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Getting It Right from the Beginning: A Critical Examination of Current Criminal Defense in Texas and Proposal for a Statewide Public Defender System.

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GETTING IT RIGHT FROM THE BEGINNING: A CRITICAL EXAMINATION OF CURRENT CRIMINAL DEFENSE IN TEXAS AND PROPOSAL FOR A STATEWIDE PUBLIC DEFENDER SYSTEM

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I. INTRODUCTION

A nationwide controversy currently exists over circumstances surrounding imposition of the death penalty.[1] Issues such as execution of

1. *See* Lisa Chedekel, *Death Penalty Debate Looms: Both Sides Saying It's Time for Change*, THE HARTFORD COURANT, Apr. 5, 2001, (reporting the remarks of several politicians about recent calls for state moratoriums on death penalty executions), WL 4/5/01 HRTFCNT A3; *Complications: DNA, Retardation Problems for Death Penalty*, HOUS. CHRON., Feb. 6, 2001, (expressing the endless supply of controversy running through the veins of the emotional death penalty debate), WL 2/6/01 HSTNCHRON 26; Jeff Fagan, *Technical Errors Can Kill,* NAT'L L. J., Sept. 4, 2000, (mentioning that 82% of retried death row inmates were subsequently found not to deserve the death penalty), WL 9/4/00 NLJ A16, (col. 2); Matt Fleischer, *His Defense Attorney Wanted Him Dead,* NAT'L L. J., Nov. 20, 2000, (detailing how a convicted murderer's defense attorney admitted to deliberately sabotaging the defendant's case because he wanted him to die for his horrible crime), WL 11/20/00 NLJ A1, (col. 2); *Indecent Executions*, ST. LOUIS POST-DISPATCH, Apr. 8, 2001, (commenting on the nationwide movement to end the execution of mentally retarded murderers), WL 4/8/01 STLSPD B2; Kevin J. Long, *Death Penalty is Deeply Flawed*, NAT'L L. J., July 24, 2000, (remarking on how thirteen convicts have been released from Illinois' death row after they were found guilty beyond a reasonable doubt and they were all actually innocent), WL 7/24/00 NLJ A15 (col. 5); Bob Mahlburg, *Proposals Urge Halt to Texas Executions*, Feb. 8, 2001, (pointing out how DNA testing and false convictions have freed several inmates and prompted lawmakers to call for an execution moratorium in Texas), WL 2/8/01 FTWTHST 1; Terri Somers, *Problems in System Spur New Death Penalty Queries: Florida Case, Use of DNA Evidence Fuel Move for Review of the Judicial Process,* SO. FLA. SUN-SENTINEL, Mar. 1, 2001, (quoting a Florida capital defense attorney saying, "[i]t's clear that in the last two years there's been a shift in public perception when it comes to the death penalty and more people are interested in its fairness and are inclined to oppose it"), 3/1/2001 SUNSENT 15A; David E. Rovella, *A Case for Halting Executions?*, NAT'L L.J., Sept. 25, 2000, (noting the Justice Department's September 12, 2000 report on the federal death penalty in relation to race and geography), WL 9/25/00 NLJ A4, (col. 2). Twelve states have passed laws barring the execution of mentally retarded convicts and another

the mentally retarded,[2] disproportionate numbers of minorities receiving death sentences,[3] minimum age of eligibility to receive the death penalty,[4] high reversal rates due to exoneration by post-conviction DNA test-

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dozen states are also currently considering similar bills. *See Indecent Executions*, ST. LOUIS POST-DISPATCH, Apr. 8, 2001, (stating that death penalty opponents claim at least 35 mentally retarded people have been executed since 1976 and there are between 200 and 300 more on death row across the nation), WL 4/8/01 STLSPD B2.

2. *See* Richardson v. Luebbers, 121 S. Ct. 1251 (2001) (mem.) (granting stay of execution pending disposition of the writ of certiorari); McCarver v. North Carolina, 121 S. Ct. 1221 (2001) (mem.) (granting stay of execution pending disposition of appellant's petition for writ of certiorari); Penry v. Johnson, 215 F.3d 504 (5th Cir. 2000), *cert. granted,* 121 S. Ct. 563 (2000) (mem.); Tony Mauro, *Supreme Court Focuses on Narrow Issues in Penry Case: Procedural Issues Surround Death Sentence of Texas Man With IQ Under 70,* TEX. LAW., Apr. 2, 2001, (discussing two cases currently on review before the Supreme Court because both defendants are mentally retarded), WL 4/2/2001 TEXLAW 5; Tony Mauro, *Penry Case Gives Death Penalty Opponents Hope,* TEX. LAW., Mar. 26, 2001, (acknowledging three of the cases currently before the Supreme Court for consideration of the defendants' mental retardation), WL 3/26/2001 TEXLAW 5.

3. *See* TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, 46 (proclaiming that capital punishment has been disproportionately imposed on black men); *Deadly Disparities*, N.Y. TIMES, Sept. 17, 2000 (reciting the results of the Justice Department's report that confirm stark geographic and racial disparities in death penalty imposition across the nation), *available at* http://www.deathpenaltyinfo.org/NYT-Disparities.html; *Inside Washington: The Justice Department Parses a Death Sentence*, NAT'L J., Mar,. 31, 2001 (stating that that "the vast majority of federal death row inmates are minorities"), 2001 WL 7181924; Mary Alice Robbins, *AG Argues Race Shouldn't Be Factor In Death Sentence*, TEX. LAW., Mar. 5, 2001, (commenting on a Texas case in which the prosecutor's psychologist testified during the punishment phase that race was one of twenty-four factors that should be considered by the jury in determining future dangerousness), WL 3/5/2001 TEXLAW 1; *Waning Penalty,* THE BOSTON GLOBE, Mar. 14, 2001, (noting the apparent controversy based on statistics claiming that seventy-four percent of all federal death penalty defendants involve racial minorities), 2001 WL 3924030; Jim Yardley, *Lawyers Call for Changes in Death Penalty in Texas: A Study Cites Misconduct and Racial Bias*, N.Y. TIMES, Oct. 16, 2000 (summarizing results of the Texas Defender Service's report on indigent criminal defense in Texas that concluded race was a pervasive influence on how capital punishment is administered and black Texans are more likely to be executed), *available at* http://www.deathpenaltyinfo.org/NYT-TX2.html; Peder Zane, *Thinking Outside the Penalty Box,* THE NEWS & OBSERVER, Mar. 25, 2001, (advancing an argument against the death penalty because of the inequalities and disproportionate effects on minorities tried for capital punishment), 2001 WL 3457915.

4. *See* Mary Alice Robbins, *Mature Enough to Die?,* TEX. LAW., Oct. 9, 2000, (discussing how a seventeen year old is not old enough to vote or secure an abortion without parental consent, but is deemed old enough to receive the death penalty), WL 10/9/2000 TEXLAW 1; Mary Alice Robbins, *International Treaty Doesn't Bar Imposing Death Sentence on Minor,* TEX. LAW. , Feb. 19, 2001, (reporting on a Fifth Circuit Court of Appeals case which ruled against an argument that a defendant that was seventeen years old when he committed his capital offense was too young to receive the death sentence), WL 2/19/2001 TEXLAW 5.

ing,[5] and ineffective assistance of counsel due to lack of adequate resources[6] lead opponents to claim that the death penalty system is deeply flawed.[7] Although the death penalty is under attack nationally,

5. *See* Vivian Berger, *Get Out of Jail With* DNA, NAT'L L.J., Apr. 17, 2000, (detailing two recent events that highlight miscarriages of justice for convicts released after DNA testing showed they did not commit the crime), WL 4/17/00 NLJ, (col.1); John Council, *Executed Man's Sons Ask Civil Court For Posthumous DNA Test*, TEX. LAW., Mar. 26, 2001, (reporting on Richard Wayne Jone's family's post-execution efforts to exonerate him through DNA testing of evidence found at the crime scene), WL 3/26/01 TEXLAW 5; Mark Hansen, *The Great Detective*, A.B.A. J., Apr. 2001, at 37 (expounding DNA testing's impact on criminal justice as "the best investigative tool since the advent of fingerprinting" and how testing has exonerated innocent defendants); Mark Hansen, *Scoping Out Eyewitness IDs*, A.B.A. J., Apr. 2001, at 39 (telling the compelling and sad story of a defendant convicted of rape based on the victim's eyewitness testimony and was subsequently exonerated by DNA testing of the evidence after serving eleven years in prison). DNA has proven a "life-saver" for several Texas convicts, such as A.B. Butler and Roy Criner. *See* Sharon Cohen & Paul Shepard, *Law, Science of DNA Remain at Odds,* SAN ANTONIO EXPRESS NEWS, October 8, 2000, (reporting that Butler is one of seventy-six prisoners, including nine death row inmates, that has been exonerated nationwide due to DNA testing), 2000 WL 27909290. Unfortunately for Butler, his release did not come until he had served sixteen years in prison). *See id.* Texas convict Roy Wayne Criner spent ten years in prison before he was exonerated through DNA testing, and even after the results showed he did not perpetrate the crime. *See DNA Testing,* Ft. Worth Star Telegram, Aug. 17, 2000, (extolling the virtues of DNA evidence to either determine guilt or innocence, but lamenting that it is still not routinely done), 2000 WL 5019247. Texas recently enacted a law giving convicts access to state-paid DNA testing. *See Law Offers Inmates State-paid DNA Test*, CHI. TRIB., Apr. 6, 2001, (adding that the law also requires certain biological evidence placed into a statewide DNA database for future crime solution), 2001 WL 4059349.

6. *See* James C. Harrington, *Introduction* to THE TEXAS CIVIL RIGHTS PROJECT, THE SEVENTH ANNUAL REPORT ON THE STATE OF HUMAN RIGHTS IN TEXAS, THE DEATH PENALTY IN TEXAS: DUE PROCESS AND EQUAL JUSTICE . . . OR RUSH TO EXECUTION?, at i, (2000) (identifying "a grossly flawed system that appoints attorneys who are often incompetent to represent poor people); TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, 93 (portraying the attorneys appointed to defend capital offense cases as inexperienced, unfamiliar with the unique demands of these kind of cases and not performing the necessary background investigations required); *see also* Mary Alice Robbins, *Death Sentence Reversed for Ineffective Assistance,* TEX. LAW., Oct. 30, 2000, (acknowledging how Arthur Lee Burton's conviction was upheld, but advising that the Court of Criminal Appeals also held that Burton received ineffective legal counsel during the punishment phase of his trial in 1998), WL 10/30/00 TEXLAW 8.

7. *See* Mary Alice Robbins, *Escapees' Counsel Question Quality of Representation in State That's Made "Death an Industry,"* TEX. LAW., Feb. 5, 2001, (reporting on the concerns expressed by Colorado lawyers who are currently representing six escaped convicts on extradition who are charged with capital murder and face the death penalty upon their return to Texas for trial); Bill Jefferys, *You Get What You Pay for: Reports Allege Low Pay, Poor Resources Rig Death Penalty System,* TEX. LAW., Oct. 23, 2000, (condemning the Texas death penalty system for providing the accused with borderline lawyers and asserting that the accused are "victims" who are doomed to death as a result), WL 10/26/2000 TEXLAW 1; Mary Alice Robbins, *Group Urges State to Fix Indigent-Defense Problems,* TEX. LAW.,

opponents attack the Texas system as one of the few states that does not provide funding for indigent criminal defense.[8] The Texas Civil Rights Project conducted a study of capital punishment in Texas and found, among other deficiencies, "a grossly flawed system that appoints attorneys who are often incompetent to represent poor people."[9] Despite the poor quality of representation received by individuals charged with capi-

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Dec. 11, 2000, (observing that "[p]oor Texans charged with crimes often languish in jail for months before getting court-appointed lawyers and frequently receive poor representation when they do have their day in court), WL 12/11/00 TEXLAW 1.

8. *See* Anita Davis, *Symposium Addresses Indigent Criminal Defense in Texas,* TEX. B.J., Feb. 2001, at 120 (reporting that lack of funding was the most important area of agreement among the symposium's participants); Allan K. Butcher & Michael K. Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas, available at* http://www.uta.edu/pols/moore/indigent/whitepaper.htm (Sept. 22, 2000) (attributing the purpose of the report by the Committee on Legal Service to the Poor on Criminal Matters was due to the national attention currently focused on indigent criminal defense in Texas).

9. *See* James C. Harrington, *Introduction* to THE TEXAS CIVIL RIGHTS PROJECT, THE SEVENTH ANNUAL REPORT ON THE STATE OF HUMAN RIGHTS IN TEXAS, THE DEATH PENALTY IN TEXAS: DUE PROCESS AND EQUAL JUSTICE . . . OR RUSH TO EXECUTION?, at i, (2000) (acknowledging that "people from all walks of life have expressed grave concern regarding the death penalty and how it is applied by the State of Texas). The report identified and addressed six areas in which the probability of error and wrongful execution were likely, as the following: (1) the appointment of often incompetent attorneys, (2) the unrestricted discretion accorded district attorneys seeking the death penalty, (3) the qualification process used to select jurors, (4) the sentencing process, (5) the appellate process and (5) the unbridled power given to the Board of Pardons and Paroles. *See id.* at ii. *See also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1852 (1994) (relating that there have been deficiencies in the representation of indigent criminal defendants in Texas that have resulted from "haphazard and under funded approaches" to the Texas court appointment system); Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1806 (2000) (stating that trial judges in Texas frequently appoint incompetent lawyers), WL 78 TXLR 1805; *Looking at Indigent Criminal Defense in Texas,* TEX. B.J., Sept. 2000, at 830 (recognizing a meeting comprised of policymakers, attorneys, and judges in Texas discussing the need for reform in indigent criminal defense); *Bush as Executioner: The 'Compassionate' Texan Winks at Capital Injustice*, PITTSBURGH POST-GAZETTE, Aug. 26, 1999, at A24 (questioning the label placed on Texas Governor George Bush as a "compassionate conservative" due to his reliance on a court appointment system that offers no protection for the mentally retarded facing execution in Texas), 1999 WL 25688457; *Death-Row Lawyers Poor, Paper Says,* SEATTLE POST-INTELLIGENCER, Sept. 11, 2000, at A3 (noting that "about one in four convicts on death row in Texas were represented at trial . . . by court-appointed lawyers with a record of professional misconduct), 2000 WL 5303303; Ken Armstrong & Steve Mills, *Gatekeeper Court Keeps Gates Shut: Justices Prove Reluctant to Nullify Cases,* CHI. TRIB., June 12, 2000 (addressing the problems with court appointed counsel based on the attorneys having been sanctioned, disbarred, or suspended), http://www.chicagotribune.com/news/nationworld/ws/item/0,1308,45186-0-45185,00.htm; *cf.* Anthony Lewis et al., Panel Discussion, *The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV.

tal offenses, ineffective assistance of counsel claims attempted in post-conviction appeals often fare poorly.[10]

1105, 1105 (1994) (discussing the 1994 annual meeting of the American Bar Association's panel discussion regarding the competency of trial counsel).

