

No. 15-0205

**IN THE
SUPREME COURT OF TEXAS**

**In re David Dow,
*Relator-Petitioner,***

vs.

**The Texas Court of Criminal Appeals,
*Respondent.***

**Corrected Brief of Amicus Curiae of the
Texas Criminal Defense Lawyer's Association
Filed in Support of David Dow, Relator-Petitioner**

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TO THE JUSTICES OF THE SUPREME COURT OF TEXAS:

The Texas Criminal Defense Lawyers Association, by and through its duly authorized representatives, presents this Amicus Brief in support of David Dow, Relator-Petitioner, and would respectfully show this Honorable Court the following:

Statement of Interests

The Texas Criminal Defense Lawyers Association (TCDLA) is an association of over 3100 lawyers in Texas who practice criminal defense law. TCDLA's purpose is to protect and ensure by rule of law those individual rights guaranteed by the Texas and Federal Constitutions in criminal cases; To resist the constant efforts which are now being made to curtail such rights; To encourage cooperation between lawyers engaged in the furtherance of such objectives through educational programs and other assistance; And through cooperation, education and assistance to promote justice and the common good. TCDLA actively helps educate lawyers throughout the State by conducting over forty seminars a year. In the area of capital offense litigation, TCDLA created a specific consulting service for lawyers and provides specific training for capital litigators at the pretrial, trial and post-trial stages of capital litigation. TCDLA has been at the forefront of the development of capital murder educational programs since 1974.

Statement in Support

The Texas Court of Criminal Appeals' recent, one year suspension of Mr. Dow from appearing before it exceeds that court's statutory and legal authority to discipline an attorney. Admittedly, the Court of Criminal Appeals may discipline a lawyer for violating its rules, but the Court is limited to the statutory punishment for contempt or referral to the Office of Disciplinary Counsel, State Bar of Texas. The statutory punishment for contempt does not include a suspension from practicing before a Court.

Statement of Jurisdiction

This Court has jurisdiction to consider Mr. Dow's petition for writ of mandamus and request for a declaratory judgment pursuant to Article V, Section 3 of the Texas Constitution. Article V, Section 3 authorizes this Court to issue writs of mandamus "necessary to enforce its jurisdiction," even permitting the issuance of a writ of mandamus to the Court of Criminal Appeals. TEX. CONST. Art. V, § 3(a). This necessarily follows because only this Court has exclusive authority to regulate the practice of law pursuant to the State Bar Act, TEX. CONST. art. II, § 1; TEX. GOV'T CODE § 81.011; *see Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398-99 (Tex. 1979). Under the State Bar Act, this Court is bestowed with "administrative control over the State Bar and provides a statutory mechanism for promulgating

regulations governing the practice of law.” *State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994) (*citing* TEX. GOV’T CODE § 81.01).

Mr. Dow has no adequate remedy by appeal. Mandamus is his only remedy. *In re Coy Reece*, 341 S.W.3d 360, 54 (2011). Only this Court that can provide the relief to which Mr. Dow is constitutionally entitled.

Argument and Authorities in Support

No court has the authority to bar a lawyer from appearing before it. This Court should immediately terminate the suspension of Mr. Dow and eliminate the chilling threat that the Court of Criminal Appeals has communicated to the entire criminal defense bar by virtue of its unprecedented and unjustified suspension. This Court has adopted procedures for disciplining lawyers that guarantee due process and fundamental fairness, and those procedures must be afforded to all lawyers, including Mr. Dow.

In total contravention of this Court’s established procedures, the Court of Criminal Appeals summarily suspended Mr. Dow. As a result, its decision suspending Mr. Dow from appearing has two direct effects on the lawyers that the Court of Criminal Appeals purports to regulate. First, its action creates a chilling effect for all lawyers who seek to represent death-sentenced inmates pursuant to the requirements of the American Bar Association’s Guidelines for the Appointment and

Performance of Defense Counsel in Death Penalty Cases (Rev. ed. 2003), reprinted in 31 HOFSTRA L. REV. 913 (2003) and the State Bar of Texas' Guidelines and Standards for Capital Defense Counsel (2006), *reprinted in* 69 Tex. Bar J. 966 (Nov. 2006). ABA Guideline 10.15.1(B) requires that lawyers aggressively litigate claims in a pre-execution posture.

Second, if the suspension by the Court of Criminal Appeals is upheld, courts at all levels — including such minor courts as Justice of the Peace and municipal courts not of record — would implicitly believe that they have the power to banish licensed attorneys from practicing before them for running afoul of whatever local rule they might impose. In other words, the action of the Court of Criminal Appeals creates a serious potential for havoc, as the system may well become run according to the whims of judges, not the procedures established by this Court.

The suspension of Mr. Dow by the Court of Criminal Appeals is particularly egregious because Mr. Dow provides pro bono representation only to indigent death row inmates. Historically, few lawyers have agreed to represent death row inmates once their cases have been affirmed on direct appeal. During the 1970's and 1980's, post conviction lawyers who represented death sentenced clients did so on a volunteer basis. Lawyers like Will Gray and Marvin Teague often stepped up at the last minute to represent death row inmates who had been abandoned by their appointed lawyers

and were facing imminent execution. The ACLU or the NAACP Legal Defense Fund also took on representation in such cases.

