

## A reflective account of Laura Kutnick and Lucy Howard's experiences working for the Texas Defender Service in Houston, Texas

An account of Laura Kutnick and Lucy Howard's 2 months spent working for the Texas Defender Service. The work and issues that we have discussed are those which had the most impact on us during our internship. Throughout, specific identifiable facts have been omitted and names of the cases that we have worked on have been substituted for "Defendant 1" and "Defendant 2" for reasons of confidentiality.

### Placement in Texas Defender Service

For the past two months we have partaken in a legal internship at the Texas Defender Service in Houston, Texas. Texas Defender Service is a not for profit organisation, receiving no appropriated funding from any state or federal sources. The firm's specific goals are to improve the quality of representation afforded those facing the death penalty in Texas and advance reforms that work to provide all those accused with crimes access to competent counsel.

Texas Defender Service approach this goal through the lens of the Texas capital punishment system by working to expose and eradicate the systemic flaws plaguing the Texas death penalty. Texas Defender Service strives towards its mission through three core programs:

1. Post-conviction litigation, attorney training, and consulting
2. Trial litigation, attorney training, and consulting
3. Policy reform, which includes issue advocacy, research, and public education

### Main issues surrounding the death penalty in Texas

Our experience at the Texas Defender Service illustrated the extensive problems the firm faces in the application of the Texas Criminal Justice System and the death penalty. Below are just a few facts that highlight the necessity and invaluable nature of the work of the Texas Defender Service.

- Texas has accounted for more than one third of modern executions since 1976 in the United States, with 423 executions as of November 2008 (*Death Penalty Information Centre & Texas Department of Criminal Justice*)
- There are 353 inmates on Texas Death Row today (*Texas Department of Criminal Justice Death Row Data 2008*).
- A death penalty case in Texas costs taxpayers an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years. (*A review of the death penalty's cost, including six years of appeals, by the Dallas Morning News for the story "Executions Cost Texas Millions" March 1992*).
- In capital cases, Texas courts continue to allow unreliable expert opinions of violence risk to influence the jury's decision whether to impose a life or death

sentence. Texas is one of only a few states which allow speculative testimony to influence the jury's decision about sentencing.

- Black and Hispanic offenders make up 68% of the current death row population in Texas. The US Census for Texas indicates that the Black and Hispanic/Latino population of Texas is 46.5%. Studies indicate that race, particularly race of victim, continues to play a role in who is sentenced to death in the United States.
- Of 38 states that administer the death penalty, only Texas and three others rely on a fragmented system of court-appointed lawyers to handle death penalty writs of habeas corpus -- complicated appeals meant to ensure that death sentences are legal and constitutional. The overwhelming majority of states provide defence representation through an institution of competent, committed lawyers who have sufficient expertise, training, and oversight.

### Work as an Intern

Since we have been in Houston, Harris County has executed on average one to two people per week. With such a high execution rate and a law firm with very limited funding, interns are essential to the running of the firm and played a major role in case work. There is a regular flow of interns in the office, whom stay for a few months at a time, all obtaining an unforgettable experience.

Our work as interns ranged a great deal. Primarily we were responsible for more administrative tasks. These consisted of summarising medical and prison records affiliated to particular inmates, and organising these into table form so that attorneys could refer to particular sections with ease. We were also responsible for a project in which we obtained information about an ineffective attorney who had worked on more than 60 capital cases in Texas. Our research indicated that on nearly all of those 60 cases, the attorney's management of the case was ineffective. There were examples of him being intoxicated at trial, and many instances of his misunderstanding of the law, filing the wrong petitions and incorrectly presenting cases. Such information will work towards the possibility of getting him struck off from the court appointed counsel list, and thus an invaluable research task.

As we progressed in our work we were accordingly given more responsibility. The most interesting and important work that we undertook was in the last 3 weeks of our internship when we were assigned two large cases with imminent execution dates. Our roles carried much responsibility and pressure as our work played an integral part in the outcome of the cases. Each case rested on very different issues and the result was different in both.

First, was the case of Defendant 1, a man that had killed a minor and wounded two others in a fit of passionate rage. He had been on death row for fourteen years, and was scheduled to be executed the following week. To begin with, we went to visit him on death row. The unit is called the Polunsky Unit, situated in Livingston in the countryside of Texas, an hour from Houston. We approached the unit and were amazed at the scale of the security operations in effect around the perimeter of the jail. There were watchtowers manned with gunmen and multiple layers of staggered

barbed wire security fences. After having to open our boot, bonnet and glove compartment to prove that we were not smuggling in any people or guns, we entered the prison, were searched, frisked, and finally able to see our inmate. The meeting took place through a pane of glass, communicating through telephones.

