

# Los Angeles Times

117 inches; 4163 words

SATURDAY, JULY 15, 2000, MAIN NEWS, PART A, PAGE 1  
COPYRIGHT 2000 / LOS ANGELES TIMES

000066369  
FAX page #1

## COLUMN ONE

### A Sleeping Lawyer and a Ticket to Death Row

■ George McFarland is awaiting execution in Texas. But his lawyers didn't mount much of a defense, and the state that leads the way in executions did little to ensure that he was competently represented.

By HENRY WEINSTEIN  
TIMES LEGAL AFFAIRS WRITER

HOUSTON—When George McFarland was accused of robbing and killing a neighborhood grocery owner, he took the advice of an acquaintance and hired longtime criminal lawyer John E. Benn. That may prove to be a fatal mistake.

Benn was 72 years old and had not handled a capital murder trial for at least 19 years. Nor did he jump headlong into the new case—he spent four hours preparing for the 1992 trial. Benn did not examine the crime scene, interviewed no witnesses, prepared no motions, did not request that any subpoenas be issued, relied solely on what was in the prosecutor's file, and visited his client only twice.

During the 17-day trial, Benn's performance took a turn for the worse: He fell asleep.

"Benn slept during great portions of the witness testimony," juror Mary Louisa Jensen said in an affidavit five years later. "It was so blatant and disgusting that it was the subject of conversation within the jury panel a couple of times."

Months after the trial ended with a conviction and death sentence, Benn was asked at a court hearing about his snoozing. "I'm 72 years old," he said. "I customarily take a short nap in the afternoon."

McFarland, now 39, is one of more than 450 people on death row in Texas

and one of at least two with a lawyer who dozed off during their trials.

McFarland's writ of habeas corpus, which challenges the constitutionality of his conviction and sentence, is considered among the most significant pending in Texas because of the profound questions it raises about the quality of legal representation courts deem acceptable for a defendant facing capital punishment.

Since Texas reinstated the death penalty in 1977, the state has executed 224 people—137 while George W. Bush has been governor—three times as many as the next highest state, Virginia.

Although lawmakers in some states are questioning the wisdom of the death penalty and public support is declining in opinion polls, Bush maintains that everyone executed in Texas on his watch was guilty and "had full access to the courts."

In the McFarland case—and another—prosecutors acknowledge that sleeping occurred but say that should not bar the execution. Harris County prosecutors insist McFarland had a fair trial.

Critics of capital punishment vehemently disagree.

"For poor people facing the death penalty, this is what it means to be represented by 'the Dream Team,'" said attorney Stephen B. Bright of Atlanta, who specializes in capital appeals as director of the Southern Center for Human Rights.

#### A Fateful Choice

In Texas, where there is no public defender system for capital cases, numerous defendants have been poorly represented by unskilled lawyers, many of whom were appointed by trial judges, said Elisabeth Semel, who heads the American Bar Assn.'s death penalty representation project. Houston judges, in particular, have had a reputation for appointing lawyers who moved cases along rapidly and often had greater loyalty to the jurists than to their clients. Two lawyers, favored by certain judges but widely criticized by leading legal experts, wound up with 10 and 12 clients

respectively on death row.

For that reason, McFarland decided to hire a lawyer on his own. Clearly, he made a poor choice, according to the trial judge in the case, Doug Shaver, who prosecuted 18 murder cases as an attorney and has presided over dozens while on the bench.

"I knew John Benn. I knew he wasn't competent," Shaver said in a courthouse interview in late June. The judge said Benn had the appearance of "a heavy drinker. . . . His clothes looked like he slept in them. He was very red-faced; he had protruding veins in his nose and watery red eyes. . . . I can't imagine anyone hiring him for a serious case."

So Shaver appointed a second lawyer, Sandy Melamed, to assist Benn.

Melamed had never worked on a capital case before and remained deferential, even though he saw Benn's limitations.

