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HEADLINE: Death Sentences in Texas Cases Try Supreme Court's Patience

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BODY:

In the past year, the Supreme Court has heard three appeals from inmates on death row in Texas, and in each case the prosecutors and the lower courts suffered stinging reversals.

In a case to be argued on Monday, the court appears poised to deliver another rebuke.

Lawyers for a Texas death row inmate, Thomas Miller-El, will appear before the justices for the second time in two years. To legal experts, the Supreme Court's decision to hear his case yet again is a sign of its growing impatience with two of the courts that handle death penalty cases from Texas: its highest criminal court, the Court of Criminal Appeals, and the United States Court of Appeals for the Fifth Circuit, in New Orleans.

Perhaps as telling is the exasperated language in decisions this year from a Supreme Court that includes no categorical opponent of the death penalty. Justice Sandra Day O'Connor wrote in June that the Fifth Circuit was "paying lip service to principles" of appellate law in issuing death penalty rulings with "no foundation in the decisions of this court."

In an unsigned decision in another case last month, the Supreme Court said the Court of Criminal Appeals "relied on a test we never countenanced and now have unequivocally rejected." The decision was made without hearing argument, a move that ordinarily signals that the error in the decision under review was glaring.

The actions of the two appeals courts that hear capital cases from Texas help explain why the state leads the nation in executions, with 336 since 1976, when the death penalty was reinstated, more than the next five states combined.

In the Miller-El case, appellate lawyers and legal scholars are buzzing over what they say is the insolence of the Fifth Circuit.

In an 8-to-1 decision last year, the Supreme Court instructed the appeals court to rethink its "dismissive and strained interpretation" of the proof in the case, and to consider more seriously the substantial evidence suggesting that prosecutors had systematically excluded blacks from Mr. Miller-El's jury. Prosecutors used peremptory strikes to eliminate 10 out of 11 eligible black jurors, and they twice used a local procedure called a jury shuffle to move blacks lower on the list of potential jurors, the decision said. The jury ultimately selected, which had one black member, convicted Mr. Miller-El, a black man who is now 53, of killing a clerk at a Holiday Inn in Dallas in 1985.

Instead of considering much of the evidence recited by the Supreme Court majority, the appeals court engaged in something akin to plagiarism. In February, it again rejected Mr. Miller-El's claims, in a decision that reproduced, virtually verbatim and without attribution, several paragraphs from the sole dissenting opinion in last year's Supreme Court decision, written by Justice Clarence Thomas.

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"The Fifth Circuit just went out of its way to defy the Supreme Court on this," said John J. Gibbons, a former chief judge of the United States Court of Appeals for the Third Circuit, in Philadelphia, who joined a brief supporting Mr. Miller-El. "The idea that the system can tolerate open defiance by an inferior court just cannot stand."

The Supreme Court agrees to hear only about 80 cases each year. It seldom accepts cases to correct errors in the lower courts and concentrates instead on resolving conflicts among appeals courts and announcing broad legal principles. But in recent years the court has often found itself fixing problems in specific Texas death penalty cases. Over the last decade, it has ruled against prosecutors in all six appeals brought by inmates on death row in Texas.

The cases all involved challenges to the fairness of the procedures used to convict and sentence the defendants rather than arguments about their innocence.

The two appeals courts handle an enormous number of capital cases and grant relief in very few. Between 1995 and 2000, the Court of Criminal Appeals heard direct appeals in 270 death sentences and reversed eight times, according to a report by the Texas Defender Service, a nonprofit law firm that represents death row inmates. The reversal rate -- 3 percent -- is the lowest of any state. California, which has a much larger death row, at 635, has executed only 10 people since 1976, to Texas's 336.

By contrast, a comprehensive study of almost 6,000 death sentences across the nation over the 20 years ended in 1995 found a 68 percent chance they would be overturned by a state or federal court.

The Fifth Circuit also reviews Texas death sentences when inmates file writs of habeas corpus -- challenges to unlawful detentions. The court has 50 or 60 capital cases pending at any given time, a spokesman said. But in recent years it has very seldom ruled in favor of prisoners on death row.

