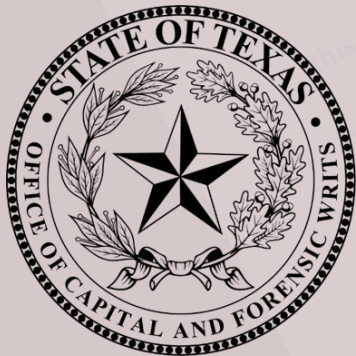


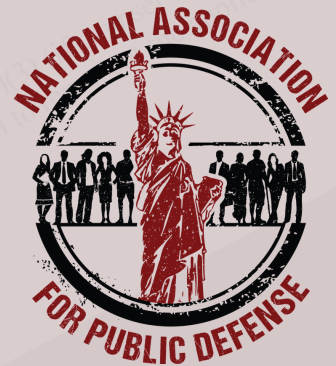
Assessment of the Texas Office of Capital and Forensic Writs

An Office of high public value with substantial challenges and resource needs



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**National Association for Public Defense
Assessment
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Executive Summary

Reason for Report

This Report is the result of a request by the Director of the Texas Office of Capital and Forensic Writs (OCFW) to the National Association for Public Defense (NAPD) to conduct an assessment of the internal and external work of the Texas Office of Capital and Forensic Writs because of the serious challenges OCFW faces. The request for an outside assessment of the program is an indicator of the caliber of the organization's leadership.

Highly valuable agency with serious challenges and resource deficiencies

OCFW is an organization of high value with good support from important constituencies, including legislative, judicial, legal, bar and criminal defense leaders. But the OCFW lacks the capacity and resources to meet its responsibilities. The management of the agency should be augmented by the creation of a Deputy Director position. An Oversight Board should be created. The OCFW needs additional financial support to meet these challenges. New resources will redound to the benefit of the clients, courts, the criminal justice system, and the public.

Texas and national standards provide minimum benchmarks

This Assessment focuses on the essential ingredients of the OCFW to competently and timely meet its responsibilities as state and national norms demand. The *Guidelines and Standards for Texas Capital Counsel* (2006); the *Supplementary Guidelines and Standards for the Mitigation Function of Defense Teams in Texas Death Penalty Cases* (2015); the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised edition February 2003); and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (2008) are used to measure the work of the OCFW against appropriate state and national minimum standards.

Findings

Delivery model produces significant benefits

- The OCFW is uniquely qualified to represent death penalty post-conviction clients effectively while keeping costs lower than those expended on private attorneys providing commensurate representation. A full-time institutional defender program providing capital post-conviction representation has substantial advantages. This delivery model provides specialized, trained staff who are actively supervised, resulting in efficient and competent assistance of counsel to clients consistent with statutory and professional requirements.

Demonstrated value

- Those Texas leaders who had the foresight to create this institutional program of representation have much to be proud of as this delivery method of representation is the most cost-effective and efficient method of providing competent capital post-conviction representation.
- The OCFW provides a necessary and important service to the state, its clients and the Texas criminal justice system by ensuring that the criminal justice system's ultimate legal decision-making is constitutionally reliable and valid.
- The public value of the Texas Office of Capital and Forensic Writs is evident. It serves the critical function of identifying and seeking the correction of mistakes that affect someone's life. When the state sentences a person to death, it is essential that there is a process to ensure that decision is valid and reliable through a fair review process. In order to help ensure fairness, the criminal justice system provides for direct appeal and post-conviction review. These post-trial processes require that there be lawyers and staff who have the competence and resources to investigate, identify and present meritorious claims for review. The constitutionality of the death penalty in Texas is predicated on competent post-conviction review of constitutional issues related to conviction and punishment. This review can only be accomplished through the presentation of evidence outside of the trial court record.
- The mission, values and client-centered nature of the OCFW are compelling. The mission and values should be formalized, especially in light of the changes of the organization, in writing so that they are visible to all who work at and with OCFW.
- Previously, evidentiary hearings on state habeas allegations were rare. The number of evidentiary hearings has increased substantially. OCFW now obtains evidentiary hearings in about 90% of its cases. This is a reflection of the high-quality work done by OCFW.
- Workloads have been reduced but still exceed professional standards. More experienced, talented attorneys populate the staff. Professionally appropriate experts are being sought

and retained. Two out of the three OCFW applications pending in the Texas Court of Criminal Appeals (“CCA”) during the development of this report were there on favorable *Wiggins v. Smith*, 539 U.S. 510 (2003) recommendations of relief.

- The OCFW is led by an attorney who is very experienced in capital post-conviction litigation. He is focused on providing client-centered representation through defense teams focused on identifying and presenting mitigation. He has substantial internal and external responsibilities that are more than one person can fulfill. Upon his appointment, policies and practices have changed to reflect a more client-centered advocacy, responsible resource stewardship, and a commitment to provide high-quality representation consistent with minimum state and national standards.
- The OCFW provides professional investigation and advocacy on behalf of clients in line with many but not all of the minimum Texas and national standards. The current Director has hired additional investigators, and the mitigation investigation conducted is more thorough. The psycho-social histories in recent OCFW applications are robust. The social histories are routinely 150 pages long, are multi-generational in nature, and are factually supported by dozens of affidavits from lay and expert witnesses.

Examples of some of our concerns

- The OCFW does not have adequate resources to timely meet its professional, statutory or legal responsibilities set forth by the Texas Bar’s *Guidelines and Standards for Texas Capital Counsel* (2006), *Standards for the Mitigation Function of Defense Teams in Texas Death Penalty Cases* (2015), and national standards as promulgated by the American Bar Association and the National Association for Public Defense.
- Much of the Director’s time is spent litigating cases which impairs his ability to meet his vital internal administrative and external responsibilities.
- The OCFW structure lacks adequate supervisory capacity, and the funding for that capacity. At a minimum, there should be a Deputy Director position created to allow the Director to better focus on institutional responsibilities and management.
- There is no oversight board to ensure the program’s accountability, integrity, and independence.
- The workload assigned to staff is excessive, and out of line with professional standards. The office is handling 8.5 cases per attorney (excluding the Director), while the standard in other offices is 4-6 *weighted* cases per attorney. There is insufficient support staff.
- The OCFW has not been provided any funding for its forensic writs responsibility.
- The OCFW does not have professional office space. Three attorneys share one office, and four investigators share the former Director’s office.

Summary of Recommendations

Implementation of the following Recommendations will allow the OFCW to competently and timely meet its responsibilities.

1. Provide More Financial Resources

More financial resources are necessary for the Texas Office of Capital and Forensic Writs to competently and timely meet its capital post-conviction and forensic writs litigation responsibilities.

- A workload study should be conducted, according to the current nationally recognized methodology, to determine the appropriate staffing standards for OCFW for capital post-conviction cases and forensic writ cases.
- Provide more financial resources to employ additional staff to reduce workloads to national standards and increase staff compensation to levels comparable to state prosecution professionals, and to ensure each team has a distinct fact investigator and mitigation specialist with a mental health background and sufficient support staff.
- These additional staff compensated appropriately will increase the ability of the OCFW to competently represent capital post-conviction clients as established by the workload standards.
- The increased compensation will reduce staff attrition which leads not only to morale issues but costly retraining and delays in the proceedings.
- To the extent professionally possible, the Office for Court Administration should provide additional administrative assistance to OCFW at no or little additional cost unless OCFW is funded for those services.

2. Enhance the Organizational Structure

Upgraded organizational structures are necessary for the Texas Office of Capital and Forensic Writs to competently and timely meet its statutory and constitutional capital post-conviction and forensic writs representation responsibilities.

- Create an organizational structure that addresses the challenges of the size of the Office and the complexity of the practice by creating at least one Deputy Director position which has the responsibility of managing the litigation work with the flexibility to hire additional supervisors as needed and funded. This will free up the Director of the Office to perform internal administrative and external responsibilities that only the Director can perform.
- Ensure each litigation team has an identified capital-qualified attorney leader, a second capital-qualified attorney, a fact investigator and mitigation specialist with mental health competency as required by state and national standards.

- The Director and new Deputy Director should attend national practice-oriented leadership/management training offered by a public defense organization.
- The Director should avail himself of a mentor from the defense community, perhaps through NAPD.

3. Create Independent Oversight Board

An independent oversight board should be created to ensure the Texas Office of Capital and Forensic Writs has program accountability and is able to competently and timely meet its statutory and constitutional capital post-conviction and forensic writs representation responsibilities.

- To ensure program integrity, create an Oversight Board that has the responsibility to provide fiscal and program review and to advance the mission and professional independent representation of clients.

4. Enhance Communication

Communication should be increased and improved so that the Texas Office of Capital and Forensic Writs is able to competently and timely meet its statutory and constitutional capital post-conviction and forensic writs representation responsibilities.

- Timely decisions and explanations should be provided.
- Assignment of cases should occur through an in-person communication after appropriate consultation and then timely, affirmatively communicated to all staff.
- Staff meetings should occur on a regular basis with a focused agenda that includes communication of information from the Director, and participatory staff educational development, perhaps provided by staff on a rotating basis and by outside professionals.
- Create job responsibilities, conduct periodic performance evaluations.
- Upgrade policies and procedures.

5. Enhance Education and Development

Education of staff should be further improved so the Texas Office of Capital and Forensic Writs can competently and timely meet its statutory and constitutional capital post-conviction and forensic writs representation responsibilities.

- There should be ongoing education and development with in-house trainings according to a plan developed after a survey of staff needs.
- A person in the Office should be designated to coordinate the creation and implementation of the education and development plan.

- There should be special attention to education on an effective functioning defense team, developing and maintaining client relationships, conflict management and resolution and conducting effective evidentiary hearings.
- A practice guideline manual should be developed to ensure staff understands practice options and expectations.
- Formal case reviews and mock practice should become a standard practice to ensure the litigation teams have the support necessary to deal with the litigation complexities.

6. Provide funding for OCFW’s forensic writ responsibilities and create statutory authority to decline forensic writ referrals when resources are inadequate

Financial resources are necessary for the Texas Office of Capital and Forensic Writs to competently and timely meet its statutory and constitutional forensic writs representation responsibilities.

- Only after providing adequate funding for the state capital post-conviction responsibilities, funds and staff should be provided to perform the work from referrals from the Texas Forensic Science Commission.
- The state’s interest to ensure reliable and valid results in criminal cases is advanced by funding an institutional capacity to determine if individuals have a legal claim because of invalid science.
- The authorizing statute should be modified to allow for refusal of a referral from the Texas Forensic Science Commission when OCFW capacity does not exist.

7. Provide professional office space with each staff member with their own office in contiguous space

Professional office space is necessary for the Texas Office of Capital and Forensic Writs to competently and timely meet its statutory and constitutional capital post-conviction and forensic writs litigation responsibilities.

8. Continue communication with the Texas Regional Public Defender's Office to manage the inevitable tension with the different professional responsibilities, and continue communication with other members of the defense community to take advantage of the expertise and perspectives of other criminal defense professionals

History

Establishment and expansion of office responsibility. The OCFW is a Texas state public defender office located in Austin, Texas which represents individuals in state post-conviction litigation upon appointment by a trial court. The OCFW, then known as the Office of Capital Writs, began in 2010, representing death-sentenced persons in state post-conviction proceedings exclusively. On September 1, 2015, the scope of the Office's mission expanded to include the representation of a select number of individuals raising challenges to their convictions through forensic science writs. Its name changed to reflect the expanded mandate; however, no funding was appropriated to perform these additional duties.

Statutory authorization and provisions for director and office. The Texas Court of Criminal Appeals (CCA) appoints the Executive Director of the OCFW from a list provided by the Capital and Forensic Writs Committee, a standing committee appointed by the president of the State Bar of Texas. The Director serves a four-year term that allows for reappointment for a second or subsequent term. The CCA “may remove the director only for good cause.” The Capital and Forensic Writs Committee has the responsibility to recommend to the CCA a Director for the OCFW when a vacancy exists. The recommendations shall be in the order of preference of the Committee. Not more than five names are to be recommended. If there are three persons qualified then the Committee must recommend at least three persons. The persons recommended “must exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases, as described by the Guidelines and Standards for Texas Capital Counsel...”¹ The Committee has five members appointed by the President of the State Bar of Texas, three who are attorneys who are not “prosecutors or law enforcement officials, all of whom must have criminal defense experience with death penalty proceedings” in Texas, and two who are “state district judges, one of whom serves as presiding judge of an administrative judicial region.” The Committee elects a presiding officer, meets at the call of that officer and its members serve at the pleasure of the President of the State Bar of Texas.²

In October 2010 after interviewing a number of candidates, the Texas Bar Capital and Forensic Writs Committee recommend two candidates to the CCA. Brad Levenson was then appointed Executive Director of the Office of Capital Writs by the Texas Court of Criminal Appeals. At the end of his four-year term, the CCA did not reappoint him. When Mr. Levenson left, there were a number of unresolved challenges at OCFW.

In September 2015, the Texas Bar Capital and Forensic Writs Committee recommended to the Court of Criminal Appeals that Benjamin Wolff be appointed to a four-year term as Director. After interviewing Mr. Wolff, the CCA appointed him to a four-year term as the Executive Director of the OCFW. Prior to assuming this position in October 2015, Mr. Wolff worked as a post-conviction attorney with the Texas Defender Service, representing death-sentenced individuals in state and

¹ Additionally, the persons recommended “may not have been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a criminal case.” TEX. GOVT. CODE § 78.004(b)(2).