"Because I perceived myself as second chair to Benn, I felt I couldn't take responsibility for preparing the trial strategy," Melamed said years after the trial.

Like Benn, Melamed never visited the crime scene and he interviewed no witnesses. Moreover, the two never worked as a team. They did not hold strategy sessions and, except in one instance, didn't decide in advance who would cross-examine each prosecution witness. Melamed said that since Benn slept while a number of those witnesses were on the stand, he wound up doing much of the cross-examination himself. According to their own testimony, the two attorneys spent a total of 10 hours preparing for a case in which a man's life was at stake.

The only division of labor the defense lawyers agreed on before the trial was that Benn would cross-examine the key eyewitness and that he would be in charge of the crucial punishment phase in the event that McFarland was found guilty.

The transcript shows that in Benn's brief cross-examination of the key witness, he did not ask her about a sharp

difference between McFarland's appearance and her initial description of the murderer. The day of the shooting, she told police the suspect was 5 feet 7 to 5 feet 8, weighed 140 to 150 pounds and had medium-brown skin. McFarland is 6 feet 1, weighs about 200 pounds and is very dark-skinned.

In the punishment phase, where lawyers ordinarily seek to paint a sympathetic portrait of their client in an effort to avoid the death penalty, Benn never arranged for any of McFarland's out-of-state relatives—including his mother and his sisters—to testify on his behalf. Moreover, Benn failed to take up the offer of a lawyer who had previously represented McFarland, and served as best man at his wedding, to testify as a character witness.

Melamed said he did the best he could in a difficult situation. Indeed, Melamed wound up handling most of the jury selection—even though he had never before undertaken the sort of detailed questioning required in a capital case. And he handled virtually the entire punishment phase—something he had not prepared for because Benn had said he would do it.

McFarland's current lawyers are seeking a new trial through a writ of habeas corpus—the historic method of overturning an unconstitutional conviction. Raising a bevy of issues, the new lawyers say that a death sentence should not be allowed to stand when it was the result of a complete breakdown in the adversarial process.

"Defense lawyers are not baby-sitters; they are charged with an ethical, moral and legal responsibility to assist their clients by testing the prosecution's theories and evidence," McFarland's current lawyers, Walter E. "Rusty" Herman III and R. Paul Wickes, contend in a brief pending in a Houston trial court. "The death penalty should not be used to punish an accused for the incompetence of his lawyers."

Melamed laments his role in the trial and staunchly maintains that McFarland should not have received a death sentence. "If someone says down the line that I screwed the case up and George should live, I will be the second-happiest guy in the world behind George."

Benn, now retired, responded, "No, I never heard of the bum," when asked if he remembered McFarland in a brief interview at his home in a pleasant

Houston neighborhood. Asked if he recalled sleeping during the trial, Benn retorted, "I've seen judges asleep on the bench."

Benn's son, Markham Benn, said his father, now 80, is in "the early stages of Alzheimer's disease. He doesn't remember anything."

McFarland's current lawyers filed their brief more than three years ago. Eric Kugler of the Harris County district attorney's office said he expects to file the reply brief in late July or August.

Then a Harris County trial judge will advise the Texas Court of Criminal Appeals whether McFarland is entitled to a new trial. If McFarland does not prevail in state courts, his attorneys would file a federal writ challenging the constitutionality of his conviction and sentence. No execution date has been set.

Some of the contentions raised by McFarland's current attorneys were vigorously challenged by prosecutors during an initial appeal. The state's Court of Criminal Appeals, which rarely reverses death sentences, upheld the verdict and sentence 7-2 in 1996.

The court majority said, among other things, that it did not matter that McFarland's attorneys had not gone to the crime scene, interviewed witnesses or conferred with one another. The court did not challenge the contention that Benn slept during the trial but said McFarland's appellate lawyer provided no detailed evidence of how often it happened. The majority said that if Benn had been McFarland's only attorney "we might be inclined" to find that he was denied counsel.

