

To: Texas Indigent Defense Commission (TIDC)
From: Dallas County District Court Judges
Date: June 17, 2024
Subject: Response to TIDC Findings and Recommendations

Dear Texas Indigent Defense Commission Members,

We appreciate the comprehensive review and thoughtful recommendations provided in your recent report. The Dallas County Criminal District Court Judges are dedicated to ensuring the highest standards of legal representation for indigent defendants in capital cases. We submit this requested reply to your findings and recommendations for your consideration.

Finding Number One and Recommendation– *The Dallas County Criminal District Courts do not always appoint two attorneys in capital cases. In accordance with Article 26.052(e), the courts must either appoint two attorneys or the public defender in capital cases, unless the state gives notice in writing that it will not seek the death penalty.*

The report indicates that Dallas County District Court Judges have not consistently appointed two attorneys in death penalty cases as required by law. Specifically, the report highlights non-compliance with Tex. Code Crim. Pro. Ann. art. 26.052, which mandates the appointment of two attorneys for indigent defendants in capital felony cases, unless the state provides written notice that it will not seek the death penalty. While the Texas Indigent Defense Commission (TIDC) report highlights a legitimate concern regarding adherence to statutory requirements, it is crucial to consider jurisprudence related to this type of appointment and the Dallas County District Attorney's position on seeking death as punishment for capital murder. In this regard, we point you to the harmless error analysis applied in caselaw referenced below in addition to the current prosecutorial practice of not seeking the death penalty.

The last capital case where the death penalty was sought in Dallas County was a 2015 case, wherein the decision to seek death was made by a prior administration. *See State of Texas vs. Kristopher Love*, F15-76400. In January of 2021, the Dallas County District Attorney signed an open letter to President Biden in support of abolishing the federal death penalty. *See* Endnote 1. This stance on the death

penalty aligns with a broader movement towards criminal justice reform. *Id.* His advocacy against capital punishment, as seen in his letter urging federal legislative efforts to abolish the death penalty, underscores a commitment to ending this practice. In this context, the trial court's decision to appoint only one attorney aligns with the DA's established practice and stance on not seeking the death penalty.

Furthermore, this written stance and practice related to not seeking the death penalty would establish that failure to appoint two attorneys could not result in harm to defendant's substantial rights in capital cases. (See *Hughes v. State*, 24 S.W.3d 833 (Tex. Crim. App. 2000) and *Kirk v. State*, 199 S.W.3d 467 (Tex. App.- Ft. Worth 2006, pet. ref'd)). In the case of *Hughes v. State*, the Texas Court of Criminal Appeals addressed the issue of non-compliance with article 26.052. The court held that failure to comply with this article is subject to a harmless error analysis under Texas Rule of Appellate Procedure 44.2(b). This means that even if a death penalty defendant was not represented by two attorneys, the error does not automatically warrant a reversal of the conviction unless the defendant can show that the error affected his substantial rights. Further, in the case of *Kirk v. State*, 199 S.W.3d 467 (Tex. App.- Ft. Worth, 2006, pet. ref'd), the court of appeals addressed the trial court's failure to appoint a second, death-qualified attorney to represent the appellant, despite a 17-month period during which the appellant was charged with capital murder and the State had not yet waived the death penalty in writing. The court in *Kirk* performed a harmless error analysis under Tex. R. App. P. 44.2(b). The analysis determined that the failure to appoint a second attorney did not affect the appellant's substantial rights.

Given the clear and consistent stance against pursuing the death penalty, as evidenced by the prosecutorial discretion exercised in capital cases to date, the trial court's decision to appoint only one attorney for cases previously considered death penalty capital cases can be seen as aligned with the current prosecutorial practices in Dallas County. This approach acknowledges the notice provided by the District Attorney's written statement and ensures judicial resources are utilized in a manner consistent with contemporary prosecutorial practices.

It is acknowledged that the TIDC's finding underscores adherence to statutory requirements regarding the appointment of attorneys in death penalty cases. The Criminal District Court Judges in Dallas County will take steps to adhere to the

requirements as set forth by Tex. Code Crim. Pro. Ann. art. 26.052 and as dictated in the TIDC's finding, whenever possible. To the extent TIDC feels strict adherence is mandated for compliance, regardless of the state of the law related to the appointment of two attorneys in capital cases, please advise.

