

T H E S P A N G E N B E R G G R O U P

Robert L. Spangenberg
President

Marbo L. Hansen
Financial Officer

Marcia L. Beeman
Research Associate

Andrew H. Tarsy
Research Associate

Tessa J. Schwartz
Research Assistant

A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS

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State Bar of Texas
Committee on Legal Representation
For Those on Death Row

Supported by:

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Prepared by:

The Spangenberg Group
West Newton, Massachusetts
Robert L. Spangenberg
Andrew H. Tarsy
Tessa J. Schwartz
Elizabeth R. Walsh
Judith T. Menton

EXECUTIVE SUMMARY

In the Spring of 1990, the State Bar of Texas entered into a contract with The Spangenberg Group of Newton, Massachusetts to study capital representation in Texas and to propose recommendations for the improvement of the current system. The study was recommended to the State Bar by its Committee on Legal Representation for those on Death Row as part of the committee's ongoing efforts to address the problem of providing attorneys to indigent death row inmates in Texas. The impetus for the study came from concerns about the perceived problems with representation in state habeas corpus proceedings. This study is the most comprehensive ever undertaken in Texas regarding representation in capital cases and provides substantial information not previously available. It was made possible through a grant from the Texas Bar Foundation.

The findings are based upon the responses from 263 private attorneys and judges in Texas who returned our questionnaires. They are also based upon numerous interviews and conversations in Texas with those most familiar with capital proceedings and analyzing substantial additional secondary data. These findings are further informed by The Spangenberg Group's experience at the national and state level over the past decade. We believe, in the strongest terms possible, that Texas has already reached the crisis stage in capital representation and that the problem is substantially worse than that faced by any other state with the death penalty.

As the number of inmates on death row in states throughout the country has grown over the past few years, concerns have been raised about how states can provide counsel. Some states have resorted to recruiting qualified attorneys to represent indigent defendants in capital cases, particularly on appeal or post-conviction, for little or no compensation. With certain notable exceptions, this inelegant solution is standard in Texas for state

habeas corpus proceedings.

In summary, the results of our study disclose that the situation in Texas can only be described as desperate. The volume of cases is overwhelming. Presently no funds are allocated for payment of counsel or litigation expenses at the state habeas level. Recruiting efforts for volunteer attorneys coordinated by the State Bar of Texas and the Texas Resource Center have been substantial, but the number of available attorneys and firms remains limited. In the long run, the problem in Texas cannot and will not be solved by a voluntary program. Many lawyers are reluctant to take those cases which invariably require an enormous personal sacrifice without compensation. Other lawyers refuse to take additional cases after having experienced a whole range of problems with their most recent case or cases. Moreover, most lawyers are reluctant to participate because of the substantial complexity of the law. Finally, the large number of cases with approaching dates of execution makes the problem most acute at this time.

In conducting this study, it was decided that to place the question of capital case representation into perspective, it would be necessary to include analysis of procedure and practice at the trial level in capital cases and to trace the involvement of counsel through each step of the process including state habeas corpus. While it has made for a voluminous report, this comprehensive approach is critical to reaching an understanding of the magnitude of the problem and the urgency of providing qualified counsel at all stages of capital proceedings. In many respects, the quality and effectiveness of counsel at trial has a direct relationship to the importance of the state habeas process.

In the long run, it is our professional judgment, based upon over ten years of study of death penalty representation throughout the country, that Texas must address substantial problems with regard to capital representation at trial. However, we are overwhelmed by the urgency of the need to address the problems at

state habeas corpus immediately.

A. SUMMARY OF FINDINGS

It is the professional judgment of the research team, which has conducted studies of capital representation on the national level and in a number of other states, that the problems in Texas far outweigh those in any other death penalty state in the country. The primary reasons for this conclusion include the following:

- o Compensation for counsel at trial and direct appeal is uneven across the state, with wholly inadequate compensation provided in many counties.
- o The constant search for qualified volunteer pro bono counsel in state habeas cases is becoming increasingly difficult, particularly when cases are under an active execution warrant.
- o Although by statute appointment of counsel in state habeas is at the discretion of the district judges, it very often does not occur, unlike other death penalty states with similar discretionary appointment rules.
- o Compensation at state habeas is often not provided either for attorneys fees or experts/expenses in districts throughout the state of Texas.
- o Funding for capital representation, where it does exist, is wholly a county responsibility. The state provides no funds whatsoever for indigent defense in Texas. This is true for only seven other states.
- o Few defender programs in Texas provide representation in capital cases. Virtually every other state has full-time experienced public defenders who specialize in capital cases.
- o Texas has more counties (254) than any other state, making attempts to coordinate capital work statewide extremely difficult.