The two courts have been resistant to claims involving withheld evidence, lies told by prosecutors and problems in jury selection, as in the Miller-El case. But legal scholars say the most intractable issue involves unusual instructions that were given to Texas juries from 1989 to 1991.

The Supreme Court ruled in 2001 that those instructions were unconstitutional. Yet the two appeals courts continued to uphold the death sentences that resulted from the instructions. Since 1991, more than 40 of the people in those cases have been executed, according to Jordan Steiker, a law professor at the University of Texas.

The state appeals court, which considers only criminal cases, is made up of elected judges, mostly former prosecutors.

The judges on the federal appeals court come from more varied professional backgrounds and have life tenure. But legal scholars say that court, once famous for defending civil rights, is now quite conservative, is burdened with one of the heaviest federal appellate dockets in the country and shows mounting hostility to death row inmates and their lawyers.

David R. Dow, a law professor at the University of Houston who represents death row inmates, said the federal appeals court had lost its way in capital cases.

"The Fifth Circuit does not understand that it is an inferior tribunal to the United States Supreme Court, and it acts lawlessly," said Professor Dow, who was a law clerk to Judge Carolyn Dineen King of the Fifth Circuit in 1985 and 1986. Referring to the court's critical role in several historic civil rights cases, he added, "If it acted this lawlessly in the 1960's, black people and white people would still be eating at separate lunch counters."

Judge King, who is now the court's chief judge and is widely considered a political and legal moderate, said Professor Dow's critique did not apply to all of her court's decisions.

"The only response I would make," she said in an e-mail message, "is that a broad generalization about the Fifth Circuit's death penalty decisions indicates to me that the speaker may not have read all of them. One cannot fairly generalize about those decisions."

Judge Lawrence E. Meyers, a Republican first elected to the Texas Court of Criminal Appeals in 1992 and its longest-serving member, said, "From my standpoint being on the court, I've seen it go up and down, from way too liberal to way too far to the right." Now, he said, "I feel like we've evened it out."

Although he has dissented in some major cases, including Monday's 5-to-4 vote to deny a stay of execution to a Texas woman later given a limited reprieve by the governor, Judge Meyers said there was no intent to defy the Supreme Court.

"We feel the Supreme Court is changing the rules on us in midstream," he said. "If they feel we're not getting it, it's because they're not being clear, but that's just a personal view."

Presiding Judge Sharon Keller, a member since 1995 and a former assistant district attorney in Dallas, did not respond to several telephone messages.

A Court of Prosecutors

"The Worst Court in Texas" was the ignominious verdict on the cover of the November issue of Texas Monthly, the state's glossy bible of style and politics. The target: the Texas Court of Criminal Appeals.

Texas is an anomaly -- the only state with two separate and completely equal high courts. One, the Texas Supreme Court, handles only civil cases. The other, the Court of Criminal Appeals, hears only criminal cases. Each has nine judges who run for staggered six-year-terms. Only Oklahoma has a similar bifurcated appeals court system, but its Supreme Court holds overall administrative responsibility.

The consequence, some experts say, is a Texas criminal appeals court largely unleavened by general practitioners and the kind of top legal talent that fills corporate boardrooms. Indeed, seven of its nine members are former prosecutors who tend to run on tough-on-crime-platforms and, critics say, embody the court's antidefense bent.

"No one runs for the Court of Criminal Appeals on a platform of vindicating constitutional rights," said Professor Steiker, the University of Texas law professor.

But Judge Meyers said there was a benefit to specializing. "It gives us a chance to be more attuned to criminal matters and the latest rulings," he said.

The system has allowed unprepared candidates to serve on the court. In 1994 a tax lawyer, Stephen W. Mansfield, won election despite admitting during the campaign that he had lied about his legal experience and biography. While a judge, he was arrested for scalping complimentary college football tickets (he pleaded no contest to trespassing) and was accused of animal abuse for locking his dogs in his car while he sat on the bench. He did not seek re-election in 2000 but ran again in 2002 and lost.

Embarrassed by that debacle, the state now requires candidates for the court to gather at least 50 signatures from all 14 appellate districts.