Finding Number Two and Recommendation – *The Dallas County District Courts do not always make a finding of good cause on the record for appointing private counsel in capital cases. If private counsel is appointed, the courts must make a finding of good cause on the record. Dallas County has a standard form for this good cause finding.*

The Texas Indigent Defense Commission has noted that Dallas County Judges have not consistently recorded findings of good cause when appointing non-public defenders in capital cases, as required by Tex. Code Crim. Proc. art. 26.04(f). This requirement is crucial for ensuring transparency and accountability in judicial appointments. While there may be questions about whether lack of documentation in the court file stating good cause are related to clerical errors, *i.e.* lost scans, computer errors associated with the switch to Odyssey, *i.e.* lost data, or judicial oversight, the judges have been reminded of their obligation to make and document these findings. The Judges are committed to adhering to the statutory requirements, reflecting their dedication to upholding the principles of impartiality and integrity. The judiciary's intent is to maintain procedural adherence and transparency, ensuring that all appointments are justified and properly documented.

It is notable with regard to this finding, that the Judges recently learned that the dataset provided to TIDC contained numerous errors identifying appointed counsel appointed in capital cases for the period audited by TIDC. (See Response to Finding 3 below for the explanation of how the data was inaccurate). After researching this finding and identifying appointed trial counsel there are far fewer instances where the Court did not enter a good cause finding than what was noted by the Commission in their audit. The Commission noted 49 instances where a finding of good cause was entered, and our audit showed 56 instances where a finding of good cause was entered for the data set reviewed. See Endnote 2. This underscores the fact that the trial courts have been in compliance with the

statutory requirements more consistently than noted in finding two. The Judges are committed to continuing this practice in the future.

The Judiciary acknowledges, for the reasons stated above, that there are instances where a finding was likely not entered. The Judiciary remains focused on meeting these requirements to uphold the integrity of the judicial process. Moving forward, the judges are dedicated to entering this finding consistently, thus maintaining public trust and confidence in the judicial system.

Finding Number Three and Recommendation: *When appointing private counsel in capital cases, the Dallas County District Courts do not always appoint from the list approved by the First Administrative Judicial Region. If private counsel is appointed, the courts must appoint an attorney approved for first chair by the First Region's Local Selection Committee.*

TIDC has raised concerns regarding the appointments of counsel not from the death-penalty approved list maintained by the First Administrative Judicial Region. As referenced in finding two above, it is crucial to note with regard to this finding, that the dataset provided to TIDC contained numerous inaccuracies. When Commissioner Price, who initiated the audit, recently published the results of the Commission's findings in Commissioners Court several statements were made which prompted further research into the findings in the report. It was then determined that the AIS report provided to the Commission was incorrect. We took steps to determine what caused the inaccuracies, but IT was unable to recreate this list and could not determine what occurred.

To conduct the audit, TIDC requested a report from Adult Information System (AIS). Upon request, IT was asked to print a list of the Capital and First Degree wheel appointments for the period from October 2020 through September 2022 (FY21 and FY22). This would include the case number, offense (if available), defendant name, and appointed attorney as noted in the AIS system. The list provided by IT, using these criteria, was given to TIDC for the Audit. After reviewing this data, post audit, it has been determined that AIS either pulled the last appointment on each capital murder case and not the initial appointment or pulled random data from another case and not the capital murder case that was published on the list or it pulled the correct data. This would mean that in many circumstances the appellate

attorney appointed was the person identified on this list and not trial counsel, or the wrong counsel who was associated with an entirely different case was pulled and included on the list.

In our review and response to this finding, it is crucial to consider current legal precedents. To do so, it is essential that we take into account the Court of Appeals' decision in *Arevalo v. State*, particularly regarding the appellant's assertion of receiving ineffective assistance of counsel (See *Arevalo v. State*, No. 05-18-00126-CR, 2019 WL 3886650 (Tex. App.—Dallas Aug. 19, 2019, pet. ref'd) (mem. op., not designated for publication)). In *Arevalo*, appellant was convicted of capital murder by a jury, and the trial court sentenced him to life imprisonment without the possibility of parole. On appeal, the appellant argued that his defense counsel's performance was deficient for accepting the appointment, as at the time, the counsel was not qualified for appointment under article 26.052 of the code of criminal procedure. *The Court of Appeals clarified that article 26.052 specifically pertains to death penalty cases, which was not applicable in this instance.* Additionally, the court noted that while there was no written waiver of the death penalty in the record, there was also no indication that the State was seeking the death penalty. Therefore, the court found no support for the claim that the defense counsel's performance fell below an objective standard of reasonableness due to being unqualified for the appointment. Consequently, the appellant's claim of ineffective assistance of counsel based on article 26.052 was deemed unsuccessful.