² See TEX. GOVT. CODE §§ 78.001, 78.002, 78.003, 78.004, 78.053.

federal post-conviction proceedings. Previously, Mr. Wolff worked for a number of years at the Bronx Defenders, a public defender organization in Bronx, NY, as a trial attorney and in a variety of supervisory positions. In these roles, Mr. Wolff supervised attorneys and other legal advocates in their practice, as well as trained and supervised a team of ten investigators. As a trial attorney, he has tried numerous felony cases to verdict. A native of Missouri, Mr. Wolff is a graduate of the University of California, Berkeley, Boalt Hall School of Law, and Davidson College. Prior to becoming an attorney, Mr. Wolff worked as a mitigation specialist and defense-initiated-victim-outreach specialist on behalf of defense counsel in capital cases on the West Coast and in the South and as a criminal defense fact investigator.

Workload and case parameters. The OCFW represents a substantial majority, 34 persons, sentenced to death in Texas in initial state habeas corpus applications and related proceedings. This amounts to 68% of the persons who have a case in the initial phase of their state capital post-conviction proceeding.

As of April 1, 2018, there were 227 people on the Texas Death Row. From 1974 to 2013, 1,062 persons were sentenced to death in Texas. Two clemencies have been granted. Texas has executed 548 people, four so far in 2018. There have been three exonerations of persons sentenced to death in Texas since 1973.³

The geography of Texas has a challenging breadth, as it is the second largest state in the country. There are 268,820 square miles in the state divided among 254 counties with a population of 28.7 million. OCFW is located in Austin, Texas and is representing clients from across Texas with investigation and hearings across the state. Death Row is located at the Allan B. Polunsky Unit in Livingston, Texas, which is 200 miles from Austin, Texas. Female death row inmates are housed at the Mountain View Unit located in Gatesville, Texas, which is 100 miles from Austin, Texas. When OCFW staff visits clients at the Polunsky Unit, they commonly work a 16-hour day, which includes eight hours of driving. Travel to the Mountain View Unit is less onerous, but still requires a four-hour roundtrip.

The Office is prohibited from providing representation in “federal habeas review,” and any action or proceeding other than one conducted under Code of Criminal Procedure Article 11.071, one that is collateral to preparation of an application under Code of Criminal Procedure Article 11.071, one that concerns any other post-conviction matter in a death penalty case other than a direct appeal proceeding under Code of Criminal Procedure Article 45.05 or Chapter 64, or one that is conducted under Code of Criminal Procedure Article 11.073 or is collateral to the preparation of an application 11.073 or one referred in writing to the Office by the Texas Forensic Science Commission.⁴⁵

³ Death Penalty Information Center, *Facts About the Death Penalty* (February 2, 2018).

⁴ The Texas Legislature created the Texas Forensic Science Commission in 2005 to address concerns about the integrity and reliability of forensic science in Texas courts.

⁵ See TEX. GOVT. CODE § 78.054.

For capital cases, the Government Code provides explicit authority for OCFW to decline representation. The Office may not accept appointment for representation of a client if a conflict exists; the Office has insufficient resources to provide competent representation; the Office cannot provide representation according to the rules of professional conduct; or there is other good cause.⁶ However, there is no such explicit authority in the Government Code for the OCFW to decline representation in cases referred to it in writing by the Texas Forensic Science Commission.⁷

If the Office is unable to provide representation in capital cases, the convicting court appoints counsel available for appointment under Article 11.071 off of a statewide list maintained by the presiding judges of the administrative judicial regions. Tex. Govt. Code § 78.056. If an attorney other than one employed by the OCFW is appointed, that attorney is compensated pursuant to Code of Criminal Procedure Articles 11.071 and 26.05.⁸ Staff salaries are paid through legislatively appropriated monies; however, OCFW is explicitly authorized to seek the appointment of any experts necessary for the investigation and presentation of the factual and legal grounds of a post-conviction application from the convicting court. *See* Tex. Code Crim. Proc. art. 11.071 § 3(f).⁹

Case process has challenging aspects. The OCFW is the preferred representation for state capital post-conviction clients with the authority to turn down a case due to conflict or lack of resources.¹⁰ After a death sentenced is rendered, the court contacts OCFW to determine whether OCFW has the capacity to accept the case. If the case is accepted, the Court appoints the OCFW. On occasion, courts seek to appoint OCFW in older matters where the previously-appointed, post-conviction counsel seeks to withdraw.

If the OCFW declines representation in a case, an attorney is appointed by the sentencing judge off of the list of state post-conviction counsel maintained by the Office of Court Administration, and administered by the Presiding Judges of the Administrative Judicial Regions. There are little to no standards regarding what qualifies an attorney for inclusion on the state post-conviction

⁶ *Id.*

⁷ It is arguable, however, that the OCFW has the authority to decline representation in cases referred to it by the Forensic Science Commission under the terms of the Code of Criminal Procedure. Article 26.044 provides that a public defender's office may not accept an appointment if: "(1) a conflict of interest exists that has not been waived by the client; (2) the public defender's office has insufficient resources to provide adequate representation for the defendant; (3) the public defender's office is incapable of providing representation for the defendant in accordance with the rules of professional conduct; (4) the acceptance of the appointment would violate the maximum allowable caseloads established at the public defender's office; or (5) the public defender's office shows other good cause for not accepting the appointment." TEX. CODE CRIM. PROC. art. 26.044. The authority of OCFW to decline cases referred to it by the Forensic Science Commission thus turns on whether these referrals should be considered the same as "appointments" under Article 26.044. Because of this uncertainty, it is our recommendation that the Government Code be amended to provide OCFW the explicit authority to decline these cases.

⁸ *See* TEX. GOVT. CODE § 78.055.

⁹ Counties may seek reimbursement for up to \$25,000 of any such expenses from the State. *See* TEX. CODE CRIM. PROC. art. 11.071 § 2A.

¹⁰ *See* TEX. GOVT. CODE § 78.054.

list except the attorney cannot have been found to be ineffective in previous death penalty case.¹¹

Texas has a unitary system wherein the appeal and the state post-conviction proceed in parallel.¹² This has substantial implications for OCFW. When the OCFW is given the opportunity to accept or decline a case under Texas Code of Criminal Procedure, article 11.071, section 2, it is impossible to predict with any accuracy when the habeas application will be due, or how long OCFW will represent that client. The filing deadline for the habeas application is tied to the date on which the state files its Answer in the separate direct appeal proceeding. When the state files its Answer on direct appeal depends, in turn, on how many extensions the state's appellate lawyer seeks and when the client's appellate lawyer files her brief. When the client's direct appeal lawyer files her brief depends, in turn, on how many extensions she takes and when the court reporter finalizes the trial record. There is tremendous variation in the timing of these events from case to case, and OCFW has no ability to control these events. While OCFW files initial applications, on average, about two years after appointment, the actual deadline in a particular case might range from a year and a half to over three years. In addition, because the OCFW deadline is triggered by a factor outside of its control (the date on which the state files its answer on appeal), OCFW has no way of projecting the due date of a habeas application with any certainty until just 45 or 135 days prior to filing.¹³ This is a structural problem that creates staffing issues and great stress. If a case team thinks that a filing will likely be due in nine months, but all of a sudden, it's due in just four and a half months, irrespective of scheduled hearings and filing deadlines in other cases, workload and scheduling chaos ensues.

Capital post-conviction representation is unique and complex. Representation of a capital client at trial is a specialty requiring advanced knowledge, skills and experience. This is evidenced by the special guidelines in Texas and nationally that apply to this work. Likewise, capital state post-conviction practice is a complex subspecialty of capital representation. This is evidenced by the

¹¹ TEX. GOVT. CODE § 78.056.

¹² The Texas process is generally as follows:

- OCFW is appointed shortly after a death sentence is imposed, typically within 20 days;
- OCFW files the initial habeas application up to 135 days, 45 days plus one discretionary 90-day extension, after the State answers on direct appeal. This leads to great uncertainty and unpredictability of filing deadlines. The initial application is filed in the trial-convicting court;
- The state then has 90-180 days to answer;
- The trial court is then required to designate factual issues for resolution, and announce the manner of fact-finding/hearing. OCFW, in practice, aggressively litigates the client's entitlement to a hearing;
- After a hearing, or in the absence of a hearing, the trial court makes a recommendation to the Texas Court of Criminal Appeals that relief should be granted or denied;
- OCFW can file "Objections" or other briefing before the Texas Court of Criminal Appeals;
- The Texas Court of Criminal Appeals then renders its Opinion, granting or denying relief from conviction or sentence;
- If the relief is denied, OCFW may file a Petition for Writ of Certiorari to United States Supreme Court;
- Upon denial of relief in the Texas Court of Criminal Appeals, irrespective of the pendency of certiorari review, Article 11.071 requires that post-conviction counsel move for the appointment of federal habeas counsel. TEX. CODE CRIM. PROC. art. 11.071.

¹³ See TEX. CODE CRIM. PROC. art. 11.071 Section a(a)-(b).

state and national standards of practice and the *Guidelines and Standards for Texas Capital Counsel* (2006) which state, “The committee adapted the ABA’s guidelines to fit the needs of capital litigation in Texas. For example, recognizing that some people facing the death penalty in Texas are citizens of other countries, a section was added detailing the additional obligations of counsel representing foreign nationals in capital cases. In addition, the committee included an expanded section instructing attorneys on how to adequately investigate and present a writ of habeas corpus in capital cases.”¹⁴

Capital post-conviction representation requires special knowledge, skills and continuous training. It is intensely demanding. Post-conviction counsel has the responsibility to investigate, develop, and plead claims of state legal and constitutional error for their clients. Counsel must have proficiency in relationship with clients under a sentence of death, conducting discovery, pleading, reviewing and synthesizing the trial record for both trial phases, review trial mitigation and ensure a complete client social history, including comprehensive information from the client’s family, social, mental health, and medical history relevant to mitigation.

To understand the nature of the work more particularly, each attorney and investigator staff member of OCFW was asked to list the tasks involved in their work.¹⁵

Culture of the Office is client-centered. The culture of an office contributes significantly to the ability of the staff to achieve the office’s mission. It has been reported that the culture under the prior Director was tumultuous. He was not reappointed to his position by the CCA after his term ended. It has been reported that the Office did not have a client-centered culture, was insular, and in stress. Other challenges included: a policy never to ask for funds for experts with the result that cases litigated by OCFW were handled sub-optimally because of the lack of expert support; allocation of an inadequate amount of travel money that prevented full investigation of cases; attorneys with only an average of 2.5 years of experience; acceptance of more cases than there was capacity to provide representation; ineffective use of the funding allocated for professional fees and contract employees; the filing of formal complaints against the former Director; an Office not funded to have, or given appropriations to have, a supervisory structure.

Under the current leadership, the Office is explicitly committed to client-centered and excellent post-conviction representation, consistent with the *Guidelines and Standards for Texas Capital Counsel* (2006) and the *Supplementary Guidelines and Standards for the Mitigation Function of Defense Teams in Texas Death Penalty Cases* (2015). Training is provided, mitigation is emphasized, consultation with outside experts is encouraged, and there is active supervision of cases. Seeking funds for necessary experts is expected, more experienced staff have been hired, including two trial litigators (one of whom serves as evidentiary hearing specialist), an experienced civil appellate advocate, an experienced attorney in Texas writ practice, and two experienced capital post-conviction attorneys. However, one of the experienced capital post-conviction attorneys is leaving after being with the Office just 15 months.

¹⁴ Guidelines and Standards for Texas Capital Counsel (2006), Preface to Guidelines.

¹⁵ See Appendix at pp. 47-49.

Budget is stagnant and inadequate for responsibilities. The Texas Legislature provides funding on a two-year budget cycle. The OCFW's fiscal year is September 1 through August 31st of the following year. For fiscal year 2016, the legislature appropriated \$1,423,146 in funding for OCFW, which included approximately \$95,000 in one-time appropriations. In fiscal year 2017, \$1,323,863 was appropriated. And \$1,337,585 was appropriated for fiscal years 2018 and 2019, which included a 4% reduction in the base-level appropriation from the fiscal year 2016 and 2017 base budgetary amount. Funding for OCFW has thus been stagnant over the last three fiscal years (2017-2019); the legislature has not appropriated the money requested by OCFW during those fiscal years.¹⁶

Article 11.071 authorizes OCFW to obtain funds for experts from the district courts before filing. The Director appropriately encourages seeking that funding. That statutory authorization has also been used to obtain funding from the district court for evidentiary hearing expert expenses. The OCFW files *ex parte* motions for the appointment of an expert under seal to the district court. The Office has been successful at obtaining court funding for expert expenses.¹⁷

When the Office's responsibilities were expanded in 2015 to include representation of persons challenging their non-capital convictions because of bad science or forensic improprieties, no funding was provided to perform those additional duties. Rather, Senate Bill 1743, which expanded the OCFW's mandate, came with a fiscal note that anticipated OCFW would need at least two and then three new attorneys and additional travel and professional fees and services appropriations to handle these new responsibilities beginning in Fiscal year 2018. In the last legislative session, however, the legislature did not appropriate any of the monies that it anticipated just two years before would be necessary for this expansion.

¹⁶ In the 84th Legislative Session (2015); OCFW sought money for five additional staff persons: an Attorney III at \$70,000 per year; an Attorney II at \$60,000 per year; two Investigator V's at \$52,000 per year each; and a paralegal at \$42,000. The Legislature, however, approved money for three new positions—an attorney at \$65,000, one investigator at \$52,000, one paralegal at \$42,000—but did not provide funding for the additional attorney and investigator requested. In the 85th Legislative Session (2017), OCFW sought two exceptional items in our Legislative Appropriations Request: 1.) Restoration of a 4% reduction from the baseline budget; and 2.) Additional staffing and resources to fulfill the OCFW mandate. With the first exceptional item request, OCFW asked that \$111,663 which had been cut from the OCFW previous budgetary base be restored so that OCFW would have more money to pay for necessary litigation costs. With the second exceptional item, OCFW sought two additional attorneys in FY2018, followed by a third additional attorney in FY2019, two additional investigators, an additional junior accountant, and commensurate increases in professional fees and services and travel budgets, commensurate with this expanded staff. This request for additional staff and resources was designed to provide staffing and support for the expanded mandate of the OCFW in the area of post-conviction challenges to flawed forensic science, as well as provide additional investigative and administrative support to meet ongoing client representation and institutional needs. Neither exceptional item request was approved by the legislature. OCFW's budget is approximately 96% of what it was in FY2016 and FY2017.

