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State Bar of Texas Appellate Section Report

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Volume 28, Number 3 Spring 2016
AND THE LIGHT GOT IN:
FROM HABEAS VOLUNTEER TO FULL-TIME CAPITAL WRITS ATTORNEY

Gretchen Sween

Ring the bells that still can ring
Forget your perfect offering
There is a crack in everything
That’s how the light gets in.

— Leonard Cohen, “Anthem”

Singer-songwriter Leonard Cohen released The Future on November 24, 1992. Since my husband was a long-time fan, he commenced playing it obsessively shortly thereafter, much to my dismay. But one song in particular, “Anthem,” resonated with me—then and now. “Anthem” reminds the listener that perfection is illusory; everything has a crack in it, yet, in the end, the crack is “how the light gets in.” In other words, the vessel that delivers the prospect of real progress is also damaged goods.

This essay describes how a decision to take on a pro bono appellate matter allowed the light to get in—thereby changing the course of my professional life rather dramatically.

I could take some poetic license and insist that the story begins when Cohen’s song inspired me to abandon my self-absorbed dreams of leading an experimental theater revolution in the wilds of Dallas, Texas and go to law school. After all, I should have recognized back then that I could effect social

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1 Gretchen Sween is a senior attorney with the Office of Capital and Forensics and a member of The University of Texas School of Law adjunct faculty. This essay expands upon an account published by The Marshall Project, available at https://www.themarshallproject.org/2015/12/17/raphael-holiday-was-put-to-death-and-his-lawyers-should-have-tried-harder-to-stop-it#.oMKKc1MEY. She is grateful to The Appellate Advocate for its interest in this story.
change and improve lives more easily with a law degree than performing shows in Deep Ellum basements before audiences the size of the Luckenbach public school system. But in truth, I continued to beat my head against a decidedly artsy wall for several more years, devoting most of my energy to quixotic theatrical endeavors while earning a meager living juggling part-time jobs as a teacher and freelance writer. I only decided to throw in the towel and head to law school nearly eight years after “Anthem” was released. I was then thirty-six.

Also, I cannot claim that I decided at last to head to law school because I’d finally recognized that I wanted to be a public interest lawyer. I was instead motivated by the basest of motives: the desire for a steady paycheck. I was tired of combatting the unstated assumption that seemed to follow me around—that I must be a deeply flawed individual considering my failure to parlay so much liberal arts education into an annual income barely above the federal poverty level.

As a neurotic Bohemian misfit, self-conscious about having achieved so little by “a certain age,” I entered law school with a discernible chip on my shoulder. In commencing my time at The University of Texas School of Law, I felt that I’d made a wrong turn in Albuquerque and thus found myself trapped in halls full of enterprising youngsters well-schooled in the ways of white-shoe firms. My disorientation did not, however, mean that I successfully resisted the urge to mouth off in class about what I saw as the irrational presumptions underpinning so many core legal concepts—like the notion that juries can be instructed to apply an objective “reasonable man” standard to assess whether someone, serving as a stand-in for a corporation, had been negligent in leaving macaroni salad on a grocery store’s floor.

I found our introductory Criminal Law class particularly unbearable. Even developments that were considered progressive—such as the attempts to distinguish among different degrees of culpability through concepts like first- and second-degree murder—seemed so retrograde. When it came to crime and punishment, the law appeared to afford little
room for nuance, science, and compassion. Legal rules were permitted to trump the consensus teachings of neuroscience, sociology, psychology, and the humanities. And the law was ill-equipped to account for a criminal defendant’s social history, drug addiction, mental illness, or intellectual disability in assessing guilt or doling out punishment. For instance, then and now, in most jurisdictions, those accused of crimes could only be found “not guilty by reason of insanity” if they could prove that, when the crime was committed, through no fault of their own, they were so impaired that they could not tell the difference between their victim and a grapefruit.