In light of the *Arevalo v. State* decision, it is evident that the Court has acknowledged that the qualifications for appointed counsel under article 26.052 of the code of criminal procedure apply exclusively to death penalty cases. This supports the position that it is not an error for the trial court to appoint counsel who is not on the death penalty qualified list, provided the State does not seek the death penalty. Thus, the trial court's appointment of counsel as referenced in this finding aligns with *Arevalo*, which acknowledges that the specific qualifications mandated by article 26.052 are irrelevant in non-death penalty cases.

The judiciary's intent with regard to appointments in capital cases, however, is to maintain the highest standards of legal representation in capital cases, ensuring that defendants receive competent and qualified counsel. Judges are fully aware of their responsibilities and are dedicated to making appointments that align with this statutory requirement. This commitment is consistent with the principles of

fairness and justice that underpin the judicial system. The Judges acknowledge this necessity and believe a valid basis exists to appoint attorneys from this approved list and are dedicated to adhering to this mandate moving forward.

Conclusion

We value TIDC's guidance and are dedicated to implementing best practices for the appointment of counsel in capital cases. We have made the necessary procedural corrections to ensure full compliance with legal requirements and to enhance the effectiveness and fairness of our indigent defense system. We look forward to continuing our collaboration to improve legal representation for all defendants.

Sincerely,

Stephanie Huff
Local Administrative District Court Judge on behalf of the Dallas County Criminal
District Court Judges

Endnotes

1. [Fair and Just Prosecution] ([FJP-Biden-Death-Penalty-Joint-Letter.pdf](#)
([fairandjustprosecution.org](#)))
2. Data reviewed consisted of 111 of the cases on the list or two-thirds of the cases reported.

UPDATED JANUARY 26, 2021



January 25, 2021

President Joseph Biden
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

cc:

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The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

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U.S. Department of Justice
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Ambassador Susan Rice
Assistant to the President for Domestic Policy
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Dear President Biden:

We are a group of current and former elected prosecutors, Attorneys General, and law enforcement leaders, and former United States Attorneys, Department of Justice (DOJ) officials and judges, writing to urge you to begin your administration by making your commitment to justice clear: immediately take all actions within your power to end the federal death penalty once and for all. We applaud your stance against the death penalty and also believe that this is a critical moment in our nation for action. We need definitive and lasting steps that go beyond a moratorium that future administrations can readily undo. As such, we call on you to take action in a multifaceted and expansive way to: commute the sentences of all those on federal death row and withdraw current death penalty warrants, dismantle the death chamber at Terre Haute, encourage DOJ leadership to instruct all federal prosecutors to not seek the death penalty in future cases, support and incentivize state efforts to end capital punishment, and support legislation to end the federal death penalty.

Over the past year, we witnessed thirteen federal executions, all an assault on human dignity and an affront to American values. This killing spree laid bare the unacceptable injustices embedded in our nation's use of the death penalty: we watched as our government killed people with severe intellectual disabilities, people who had worked for decades to take responsibility for their crimes

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and rehabilitate, and a woman with an unspeakable history of abuse and trauma. These tragedies demand bold and definitive action. And at a time when racial injustice, trust in law enforcement, and our nation's reputation in the eyes of the world are all in dire need of repair, anything short of these steps would fail to move our nation forward or attend to these pressing crises. We should not leave the lives of all people still on federal death row — and many more who will become entangled with the federal system — in the hands of future administrations. Nor should we continue to part company with other Western democracies in our willingness to implement a failed death penalty system. We ask you to choose justice, mercy, and compassion for our nation.

Many have tried for over forty years to make America's death penalty system just. Yet the reality is that our nation's use of this sanction cannot be repaired, and it should be ended. The death penalty raises serious concerns in tension with the constitutional ban against cruel and unusual punishment and the guarantees of due process and equal protection under the law.¹ It is unequally and arbitrarily applied, ineffective at improving public safety, and a waste of taxpayer resources; and its use presents the perilous risk of executing an innocent person.²

We also now know that we have not executed the worst of the worst, but often instead put to death the unluckiest of the unlucky — the impoverished, the poorly represented, and the most broken. Time and again, we have executed individuals with long histories of debilitating mental illness, childhoods marred by unspeakable physical and mental abuse, and intellectual disabilities that have prevented them from leading independent adult lives. We have executed individuals with trial lawyers so derelict in their duties and obligations that they never bothered to uncover long histories of illness and trauma. We have also likely executed the innocent.³