10. All of the following capital offense cases represent appellate claims of ineffective assistance of counsel on various grounds in which the convictions were affirmed. The case citations listed are deliberately restricted to cases arising after cut-off prior to 1986, when the Texas Court of Criminal Appeals adopted the *Strickland* standard. *See* Hernandez v. State, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986) (en banc) (holding that "the *threshold standard* for determining effective assistance of counsel enunciated in *Strickland* is not substantially different from the standard" adopted by the Texas Court of Criminal Appeals in recent years prior to this opinion); *see also* King v. State, 29 S.W. 3d 556, 566 (Tex. Crim. App. 2000) (en banc) (failing to demonstrate ineffective assistance of counsel for not presenting evidence to support a motion for withdrawal because the counsel's motion was premised on the defendant's lack of cooperation and inability to demonstrate how the jury's verdict was prejudiced by the withdrawal of counsel); Wright v. State, 28 S.W. 3d 526, 530 (Tex. Crim. App. 2000) (denying effective assistance of counsel claim that defendant's appointed counsel was not qualified to defend his capital offense charge under the Texas Code of Criminal Procedure Article 26.052 because he was not harmed by the non-compliance); Cardenas v. State, 30 S.W.3d 384, 391 (Tex. Crim. App. 2000) (en banc) (addressing appellant's five allegations of ineffective assistance of counsel and rejecting each claim for defendant's failure to show harm); Tong v. State, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000) (en banc) (stating that reviews of defense counsels' representation at trial is highly deferential and a strong presumption is accorded that counsel's actions reside within a wide range of reasonably professional assistance, which the defendant has the burden to overcome); Guidry v. State, 9 S.W. 3d 133, 139 (Tex. Crim. App. 1999) (claiming ineffective assistance of counsel because of trial counsel's failure to object to the trial judge's remarks during voir dire authorizing the jury to discriminate against defendant on account of his gender when deliberating in the punishment phase on mitigating circumstances); Dewberry v. State, 4 S.W.3d 735, 757-58 (Tex. Crim. App. 1999) (alleging that trial counsel was deficient for failing to file a motion for a new trial, not investigating his case fully, and for not presenting an argument based on a recent Supreme Court decision in support of a request for a parole law instruction); Ladd v. State, 3 S.W.3d 547, 569 (Tex. Crim. App. 1999) (arguing that defense counsel's assistance was ineffective because he failed to object to three statements made by the prosecutor in closing argument that the defendant failed to call any defense witnesses other than himself, defendant lacked any remorse for his crime and that defendant possesses an antisocial personality); Fuentes v. State, 991 S.W. 2d 267, 272 (Tex. Crim. App. 1999) (complaining that he was entitled to a jury charge on felony murder, and that by not requesting the instruction the defense attorney was deficient, but not successfully establishing that felony murder is a lesser included offense of murder on appeal); Busby v. State, 990 S.W.2d 263, 268 (Tex. Crim. App. 1999) (overruling capital defendant's allegation of ineffective assistance of counsel due to attorney's request and receipt of instructions on the procedure for exercising preemptory challenges used in non-capital trials because the attorney might have thought the advantages outweighed the disadvantages of foregoing the capital offense trial procedure); McFarland v. State, 928 S.W.2d 482, 499 (Tex. Crim. App. 1996) (en banc) (failing to find that any of defendant's thirteen points of error alleging ineffective assistance of counsel were valid); Chambers v. State, 903 S.W.2d 21, 32 (Tex. Crim. App. 1995) (holding that defense counsel's failure to question one potential juror during voir dire on juror's views regarding capital punishment was trial strategy and not ineffective assistance of counsel); Patrick v. State, 906 S.W.2d

The Texas legal community faces an increasingly problematic situation due to the large number of people currently on death row and the high number of executions each year.[11] Consider the following scenario: A man commits a murder during the commission of a robbery.[12] Because of the defendant's status as an indigent indicted for a capital offense, the trial judge appoints defense counsel.[13] During the course of the trial, the

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481, 495 (Tex. Crim. App. 1995) (en banc) (citing three specific alleged errors of trial counsel as failing to discover that defendant's aggravated assault conviction was invalid, failing to object to the admissibility of DNA evidence, and failing to object to the erroneous definitions of knowingly and intentionally during the guilt/innocence phase of trial); Rodriguez v. State, 899 S.W.2d 658, 665 (Tex. Crim App. 1995) (en banc) (presenting eight instances of ineffective assistance which were overruled); Garcia v. State, 887 S.W.2d 862, 880-81 (Tex. Crim App. 1994) (en banc) (remarking that review of counsel's representation is entitled to high deference with a strong presumption that counsel's conduct is within a wide range of reasonable representation); Butler v. State, 872 S.W.2d 227, 241 (Tex. Crim. App. 1994) (en banc) (failing to find appellant's defense attorney's conduct deficient); Ex Parte Davis, 866 S.W.2d 234, 238 (Tex. Crim. App. 1993) (en banc) (complaining that trial counsel's failure to object to the commitment of the jurors harmed him by denying him his right to a jury able to consider his age as a mitigating factor during the punishment phase); Narvaiz v. State, 840 S.W.2d 415, 433 (Tex. Crim. App. 1992) (en banc) (maintaining that defense counsel's error was in failing to request a jury charge during the guilt/innocence phase regarding whether "sudden passion should be negated prior to returning a guilty verdict of capital murder"); Mooney v. State, 817 S.W.2d 693, 696 (Tex. Crim. App. 1991) (en banc) (convicting defendant of murder in the course of robbery and failing to find that defense counsel's less than thorough pretrial investigation and preparation was ineffective assistance); Kinnamon v. State, 791 S.W.2d 84, 97 (Tex. Crim. App. 1990) (en banc) (holding that defense counsel's failure to submit a charge on the lesser included offense of murder was not ineffective because the evidence did not authorize submission of the instruction as a lesser included offense); Washington v. State, 771 S.W.2d 537, 543 (Tex. Crim. App. 1989) (en banc) (emphasizing that counsel was not ineffective for informing the jury of the availability of appellate review and as such, the death penalty is an unreliable sentence); Holland v. State, 761 S.W.2d 307, 318 (Tex. Crim. App. 1988) (reciting defendant's failure to show how he was harmed by his counsel's challenges for cause for three prospective jurors that were allegedly improperly denied such that trial counsel could have voiced a valid objection); Hernandez v. State, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (en banc) (claiming ineffective assistance of counsel for failing to pursue an insanity defense, presenting facts into evidence that rebutted any appearance of self-defense, and being ignorant of the facts of the case and governing law).

11. *See* DEATH PENALTY INFO. CTR., *State-by-State Information*, *at* http://www.deathpenaltyinfo.org/texas.html (last modified Feb. 8, 2001) (stating that there are 448 death row inmates in Texas, and there have been 242 executions since 1976).

12. *See* Burdine v. Johnson, 66 F. Supp. 2d 854, 855 (S.D. Tex. 1999), *vacated by* 231 F.3d 950, 964 (5th Cir. 2000).

13. *See* Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1812 (2000) (explaining that Joe Frank Cannon was the lawyer appointed at trial); *cf.* Alan Berlow, *Death in Texas; The Capital of Capital Punishment Should Heed Illinois's Example*, THE WASH. POST, Feb. 13, 2000, at B05 (explaining that Texas's Governor George Bush vetoed a bill that would have allowed for the

defendant's attorney often nods off or falls asleep.[14] Thereafter, the jury convicts and sentences the defendant to death by lethal injection.[15] On appeal, the Texas Court of Criminal Appeals addresses the issue of the sleeping attorney, yet holds that such representation does not constitute ineffective assistance of counsel causing sufficient harm to require reversal.[16] After the defendant exhausts all state habeas corpus avenues, a Federal district judge finally concludes that the indigent defendant's sleeping attorney violated the defendant's Sixth Amendment rights.[17] Consequently, the court vacates the conviction,[18] and the state finally releases the defendant from death row.[19]

The above scenario describes the case of Calvin Burdine.[20] Although what happened in the course of Burdine's trial and subsequent appeal

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creation of public defender's offices in Texas because the current system in which ad hoc judges appoint attorneys for indigent defendants provides better quality legal representation), 2000 WL 2285347.

14. *See Burdine*, 66 F. Supp. 2d at 864 (establishing that three jurors saw Joe Cannon drift in and out of sleep). While this federal district court found Burdine's counsel was ineffective based on the episodes of sleeping, the Fifth Circuit recently vacated the judgment rejecting the contention that the attorney slept through critical stages of the trial. *See Burdine*, 231 F.3d at 964. However, this decision was not unanimous. *See id.* at 965. Rather, in his dissenting opinion, Judge Benavides declared that it "shocks the conscience" that any defendant could face the death penalty when the trial attorney slept through substantial portions of the trial. *See id.* (Benavides, J., dissenting). Judge Benavides concluded that prejudice could be presumed under *Strickland* if counsel sleeps during a capital murder trial (asserting that a defendant's Sixth Amendment right to counsel is denied when the attorney sleeps through substantial portions of the trial). *See id.*; *see also* Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1812 (2000) (equating representation by "sleeping counsel" to having no counsel at all); *cf.* David R. Row, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 695 (1996) (relating that Joe Cannon also slept through the trial of Carl Johnson). After his appeals process expired, Carl Johnson became the ninety-ninth person to die in Texas since executions resumed in 1982. *Id.* at 691.

15. *Burdine*, 66 F. Supp. 2d at 855.

16. *See id.* at 856 (stating that the Court agreed with the lower court that counsel slept during trial, yet did not find this sufficient to meet the *Strickland* standard for relief).

17. *See id.* at 866 (concluding that the conviction was unconstitutional because Cannon slept through "substantial portions" of the trial).

18. *Id.* at 867.

19. *See id.* (reciting court orders granting the defendant's petition for writ of habeas corpus and directing the State of Texas to either retry or release the defendant).

20. *See Burdine*, 66 F. Supp. 2d at 854. On September 29, 1999, a federal district court judge granted Burdine's writ of habeas corpus and ordered the State of Texas either to retry Burdine or release him from prison. *See* Burdine v. Johnson, 66 F. Supp. 2d 854, 867 (S.D. Tex. 1999). The Fifth Circuit vacated this judgment in October 2000. *See* Burdine v. Johnson, 231 F.3d 950, 965 (5th Cir. 2000). The court, however, agreed to rehear the case *en banc* two months later. *See* Burdine v. Johnson, 234 F.3d 1339, 1339 (5th Cir. 2000).

offends traditional notions of justice, Texas case law provides many examples of inadequate counsel leading to the imposition of the death penalty.[21] Although these defendants have been accused of committing heinous crimes, all criminal defendants enjoy the absolute right to effective assistance of counsel.[22] Furthermore, inadequate representation raises the spectre of the state incorrectly convicting an innocent defendant.[23] Indeed, adequate representation operates as a necessary safeguard to preserve the integrity of the criminal justice system by preventing scenarios such as the case of Calvin Burdine.[24]

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21. *See, e.g.*, Anderson v. Collins 18 F.3d 1208, 1215 (5th Cir. 1994) (denying habeas corpus relief in a case where trial counsel failed to request a lesser included charge for voluntary manslaughter or to conduct appropriate voir dire); McFarland v. State, 928 S.W.2d 482, 505 (Tex. Crim. App. 1999) (en banc) (finding sleeping defense counsel constitutionally adequate); *see also* David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694-95 (1996) (describing the unpublished decision in which the Texas Court of Criminal Appeals upheld the death sentence despite the inexperienced defense attorney who slept through trial); *see also* Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1813 (2000) (relating that Larry Norman Anderson was executed even though the Fifth Circuit concluded that his attorney, Joe Cannon's "reputation for incompetence" did not apply to this case), 2000 WL 78 TXLR 1805; Justice Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 1 (1986) (explaining that those facing capital offenses "frequently suffer the consequences of having trial counsel who are ill-equipped to handle capital cases"); Southern Center for Human Rights, *Death in Texas: Sleeping Defense Lawyers, Political Judges, Assembly Line to the Death Chamber Described in Two Articles*, (last visited Feb. 13, 2001) (asserting that the denial of effective counsel makes it impossible to show the injustices that occur at the trial level), *at* http://schr.org/news/news_texasfairness.htm.

22. *See* U.S. CONST. amend. VI (stating that in all criminal prosecutions accused persons have the right to assistance of counsel); *see also* Kimmelman v. Morrison, 477 U.S. 365, 366 (1986) (stating that the right to counsel is not conditioned upon actual innocence); Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that there is a right to effective counsel); Leslie Ryan, *Responding to the Crisis in Death Penalty Representation*, HUM. RTS. Spring 1996, at 5, 6 (quoting Sara-Ann Determan, chair of the ABA's Death Penalty Representation Project in Washington, D.C. as referring to those facing the punishment of death as "the very people that test our commitment to justice and . . . whether we as a profession can meet our obligation to be the guardians of the process of justice").

23. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1853 (1994) (observing the Fifth Circuit's acknowledgment that inadequate counsel played a part in a case where the defendant's "innocence was a close question").

24. *See* Justice Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 1 (1986) (observing that society has an obligation to ensure that defendants in capital cases have "an adequate opportunity to present their defenses" due to the unique finality of this type of case); *see also* Mary Alice Robbins, *Death Row Inmate Didn't Show He Was Harmed by Napping Lawyer*, TEX. LAW., Nov. 6, 2000, at 1 (referring to Burdine's situation as being "tantamount to having no

Texas stands as the only death penalty state that does not offer statewide public defender representation for indigent defendants at capital trials.[25] In order for Texas to realize the goal of fair and adequate representation as expressed in *Gideon v. Wainwright*,[26] Texas must begin to change the process for defending indigent defendants accused of capital offenses.[27] In this regard, Texas should implement a statewide public defender system for indigent defendants accused of capital offenses to ensure that the imposition of the death penalty results only from a fair and constitutionally firm adjudication.[28]

In order to provide truly effective assistance of counsel for indigent defendants in Texas, this Comment focuses on the implementation of a Public Defender system based on three premises. First, a public defender system would create an efficient and effective administrative system that will cure many of the ills of the current appointment system and ensure that the state provides competent counsel to indigent defendants.[29] Second, a public defender system will help to ensure that indigent capital

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lawyer," even though the Fifth Circuit did not view Cannon's sleeping episodes as occurring during the introduction of any crucial evidence). In fact, University of Houston Law Professor David Dow indicated that this type of decision makes it inevitable that defendants will lose ineffective assistance of counsel claims almost every time. *See id.*

25. *See* THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS 122 (1993) (comparing various types of defender programs in the United States).

26. 372 U.S. 335 (1963); *see* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 70-71 (9th ed. 1999) (recognizing the view that the dream of the right to capable counsel for all indigent defendants, as presented in *Gideon*, remains unrealized more than thirty years later); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1866 (1994) (questioning whether or not the right to counsel guaranteed in *Gideon* has in fact received fundamental protection).

27. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (indicating there can be no procedural or substantive safeguards for indigent defendants if they are deprived of the assistance of an attorney); *see also* William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 92 (1995) (standing for the proposition that the guarantee of adequate counsel has not been ensured), WL 4 WMMBRJ 91.

28. *See* THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS 165 (1993) (recommending that there should be a statewide body to handle capital representation in Texas).

29. *See* Allan K. Butcher & Michael K. Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas*, *available at* http://www.uta.edu/pols/moore/indigent/whitepaper.htm (Sept. 22, 2000) (outlining the different ways counsel is assigned in Texas, including public defender offices, "contract" attorneys, and the judge-assigned system). In order to ensure that a new system for assigning counsel for indigent defendants is effective, the attorneys must be competent and a vigorous defense must be encouraged. *Id.* at 1; *see also* Alan Berlow, *Death in Texas; The Capital of Capital Punishment Should Heed Illinois's Example*, WASH. POST, Feb. 13, 2000, at B05 (explaining that the three counties in

defendants receive effective legal representation far exceeding that which is minimally required under the *Strickland* standard.[30] In addition, establishing a proper system from the beginning will reduce time consuming appeals based on ineffective assistance of counsel and other possibly avoidable procedural errors.[31] Third, implementing the system in Texas will provide well-trained, seasoned attorneys with experience trying capital cases, promoting judicial efficiency as an end result.[32] Consequently, cases would move more quickly through the courts because not only would public defender attorneys be more familiar with criminal procedure rules, but such attorneys also would not be attempting to juggle a private, more financially lucrative practice simultaneously.[33] Implement-

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Texas with established public defender offices are generally considered to provide better representation than that provided by the current system), 2000 WL 2285347.

30. *See* James Kura, *Prove You Need the Money: Public Defenders Should Use Caseload to Raise Funds and Influence People*, CRIM. JUST., Spring 1989, at 21-22 (1989) (relating problems with public defender offices that center around controlling caseloads, lack of adequate staff and poor funding); Patrick Noaker, *It Doesn't Come With the Territory*, CRIM. JUST., Summer 1995, at 14, 14 (1995) (describing resource problems faced by public defenders due to the increased "war on crime," expenditures and decreased state and governmental revenues); Alan Berlow, *Death in Texas; The Capital of Capital Punishment Should Heed Illinois's Example*, WASH. POST, Feb. 13, 2000, at B05 (indicating that even though Illinois has a public defender system, thirteen people on death row have been found to be innocent since the reinstatement of the death penalty), 2000 WL 2285347. In fact, Illinois Governor George Ryan has placed an indefinite moratorium on execution in the state. *Id.*

31. *Compare Strickland*, 466 U.S. at 687 (requiring prejudice to be proven), *with Perillo*, 205 F.3d at 781-82 (allowing prejudice to be presumed once an actual conflict of interest has been established).

32. *See* Burdine v. Johnson, 231 F.3d 950, 964 (5th Cir. 2000) (allowing an attorney who slept through substantial portions of Burdine's trial to pass the *Strickland* test for ineffective counsel claims).