Moreover, back when I started law school, it was perfectly legal in many states, including Texas, to execute someone who had mental retardation; who had committed the crime in question as a teenager; who was so psychotic he thought the devil had arranged for the warden to pump ozone into the cell to control his thoughts and prevent him from preaching the Gospel; who had never had much of a chance due to multi-generational poverty, racism, drugs, and rampant violence in the home; or whose appointed lawyer had slept through the trial or failed to put on any mitigation case whatsoever. Back then, as now, Texas was busily executing the lion’s share of those in this nation who had been sentenced to death. And I was appalled.

The disorientation caused by one semester of Criminal Law had made me categorically certain about one thing: No way in hell was I interested in a career in that particular practice area. Despite my attraction to various progressive causes—such as constitutional challenges to institutional discrimination and to the arbitrary imposition of the death penalty, I eventually kept my head down, worked hard, and ended up with a job clerking for a well-respected, tough-on-crime, Republican-appointed, federal district court judge to be followed by a full-time job with an elite civil litigation boutique that specialized in complex commercial disputes. A success story, yes?

Years later, at the end of 2015, I agreed to represent a death-sentenced indigent named Raphael Holiday pro bono. As a
result, my whole notion of success changed—and, once again, as did my career trajectory.

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When I got a call from one of the directors of UT Law’s Capital Punishment Clinic, I was busy putting some finishing touches on a brief explaining why certifying a merger class against our client, the acquiring company, was at odds with all of the requisite factors as well as common sense. The distraction was welcome.

“Gretchen, Jim Marcus here. I may have a case for you, if you’re interested. It’s kind of a desperate situation.”

Jim told me about Raphael Holiday and how he was already “under warrant,” meaning an execution date had been set. It had been set for November 18, 2015—and it was then already mid-October. Apparently, Raphael had been writing to lawyers all over the country seeking help after his appointed counsel had told him that they did not intend to do any more work for him. Apparently, they had sent him a letter with the news and suggested that he try finding a public interest group or volunteer lawyers who might be willing to help him instead.

Raphael’s efforts to find new lawyers to volunteer under these circumstances had proven fruitless. Therefore, on September 14, 2015, he wrote directly to the court: “Your honor, I beg you to consider new appointment of effective counsels to my case. They have refused to help me and it is a disheartening conundrum I am not fit to comprehend.” He also noted that he had been treated with “hostile verballity from these two attorneys” and the attorney-client “relationship [was] no longer functional in a way that was productive for either [of the] parties.” He beseeched the district judge to appoint new lawyers so that he might at least try to pursue clemency before it was too late. At that point, the only avenue seemingly still available to Raphael was a clemency application. And under Texas law, the deadline for such an application is cued off of an execution date. Thus the clock had already been ticking when Raphael turned to the court for help.
His appointed lawyers filed a response, opposing their client’s request. They admitted that they did not intend to pursue clemency on his behalf. They justified that decision with the bald assertion that, “given political realities, there is no chance at all that a clemency petition would be granted.” They also sought to assure the court of their commitment by stating that they had “filed (and were granted) a stay of execution the day before the execution was to take place in” the case of Clifton Williams, another one of their death-sentenced clients. That assertion, however, proved to be untrue—as was their insistence that Raphael had no basis for further legal appeals. But at this point, Raphael was on his own and had no one to expose his appointed lawyers’ misstatements. The district court accepted the representations made by Raphael’s appointed lawyers—trusting that they, as officers of the court, were telling the truth. The court denied Raphael’s pro se request without a hearing based on the representations of his appointed lawyers.

Not knowing that the district court had already ruled against him—because his lawyers had not told him—on October 15, 2015, Raphael wrote a second letter to the district court. The letter expressed urgency, explaining that his appointed lawyers had said they would do “NOTHING ELSE.” By then, as Raphael explained, he had gotten some responses to his letters, but no one was willing to take over unless his appointed lawyers would agree to step down. Apparently, his appointed lawyers had responded to this development, as Raphael told the court, by “fighting to stay on” and “demanding” that he give them “the legal work that others have done on my behalf.” In other words, his appointed lawyers were unwilling to withdraw or do further work, but they seemed willing to take credit for work others might do for free even as they insisted there was nothing more that was worth doing.

All this had happened before I’d gotten that call from Jim Marcus.