In another episode widely perceived as an embarrassment, Roy Criner, a prison inmate serving 99 years for the rape and murder of a 16-year-old girl that he insisted he had never committed, successfully petitioned for a DNA test not available during his trial. The test determined that the semen in the victim was not his. A second test produced the same result.

The trial court asked the criminal appeals court to order a new trial, but with Judge Keller prominently in the majority, it voted 6-3 to let the conviction stand. Gov. George W. Bush, then running for the White House, granted Mr. Criner clemency. "It's pretty bad when you have to go to Governor Bush for relief," said James Marcus, executive director of the Texas Defender Service.

Maintaining that the court was not responding to such bad publicity, another member of the court, Judge Barbara Hervey, a former San Antonio prosecutor elected in 2000, has been instrumental in using a \$20 million legislative appropriation, and seeking additional money, to foster a network of "innocence clinics" at law schools around the state to investigate credible claims of wrongful conviction. Though the article in Texas Monthly stung, she said, "We are in the game of justice."

Robert Dawson, a University of Texas law professor working with Judge Hervey on the innocence project, said he saw the court "beginning to float back" to more moderate rulings. Deducing too much from the recent Supreme Court critiques would be a mistake, he said. "It's like driving down a road and seeing two cars a mile apart with flats and concluding that the tire manufacturing industry is in the toilet."

Capital Cases in Volume

A state court largely made up of former prosecutors might be expected to be skeptical of the claims of death row inmates. Why federal judges on the Fifth Circuit might share that attitude is a bit of a mystery, legal scholars said, noting that the judges are appointed for life, and are generally distinguished and independent-minded intellectuals.

One explanation is political. Of the court's 16 judges, only 4 were appointed by Democratic presidents.

"The Fifth Circuit has been anything but a liberal court," said Arthur D. Hellman, a law professor at the University of Pittsburgh and an expert on the federal courts. "It's probably second only to the Fourth Circuit," in Richmond, Va., "as a conservative circuit."

"The Fifth Circuit," he added, "seems to be in tune with the Supreme Court in the broad run of cases."

But not in all cases.

"The one exception," said Eric M. Freedman, a law professor at Hofstra University, "is in the area of habeas corpus, especially in death penalty cases. In that area it has been consistently over the top in inventing rationalizations by which to defend the indefensible."

"A circuit that 40 years ago was justly famous for implementing the mandates of the Bill of Rights and the Supreme Court respecting racial fairness," he said, "is now justly notorious for its outright refusal to apply fundamental principles of due process to the criminal justice system."

The court, which hears appeals from Texas, Mississippi and Louisiana, is by some measures the busiest federal appeals court. Its judges decided an average of 862 cases each in 2003 -- more than three each business day -- compared with a national average of 459.

In a 1992 speech, Judge King, who had not yet become the court's chief judge, said the "sheer volume" of cases in the Fifth Circuit "has had an adverse impact on the number of decisions that we can fairly claim have been fully considered and understood."

"We cannot devote to more than a few cases a year," she continued, "the time required for a careful review of a record of any length, for in-depth research and even for prolonged, thoughtful consideration."

In an e-mail message, Judge King said, "The situation has eased somewhat since 1992 because the volume of complicated civil appeals is declining." On the other hand, the judges on the court in 1992 decided 640 cases each year, or some 200 fewer than they do today, according to the administrative office of the federal courts.

Other courts make essentially all their death penalty decisions available for formal publication; in recent years, the Fifth Circuit has published only 18 percent of such decisions. And its decisions were on average half the length of capital decisions from other federal appeals courts.

Appellate lawyers who follow the court's death penalty jurisprudence say the court is overwhelmed by the number of capital cases, which may cause it to be hostile to the claims of death row inmates. "You can't do death in volume," said George H. Kendall, a lawyer with Holland & Knight in New York who represents Delma Banks Jr., a Texas death row inmate.