¹⁷ Texas Code of Criminal Procedure article 11.071 provides that the first \$25,000 in habeas expenses spent by the counties is reimbursable by the state.

Recommendations and Rationale

Government performs best when it accomplishes its work competently and timely. The following Recommendations, when implemented, will allow the OCFW to competently and timely meet its statutory and constitutional capital post-conviction and forensic writs litigation responsibilities.

1. Provide More Financial Resources

More financial resources are necessary for the Texas Office of Capital and Forensic Writs to competently and timely meet its capital post-conviction and forensic writs litigation responsibilities.

- A workload study should be conducted, according to the current nationally recognized methodology, to determine the appropriate staffing standards for OCFW for capital post-conviction cases and forensic writ cases.
- Provide more financial resources to employ additional staff to reduce workloads to national standards and increase staff compensation to levels comparable to state prosecution professionals, and to ensure each team has a distinct fact investigator and mitigation specialist with a mental health background and sufficient support staff.
- These additional staff, compensated appropriately, will increase the ability of the OCFW to competently represent capital post-conviction clients as established by the workload standards
- The increased compensation will reduce staff attrition, which leads not only to morale issues but costly retraining and delays in the proceedings.
- To the extent professionally possible, the Office of Court Administration should provide additional administrative assistance to OCFW at no or little additional cost unless OCFW is funded for those services.

Across all of the data collected during this Assessment, and the NAPD Assessment evaluators' analysis of the work of post-conviction staff professionals, the current workloads, the interviews of persons knowledgeable about the work of OCFW both within and outside of the Office, there is clarity that the OCFW needs more resources to do the work, including increased staffing and compensation. The professionals outside of the Office and Office staff report a highly under resourced agency, one that has never received funding necessary to meet its responsibilities.

Guidelines and Standards for Texas Capital Counsel (2006), GUIDELINE 5.1A ["Workload"], states: "Effectual mechanisms should be implemented to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these Guidelines."

Workload is excessive; updated study needed

OCFW's footprint is broad. OCFW represents 68% of the persons who have a case in the initial phase of their state capital proceeding. During this fiscal year, OCFW has represented 40 different

clients in 43 different client matters so far. The Office currently represents 34 persons sentenced to death in Texas in state post-conviction and related proceedings in the same number of cases.¹⁸

This means at least 68 attorney assignments¹⁹ are needed without any *weighting* of the cases. With 8 staff attorneys, this means that there is a current average of 8.5 cases per attorney.

In measuring attorney workloads, however, it's important to evaluate cases according to case-specific factors such as record size, number of issues, whether an evidentiary hearing is conducted, or whether there are other individual case characteristics that argue for recognizing that certain cases are more labor-intensive than others. For example, OCFW represents one client in a case that has 25 terabytes of discovery provided by the State, which means that the case-related material in this single case is over three times the size of the entire server that stores all other OCFW case files and institutional records. Without any *weighting* of cases, this single case counts the same as cases where the record is much more modest. The evaluation of caseload in the absence of any *weighting* of cases results in a substantial undervaluing of actual workload.

In other words, 68 attorney assignments and the average of 8.5 cases per attorney does not take into account that some cases, because of record size or individual case complications, are more complex and time consuming and as a result should not be counted as just one case.

As of the date of this Report, the stages of the cases are as follows:

- Cases assigned with investigation being conducted, petition not yet filed: 5
- Cases with petition filed: 29
- Cases pending decision on receiving live evidentiary hearing: 7
- Cases with live evidentiary hearing granted but not yet conducted: 12
- Cases with live evidentiary hearing in process: 4
- Total cases being handled by office: 34.

There is some variation in the numbers of cases assigned to attorneys and investigations. According to caseload tracking spreadsheets maintained by the Director, caseloads for attorneys vary from 4-10, from 4-8 for investigators. In addition, aside from his institutional, management, and supervisory responsibilities, the Director maintains an excessive caseload of six cases, mostly comprised of cases where the previous counsel left the OCFW.

The number of death sentences in Texas since 2000 continues at a level that makes it clear more staff will be necessary into the future. Over the last 10 years, there have been an average of 7.2 death sentences per year in Texas.²⁰

¹⁸ These case numbers are a snapshot of OCFW's present caseload at the time of this report.

¹⁹ This calculation is made by multiplying the number of cases by 2 attorneys, 2 X 34 = 68.

²⁰ The data from 2000 – 2017 is as follows:

	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008
Number of death sentences	4	4	2	11	9	9	8	8	8	9

The number of post-conviction evidentiary hearings has significantly increased through the years. This has provided more meaningful process to clients.

This increase results in substantially more work. During the first four years of the Office, 3.5 hearings per year were obtained. In the last four years, an average of 12.2 hearings were obtained.²¹

The work of the office from Fiscal Year 2011 to the work projected for Fiscal Year 2019 is as follows:²²

Death Penalty Information Center's Death Sentences in the United States From 1977 By State and By Year (accessed February 8, 2018).

²¹ The OCFW is subject to performance measures approved by the Legislative Budget Board and the Governor's Budget staff. One of the performance measures that has guided the legislative assessment of the work of OCFW has been the number of evidentiary hearings the OCFW handles in any given year. Evidentiary hearings are ordered only when the trial court finds controverted, material factual issues regarding the legality of the applicant's conviction or sentence. TEX. CODE CRIM. PROC. art. 11.071 §9(a). When cases raise allegations that require evidentiary development, it is an indicator of the quality of the application. In fiscal year 2012, the number of evidentiary hearings granted by the trial court on OCFW habeas applications was a key performance measure. In fiscal year 2012, the number of evidentiary hearings expected of OCFW was one; in fiscal years 2013 to 2017, the number of evidentiary hearings expected of OCFW was three per year. In each year since this measure has been tracked, OCFW has handled far more evidentiary hearings with its budget than contemplated by the legislature.

²² The definition used for the terms in this table tracks the definition used to evaluate OCFW compliance with the performance measures adopted by the Legislative Budget Board and the Office of the Governor:

Of Cases Rejected: Number of cases, under 11.07, 11.071, 11.073 46.05 and 64, referred to the OCFW, and refused by the OCFW, during a given fiscal year.

Of Cases Resolved: Number of habeas corpus and related cases, brought pursuant to Articles 11.07, 11.071, 11.073, 46.05 and 64, and related proceedings that OCFW has resolved over the course of the fiscal year. *See generally* OCFW Explanatory Measure 2.

Of Cases Pending: The measure is a count of the number of habeas corpus and related cases, brought pursuant to Articles 11.07, 11.071, 11.073, 46.05 and 64, and related proceedings that OCFW has litigated over the course of the fiscal year. Thus # of cases pending= (sum of all cases accepted in this and prior years)- (# of cases resolved during prior fiscal years). *See* OCFW Explanatory Measure 2.

Of Cases Accepted: The number of new cases accepted and handled, pursuant to Code of Criminal Procedure Articles 11.07, 11.071, 11.073, 46.05, and 64, and related proceedings, over the course of a given reporting period. *See* OCFW Output Measure 2.

Of Cases In Evidentiary Hearing: Number of post-conviction applications for which post-filing evidentiary development has been ordered under Article 11.071 sec. 9a. *See* Outcome Measure #1.

Of Pending Cases For Which A Live Evidentiary Hearing Has Been Ordered, But Not Yet Complete: This tracks the number of cases in the live evidentiary hearing stage. The period counted for this measure begins with when a live hearing is ordered, and ends when the trial court enters findings of fact (or when OCFW withdraws from representation). It is common that hearings span multiple fiscal years; thus, a single live hearing will be counted in multiple years as a reflection of the workload in those years.

Of Filings: This is the number of applications for writs habeas corpus and other relief, pursuant to Articles 11.07, 11.071, 11.073, 46.05, and 64, and related proceedings involving writs of prohibition, mandamus and certiorari filed over the course of a reporting period. *See* OCFW Output Measure 1.

	FY2011 Actual	FY2012 Actual	FY2013 Actual	FY2014 Actual	FY2015 Actual	FY2016 Actual	FY2017 Actual	FY2018 Projected	FY2019 Projected
Cases rejected	0	1	2	2	0	2	0	3	4
Cases accepted	12	9	12	13	7	9	3	4	8
Cases resolved	1	3	1	1	8	5	4	9	6
Cases pending	12	20	29	41	47	48	46	46	45
Cases in evidentiary hearing	0	0	4	10	12	13	24	21	20
Live evidentiary hearing ordered but not yet complete	0	0	4	6	7	8	17	17	15
# of filings	2	6	10	10	14	14	10	8	8

Most clients have two attorneys assigned to their case. The exception is cases, typically due to staff turnover, where there might only be one attorney. Sometimes at the hearing stage, a hearing attorney may be added due to the inexperience of the staff, in a situation where the two attorneys involved with the case at the time of filing do not have the experience to handle the courtroom hearing litigation. At the pre-filing stage, the Office has moved to a policy of putting two mitigation specialists on each team.²³ The Director reports that this helps balance workload, and mitigates the consequences of turnover.

The case work lasts longer than when first projected. This is a significant fact as those initial projections were used to staff the Office. When OCFW first began, it was assumed that cases handled by OCFW would be on a one-way track towards the CCA and then if the client did not prevail on to federal court. It was projected that this post-conviction process would occur in a short period of time. This has turned out not to be true. When OCFW first opened, it was projected that OCFW would represent individual clients for 3.5 - 4 years. Now, it is projected, with substantially more information, that OCFW will represent clients on average for approximately 6 years.

There are several reasons cases remain on the OCFW docket for longer than initially anticipated. The filing deadlines are unpredictable, leading to institutional difficulty at projecting future workload; OCFW files some post-conviction applications 20 months after appointment, and other cases over 30 months after appointment, but does not know its filing deadline until the State files its answer on direct appeal. There are more evidentiary hearings than before. It is common that

²³ The Office conflates the roles of mitigation specialists and fact investigators and sometimes use the words interchangeably; while some have more experience on the fact investigation side, and others on the mitigation side, “everyone does everything.”

the litigation of constitutional claims in cases involves more than one round of litigation before the CCA.

The result is that the OCFW's ongoing workload is more onerous than initially projected. For example, the OCFW continues to represent the third client to whom it was ever appointed, now 7 years after the initial appointment. The CCA recently remanded that case to the convicting court for an entirely new evidentiary hearing. Thus, it is likely that the OCFW will continue to represent that client for at least two additional years.

Evidentiary hearings are ordered only when the trial court finds controverted, material factual issues regarding the legality of the applicant's conviction or sentence.²⁴ When cases raise allegations that require evidentiary development, it is generally a rough proxy for the quality of the application. Beginning in Fiscal Year 2012, the number of evidentiary hearings granted by the trial court on OCFW habeas applications was a key performance measure. In fiscal year 2012, the number of evidentiary hearings expected of OCFW was one. In Fiscal Years 2013 to 2017, the number of evidentiary hearings expected of OCFW was three per year. In each year since this measure has been tracked, OCFW has consistently handled far more evidentiary hearings with its modest budget than contemplated by the legislature:

	FY2012	FY2013	FY2014	FY2015	FY2016	FY2017
Number of Evidentiary Hearings Expected (Legislative Performance Measure)	1	3	3	3	3	3
Actual Number of Ongoing Live Evidentiary Hearings	0	4	6	7	8	17

Evidentiary hearings are incredibly time-intensive and resource-intensive efforts. They are effectively trials about the trial, requiring months of preparation, expert assistance, and investigative resources. The time needed to adequately prepare for an evidentiary hearing is even longer where, due to turnover, the attorneys or investigators assigned to a case at the time of investigation and case filing have left the office. Every time a court grants an evidentiary hearing in a client's case, the resources that OCFW must devote to that case and the period of time during which it must provide such resources increase substantially. This is another unpredictable factor outside of OCFW's control. Indeed, a hearing is typically ordered approximately two-and-a-half years after OCFW is appointed to represent a client.

Excessive workloads are exacerbated by statewide travel to meet with clients, investigate cases, talk to witnesses and experts and conduct courtroom work across the Texas expanse, the length of the case records and most importantly staff attrition. It is also complicated because the work of the capital post-conviction litigation process requires several distinct skill sets: 1) reviewing records, investigating, writing petitions; 2) conducting evidentiary hearings; 3) writing post-

²⁴ TEX. CODE CRIM. PROC. art. 11.071 Section 9(a).

conviction “appellate” briefs; and writing petitions for *writ of certiorari* to United States Supreme Court.

Workloads for mitigation specialists and fact investigators should also be addressed. A staffing model should be considered for all support staff, perhaps as a ratio to the number of attorneys.²⁵

It is clear that the Office staff has more work than the staff can competently perform. No team member with more than 4-6 cases²⁶ can fully comply with the minimum state and national standard of practice.²⁷

The best way to determine precisely how many staff are needed to provide competent representation is to determine the appropriate workload an attorney and a staff member can handle.²⁸ The 1973 National Advisory Council method of merely counting the number of cases is no longer a valid measurement as it does not account for all the factors in case work and undercounts the work required.

The American Council of Chief Defenders issued a statement in 2007 in which they called for “each jurisdiction [to] develop caseload standards for practice areas that have expanded or emerged since 1973 and for ones that develop because of new legislation. Case weighting studies

²⁵ It has been reported to the NAPD Consultants for this Assessment that federal capital habeas units are staffed with 1.6 support staff for each attorney. Support staff at least at this level should be provided.