I told him I would think hard about it.

Aside from conferring with Jim about the basic posture of
the case, I had some due diligence to do. I recognized that I needed to have some understanding of the criminal allegations that had been pursued so as to put Raphael Holiday on death row. Even though I was not going to be addressing questions relevant to the underlying conviction, I needed to know what the State would be invoking in the likely event that it would oppose the appeal. What I learned was harrowing. Raphael Holiday had been convicted of three counts of capital murder as a result of the deaths of three young girls, the youngest of which was his biological daughter. She was only 18 months old at the time. The fire had consumed a log house in the woods in Madison County. Raphael had been living in that log cabin with the mother of those three girls, until she had had the law turn him away. Each of the girls had a different father. Raphael, the father of the third girl, had recently been rejected for a new lover. She was white; Raphael—and his predecessors and the new boyfriend—were black. This was in southeast Texas where it is not uncommon to see Confederate flags plastered on the backs of pick-up trucks below visible, well-appointed gun racks.

The night of the fire, Raphael had confronted his former girlfriend. It was nearly midnight when he appeared on the scene in a rage over allegations that he had sexually molested the eldest child. The girls’ mother called her aunt, who lived just down the road, to come intervene. This other woman and her brother arrived with a shotgun. Then the story gets very confusing. Raphael pulled out a pistol; his girlfriend ran out the back of the house; the uncle then ran off—and later ran into his niece with some other man in the woods. Meanwhile, the aunt was left behind with Raphael and his gun. The aunt ended up splashing gasoline, retrieved from her house, all over the house. The stories differ about how the fire started and why three little girls were left inside when it went up in flames. When the fire erupted, Raphael had fled the scene in the aunt’s car. But because a cop was already waiting there on the dirt country road, he was quickly apprehended and arrested just before the car too burst into flames.

Not even these scant details were available as a result of an
Internet search, but I was able to learn enough to know that the end result was horrible: three children burned alive. An Internet search also yielded a picture of a rail-thin young mother with three little girls—an image that I later learned had been blown up into a large poster and used as a trial exhibit.

Looking at an image of those three beautiful little girls made me physically ill. But I also recognized that the events that had caused their untimely deaths had little to do with the legal principle I was being asked to fight for now, sixteen years later. Nor did my client’s guilt or innocence or even the constitutionality of his sentence have anything to do with the issue at hand: his right to conflict-free counsel on the eve of his execution. I took some deep breathes and stiffened my resolve.

What I was willing to do for Raphael Holiday was quite circumscribed. I did not feel qualified to take on full responsibility for his representation. I was not a criminal lawyer, let alone a death-penalty specialist. Moreover, I was rather terrified by the fact that he had a looming execution date less than a month away. But because, or in spite, of the dire circumstances, I thought I could handle an appeal intended to address a fairly discrete legal issue. More specifically, I would be making a statutory construction argument. I would be asking: under the relevant federal statute, the Criminal Justice Act provision that provides for appointment of counsel in death cases, wasn’t this man entitled to new court-appointed lawyers since his current court-appointed lawyers had told him that they did not intend to do any more work for him even while admitting that there was, in principle, at least one more possible remedy—which he wished to pursue? And then there was an ancillary issue: what were the implications of the fact that his current appointed counsel had taken steps to block his pro se efforts to replace them after they had expressly told him to seek out other lawyers who might be willing to help him on a pro bono basis?

I needed to see if Raphael Holiday would accept that I would only be undertaking an appeal of the district court’s ruling on his pro se motion and seeking a stay of his execution so that, if the appeal succeeded, the relief would be meaningful. That
is, the goal would just be to preserve his right to obtain new appointed lawyers who would be willing to pursue any relief still available to him before time ran out. If his execution date was ultimately withdrawn, that would automatically reset key deadlines that were rapidly approaching, including the deadline to file a clemency application with the State’s executive branch. A stay would be the only way substitute counsel would have a chance to step in and do the kind of investigation and extra-legal drafting that a clemency application would require.