Race also plays a deeply disturbing and unacceptable role in the application of the death penalty. Studies have documented that defendants of color are disproportionately likely to be sentenced to die — this is particularly and uniquely true when the victim is white.⁴ The pernicious and racially disparate legacy of the death penalty is incontrovertible: people of color have accounted for a disproportionate 43% of executions in the United States since 1976, and 55% of defendants currently awaiting execution are people of color.⁵ Moreover, there are stark disparities in executions relative to the race of the victim: since 1976, a total of 21 white defendants were executed for crimes perpetrated against a Black victim; in contrast, in that same time period, 297 Black defendants were executed for crimes perpetrated against a white victim. Strikingly, while about 76% of all death penalty cases involve white victims, only one-half of all murder victims are white.⁶ This research underscores the systemic racism evident throughout our justice system.

The federal government should not ignore these issues in the best of times, but these concerns are especially acute in the midst of a global pandemic and calls for racial justice that have led to an ever-deepening erosion of trust in government and our criminal legal system. Our nation's use

¹ ACLU, *The Case Against the Death Penalty* (available at <https://www.aclu.org/other/case-against-death-penalty>).

² *Id.*

³ Andrew Cohen, *Yes, America, We Have Executed an Innocent Man*, *The Atlantic*, May 14, 2012 (available at <https://www.theatlantic.com/national/archive/2012/05/yes-america-we-have-executed-an-innocent-man/257106/>).

⁴ ACLU, *Race and the Death Penalty* (available at <https://www.aclu.org/other/race-and-death-penalty>).

⁵ Death Penalty Information Center, *Executions by Race and Race of Victim* (available at <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim>).

⁶ *Id.*

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of the death penalty separates us from many other democratic nations. Germany abandoned the death penalty after the Holocaust and enshrined protecting human dignity as a core value of its justice system. Italy abolished the death penalty to reckon with the horrors of fascism. Abolition of the death penalty was part of how these nations said “never again” to atrocity and oppression – and it is time for our nation to revisit its place in this history.

For all these reasons, we ask you to not only support federal legislative efforts to end capital punishment, but to take all steps in your power to disassemble the machinery of death and ensure future presidents cannot execute the dozens of people on federal death row at will. Every individual who remains on death row remains in peril. Every federal prosecutor who still seeks death sets in motion the wheels of a failed system and the government-sanctioned taking of the life of a fellow American. And keeping intact the death chamber at Terre Haute leaves the stage still set for unspeakable cruelty that says more about *us* as a society than it does about those we execute.

We call on you to begin your administration with these bold steps towards mercy and justice.