33. Allan K. Butcher & Michael K. Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas*, *available at* http://uta.edu/pols/moore/indigent/whitepapter.htm (Sept. 22, 2000) (attributing the economics of a modern private law practice as contributing to the problems inherent in the court-appointment system). The average hourly rate charged for criminal legal work is $135.98. *Id.* However, most defense attorneys receive, on the average $39.81 per hour for court assignments. *Id.* Thus, this is a fifty-five percent shortage for covering overhead expenses for the law firm. *Id.* In the end, court-appointed lawyers end up subsidizing the county to the tune of $96.17 per hour. *See id.* *See* THE TEXAS CIVIL RIGHTS PROJECT, THE SEVENTH ANNUAL REPORT ON THE STATE OF HUMAN RIGHTS IN TEXAS, THE DEATH PENALTY IN TEXAS: DUE PROCESS AND EQUAL JUSTICE . . . OR RUSH TO EXECUTION?, at 13 (2000) (evaluating the effects of inadequate compensation for court-appointed attorneys as taking away considerable money and business from those attorneys that accept cases); *see also* Strickland v. Washington, 466 U.S. 668, 688-89 (1984) (addressing the obligation of counsel under the American Bar Association's Standards for Criminal Justice and concluding that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel"); Richard Klein, *The Constitutionalization of* Ineffective

ing these three recommendations will help Texas assure effective assistance of counsel for indigent capital defendants.[34]

This Comment analyzes the weaknesses in Texas's current appointment system and proposes a new system to better protect the indigent capital defendant's Sixth Amendment right to effective assistance of counsel. Part II briefly discusses the history of the death penalty in the United States and, more specifically, in Texas relative to the right to effective assistance of counsel. Part III outlines currently existing public defender offices at both the federal and state level, including an analysis of the advantages and disadvantages of both systems. Part III also describes Texas's current court appointment system. Part IV analyzes the need for a public defender system in Texas in light of the current standard used for determining ineffective assistance of counsel set forth by the Supreme Court.[35] Part IV further explains why the current appointment system is inadequate. Part V proposes a model for the ideal statewide public defender system based on the successful implementation of federal and state systems currently in place. Part V also discusses reasons why Texas has been reluctant to institute this kind of system and offers solutions to overcome objections to implementing a statewide public defender system. In conclusion, Part VI stresses the need for such changes in order to ensure that Texas does not erroneously apply the death penalty.

II. HISTORICAL DEVELOPMENT OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN DEATH PENALTY CASES

The proposal focuses on a statewide public defender system available only for capital cases. Fundamental differences exist between capital and noncapital cases that make the assurance of adequate counsel in capital cases vital to the justice system.[36] In addition to the right to counsel at

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Assistance of Counsel, 58 MD. L. REV. 1433, 1445-46 (1999) (regarding the *Strickland* standard as requiring "little more than a warm body" to qualify as effective defense counsel).

34. *Compare* Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) (indicating that the United States Supreme Court has consistently held that adequate assistance is necessary in order to satisfy the Sixth Amendment right to counsel), *with* James Ridgeway, *Straight-Shooting Shrub*, VILLAGE VOICE, May 23, 2000 (distinguishing Governor Bush's emphasis on the fairness of the Texas death penalty from the fact that some court appointed attorney's have slept through trial, failed to file essential legal documents on time, and have been cited for misconduct), 2000 WL 8351446. Additionally, almost all of the approximately 465 death row inmates in Texas are indigent. *See id.*

35. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (outlining the two-prong test for ineffective assistance of counsel claims as requiring the defendant to show not only serious errors, but also that those errors deprived the defendant of a fair proceeding).

36. *See* Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV. 485, 488-95 (1995) (outlining "the notion that 'death is different'" by giving examples of fundamental differences between capital and non-capital proceedings). First, capital cases involve bifur-

the trial level guaranteed under *Gideon*, capital defendants in Texas also have a statutory right to an attorney for the first automatic appeal.[37]

A. *History of the Death Penalty in the United States*

In 1972, the United States Supreme Court held all existing death penalty statutes unconstitutional in *Furman v. Georgia*.[38] *Furman*, however, did not constitute an absolute ban on capital punishment.[39] To the con-

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cated proceedings, one addressing guilt and the other addressing punishment if guilt is adjudicated. *Id.* at 488. The punishment phase is different than a sentencing hearing for non-capital cases because it centers on the defendant's life and background, instead of the circumstances and facts of the crime. *Id.* Second, capital defense litigation is more complicated than ordinary criminal cases. *Id.* The defense must convince the same jurors that convicted the defendant that he does not deserve to die. *Id.* at 489. Third, sentencing is individualized because the jury must be provided with enough information "to ensure that the basic humanity of the individual . . . is not completely ignored." Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV. 485, 490 (1995). Lastly, representation differs for capital offense trials. *Id.* at 493. The requirement for individualized sentencing requires more than just a duty to investigate the defendant's background, but also a duty to present all relevant evidence to the jury so that it may "'make the case for life.'" *Id.* In *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) the Supreme Court recognized the defendant's constitutional right to have the assistance of expert witnesses during the trial. *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 1535-37 (9th ed. 1999) (outlining the different types of sentences available when a person is convicted of a crime). There are three basic forms of punishment: capital punishment, incarceration, and probation, including intermediate penalties such as boot camp, house arrest, and financial sanctions. *Id.*

37. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(h) (Vernon Supp. 2000) (outlining the current procedure in capital cases for offenses committed on or after September 1, 1991); art. 37.0711, § 2(j) (stating the proper procedures in capital offense cases for offenses committed prior to September 1, 1991); art. 11.071, § 2(a)-(f) (mandating the procedure for appointment of counsel for habeas corpus applicants seeking relief from the death penalty). *Compare* McKane v. Durston, 153 U.S. 684, 687-88 (1894) (declaring that the United States Constitution does not guarantee the absolute right to appeal), *with* WAYNE R. LAFAVE & JEROLD H. ISREAL, CRIMINAL PROCEDURE § 26.1(a), at 954 (1985) (stating that cases in which the Supreme Court has upheld the *McKane* rule have involved situations in which the states have provided for an automatic appeal). For most defendants, this right to counsel is in reference to an appeal to one of the intermediate court of appeals in Texas. However, for defendants convicted of capital murder, there is a right to counsel in a direct appeal to the Texas Court of Criminal Appeals.

38. *See* Furman v. Georgia, 408 U.S. 238, 260, 295 (1972) (Douglas, J., concurring) (finding the imposition of the death penalty "unrestrained and unguided"). Essentially, the Court found that the manner in which the punishment was handed out constituted a violation of the Eighth Amendment right against cruel and unusual punishment. *Id.* at 256-57.

39. *See* Paul Reidinger, *A Court Divided*, A.B.A. J., Jan. 1987, at 48 (announcing what one Stanford law professor said, "the real issue in . . . [*Furman*] was the constitutionality of the death penalty provisions across the country"). The *Furman* Court was divided 5-4, so a consensus was never reached that the death penalty constituted cruel and unusual punishment under the Eighth Amendment. *See* David O. Stewart, *Dealing with Death*, A.B.A. J.,

trary, the court approved the use of the death penalty as long as states provided certain procedural safeguards at trial.[40] As a result, states began amending their respective death penalty statutes.[41] The Supreme Court upheld Texas's current death penalty scheme in 1976.[42]

Texas requires a bifurcated trial in all capital offense cases in which the state seeks the death penalty.[43] Under this bifurcated trial system, once a jury finds a defendant guilty of a capital offense,[44] the determination of whether the defendant receives life imprisonment or a death sentence occurs at a separate hearing.[45] At this punishment phase,[46] the jury answers a series of questions:

Nov. 1994, at 51 (stating that "[i]n five separate opinions, the *Furman* majority criticized the complete absence of standards for controlling the imposition of death sentences, making executions random events").

40. *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976) (stating that the *Furman* holding was not a per se ban of the death penalty, but that it could not be imposed when sentencing procedures created a substantial risk of arbitrary and capricious application).

41. *See* Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV. 485, 491 (1995) (referring to the fact that state legislatures quickly revised capital sentencing guidelines in order to allow the death penalty to follow the *Furman* decision).

42. *See* Jurek v. Texas, 428 U.S. 262, 276 (1976) (holding that the system assures a death sentence is not "wantonly" or "freakishly" imposed). The Court found that several requirements of the capital sentencing scheme made the scheme constitutional: the requirement that there is an aggravating circumstance, that mitigating circumstances are allowed, and judicial review is prompt. *See id.*

43. TEX. CODE CRIM. PROC. ANN. art. 37.071(a) (Vernon Supp. 2000); *see also Jurek*, 428 U.S. at 269 (affirming the decision in Texas to revise the capital sentencing scheme to include a procedure that sends questions to the jury to be answered after a verdict of guilty during the punishment phase of the trial); *cf.* TEX. PEN. CODE ANN. § 19.03 (Vernon 1989) (defining a capital offense as one in which the defendant knowingly and intentionally commits murder in one of five situations, including murder of a peace officer or fireman). The Penal Code further states that a murder committed in the course of "kidnapping, burglary, robbery, aggravated sexual assault, and arson," and for remuneration, constitutes a capital murder. *Id.* A capital offense also occurs if a murder is committed while escaping or attempting to escape from a penal institution, or the murder of a prison employee by a prison inmate. *Id.*; *cf.* SUBCOMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION (May 1998) (stating that Federal law provides for the same type of system), *at* www.uscourts.gov/dpenalty.

44. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(a) (Vernon Supp. 2001) (stating that before the sentencing proceeding begins, the defendant must be found guilty in a "trial for a capital offense in which the state seeks the death penalty").

45. *See id.* (providing for a separate sentencing proceeding from the guilt/innocence phase and allowing both the state and the defendant to present evidence for or against the imposition of the death penalty respectively).

46. *See Jurek*, 428 U.S. at 267 (referring to this portion of Jurek's trial as the "punishment phase" in which witnesses where allowed to testify regarding Jurek's reputation).

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

(2) whether the defendant actually caused the death of the deceased, or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.[47]

In addition, a third question must be submitted to the jury if both previous questions are answered affirmatively:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence imposed.[48]

The state may impose the death penalty only if the jury finds the defendant guilty beyond a reasonable doubt and affirmatively answers each question.[49]

Under Texas Code of Criminal Procedure (TCCP) Article 26.052(e), the district court judge presiding over a capital case must appoint counsel for any indigent defendant.[50] The attorney appointed at trial may represent the defendant throughout the entire litigation process.[51] In order

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47. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b)(2) (Vernon Supp. 2001); *see Jurek*, 428 U.S. at 269 (outlining the two questions required by this statute). The *Jurek* court also included a third question that may be presented to the jury: "whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation . . . by the deceased." *Id.* This issue is codified at art. 37.0711 which applies only to trials for capital offenses committed prior to September 1, 1991. *Id.* art. 37.0711 § 3(b)(3) (Vernon Supp. 2001). The issue was omitted for capital offenses occurring on or after September 1, 1991. *Id.* art. 37.071.

48. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(1) (Vernon Supp. 2001); *see Jurek*, 428 U.S. at 269 (outlining the jury questions required by this statute). The third question set forth in *Jurek*, "whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation . . . by the deceased" only applies to capital offense trials for offenses committed prior to September 1, 1991. *See* art. 37.0711 § 3(b)(3). The provocation issue was omitted for capital offenses committed on or before September 1, 1991. *See* art. 37.071 § 2(e)(1).

49. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(g) (Vernon Supp. 2001).

50. TEX. CODE CRIM. PROC. ANN. art. 26.052(e) (Vernon Supp. 2001).

51. *See* TEX. CODE CRIM. PROC. ANN. art. 26.04 (Vernon 1989) (stating that the attorney shall represent the defendant until dismissal, acquittal, exhaustion of appeals process, or until another court appointed attorney replaces the original appointed attorney).

to preserve constitutional guarantees, the right to counsel must encompass the right to effective assistance of counsel.[52]

In 1982, Texas resumed the death penalty,[53] executing 225 death row inmates since that time.[54] In 2000 alone, the state executed forty convicted felons.[55] Texas currently leads the country in the number of executions.[56] Alarmingly, many of those sentenced to death experienced ineffective counsel at the trial level.[57] For example, in 1991, the state released Frederico Martinez-Macias after nine years on death row due to his trial counsel's ineffective and unconstitutional performance at trial.[58] Although the Sixth Amendment mandates a general right to counsel, it does not contain a provision defining the level of competency that counsel must possess.[59]

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52. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (proclaiming that the reason for effective counsel is to ensure a fair trial).

53. David R. Row, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 691 (1996) (stating that the actual infliction of the death penalty resumed in 1982); Ryan A. Byrd, Comment, *A "Last Hug" Before Execution: The Case in Favor of Contact Visitation for Death Row Inmates in Texas*, 2 SCHOLAR 249, 256 (2000) (explaining that the first post-*Jurek* execution occurred on December 7, 1982).

54. Death Penalty Information Center, *at* http://www.deathpenaltyinfo.org/texas.html (last modified Feb. 8, 2001) (stating that the breakdown of race/gender executions in Texas is: 81 Black, 121 White, 36 Hispanic, 4 of other races, 2 female, and 240 male).

55. *See* Death Penalty Information Center, *Number of Executions by State Since 1976*, *at* http://www.deathpenaltyinfo.org/dpicreg.html (last modified Feb. 8, 2001) (listing the total number of executions in each death penalty state). Virginia is the closest behind Texas in total executions since 1976 with thirty-eight executions, followed by Florida with fifty-one and Missouri with forty-seven. *Id.*

56. *See id.* (stating Texas has executed 243 people since 1976, forty of which were carried out in 2000 alone).

57. *See* Burdine v. Johnson, 66 F. Supp. 2d 854, 866 (S.D. Tex. 1999) (finding Burdine's conviction unconstitutional due to sleeping counsel); *cf.* Perillo v. Johnson, 205 F.3d 775, 808 (5th Cir. 2000) (holding that actual conflict results in a denial of Sixth Amendment rights to effective counsel). The standard for review in cases of actual conflict, which requires a showing that the conflict adversely affected the attorney's performance, is lower than the *Strickland* standard. *See id.* at 781.

58. *See* Martinez-Macias v. Collins, 810 F. Supp. 782, 823 (W.D. Tex. 1991) (adopting magistrate judge's findings and concluding prejudice to the defense due to trial counsel's performance was obvious); Stephen B. Bright, *Death in Texas*, THE CHAMPION, *at* http://schr.org/champion (July 1999) (referring to Martinez-Macias's release after innocence was established by a group of volunteer lawyers).

59. U.S. CONST. amend. VI.

B. *Sixth Amendment Right to Counsel*

The Sixth Amendment to the United States Constitution guarantees the right to counsel in most criminal prosecutions.[60] In *Powell v. Alabama*,[61] the United States Supreme Court held that the denial of counsel violates the Fourteenth Amendment's due process clause, thereby applying the Sixth Amendment to states.[62] *Powell* espoused the need for effective counsel due to the vital importance of receiving a fair trial.[63] This premise becomes especially significant with regard to death penalty cases.[64] The finality of the death penalty has always concerned the courts, especially in the analysis of whether a defendant received effective counsel at the trial level.[65]

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60. U.S. CONST. amend. VI; Scott v. Illinois, 440 U.S. 367, 374 (1979) (Powell, J., concurring) (affirming the decision in *Argersinger* that a criminal defendant cannot be imprisoned absent the appointment of counsel required under the Sixth Amendment); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (extending the Sixth Amendment right to counsel to all cases involving petty, misdemeanor, or felony). However, in determining whether the right to counsel applies, the potential for incarceration is a key concern. *See id.* at 33 (concluding that imprisonment for even a brief time gives rise to this constitutional right).

61. 287 U.S. 45, 68 (1932).

62. *See* Powell v. Alabama, 287 U.S. 45, 66 (1932) (stating that the violation occurs when a defendant is unable to personally employ counsel); *see also* Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (stating the right to counsel is a safeguard of the Constitution which is necessary to ensure the fundamental rights of life and liberty); *cf.* Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980) (allowing retained counsel to be included in ineffective assistance of counsel analyses).