During the mid-1980's, the Texas Resource Center was created to fill the void in the representation of death row inmates. When Congress de-funded the various resource centers around the country, the Texas Defender Service and various Innocence Projects around the State began filling the void.

In 2009, the Texas Legislature created the Office of Capital Writs, which handles state habeas cases and, depending on its budgetary constraints, takes on some pre-execution litigation (but only in the state courts as it is not authorized to litigate in federal court).

The American Bar Association, in conjunction with the federal judiciary, has created a program to recruit large civil firms to provide capital habeas representation on a pro bono basis. However, there are often not enough firms able to provide the representation required in Texas, which has the most active death row in the nation.

In the Southern District of Texas, Mr. Dow has been an active participant in this recruitment program by acting as a consultant to the civil lawyers volunteering to engage in pro bono representation of death penalty cases.

Despite these efforts, there still are not enough lawyers willing to engage in capital habeas representation. As execution dates approach, appointed lawyers still

abandon their clients. Mr. Dow and the Texas Innocence Network frequently step in to fill the void, often times at the eleventh hour.

Mr. Dow is dedicated to serving a segment of the population that few care to represent. For every failed post-conviction effort by a lawyer handling a death penalty case, the case ends with the client being killed at a pre-designated time and date on the lawyer's calendar, too often because prior counsel did not present a legal argument or issue which could have prevented the death of the human being, the client, who the lawyer by then knows on a first name basis.

The emotional toll of capital habeas defense work on even the best and most seasoned lawyers is real. *See, e.g.*, Susannah Sheffer, *Fighting for Their Lives: Inside the Experience of Capital Defense Attorneys* (Vanderbilt Univ. Press 2013). Lawyers describe feeling alienated from their peers, scarred and traumatized by the work of representing those the state executes in the name of justice. *Id.* at 86-113. Many lawyers who are willing to accept these cases at some point in their career ultimately elect to stop taking them for this and other reasons.

While the death of a client is a constant fear of the death penalty lawyer, lawyers are often mindful of the fact that death penalty cases have historically shaped the landscape for all criminal prosecutions. Unfortunately, the Court of Criminal Appeals has often been rebuked by the United States Supreme Court for its ruling in

death penalty cases. *See e.g., Adams v. Texas*, 448 U.S. 38 (1980); *Estelle v. Smith*, 451 U.S. 454 (1981) *Panetti v. Quaterman* 127 S.Ct. 2842 (2007), *Penry v. Lynaugh*, 492 U.S. 302 (1989), *Penry v. Johnson* 531 U.S. 1003 (2001), *Tennard v. Dretke*, 542 U.S. 274 (2004); *Smith v. Texas*, 543 U.S. 37 (2004); *Banks v. Dretke*, 540 U.S. 668 (2004); *Smith v. Texas*, 550 U.S. 297 (2007); *Abdul-Kabir v. Quaterman*, 550 U.S. 233 (2007); *Brewer v. Quaterman*, 550 U.S. 286 (2007). Lawyers like Mr. Dow have been at the forefront of this litigation in the fight for justice and due process.

Today, Mr. Dow is involved in fourteen federal habeas death penalty cases and has five cases pending in state court. He is an active consultant on countless others. Mr. Dow is an asset to the criminal justice system, as he has gone above and beyond the call of duty. He should be applauded and saluted, not suspended. Just as he fights to ensure that justice and due process are accorded his clients, Mr. Dow, if he is to be suspended from the practice of law in the Court of Criminal Appeals, is entitled to some semblance of due process through the mechanism envisioned by the legislature and adopted by this Court.

The transcript of the proceedings in the Court of Criminal Appeals reveals that it acted as witnesses, prosecutors, judges and appellate court at the same time. This multifaceted role is inconsistent with due process. The State Bar Act was created to protect the public and lawyers from such summary proceedings while the legislature

gave this Court the exclusive authority to suspend lawyers from the practice. That right was not conveyed to any other court.

Conclusion

Thus, TCDLA urges this Court to exercise its jurisdiction and insure that the suspension of lawyers rests solely with the process created by the State Bar Act.

TCDLA urges this Court to afford Mr. Dow the process that he is due.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rules of Appellate Procedure Rule 9.4(i)(3), I certify that this document complies with Rule 9.4(I) and contains 1,674 words excluding the parts specifically excluded by Rule 9.4(i)(1).

/s/ Stanley G. Schneider
Stanley G. Schneider

CERTIFICATE OF SERVICE

I certify that an electronic copy of this document has been served on Sian Schilhab, General Counsel of the Court of Criminal Appeals via an email to Sian.Schilhab@txcourts.gov on this 18th day of March 2015.

/s/ Stanley G. Schneider
Stanley G. Schneider