- o Texas has the largest death row population of any state in the country.
- o Texas has, by a substantial number, more execution warrants issued each year than any other state.
- o A significant number of attorneys and judges responding to this study have indicated that the quality of representation in capital cases in Texas is adversely affected by the level of compensation provided.
- o Results of the study show that more and more experienced private criminal attorneys are refusing to accept court appointments in capital cases because of the time involved, the substantial infringement on their private practices, the lack of compensation for counsel fees and experts/expenses and the enormous pressure that they feel in handling these cases.

The problems of capital representation in Texas can be found at all levels of the criminal system from trial to state habeas. Furthermore, the inadequacy of counsel at the trial level reverberates through the direct appeal process and the state habeas level. The results of our study show clearly that in the long run, appointment, qualification standards and adequate compensation are all issues that must be addressed at the trial level if positive reform of the system of capital representation in Texas is to be achieved. Furthermore, we believe that it is impossible to achieve these results without substantial state funds. Notwithstanding all of the serious problems in the trial and direct appeal stages, this study makes it clear that the problems at state habeas are overwhelming and of grave consequence. For this reason, our findings and recommendations provide particular emphasis on the problems of state habeas.

What follows is a series of major findings on the entire capital representation system in Texas, a number of findings particular to state habeas and several other findings with respect to capital representation in Texas.

B. MAJOR FINDINGS

1. System of Representation

- o The entirely county-based system of appointment of counsel to indigent defendants in capital cases results in a lack of uniformity and a lack of control over the quality of representation provided throughout the state.
- o Texas is the only death penalty state in which representation in capital cases is provided almost exclusively by private counsel and primarily not by public defender programs.
- o Many district court judges are not following the requirements of Article 26.05 of the Code of Criminal Procedure which mandates that each county adopt a formal schedule of fees for court-appointed counsel.

2. Funding

- o As a result of the total lack of state funds for representation of indigents in capital cases in Texas, the burden of funding this constitutionally mandated function falls entirely on the individual counties. This results in an uneven level of available services in the various counties around the state. In addition, this funding scheme places an undue burden on smaller, rural and less affluent counties.

3. Appointment of Counsel

- o Because there are no statewide qualification standards or eligibility guidelines for the appointment of private counsel to represent indigent defendants in capital cases, judges

around the state are not held accountable for the qualifications of attorneys they appoint to represent capital defendants.

- o Few counties have developed standards relating to the timing of appointment of counsel in capital cases. Judges often do not appoint counsel to indigent defendants until after the outset of the proceedings and defendants are sometimes without representation during important phases of their cases.
- o In many counties, only one attorney is appointed in a capital case. Policies regarding the appointment of two attorneys vary widely around the state and even within some counties.

4. Compensation of Appointed Attorneys

- o In almost every county, the rate of compensation provided to court-appointed attorneys in capital cases is absurdly low and does not cover the cost of providing representation.
- o Fee schedules for court appointed attorneys in capital cases vary widely throughout the state. Maximums or caps on compensation are also widely disparate.
- o Attorneys and judges agree that the low rates of compensation currently paid to court-appointed attorneys in capital cases have a detrimental effect on the quality of representation provided.

5. Funding for Expert Witnesses and Other Litigation Expenses

- o There is a serious underfunding of essential expert services and other expenses in capital trials and appeals.

- o Expenses are largely paid for by attorneys themselves. These out-of-pocket expenses are rarely reimbursed by the court in state habeas cases.

6. State Habeas Corpus

By far, the greatest problem in capital representation in Texas has been found in the state habeas corpus process. What follows is a series of findings specifically relating to capital representation in state habeas corpus proceedings.