63. *Compare Powell*, 287 U.S. at 71 (relating the facts of the case to the "fundamental postulate [of] immutable principles of justice"), *with* Betts v. Brady, 316 U.S. 455, 473 (1942) (holding that an indigent defendant accused of robbery did not have a constitutional right to an attorney because the Fourteenth Amendment requirement of counsel leads to "an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel"). Justice Black declined to follow this generalization in his dissent. *See id.* at 474 (Black, J. dissenting). The court in *Gideon v. Wainwright*, which held that the Fourteenth Amendment did confer an obligation upon the states to provide counsel at trial, subsequently overruled Betts. *See* Gideon v. Wainwright, 372 U.S. 335, 339, 345 (1963) (stating that *Betts* should be overruled).

64. *See* Justice Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, *in* 86 COLUM. L. REV. 1, 1 (1986) (stating "[t]he unique finality of a capital sentence obliges society to ensure that capital defendants receive a fair chance to present all available defenses"). Justice Marshall also notes that frequently appointed trial counsel is "ill-equipped" to defend capital cases and that this lack of experience "takes a heavy toll." *See id.* at 1-2.

65. *See* Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (referring to the irrevocability of the death penalty); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (stating that "[w]hen a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed"); Richard P. Rhodes, Jr., Note, Strickland v.

C. *Constitutional Right to Effective Assistance of Counsel*

Although *Powell* extends the Sixth Amendment to the states, commentators often recognize *Gideon* as the decision leading to the right to effective assistance of counsel.[66] Unfortunately, the Supreme Court failed to adequately develop a standard for accessing this right in the years that followed the *Powell* decision.[67] However, "*Gideon's* Trumpet"—the term used to describe the prouncement in *Gideon* of the right to counsel as inherently encompassing the right to competent counsel—was not fully realized until the Supreme Court's decision seven years later in *McMann v. Richardson*.[68] However, the "range of competence" language used in *McMann* did little to further the standard of review.[69] Finally, in 1984, *Strickland v. Washington*[70] announced a cohesive standard of review to assess the newly realized right to effective counsel.[71]

1. *Gideon v. Wainwright*

In *Gideon*, the Court included the Sixth Amendment right to counsel among those rights "deemed necessary to insure fundamental human

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Washington: *Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121, 122 (1992) (emphasizing the value the Supreme Court places on capital over noncapital cases).

66. *See* Anthony Lewis, *To Realize* Gideon: *Competent Counsel with Adequate Resources*, CHAMPION, Mar. 1998, at 20, 21 (referring to the right to counsel under *Gideon* as requiring competent counsel), WL 22-MARCHAMP 20; Michael L. Piccarreta, *The Promise of* Gideon, 33 ARIZ. ATT'Y 10, 10 (1997), WL 33-MARAZATT 10 (standing for the proposition that representation of indigent defendants by inexperienced and underfunded attorneys has effectively hollowed the promise in Gideon of the right to counsel); *see also* Allan K. Butcher & Michael K. Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas* (2000) (referring to the revolutionary effects of *Gideon*), *available at* http://www.uta.edu/pols/moore/indigent/whitepaper.htm. However, the decision in Gideon was, in fact, merely an extension of the decision in *Powell* requiring legal counsel for indigent defendants. *See id.* at 1.

67. *See* Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (announcing the rule that when a defendant charged with a misdemeanor faces imprisonment, the defendant must be represented by counsel unless he waives that right).

68. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) (referring to the importance of competent court appointed counsel).

69. *See* Richard P. Rhodes, Jr., Note, Strickland v. Washington: *Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121, 121-22 (1992) (asserting that although the notion that defense "counsel must be 'effective' to fulfill the constitutional requirement first appeared in McMann v. Richardson," *McMann* failed to establish a standard by which the competence of counsel could be measured).

70. 466 U.S. 668 (1984).

71. *See* Strickland v. Washington, 466 U.S. 668, 692-96 (1984) (analyzing previous standards of review utilized by courts in determining if an attorney's performance was "reasonably effective assistance").

rights of life and liberty."[72] More specifically, the Supreme Court decided whether the right to counsel under the Sixth Amendment constitutes a fundamental right guaranteed for a fair trial.[73] By including the concept of a fair trial in its analysis, the Court implicitly deemed effective assistance of counsel a constitutional requirement.[74] Since the decision in *Gideon*, the Supreme Court has explicitly protected the constitutional right to effective assistance of counsel.[75] The clearest pronouncement of this came in *McMann*, in which Justice White stated that "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel."[76] Unfortunately, the *McMann* court failed to set forth a standard for determining whether a defendant had received effective representation.[77]

2. *Strickland v. Washington*

In *Strickland*, the Supreme Court specifically addressed ineffectiveness of counsel for the first time and formulated a two-prong test still utilized by courts today.[78] The State of Florida indicted Washington based on his participation in a string of crimes, including three brutal stabbing murders.[79] After conviction, the trial court sentenced Washington to

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72. *See* Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938); *accord* Powell v. Alabama, 287 U.S. 45, 63 (1932) (agreeing that the right to counsel is fundamental in character).

73. *See Gideon*, 372 U.S. at 342 (concluding that the right to counsel is indeed guaranteed by the Constitution). The Court also made clear that this constitutional principle was necessary in order to "achieve a fair system of justice." *Id.* at 344.

74. *See generally id.* at 339 (referring to the denial of counsel as a denial of "fundamental fairness").

75. *See* Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) (stating that the decisions of the Court have clearly defined ineffective assistance of counsel as not satisfying the right to counsel under the Sixth Amendment).

76. McMann v. Richardson, 397 U.S. 759, 771 (1970).

77. *See id.* (concluding that although effective counsel is an important Constitutional guarantee, determining the existence of effective counsel constitutes a matter for the trial court); Richard P. Rhodes, Jr., Note, Strickland v. Washington: *Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121, 122 (1992) (referring to the wide range of standards of review fostered by the *McMann* decision).

78. Strickland v. Washington, 466 U.S. 668, 683, 697 (1984) (stating that the standard set forth by the Court is of a general nature and should be afforded flexibility); Hernandez v. State, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (en banc) (adopting the *Strickland* standard of review for ineffective assistance of counsel cases in Texas).

79. *See Strickland*, 466 U.S. at 671-72 (listing the offenses that took place in a crime spree that lasted for a ten day period). The other crimes involved included "torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft." *Id.* at 672. Even though Washington only admitted to kidnapping and later two murders, he was even-

death.[80] The case proceeded through the state and federal appellate courts, until the United States Court of Appeals for the Fifth Circuit finally reversed and remanded the case so that the lower court could determine if the errors made by the attorney "resulted in actual and substantial disadvantage to the course of [the] defense."[81]

Eventually, the Supreme Court heard the case and formulated a two-prong test for determining ineffective assistance of counsel.[82] This standard requires that the defendant show both that the trial counsel provided deficient assistance and that this deficiency prejudiced the defense.[83] According to the Supreme Court, the situation in *Strickland* involved what the Court called "an experienced criminal lawyer."[84] Unfortunately, the two-prong approach does little to provide a definition of

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tually indicted for first-degree murder, robbery, "kidnapping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery." *Id.*

80. *Id.* at 675.

81. *Id.* (referring to ineffective assistance of counsel claims for which Washington sought relief in appeal to federal court). The ineffective assistance claims included failure to request a psychiatric report, obtain a presentence investigation report, present character witnesses, cross-examine medical experts, and failure to "present meaningful arguments to the sentencing judge." *See Strickland*, 466 U.S. at 675.

82. *Compare Strickland*, 466 U.S. at 683, 697 (stating that the standard set forth by the court is of a general nature and should be afforded flexibility), *with Hernandez*, 726 S.W.2d at 57 (adopting the *Strickland* standard of review for ineffective assistance of counsel cases in Texas), *and* William S. Geimer, *A Decade of* Strickland's *Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 93 (1995) (considering the idea that *Strickland* has "effectively discarded Gideon's noble trumpet call to justice in favor of a weak tin horn").

83. *See Strickland*, 466 U.S. at 687 (announcing the two-prong test a criminal defendant must pass in order to establish ineffective assistance of counsel under the Sixth Amendment's meaning of "counsel"). The standard was announced as follows:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687; Richard P. Rhodes, Jr., Note, Strickland v. Washington: *Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121, 123 (1992) (opining that the two-prong standard of review established in *Strickland* essentially "eviscerated its own decision" due to the vague guidelines the Court gave to trial courts in determining effectiveness of counsel).

84. *Strickland*, 466 U.S. at 672 (stating that the State of Florida had appointed this attorney to represent the accused in the charges of kidnapping and murder).

an experienced criminal lawyer; rather, the court grants almost complete deference to the trial attorney's performance with an assumption of effectiveness.[85] The Court favored this analysis because of the inherent problems involved in reconstructing the circumstances surrounding an attorney's conduct with the "distorting effects of hindsight."[86] The Court admitted, however, that lower courts should not mechanically apply the two-prong test.[87] Nevertheless, many commentators assert that the *Strickland* standard has done little to provide for the constitutional guarantee of effective assistance of counsel due to the inability of criminal defendants to satisfy the prejudice prong of the *Strickland* analysis.[88] Furthermore, courts do not deem an attorney's performance constitutionally deficient unless the errors undermined the reliability of the trial's outcome.[89]

The *Strickland* standard proves particularly devastating for indigent capital defendants.[90] For example, although appointed attorneys must

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85. *See id.* at 697 (declaring that ineffective assistance of counsel claims should not result in a burden on defense counsel). According to the dissent, vague references to the reasonableness of an attorney's performance does little to tell both attorneys and lower courts how defense counsel must behave. *Id.* at 707-08 (Marshall, J., dissenting).

86. *See id.* at 689 (indicating that there must be a strong presumption that the performance of the trial attorney fell within what would be considered reasonably professional assistance).

87. *See id.* at 690, 695 (explaining that although the standard should guide the process, a court should consider individual circumstances in making its decision). In fact, the court stated that the mere presence of an attorney does not satisfy the Constitutional right to counsel. *See Strickland*, at 685. Unfortunately even the Court failed to take the opportunity to protect indigent defendants from incompetent attorneys. *See id.* at 707 (Marshall, J., dissenting); *see also* Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV. 485, 499 (1995) (indicating that the Court did not take the necessary steps to protect the defendant from the type of attorneys that "plague the system").

88. *See* Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1446 (1999) (arguing that the *Strickland* standard allows "little more than a warm body with a law degree" to qualify as effective counsel); Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413 app. II, 459 (1988) (listing federal circuit court cases per circuit in which the courts found some inadequate attorney performance, but failed to find the prejudice prong of the *Strickland* standard satisfied); *cf.* Richard L. Gabriel, Comment, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1261 (1986) (maintaining that the *Strickland* standard allows courts to presume guilt in criminal cases without the benefit of a properly functioning adversarial system).

89. *See* United States v. Cronic, 466 U.S. 648, 656 (1984) (holding that even in the face of "demonstrable errors" the Sixth Amendment is not violated if "a true adversarial criminal trial has been conducted").

90. *See* Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 423 (1995) (interpreting the *Strickland* opinion as suggesting "that the deprivation of resources necessary to prepare a mean-

defend a capital murder client using limited resources, many courts presume such limitation and do not consider that factor when analyzing an ineffective assistance claim.[91] In addition, courts view the defense attorney as having done as much as possible under the circumstances.[92] As a result, courts operate under a strong presumption of competency in appointed counsel cases and grant tremendous deference to an attorney's "strategic decisions."[93] This deferential treatment standard has caused ineffective assistance of counsel claims to fail, deeming these claims to pass constitutional scrutiny.[94] Therefore, indigent capital defendants cannot rely solely on the *Strickland* standard to ensure receipt of competent counsel for their defense.

A statewide public defender system can help to ensure that an indigent capital defendant has access to adequate resources and competent, experienced trial attorneys. The federal judicial system has long recognized this need and provides federally funded public defenders to indigent defendants.[95] In addition, Los Angeles County, California has established a public defender office, as have several counties in Texas.[96] Further examination of these public defender systems provides a model for Texas to use in adopting a statewide system.

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ingful defense is a factor mitigating *against* a finding that the defendant was afforded ineffective assistance of counsel").

91. *See id.* (noting that courts evaluate "'circumstantial constraint of time, money, and clients' initial stories as givens which the defense attorney has neither the responsibility nor the capacity to change.'").

92. *See id.* (examining the many factors utilized by courts when applying the *Strickland* standard).

93. *See id.* at 422 (assessing how lower courts apply *Strickland* and stating that the courts find "'strategic decisions' virtually unassailable").

94. *See* Richard L. Gabriel, Comment, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1261 (1986) (stating that the two-pronged *Strickland* test "undermines the goal of the Sixth Amendment—a just result achieved through a proper adversarial proceeding"); *see also Cronic*, 466 U.S. at 656 (emphasizing the adversarial process "requires that the accused have 'counsel acting in the role of advocate' to survive the "crucible of meaningful adversarial testing").

95. 18 U.S.C. § 3006A(a)(3)(B), (g), (i) (1993).

96. *Compare* Jeff Brown, *Disqualification of the Public Defender: Toward a New Protocol for Resolving Conflicts of Interest*, 31 U.S.F. L. REV. 1, 1 (1996) (referring to the creation of the public defender offices in certain California counties), *with* TEX. CODE CRIM. PROC. ANN. arts. 26.042-26.050 (allowing for the creation of public defender offices in certain Texas counties).

III. Other Jurisdictional Schemes As a Model for a Proposed Public Defender System in Texas

In order to propose a viable public defender system for Texas, an analysis of other public defender offices becomes helpful. Existing models include the Federal Public Defender, the Los Angeles County Public Defender, and the El Paso County Public Defender. Adopting the most successful aspects of these public defender offices will allow Texas to establish a successful and effective public system of representation for indigent capital defendants. In addition, by recognizing the shortcomings of each system, Texas can avoid the pitfalls that plague operating public defender offices.

A. *Federal Public Defender Model*

The Federal Public Defender's Office provides an important model for Texas. By focusing solely on the federal public defender system operating within the state, the Texas legislature has an existing blueprint for covering the entire state. Despite the differences between state and federal judicial system, the federal public defender program provides a basic foundation for establishing the infrastructure of the state's counterpart.

1. Statutory Authority

Title 18 U.S.C. § 3006A governs the Federal Public Defender Office.[97] The plan set forth in § 3006A requires each district court in the United States to have a federal public defender to represent the indigent.[98] Specifically, § 3006A(a)(1)(H) entitles the defendant to court appointed counsel as required under the Sixth Amendment.[99] Furthermore, adequate representation includes services in addition to the mere appointment of counsel, such as investigative and expert services.[100] Moreover, the indigent federal defendant's right to counsel continues throughout the judicial process, from initial appearance to appeal, unless or until the defendant becomes financially able to pay for retained counsel.[101]

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97. *See* 18 U.S.C. § 3006A(g)(2)(A) (1994) (establishing the statutory structure of the Federal Public Defender Organization).

98. *See* 18 U.S.C. § 3006A(a) (1994) (stating that the defendant must be unable to obtain adequate representation on his own).

99. 18 U.S.C. § 3006A(a)(1)(H) (1994).

100. 18 U.S.C. § 3006A(a) (1994).

101. *See* 18 U.S.C. § 3006A(c) (1994) (stating a defendant previously able to retain private counsel may also receive appointed trial counsel if later becoming indigent).

In accordance with the Supreme Court's decision in *Gideon*, any such appointment also requires the selection of effective counsel.[102] Although the constitutional provision does not state from where the appointed counsel must come,[103] a federal public defender office generally employs these attorneys.[104] Typically, a federal public defender's office consists of at least one full-time salaried attorney and a full-time supporting staff appointed for four years by the court of appeals.[105]

2. Infrastructure of the Federal Public Defender Office System in Texas

Texas has four Federal Judicial Districts,[106] each of which has a Federal Public Defender Office.[107] Each office covers the counties included in that particular district, with branch offices in certain other counties.[108] The Fifth Circuit Court of Appeals appoints the head public defender and determines how many attorneys will staff each office.[109] While courts of-

102. *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (applying the general proposition that the Sixth Amendment provisions of the Bill of Rights are "fundamental and essential to a fair trial").

103. 18 U.S.C. § 3006A(b) (1994) (referring to the ability of the Court to choose attorneys from a previously approved or designated judicial panel or pursuant to a bar representation plan, from the local association or legal aid society).

104. *See generally* Telephone Interview with Henry Bemporad, Deputy Federal Public Defender, Western District of Texas Federal Public Defender Office (Oct. 10, 2000) (explaining the federal offices that exist in Texas).

105. 18 U.S.C. § 3006(g)(2)(A) (1994).

106. United States District Courts, *at* http://www.usdoj.gov/usao/eousa/kidspage/usdcmap.html (last visited Feb. 25, 2001).