²⁶ Federal habeas units have a workload standard of each attorney carrying 4-6 cases at any one time in various stages but the cases are *weighted* to address the actual workload involved. Case *weighting* is a way to attempt to measure the actual workload instead of the simplistic method of counting the number of cases. The federal judiciary also uses case weighting to address the growing complexity of criminal cases at trial and post-conviction. The goal with case *weighting* is to account for factors which make a case more complex and more time-consuming. The factors that are part of the federal capital habeas *weighting* include:

- Over 15,000 pages of transcripts, briefs, petitions and opinions related to the action,
- There were three or more criminal episodes (separated by time and geography) resulting in three or more homicides tried in one proceeding and resulting in one judgment of death.
- There are international connections in the case.
- A hearing on competency to be executed or to waive post-conviction relief has been granted.

See Committee on Defender Services, *Report on Death Penalty Representation* (1995). See also James M. Anderson, Cha-Chi Fan, Mariana Horta, Nicholas M. Pace, Greg Ridgeway, *Case Weights for Federal Defender Organizations* (2011), p. 35 (identifying the following factors to calculate case complexity *weighting*: “a. Lengthy record b. Number of issues c. Evidentiary hearing d. Age of case e. Additional investigation needed.”).

²⁷ *Guidelines and Standards for Texas Capital Counsel* (2006); the *Supplementary Guidelines and Standards for the Mitigation Function of Defense Teams in Texas Death Penalty Cases* (2015); the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised edition February 2003); and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (2008).

²⁸ “Justice system organizations in the United States, including some court systems, probation departments, prosecutor offices, and criminal defense programs, have relied on case weights for years as a means for estimating personnel need and for allocating scarce resources. Time based case weights are of two types: absolute (reflecting the average time measured for a particular type of case) and relative (reflecting how the average time measured for a particular type of case compares to the average for all cases taken together).” James M. Anderson, Cha-Chi Fan, Mariana Horta, *Case Weights for Federal Defender Organizations* (2011) p. xviii.

must be implemented in a manner which is consistent with accepted performance standards and not simply institutionalize existing substandard practices.”²⁹

Likewise, NAPD recently published its *Statement on the Necessity of Meaningful Workload Standards for Public Defense Delivery Systems*.³⁰ In that Statement, NAPD concludes that “...the time has come for every public defense provider to develop, adopt, and institutionalize meaningful workload standards in its jurisdiction.” Workload standards should be “...derived and institutionalized through ongoing, contemporaneous timekeeping by public defense providers.”³¹

Workload methodology continues to evolve and increase in accuracy. Four workload studies using the most developed methodology have been conducted by the American Bar Association Standing Committee on Legal Aid and Indigent Defendants in Missouri, Rhode Island, Louisiana and Colorado. While the studies make recommendations for cases at trial, they use the most sophisticated methodology which is uniformly proving to demonstrate that previous workload studies have substantially underestimated the amount of work needed to competently represent a client.³² The Missouri Project has a National Blueprint for a workload study included at the end of the report.³³

Texas also has experience with focusing on indigent defense workloads and not just caseloads. In 2015, TIDC published a study by Dr. Dottie Carmichael and others entitled *Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission* (2015). TIDC has also released additional workload studies for juvenile and direct appeal cases.³⁴

Texas has an earlier version of a workload study for capital post-conviction cases. It indicates the current OCFW workloads are excessive. In 2007, The Spangenberg Group conducted the most recent analysis of the amount of time it takes to represent a client in a state capital post-conviction case in several states. These studies have been conducted in North Carolina, Virginia, Florida³⁵ and Texas. The number of hours from state post-conviction through United States

²⁹ American Council of Chief Defenders *Statement on Caseloads and Workloads* (2007), p.1, <http://www.oregon.gov/OPDS/docs/CBS/ACCD%20Caseloads%20Report%20Final.pdf>.

³⁰ NAPD Statement on the Necessity of Meaningful Workload Standards for Public Defense Delivery Systems (2015), http://www.publicdefenders.us/files/NAPD_workload_statement.pdf.

³¹ NAPD Statement on the Necessity of Meaningful Workload Standards for Public Defense Delivery Systems (2015), pp 1,2.

³² The American Bar Association has made these studies available at www.indigentdefense.org.

³³ The Missouri Project A Study of the Missouri Public Defender System and Attorney Workload Standards (June 2014), pp 11-21, https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf.

³⁴ See Juvenile Addendum and Appellate Addendum: Guidelines for Indigent Defense Caseloads (2016), <http://www.tidc.texas.gov/resources/publications/news/press-releases/161213pressrelease.aspx>.

³⁵ “This process generated a detailed outline of the state post-conviction process. Using this outline, the most experienced and qualified lawyers at CCRC have estimated that, on average, over 3,300 lawyer hours are required to take a post-conviction death penalty case from the denial of certiorari by the United States Supreme Court following direct appeal to the denial of certiorari following review by the Florida Supreme Court of the Circuit Court’s denial of a Rule 3.850 motion for post-conviction relief. This estimate is consistent with time records reported by

Supreme Court *writ of certiorari* averaged 800-1,000 hours per case. Using this information, it was estimated that one attorney could represent between 2 and 3 *new* habeas cases per year.³⁶

The 2007 study clearly undercounts the current work required. Factors that influence the study's results is that since 2007 habeas litigation has become more complicated as the result of the increase in the number of cases; the complexity and length of the record, the evolution of issues in capital litigation, and the consequences resulting from the statutory requirement that a finding of ineffective assistance prohibits future capital representation.³⁷

A workload study using the evolving methodology should be conducted, perhaps funded by the Texas Indigent Defense Commission,³⁸ to determine the appropriate workload standards for OCFW staff. The results of this study would allow the State and OCFW to have an explicit funding and workload staffing policy. A Texas OCFW workload study would have several benefits. It would be data-driven, state-specific, and produce caseload limits that more closely resemble lawyers' ethical and constitutional duties.

Employ additional staff to reduce workloads to align with professional standards

While the Office has steadily grown over the last eight years, the staffing has not kept up with the workload. In FY2012, the Office had 9 FTEs (1 director, 3 attorneys, one legal assistant, one investigator, one mitigation specialist, one accountant, and a legal secretary). During FY2012, the Office had 20 pending cases, and did not handle any evidentiary hearings. In FY2018, the Office has 16 filled positions, including the Director, 8 staff attorneys, 5 investigators (who perform investigative and mitigation functions), a legal assistant, and an accountant who performs human resources, payroll, reimbursements, and procurement functions. The Office represents 34 different clients presently, and estimates that it will handle 46 different client matters over the course of this fiscal year, including 17 evidentiary hearings.

Additional staff should be added to:

several large pro bono law firms in our survey. Also, the Florida estimate does not appear unusual in light of the experience of post-conviction lawyers practicing in other states." *Time and Expense Analysis of Post-Conviction Capital Cases in Florida*, Prepared by The Spangenberg Group for the Florida Supreme Court and the Florida Legislature (April 1998), p. 16.

³⁶ The Spangenberg Group, Information to the Texas State Bar Task Force on Capital Habeas Regarding the Development of Workload Standard for the Representation of State Capital Habeas Defense in Texas (2007).

³⁷ Texas prohibits the employment of counsel who has been found ineffective during the trial or appeal of a capital case. Texas government code-gov't §78.053(b); Texas Government Code § 78.056(a). Generally, there are two types of ineffective assistance of counsel. One is a mistake by a competent lawyer that is explained by workload or other factors. Another is assistance that is comprehensively not effective across cases. The attorney who is comprehensively ineffective should be prohibited from representation of capital clients. The attorney who makes a misjudgment but who is otherwise performing competently should not be forever prohibited for representing capital clients. The unintended consequence and unfairness to the client and to the reliable resolution of litigation of this total prohibition is that it drastically inhibits a competent attorney who has made a mistake from admitting to the mistake because the attorney's livelihood will be adversely affected by the admission.

³⁸ The current "breed of workload studies is more rigorous than its predecessors." Geoffrey T. Burkhart, *How to Leverage Public Defense Workload Studies*, 4 Ohio St. J. Crim. L. 403, 429 (2017), <http://moritzlaw.osu.edu/students/groups/osjcl/files/2017/04/04-Burkhart.pdf>.

- Accommodate a reduced caseload for the Director,
- Create a Deputy Director position with a reduced caseload who can help manage the supervision of litigation in the office to allow the Director to focus on management and institutional issues,
- Ensure staff attorneys have no more than 4-6 *weighted* cases at a time,
- Have separate fact investigators and mitigation specialists with mental health background on each case as the Texas Guidelines require, and
- Create an adequate number of paralegals.

Compensate staff at appropriate levels to reduce attrition and turnover which are expensive and deplete valuable resources

The attrition in the OCFW has been substantial. Since October 2010, twenty-five staff have departed, the equivalent of over 150% of the present staff size. This includes twelve attorneys, ten investigators and three support staff. The attrition has resulted for a number of reasons including unrealistic workloads, inadequate compensation, and the complexities and challenges of the work. Since October 2017, OCFW has lost two attorneys and one investigator to the newly created federal public defender Texas Capital Habeas Units and other federal capital habeas units nationally, which offer substantially higher salaries for the same work. As such, the newly created federal defender capital habeas units in Dallas and Austin can be expected to serve as a source of institutional instability for OCFW so long as there is a significant salary disparity, because attorneys and mitigation specialists from OCFW will continue to be attracted to the higher compensation. Unless salaries can be raised to more competitive levels, OCFW will be perpetually at risk of losing staff after having invested considerable resources in training and developing them.³⁹

Attrition has a high cost in lost productivity, impairment of the relationship with the client and lowering of morale. There is often a delay in replacing the person who left. The new person arrives without the knowledge of the cases of the departing staff member. Educating the new staff so that they are current results in duplicating the work of the departed staff member. This is inefficient and results in requests for additional time to competently complete the work and delays in eventual resolution of the case. Everyone becomes frustrated as a result: staff, clients, judges, prosecutors, the families of victims.

The biennial workforce summaries compiled by the State Auditor based on financial data, indicate OCFW turnover rate by year was as follows:

FY2011	22.9%
FY2012	35.3%
FY2013	0%
FY2014	48.8%

³⁹ OCFW attorney salaries are also low in comparison to the attorney salaries paid by other state agencies. Notwithstanding the complexity and demanding nature of capital habeas litigation, according to Fiscal Year 2018 data compiled by the Texas State Auditor, the average state salary paid to attorneys is \$81,778, while the average OCFW attorney salary for Fiscal Year 2018 is just \$70,647.

FY2015	8.3%
FY2016	14.8%
FY2017	25.8%.

Thus, OCFW historical turnover rate from opening to present is 22.3%. The state government average overall hovers at around 17.5%, and the average for the judiciary is about 12%.⁴⁰

The OCFW attrition rate by classification from FY 2011 to FY 2018 demonstrates the problem:

Attrition Rate	FY2011	FY2012	FY2013	FY2014	FY2015	FY2016	FY2017	FY2018
Attorney	33%	25%	0%	29%	14%	25%	25%	38%
Investigator/Mit. Specialist	50%	50%	0%	100%	0%	25%	40%	40%
Administrative Support	0	67%	0%	50%	0%	0%	0%	0%
Director	0	0%	0%	0	100%	0%	0%	0%
Global Attrition Rate	22%	40%	0%	46%	15%	20%	25%	31%

Salaries: It costs more to pay less

There are no structured salary increases for staff, including merit or performance based, and the tight OCFW budget does not presently allow for much salary flexibility. The salaries of the attorneys in the OCFW are not comparable to salaries of the Assistant State Prosecuting Attorneys, or county-level assistant district attorneys who are opposing counsel.

Additional funds should be provided to compensate staff at levels comparable to their counterparts in the criminal justice system. They should be in line with RPDO and the State Prosecuting Attorney staff.

There should be an incentive for merit pay, longevity and increased duties. While performance-based pay increases are the preferred method of rewarding performance, they are also the most difficult to budget for and implement. Merit and longevity should be the incentive for moving up in the organization. There must be pay ranges within each job classification to allow for merit and longevity increases.

⁴⁰ See *Annual Report on Classified Employee Turnover for Fiscal Year 2017*, December 2017 Report No. 18-703.

Studies indicate that the cost of high turnover due to low salaries to the system of justice is enormous.”⁴¹

These findings and recommendations are verified by other independent evaluations. As the American Bar Association observed in 2013, “while Texas has established [OCFW] to represent death row inmates in state habeas petitions... Texas fails to compensate [OCFW] attorneys at a rate commensurate with prosecutors.”⁴²

Seek administrative assistance from the Office of Court Administration

To the extent professionally possible, The Office of Court Administration should provide additional administrative assistance to OCFW, including human resources, financial, legislative financial reporting, and accounting services in order to support OCFW and allow it to concentrate on its main function of providing effective representation of clients.

Additional resources for OCFW is the first Recommendation because it is the most imperative. Without more resources, no one can expect OCFW to timely and competently meet its professional responsibilities.

⁴¹ “Studies regularly define the consequences of high turnover: loss of institutional knowledge; additional duties for those remaining; rising backlogs and reduced productivity; and high replacement costs for selection, onboarding, training and development of new employees. Often these departures create major gaps in office coverage. This creates a number of organizational problems which include:

- lowered productivity--trial preparation is lost and must be repeated.
- overworked remaining staff--caseloads are redistributed to other ASAs and APDs already carrying full caseloads.
- lost knowledge--organizational and CLE training is forfeited, as well as courtroom development and mentoring.
- training costs--replacement Assistant State Attorneys and Assistant Public Defenders must be onboarded and trained anew.
- interviewing costs--senior leaders at SA and PD offices must conduct rounds of timely interviews to find most qualified applicants.
- recruitment--job openings must be advertised and applications and background inquiries conducted.
- case interruptions--delays must be granted when requested by APDs new to a case, and ASAs who inherit case must become familiar with status of plea negotiations and potential trial.
- victim and witness frustration--victims anxious for justice get frustrated by delays and replacement attorneys, witness memory fades, witnesses move or get transferred, and defense case preparation, continuity and confidence can be lost.
- Justice delayed or denied--case results can be altered when new ASA and APD takeover a case....