To make sure that we were on the same page, I arranged to have Dick Burr, a veteran capital-defense lawyer who had access to death row, meet with Raphael to discuss the arrangement. I could not simply call Raphael up or shoot him an email at the Polunsky Unit in Livingston, Texas as I was used to doing with my commercial clients. So I needed an intermediary. Apparently, Raphael was thrilled by the idea. He agreed to the terms, and an attorney-client relationship between us was formed. We both signed an engagement letter clarifying the limited scope of what I was agreeing to do. Then I got to work.

As soon as I filed a notice of appeal on his behalf, Raphael’s appointed lawyers reacted to this development by first offering to withdraw—but only if I would agree to take on the entire representation pro bono. After I explained that that was not what I had been retained to do, they tried a different course. That night, they filed a motion to reopen litigation in the district court—asking the judge to order me to take over the whole case pro bono and to abandon the appeal. When that effort failed, decorum was largely abandoned. Raphael’s appointed lawyers alternatively threatened to pursue sanctions against me if I did not dismiss the appeal and proposed that I ghost-write a clemency petition, again pro bono, for their signature. In a matter of days, they reversed course yet again, promising the district court that they would put together a clemency application after all—even though, by then, the deadline was only a few days away and they had not undertaken any investigation or even spoken with Raphael about their intentions. The district court, however, decided that their pledge to file something was sufficient.
The court denied my motion to reconsider Raphael’s request to have new lawyers appointed and denied the request to stay the imminent execution date so that new lawyers would have a reasonable opportunity to pursue clemency in accordance with standards promulgated by both the ABA and the State Bar of Texas.

Time was flying by far too quickly. I immediately filed an amended notice of appeal and prepared to move forward in the Fifth Circuit with an appellant’s brief and a motion to stay the execution.

Meanwhile, Raphael’s appointed lawyers threw together a clemency application in a 48-hour period—without Holiday’s knowledge or input. They were seemingly determined to moot the appeal. But the clemency application, which I obtained from Raphael’s bewildered mother, reflects precisely what one would expect from those who had disavowed any belief in the endeavor and who had been fighting against their own client’s efforts to obtain a stay of his execution. On the first page, they twice misreported the execution date as “February 18, 2015”—a date that had passed seven months earlier. Most of the sham application is a description of the gruesome details of the crime, lifted virtually verbatim from a Texas Court of Criminal Appeals decision from 2006. That same material—that no rational person could suggest was prepared to evoke a sense of mercy—was later quoted in full in the State’s appellee’s brief opposing our motion to stay. Only buried in affidavits, prepared years ago for other proceedings as a result of the work of other lawyers, can one find descriptions of the horrific abuse to which Raphael was subjected throughout his childhood. The sham application’s superficial bulk was derived from required attachments, ten-year-old affidavits, and an academic article that had nothing to do with Raphael or his quest for clemency.

The only “original” material was a short, required victim-impact statement, a paragraph drafted in such a way that it seemed calculated to stick a knife in the client’s back: “It is not possible to address the impact of this crime on the family of the children killed,” they wrote. “Neither Raphael nor
his attorneys have had any communication with them.” But one victim of the crime was the grandmother of one of the children, Angella Nickerson, who was also Raphael’s mother. Raphael’s appointed lawyers had been in communication with her—prompting pointed anguish over their refusal to pursue clemency for her son and then their eleventh-hour attempt to manufacture the appearance of a clemency application. Mrs. Nickerson is part of the larger untold story of extreme poverty, degradation, and virtual torture that characterized Raphael’s childhood that may have shed some light on a devastating event that had occurred 16 years earlier when he was 20 years old. That story had not been fully investigated or told—nor had the story of his transformation during years spent in prison haunted by the spirits of three lost innocents.