- o Despite the fact that Articles 11.07, 26.04 and 26.05 of the Code of Criminal Procedure in Texas gives the district court judges discretion to appoint counsel and to compensate them in state habeas proceedings, this is almost never done.
- o Only three of the 33 attorneys in the study who had served as counsel in state habeas capital cases reported that they received compensation.
- o Despite the fact that district court judges under the statute have the authority to provide funds for experts and expenses, these are almost never approved.
- o Because state habeas counsel is generally only available in capital cases on a volunteer pro bono basis, it has been necessary to turn to large civil law offices both within and outside of Texas to represent capital defendants in Texas.
- o The problem of lack of appointed counsel in state habeas capital cases is exacerbated by the fact that Texas has the largest number of execution warrants in the nation filed each year. It is far more difficult to get a lawyer to step into a case under an active execution warrant than it is when there

is substantial time to prepare for the case.

- o Despite efforts by the State Bar of Texas, the Texas Resource Center and others, Texas is running out of volunteer lawyers and law firms willing to provide pro bono lawyers and law firms willing to provide pro bono representation in capital cases at state habeas. Increasingly, qualified attorneys who were willing at one point to provide representation at state habeas are now refusing to get involved because of the prohibitive amount of time that it takes and the uncertainty with regard to compensation.
- o The volume of capital cases at state habeas in Texas is enormous and many more will reach this point over the course of the next year. The volume of cases at state habeas adds significantly to the problem of finding qualified volunteer pro bono counsel.
- o There is no organized statewide program to develop standards or qualifications for counsel or to assure that volunteer counsel will be found for state habeas capital cases. This is true even though the State Bar and the Texas Resource Center have spent time and energy responding to warrants and recruiting volunteer counsel for case after case.
- o Ensuring the appointment of qualified counsel in state habeas capital cases is further complicated by the fact that volunteer pro bono counsel generally do appear on behalf of a defendant. Some district judges stated in response to the questionnaire that they do not appoint or compensate counsel at state habeas because volunteer pro bono counsel generally arrive prepared to handle the case.

- o Despite the efforts of the Texas Bar and the Texas Resource Center, and because of the huge volume of state habeas cases, survey results show that the quality of representation in these cases is uneven and that in some cases, the performance of counsel is extremely poor.
- o It is unfair to require attorneys to provide representation in state habeas cases on a pro bono basis.

The existence of any one of these findings provides a serious barrier to quality representation in state habeas capital cases in Texas. Because commonly in Texas when they are found together, it is our professional view that representation in the state habeas cases in Texas has gone beyond the crisis level and requires immediate attention.

7. Other Findings

- o In order to increase the number of attorneys willing to accept capital cases, the state of Texas must provide adequate compensation for attorneys, adequate funds for necessary experts and expenses, back-up legal consulting services, and specific advanced training.
- o Rural counties experience particular difficulties with capital representation. Problems include less money to compensate attorneys for time and expenses, fewer qualified counsel, and the repeated assignment of capital cases to a small group of attorneys.

C. SUMMARY OF RECOMMENDATIONS

What follows is a series of recommendations that The Spangenberg Group has developed as a result of conducting this

study and other studies in a number of jurisdictions around the country on capital representation. We begin by setting out several major recommendations relating to the entire system of capital representation in Texas and then specific improvements which are necessary at the state habeas corpus level.

1. Major Recommendations

- o There should be established in Texas a statewide body or organization responsible for developing standards and guidelines for capital representation throughout the state. The organization should include representatives of the State Bar, the Criminal Defense Lawyers' Association, the Texas Resource Center and other organizations concerned with the delivery of capital representation.
- o The state should reimburse counties at no less than 50% of the cost of compensating court-appointed counsel to indigents in capital cases at trial and direct appeal. The state should also reimburse the counties for up to 50% of the cost of providing investigators, expert witnesses and other necessary litigation expenses in these cases. Reimbursement should be conditional on county compliance with all standards and guidelines promulgated by the state organization and the court.
- o The state should provide 100% of the funds required to provide court-appointed counsel to indigents at state habeas corpus in capital cases. In addition, the state should pay 100% of the cost of investigation, expert witnesses and other necessary litigation expenses in those cases.
- o There should also be created within the state oversight organization a division of full-time, salaried, experienced

and qualified attorneys to provide direct representation in state habeas capital cases and to coordinate with the Resource Center, the provision of expert consultant services for the private bar at trial and direct appeal. As an alternative to this approach, we would support the development of such a unit within the Texas Resource Center.

- o While we recommend that the state oversight organization direct its immediate attention to the crisis in representation in state habeas capital cases, it should also be charged with reviewing the overall system of capital representation in Texas and making recommendations to the executive and legislative branches for immediate implementation at the trial and direct appeal levels.
- o It should be established by legislation or court rule that no execution warrants be issued until the defendant has been through the entire criminal process for the first time. This would include trial, direct appeal, state habeas and federal habeas.