107. *See* Telephone Interview with Henry Bemporad, Deputy Federal Public Defender, Western District of Texas Federal Public Defender Office (Oct. 10, 2000) (explaining the particular structure of the office for the Western District of Texas).

108. *See id.* (referring to the external structure of the Federal Public Defender Offices). For example, the public defenders office for the Western District of Texas is headquartered in San Antonio, with staffed branch offices in El Paso, Del Rio, Austin, and Alpine. Office of the Public Defender Western District of Texas, *at* http://fpd.home.texas.net (last visited Jan. 4, 2001) (listing the public defender offices that exist in the Western District); *see also* Telephone Interview with Henry Bemporad, Deputy Federal Public Defender, Western District of Texas Federal Public Defender Office (Oct. 10, 2000) (confirming the main office of the Western District is located in San Antonio). Throughout the entire district, the public defenders office employs approximately forty attorneys at any given time. *Id.* Each branch office handles trial cases for the applicable counties, with an appellate section based in San Antonio. *Id.* This district handles a total of approximately 4000 cases per year. *See id.* (estimating the number of cases defended by the entire Western District of Texas).

109. *See id.* (stating that the Fifth Circuit influences whom the public defenders are in Texas by appointing the individual who heads each office).

ficially appoint the head public defender to each case, the public defender's office often delegates cases to staff attorneys.[110]

Section 3006A provides for the establishment of a panel of support attorneys to take cases in which a conflict of interest arises or when the office has too many cases under its authority.[111] These support attorneys consist of members of the local legal community who have agreed to take the cases.[112] However, the statute requires that the federal public defender office handle at least two-thirds of the appointed cases within its district.[113]

B. *Los Angeles County, California Public Defender Model*

California provides Texas with a second valuable example of a statewide public defender office due to the relative similarity in the states' size and population.[114] In that regard, both Texas and California have a diverse population extending over a massive area.[115] Unlike the Federal Public Defender system which separates a state into regions, California law creates a public defender office in each county to serve that county's indigent defendants.[116]

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110. Telephone Interview with Henry Bemporad, Deputy Federal Public Defender, Western District of Texas Federal Public Defender Office (Oct. 10, 2000).

111. 18 U.S.C. § 3006A(a) (1994); *see* Telephone Interview with Henry Bemporad, Deputy Federal Public Defender, Western District of Texas Federal Public Defender Office (Oct. 10, 2000) (referring to the policy of the Western District's public defender to refer cases when there is a conflict).

112. 18 U.S.C. § 3006A(a) (1994) (providing that local attorneys may be appointed to handle some cases); *see* Telephone Interview with Henry Bemporad, Deputy Federal Public Defender, Western District of Texas Federal Public Defender Office (Oct. 10, 2000) (stating that the local offices use members of the local bar).

113. 18 U.S.C. § 3006A(a) (1994); *see* Telephone Interview with Henry Bemporad, Deputy Federal Public Defender, Western District of Texas Federal Public Defender Office (Oct. 10, 2000) (explaining that the appellate section handles cases for the entire district).

114. *See* Graham Bateman & Victoria Egan, THE ENCYCLOPEDIA OF WORLD GEOGRAPHY 51-52 (1993) (setting forth geographical data allowing for a comparison between California and Texas).

115. *See id.* at 51 (explaining that California is one of the most populous states spanning an area of 158,706 square miles). With an area of 266,807 square miles, the sheer size of Texas makes it the largest of the continental states. *See id.*

116. *See* Jeff Brown, *Disqualification of the Public Defender: Toward a New Protocol for Resolving Conflicts of Interest*, 31 U.S.F. L. REV. 1, 1 (1996) (referring to public defender offices established in individual counties).

1. Statutory Authority

Three key California codes provide the statutory authority for the statewide public defender office: the Government Code,[117] Penal Code,[118] and the Welfare and Institution Code.[119] In addition, other California codes expand on the services provided by the Public Defender Office to protect the right to counsel within the state.[120] California established its Public Defender Offices in 1913, with offices currently servicing fifty-seven of the state's fifty-eight counties.[121] Each office seeks to provide professionally competent representation to indigent criminal defendants.[122]

2. Infrastructure of the Los Angeles County Public Defender Office

The Los Angeles Public Defender Office consists of forty-nine satellite offices, including an appellate division, a mental health division, and several juvenile divisions.[123] One central public defender and an assistant public defender head the office with supporting staff available.[124] As

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117. *See* CAL. GOV'T CODE §§ 15400-15425 (Deering 1997) (defining the core duties of the California Public Defender).

118. *See* CAL. PENAL CODE § 1240 (Deering 1982) (specifying the types of cases, hearings, and responsibilities of the state Public Defender).

119. *See* CAL. WELF. & INST. CODE §§ 317-318 (Deering 1998 & Supp. 2001) (requiring the Public Defender to represent juveniles and persons involved in dependency proceedings).

120. *See* CAL. BUS. & PROF. CODE § 467.7(b) (Deering 1998) (requiring a defendant to have an opportunity to meet with the public defender before waiving his right to counsel); *see also* CAL. CIV. PROC. CODE § 170.5(e) (Deering 1996) (defining a public defender as a nonprofit entity restricted to serving indigent clients); CAL. FAM. CODE § 7860 (Deering 1996) (granting the right for a public defender to be appointed to represent a child or a child's parent, but not both); CAL. HEALTH & SAFETY CODE § 416.95 (Deering 1990) (allowing the appointment of a public defender to represent a developmentally disabled adult); CAL. PROB. CODE § 1471 (Deering 1991) (stating that "the court shall . . . appoint the public defender or private counsel to represent the interest of [a person who lacks legal capacity]" in certain proceedings); CAL. VEH. CODE § 1810.5 (Deering 2000) (allowing the public defender's office equal access to the Department of Motor Vehicle's records at no cost).

121. *See* Jeff Brown, *Disqualification of the Public Defender: Toward a New Protocol for Resolving Conflicts of Interest*, 31 U.S.F. L. REV. 1, 1 (1996) (explaining the background of the public defender in California). In fact, Los Angeles County was the location of the first public defender office in California. *See id.*

122. *See id.* (adding that the offices strive to provide a legal defense in the most cost-effective manner).

123. Law Offices Los Angeles County Public Defender Branch & Area Telephone Numbers, *at* http://pd.co.la.ca.us/pd-tele.htm (last modified Oct. 1, 1998). In fact, there are now branch offices in cities other than Los Angeles. *Id.* (listing branch offices in cities such as Torrance, Compton, and Lynwood).

124. *Id.*

with the federal system, however, the public defender does not always operate in cases involving indigent representation.[125] When the office has insufficient staff or a conflict of interest arises, the court may appoint an attorney in private practice to represent an indigent defendant.[126] Because of the size of Los Angeles County, the public defender office currently employs a rather large staff, growing from only around twelve attorneys in the 1960s.[127] The Los Angeles County public defenders office now has several branch offices in the greater Los Angeles metropolitan area.[128]

C. *El Paso County, Texas Public Defender Model*

As in California, statutory authority also exists in Texas for the creation of a public defender's office,[129] and Texas has a few such offices in counties scattered throughout the state.[130] The Code of Criminal Procedure authorizes the establishment of public defender offices in certain Texas counties, as well other counties based on size and the number of district and county courts.[131]

In Texas, criminal cases are adjudicated in the county in which the criminal offense occurred.[132] Historically, many counties routinely as-

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125. *See* Jeff Brown, *Disqualification of the Public Defender: Toward a New Protocol for Resolving Conflicts of Interest*, 31 U.S.F. L. REV. 1, 2 (1996) (explaining when private bar attorneys are utilized instead of public defender attorneys).

126. *See id.* (standing for the proposition that new standards are needed in California to deal with conflict of interest issues).

127. *See* Note, *Metropolitan Criminal Courts of First Instance*, 70 HARV. L. REV. 320, 345 (1956) (outlining the number of attorney's in the city office in 1956, in addition to three stenographers).

128. *See* Law Offices Los Angeles Public Defender, *at* http://pd.co.la.ca.us/pd-tele.htm (last modified Oct. 1, 1998) (listing branch offices of the Los Angeles County Public Defender Office).

129. *See* U.S. CONST. amend. VI (guaranteeing the right to counsel); TEX. CONST. art. I, § 10 (complying with the constitutional right to counsel); *see also* TEX. CODE CRIM. PROC. ANN. arts. 26.043, 26.046 (Vernon 1989) (establishing the formation of public defender offices).

130. *See* TEX. CODE CRIM. PROC. ANN. arts. 26.041-26.050 (Vernon 1989 & Supp. 2001) (authorizing a public defender to be set up in several counties and judicial districts); *see also* Telephone Interview with William Cox, Division Chief Administration, El Paso Public Defender Office (Oct. 10, 2000) (explaining that state public defenders also exist in Dallas County, Webb County, and Wichita County).

131. TEX. CODE CRIM. PROC. ANN. art. 26.044 (Vernon 1989) (authorizing the creation of a public defender in counties having at least four county courts and four district courts).

132. Allan K. Butcher & Michael K. Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas*, *available at* http://www.uta.edu/pols/moore/indigent/whitepater.htm (Sept. 22, 2000) (chronicling the history of indigent criminal defense delivery systems in Texas).

signed local attorneys to defend indigents, providing little or no compensation for time or expenses.[133] These appointments were not well-received by local attorneys, and some county bar associations intervened to improve the situation.[134] In those counties, bar association members collected a fee used to pay attorneys willing to take court appointments.[135] Such arrangements prompted the statutory creation of the first public defender office in Texas in 1969.[136] For example, the Tarrant County Bar Association in Fort Worth transferred the financial burden to the county by convincing the Texas legislature to provide one county-funded public defender position for each existing county court that had jurisdiction over criminal cases.[137] Despite having a public defender office, some counties, including El Paso County, continue to collect assessments from its members that are unwilling to take court appointments.[138]

Currently, public defender offices operate in only five counties: El Paso,[139] Dallas,[140] Webb,[141] Wichita,[142] and Colorado.[143] Public Defenders do not exist in all Texas counties due in large part to the restrictions placed on the creation of such offices found in the CCP.[144] The public defender's office in El Paso county serves as evidence that such an office

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Allan K. Butcher & Michael K. Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas*, *available at* http://www.uta.edu/pols/moore/indigent/whitepater.htm (Sept. 22, 2000).

138. *Id.* (relaying that in El Paso County, attorneys that do accept criminal appointments must pay a $600.00 yearly assessment, for deposit into the county's Indigent Criminal Defense Fund).

139. TEX. CODE CRIM. PROC. ANN. art. 26.044(a) (Vernon 1989).

140. *See* TEX. CODE CRIM. PROC. ANN. art. 26.044 (Vernon 1989) (authorizing a public defender to be created in any county which has four county courts and four district courts).

141. *See* TEX. CODE CRIM. PROC. ANN. art. 26.046 (Vernon 1989) (authorizing the commissioner's court of Webb County to appoint a public defender).

142. *See* TEX. CODE CRIM. PROC. ANN. art. 26.043 (Vernon 1989) (authorizing the commissioner's court of Wichita County to appoint a public defender).

143. TEX. CODE CRIM. PROC. ANN. art. 26.047 (Vernon 1989 & Supp. 2001) (allowing the county commissioner's court to appoint a public defender).

144. *See* TEX. CODE CRIM. PROC. ANN. art 26.044 (Vernon 1989); *cf.* Tex. S.B. 247, 76th Leg., R.S. (1999) (proposing an amendment to the Code of Criminal Procedure to allow for the creation of regional public defender offices throughout the state); Bob Ray Sanders, *Judges Decreed Death for Indigent Defense Bill*, FORTH WORTH STAR-TELEGRAM, June 23, 1999 (referring to the purpose of the indigent defense bill as merely authorizing the county commissioners to create public defenders rather than mandating any changes in the current system), 1999 WL 6241494.

can effectively exist in the state, helping overcome any reluctance to create a public defender's office statewide.[145]

1. Statutory Authority

Texas Code of Criminal Procedure Article 26.044 provides the statutory authority for the El Paso Public Defender Office.[146] This provision allows any county with at least four county courts and four district courts to create a public defender's office to represent indigent defendants within the county.[147] The Code establishes that an attorney may serve as a public defender if the attorney is a member of the state bar, has practiced for a year, and has some experience in criminal law.[148]

2. Infrastructure of the El Paso County Public Defender Office

In 1987, El Paso County formed a public defender office to serve indigent defendants.[149] The head public defender, appointed for an indefinite term by the El Paso County Commissioners Court, manages the office.[150] A total of twenty-two attorneys work in seven units: four trial units, a juvenile unit (dealing with such things as detention hearings and trial cases), a pre-indictment unit (in which one attorney oversees a case until indictment), and an appellate unit.[151] A division chief and two to four additional attorneys head each unit.[152] Furthermore, each unit typically covers between one and five courts.[153]

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145. *Compare* TEX. CODE CRIM. PROC. ANN. art. 26.044(a) (Vernon 1989) (authorizing public defender office in El Paso county based on its size), *with* Stephen B. Bright, *Elected Judges and the Death Penalty in Texas, Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1806 (2000) (blaming the current problems with the appointment system in Texas on the fact that state judges are elected).

146. TEX. CODE CRIM. PROC. ANN. art 26.044(a) (Vernon 1989) (establishing the statutory authority for appointing a public defender, which became effective September 1, 1985).

147. TEX. CODE CRIM. PROC. ANN. art. 26.044(a)(f) (Vernon 1989).

148. *See id.* art. 26.044(b) (stating that an attorney is eligible to be appointed as a Public Defender if the attorney is a member of the Texas Bar, has "practiced law for at least one year; and has prior experience in criminal law").

149. *See* Telephone Interview with William Cox, Division Chief Administration, El Paso Public Defender Office (Oct. 10, 2000) (explaining the procedure followed by the county to establish the Public Defender office).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

El Paso County's public defender office has handled capital punishment cases for the past eight years.[154] In that regard, the county hired a capital punishment expert three years ago.[155] Before a case reaches the public defender office, however, the defendant must qualify for services by establishing indigency.[156]

IV. NEED FOR A STATEWIDE PUBLIC DEFENDER SYSTEM IN TEXAS

Today, the right to effective assistance of counsel often gets overlooked in death penalty cases.[157] The Fifth Circuit, on numerous occasions, has upheld convictions of indigent defendants in the face of legitimate concerns regarding court appointed attorneys.[158] In addition, the Texas Court of Criminal Appeals has often affirmed decisions in which the facts suggest a lack of effective counsel.[159]

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154. Telephone Interview with William Cox, Division Chief Administration, El Paso Public Defender Office (Oct. 10, 2000).

155. *Id.*

156. *Id.*

157. *Compare* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (referring to the Court's long-standing recognition of the right to assistance of effective counsel), *and* Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (referring to the criminal defendant's need to receive "the guiding hand of counsel at every step of the proceedings against him"), *and* Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985) (holding that an attorney's use of drugs was not "in and of itself, relevant to an ineffective assistance claim"), *and* Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) (rejecting defendant's argument that counsel was per se ineffective because his attorney had alcohol on his breath during trial), *with* McFarland v. State, 928 S.W.2d 482, 505 (Tex. Crim. App. 1986) (en banc) (viewing ineffective assistance of counsel under the totality of the circumstances and holding that sleeping counsel did not violate the Sixth Amendment), *and* Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 789, 829 (1999) (recognizing that the Fifth Circuit has found a sleeping counsel "sufficient" to defend indigent defendants).

158. *Compare* Martinez-Macias v. Collins, 810 F. Supp. 782, 795, 979 F.2d 1067, 1067 (5th Cir. 1992) (granting writ of habeas corpus on the basis that defendant was denied effective assistance of counsel at both the guilt and sentencing phases of trial because the defendant's "actual innocence was a close question"), *with* Burdine v. Johnson, 231 F.3d 950, 964 (5th Cir. 2000), *overruling* Burdine v. Johnson 87 F. Supp. 2d 711 (S.D. Tex. 2000) (emphasizing that although the court was not condoning the sleeping of a capital defendant's counsel at trial, there could not be a presumption of prejudice under the constitutional guarantee of the right to effective assistance of counsel), *reh'g granted*, 234 F.3d 1339 (5th Cir. 2000) (agreeing to rehear the cause en banc).