But the appeals court said that whatever Benn's shortcomings, McFarland's appellate lawyer failed to show that Melamed's work was inadequate. "Although we do not condone Benn's behavior, viewing the totality of circumstances, appellant fails to make any showing that he was not effectively represented at trial by Melamed."

At an earlier hearing seeking a new trial, Melamed testified, among other things, that he had hoped the jury might take sympathy on McFarland because of Benn's "naps." That prompted the appeals court to opine that "Melamed's decision to allow Benn to sleep" could be viewed "as a strategic move on his part."

Not exactly, Melamed said in a recent interview. He attempted, for a while, to serve as a baby-sitter to Benn

in an effort to keep his co-counsel awake. But Melamed said he eventually abandoned the effort because he could not keep an eye on Benn and concentrate on testimony at the same time.

McFarland's problems with attorneys did not end when the trial concluded. During the initial appeal, McFarland was represented by Marcelyn Curry, an inexperienced, state-appointed lawyer doing her first capital appeal and plagued by severe health problems, including anemia, hepatitis A and B, and dizzy spells, all of which caused her to be frequently bedridden. Curry missed three deadlines for filing the appeal and was threatened with contempt.

She admitted in a court affidavit that her papers were "incomplete." Indeed, the Texas Court of Criminal Appeals cited more than half a dozen inadequacies in her brief, but still upheld the verdict.

Charles Baird, then a Texas Court of Criminal Appeals judge, issued a sharp dissent, saying McFarland was entitled to a new trial. "I find the majority's suggestion that it was somehow reasonable trial strategy for [McFarland's] lead counsel to take a 'short nap' during the trial utterly ridiculous," Baird wrote.

"The possibility of jury sympathy can never be a reasonable alternative to effective representation," continued Baird, who was later voted off the bench in an election that focused on his death penalty opinions. "A sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense. In my view, a sleeping attorney is no attorney at all."

Given the lack of communication between the two defense attorneys and the fact that Melamed did little trial preparation, his presence "did not excuse or rehabilitate Benn's incompetent representation," Baird wrote. "I'm No Angel"

McFarland, who grew up in the Bronx, has been in trouble with the law for more than two decades.

He came to Texas to join the Job Corps as a troubled teenager in 1978 and was later convicted of armed robbery and two misdemeanor thefts. At the time of his murder indictment, he also was facing charges on another robbery—in which he allegedly brandished an Uzi—and on separate gun possession charges.

"I'm no angel," McFarland readily volunteered in an interview at the prison

where death row inmates are housed in Livingston, 70 miles north of here.

Regardless, McFarland insists that he did not kill grocer Kenneth Kwan and that his trial was a mockery of what the American legal system is supposed to provide.

"There are no words to express the pain, the anger, the frustration," McFarland declared through a telephone while seated in a bulletproof-glass-enclosed interview cubicle.

McFarland said he was shocked during jury selection to see Benn slumbering and confronted him. He said the attorney replied that he was just listening with his eyes closed and he was capable of making choices based on the prospective jurors' written answers to a questionnaire.

McFarland said that he periodically tried to awaken Benn by kicking his chair. "When you have a juror looking and your lawyer is sleeping, you're boiling over but you don't want to look too agitated because of what people will think."

Melamed said the courtroom bailiff, David Hernandez, also kicked Benn's chair and tried to nudge him awake, but eventually stopped.

"I expected John Benn to get up there and not only question their lead eyewitness but challenge every single person who had something to say against me. He just let it go by," McFarland lamented.

Capital cases often drag on for years and frequently involve complicated issues. But McFarland's current lawyers say there is nothing subtle about his situation.