2. Private Attorney Recommendations

- o Two attorneys should be appointed to represent indigent defendants at all levels in all capital cases--at trial, on direct appeal, and during state habeas corpus proceedings.
- o Counsel should be appointed to capital defendants in a timely manner so that all defendants will have representation at every stage of the proceedings beginning as soon as possible after arrest.
- o Attorneys who handle a capital case pro bono at one stage of the proceedings should not be precluded from compensated

appointment later in the proceedings. Qualified attorneys should be appointed by the court at their request, regardless of prior pro bono representation.

- o Adequate compensation should be provided to court-appointed counsel at all levels in all capital cases--at trial, on direct appeal, and during state habeas corpus proceedings. The hourly fees for such cases should be no less than \$100 an hour and there should be no arbitrary maximum fee in any individual case.
 - o Adequate funds should be provided in all capital cases at trial and post-conviction for experts, investigators and other necessary costs of litigation.
 - o Extensive training opportunities should be provided for all attorneys involved in death penalty representation. To this end, funds should be allocated for the specific purpose of providing training of counsel.
3. Recommendations for Improvement in State Habeas Capital Representation
- o Legislation should be enacted to require the appointment of counsel in all state habeas corpus capital cases. Necessary monitoring should take place to assure that such representation is provided immediately following either affirmance in the Texas Court of Criminal Appeals or denial of certiorari from the United States Supreme Court after affirmance of the Texas Court of Criminal Appeals.
 - o Qualification standards for court-appointed counsel at state habeas should be developed by the state oversight organization and supported either by the Supreme Court through its rulemaking authority, or by legislation. The qualification

standards should include substantial criminal law experience, prior experience in capital cases, training, and other appropriate measures.

- o Adequate compensation should be provided for state habeas counsel in all cases. The hourly fees for such cases should be no less than \$100 an hour and there should be no arbitrary maximum fee in any individual case nor any negotiated flat fee per hour. Appointed counsel should be paid promptly for all hours worked and a process should be developed for interim payments.
- o Adequate funds should be provided in all state habeas capital cases for expert witnesses, investigators and other necessary costs of litigation.
- o Substantial state funds should be appropriated to the Texas Resource Center to permit it to take on a larger role in state habeas and federal habeas capital work.

D. CONCLUSION

This study is the most comprehensive ever undertaken in Texas regarding capital representation. However, it is not the first. Many judges and lawyers and the State Bar of Texas have said for years that there are serious problems in the area of capital representation. This study concludes that there are, in fact, serious problems and that they exist at trial, direct appeal and in post-conviction proceedings. They are problems of a systemic nature which can only really be remedied by thoughtful systemic solutions. The preceding recommendations form a broad outline for what is necessary in this regard throughout the capital representation process, with particular focus on representation at state habeas.

In the introduction to this report, we quoted from the report of the Ad Hoc Committee Regarding Legal Representation of Those on Death Row: "Texas Plan," dated April 1987. In the conclusion of that report, the Committee stated in part:

The State and Federal courts, and members of the State Bar universally agree that a severe problem exists in the State of Texas concerning the availability of competent counsel to represent indigent inmates sentenced to death in their post-conviction proceedings and that this problem is daily growing worse. We believe that the State Bar must take the initiative to lead in developing a solution. The cornerstone of this solution should be the concept of "volunteerism." Any matter involving the potential taking of human life deserves the utmost professional competency and personal commitment by an attorney.

Despite the efforts of the State Bar of Texas and its Committee on Representation For Those On Death Row, the Texas Criminal Defense Lawyers Association, the Texas Resource Center, the ABA Postconviction Death Penalty Representation Project and hundreds of judges and private attorneys in Texas, our research compels us to the conclusion that current attempts to secure counsel for death row inmates are wholly inadequate. Providing volunteer pro bono counsel for state habeas corpus capital cases in Texas is not a permanent solution to the problem.

In an April 1992 article in the Texas Bar Journal, the Chair of the State Bar Committee on Death Row Representation, Vincent W. Perini, stated:

Despite the obvious efficacy of 11.07 post-conviction litigation (which, incidentally, is a prerequisite to the federal habeas corpus process), Texas district judges rarely appoint lawyers at the 11.07 stage since it is not required.