Most respectfully,

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Phil Weiser

Attorney General, Colorado

CauseNumber	FirstName	LastName	Attorney First Name	Attorney Last Name	Attorney Actually Appointed/Good Cause Order
F2076410	CHRISTOPHER	GONZALEZ	Stephen	Duplantis	Order for good cause appointing Edwin King
F2076409	CHRISTOPHER	GONZALEZ	Stephen	Duplantis	Order for good cause appointing Edwin King
F2015490	ISIAIAH	MAGANA	Thomas	Gatlin	Order for good cause appointing Andrea Handly
F2076672	Shaun	Mack	Stephanie	Hudson	Good cause order appointing Stephanie Hudson
F2076607	EMBRAY	TAYLOR	Jens	Bakker	Good cause order appointing Richard Franklin
F2077068	ISZALYN	STARKS	CHRISTOPHER	COKER	Good cause order appointing Richard Franklin
f2077110	NITA	VASQUEZ	Brian	Salvant	Good cause order for Heath Harris
f2132817	CODIE	MCCRORY	Mike	Howard	Good cause order appointing Juan Sanchez
F2132818	LESLIE	CURTIS	Bree	West	good cause order appointing Robbie McClung
f2115491	DOMINIQUE	ROBINSON	richard	franklin	Good cause order appointing Reed Prospere
F2115492	DOMINIQUE	ROBINSON	richard	franklin	Good cause order appointing Reed Prospere
F2175200	TRISTIN	HOWARD	heath	harris	Good cause order appointing Heath Harris
F2175010	TERRELL	PERSLEY	Catherine	Bernhard	Good cause order appointing Catherine Bernhard
F2175038	JOSHUA	SCOTT	Patty	Tress	Good cause order appointing John Tatum
F1976769	JONATHON	MANCIAS	Mark	Watson	Good cause order appointing George Ashford
f2115497	MARTIN	REYES	Ray	Jackson	Good cause order appointing Phillip Hayes
F2175283	KYLE	FLANAGAN	Tyler	Carleton	Good cause order appointing Heath Harris
F2175500	BRANDON	SHAW	Phillip	Linder	good cause order for Phillip Linder
F2175501	DERRICK	LANE	John	Avery	Good cause order appointing George Ashford
F2076181	JOHN	MILLS	Paul	Johnson	Good cause order appointing Paul Johnson
F2133496	MADISON	MCDONALD	terrance	downs	Good cause order appointing Catherine Bernhard
F2133495	MADISON	MCDONALD	terrance	downs	Good cause order appointing Catherine Bernhard
F2076605	LAQUITA	STEWART	Matthew	Espinosa	Good cause order appointing Andrea Handley
F2120557	NORMAN	COLLIER	curtis	lilly	Good cause order appointing Phillip Hayes
F1977004	SHURANDA	WILLIAMS	Reynie	Tinajero	Good cause order appointing George Ashford
F2176037	TROYSHAYE	HALL	richard	franklin	Good cause order appointing Richard Franklin
F2176203	KEJUAN	LEWIS	Teresa	Hawthorne	Good cause order appointing Paul Johnson
F2076986	ARMANDO	LIMONGUTIE	Reynie	Tinajero	Good cause order appointing Reynie Tinajero
F2125071	GABRIELA	TORRES	sindhu	alexander	Good cause order appointing Juan Sanchez,
F2125070	KVAUGHANDE	PRESLEY	sindhu	alexander	then good cause order appointing Bill Cox III
F2075253	JOSIAH	SALINAS	Lalon	Peale	Good cause order appointing Heath Harris
F1775299	Latwon	Goff	Lawrence	Mitchell	Good cause order appointing Lalon Peale
F2175987	DARRIYNN	BROWN	John	Teter	Good cause order appointing Heath Harris
F2076481	DEVIONNE	HITCHENS	Neil	Pask	Good cause order appointing Edwin King
F2141635	JEREMIAH	JACKSON	Bree	West	Good cause order appointing Lalon Peale
F2075935	LAYSHA	GARCIA	jeff	lehman	Good cause order appointing Gary Unell
F2176636	JAMAIL	MARTIN	John	Read	Good cause order appointing Reed Prospere
F2042026	JAMES	BROWN	Phillip	Barton	Good cause order appointing Heath Harris
f2141785	TIMOTHY	JOHNSON	Bree	West	Good cause order appointing Paul Johnson
F2141786	DONTERIOUS	LOCKHART	David	Pire	Good cause order appointing Lalon Peale
F2141795	NICHOLAS	MAYBERRY	Janet	Traylor	Good cause order appointing Edwin King
F2075474	JAMES	DAVIS	gina	clark	Good cause order appointing Gina Clark
F1976490	DONDI	TURNER	Karen	Lambert	Good cause order appointing Juan Sanchez
F2176934	JANIYA	MILLER	Paul	Johnson	Good cause order appointing Paul Johnson
F2177009	EDGAR	RAMIREZ	Erin	Hendricks	Erin Hendricks appointed; Good cause order appointing Paul Johnson
f2176935	JAMES	LEVELS	Lalon	Peale	Good cause order appointing Lalon Peale
F2176933	JACOBY	TATUM	curtis	lilly	Good cause order appointing "Edwin King but Retained P. Barrett"
F2275132	DARREN	HANSON	Clayton	Smith	Good cause order appointing Catherine Bernhard
F2275063	AUZHANA	REESEDRAYDI	Doyle	Bunch	Good cause order appointing Paul Johnson
f2100336	STEVEN	DANIELS	Kristin	Brown	Good cause order appointing Don Guidry

F2240367	JOHNATHAN	PYLE	Paul	Johnson	Good cause order appointing Paul Johnson; Nigel Redmond retained
F1876862	CHRISTOPHER	WHITLEY	stuart	parker	Good cause order appointing Edwin King
F2275177	DEARIUS	BRADLEY	Leigh	DeMasi	Good cause order appointing Juan Sanchez
F2275274	EDWARD	MORGAN	Sherrod	Edwards	Good cause order appointing Sherrod Edwards
F2275687	HENRY	INGRAM	Paul	Johnson	Good cause order appointing Paul Johnson