Business analysts have attempted to determine the actual cost of staff turnover, and the estimates range from 50 percent of the annual salary to 400 percent, when the turnover is in senior leadership and highly technical positions.... The problems and issues created by such noncompetitive salaries actually costs taxpayers more in recruitment and retraining, than targeted pay raises would cost.” Florida TaxWatch, *When It Costs More to Pay Less: Starting Salaries for Assistant State Attorneys and Assistant Public Defenders in Florida Among Lowest in Nation* (2014) pp. 8, 10, 12, <http://www.floridatxwatch.org/resources/pdf/ASAAPDFINAL.pdf>.

⁴² ABA *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* (2013), Chapter 8, p. xxxvi, https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_report_chapter_summaries.authcheckdam.pdf.

2. Enhance the Organizational Structure

Upgraded organizational structures are necessary for the Texas Office of Capital and Forensic Writs to competently and timely meet its statutory and constitutional capital post-conviction and forensic writs representation responsibilities.

- Create an organizational structure that addresses the challenges of the size of the Office and the complexity of the practice by creating at least one Deputy Director position which has responsibility of managing the litigation work with the flexibility to hire additional supervisors as needed and funded. This will free up the Director of the Office to perform internal administrative and external responsibilities that only the Director can perform.
- Ensure each litigation team has an identified capital-qualified attorney leader, a second capital-qualified attorney, a fact investigator and mitigation specialist with mental health competency, as required by state and national standards.
- The Director and new Deputy Director should attend national practice-oriented leadership/management training offered by a public defense organization.
- The Director should avail himself of a mentor from the defense community, perhaps through NAPD.

Create and fund a Deputy Director position

No one person can adequately supervise the work of eight attorneys, five investigators, a legal assistant and an accountant, particularly not while also handling a full caseload of six capital habeas cases, preparing reports on agency activity to the Legislative Budget Board, preparing appropriations requests, advocating for agency interests before the Legislature, and tending to other, varied external professional and fiscal responsibilities.

There is broad agreement within the organization that the Director “wears too many hats” and therefore does not have the time to meet the responsibilities of all of his roles. As a result, the Director is unable to be as responsive as he might otherwise be to staff, or timely address personnel and external issues. There is only so much one person can do. There is a collective desire for an enhancement of the organizational structure to create a Deputy Director position. Duties could include supervision of all or most all litigation. There is also a need for a person to create and produce coordinated ongoing education that is responsive to staff needs. The Director should not be counsel in more than 2 cases. The supervisor should not be counsel in more than 2 cases.

Properly constitute all defense teams

Axiomatically, the work of capital litigation is not a solo endeavor. It requires the work of a Defense Team that has a designated lead counsel⁴³ and an additional capital qualified attorney,

⁴³ See State Bar of Texas, *Guidelines and Standards for Texas Capital Counsel* (2006), Guideline 10.1(A) [“The Defense Team”] (“...lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards”); See also ABA

a fact investigator and a mitigation specialist with a mental health background. This is the lynchpin of competent capital representation.

Currently, OCFW does not have the funding to meet this standard of practice. Too many cases have one “investigator” doing the work of a fact investigator and of the mitigation specialist. When an attorney departs, too many teams only have one counsel. Most staff are on multiple teams but most teams do not have a designated lead counsel. These practices are problematic and inconsistent with the state and national standards.

The state and national minimum standards of capital practice are clear. There must be representation by a defense team composed of two qualified capital attorneys, a fact investigator and a mitigation specialist with a mental health background. There must be a designated lead counsel. A leader is necessary to make sure that the work for the client is done properly and completely. There must be a person who has ultimate accountability for the work of the team. Too much is at stake to allow anything to fall through the cracks. This is a core standard.⁴⁴ The

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised edition February 2003), Guideline 10.4(B).

⁴⁴ As the *Guidelines and Standards for Texas Capital Counsel* (2006), GUIDELINE 3.1 [“The Defense Team and Supporting Services”] published by the State Bar of Texas states:

A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.

1. The defense team should consist of no fewer than two attorneys qualified in accordance with GUIDELINE 4.1, an investigator, and a mitigation specialist.

2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

Guideline 3.1, State Bar of Texas *Guidelines and Standards for Texas Capital Counsel* (2006).

In addition, GUIDELINE 10.1 The Defense Team, requires that one of the attorneys on the Defense Team be lead counsel, and “lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards.” The team shall have an “investigator to conduct factual investigations of the case on guilt-innocence and punishment issues;” and a mitigation/mental health associate, “qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments....”

In addition, *Supplementary Guidelines and Standards for the Mitigation Function of Defense Teams in Texas Death Penalty Cases* (2015), GUIDELINE 4.1 [“Qualifications of the Defense Team”], describe the particulars of defense team member responsibilities:

A. Capital defense team members should demonstrate a commitment to providing high quality services in the defense of capital cases; should satisfy the training requirements set forth in these Supplementary Guidelines; and should be skilled in the investigation, preparation and presentation of evidence within their areas of expertise.

B. The defense team must include individuals possessing the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client's life history. Life history includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual

fact investigator and mitigation specialist responsibilities are separate and different. They require distinct education and experience and should not be combined or conflated.⁴⁵

orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.

C. Mitigation specialists must be able to identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information. They must be skilled interviewers who can recognize and elicit information about mental health signs and symptoms, both prodromal and acute, that may manifest over the client's lifetime. They must be able to establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of sensitive information and to assist the client with the emotional impact of such disclosures. They must have the ability to advise counsel on appropriate mental health and other expert assistance.

D. Team members must have the training and ability to use the information obtained in the mitigation investigation to illustrate and illuminate the factors that shaped and influenced the client's behavior and functioning. The mitigation specialist must be able to furnish information in a form useful to counsel and any experts through methods including, but not limited to: genealogies, chronologies, social histories, and studies of the cultural, socioeconomic, environmental, political, historical, racial and religious influences on the client in order to aid counsel in developing an affirmative case for sparing the defendant's life.

E. At least one member of the team must have specialized training in identifying, documenting and interpreting symptoms of mental and behavioral impairment, including cognitive deficits, mental illness, developmental disability, neurological deficits; long-term consequences of deprivation, neglect and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior; effects of substance abuse and the presence, severity and consequences of exposure to trauma. Team members acquire knowledge, experience, and skills in these areas through education, professional training and properly supervised experience.

F. Mitigation specialists must possess the knowledge and skills to obtain all relevant records pertaining to the client and others. They must understand the various methods and mechanisms for requesting records and obtaining the necessary waivers and releases, and the commitment to pursue all means of obtaining records.

⁴⁵ “The fact investigator and mitigation specialist with a mental health background are two distinct roles. Adherence to the team approach to capital defense outlined by ABA Guideline 4.1 basically requires the team leader to take four affirmative steps. First, select two qualified attorneys. Second, select an investigator. Third, select a mitigation specialist. And fourth, ensure one of the team members is qualified to detect by observation and interaction with the defendant the presence of any mental or psychological disorders. [ABA Guideline 4.1, p. 28]. In fact, one federal court recently granted habeas relief in a case due, in part, to a lack of adherence to this guideline. See *Eaton v. Wilson*, 2014 WL 6622512, at *31 (D.Wyo. 2014) (“The ABA Guidelines mandate, as part of the team approach to the defense of capital cases, the ‘team’ should include both an investigator, as well as a mitigation specialist.... A qualified investigator and a qualified mitigation specialist each have unique skills which allow them, as opposed to trial counsel, to address the challenges which arise in developing facts, and presenting a strong mitigation case, on behalf of a defendant....[Lead trial counsel], ... responsible for the selection and performance of the capital defense team..., made the conscious decision to combine and delegate the responsibilities of both investigation and mitigation to a single person. He made this decision notwithstanding the fact the ABA Guidelines, which he acknowledged having read ..., mandate a capital defense team have at least two qualified attorneys, an investigator, **and** a mitigation specialist.”) (emphasis in original). In that case, the court observed that the sole investigator serving as both an investigator and a mitigation specialist,

while arguably a skilled investigator based on her background and experience, obviously did not have the training or the experience, nor was she allowed to devote the time necessary, to be an effective mitigation specialist. The ABA Guidelines mandate two separate qualified persons as part of capital defense team, one to act as an investigator, and one to fulfill the responsibilities of a mitigation specialist....[The assigned investigator] was likely qualified to act as an investigator, and

Attend public defense leadership – management education

The Director and new Deputy Director should attend national practice-oriented leadership/management training offered by a public defense organization. This education will afford the Director and new Deputy Director with principles of leadership and management particular to public defense. It will provide connections with national public defense leaders who share similar program challenges.

Seek a national mentor

The Director should avail himself of a mentor from the defense community, perhaps NAPD. The NAPD Systems Builder Committee provides this service to member organizations at no charge.⁴⁶

3. Create Independent Oversight Board

An independent oversight board should be created to ensure the Texas Office of Capital and Forensic Writs has program accountability and is able to competently and timely meet its statutory and constitutional capital post-conviction and forensic writs representation responsibilities.

- To ensure program integrity, create an Oversight Board that has the responsibility to provide fiscal and program review and to advance the mission and professional independent representation of clients.

Currently, the OCFW Director is selected by the Texas Court of Criminal Appeals from a list of nominees. The Texas Court of Criminal Appeals selects and appoints the Director to a four-year term and can terminate the Director upon good cause. Otherwise, there is no ongoing oversight body with the responsibility to provide fiscal and program review, support and assistance in advancing the independence of the program.

No one disputes that to comply with constitutional requirements, the representation of clients must be independently performed. National standards and practice clearly reflect this value.⁴⁷

The first principle of the ABA *Ten Principles of a Public Defense Delivery System* (2002) is that “The public defense function, including the selection, funding, and payment of defense counsel,

did fulfill said function as part of Petitioner's trial team. She was not, however, qualified by either training or experience, as well as being restrained by time, to act as a mitigation specialist.

Eaton v. Wilson, 2014 WL 6622512, at *33 (D.Wyo. 2014).

⁴⁶ The NAPD Systems Builder Committee information is found at: <http://www.publicdefenders.us/systemsbuilders>.

As part of the Committee's efforts to strengthen the quality of public defense delivery systems, the NAPD Systems Builders Committee has established a Mentors Program for Executive and Manager Leadership. This program is available to any new or veteran public defense leader who seeks a mentor to address professional and personal challenges in creating or enhancing a client-centered best practice public defense program. Mentors will be arranged after consultation regarding office size, structure, delivery system and challenges to address.

⁴⁷ See National Association for Public Defense's *Foundational Principles* (2017); NAPD's *Qualifications of Those Selecting Public Defense Leadership* (2017).

is independent.”⁴⁸ The ABA Principles “constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.” Without independence, all of the other ABA *Ten Principles* are difficult to achieve. Independence also increases the confidence of the public in the professional work of public defenders.

This national standard provides that the public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.

The support of the CCA was critical to the creation of OCFW.

Independence, coupled with oversight, is essential to the success and long-term stability of OCFW. Apart from the appointment power vested in the CCA, there is no current mechanism for ongoing oversight of the OCFW’s programmatic and fiscal governance.

To safeguard independence and to promote efficiency and the provision of high quality services, national standards call for a public defense program to have a nonpartisan board overseeing the delivery of defender services.⁴⁹ The Texas Legislature has previously recognized the desirability

⁴⁸ A public defender’s “principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.” *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979). “In our system, a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public not by acting on behalf of the State or in concert with it, but rather by advancing ‘the undivided interests of his client.’.... [A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, see *Moore v. United States*, 432 F.2d 730 (CA3 1970), a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.... [T]he constitutional obligation of the State [is] to respect the professional independence of the public defenders whom it engages.... *Implicit in the concept of a ‘guiding hand’ is the assumption that counsel will be free of state control.*” *Polk County v. Dodson*, 454 U.S. 312, 318-19, 322 (1981). “Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. *Strickland v. Washington*, 466 U.S. 668 (1984). Footnotes to ABA *Principle 1* refer to National Study Commission on Defense Services’ (NSC) *Guidelines for Legal Defense Systems in the United States* (1976). The *Guidelines* were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant. NSC *Guideline 2.10 (The Defender Commission)* states that “a special Defender Commission should be established for every defender system, whether public or private,” and that the primary consideration of appointing authorities should be “ensuring the independence of the Defender Director.” NSC *Guideline 2.11* states that the “primary function of the Defender Commission should be to select the State Defender Director.” Nationally, virtually all defender commissions appoint the chief defender. Kentucky and West Virginia are the current exceptions.

⁴⁹ ABA *Providing Defense Services*, Standard 5-1.3 Professional independence (3d ed. 1992), states: (a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs. (b) An effective means of securing professional independence for defender organizations is to place responsibility for

of Oversight Boards for county-based public defender programs.⁵⁰ There is ample reason to believe that the management and accountability benefits of oversight boards for county programs would be seen with the establishment of an Oversight Board for the OCFW.

The composition and authority of the Oversight Board are critical. The Board should:

- Have oversight and fiduciary responsibilities but should not interfere with the conduct of cases;
- Not include active prosecutors or judges;
- Have non-partisan appointees from multiple entities, including the Texas Indigent Defense Commission, the Texas indigent defense community and law schools;⁵¹
- Be comprised of members appointed to staggered terms;
- Have at least nine members, the majority of which are practicing attorneys and “organizations concerned with the problems of the client community.”⁵²

governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction. The Commentary to ABA *Providing Defense Services* Standard 5- 1.3 states: “Members of governing boards should not include prosecutors and judges. This restriction is necessary in order to remove any implication that defenders are subject to the control of those who appear as their adversaries or before whom they must appear in the representation of defendants, except for the general disciplinary supervision which judges maintain over all members of the bar.”