"This is not a case about the arcane niceties of death penalty law and procedure," the lawyers contend in their brief seeking a new trial. "There is no physical evidence connecting McFarland with the murder of Kenneth Kwan in November of 1991. . . . No murder weapon. No fingerprints. No forensic evidence of any kind. The state's case was based on a dubious and uncorroborated identification of McFarland during a police lineup that was conducted outside the presence of McFarland's counsel, in direct contravention of the 6th Amendment right to counsel."

During the prison interview, McFarland said he has chatted with Calvin J. Burdine, the second death row inmate currently seeking a new trial because his now-deceased lawyer, Joe Frank

Cannon, slept through parts of his murder trial.

McFarland said that he also knew Carl Johnson, who was executed in 1995 after federal courts said he could not even litigate the issue of Cannon sleeping at his murder trial because the point had not been raised early enough in the appellate process.

"He thought that issue would save him," McFarland said ruefully.

Last year, a federal trial judge in Houston ruled that Burdine was entitled to a new trial because Cannon slept through significant portions of his 1987 trial. "A sleeping counsel is equivalent to no counsel at all," wrote Judge David Hittner, an appointee of President Reagan.

The Texas attorney general's office has appealed, maintaining that the state is still entitled to execute Burdine. The state says that Burdine has failed to demonstrate that Cannon's performance actually harmed his client.

Regardless of how a federal appellate court in New Orleans rules, the Burdine case could go to the U.S. Supreme Court, which has never directly decided whether a criminal defendant is entitled to a retrial if his attorney slept through key portions of a trial.

In American jurisprudence, the issue is hardly open and shut.

At one point during McFarland's trial—which lasted five days, including sentencing, following 12 days of jury selection—Houston Chronicle courthouse reporter John Makeig asked Judge Shaver about Benn repeatedly falling asleep.

"The Constitution says everyone's entitled to the lawyer of their choice, and Mr. Benn was their choice. The Constitution doesn't say the lawyer has to be awake," Shaver responded.

#### A \$27,000 Robbery

The murder that put McFarland on death row occurred on Friday, Nov. 15, 1991, a cloudy but warm day in Houston.

The morning began like most for Kenneth and Shirley Kwan. They left home to open the C&Y Food Center, which they had run for 17 years in Houston's low-income Trinity Gardens neighborhood.

On Fridays, a lot of people cashed checks at the modest store, just across the road from a small waste management company and a Baptist church. So Mr. Kwan and security guard James L.

Powell went to the bank in Kwan's van and picked up \$27,000 in cash. Powell carried a shotgun.

When they returned to the grocery, Kwan, carrying the money, got out on the driver's side. A man carrying a large plastic bag rose from where he was sitting outside a laundromat next door to the market. He hurried by Kwan, headed toward Powell. Kwan hastened his pace toward the store.

The man pulled out a handgun, put it to Powell's head, and told him, "Drop the gun. Drop the gun. If you don't I'll blow your goddamned brains out." Powell said he complied but heard two shots fired at Kwan from behind him.

Nine months later, during McFarland's trial, Powell was asked if he saw the man who had held the plastic bag seated in the courtroom. "No, I don't," he responded.

Carolyn Bartie, a regular C&Y customer who had come to buy stamps, turned out to be the key trial witness. She was sitting in her car when Kwan and Powell pulled up.

Bartie said that the man who had been carrying the plastic bag fired at Kwan and then directed another man, wearing a ski mask, to enter the store and get the moneybag Kwan was holding.

As Kwan lay dying inside the store, the two perpetrators ran toward a waiting car with the money and sped off.

Soon thereafter, the police recovered a stolen 1986 Chevrolet Suburban several blocks away that they believed had been used in the robbery. No fingerprints were recovered from the vehicle, and the gun was not found in it.

That day, Bartie told detectives that everything happened so fast she did not think that she could identify the man with the plastic bag and the handgun, according to police reports.

But a month later, Bartie, a data entry operator for the Houston Police Department, tentatively identified McFarland as that man from a Police Department photo spread of six individuals. She subsequently picked him out at a lineup and identified him at trial.