At times the federal appeals court has been unfathomable to its critics. Last December, for instance, it considered the last-minute appeal of Billy Frank Vickers, scheduled to die for the killing of a grocer in 1993. With the inmate already given his last meal, the judges deliberated until 9 p.m. and announced they were leaving, with no decision. Bewildered state prison officials allowed the death warrant to expire, granting Mr. Vickers a delay. He was executed six weeks later.

In October, a Houston federal judge granted a last-minute stay to Dominique Green, but the state appealed. The Fifth Circuit then gave defense lawyers less than half an hour to file their response, Professor Dow said. A rushed brief was e-mailed to the court and turned down. The Supreme Court also rejected a stay, and Mr. Green was executed that night.

Instructing Jurors to Lie

Much of the tension between the Supreme Court and the two lower courts is rooted in the instructions given to juries in Texas from 1989 to 1991.

Three Texas death penalty cases heard by the Supreme Court in the last four years have concerned those instructions.

From 1976, when the death penalty was reinstated, until 1989, Texas juries were generally asked only two questions at the sentencing phase of a capital trial: Was the killing deliberate? Does the defendant pose a danger to others? If the jurors unanimously answered yes to both, the judge was required to impose a death sentence.

In 1989, the Supreme Court ruled that the Texas procedure was flawed because it did not allow the jury to consider mitigating evidence that might cause it to spare the defendant's life. But the Texas Legislature did not revise the procedure until 1991.

In the meantime, Texas judges adopted ad hoc instructions that retained the two questions but also told jurors that they could falsely answer "no" to one or both questions if they thought the mitigating evidence was strong enough.

In 2001, the Supreme Court held that instructing a juror to lie was unconstitutional. "It would have been both logically and ethically impossible for a juror to follow both sets of instructions," Justice O'Connor wrote.

But the Fifth Circuit and the Court of Criminal Appeals continued to uphold death sentences imposed under the unconstitutional procedure, saying that some juries considering some mitigating evidence actually could have followed the seemingly inconsistent instructions.

Indeed, in 2003 the entire Fifth Circuit reaffirmed that approach in a case against Mark Robertson, convicted in 1991 of murdering a store clerk, a friend and the friend's grandmother. He was sentenced to death for the last killing. Judge Edith H. Jones, writing for the majority, said the Supreme Court's 2001 decision was meant to apply only to some cases in which the instructions had been used.

Two dissenting judges said the court was simply refusing to follow the instructions of the Supreme Court. "I am amazed," wrote one, Judge Harold R. DeMoss Jr., that the majority "would have the audacity to turn around and reach the same result the Supreme Court just vacated."

The Supreme Court declined without comment to hear the case again. The Court of Criminal Appeals then stayed Mr. Robertson's execution and has not yet ruled on his case.

In June, though, the Supreme Court returned to the subject, in even more explicit language in the case of Robert Tennard, convicted of killing a neighbor in Houston in 1985. The Fifth Circuit's approach, Justice O'Connor wrote in the decision for the 6-to-3 majority, "has no foundation in the decisions of this court."

Still, the Texas Court of Criminal Appeals appeared not to have heard the message, and the Supreme Court addressed the topic in another case in November. The criminal appeals court relied on "precisely the same 'screening test' we held constitutionally inadequate" in the June decision, the decision said.

In the Miller-El case, too, which will be argued for a second time on Monday, there is reason to expect a firm response from the court.

Mr. Miller-El, who has been on death row since 1986, contends that prosecutors violated his constitutional rights by excluding blacks from his jury.

Writing for the majority in the Supreme Court's 8-to-1 decision last year, Justice Anthony M. Kennedy discussed evidence that prosecutors had acted improperly. Among other things, he noted, prosecutors questioned black potential jurors more aggressively about their views on the death penalty than they did white jurors.

Only Justice Thomas dissented from the decision, saying that none of the factors cited by Justice Kennedy "presented anything remotely resembling clear and convincing evidence of purposeful discrimination."

Mr. Miller-El, Justice Thomas wrote, "ignores the fact that of the 10 whites who expressed opposition to the death penalty, eight were struck for cause or removed by agreement, meaning no 'manipulative' script was necessary to get them removed."