⁵⁰ Article 26.045 of the Texas Code of Criminal Procedure authorizes counties to establish oversight boards for local public defender programs. While it may not gain access to privileged or confidential information, among the powers that may be delegated to the board are the following: recommending the selection and removal of a chief public defender; setting policy for the office; and developing a budget proposal for the office. TEX. CODE CRIM. PROC. art. 26.045.

⁵¹ For example, Kentucky’s oversight board, the Public Advocacy Commission has the “dean, ex officio, of each of the law schools in Kentucky or his or her designee” as a member of the Commission. KRS 31.015(1)(a)(5).

⁵² National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), Guideline 2.10 [“The Defender Commission”], http://www.nlada.net/sites/default/files/nsc_guidelines_for_legaldefenseystems_1976.pdf). In its report, the United States Department of Justice-sponsored National Study Commission on Defense Services made the following recommendations for public defender oversight: A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented. Commission members should be selected under the following criteria: (a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director; (b) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics; (c) No single branch of government should have a majority of votes on the Commission; (d) Organizations concerned with the problems of the client community should be represented on the Commission; (e) A majority of the Commission should consist of practicing attorneys. (f) The Commission should not include judges, prosecutors, or law enforcement officials. Members of the Commission should serve staggered terms in order to ensure continuity and avoid upheaval. National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), Guideline 2.10. NAPD’s *Qualifications of Those Selecting Public Defense Leadership* (2017) states, “The authorities appointing the selecting board or commission should not be: An adversary

Our criminal justice system is founded on the value that just outcomes for citizens whose life is at risk is best achieved through an adversarial system with courts, prosecutors and defenders who are able to perform their functions independently. Creating an OCFW Oversight Board in compliance with national standards will provide needed oversight and accountability while preserving the independence of the OCFW as an effective indigent defense delivery system.

4. Enhance Communication

Communication should be increased and improved so that the Texas Office of Capital and Forensic Writs is able to competently and timely meet its statutory and constitutional capital post-conviction and forensic writs representation responsibilities.

- Timely decisions and explanations should be provided.
- Assignment of cases should occur through an in-person communication after appropriate consultation and then timely, affirmatively communicated to all staff.
- Staff meetings should occur on a regular basis with a focused agenda that includes communication of information from the Director, and participatory staff educational development, perhaps provided by staff on a rotating basis and by outside professionals.
- Create job responsibilities, conduct periodic performance evaluations.
- Upgrade policies and procedures.

Clear and complete communication is what everyone wants. The volatility, uncertainty, and complexity of capital post-conviction work in organizations which deliver that representation make clear and complete communication difficult, especially when the Director does not have enough time for essential responsibilities with overworked staff. Nevertheless, there must be improved communications at OCFW. “A good way to make it easier for team members to hold one another accountable is to clarify publicly exactly what the team needs to achieve, who needs to deliver what, and how everyone must behave in order for the team to succeed. The enemy of accountability is ambiguity....”⁵³ There are a variety of ways to accomplish this, including communication of decisions and the rationale for the decisions through in-person communications, staff meetings, performance standards, performance reviews, explicit straightforward policies and procedures.

Timely decisions and explanations should be provided

People within the organization and external to the organization want to know information relevant to their responsibilities. The leader has the responsibility to provide material information to advance the agency externally and increase the knowledge and capacity of staff.

of the public defender’s office or its clients, including but not limited to individuals associated with: law enforcement, prosecution, parole, probation, corrections – including local jail administrators and the department of corrections, active judges.”

⁵³ Patrick Lencioni, *The Five Dysfunctions of a Team* (2002), p. 214.

External interviews by the evaluators of this Assessment confirm that the Director is communicating with external leaders in a way that is advancing the program.

Staff interviews indicate that the internal and external responsibilities of the Director, the lack of adequate supervisory staff, the inadequate staffing and the turnover of staff significantly impair the Director's ability to timely and fully communicate. Interviews with staff uniformly indicate the need for communication that is timely and complete to ensure staff have the information necessary to perform their work competently.

Assignment of cases

Assignment of cases should usually occur through an in-person communication after appropriate consultation. This assignment should then be affirmatively communicated to all staff. Currently, there is a case assignment form available to all staff electronically. This is an important way to communicate uniformly to all staff. However, occasionally some assignments have been made without the staff member first being informed in person. The current case assignment list should formally designate first and second chairs to make sure there is clear accountability and so the team knows who is ultimately in charge.

Staff meetings should occur on a regular basis with a focused agenda that includes communication of information from the Director, and participatory staff educational development, perhaps provided by staff on a rotating basis and by outside professionals.

Regular, informative staff meetings and in-house trainings should be conducted. The Director should lead the staff meetings with staff members communicating updates on case status and case issues. The Director has an open-door policy. This is an important way to attend to issues timely. When there is an issue that is causing strife in the Office, all staff involved should be involved in the communications, and, when appropriate, there should be clearly communicated resolution with expectations set for staff. There should be timely follow-up to ensure compliance with expectations.

Create job responsibilities, conduct periodic performance evaluations

Making implicit expectations explicit has benefits. "A little more structure goes a long way toward helping people take action they might not otherwise be inclined to do. This is especially true when it comes to giving people feedback on their behavior or performance."⁵⁴

Currently, staff do not have individualized written responsibilities. Performance evaluations are not being regularly conducted. This is not surprising as the Office is understaffed without adequate supervisory capacity and has a Director who is compromised with too much work. However, performance evaluations that set out job responsibilities must be done consistently.⁵⁵

⁵⁴ Patrick Lencioni, *The Five Dysfunctions of a Team* (2002), p. 215.

⁵⁵ As the National Study Commission on Defense Services recommended, "The professional performance of defender staff attorneys should be subject to systematic supervision and evaluation based upon publicized criteria. Supervision and evaluation efforts should be individualized, and should include monitoring of time and caseload records, review and inspection of case files and transcripts, in-court observation and periodic conferences." National

“Successful leaders have high expectations of themselves and of their constituents. These expectations are powerful because they are frames into which people fit reality.... Being clear about what’s expected of them, and what you’re trying to accomplish, is essential to helping people stay the course, especially when the going gets tough.”⁵⁶ Written job duties, regular performance reviews are ways to communicate clear expectations. Performance standards are required by Texas and national Guidelines.⁵⁷

Upgrade policies and procedures

The Office has policies and procedures. A number of staff indicate they would be helped by an updated more complete policy and procedure manual that addresses relevant issues. Written policies and procedures that are ways to inform staff of the rules and expectations. They set boundaries for conduct and they inform staff what the rules are up front.

5. Enhance Education and Development

Education of staff should be further improved so the Texas Office of Capital and Forensic Writs can competently and timely meet its statutory and constitutional capital post-conviction and forensic writs representation responsibilities.

- There should be ongoing education and development with in-house trainings according to a plan developed after a survey of staff needs.
- A person in the Office should be designated to coordinate the creation and implementation of the education and development plan.
- There should be special attention to education on an effective functioning defense team, developing and maintaining client relationships, conflict management and resolution and conducting effective evidentiary hearings.
- A practice guideline manual should be developed to ensure staff understands practice options and expectations.
- Formal case reviews and mock practice should become a standard practice to ensure the litigation teams have the support necessary to deal with the litigation complexities.

There should be ongoing education and development with in-house trainings according to a plan developed after a survey of staff needs.

In recognition of the volume and complexity of the work, Texas and national Guidelines mandate ongoing education for the members of the defense team.⁵⁸ A learning organization is “continually

Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), Guideline 5.4 [“Supervision and Evaluation of Defender System Personnel”].

⁵⁶ Kouzes and Posner, *The Leadership Challenge* (4th ed. 2007) pp. 282, 286.

⁵⁷ See, e.g., *Guidelines and Standards for Texas Capital Counsel* (2006), GUIDELINE 9.1, states:

Establishment of Performance Standards A. The standards of performance should be formulated so as to ensure that all counsel provide high quality legal representation in capital cases in accordance with these Guidelines. The standards of performance should include, but not be limited to, the specific standards set out in these Guidelines.

⁵⁸ *Guidelines and Standards for Texas Capital Counsel* (2006), GUIDELINE 7.1 [“Training”], states:

expanding its capacity to create its future.”⁵⁹ Representing capital clients is a unique professional discipline. Capital post-conviction organizations must be learning organizations if they are to rise to the level of the challenges through advancement of their professional discipline. Effectively practicing a “discipline is to be a lifelong learner. You never arrive; you spend your life mastering disciplines.”⁶⁰

A person in the Office should be designated to coordinate the creation and implementation of the education and development plan.

Most staff report that the Office has done a good job of sending staff to appropriate national education as funds allow. This is an important way to learn from the best national thinking and practice. Most staff also express a desire for more education on how they can perform their discrete responsibilities well. Many staff report they need help in understanding what the expectations are for their work. This may be explained in part by the youth of staff, the “investigator” role conflating fact investigation and mitigation tasks, and different attorneys requesting different tasks from investigators.

The Director does not have the time to coordinate and plan education. The Office would benefit from designation of a person to coordinate the development of a training plan over the course of a year informed by an education needs survey of staff.⁶¹

A. The Legal Representation Plan should provide funds for the effective training, professional development, and continuing education of all members of the defense team.

B. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:

1. relevant state, federal, and international law;
2. pleading and motion practice;
3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
4. jury selection;
5. trial preparation and presentation, including the use of experts;
6. ethical considerations particular to capital defense representation;
7. preservation of the record and of issues for post-conviction review;
8. counsel’s relationship with the client and his family;
9. post-conviction litigation in state and federal courts;
10. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;
11. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.

C. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program that focuses on the defense of death penalty cases.

D. All non-attorneys wishing to be eligible to participate on defense teams should receive continuing professional education appropriate to their areas of expertise.

⁵⁹ Peter M. Senge, *The Fifth Discipline: the art & practice of the learning organization* (2006), p. 14.

⁶⁰ Peter M. Senge, *The Fifth Discipline: the art & practice of the learning organization* (2006), p. 10.

⁶¹ The person responsible for training should attend a national public defense train the trainer program.

The Office has begun an in-house training series on courtroom litigation. This is an excellent development. Additional keys to successful representation of clients are reflected in the state and national Guidelines.⁶² They are a roadmap for education.

There are easily accessible resources in writing⁶³ and through webinars⁶⁴ to enhance in-house education.

There should be special attention to education on an effective functioning defense team, developing and maintaining client relationships, conflict management and resolution and conducting effective evidentiary hearings.

The cornerstone of effective capital representation is a trusting relationship with the client. The Defense Team is the lynchpin of effectively representing a capital client. Finding and presenting mitigating evidence through a compelling story of the client is essential. That is why these are pivotal state and national standards of capital practice. It is not uncommon for there to be challenging matters in the client relationship, Defense Teams that experience substantial differences of opinion, and barriers to effective presentation of evidence. In light of what staff

⁶² Guidelines and Standards for Texas Capital Counsel (2006); Supplementary Guidelines and Standards for the Mitigation Function of Defense Teams in Texas Death Penalty Cases (2015); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised edition February 2003); Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008).

⁶³ ABA *Tell the Client's Story: Mitigation in Criminal and Death Penalty Cases* (2017) has chapters on mitigation, competency of counsel, the meaning of neuroscience, creating and leading the mitigation team, the case review process, developing case theories, successful relationships with clients, integrating experts into the case, telling the clients story through the litigation, special challenges and it contains sample social histories and case review forms.

⁶⁴ OCFW's membership in the National Association for Public Defense allows the Office to take advantage of the NAPD webinars live or recorded. Some available programs include:

- Fundamental of Zealous Capital Clemency Representation | 01/24/18 | [Laura Schaefer](#)
- Collecting and Using Records to Create Narrative in Capital Cases | 01/17/18 | [Dana Cook](#)
- Interviewing in Capital Cases | 01/09/18 | [Dana Cook](#)
- Victim Impact Considerations | 10/16/17 | [Michal Ogul](#)
- Lessons Learned from the Bryan Sheppard Miller Litigation | 9/26/17 | [Cyndy Short](#)
- Establishing & Maintaining a Successful Relationship with a Capital Client | 9/22/17 | [Margaret O'Donnell](#)
- Intro to Colorado Method of Jury Selection | 9/15/17 | [Matt Rubenstein](#)
- Developing and Leading Effective Mitigation Teams | 5/24/17 | [Ed Monahan](#) & [Jim Clark](#)
- Litigating Federal Habeas Claims and Getting the Resources You Need in Miller Cases | 4/13/17 | [Ann Roan](#) & [Marsha Levick](#)
- "Extending Atkins" Severe Mental Illness and the Death Penalty | 4/12/17 | [Aurelle Tabuteau Mangels](#)
- Partnering to Resolve Cases | 3/30/17 | [Jennifer Friedman](#)
- Identifying and Responding to Prosecutors Themes | 3/30/17 | [Michael Ogul](#)
- Future Dangerousness, Aggravation and other Cause of Hair Loss | 3/1/17 | [Marc Bookman](#)
- Strategizing about Resolutions Without Trial in Capital Cases | 2/28/17 | [Celia Ouellette](#)
- Recreating the Story for the Future: Forgiveness and Remorse, Defense Victim Outreach, Creating Mitigation and Re-entry Planning | 1/31/17 | [Lisa Rickert](#) & [Lloyd Epstein](#)
- Trauma | 1/24/17 | [Betsy Wilson](#) & [Antoinette Kavanaugh](#)
- Investigating Mitigation | 1/17/17 | [Shobha Lakshmi Mahadev](#) & [Juliet Yackel](#)

report through the interviewing process, continuous training on these areas of practice is particularly commended to OCFW.