During his brief cross-examination, Benn asked Bartie how she had been able to identify McFarland more than a month after she told police she couldn't. She responded that she simply had been "scared" at the time.

But Benn neglected to ask Bartie anything about the major discrepancies

between McFarland's appearance and her initial description of the gunman. Nor did the defense attorneys point out the discrepancies in size and skin shade during their closing arguments.

The other key witness at the trial was McFarland's 20-year-old nephew, Craig A. Burks. Three days after the murder, Burks called the Houston "Crime Stoppers" line and told police he had information on the case. He also testified at a grand jury several months before the trial.

The night of the murder, Burks testified at trial, McFarland, driving a new car and carrying a wad of bills, told him and Burks' uncle, Walter Burks, that he had participated in a robbery at the store. At one point in the testimony, Craig Burks said McFarland told him he "shot the dude, the Chinese guy." But when the prosecutor asked if McFarland told him why he fired, Burks contradicted himself, saying McFarland told him that it was another man, Albert Harris, who shot Kwan.

Melamed attempted to shake Burks on cross-examination by repeatedly asking him about the fact that "Crime Stoppers" had paid him \$900 for the tip. He also pressed Burks about the fact that he was offered a reduced sentence on an aggravated robbery in return for his testimony. Burks insisted that he was telling the truth.

Melamed did not question Burks on his contradictory statements about who fired the gun—which repeated the same contradiction he had made in his grand jury testimony.

Moreover, Melamed did not ask Craig Burks about something that McFarland's new lawyers say may be even more important: Walter Burks had told the grand jury that McFarland had not said he participated in the robbery-murder.

Police never charged Harris, or another man, Michael J. Clark, who Craig Burks testified was the chief planner of the robbery. Clark was the acquaintance who recommended Benn to McFarland, according to several attorneys in Houston.

The defense called no witnesses and the jury deliberated only 80 minutes before convicting McFarland.

In the punishment phase, prosecutors called 20 witnesses over a 3 1/2-hour period in an effort to show that McFarland, if allowed to live, posed a continuing threat to society.

Only three witnesses were called by McFarland's attorneys, and they were on the stand for all of 15 minutes.

A foreman at a paper factory where McFarland was employed for three years said he was a good, reliable worker. A guard in the jail where McFarland was housed for six months awaiting trial said he had not gotten into any trouble during that period. And McFarland's wife, Patricia, told the jury that her husband had always tried to take care of her and their two sons, George Jr., 6, and Gregory, 4, both of whom were in the courtroom.

There was no testimony from any relatives about McFarland's early life, such as the fact his father left the family. Nor was there any psychiatric testimony about anything that might have contributed to his becoming a criminal—rudimentary things that experienced, competent defense lawyers normally do in such a case.

Melamed offered little more in his closing argument than a summary of his three witnesses and a plea for mercy. In contrast, prosecutors Kate Dolan and Ned Morris took one of the principal weaknesses in their case and turned it into an asset, saying that a lack of fingerprints showed how clever McFarland was. They also told the jury that there was no doubt that McFarland represented a future danger to society, even in prison. And Morris emphasized that at a time "when his life is on the line," McFarland's lawyers offered little mitigating testimony.

Juror Jensen found this particularly troubling.

"I kept waiting for the defense to put on some evidence that would provide me with a reason not to vote on the special issues in a way that the death penalty would result," Jensen said in an affidavit submitted as part of McFarland's writ of habeas corpus.

"The original vote was 9-3 for the death penalty," she said. But "the defense never did present any meaningful evidence and because of what the prosecutor presented I felt I had no choice but to vote for the death penalty."

Attorney Richard Frankoff, who met McFarland in 1984 and represented him in two robbery cases, said he still is pained at the fact that McFarland's attorneys did not call on him to present mitigation testimony.