The inmate dispelled any negative dispositions that we had in our minds. We spoke for four hours to Defendant 1 who had not seen outside the prison walls for 14 years, and who showed utter remorse for his actions. His sole wish was to be saved from execution and be able to see his children again. Through our discussions with him, it became apparent that growing up for Defendant 1 had been extremely difficult; he had suffered much abuse and severe depression. Such issues are called mitigating circumstances, and can serve in a court of law to negate a death sentence, or persuade the jury that it is not the correct course of action. Never had these issues been previously investigated.

Over the next four days, we conducted interviews with family members, and obtained medical records which proved that Defendant 1 had a very distressing childhood. Both his mother, brother, aunt and grandmother told us stories of him witnessing horrific abuse from his father towards his mother throughout his whole childhood and being subject to his own terrifying abuse from his father. This suffering had made him very depressed, and we discovered from his family and medical records that he had attempted to commit suicide on more than one occasion. At no stage had a psychologist had ever examined him to determine his culpability for the crime. It has been proven that witnessing such crimes can lead to trauma at a young age, which has a severe effect on how children carry out their anger and emotions. We obtained a statement from a doctor who testified that a neurological examination was essential before any execution could take place.

We presented all of these issues in a letter of Reprieve to the Governor of Texas two days before the execution was scheduled to take place. The letter asked for a thirty day reprieve of the execution to further investigate the issues that had been discovered for the first time in fifteen years. The letter was however denied the day after it was submitted and Defendant 1 was executed on the 7<sup>th</sup> of November, 2008. Apparently the state does not grant reprieves for mitigating factors as strong as these. If these issues had been investigated at the trial, the sad fact is that Defendant 1 may have never been put on death row in the first place.

The state of Texas only allows two excuses to the punishment of death; being a juvenile and having mental retardation. Since 2002, in the case of *Atkins v Virginia* 536 U.S. 304 (2002), it is now illegal in the state of Texas to execute someone that is mentally retarded. This was the primary issue for the second case of Defendant 2 that was assigned to us on the same day that Defendant 1 was executed. Defendant 2 was accused of shooting a girl during her interrogation by himself and other members of group. He had been on death row for fifteen years.

To prove mental retardation, the defendant must have an IQ score between 70 and 75. It must also be proven that he/she has an adaptive deficit, and this must be registered as apparent before they reached the age of 18. Adaptive deficits consist of conceptual, social and practical difficulties that may have hindered them whilst growing up.

Defendant 2 had an IQ score of 71, but we had to prove that he had adaptive deficits. Conducting investigations with his brother, 2 sisters, aunt and ex-wife proved extremely fruitful. Through extensive interviews with these family members, we found that: conceptually, Defendant 2 was much slower than his siblings and it always took him longer to understand what was said to him. He hardly ever spoke and could not understand complicated vocabulary. If he needed something he would never ask, instead he would go without. Defendant 2 never initiated any activities himself; he was guided throughout his whole childhood regarding everyday tasks, and simple chores. This continued in his marriage also. Socially, Defendant 2 had no friends growing up. He followed others and was picked on, bullied, easily manipulated into doing things and often took the blame for his siblings. As a result of these issues, and many more, he had very low self-esteem. Practically, Defendant 2 did not know how to take care of daily activities, nor had the ability to maintain a safe environment for himself.

Such facts, alongside his IQ score indicated a very good case of mental retardation. All the evidence that we gathered was submitted by the attorneys in our office in a petition to the Court of Appeals two days before his execution was due. Defendant 2 obtained a stay from his execution, and his case was re-admitted for an evidentiary hearing. This was a huge success.

In visitation with Defendant 2 a couple of days later, he was thankful, largely to us and his lawyer, for his life. The work that we did enabled him to see his family again and continue to live the life that he had created for himself in jail. He described the moment when he was informed of his stay, after being taken to his death on November 14, 2008, and coming as close as requesting his last meal. If the hearing is successful, he may never be killed, but be committed to a life of imprisonment, which was all he asked for. *Atkins v Virginia* was not law when Defendant 2's case went to trial. However, his lawyers have had 16 years to raise the claim in his numerous appeals, but this was the first time that it was ever mentioned.

### Conclusions

These examples of our work highlight the kind of system that a law firm like the Texas Defender Service is facing. The death penalty is supposed to be reserved for the worst of the worst. No-one that I have met on Death Row fits these characteristics. The men that we have met showed complete remorse for what they did or even pleaded their innocence. If Texas Defender Service did not step in at this late stage and investigate issues that may save someone's life – issues that have never been investigated in the numerous years that inmates sit on death row awaiting their executions, then it would never be done.

The experience was greatly interesting and illustrated such a contrast from the legal system in the UK. The reality of a Western Democracy killing people in the name of justice is completely alien to us. We went to Texas opposing the death penalty, but not with any strong views or foundations to back this up. The experience that we had has cemented our view and enabled us to justify them on emotional and human grounds, and to fully understand the difficulties facing good lawyers in this field.