Finding lawyers to do this work out of the goodness of their hearts is not easy, even on Wall Street. Today in Texas there are about 25 condemned inmates who have cases to litigate but no lawyers to litigate them. Recruiting lawyers is a constant and continuing struggle. The representation is as nerve-racking as it is

In 1987, the University of Texas School of Law established a Capital Punishment Clinic which gave course credit to students assigned to attorneys working on death penalty cases. In time the clinic began recruiting volunteer lawyers from private law firms. This effort, led by Professor Ed Sherman, was the precursor to the Texas Resource Center.

Also in 1987, an "Ad Hoc Committee Regarding Legal Representation of those on Death Row" was formed under the auspices of the State Bar of Texas in an effort to study the problem and to recommend solutions. The committee was chaired by the late Judge M.P. Duncan III of the Texas Court of Criminal Appeals. The April 1987 Committee Report states in part:

The impact of this problem on the quality of justice and judicial administration in the state and federal courts is that the absence of a system to ensure that death sentenced inmates have counsel throughout the process has had a detrimental effect upon all the parties and upon the quality of justice in both our state and federal courts.

For the state, it has often meant that he or she has not had the means to test the fairness of his or her conviction and sentence of death. For the courts, it has meant high-pressure decision-making because an execution date is imminent and sometimes briefs and arguments have been inadequate and for society at large, it has meant that the larger issues present in many of the death cases receive inferior adversarial testing. The absence of an attorney usually means that cases are delayed, and the courts fail to receive the assistance they need from counsel. Justice is thereby frustrated.

The cases involving death row inmates demonstrate that the commonly held view that the so-called endless steps in the appeals process are utilized by the death row inmate solely as a means to avoid the terms of his sentence is not necessarily valid. While most of the inmates seek to pursue their appeals, it is largely because the law concerning the implementation of the current capital punishment statutes continues to evolve in both the state and federal courts.

In January and February of 1988, Texas lawyers were exhorted

to meet the habeas crisis in letters mailed first from the President of the State Bar, Joe Nagy, and Presiding Judge John Onion of the Court of Criminal Appeals; then from Chief Judge Charles Clark of the Fifth Circuit Court of Appeals. This began a process which has continued to the present. President James P. Sales wrote in the President's Page of the September, 1988 Texas Bar Journal:

For an individual upon whom society has visited the ultimate sentence - the finality of execution - the conscience of society mandates that all reasonable doubt be eliminated. In response to society's mandate, our legal tradition requires, indeed, compels effective, dedicated and aggressive representation to test the death sentence by every appropriate and available constitutional and legal principle.

The problem at post-conviction is particularly acute. Ayala v. State of Texas, 633 S.W. 2d 526 (1982) states, "The fourteenth amendment does not require the state to provide indigents with service of counsel in seeking discretionary review beyond the first step of appeal." The result is that in the vast majority of capital cases in Texas at state habeas, representation is seldom provided except on a pro bono basis. Counsel generally absorb all costs for expert witnesses or other litigation expenses.

The post-conviction phase of a death penalty case demands many hours of work from defense counsel. According to the American Bar Association Report, "Time and Expense in Postconviction Death Penalty Cases,"¹ attorneys average hundreds of hours handling the state post-conviction phase of a capital case alone. Because of the complexity, recruiting volunteer pro bono counsel for post-conviction cases has become extremely difficult. Several years

¹"Time and Expense Analysis in Post-Conviction Death Penalty," February 1987, as prepared by The Spangenberg Group for the Senate Appropriations Committee, Florida Legislature, House Appropriations Committee, Florida Legislature, and Office of the Governor, State of Florida.

ago, the American Bar Association itself created the Postconviction Death Penalty Representation Project, which while extremely successful, has been unable to meet the total problem on a nationwide basis. Other states with death row populations approaching that of Texas, e.g., California and Florida, have developed comprehensive, systematic approaches to providing representation through substantial appropriations of state funds.

The Texas problem is further dramatized by the size of the state and the volume of cases that are currently in the system. The population of Texas' death row in February, 1993 is 367, an increase of 20% since 1989. We estimate that the number of persons on death row will continue to grow at an even higher rate in the next few years. At the present time, there are approximately 175 capital cases pending before the Texas Court of Criminal Appeals, the highest state court hearing criminal appeals in Texas. We were told that the Court of Criminal Appeals affirms a death sentence on the average of one per week.