159. *See* Hernandez v. State, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986) (en banc) (refusing to use a standard of review different from the one enumerated in *Strickland* because of Fifth Circuit precedent); *cf.* Mary Alice Robbins, *CCA Asked to Recuse Itself in Death Penalty Case*, TEX. LAW., Nov. 20, 2000, at 27 (citing attorney Rene Gonzalez as stating the Texas Court of Criminal Appeals "is in a rush to affirm these [capital murder] cases and move these people along"). *But cf. Ex parte* Jordan, 879 S.W.2d 61, 62 (Tex.

Consider the case of George McFarland, an indigent defendant represented by an attorney caught sleeping during parts of the trial.[160] In *McFarland v. State*,[161] the Court of Criminal Appeals did not consider the Sixth Amendment protection as requiring that counsel remain awake.[162] At least one judge, however, recognized that an attorney who sleeps at trial qualifies as ineffective under *Strickland*.[163] A statewide public defender system providing representation at both the trial and appellate level will help to solve the deficiency in representation currently plaguing Texas.[164]

A. *Current Appointment System in Texas*

The Texas Code of Criminal Procedure requires the appointment of counsel when an indigent defendant faces imprisonment.[165] Although the TCCP provides for the appointment of counsel, the quality of court appointed counsel varies widely across the state.[166] For example, in

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Crim. App. 1994) (en banc) (setting aside the defendant's conviction based on ineffective assistance of counsel).

160. McFarland v. State, 928 S.W.2d 482, 505 (Tex. Crim. App. 1996) (en banc).

161. 928 S.W.2d 482 (Tex. Crim. App. 1996) (en banc).

162. *See McFarland*, 928 S.W.2d at 505 (stating that because co-counsel was always available, McFarland was never completely without counsel); *see also* Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1811 (2000) (noting that the trial judge allowed the trial to continue even though he was aware that McFarland's attorney often fell asleep during the trial). The state district court judge allowed the capital murder trial to continue based "on the theory that 'the Constitution doesn't say the lawyer has to be awake.'" *Id.*

163. *See McFarland*, 928 S.W.2d at 527 (Baird, J., dissenting) (stating that "a sleeping attorney is no attorney at all"). Judge Baird disagreed with the majority's view that the presence of a second attorney excused the primary attorney's naps during trial. *Id.* The co-counsel was ill-prepared and in "no position to put forth a coordinated defense strategy." *Id. Accord* Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984) (stating that when an attorney sleeps through a substantial part of a trial, the conduct is inherently prejudicial).

164. *See* Bob Ray Sanders, *Judges Decreed Death for Indigent Defense Bill*, FORT WORTH STAR-TELEGRAM, June 23, 1999, at 1 (referring to Senator Rodney Ellis's comment that furor over his indigent defense bill was surprising due to the fact that many people view the current indigent defense system in Texas as flawed), 1999 WL 6241494; Stephen B. Bright, *Death in Texas*, THE CHAMPION, *at* http://schr.org/champion (July 1999) (standing for the proposition that poor representation by court-appointed counsel results from the whims of voters who elect judges in Texas and the legislature's refusal to provide independent indigent defense programs).

165. TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (Vernon 1989).

166. *See* TEX. CODE CRIM. PROC. ANN. art. 26.044(a) (Vernon 1989); *see also* THE TEXAS CIVIL RIGHTS PROJECT, THE SEVENTH ANNUAL REPORT ON THE STATE OF HUMAN RIGHTS IN TEXAS, THE DEATH PENALTY IN TEXAS: DUE PROCESS AND EQUAL JUSTICE . . . OR RUSH TO EXECUTION?, 12 (2000) (stating that most counties in Texas rely on a

Bexar County, the San Antonio Bar Association creates a list of all attorneys eligible for court appointments.[167] Under the "San Antonio Plan," an attorney may opt-out of court appointments by paying an annual fee of $500.[168] The bar association then compiles a list of remaining attorneys and sends the list to the district courts.[169] Thereafter, judges pick from the list by alphabetical order as the need arises.[170] In contrast, Harris County, which has twenty-two trial courts, uses a mixture of private practice attorneys and contract attorneys.[171]

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court-appointment system for indigent defendants). However, these court appointments are effectively voluntary assignments. *See id.* (pointing out the inadequacies of the court appointment system in relation to the two other available options); *see also* Max B. Baker & Linda P. Campbell, *Not All Can Pay High Cost of Justice: Texas Has Inadequate Defense for the Poor, New Report Finds*, FORT WORTH STAR-TELEGRAM, Jan. 16, 2000 (stating that many judges do not use any formal criteria for appointing attorneys for indigent defendants), 2000 WL 4990737. In fact, almost half of all judges in the state believe that other judges appoint defense counsel merely because the attorney has a reputation for quickly resolving cases, without regard to ensuring a quality defense. *See id.* (noting some of the Texas State Bar's standing committee's findings following a statewide survey of judges and legal professionals).

167. *See* Telephone Interview with Maria Salizar-Salinas, Administrative Assistant, Bexar County Criminal District Administration (Sept. 8, 2000) (confirming that she maintains a list of attorney's eligible to receive court appointments); *see also* Memorandum from Jennifer Gibbins Durbin, President, San Antonio Bar Association, to all Attorneys Practicing in Bexar County (identifying the rules governing court appointments in Bexar County).

168. *See* Memorandum from Jennifer Gibbins Durbin, President, San Antonio Bar Association, to all Attorneys Practicing In Bexar County (explaining the costs of the program). The money gathered from the annual fee is used to lessen the financial burden placed on attorneys who accept criminal appointments for indigent defendants. *See id.*; *see also* Max B. Baker & Linda P. Campbell, *Not All Can Pay High Cost of Justice: Texas Has Inadequate Defense For the Poor, New Report Finds*, THE FORT WORTH STAR-TELEGRAM, Jan. 16, 2000 (relating that the $500 fee is paid by attorneys to avoid representation of poor clients), 2000 WL 4990737.

169. *See* Telephone Interview with Maria Saliza-Salinas, Administrative Assistant, Bexar County Criminal District Administration (Sept. 8, 2000) (stating that the appointment eligibility list used by the trial judges originates from the San Antonio Bar Association).

170. *See* Telephone Interview with Maria Salizar-Salinas, Administrative Assistant, Bexar County Criminal District Administration (Sept. 8, 2000) (explaining that the court coordinator chooses the next name in the list after a finding that the defendant is indigent).

171. *See* Allan K. Butcher & Michael K. Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas*, Sept. 22, 2000, *available at* http;//www.uta.edu/pols/moore/indigent/whitepaper.htm (Sept. 22, 2000) (explaining that the contract system in Harris County is controlled by individual courts).

B. *Current Court Appointed Representation in Texas is Inadequate*

A statewide public defender system would represent a more efficient method for providing criminal defense to indigent defendants.[172] Rather than a system haphazardly applied by judges in each county, a public defender system will create a unified and fair approach to court appointment in Texas.[173] This administrative change will allow greater assurance that the state protects the guaranteed constitutional right to effective counsel for all capital defendants.[174]

The current Texas court appointment system leads to situations where ineffective counsel represent the defendants most in need of effective assistance, those who face deprivation of life.[175] However, even if a statewide public defender system operated at a maximum level of effectiveness and efficiency, the possibility still exists that ineffectiveness will occur either because a "bad apple" has permeated the system or because an otherwise competent attorney had a bad day.[176] Therefore, the proposed public defender system should ensure adequate safeguards, such as hiring attorneys experienced in trying capital cases and providing additional training for less-experienced trial attorneys, to prevent the necessity of post-verdict claims of ineffective assistance of counsel.

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172. *See generally* TEX. CODE CRIM. PROC. ANN. art. 26.04 (Vernon 1989) (reflecting the current system allowing courts to appoint attorneys to represent indigent defendants); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1839 (1994) (standing for the proposition that inadequate representation of criminal defendants in Texas under the current system deprives the defendants of their constitutional guarantee to effective assistance of counsel).

173. *See* Allan K. Butcher & Michael K. Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas*, Sept. 22, 2000, *available at* http://www.uta.edu/pols/moore/indigent/whitepaper.htm (Sept. 22, 2000) (referring to the influence that the election process of state judges in Texas has on the appointment process).

174. *See* McMann v. Richardson. 397 U.S. 759, 771 (1970) (announcing the long-held view "that the right to counsel is the right to effective assistance of counsel").

175. *See* Max B. Baker & Linda P. Campbell, *Not All Can Pay High Cost of Justice: Texas Has Inadequate Defense for the Poor, New Report Finds*, FORT WORTH STAR-TELEGRAM, Jan. 16, 2000 (relating one problem with the current court-appointment system is that judges consult with prosecutors before appointing defense attorneys), 2000 WL 4990737; *Bush Urged to Approve Defender Bill, Judges Criticize Proposal on Lawyer Appointments*, DALLAS MORNING NEWS, June 5, 1999 at 38A (citing the author, Rodney Ellis, of the 1999 proposed indigent defense bill as stating that the current system of appointments by judges results in a "hodgepodge of sometimes ineffective counsel"), 1999 WL 4125847.

176. *See* Michael Ross, *How Many Innocent Men Will Be Killed?*, 23 HUM. RTS., Summer 1996, at 20 (1996) (indicating that Supreme Court Justice Thurgood Marshall once said: "No matter how careful courts are . . . human error remain[s] too real").

C. *Problem in Texas in Light of the Review Standard Set Forth in* Strickland v. Washington

The reluctance of Texas courts to hold that a criminal defendant received ineffective assistance of counsel is not surprising when considering the standard of review used by appellate courts.[177] In order to prove ineffective assistance of counsel, a defendant must show that the trial attorney performed deficiently and that such deficiency prejudiced the defense by affecting the outcome of the trial.[178] This standard of review proves especially problematic in Texas due to the vast disparity in trial experience and ability of attorney's appointed to defend the indigent.[179] Although an inexperienced attorney is not *per se* ineffective, when an attorney with absolutely no trial or criminal defense experience represents a defendant facing the death penalty, a stronger possibility exists that a *Strickland* violation will occur.[180]

The Supreme Court in *Strickland* explained that lower courts must make an inquiry into the fundamental fairness of the proceeding's result contrasted against the "strong presumption of validity" in the appointed counsel's representation.[181] Indeed, the Court noted the importance of the fundamental right to counsel in recognizing the need for effective rep-

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177. *See* Lockhart v. Fretwell, 506 U.S. 364, 369 (1993) (explaining that an analysis of effective assistance of counsel must focus on both the outcome determination as well as whether or not the proceeding itself was fundamentally unfair to avoid a defective decision); Strickland v. Washington, 466 U.S. 668, 689 (1984) (referring to the extreme deference accorded trial counsel's performance); Armstead v. Scott, 37 F.3d 202, 206-07 (5th Cir. 1994) (following the Supreme Court's narrow prejudice inquiry under *Fretwell*).

178. *See Strickland*, 466 U.S. at 687 (stating that satisfaction of both prongs is necessary to show that there was a breakdown in the adversarial process thereby rendering an unreliable result); *see also* Westley v. Johnson, 83 F.3d 714, 719 (5th Cir. 1996) (stating that trial counsel's actions are based on strategy, therefore the burden is difficult for a defendant to overcome).

179. *See* Ken Armstrong & Steve Mills, *Gatekeeper Court Keeps Gates Shut: Justices Prove Reluctant to Nullify Cases*, CHI. TRIB., June 12, 2000 (explaining that some attorneys appointed by the Texas Court of Criminal Appeals to represent death row inmates on their final appeal have been sanctioned by the State Bar, including occurrences shortly before being appointed by the court), http://www.chicagotribune.com/news/nationworld/ws/item/0,1308,45186-0-45185,00.html. These appointed lawyers have also included those with very little experience and those who have been disciplined for misconduct. *Id.*

180. *See Perillo*, 205 F.3d at 786 (explaining that the court appointed attorney at Perillo's second trial "had never tried a capital case"). This court appointment is actually what led to the conflict of interest and ultimate granting of Perillo's request for habeas corpus relief. *See id.* at 786-87. Robert Pelton, the court appointed attorney, asked Jim Skelton to join the defense team. *See id.* at 786. Skelton had previously represented a co-defendant in a previous trial and his defense strategy was to place blame on Perillo. *See id.*

181. *See Strickland*, 466 U.S. at 687 (explaining that courts must engage in this inquiry due to the "breakdown in the adversary process" which can potentially occur when counsel has been ineffective).

resentation.[182] However, comparing the attorney appointed by the Florida trial court in *Strickland* with those appointed in Texas cases such as Calvin Burdine's only magnifies the questionable reluctance of Texas appellate courts and the Fifth Circuit to find ineffective assistance of counsel.[183] While Washington's attorney attempted to advocate on behalf of his client, thus leading the Supreme Court to find effective assistance of counsel, court appointed attorneys in Texas often do not rise to the same level.[184]

V. A PROPOSAL FOR A PUBLIC DEFENDER SYSTEM IN TEXAS

In order to overcome the minimal standards of effective assistance of counsel in capital cases set forth by *Strickland*, the state should create a statewide public defender system.[185] While public defender offices have received criticism in other states,[186] this proposal seeks to remedy common problems faced by those offices.[187] Based on a proposed amendment to the Texas Code of Criminal Procedure and the models provided by the federal public defenders system, the California system, and the El Paso County system, this proposal functions as a viable alternative to the current court appointment method.[188]

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182. *See id.* at 685 (recognizing the critical role attorneys play in order for justice to result from the adversarial process); *see also* McMann v. Richardson, 397 U.S. 759, 771 (1970) (referring to a certain range of competence required of criminal defense attorneys).

183. *Compare Strickland*, 466 U.S. at 672-73 (outlining the attorney's efforts to advocate for his client and the sense of hopelessness the attorney faces when presented with the particular facts of Washington's case), *with* Paul M. Barrett, *On the Defense: Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994 at A1 (explaining that Joe Cannon's entire case file constituted only three pieces of paper with a few handwritten remarks), 1994 WL-WSJ 343264.

184. *See Strickland*, 466 U.S. at 672-73 (referring to several issues for which the attorney advised Washington adequately, including advice not to confess and not to confess and not to waive the right to a jury trial).

185. *See* THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS 165 (1993) (recommending the implementation of a governing agency to improve indigent defense in Texas).

186. *See* Dale Jones, *The Office of the Public Defender, Race and Proportionality Review in New Jersey: The View from the Back of the Bus*, 26 SETON HALL L. REV. 1469, 1469 (1996) (indicating that racial bias is a problem faced both in the New Jersey Office of the Public Defender and throughout the country with regard to capital cases).

187. *See* Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 752-53 (1995) (standing for the proposition that prosecutors and public defenders are not evenly matched in the adversarial process).

188. *See* Henry Gabriel & Kimber L. Tuttle, *Duties of the Court Appointed Attorney*, 27 TEX. TECH L. REV. 429, 432 (1996) (referring to the procedure in Texas in which judges may contact the coordinator of the "Texas Appointment Plan" in order to request an attorney to represent an indigent defendant).

A. *Statutory Authority*

In order to create a state public defenders system in Texas, the legislature must amend the TCCP to provide statutory authority for the creation of public defender offices either in every county or in a regional capacity.[189] To accomplish this, the Texas legislature must modify the wording of Article 24.044 to allow public defenders to cover every county instead of the current authorization merely for "any county with four county and four district courts."[190] In addition, the Code should provide an outline for the structure and funding for each office within the system.[191]

The United State Code, Section 3006A, governing the Federal Public Defender Office, provides an effective model detailing how the state should prescribe a public defender system.[192] For example, the Code should set forth that the state appellate court governing the county in which the public defender is to be established shall appoint the chief public defender.[193] Additionally, the code must contain explicit guidelines governing the compensation of the public defender attorneys in relation to attorneys with similar qualifications in the District Attorneys office of the particular county.[194]

189. *See* Tex. S.B. 247, 76th Leg., R.S. (1999) (failing at an attempt to modify certain sections of the Texas Code of Criminal Procedure in order to allow for the availability of public defender offices in Texas), WL 1999 TX S.B. 247 (SN).

190. *Compare* TEX. CODE CRIM. PROC. ANN. art 26.044(a) (Vernon 1989) (stating that the provision only applies to counties with four district and four county courts), *with* Tex. S.B. 247, 76th Leg., R.S. (1999) (attempting to amend art. 26.044 to allow for the creation of "regional public defenders"), WL 1999 TX S.B. 247 (SN).

191. *See* 18 U.S.C. § 3006A(g)(2)(A) (1994) (providing funding for the Federal Public Defender offices).