Because, in my view, the clemency application was a sham, I pushed forward with the appeal to secure meaningful representation for my client as I had pledged to do. By then, further investigation had revealed that Raphael also had additional legal claims that his appointed lawyers seemed to have forgotten about. I also learned that the argument they had made to the district court as proof of their willingness to zealously represent Raphael involved a significant misrepresentation. They had claimed that, when an additional avenue of relief had manifested itself in another case, they had “not hesitated” to seek relief and had even obtained a stay of execution for their client Clifton Williams. Yet by the time I was preparing my Fifth Circuit brief, I knew that this representation made to a federal judge in a public filing was false. An entirely different lawyer, who had been appointed by a state court judge after these same lawyers had abandoned Mr. Williams, had found a forgotten basis for relief and had obtained the stay, not his federally appointed lawyers who were also representing Raphael. That information seemed highly relevant in considering whether a conflict existed between Raphael and his appointed counsel, as did the way they had litigated against Raphael in the district court.

However, even before I filed the appellant’s brief and motion to stay, Raphael’s appointed counsel appeared on the scene—
claiming to be appearing on his behalf too. They then filed responses opposing the relief I sought and a motion of their own asking the court to dismiss Raphael’s appeal as frivolous.

I responded to each of these filings—as well as the opposition briefs filed by the State, the actual appellee. The State sought to exploit the fact that two sets of lawyers were purporting to represent Raphael—accusing me of having “no standing” and of being a mere “next friend,” although neither of these legal concepts fit the facts. But the State certainly could not be faulted for trying to paint me as an “interloper” because that was the same argument that Raphael’s appointed counsel were making as they urged the Fifth Circuit to dismiss the appeal and deny the stay of execution (sought by their own client) because, in their view, the appeal had been mooted by the clemency application they had filed in his name, though without his involvement or consent.

The Fifth Circuit panel assigned to the case did not ultimately decide whether the clemency application was a sham, as Raphael and I believed. But Raphael’s appointed lawyers essentially confessed to the court that it was. While the application was still pending, they wrote to the Fifth Circuit that, in their “informed professional belief[,] the clemency has next to zero chance of success[.]” It was inconceivable to me that a lawyer laboring on the civil side of the docket would ever file a document with a federal court stating that his corporate client had “zero chance” of succeeding in another proceeding that that same lawyer had initiated and that was still pending. More inconceivable still was the notion that anyone would argue that such conduct does not reflect a conflict of interest. Yet that is what the State argued to the Fifth Circuit—even as it quoted Raphael’s appointed lawyers’ statement that he had “zero chance” of prevailing.

The Fifth Circuit’s one-page order denying relief simply noted that the district court had not abused its discretion in denying Raphael’s request for new lawyers. The decision also stated in a footnote: “Although we do not dismiss this appeal as frivolous, in light of the district court’s explanations for not
displacing court-appointed counsel we warn the attorney here that subsequent attempts in this case to displace counsel will be viewed with skepticism."

By this time, the Texas Board of Pardons and Paroles had summarily denied the hastily prepared clemency application.

With only two days left before the execution date, Raphael and I decided to take the fight up to the Supreme Court. There was reason to hope that the nation’s highest court might, just might, review the case. In a 2009 decision, Harbison v. Bell, the Supreme Court had emphasized that the rights to representation that death-sentenced indigents are provided under federal law include the right to have “meaningful” access to clemency as well as other proceedings. Congress, the Supreme Court reasoned, “did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells.” Subsequent cases had also emphasized that when a conflict of interest arises between a death-sentenced indigent and his appointed lawyers, the district court is “compelled” to appoint substitute counsel.

But on the very day of the execution, the Supreme Court issued an order, declining to review the case or to stay the execution. Justice Sotomayor, however, took pains to issue a statement in conjunction with the order, expressing unambiguously her view that Raphael’s appointed lawyers had abandoned him, that the district court had abused its discretion by refusing to appoint new lawyers, and that the clemency application the appointed lawyers had submitted “proved unsuccessful—and likely would have benefited from additional preparation by more zealous advocates.” She also speculated

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2 129 S. Ct. 1481, 1491 (2009).
3 See, e.g., Martel v. Clair, 132 S. Ct. 1276 (2012) (holding that district courts should apply the “interests of justice” standard when deciding whether to grant a death-sentenced indigent’s request for the appointment of substitute counsel); Christeson v. Roper, 574 U.S. ___ (2015) (finding that the substitution of appointed counsel should have been permitted under Martel because of the original attorneys’ apparent conflict of interest with their client).
that “this Court, unlike a state court, is likely to have no power to order Texas to reconsider its clemency decision with new attorneys representing Holiday.”