Approximately 105 capital cases are pending at the state post-conviction level and roughly 92 cases are pending at the federal habeas corpus stage. There may well be another 75 or more new habeas corpus petitions filed in the federal courts in Texas within the next year and an equal number in state habeas corpus. These figures are overwhelming, particularly in light of the high volume of capital cases awaiting trial. It is difficult to articulate just how serious the problem of representation appears to be. Our view, having completed this study and numerous others throughout the country, is that no other state comes even close to the level of urgency of the problems in Texas.

The following table provides a county-by-county listing of the number of defendants on death row in Texas as of 1990, when we began our study.

Table 1-1

DEATH ROW POPULATION IN TEXAS BY COUNTY

<u>County</u>	<u>Death Row Population</u>	<u>County</u>	<u>Death Row Population</u>
Angelina	3	Johnson	1
Anderson	1	Jones	1
Aransas	1	Kleberg	1
Atascosa	1	Lamar	1
Bell	1	Lamb	1
Bexar	20	Lee	1
Bowie	3	Leon	1
Brazos	5	Liberty	4
Brazoria	2	Limestone	1
Caldwell	1	Lubbock	5
Cameron	7	Madison	1
Chambers	1	Matagorda	1
Clay	1	McLennan	4
Collin	3	Milam	1
Comal	1	Montgomery	4
Crockett	1	Navarro	4
Culberson	1	Newton	1
Dallas	28	Nueces	6
Denton	3	Orange	1
Ector	1	Palo Pinto	1
Ellis	1	Parker	3
El Paso	5	Pecos	2
Fort Bend	3	Potter	3
Freestone	1	Scurry	1
Galveston	4	Shelby	1
Grayson	2	Smith	5
Gregg	2	Tarrant	13
Hale	1	Taylor	6
Hamilton	1	Tom Green	4
Hardin	1	Travis	5
Harris	101	Trinity	3
Henderson	2	Victoria	2
Hidalgo	1	Walker	5
Houston	1	Wharton	1
Hunt	1	Williamson	2
Jefferson	8	Wood	1
		Zapata	1
TOTAL	319		

* Data as of 1990

Once the Court of Criminal Appeals affirms a sentence of death, the state district court often sets an early execution date. In most cases, the attorney who has represented the defendant on

direct appeal terminates representation on affirmance by the Court of Criminal Appeals. In many cases, the defendant is not notified that counsel has terminated representation, but rather assumes that he is still represented. It is at this point that statutorily mandated compensation for court-appointed counsel ends. At this point, volunteer counsel must be recruited to pursue a writ of certiorari to the U.S. Supreme Court and to pursue state post-conviction remedies on behalf of the inmate. It is not uncommon to find that there is no counsel of record for the inmate as the date of execution approaches.

As indicated in the American Bar Association report prepared for the Criminal Justice Act Division of the Administrative Office of the United States Courts, cases litigated under an active warrant often require substantially more time and generate greater costs for counsel.² The volume of warrants filed in Texas far exceeds that of any other state.

When warrants are issued in cases where there is no counsel, the results may be dire. An attorney may be recruited hastily and often the recruited counsel have no familiarity with the highly technical capital case legal issues; important constitutional issues are often not raised or properly litigated; one lawyer may represent the inmate in state post-conviction proceedings, and still another in federal court. New counsel may find substantial issues missed by his/her predecessor; and finally, delay often occurs while new counsel becomes familiar with the record and case history.

In summary, the results of our study disclose that the situation in Texas can only be described as desperate. The volume of cases is overwhelming. Presently no funds are allocated for payment of counsel or litigation expenses at the state habeas

²The Spangenberg Group, "Caseload and Cost Projections for Federal Habeas Corpus Death Penalty Cases in FY 1988, FY 1989 and FY 1990, An Update to the September, 1987 Study," July 1988; prepared for the Criminal Justice Act Division, Administrative Office of the U.S. Courts, pp. 16-18.

level. Recruiting efforts for volunteer attorneys coordinated by the State Bar of Texas and the Texas Resource Center have been substantial, but the number of available attorneys and firms remains limited. In the long run, the problem in Texas cannot and will not be solved by a volunteer program. Many lawyers are reluctant to take these cases which invariably require an enormous personal sacrifice without compensation. Other lawyers refuse to take additional cases after having experienced a whole range of problems with their most recent case or cases. Moreover, most lawyers are reluctant to participate because of the substantial complexity of the law. Finally, the large number of cases with approaching dates of execution makes the problem even more acute at this time.