192. *See generally id.* § 3006A (indicating the structure, financing and compensation requirements of the Federal Public Defender).

193. *See generally id.* § 3006A(g)(2)(A) (indicating that the "Federal Public Defender [is] appointed by the [federal] court of appeals for the circuit").

194. *Compare id.* (stating that the federal public defender should be compensated in relation to the United State Attorney, its prosecutorial counterpart), *with* TEX. CODE CRIM. PROC. ANN. art 26.05 (Vernon 1989) (outlining guidelines for the compensation of public defender attorneys without mentioning their relation to district attorneys, their state prosecutorial counterparts).

B. *Infrastructure of the Proposed State Public Defender System in Texas*

Based on the models discussed in Part II, an infrastructure for a public defenders system naturally arises.[195] While the existing Public Defender Office in El Paso provides the most viable model,[196] both the Federal Public Defender system and the Los Angeles County Public Defender also provide useful aspects.[197] Because this proposal seeks to create a system that has not yet existed in Texas on a statewide level, lawmakers have the opportunity to include the most effective aspects of each model while excluding areas of problem or concern.[198]

1. Statewide Structure of the System

A sound organizational structure provides the essential basis for a properly functioning public defender system.[199] Rather than an individual statewide public defender office, Texas need not create offices in every county.[200] An analysis of which counties have the most capital defendants, combined with a close approximation of the federal counter-

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195. *See generally* Telephone Interview with William Cox, Division Chief Administration, El Paso Public Defender Office (Oct. 10, 2000) (explaining the structure of the current Public Defender Office in El Paso, Texas).

196. *See id.* (standing for the proposition that the office is efficient and successful because it contains the three essential divisions each office should include).

197. *See generally* CRIMINAL JUSTICE ACTION PLAN § IV(A)(2) (2000) (requiring that the Federal Public Defender shall provide legal services throughout the district); Graham Bateman & Victoria Egan, THE ENCYCLOPEDIA OF WORLD GEOGRAPHY 51-52 (1993) (indicating geographic data for California and Texas so that the reader could infer many similarities between the two states).

198. *See* Allan K. Butcher & Michael K. Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas*, Sept. 22, 2000, *available at* http://www.uta.edu/pols/moore/indigent/whitepaper.htm (Sept. 22, 2000) (stating that "there is no single 'appointed counsel' system" in Texas). Rather, more than 800 of the criminal judges in Texas determine how an attorney will be appointed in his or her particular court. *Id.*

199. *See generally* Telephone Interview with William Cox, Division Chief Administration, El Paso Public Defender Office (Oct. 10, 2000) (explaining the structure of one of the existing state public defender offices currently in Texas).

200. *See* TEX. CODE CRIM. PROC. ANN. art. 26.045 (Vernon 1989) (providing for a "public defender system" to be created for the 33rd Judicial District of Texas, which is composed of Blanco, Burnett, San Saba, Mason, and Llano counties). *See generally* Telephone Interview with Henry Bemporad, Deputy Federal Public Defender, Western District of Texas Federal Public Defender Office (Oct. 10, 2000) (referring to the structure of the Federal Public Defender Office as providing services to surrounding counties).

part, justify creating regional offices in larger counties to cover surrounding smaller counties as the need arises.[201]

In order to define the overall structure of the system, the Federal Public Defender Office provides the clearest model.[202] Similar to the division of the federal office into four districts, the proposed system divides Texas into districts based on the diverse needs of particular areas within the state.[203] For example, many counties cannot financially support an independent public defender office. In addition, many counties rarely confront capital cases.[204] By establishing offices only in major counties, Texas can overcome these problems without sacrificing efficient and effective counsel for indigent defendants. These offices will then serve the surrounding counties.[205] For example, Texas can establish an office in Bexar County to serve as the central public defender for the following counties: Comal, Medina, Atascosa, Frio, Guadalupe, Wilson, and other smaller surrounding counties.

2. Division Within Each Office

In order for each office to effectively handle cases, the state should establish guidelines for a division of labor within each office.[206] The El Paso County model provides the best approach.[207] Because that office serves all indigent defendants, rather than merely capital cases, Texas may scale down its offices accordingly.[208]

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201. *See generally* TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY Table B (2000) (detailing where death row inmates come from based on the county in which they were convicted).

202. *See generally* Telephone Interview with Henry Bemporad, Deputy Federal Public Defender, Western District of Texas Federal Public Defender Office (Oct. 10, 2000) (explaining the structure of the federal system and offices).

203. *See generally id.* (explaining that the Federal Office is divided into Northern, Southern, Western, and Eastern districts).

204. *See* TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY tbl. B (2000) (laying out counties in which death row inmate currently come from).

205. *See* Telephone Interview with Henry Bemporad, Deputy Federal Public Defender, Western District of Texas Federal Public Defender Office (Oct. 10, 2000) (stating that the Federal Public Defender for the Western District of Texas services counties within that district).

206. *See* Telephone Interview with William Cox, Division Chief Administration, El Paso Public Defender Office (Oct. 10, 2000) (referring to the importance of a division of authority in the El Paso Public Defender Office).

207. *See id.* (outlining the functional structure of the El Paso Public Defender's office).

208. *See id.* (stating that indigency is determined before the case is assigned to the El Paso County office).

Each office should include three essential divisions: pre-indictment, trial, and appellate.[209] The pre-indictment division handles the case from the moment an indigent defendant's need arises until the case reaches the trial phase.[210] The trial division then handles the case through trial until the court enters a final judgment.[211] Finally, the appellate division handles all post-conviction review resulting from the capital offense defendant's automatic right to appeal to the Texas Court of Criminal Appeals.[212] Due to this automatic right to appeal, however, the state should emphasize the interrelated nature of all three divisions and require heavy interaction between the attorneys staffing each division.

3. Composition of Office Personnel

Each office in the state public defender system should contain similar office personnel with similar job descriptions as those in the El Paso county office. Because the mandatory system only serves indigent capital defendants, the state does not need a centralized death penalty section.[213] Rather, the primary focus concerns the quality of the attorney permitted to enter the system.[214] An emphasis on quality over quantity best guarantees that the defendant receives effective representation above the standard mandated under *Strickland*.[215]

209. *See id.* (explaining that the El Paso Office includes pre-indictment, trial, and juvenile divisions).

210. *See id.* (referring to the responsibilities of the attorneys assigned to the pre-indictment division).

211. *See* Telephone Interview with William Cox, Division Chief Administration, El Paso Public Defender Office (Oct. 10, 2000) (inferring that the trial division follows the pattern of the indictment division in handling each case until the final judgment).

212. *See* Telephone Interview with Henry Bemporad, Deputy Federal Public Defender, Western District of Texas Federal Public Defender Office (Oct. 10, 2000) (indicating that the Federal Public Defender Office for the Western District of Texas has a central appellate division located in San Antonio, Texas).

213. *See generally id.* (explaining that there is a specialized appellate section for the federal offices).

214. *See* Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999 (noting that on at least thirty-three occasions, disbarred or suspended attorneys represented capital defendants at trial), http://www.chicago.tribune.com/news/metro/chicago/ws/item/0,1308,37842-0-37872,00.html.

215. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring merely "reasonably effective assistance").

a. Chief Public Defender

A chief public defender in each of the appropriate counties allows for the most efficiently run system.[216] Similar to the federal counterpart, this system does not have a central public defender who oversees branch offices in the entire state.[217] The El Paso office presents a favored model.[218] Similar to that office, a central authority appoints the chief public defender.[219] Although the county commissioners court appoints the El Paso public defender, the state appellate court governing the particular county should appoint the new public defenders.[220] This type of appointment system closely resembles the federal paradigm.[221] Such a system lends credibility to the public defender office in the eyes of state judges because of the similarity of this approach to the current system in which judges appoint defense counsel to indigent defendants on an individual basis.[222] Finally, in addition to a chief public defender, Texas should establish an assistant public defender in larger counties similar to the Los Angeles Public Defender Office to assist in administrative duties.[223]

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216. *See generally* Telephone Interview with William Cox, Division Chief Administration, El Paso Public Defender Office (Oct. 10, 2000) (stating that the El Paso office is headed by a chief public defender).

217. *See* Telephone Interview with Henry Bemporad, Deputy Federal Public Defender, Western District of Texas Federal Public Defender Office (Oct. 10, 2000) (explaining that the Chief Public Defender in San Antonio, Texas oversees all the satellite offices in the Western District of Texas).

218. *See generally* Telephone Interview with William Cox, Division Chief Administration, El Paso Public Defender Office (Oct. 10, 2000) (referring to the central position held by the Chief Public Defender).

219. *See id.* (explaining that the Chief is appointed by the El Paso County Commissioner's court).

220. *See* Henry Gabriel & Kimber L. Tuttle, *Duties of the Court Appointed Attorney*, 27 TEX. TECH L. REV. 429, 430 (1996) (explaining that the Fifth Circuit provided for a defender organization as one of the ways that attorneys can be appointed to defend indigents).

221. *See generally* Telephone Interview with Henry Bemporad, Deputy Federal Public Defender, Western District of Texas Federal Public Defender Office (Oct. 10, 2000) (explaining the structure of the federal office).

222. *See* Henry Gabriel & Kimber L. Tuttle, *Duties of the Court Appointed Attorney*, 27 TEX. TECH L. REV. 429, 432 (1996) (explaining that Texas follows the "Texas Appointment Plan," in which the court requests that counsel be appointed to represent an indigent defendant).

223. *See generally* Law Offices Los Angeles County Public Defender, Branch & Area Telephone Numbers, *at* http://pd.co.la.ca.us/pd-tele.htm (last updated Oct. 1, 1998) (indicating that there is one assistant public defender in Los Angeles County).

b. Staff Attorneys

Each division should include a minimum of two staff attorneys, although this number may include the division chief.[224] To ensure experience with the relevant type of cases presented, each division should include one attorney with an expertise in capital punishment, either through experience or education.[225] Ideally, the division chief and the staff attorneys would all have expertise in capital punishment.[226] Because this type of whole-scale expertise is probably financially impractical, at a minimum, the division chief should fill this requirement to ensure adequate knowledge of the specialized subject matter pertaining to this proposed system.[227]

c. Support Staff

Finally, each office within the system must contain some minimum level of support staff.[228] Once again, due to the nature of the office as serving only capital cases, the large-scale support staff that exists in the model offices is unnecessary.[229] Rather, each office should include at least one legal secretary or paralegal.[230] This person will assist the staff attorneys with investigation, research, and maintenance of the case.[231] Because each office will have only minimal support staff available, the staff attorneys will remain responsible for the bulk of the work resulting from representation.[232]

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224. *See generally* Telephone Interview with William Cox, Division Chief Administration, El Paso Public Defender Office (Oct. 10, 2000) (referring to the structure of the El Paso Office as containing a Chief who oversees a number of staff attorneys).

225. *See generally id.* (stating that the El Paso Office recently added a capital punishment expert to their staff).

226. *See generally id.* (indicating that the El Paso Office is composed of a chief and staff attorneys assigned to specific divisions and/or cases).

227. *See generally id.* (indicating the establishment of a capital punishment expert due to the extreme importance of expertise in this area).

228. *See generally id.* (referring to the importance of the support staff to the El Paso Office).

229. *See* Telephone Interview with William Cox, Division Chief Administration, El Paso Public Defender Office (Oct. 10, 2000) (explaining the number of support staff utilized in order to provide services for the number of cases that come through the office).

230. *See generally id.* (explaining that legal secretaries make up the composition of the El Paso Office's support staff).

231. *See generally id.* (referring to the duties of the support staff).

232. *See generally id.* (stating that the staff attorneys at the El Paso Office assume primary responsibility for their cases).

C. *Reasons Why This System Has Not Been Implemented to Date*

Texas has not implemented a statewide public defender for a few key reasons, each of which an efficient, effective system can overcome. Primarily, the strongest resistance arises in the political arena.[233] This resistance comes from criminal defense attorneys, prosecutors, and judges who rely on the current system for financial and political support.[234] In addition, the rising cost of criminal defense raises a key concern with regard to the implementation of any type of uniform system.[235] Finally, the issue of whether any kind of statewide system can truly serve the needs of the entire population in a state as large and densely populated as Texas has caused some concern.[236]

1. Benefits of the Current System in Texas Politics

Reliance on the death penalty and a "tough on crime" stance has become a mainstay in American politics,[237] with Texas leading the way.[238]

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233. *See* Bob Ray Sanders, *Judges Decreed Death for Indigent Defense Bill*, FORT WORTH STAR-TELEGRAM, June 23, 1999, at 1 (referring to the defeat of the indigent defense bill after Governor Bush vetoed it under pressure from Texas judges), 1999 WL 6241494.

234. *See, e.g.*, Max B. Baker & Linda P. Campbell, *Unequal Justice in Tarrant County, the Ability to Afford an Attorney is Often the Difference Between Serving a Sentence Behind Bars or Out in the Community*, FORT WORTH STAR-TELEGRAM, Oct. 15, 2000, at 1 (indicating that the indigent defense bill was vetoed by Governor Bush under pressure from these groups even though it was passed by both the House and the Senate), 2000 WL 28286256.

235. *See* Diane Jennings, *Defense of Indigents Criticized in Texas: Bush, Others Call Appointee System Sound*, DALLAS MORNING NEWS, July 16, 2000, at 1A (discussing how Texas provides little funding for indigent defense, thereby forcing counties to pay the rising cost of criminal defense), 2000 WL 23717334.

236. *See* Telephone Interview with William Cox, Division Chief Administration, El Paso Public Defender Office (Oct. 10, 2000) (stating a concern that a statewide office may not serve the needs of the state effectively).

237. *See* Peter J. Benekos & Alida V. Merlo, *Three Strikes and You're Out!: The Political Sentencing Game*, 59 FED. PROBATION 3 (Mar. 1995) (concluding that politicians continually embrace tougher sentencing proposals, including the death penalty, because the stance still works politically), 59-MAR FEDPROB 3. For example, after Michael Dukakis, while Governor of Massachusetts, granted clemency to a convicted rapist and murderer who subsequently committed another rape, republicans encouraged a campaign of "devilish brilliance" that became an integral part of "American political folklore." *Id.*

238. *See* Alan Berlow, *Lethal Injustice*, AM. PROSPECT, Mar. 27, 2000 (indicating that when he first ran for Governor in 1994, George W. Bush "ruthlessly exploited the issue" of the death penalty), 2000 WL 4739255. In fact, the number of executions that have taken place while George W. Bush has been governor of Texas account for greater than one-third of all executions nationwide. *Id.*; *see also* Shirley Shaffer Harnsburg, *For Some, Life Can Be Short in Bush's Texas*, HARRISBURG PATRIOT, Aug. 16, 2000, at A16 (stating that most judges in Texas support the death penalty), 2000 WL 9357165.

The fact that Texas elects judges compounds the problems with the current system of court appointments.[239] As such, judges, at times, use their position to garner political support and campaign contributions.[240] Unfortunately, the emphasis placed on political agendas often occurs at the expense of the lives of indigent defendants.[241]

The desire of Texas judges to maintain the status quo is quintessentially evident with regard to the indigent defense bill vetoed by Governor George W. Bush in 1999.[242] The bill itself would have encouraged the creation of public defender offices throughout Texas.[243] Essentially, the bill allowed, but did not require, individual county commissioners courts to establish a public defender office.[244] This bill advanced the unanimous intent of the Texas legislature to improve indigent criminal defense in the state.[245] Yet, under pressure from judges across Texas, Bush vetoed the

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239. *See* Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1826 (2000) (stating that a large part of the problem with court appointed counsel in Texas stems from the fact that judges are elected by popular vote).

240. *See id.* at 1806 (arguing that some judges treat court appointments as "political patronage"); *see also* Ryan A. Byrd, Comment, *A "Last Hug" Before Execution: The Case in Favor of Contact Visitation for Death Row Inmates in Texas*, 2 SCHOLAR 249, 259 (2000) (stating that politicians in Texas "wholeheartedly support" the imposition of the death penalty in order to gain political support).