The Fifth Circuit's decision in February, which ruled against Mr. Miller-El, echoed that and many other statements in Justice Thomas's dissent. "Of the 10 non-black" potential jurors "who expressed opposition to the death penalty," the

decision said, "eight were struck for cause or by agreement, meaning no 'manipulative' script was necessary to get them removed."

Judge DeMoss, the author of the Fifth Circuit decision, declined to discuss it.

Professor Dow said he was still skeptical that the two appeals courts would follow the directions of the Supreme Court. "We're coming up on 25 executions this year," he said. "They get away with it most of this time. They appear not to be chastened when they do not get away with it."

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GRAPHIC: Photos: JUDGE SHARON KELLER -- The presiding judge of the Texas Court of Criminal Appeals, which hears only criminal cases. Seven of its nine judges are former prosecutors. (Photo by Erich Schlegel/The Dallas Morning News)

JUDGE CAROLYN DINEEN KING -- The chief judge of the United States Court of Appeals for the Fifth Circuit, which legal scholars say has shown increasing hostility to death row inmates. (Photo by Bill Haber/Associated Press)

Thomas Miller-El

LaRoyce Smith

Robert Tennard

Delma Banks Jr.

Johnny Paul Penry

Frank McFarland (Photographs from The Associated Press [Miller-El, Penry and McFarland] and the Texas Department of Criminal Justice [others])(pg. 40)

Thomas Miller-El has been on death row in Texas since 1986. (Photo by Brett Coomer/Associated Press)(pg. 1)Chart:

"Cases Where the Supreme Court Weighed In" The United States Supreme Court has reversed decisions in six death penalty cases made by the Fifth Circuit or the Texas Court of Criminal Appeals in the past decade, including three this year. TO BE ARGUED MONDAY Prisoner -- Thomas Miller-El On death row since -- 1986 Crime -- Killing a clerk at a Holiday Inn in Irving, Tex., during a 1985 robbery in which he and his wife stole \$3,000. Supreme Court ruling -- The Supreme Court will hear the case again on Monday. In 2003, it ordered the Fifth Circuit to consider evidence that prosecutors had excluded blacks from the jury. But the Fifth Circuit granted him no relief. RULINGS ISSUED THIS YEAR Prisoner -- LaRoyce Smith On death row since -- 1991 Crime -- Killing a 19-year-old woman by shooting, then stabbing her, during the robbery of a fast food restaurant in DeSoto, Tex., in 1991. Supreme Court ruling -- In November, the Supreme Court reversed the Texas Court of Criminal Appeals, which had upheld Mr. Smith's death sentence even though the jury instructions had been held unconstitutional. Prisoner -- Robert Tennard On death row since -- 1987 Crime -- Killing a neighbor in Houston in 1985 by stabbing him and attacking him with a hatchet. Supreme Court ruling -- In June, the Supreme Court overruled the Fifth Circuit, which allowed defendants to be executed although they had been sentenced under jury instructions deemed unconstitutional. Prisoner -- Delma Banks Jr. On death row since -- 1980 Crime -- Killing a 16-year-old coworker in Nash, Tex., in 1980. Supreme Court ruling -- In February, the Supreme Court reversed a ruling by the Fifth Circuit, which had denied relief to Mr. Banks even though prosecutors had hidden evidence in his case and lied about it. 2001 Prisoner -- Johnny Paul Penry On death row since -- 1980 Crime -- Raping a 22-year-old woman and then stabbing her to death in 1979, three months after his release from prison on a prior rape conviction. Supreme Court ruling -- In 2001, the Supreme Court reversed the Fifth Circuit, ruling that jury instructions used in Texas from 1989 to 1991 were unconstitutional in at least some cases. 1994 Prisoner -- Frank McFarland On death row since -- 1990 (executed in 1998) Crime -- Raping and stabbing to death a 26-year-old Arlington, Tex., woman in 1988. Supreme Court ruling -- In 1994, the Supreme Court ruled that the Fifth Circuit was mistaken in saying it was powerless to stay the execution of Mr. McFarland, who had been unable to find a lawyer to file papers for him. He was executed in 1998. (Sources by Texas Department of Criminal Justice news reports)(pg. 40)

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