"Although McFarland has had troubles with the law, I have developed a genuine affection for the man," said

Frankoff, who was just elected president of the Harris County Criminal Lawyers Assn. "He struck me as a loving husband and father."

Frankoff also submitted an affidavit saying that after McFarland was arrested on a 1984 robbery charge, he was inadvertently released by the authorities and came to Frankoff's office. "He wanted to turn himself back in." Frankoff arranged for McFarland to return to jail. Eventually, McFarland pleaded guilty and was sentenced to a six-month term.

The day of his sentencing, McFarland and his longtime girlfriend Patricia Burks were married in the judge's chambers with Frankoff serving as best man.

"I believe his life is capable of being redeemed. A jury should have heard that during the punishment phase," Frankoff said.

#### **A Better Legal Team**

Through pure serendipity, McFarland now has far stronger legal representation.

After his conviction was upheld by the Texas Court of Criminal Appeals in 1996, McFarland wrote a letter to his cousin Ronald Collier, a New York engineer, asking him to help find a new lawyer to file a constitutional challenge.

Collier, who had been close to McFarland since they were youths in the Bronx, called George Kendall at the NAACP Legal Defense and Educational Fund in New York.

Besides handling a heavy caseload himself, Kendall frequently recruits lawyers from large firms to take on the cumbersome task of preparing habeas corpus writs, which require not only sophisticated legal work but also an independent investigation of the facts and the trial record.

Conscientious lawyers often spend hundreds of hours on such cases.

Kendall asked legal defense fund board member Daniel L. Rabinowitz to help in the search. Rabinowitz solicited his friend and former partner, R. Paul Wickes of New York's venerable Shearman & Sterling, one of the nation's largest law firms with more than 800 attorneys, and a roster of blue chip clients including Citicorp and Morgan Stanley. Wickes, a veteran corporate lawyer who in the late 1970s had served as chief of staff to Vermont's Republican Gov. Richard Snelling, agreed to review a synopsis of the case.

"I threw it in my briefcase and I

took it home for the weekend with a lot of other work," Wickes said in a recent interview.

What happened in McFarland's case troubled Wickes. But he said another factor cemented his decision to represent McFarland.

That weekend in early 1997, Wickes said, he read a New Yorker article entitled "Tinkering with Death" by U.S. 9th Circuit Court of Appeals Judge Alex Kozinski, whose chambers are in Pasadena. In the article, Kozinski, who supports capital punishment, offered a highly personal view of what it is like to have a man's life in his hands, including recollections of how he awoke several times one night wondering if an execution had been carried out.

Several statements in the article troubled Wickes. First off, Kozinski wrote that "death cases are meticulously litigated, first in state court and then in federal court." Kozinski also accused "liberal colleagues" on the 9th Circuit of tacitly acting in concert with lawyers engaging in manipulation to get executions postponed.

"I was sitting there and I am a big, fancy New York lawyer and it's been a long time since anyone has called me a liberal," Wickes said, "but I think death is different."

McFarland also has another lawyer now because in recent years Texas has begun appointing attorneys to handle the state habeas corpus proceeding for people convicted of capital murder. McFarland's local counsel is Walter E. "Rusty" Herman III, of Humble, Texas, a well-regarded criminal defense lawyer and former federal prosecutor.

In addition, McFarland now has the assistance of two Houston private investigators retained by Shearman & Sterling. Wickes said the firm, which is working for free, has incurred "hundreds of thousands" of dollars in expenses.

In contrast, Shaver allotted only \$600 for an investigator. Melamed said he was paid about \$15,000. It is not clear how much Benn was paid. McFarland wouldn't say and Benn does not remember.

For McFarland to win a new trial, he must overcome strong legal presumption, based on a U.S. Supreme Court ruling, that his lawyers were competent under prevailing professional standards and that the outcome of the original trial was reliable.