We especially encourage education on the effective functioning of the Defense Team. “Successful mitigation outcomes in capital cases are almost always a result of interdisciplinary team effort; very rarely are they attributable to superstar performances. It is also rare that a defense team just happens, by chance, to be an *effective* team.”⁶⁵ State and national guidelines require a team that reflects diverse perspectives. That is a primary reason the team has two attorneys, a fact investigator and a mitigation specialist with a mental health background, often a masters level social worker. There must be a lead attorney on each defense team who has ultimate responsibility for the case. While conflict is natural, team members must actively work to have productive, creative exchange of perspectives, under the lead attorney’s facilitation.⁶⁶ Education on the fear of conflict, benefit of multiple perspectives, productive conflict, the dysfunctions of teams⁶⁷ and ways to correct team dysfunctions should be priorities.

A practice guideline manual should be developed to ensure staff understands practice options and expectations.

A good number of staff said they needed help on understanding the particulars of their responsibilities. Some of this is due to the overlapping duties of the “investigators” who are both fact investigators and migration specialists. Creation of a practice guide manual to reflect job expectations for each distinct defense team role should be created to help staff know what is expected of them.

Formal case reviews and mock practice should become a standard practice to ensure the litigation teams have the support necessary to deal with the litigation complexities.

Structured case reviews and simulated practice *before* the work is performed are leading forms of learning and achieving results. The state, the office, and the client all benefit from a prepared team. Currently, the Director encourages internal and outside reviews of cases. These reviews are in fact occurring at OCFW. They should formally become part of the practice and culture of OCFW, and occur regularly and systematically.

Each case could have several case reviews. The first review could be held within the first few months of the team forming and the record being received. The purpose of this review is to

⁶⁵ ABA Tell the Client’s Story: Mitigation in Criminal and Death Penalty Cases (2017), p. 141.

⁶⁶ Productive or creative conflict is helpful for clients. Conflict that is a clash of perspectives is necessary to deal with addressing complex problems. Conflicting viewpoints in addressing the problem are beneficial. Unproductive conflict, *I am right you are wrong, I care, you don’t, and I am not interested in understanding your point of view*, is not helpful for clients. There is a clash between pure advocacy with the goal of winning the argument versus a conversation of reciprocal discovery with both inquiry and advocacy where the goal is to find the best solution. See Chapter 6, “Creating and Leading the Mitigation Team,” ABA *Tell the Client’s Story: Mitigation in Criminal and Death Penalty Cases* (2017) pp. 156, 158-59.

⁶⁷ See Patrick Lencioni, *Overcoming the Five Dysfunctions of a Team* (2005). Lencioni identifies team dysfunctions as absence of trust, fear of conflict, lack of commitment, avoidance of accountability, inattention to results. Overcoming these dysfunctions requires building trust, mastering conflict, achieving commitment, embracing accountability, focusing on results.

ensure that the team is properly constituted, communicating well, actively working in compliance with the Texas and ABA Guidelines, that the team is attuned to the needs of the client, and that the team is beginning to formulate and investigate a compelling theory of life. The second review is conducted after considered investigation of the merits and before the petition is filed. The purpose of this review is to ensure there is a persuasive theory of life and nothing is being missed, neglected or avoided. Any unresolved tension within the team can be addressed. A third case review can be held within months or even weeks of an evidentiary hearing. For this review, the team prepares to present significant aspects of their arguments and evidence in a simulated manner with someone playing the role of the prosecutor and judge. For instance, a particularly difficult cross-examination can be presented. The team provides active feedback from each of their perspectives. If there are loose ends, they are identified at this point with a plan to tie them up. This review process ensures that the theory of the case is set, that it has been fully investigated, and that the team is set to effectively present evidence at this critical hearing. The reviews are attended by not only the defense team but also other staff from OCFW and other experienced defense litigators.

“As a matter of common sense, we know that constructive advice from other perspectives is beneficial, and the more difficult the problem, the more value can be gained from considering new points of view. ‘With different values, we screen reality for different information and put facts together into a different picture.’ None of us, no matter our knowledge and experience, sees things from all the various points of views. Each of us has blind spots. Professionals struggle with the defense mechanisms of avoidance and denial as part of the human condition.”⁶⁸

6. Provide funding for OCFW’s forensic writ responsibilities and create statutory authority to decline forensic writ referrals when resources are inadequate

Financial resources are necessary for the Texas Office of Capital and Forensic Writs to competently and timely meet its statutory and constitutional forensic writ representation responsibilities.

- Only after providing adequate funding for the state capital post-conviction responsibilities, funds and staff should be provided to perform the work from referrals from the Texas Forensic Science Commission.
- The state’s interest to ensure reliable and valid results in criminal cases is advanced by funding an institutional capacity to determine if individuals have a legal claim because of invalid science.
- The authorizing statute should be modified to allow for refusal of a referral from the Texas Forensic Science Commission when OCFW capacity does not exist.

Funding

Texas is a national leader on institutionally addressing the need for forensic science integrity.

⁶⁸ ABA *Tell the Client’s Story: Mitigation in Criminal and Death Penalty Cases* (2017), p. 157.

The Texas Legislature created the Texas Forensic Science Commission in 2005 to address concerns about the integrity and reliability of forensic science in Texas courts. The concerns emanated in part from problems at the Houston Police Department's ("HPD") crime lab in the early 2000's. Serious deficiencies were found in many areas of forensic analysis at the HPD lab, including the handling, labeling, storing and examination of evidence.

OCFW is statutorily required to provide representation in cases referred in writing by the Office of the Texas Forensic Science Commission. The Commission has had thousands of cases that have required further investigation, analysis, further legal review and representation but those cases have not been referred to OCFW because it understands that OCFW was not provided any resources to provide this service. Rather, the Forensic Science Commission has referred those cases to time-limited grant funded programs and pro bono counsel. But there are limits to this practice as a sustainable future method of satisfying this critical need.

The Forensic Writs statutory responsibility assigned to OCFW has never been funded. In the 84th Legislature (2015), the previous OCFW Director supported a bill that was enacted which changed the name from Office of Capital Writs to the Office of Capital and Forensic Writs, and expanded the mandate to include the representation of persons raising junk science claims in non-capital cases referred to OCFW by the Texas Forensic Science Commission. This mandated expansion of responsibilities was unfunded, but came with a fiscal note. In the first biennium, OCFW was required to establish a methodology and handle a "limited" number of forensic cases with existing resources. The idea was that the mandate would expand first, and then, two years later, the expansion would be funded in the manner anticipated by the fiscal note and OCFW would start doing these cases. The current OCFW Director requested money during the 2017 legislative session to fund this expansion, but the legislature did not fund it.

Funding the institutional forensic writ capacity is a high value.

Therefore, as a matter of efficiency, reliability and integrity of the criminal justice system's decision making, there remains a critical need for a funded institutional capacity to accept referrals and investigate referred matters to determine if a person has a legitimate legal claim for relief and if so litigate that claim on behalf of the individual. The Texas Forensic Science Commission cannot perform that function. OCFW could, if funded.

The Texas Forensic Science Commission's initial Annual Report for FY 11 stated: "Texas legislators created the Commission in 2005 in part due to concern over the increasing number of exonerations based on new DNA evidence, in Texas and across the nation. Many of the exonerations occurred after Texas passed landmark post-conviction DNA testing legislation in 2001, codified in Chapter 64 of the Texas Code of Criminal Procedure. The legislation streamlined the process used by inmates to seek post-conviction testing. As the Forensic Science Commission noted in 2012, there were just seven DNA exonerations in Texas prior to the passage of the Chapter 64 DNA testing statute, and there were 37 DNA exonerations in the 11 year period after the Chapter 64 came into effect.

Moreover, of the 45 exonerations in Texas at the time of the FY 11 Annual Report, the Commission estimated that 21 cases involved the use of unvalidated or improper forensic science at trial, and these exonerated individuals spent an average of 13.5 years wrongly incarcerated.⁶⁹

Since then, the numbers of exonerations due to flawed forensic science have increased substantially. The National Registry of Exonerations estimates that there have been 156 exonerations in Texas since 1989 in which flawed forensic science was a contributing factor.⁷⁰

The establishment of the Commission and an entity to litigate forensic writs is not only critical but commendable.

Refusal authority must be created.

Currently, the OCFW authorizing statute does not provide explicit authority to OCFW to decline a case referral when OCFW does not have the capacity to perform the work. The statute should be changed to provide refusal authority upon a referral from the Texas Forensic Science Commission when OCFW's capacity does not exist to litigate the referred forensic writs.

7. Provide professional office space with each staff member with their own office in contiguous space

Professional office space is necessary for the Texas Office of Capital and Forensic Writs to competently and timely meet its statutory and constitutional capital post-conviction and forensic writs litigation responsibilities.

Capital litigation invariably involves sensitive subjects and confidential information. The office space of OCFW is not contiguous, and is laid out in a way that is un conducive to confidential communication. OCFW does not have separate offices for each attorney and investigator. Instead, three attorneys work from makeshift workstations in a former conference room, and four investigators have desks in the office once occupied by the former Director. Other staff work in cubicles where maintaining confidentiality of communication is impossible.

The Office has obtained additional space but does not have the funds to create individual offices for staff and the new space is not contiguous with the present office.

For professional work, staff require individual offices. Importantly, individual offices would increase the efficiency of staff as it would result in the ability to concentrate more and perform work without interfering with the work of colleagues.

⁶⁹ Texas Forensic Science Commission Annual Report FY 11, p. 21-22, <http://www.fsc.texas.gov/sites/default/files/documents/files/TFSCAnnualReport2012.pdf>.

⁷⁰ National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>. See also Report, Timothy Cole Exoneration Review Commission (December 2016), <http://www.txcourts.gov/media/1436589/tcerc-final-report-december-9-2016.pdf> (Examining drug-related exonerations since 2010 and finding that 94% were due to flawed forensic science).

8. Continue communication with the Texas Regional Public Defender's Office to manage the inevitable tension with the different professional responsibilities, and continue communication with other members of the defense community to take advantage of the expertise and perspectives of other criminal defense professionals

Talking with trial counsel

There is inevitable professional tension between trial, increasingly provided by the Regional Public Defender Office, and post-conviction counsel, most usually OCFW counsel. Trial and post-conviction counsel have different roles and responsibilities but they share the same client who is legally and ethically entitled to competent representation from both counsel. As the case progresses, trial counsel has particular professional responsibilities to the client to cooperate with post-conviction counsel. That does not make it easy when work is being scrutinized at a later date and time by post-conviction counsel. How that communication occurs is critical. Post-conviction counsel has the responsibility to professionally and timely communicate with trial counsel.

The “communications challenge in the face of complexity is to manage this paradox: how do we speak clearly to different groups, listen to them and deliver message they experience consistent and aligned with their ways of making sense of the world – and all the while we are learning together, in the moment, about the nature of the situation and what might be helpful ways to make it better?”⁷¹

The tendency is to think of us versus them. The very best professionals “don’t think in terms of us versus them; they don’t think in terms of enemies. There are people who want different things, but each person tends to act from a place that she considers an honorable and rational approach, no matter how horrible it seems to you. There is power in knowing the other perspective, not just to use it against a person in some way but also to learn from it.”⁷²

It is clear from speaking to both the Director of RPDO and the Director of OCFW that these leaders have discussed this tension and have deliberately addressed the tensions. RPDO invited OCFW to come in person and communicate with RPDO staff. Both leaders are to be commended for this step. It would be beneficial for OCFW to invite RPDO to do the same. The two Directors must have ongoing communication between themselves and amongst their staff to manage the tensions which will likely endure.

⁷¹ Jennifer Garvey Berger and Keith Johnston, *Simple Habits for Complex Times: Powerful Practices for Leaders* (2015), p. 149.

⁷² Jennifer Garvey Berger and Keith Johnston, *Simple Habits for Complex Times: Powerful Practices for Leaders* (2015), p. 21.

Consulting colleagues

There is much to be gained from professional associations and communications. The Texas legislature has explicitly authorized OCFW to “consult with law school clinics with applicable knowledge and experience and with other experts as necessary to investigate the facts of a particular case.”⁷³ The current Director encourages external education and consultation. This is an essential practice because the more complex the work, the higher the stakes, the more a professional is required to access differing perspectives.

⁷³ TEX. GOVT. CODE § 78.054 (d).

Conclusion

The OCFW is an office of high public value with substantial challenges and resource needs.

The state has a sacred constitutional responsibility to ensure the death penalty is administered in a fair, consistent and reliable manner. The Texas Office of Capital and Forensic Writs' public value ensuring that this responsibility is met is evident. Texas criminal justice leaders, the Director of the OCFW and its staff are commended for their dedication to the success of the OCFW and for their cooperation in providing information for this Program Assessment.

Despite substantial progress under the current Director, the needs of the OCFW remain prominent as outlined in the eight Recommendations. Expeditious implementation of these Recommendations will allow the OCFW to competently and timely meet its responsibilities.

We urge full implementation of the Recommendations.

The OCFW provides a necessary and fiscally responsible service to clients, the citizens of Texas and the Texas criminal justice system ensuring that the criminal justice system's ultimate legal decision-making is reliable and valid.

References

NAPD and the Systems Builders Committee

This Report was undertaken by the National Association for Public Defense (NAPD) at the request of Benjamin Wolff, Executive Director of the Texas Office of Capital Forensic Writs.

The National Association for Public Defense is a 17,000-member national association of public defenders and other public defense professionals. NAPD is the voice of public defense in America, engaging public defense professionals into a clear and focused voice to address the systemic failure to provide the constitutional right to counsel, and to collaborate with diverse partners for solutions that bring meaningful access to justice for poor people.