241. *See* THE SEVENTH ANNUAL REPORT ON THE STATE OF HUMAN RIGHTS IN TEXAS, 2000 THE TEXAS CIVIL RIGHTS PROJECT 7 (concluding that Texas's process for capital punishment is a "flawed streamlined system eager to alleviate court dockets and accomplish political agendas at the expense of a person's life"). *See generally* JOHN H. BARTON ET AL., LAW IN RADICALLY DIFFERENT CULTURES 395 (1983) (suggesting that a trial judge is the core of the criminal process and his demeanor in handling the proceedings shapes the public's impression of the criminal justice system). "Reliance upon the judge . . . to protect the interests of defendants is an inadequate substitute for the advocacy of conscientious defense counsel." *Id.*

242. *See* Tex. S.B. 247, 76th Leg., R.S. (1999) (referring to the important nature of the bill and "imperative public necessity" that the proposition be heard expediently); Bob Ray Sanders, *Judges Decreed Death for Indigent Defense Bill*, FORT WORTH STAR- TELEGRAM, June 23, 1999, at 1 (implying that Texas Governor George W. Bush vetoed the indigent defense bill under pressure from criminal district judges), 1999 WL 6241494.

243. *See* Tex. S.B. 247, 76th Leg., R.S. (1999) (proposing an amendment to the Texas Code of Criminal Procedure, art 26.044 to allow for regional public defenders in any county regardless of its size or judicial structure).

244. *See id.* (allowing county commissioners to establish procedures governing appointment of counsel for indigent defendants).

245. *See* A. Phillips Brooks, *Bush Veto on Legal Aid Bill Draws National Scrutiny*, AUSTIN AM.-STATESMAN, June 22, 1999 (referring to the fact that both the House and the Senate supported the bill without opposition), 1999 WL 7416622.

bill.[246] Despite the apparent fear of judges that state courts would lose their power over criminal appointments, the bill did not actually compel officials in any counties to make substantive changes.[247]

2. Lack of Financing for a Public Defender System

A second potential problem area concerns the financing of the proposed system. Some commentators allude to cost as the primary reason Texas has never instituted such a system.[248] Seeking the death penalty raises costs for both the defense and prosecution for the state.[249] Regarding appointment of counsel at trial for indigent defendants, Texas remains one of only a few states which requires the county to fund the entire cost of appointed counsel.[250]

Texas can tap several resources to overcome the increased cost argument and fund the proposed system. For example, the state can obtain

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246. *See id.* (indicating that the bill was criticized by judges because it would have usurped their current authority over court appointments); *see also* John Moritz, *Public Defenders Measure Defended by State Senator, Judges Who Oppose the Bill Say They Should Choose Counsel for Indigent Suspects*, FORT WORTH STAR-TELEGRAM, June 5, 1999 (noting the opposition to the indigent defense bill by judges and criminal defense attorneys who urged Governor Bush to veto the bill), *available at* 1999 WL 6238340.

247. *See* Tex. S.B. 247, 76th Leg., R.S. (1999) (stating the counties "may" appoint a public defender to provide indigent legal representation); *see also* John Moritz, *Public Defenders Measure Defended by State Senator, Judges Who Oppose the Bill Say They Should Choose Counsel for Indigent Suspects*, FORT WORTH STAR-TELEGRAM, June 5, 1999 (stating that the bill was intended to ensure appointment of counsel within twenty days after a suspect's arrested, and it was not intended to "compel officials to make any changes").

248. *See* WAYNE R. LAFAVE, MODERN CRIMINAL LAW 19 (2d ed. 1988) (referring to court appointed defense counsel as receiving compensation from the state which is lower than that which the attorney would have received had he been privately retained); Alan Berlow, *Lethal Injustice*, AM. PROSPECT, Mar. 27, 2000 (acknowledging that no one knows the real cost of financing competent attorneys for indigent defendants), 2000 WL 4739255.

249. *See* Ronald J. Tabak, *How Empirical Studies Can Affect Positively the Politics of the Death Penalty*, 83 CORNELL L. REV. 1431, 1439 (1998) (referring to studies that find death penalty cases cost "considerably more" than non-death penalty cases); *cf.* SUBCOMMITTEE ON FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION, http://www.uscourts.gov/dpenalty/3EXECS.htm (May 1998) (stating that the cost of pursuing a capital case in federal court is increased when the Attorney General authorizes the death penalty). The average cost of a non-death penalty case was $55,772, compared with $218,112 for one in which the death penalty is sought. *Id.*

250. *See* TEX. CODE CRIM. PROC. art. 26.044(c) (Vernon 1989) (delineating the salary of the public defender is "paid out of the appropriate county fund); *see also* Max B. Baker & Linda P. Campbell, *Not All Can Pay High Cost of Justice Texas Has Inadequate Defense for the Poor, New Report Finds*, FORT WORTH STAR-TELEGRAM, Jan. 16, 2000 (referring to the fact that only Texas provides state funding of appointed counsel when a death penalty sentence is appealed), 2000 WL 4990737.

assistance from the federal government.[251] Although Texas receives $153 million in federal assistance in order to fund programs concerning criminal justice, none of the money goes toward indigent defense.[252]

Another financing alternative would be obtaining grants from foundations dedicated to criminal justice.[253] For example, the Ford Foundation provides grants for organizations to reduce "injustice" and strengthen "democratic values."[254] A second foundation dedicated to criminal justice is the Soros Foundation. The Soros Foundation currently supports "The Gideon Project" as part of its program to advance greater professional and ethical standards in the legal profession in the United States.[255] As part of this effort, the Foundation provides grants for many organizations working to improve indigent defense.[256] One such group is actually located in Austin, Texas.[257] Pro Tex: Network for Progressive Texas focuses specifically on death penalty issues and reform for indigent defense.[258] The state could utilize the experience and expertise of the Soros Foundation to help defray costs associated with establishing an indigent defense system.

Other available alternatives and resources may help both the financial and logistical burdens confronted by the proposed statewide system. The State of Texas has nine ABA accredited law schools within its borders.[259] Law schools may represent a tremendous untapped resource for the State. In other areas, such as Washington D.C. and New York, the legal community has utilized law students to assist with the growing need for indigent defense, through clinics implemented specifically for providing help in this arena.[260] Some Texas law schools already offer some type of

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251. *See* Alan Berlow, *Lethal Injustice*, AM. PROSPECT, Mar. 27, 2000 (explaining the existence of federal assistance for criminal justice programs in Texas), 2000 WL 4739255.

252. *Id.*

253. *See* Robert E. Jagger, *Stetson: The First public Defender Clinic*, 30 STETSON L. REV. 189, 200 (2000) (referring to grants provided to Stetson University College of Law providing funding for its criminal law clinic).

254. *See* Ford Foundation Mission Statement *at* www.fordfound.org (stating that the goals behind the foundation's grants or loans of money to organizations).

255. Soros Foundation Network, Program on Law and Society-US Programs, *at* http://www.soros.org/usprograms/law&society.htm.

256. Soros Foundation Network, US Programs Approved Grants November 2000, *at* http://www.soros.org/usprograms/grants-nov-2000.htm (listing money granted to organizations qualifying for "The Gideon Project" in November 2000).

257. *Id.*

258. *Id.*

259. LAW SCH. ADMISSION COUNCIL, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 52-53 (1999) (listing the nine law schools in Texas).

260. *See* Georgetown University Law Center, *Law Center Clinical Programs*, *at* http://www.law.georgetown.edu/clinics/index.html (last visited Feb. 13, 2001) (explaining that its Criminal Justice Clinic provides legal assistance for the under-represented in the metropol-

clinical program.[261] Linking an indigent defense system to an existing clinical program will allow the state to defray some of the cost of a public defender office, while simultaneously accessing a wealth of knowledge and labor in law school students. Finally, the members of the local bar in each county could opt-out of possible indigent representation by paying a yearly fee under a plan similar to the "San Antonio Plan."[262] This money would help fund the public defender office that governs the respective counties.

3. Texas's Size and Dense Population

Upon first consideration, a statewide system may not seem viable due to the state's size and large population.[263] For this reason, the proposal is termed a "system" rather than an "office."[264] While an office connotes a statewide set of offices run by a central public defender, a system consists of individual offices tailored to the particular community standards and needs, including the creation of individual offices in particular counties that serve the needs of numerous satellite counties.[265] This smaller group of offices will serve the specific needs of local communities.

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itan area of the District of Columbia); *see also* New York University School of Law, *Experiencing the Real World in Clinics*, *at* http://www.law.nyu.edu/clinicsexperience/yearlong.html (last visited Feb. 13, 2001) (stating that participants in the Capital Defender Clinic may participate in the defense of those charged with capital crimes while working alongside attorneys from "either the New York State Capital Defender Office or the New York Legal Aid Society Capital Defender Unit").

261. *See* St. Mary's University School of Law, *Clinical Legal Education*, *at* http://204.158.207.3/clinicalprgs.htm (last visited Mar. 5, 2001) (explaining the Criminal Justice Clinic operated through the School of Law provides indigent defense through the use of law students supervised by attorneys from the local bar); *see also* University of Texas School of Law, *School of Law Online: Clinical Programs* (Aug. 29, 2000), *available at* http://www.utexas.edu/law/clinics/allclinics.html (last visited Mar. 5, 2001) (describing the clinic available to University of Texas Law students dedicated to criminal defense); Southern Methodist University Criminal Justice Clinic, *at* www.law.smu.edu/clinics/main.htm (last modified Nov. 11, 1999) (stating that the clinic provides representation to criminal defendants charged with jailable offenses).

262. *See* Memorandum from Jennifer Gibbins Durbin, President, San Antonio Bar Association, to All Attorneys Practicing in Bexar County (allowing attorneys in Bexar County to opt out from indigent criminal appointments for $500 per year).

263. *See* Telephone Interview with William Cox, Division Chief Administration, El Paso Public Defender Office (Oct. 10, 2000) (referring to the possibility that the diversity within Texas and its size may preclude a statewide Public Defender Office).

264. *See id.* (referencing the important functional differences between the two terms).

265. *Id.*

VI. CONCLUSION

The apparent need for and inclination toward supporting the death penalty in this country is not disputed.[266] The state bears a heavy burden, however, in guaranteeing that courts apply this form of punishment only upon those members of society who truly deserve it.[267] The Constitution of the United States includes several guarantees essential to any discussion of the death penalty: the guarantee of due process of law, the right to a fair trial, and the right to effective assistance of counsel.[268] If the state violates any one of these guarantees, the Constitution itself suffers.[269] When the issue arises of whether the state may deprive a defendant of life, the right to effective assistance of counsel holds the highest degree of importance.[270] Without effective counsel, a defendant may not have a fair trial, a fair trial by an impartial jury, an adequate defense, or the guarantee of due process of law.[271]

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266. *See* Carol S. Steiker & Jordan M. Steiker, *The Constitutional Regulation of Capital Punishment Since* Furman v. Georgia, 29 ST. MARY'S L.J. 971, 977 (1998) (referring to the immediate response of thirty-five states after the decision in *Furman* to revamp their death penalty statutes in order to withstand constitutional scrutiny).

267. *See generally* Laurence A. Grayer, *Against the Global Trend: Support for the Death Penalty Continues to Expand Within the United States*, 7 INT'L LEGAL PERSP. 1, 18 (1995) (proclaiming that the decision in *Gregg v. Georgia* has not eliminated an irrationally and discriminatorily conducted death penalty). *But cf.* Strickland v. Washington, 466 U.S. 668, 701 (1984) (Brennan, J., dissenting) (stating that "the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments").

268. U.S. CONST. amend. IV § 1 (stating no person shall be deprived of life or liberty "without due process of law"); U.S. CONST. amend. VI (guaranteeing that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defense [sic]"); *see* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (recognizing that a long line of Supreme Court cases since *Gideon v. Wainwright* have defined the right to counsel under the Sixth Amendment as the right to effective counsel).

269. *See McMann*, 397 U.S. at 771 (asserting that in order for the Sixth Amendment right to counsel to be guaranteed, cannot be "left to the mercies of incompetent counsel," and judges must maintain appropriate performance standards for criminal defense attorneys).

270. *See generally* Gideon v. Wainwright, 372 U.S. 335, 337 (1963) (referring to the trial judge's comment that counsel can only be appointed for a defendant in a capital case, as an erroneous view that the Sixth Amendment is limited to situations in which deprivation of life is at stake).

271. *See generally* U.S. CONST. amends. V, VI & XIV (guaranteeing due process through incorporation of the Bill of Rights); *see also* McMann v. Richardson, 397 U.S. 759, 771 (1970) (announcing that "defendants facing felony charges are entitled to the effective assistance of competent counsel"); *Gideon*, 372 U.S. at 340 (expressing the right to counsel as a necessity for due process); Avery v. Alabama, 308 U.S. 444, 450 (1940) (including the right to assistance of counsel as a guaranteed benefit under the Fourteenth Amendment). The *McMann* Court also distinguished the trial court's ability to retrospectively determine

The problem with the current court appointment system in Texas is exemplified by both the number of people either on death row or executed in Texas as a result of ineffective counsel and the number of ineffective assistance of counsel appeals currently bombarding the Texas appellate court system.[272] The creation of a statewide public defender system would help to cure the administrative ills currently faced in Texas capital defense cases.[273] Texas must carefully and deliberately define a public defender to avoid continuous problems with ineffective assistance of counsel.[274] This system must meet the needs of the individual communities which they serve in addition to living up to the dream of *Gideon*.[275]

While a revision of the standard of review for ineffective assistance of counsel claims is clearly necessary and outside the scope of this Comment, a public defender system would cure many of the problems with ineffective assistance of counsel in Texas from the beginning.[276] When the state implements these changes, the problem of ineffective counsel for indigent capital defendants will dissipate substantially.[277] The death

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the effectiveness of counsel's performance. *See id.* The Court stated that the examining standard is not whether counsel's trial strategy is right or wrong, but whether the performance had been "within the range of competence demanded of attorneys in criminal cases." *See id.* This is the key to the *Strickland* analysis. *See* Strickland v. Washington, 466 U.S. 668, 689 (1984) (referring to the problematic nature of looking back at counsel's performance with "the distorting effects of hindsight"). However, even in *Strickland*, the Court retained the fundamental nature of the right to effective assistance of counsel. *See id.* at 690 (requiring a court to determine whether acts identified by a defendant are "outside the wide range of professionally competent assistance").

272. *See* Death Penalty Information Center, Texas, *at* http://www.deathpenaltyinfo.org/texas.html (last modified Feb. 13, 2001) (relating that as of Jan. 1, 2001 there were 448 people on death row in Texas); *see also* THE SEVENTH ANNUAL REPORT ON THE STATE OF HUMAN RIGHTS IN TEXAS 2000, THE TEXAS CIVIL RIGHTS PROJECT 7 (2000) (indicating that the current system is Texas maintained because it allows court dockets to be quickly alleviated).

273. *See* TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 78 (2000) (distinguishing Texas from other states that have specialized public defender offices in order to provide experience legal counsel, which is necessary to ensure fair representation of defendants at trial).

274. *See generally* 18 U.S.C. § 3006A (1994) (specifically outlining the requirements for managing the federal public defender).

275. *See* Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (relating the right to counsel as a fundamental right necessary for due process of law).

276. *See* Alan Berlow, *Lethal Injustice*, AM. PROSPECT, Mar. 27, 2000 (espousing the problems with the administration of the death penalty in Texas due to the problematic court-appointment system), WL 3/27/00 AMPROSP 5457.

277. *See* Justice Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 1 (1986) (stating that "calling attention to the extraordinary unfairness" faced by death penalty defendants should spur change in the legal community); *see generally* Strickland v. Washington, 466 U.S. 668, 680 (1984) (including the right to effective assistance of counsel within the right to counsel

penalty can continue to exist but only when those defendants who truly deserve the sentence receive it.[278]

guaranteed by the Sixth Amendment). In order for counsel to fall within the legal definition of "reasonably effective assistance of counsel," the attorney must possess adequate skill and knowledge, as well as "the time and resources to be able to apply his skill" in defense of the indigent client. *See* State v. Peart, 621 So. 2d 780, 789 (La. 1993).

278. *See* Richard P. Rhodes, Jr., Note, Strickland v. Washington: *Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel*, 12 B.C. THIRD WORLD L.J. 121, 154 (1992) (standing for the proposition that a more clearly defined standard under *Strickland* would help ensure effective assistance of counsel). *But cf.* Justice Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 8 (1986) (opposing the death penalty in all circumstances); THE SEVENTH ANNUAL REPORT ON THE STATE OF HUMAN RIGHTS IN TEXAS, 2000 THE TEXAS CIVIL RIGHTS PROJECT 3 (declaring the most alarming aspect of capital punishment cases is the fact that sometimes an inmate's innocence is discovered based on "extraordinary efforts" that become available "*despite* the protections of the criminal justice system").