Since the high court has set such a

difficult standard, there are numerous instances in which dubious performances by an attorney have nonetheless been deemed acceptable. Indeed, in the Burdine case, lawyers for the state of Texas have reminded a federal appeals court that there have been instances in which appellate judges have not overturned verdicts of trials in which attorneys were drunk, had psychotic reactions or admitted they were "totally unprepared."

On the other hand, without defining the parameters, the Supreme Court in another 1984 case said there are some instances where a lawyer's performance has been so bad that it is inherently prejudicial to the defendant's case.

The high court has not ruled directly on the issue of sleeping lawyers. But at least two federal appeals courts have held that if a lawyer sleeps through significant portions of a case, such conduct is inherently prejudicial.

In the most recent case, in 1996, a federal appeals court in New York awarded a new trial to a man convicted at a drug trial where his lawyer was frequently asleep. "Effectiveness of counsel depends in part on the ability to confer with the client during trial on a continuous basis, and the attorney must be 'present and attentive' in order to make adequate cross-examination—a matter of constitutional importance by virtue of the 6th Amendment," the appellate judges wrote.

#### **The Pain Continues**

McFarland's case could continue in the courts for several more years. Meanwhile, Shirley Kwan and her children continue to suffer from the loss of husband and father.

She sold the C&Y market and is now living in suburban Houston with the youngest of her three children. The other two are in college. "It's hard," says Kwan.

In fact, she says, it's very hard. "It will stay with me all my life. Nothing can change that."

Judge Shaver, for his part, said he wishes that he had done two things differently during the trial: given the defense more than the \$600 he allotted for the investigator and appointed a lawyer to assist Benn who actually had experience in death penalty cases.

"It would have looked better if there was a lawyer with more death penalty experience," Shaver volunteered, even though he said that he had seen worse defense teams in a capital trial.

"It's not always what it is," said the judge, who is semiretired. "It's how it appears."

McFarland spends 23 hours a day in a 6-by-10-foot cell, passing time reading romance novels and listening to a religious radio station because "you feel like you have company in the cell."

McFarland says he has "a little more hope" now because of his new lawyers. But he does not predict that he will be freed any time soon. "When I look at Doug Shaver and the judges from the Court of Criminal Appeals and the governor of Texas, no one seems to uphold the law, no one seems to represent the Constitution."

While McFarland was speaking, during a prison media day in June, reporters from various other news organizations were interviewing four other death row inmates nearby. Three have since been executed.

#### **Photo:**

George McFarland sits on death row in Texas for a 1991 murder that he says he didn't commit.

ID NUMBER: 20000715fwfa20ke

#### **Photographer:**

ALAN CHARLES POGUE /  
For The Times

#### **Photo:**

A photo taken by Houston police shows the scene of the fatal 1991 shooting of grocer Kenneth Kwan, who was robbed of \$27,000 outside his store.

ID NUMBER: 20000715fxnrzjke

#### **Photographer:**

Court exhibit

#### **Photo:**

Attorney R. Paul Wickes, a member of McFarland's current legal team handling his appeal, argued in a brief that "the death penalty should not be used to punish an accused for the incompetence of his lawyers."

ID NUMBER: 20000715fxngw6ke

#### **Photographer:**

RANDI LYNN BEACH /  
For The Times

#### **Photo:**

Judge Doug Shaver said he knew John Benn was incompetent, so he named a second lawyer to help.

ID NUMBER: 20000715fxnvw8ke

**Photographer:**  
Houston Chronicle

**Type of Material**  
Non Dup

**Descriptors**  
ATTORNEYS;  
CAPITAL PUNISHMENT — TEXAS;  
COMPETENCY;  
LEGAL MALPRACTICE;  
PRISONERS — TEXAS;  
MURDERS — TEXAS;  
EVIDENCE;  
MCFARLAND, GEORGE

---

**NOTE:**  
May not be reproduced or  
retransmitted without permission.  
For permission, call:  
800 LA TIMES, Ext. 74564.