1.1 Texas Appellate Practice and Educational Resource Center
(The "Texas Resource Center")

As a result of discussions several years ago among the University of Texas School of Law and the Ad Hoc Committee Regarding Legal Representation of Those on Death Row of the State Bar of Texas, and attorneys involved in death penalty work, the establishment of a death penalty resource center was proposed. The Center's role would be to provide legal consulting services to defense lawyers willing to represent indigent defendants in post-conviction death penalty cases in state and federal court. The original proposal for the Resource Center, written in the Spring of 1988, included the following description:

Texas is one of only ten states in the country that fund their indigent defense system entirely through county funds. The result is that each county, large or small, bears the total responsibility for funding indigent defense services. Particularly in less populous counties, the burden on a limited tax base becomes severe as the number of cases increases. Thus, court-appointed counsel throughout the state are often required to provide representation at trial and appeal for limited, and sometimes wholly inadequate fees.

The Center was created in 1988 to address the critical lack of state and federal habeas representation for Texas' death row inmates. Its primary source of support is federal funding through the Administrative Office of the U.S. Courts. These funds are available under the Criminal Justice Act, which has provided funds for similar centers in several other death penalty states. With the support of the federal judiciary, the State Bar, and the University of Texas Law School, the Center's staff began to recruit, train, and assist attorneys handling capital habeas cases on a pro bono basis. The Center began receiving funds from the Administrative Office of the U.S. Courts in 1988 to support its federal habeas work. Additional funds for the Center's state habeas effort have been provided since then by the Texas Bar Foundation, Amnesty International, the State Justice Institute, the Texas Equal Access to Justice Foundation (IOLTA), and St. Mary's University School of Law. The University of Texas School of Law, South Texas College of Law, and St. Mary's University School of Law provide ongoing in-kind support for the Center's work.

Now operating regional offices in Houston and San Antonio in addition to the main office in Austin, enormous demands are made for the Center's services. Its legal staff of 15 attorneys work around the clock to try and address those needs. Since it was established, the Center's caseload has steadily grown and its staff is now involved in the representation of 191 of the approximately 210 death row inmates whose convictions and sentences have been affirmed. Approximately 88 inmates are represented by attorneys recruited by the Center and cooperating bar associations. Nearly 56 inmates are represented directly by Center attorneys or are on a waiting list to have attorneys recruited for them, and the remaining 47 inmates are represented by attorneys who have asked the Center for substantial assistance.

The Resource Center has been highly successful in tracking cases, recruiting attorneys and law firms, providing training,

developing pleadings and manuals, providing direct representation and acting as resource counsel. It has also been able to document the enormous unmet need for competent, adequately compensated counsel at the state habeas corpus level.

Despite enormous effort in a wide variety of areas, the Resource Center is simply not equipped to handle the amount of work required of it by current practices regarding the appointment of counsel in capital cases. Their staff provide an invaluable array of services under truly unique pressures and circumstances.

1.2 Organization of the Report

Chapter one of the report has provided an introduction and history of the study. Chapter two reviews the right to counsel in the state of Texas. Chapter three discusses the methodology of the various elements of the study. Chapter four presents the results of our preliminary telephone survey of selected district court judges. Chapters five through eight present the data from the four survey questionnaires. Chapter nine is a presentation of comparative information on capital case representation in other states. Chapters ten and eleven present findings and recommendations. In addition, the items found in the appendices provide important supplemental data and information on related topics.

In conducting this study, it was decided that to place the question of capital case representation into perspective, it would be necessary to include analysis of procedure and practice at the trial level in capital cases and to trace the involvement of counsel through each step of the process including state habeas corpus. While it has made for a voluminous report, this comprehensive approach is critical to reaching an understanding of the magnitude of the problem and the urgency of providing qualified counsel at all stages of capital proceedings. In many respects, the quality and effectiveness of counsel at trial has a clear and

direct relationship to the importance of the state habeas process.

In the long run, it is our professional judgment, based upon over ten years of study of death penalty representation throughout the country, that Texas must address substantial problems with regard to capital representation at trial and direct appeal. However, we are overwhelmed by the urgency of the need to address the problems at state habeas immediately.