Meanwhile, litigation—and hope—had opened up on another front. After reading about what was happening with Raphael, his original trial lawyers had surfaced and expressed an interested in seeing if there was anything they too could do. Working independently of me, they had discovered a double-jeopardy problem with the indictments and another unexhausted claim. They prepared a pleading and raced to the state trial court on the very date the execution was scheduled. Miraculously, after a hearing, that judge was willing to enter a stay of the execution long enough to see what appellate remedies might still be available to Raphael. I got the news that afternoon and was elated. But just as quickly, I was plunged back into a state of extreme anxiety, because the State announced at the same hearing that it was going to seek mandamus relief from the Court of Criminal Appeals to force the execution to go forward.

The State filed its mandamus petition that afternoon. At the same time, the Court of Criminal Appeals was hearing extended oral arguments in the criminal case against former Governor Rick Perry over the propriety of charges based on his use of the executive veto. Before the close of business that day, Raphael’s trial lawyers filed a response opposing the State’s mandamus petition. But shortly after the court received that filing, it issued a per curiam decision granting the State leave to seek mandamus relief. The short order also stated “that the trial court’s November 18, 2015 order withdrawing the death warrant is void, and the death warrant is still valid. No motions for rehearing this matter will be entertained.” In other words, the court ordered the execution to take place that night as originally scheduled.

In a dissenting opinion, Justice Alcala questioned whether the State had carried its burden of establishing that it was entitled to “extraordinary relief,” as it had not, in her view, satisfied either element of the mandamus standard.
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Just before the lethal injections were administered, Raphael thanked his “loved ones” and the warden.

Following the execution, a member of the press reported that one of Raphael’s appointed lawyers had insisted in an interview: “I’d walk through hell with a can of gasoline with my clients to protect their interests.” The lawyer made this remark in the context of questions about his commitment to a man who, that very night, had been executed for deaths caused by a gasoline fire.

The State declared Raphael Holiday dead at around 8:30 pm Central time while I sat alone sobbing in a parked car, finding myself incapable of fielding any more phone calls from the many people who had shown interest in this fight about whether a death-sentenced man was entitled to have a conflict-free lawyer appointed to fight for him by making, among other things, a meaningful effort to pursue clemency.

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Clemency, although a rule-based process, is fundamentally about injecting mercy into the process dispensing criminal punishment. As the Supreme Court recently explained: “Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.” Indeed, over 180 years ago, the Court recognized that clemency reflects “an act of grace,” proceeding “from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.”

In short, a clemency proceeding gives a condemned person the right to plead for his life in terms the judicial process cannot accommodate. The point is not to rehash legal claims that the

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courts have previously rejected hoping for a better outcome before different decision-makers in the executive branch. Instead, it affords the chance to present humane reasons unique to the applicant that evoke the need for, and instill the desire to, grant mercy. The right to seek mercy, by arguing from a perspective that transcends the limits of the judicial process, is not a matter to abandon or pursue without considerable care.

The clemency application that Raphael’s appointed lawyers threw together in a 48-period by cutting-and-pasting old work-product into a form borrowed from other lawyers at the last minute does not reflect “meaningful” access to this inherently long-shot relief. Clemency requires that lawyers spend time investigating and learning the part of the client’s story that cannot simply be gleaned from prior legal proceedings. It is a story that begins well before a devastating crime was committed and continues well after incarceration commenced. It is a story that played out beyond the confines of courts and legalistic arguments. No one can meaningfully accomplish that mission in 48 hours.

The clemency application submitted in Raphael’s name (and without his knowledge) did not reflect any attempt to understand Raphael Holiday as a human being, but instead reduced him to the worst moment in his life—a dreadful moment that haunted him thereafter, but had not, in his view, been fully or fairly developed in judicial proceedings. The sham application did not capture the stories of the many people who were still in his life—including others directly affected by the crime that he was convicted of committing or the siblings he essentially raised when he himself was no more than a child—people who continued to value his life and were appalled that his appointed lawyers had rejected out of hand the chance to pursue this last recourse the criminal justice system offers.

