working to improve the work performed by court-appointed lawyers for three decades. Improving the death penalty writ system is simply the cost of doing the job right, he said.

“I’ve been a criminal lawyer over 40 years. There are a lot of really terrible sociopaths and horrible people, so if you want to have the death penalty, fine. But there is no question that it has got to be done with great integrity, and we have never done that in Texas,” Perini said.

“If you want a death penalty, you can have a death penalty, but you have to pay for it.”

### **What is habeas corpus?**

The writ of habeas corpus, also known as the Great Writ, is meant to protect against illegal detention. A writ is a document filed on behalf of an inmate that asks the courts to re-examine the circumstances and legality of the confinement. ‘Habeas corpus’ is taken from the Latin for ‘you have the body.’