

ABSENTEE ADVOCACY

Failures in Harris
County's Capital
Representation
System

Texas Center for Justice and Equity

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Since the U.S. Supreme Court legalized the death penalty in 1976, Harris County, Texas, has executed more people than any other non-Texas state in the union.¹ In part, this can be attributed to systemic issues with the county's capital representation process: despite a dramatic reduction in the number of defendants sentenced to death in the recent past, Harris County's justice system remains rife with dysfunction in capital cases.

FAILURES IN CAPITAL REPRESENTATION

Harris County's shortcomings were recently detailed in *Death by Design*, a report by the nonprofit Wren Collective that highlights failures in how the County handles cases where a defendant is accused of a capital crime and faces the death penalty or a sentence of life without parole – effectively death by incarceration.² The full *Death by Design* report is a damning and comprehensive indictment of capital representation in Harris County, based on a detailed analysis of evidence presented in capital cases, attorney caseload numbers, attorney billing records, and case outcomes.³ Among other things, the report uncovered four cases wherein a defendant facing capital murder charges had no contact with their attorneys outside of court appearances.

Not everyone agreed with the conclusions of *Death by Design*; one local defense attorney (whose law practice has previously represented defendants facing the death penalty) opined that, "Academics should shut up about something they know nothing about, which is running a small business."⁴ This response is telling, given that community members and advocates have long raised criticisms regarding the financial element of indigent defense in Harris County, largely stemming from the attorney appointment system.

While the establishment and slow growth of the Harris County Public Defender's Office within the last 15 years has been encouraging, the County's elected criminal court judges retain control as to which attorneys are appointed to represent indigent defendants. Previous research has revealed that defense attorneys from the private bar who donate to judicial election campaigns are often rewarded by those same judges with indigent defense appointments.⁵ These attorneys are paid for their services out of the public coffers, but the judge must approve expenses related to their cases, such as hiring experts and investigators, as well as approve the amount of compensation to be paid to lawyers for their work. In years past, several attorneys have regularly received hundreds of thousands of taxpayer dollars in reimbursement per year in these cases, with one attorney recently topping one million dollars in yearly fees.⁶

Unfortunately for indigent defendants in Harris County, the Public Defender's Office does not accept capital cases, leaving those defendants' attorneys to be chosen by the judge presiding over their case. These attorneys steadfastly maintain that this appointment system in no way affects their representation.

Given the complex nature of formulating a legal defense to capital charges in court, should the public trust the Harris County defense attorneys who are telling others to butt out?

DATA SPOTLIGHT: ATTORNEY NONPERFORMANCE

To answer the above question, we reviewed jail visitation logs and court filings for capital murder cases active between January 1, 2015, and March 1, 2020. The attorney visitation logs reflect the primary, and possibly exclusive, method for attorneys to hold confidential meetings with their clients, whether in person or over video. The jail visitation logs included case numbers and defendants' System Person Numbers (SPNs), which allowed us to connect the visitation logs to Harris County's online criminal case portal.

Through that portal, we reviewed each relevant case and removed any defendants who were able to bond out of jail, as post-bond consultations with their attorneys would not be recorded in the jail visitation log. Having narrowed the sample to only those defendants who did not post bail and who remained incarcerated through either March 1, 2020, or the end of their case (meaning all attorney visits during that time would be included in the visitation log), we examined the numbers. Our analysis affirmed several shocking facts regarding the representation of capital murder defendants in Harris County:

Of the 603 defendants held in the Harris County Jail while charged with capital murder cases active between January 1, 2015, and March 1, 2020:

- 51 individuals received no visits by an attorney during this period
- 137 individuals were visited by an attorney less than once per year
- 258 individuals were visited by an attorney less than twice per year
- 56 individuals (less than 10% of cases) were visited by an attorney more than once per month
- 12 individuals were convicted but never visited by an attorney

Numbers alone do not answer our question, but the alarming infrequency of attorney visits to capital defendants in Harris County clearly shows attorneys doing less than the bare minimum for their clients. Consider the American Bar Association's guidelines for defense counsel in death penalty cases, which state: "Counsel at all stages of the case should engage in a continuing interactive dialogue concerning all matters that might reasonably be expected to have a material impact on the case."⁷ For the dozens of Harris County defendants whose attorneys did not visit them over the course of their case, this interactive dialogue never started.

While an attorney should be afforded the discretion to develop legal theories and evidence behind their case, failing to visit a client whose life is *literally* on the line in no way comports with rendering "effective, high-quality legal representation with integrity."⁸ Whatever the underlying causes of these failures in legal defense, assertions that this is an acceptable compromise between legal practice and financial consideration must be wholly rejected.

Our analysis, which supports the findings detailed in *Death by Design*, also demonstrates that Harris County's capital representation system is broken beyond repair. With lives hanging in the balance, it is

long past time for Harris County to do something to address the issue of inadequate counsel in capital cases.

But how can this broken system be fixed?

THE SOLUTION CAN ALREADY BE FOUND IN TEXAS

Texas' Regional Public Defender for Capital Cases (RPDO) provides capital representation in 186 Texas counties.⁹ The RPDO model assigns a team of four people to each case it receives, including two attorneys, an investigator, and a mitigation specialist – all of whom have training specific to capital cases. With studies showing RPDOs outperforming private court-appointed lawyers like those assigned to capital cases in Harris County, the County should embrace the model and create the Harris County Capital Defender Office.

A person does not have to have run a small business or have graduated with a law degree to know that an attorney should visit their incarcerated client as their case progresses – especially when that client is charged with a capital offense. The woefully inadequate representation afforded to indigent capital defendants in Harris County is clear, and, without a change, the county will continue to be tarnished by its legacy as the epicenter of American capital punishment. By adopting the RPDO model and establishing a Harris County Capital Defender Office, the County can begin to repair that legacy.

¹ Phil McCausland, “Why Texas’ ‘death penalty capital of the world’ stopped executing people,” *NBC News*, December 16, 2017, <https://www.nbcnews.com/storyline/lethal-injection/why-texas-death-penalty-capital-world-stopped-executing-people-n830276>.

² *Death by Design*, Wren Collective, December 2023, https://www.wrencollective.org/_files/ugd/8fe8f0_fd475c291d07486188088f0d5c2ffa33.pdf.

³ *Id.*

⁴ Neena Satija, “Shoddy work from Houston lawyers, judges jeopardizes justice in death penalty cases, study reveals,” *Houston Chronicle*, December 14, 2023, <https://www.houstonchronicle.com/news/investigations/article/houston-lawyers-workload-jeopardizes-justice-18549774.php>.

⁵ See e.g. Neel U. Sukhatme & Jay Jenkins, “Pay to Play? Campaign Finance and the Incentive Gap in the Sixth Amendment’s Right to Counsel,” 70 *Duke Law Journal* 775-845 (2021), <https://scholarship.law.duke.edu/dlj/vol70/iss4/2>.

⁶ *Id.*

⁷ American Bar Association (ABA), “Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,” 2003, https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2003-guidelines/.

⁸ ABA, “Criminal Justice Standards: Defense Function, Standard 4.1-2,” Fourth Edition (2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

⁹ See <https://rpdo.org/>

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**Texas Center for
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