Raphael’s appointed lawyers didn’t ask him why pursuing clemency was so important to him before they announced in a letter that pursuing clemency “just gives an inmate false hopes.” But Raphael had an answer. He felt his side of the story, during his 16 years in prison in the wake of a horrific tragedy,
had never been told. It wasn’t that he was deluded about the odds of relief. He understood that clemency was his last chance to get his story out.

Because no one undertook any real investigation in conjunction with Raphael’s federal appeals or to support a clemency application, we cannot know the full story. But a sketchy outline can be pieced together from his words, his mother’s memories, and undeveloped clues lurking in the judicial record.

Picture this: You are born poor and black in a small town in southeast Texas in 1979. Your mother is 15 years old. Your biological father is not part of the story. Your mother eventually marries someone else. Your step-father and mother beat you routinely because that was how things were done in their experience. Life is hard and you are expected, from a very young age, to take care of your two younger half-brothers. You are beaten when you fall short. You run away repeatedly.

By age 15, you finally succeed. You are taken in by a friend of some relative in another town. She starts giving you drugs hoping to disable you so that you can then get “sick checks.” You are in and out of school. You have trouble holding a job.

Then you fall in love. She is white. She has two kids from two different men. You want to help her raise those kids. You arrange to move into a trailer together and build a family. Soon she is pregnant with your child. The baby is born early and with a hole in her heart. But when you hold her in your arms, she reaches a hand up toward the sky. So you decide “The Lord wants her to be named Justice.” You are now 19.

That year, your common-law wife’s aunt offers your family a place to live. It is a cabin deep in the woods on property she and her husband own. You are excited to move there. It is rickety and old, but it will be a place of your own. But your wife doesn’t like it there. She soon grows distant. One day, you come home and she is there with her mother ordering you off the place. Your wife gets an ex parte protective order against you. But she also keeps trying to see you. You suspect she is also sleeping with someone else. You go to confront her and
catch her in bed with another man. That man threatens you; he sends word through mutual friends that he will kill you if you come around again. Then you are accused of sexually assaulting the eldest child. (Years later, a criminal background check of your estranged wife’s boyfriend shows that he was convicted of sexually assaulting a minor the very same month you were accused; but this was never investigated.)

You are in a rage. You decide to confront this man. You get a gun for protection. You go to the house and he is not there. Only your estranged wife is there with the three girls. You argue. Your wife’s aunt comes over along with her brother, armed with a shotgun. He points the gun at you. You then pull out your own gun and point it at your wife’s aunt. The other man drops his gun. Your estranged wife runs off. You go with her aunt to the main house. She gets large containers of gasoline. You go back to the cabin. She starts pouring gas all over the house as you continue to follow her holding a gun. You notice that, although your wife is gone, the three little girls are still there sitting on a couch. You go toward them to get them out of the house that is filling up with fumes. As you get up to go to them, the house explodes. You get out of the house and then help pull your wife’s aunt out of a back window. You ask her about the kids. She says they are all dead. You try to get back inside, but the whole place is by then engulfed in flames. You panic, run to the aunt’s car, and speed off. You are soon stopped by the police who were waiting just down the road. You are 20 years old.

You tell the deputy what happened as you are arrested. He believes you should not be charged with a capital crime—so much so that he testifies to that effect during the sentencing phase of your trial.

But you are charged with, and convicted of, three counts of capital murder. And you are given multiple death sentences. You cannot imagine how anyone believed you intended to kill those kids. Meanwhile, the sexual assault accusation made against you was dropped by Child Protective Services. You had voluntarily submitted to a DNA test and adamantly denied the allegation. But that test was not made part of the record at trial.
Instead, the accusation was. Your wife’s aunt, who poured the gasoline all over the house, testifies at trial that she saw you bend over just before the fire started. She had not said that in previous statements to investigators. You had wanted to testify at trial to explain that you never intended to kill those kids and that you did not start the fire. Your lawyers advise you not to testify. Your trial is interrupted one day by the man your wife had been sleeping with who had threatened to kill you and who had been convicted of sexual assault of a minor the same month that you were accused of such conduct. The man was arrested for making a “terroristic threat,” but this role in the story was not investigated or explained to the jury or to any court.

You spend 16 years in prison, 14 on death row in Livingston, Texas. You keep hoping your lawyers will help you get your story out. You believe in God. You become a valued member of the prison community. Your mother, your brothers, and other loved ones continue to believe in you. But your federally appointed lawyers, during the first of only a few meetings, stop you when you start to volunteer your story. They say they “don’t need to hear that.” They don’t care that you didn’t pour any gasoline in the house, that you didn’t start the fire, that you didn’t intend for the kids to be there. They say they are bound by the record.

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As noted above, the Supreme Court decided not to review Raphael’s case. That is, of course, the Court’s prerogative; and it denies the vast majority of the requests it receives. But previous Supreme Court cases and Justice Sotomayor’s statement in this case tell us what should have been done. When a death-sentenced indigent states that a conflict has arisen with his court-appointed attorneys and he or she asks for the appointment of new lawyers, the district court should investigate the source and nature of the client’s complaint. Judges should not simply rely on the representations of the lawyers, who may well be solely responsible for the problem.

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6 See Clair, 132 S. Ct. 1276; Christeson, 574 U.S. ___.
I continue to wonder: when the conflict between lawyer and client only becomes obvious after the State has set an execution date, shouldn't that be a reason to slow down, not speed up, the wheels of justice?

Also, drawing on my experiences on the civil side, it seemed to me that when appointed lawyers file documents with federal courts in which they take positions adverse to their own client and make material misstatements about what they have and have not done for their clients, this should be a cause for concern. Such violations of basic rules of professional responsibility are generally not tolerated in civil cases involving, for instance, disputes about intellectual property. Should the ethical standards be more lax when the client is indigent and the lawyers have been appointed by a court and are being paid by federal tax dollars?

I will continue to seek answers to these and other lingering questions—because when Raphael was executed, I did not know, and still do not know, most of his story.

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The day after the State of Texas executed Raphael Holiday, I dragged myself into the office. I did so by thinking about the career death-penalty lawyers who had inspired me during this month-long ordeal. They, in stark contrast to Raphael's appointed lawyers, commit routinely and fiercely to the Sisyphean task of pushing an enormous boulder straight uphill—again and again. They do so not because they expect to win many legal battles. They mostly lose. As Dick Burr, who has been toiling selflessly in this arena for 40 years said to me, "We do this work to fight against the caste system in America. The lowest of the low are the poor who have been convicted of capital crimes. Most people are not interested in these people—until after it becomes clear that they are actually innocent." The toil is worth it to lawyers like Dick Burr, not because of, but in spite of, the odds of losing. "The winning," Dick Burr explained to me, "comes from seeing the difference you can make in taking the time to build relationships with these
people whom society has cast off. If they get past the initial stage of anguish and depression, they begin to read, to think, to build connections. Being part of seeing that redemption is what makes this work so rewarding.”

When I got back to my office the day after the execution, I found an envelope addressed to me sitting in my chair. It was from Raphael. Inside was a card. It had a picture of bright yellow and red flowers on the front with the word “generosity” printed in bold letters in the corner. Inside he had written: “Thank you for your help. I cannot thank you enough. God bless you always.”

For me, that was how the light got in.

Less than two months later, I left my comfortable practice as a civil appellate practitioner and took a job with the Office of Capital and Forensic Writs. I now work for the State of Texas, against the State of Texas, representing indigents on death row in state habeas corpus proceedings. Every day I am reminded of Raphael Holiday and the fuller story of what led up to and followed that terrible, chaotic night in 2000 when he was 20 years old, which culminated in the senseless death of three innocent girls. Numerous questions remain. One thing is certain, however: Raphael’s execution—but one example of the many cracks plaguing our criminal justice system—was a catalyst, compelling me to do my part to let more light in.