The above request was made to the NAPD's Systems Builders Committee, chaired by William Ward, Public Defender of Minnesota, to conduct the assessment and to make recommendations. The NAPD Systems Builders Committee works to strengthen the quality of public defense delivery systems throughout the country. The Systems Builders Committee is comprised of current and retired defender leaders, public defender board and/or commission members, and system advocates representing a range of experiences and perspectives on public defense issues. The mission of the committee is to assist leaders who are building excellent, client-centered public defense programs, through training, consultation, collaboration, and on-site technical assistance.

Methodology

This Report is the result of interviews conducted Monday January 15 thru Thursday January 18, 2017 in person in Austin Texas and subsequently by phone and e-mail with 31 individuals, all staff of the Office of Capital and Forensic Writs, former OCFW staff members, the current and prior Executive Director of the Texas Indigent Defense Commission, capital litigation professionals, members of the Texas Bar Capital and Forensic Writs Committee, multiple interviews with the Office Director, and interviews with the General Counsel of the Texas Forensic Science Commission, the State Prosecuting Attorney, the Executive Director of Texas Judicial Council and the Administrative Director of the Texas Office of Court Administration, and the Presiding Judge of the Texas Court of Criminal Appeals.

There was a review of relevant materials, including: caseload numbers, budgets for the OCFW as well as money spent on capital cases in Texas, the PPRI Report prepared by Texas A&M, the structure of the OCFW, Office policies, the history of the office, training made available to attorneys and staff, and the Spangenberg Report on the Texas public defender system.

For most of the staff interviews, the consultants used an Appreciative Inquiry model, which is a strengths-based investigation, asking:

- What are your responsibilities?
- How do you feel about this Assessment process?

- What do you value most about your work?
- What has been your greatest achievement?
- What factors have contributed to your successes?
- What are three desires to improve your practice?
- What are three wishes to improve your organization's effectiveness?
- What other thoughts do you have?

See generally Singleton *et al.*, "Appreciative Inquiry An Innovative Initiative for Continuous Improvement in Doctoral Education, *AI Practitioner* (May 2014), at 24. Its theory is that there is a four stage process for progress:

1. Discovery ("Discover and disclose [its] positive capacity." (Cooperrider & Whitney, 2001));
2. Dream ("Uncover values and aspirations [you] might not have been aware of." (Bushe, 2007));
3. Design ("A process of finding common ground by sharing discoveries and possibilities, dialoguing and debating." (Ludema, Cooperrider & Barrett, 2001));
4. Destiny ("An invitation to construct the future through innovation and action" (Ludema, Cooperrider & Barrett, 2001)).

See generally "Appreciative Inquiry: 4 Steps to Creating Your Dream Future," <https://positivepsychologyprogram.com/appreciative-inquiry>.

The Recommendations are made using Texas and national standards, including *Guidelines and Standards for Texas Capital Counsel* (2006); the *Supplementary Guidelines and Standards for the Mitigation Function of Defense Teams in Texas Death Penalty Cases* (2015); the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised edition February 2003); and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (2008).

NAPD Consultants for Texas Assessment

Doug Wilson is the Colorado State Public Defender. He started with the Colorado system in 1981 and was assigned to the Pueblo, Colorado trial office in January of 1982 where he handled all types of cases from juvenile delinquency to adult misdemeanors and felonies. He went into private practice in 1985 and handled his first capital case in 1986 and continued to represent capital defendants in trial courts for the next 20 years. In 1992, he returned to the Office of the State Public Defender as the Office Head in the Pueblo trial office where he was responsible for supervising that office, as well as handling capital cases across the state. In 2005, he was appointed by the State Public Defender to the position of Chief Trial Deputy in the State Office where he handled only capital cases across the state. He remained in that position until November 1, 2006, when he was appointed by the Colorado Public Defender Commission to become Colorado's sixth State Public Defender. He currently manages a 90-million-dollar budget and 800 + full time employees.

Ed Monahan is a national criminal and public defense consultant and trainer. He was the chief defender of the Kentucky Department of Public Advocacy, the statewide public defense program, from 2008-2017. He is co-editor of the ABA's *Tell the Client's Story: Mitigation in Criminal and Death Penalty Cases* (May 2017); co-authored with James J. Clark, *Mitigation is the Heart and Soul of Just and Merciful Sentencing*, ABA Human Rights magazine, Vol. 42 No. 4 p. 17; author of *Children are Constitutionally Different: Neuroscience Developments Bring Smart Changes*, American Bar Association Government and Public Sector Lawyers Division, *The Public Lawyer*, Vol. 24 No. 2 (Summer 2016) p. 6; co-authored with James J. Clark *Excessive Workload* ethics chapter in ABA Ethics Manual for Public Defenders (Rodney J. Uphoff, ed., 1995). Ed began as a Kentucky public defender in 1976. Monahan is a member of the Pretrial Justice Institute's Research Advisory Committee; a member and treasurer of the ABA Government and Public Sector Lawyers Division Council, served on the ABA Death Penalty Due Process Review Project Steering Committee, 2014-2017, and on the ABA Task Force on Preservation of the Justice System, 2011 to 2012, co-chaired by Ted Olsen and David Boies. He is a member of the Steering Committee of the National Association for Public Defense and chairs its Education Committee; a member of the National Association of Criminal Defense Lawyers and co-chairs its Subcommittee on Pretrial Release Advocacy; past chair of the Kentucky Bar Association's Criminal Law Section; a member of the KBA Ethics Committee (2000–2007; 2008–2011); and past chair of the NLADA American Council of Chief Defenders. Ed is a charter board member of the Kentucky Association of Criminal Defense Lawyers and a past president. He was co-counsel in *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000) and *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990) (en banc), both granting federal habeas relief to clients sentenced to death. Ed was counsel in *Binion v. Commonwealth*, 891 S.W.2d 383 (Ky. 1995), which recognized the constitutional requirement for defense experts. Ed is a 1976 graduate of Washington D.C.'s Catholic University of America's Columbus School of Law.

Appendix

Tasks for capital post-conviction defense team

These tasks are a compilation of the thoughts of the OCFW attorney and investigator staff, its Director, and the Assessment evaluators. The evaluators provided an initial draft with changes from the Director to the 13 attorney and investigator staff asking each staff member to provide feedback on it. Nine returns of information were received. While there is not complete agreement, this represents a reasonable list of work tasks.

Defense team creation and work

- Lead attorney convenes and meets with defense team, creates agenda, circulates notes, brainstorms issues, work, invites perspective of each team member, facilitates productive conflict, resolves case and team issues, sets priorities;
- Collaboratively, lead attorney allocates, directs, and supervises work of defense team;
- Actively seek involvement and perspectives of members of the team;
- Develop theory of the case and defense strategy;
- Periodic case reviews conducted;
- Mitigation specialist continuously assesses and makes clinical evaluations of clients' and witnesses' mental health; describes symptoms of mental health diagnoses as per DSM-V criteria;
- Conducts work according to state and national capital guidelines;

Client relationship

- Meet with client, maintain prompt and continuous communication with the client, to develop trust, rapport and co-operation;

Obtain, research and review information

- **Records**
 - Obtain trial record and file of trial counsel, trial experts, mitigation specialist, investigator, client life history;
 - Request with business records affidavits records relating to our client's life and family as far back as possible, including school records, employment records, family and individual social service records, juvenile criminal justice records, adult criminal records; and psychological and psychiatric records;
 - Analyze the significance of record and interview information in terms of impact on development, including effect on personality and behavior;
 - Obtain media coverage of the case;
 - Maintain and update daily database of requested and received records;
 - Review, organize, index, digest record, trial counsel files, OCFW-procured files, OCFW witness memos;
 - Identify missing information and file motion to obtain discovery.
- **Investigation and interviews**

- Before filing of petition, conduct thorough and independent investigation, conducting a full examination of the defense provided to the client at all prior phases of the case, as well as all issues pertaining to guilt phase and penalty phase issues ;
- Identify people to interview;
- Interviewing prior counsel and members of the defense team and examining the files of prior counsel;
- Interview witnesses, and build rapport necessary to overcome barriers to disclosure of sensitive information; obtain records of trial counsel, including workload, billing records, and experience;
- Interview jurors, prior experts;
- Obtain affidavits from social history witnesses, jurors, trial experts, other trial team members;
- Locate witnesses, jurors; interview them, prepare their affidavits.
- **Social history and chronologies**
 - Develop chronologies, genograms for team and for experts;
 - Mitigation Specialist develops and writes bio-psycho-social history that will be included in habeas petition that describes family history going back at least three generations.
- **Experts**
 - Identify appropriate experts, seek funding from trial court, retain experts;
 - Facilitate expert work, including providing expert with collated material information, questions to be answered;
 - Work with experts on affidavits.
- **Research**
 - Conduct social science research relevant to multi-generational social history;
 - Conduct research relevant to forensic science issues in case;
 - Research legal authority;
 - Review appellate counsel’s briefs and arguments raised, attend appellate oral argument, CCA Opinion.

Travel

- Travel on cases (prison is 3.5 hours away; case investigation routinely requires 3 hours of travel each way, often more, sometimes with overnight stays), and to trainings in- and out-of-state.

Write motions

- Consider, develop and file motions in trial court and Court of Criminal Appeals;
- Litigate procedural due process issues related to the statutory procedure and entitlement to a hearing;
- Continue to investigate and develop claims before anticipated evidentiary hearing, including obtaining additional relevant affidavits of non-testifying witnesses;
- Move for necessary discovery relevant to claims being investigated and or litigated;

- Seek hearings on motions.

Writing petition

- Develop legal claims;
- Draft petition that litigates all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation;
- Defense team reviews draft petition and affidavits;
- Proofread and cite check petition;
- Finalize and file petition.

Evidentiary hearing

- Prepare witnesses to testify;
- Hearing preparation including case reviews and simulations;
- Courtroom and hearing advocacy;
- Draft hearing-related motions;
- Keep in communication with client, friends, family members, and update as authorized and appropriate;
- Develop exhibits;
- Team reviews and discusses hearing testimony, direct and cross-examination questions and strategy;
- Conduct simulations and obtain feedback;
- Conduct evidentiary hearing;
- Draft proposed Findings of Fact and Conclusions of Law; defense team reviews, edits and files.

CCA work

- Draft appellate and post-hearing briefing.

Certiorari petition

- Research, develop legal arguments;
- File petition for writ of certiorari before the United States Supreme Court.

Education

- Attend training.

Texas Code of Criminal Procedure Article 11.071: Procedure in death penalty case

Application to Death Penalty Case

Sec. 1. Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.

Representation by Counsel

Sec. 2. (a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

(b) If a defendant is sentenced to death the convicting court, immediately after judgment is entered under Article 42.01 , shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus. If the defendant desires appointment of counsel for the purpose of a writ of habeas corpus, the court shall appoint the office of capital and forensic writs to represent the defendant as provided by Subsection (c).

(c) At the earliest practical time, but in no event later than 30 days, after the convicting court makes the findings required under Subsections (a) and (b), the convicting court shall appoint the office of capital and forensic writs or, if the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code , other competent counsel under Subsection (f), unless the applicant elects to proceed pro se or is represented by retained counsel. On appointing counsel under this section, the convicting court shall immediately notify the court of criminal appeals of the appointment, including in the notice a copy of the judgment and the name, address, and telephone number of the appointed counsel.

(d) Repealed by Acts 2009, 81st Leg., ch. 781, § 11.

(e) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move for the appointment of counsel in federal habeas review under 18 U.S.C. Section 3599 . The attorney shall immediately file a copy of the motion with the court of criminal appeals, and if the attorney fails to do so, the court may take any action to ensure that the applicant's right to federal habeas review is protected, including initiating contempt proceedings against the attorney.

(f) If the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code , the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code . The convicting court shall reasonably compensate as provided by Section 2A an attorney appointed under this section, other than an attorney employed by the office of capital and forensic writs, regardless of whether the attorney is appointed by the convicting court or was appointed by the court of criminal appeals under prior law. An attorney appointed under this section who is employed by the office of capital and

forensic writs shall be compensated in accordance with Subchapter B, Chapter 78, Government Code.

State Reimbursement; County Obligation

Sec. 2A. (a) The state shall reimburse a county for compensation of counsel under Section 2, other than for compensation of counsel employed by the office of capital and forensic writs, and for payment of expenses under Section 3, regardless of whether counsel is employed by the office of capital and forensic writs. The total amount of reimbursement to which a county is entitled under this section for an application under this article may not exceed \$25,000. Compensation and expenses in excess of the \$25,000 reimbursement provided by the state are the obligation of the county.

(b) A convicting court seeking reimbursement for a county shall certify to the comptroller of public accounts the amount of compensation that the county is entitled to receive under this section. The comptroller of public accounts shall issue a warrant to the county in the amount certified by the convicting court, not to exceed \$25,000.

(c) The limitation imposed by this section on the reimbursement by the state to a county for compensation of counsel and payment of reasonable expenses does not prohibit a county from compensating counsel and reimbursing expenses in an amount that is in excess of the amount the county receives from the state as reimbursement, and a county is specifically granted discretion by this subsection to make payments in excess of the state reimbursement.

(d) The comptroller shall reimburse a county for the compensation and payment of expenses of an attorney appointed by the court of criminal appeals under prior law. A convicting court seeking reimbursement for a county as permitted by this subsection shall certify the amount the county is entitled to receive under this subsection for an application filed under this article, not to exceed a total amount of \$25,000.

Investigation of Grounds for Application

Sec. 3. (a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

(b) Not later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the convicting court an ex parte, verified, and confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request for expenses must state:

- (1) the claims of the application to be investigated;
- (2) specific facts that suggest that a claim of possible merit may exist; and
- (3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant.

(d) Counsel may incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the convicting court or the court of criminal appeals. On presentation of a claim for reimbursement, which may be presented ex parte, the convicting court shall order reimbursement of counsel for expenses, if the expenses are reasonably necessary and reasonably

incurred. If the convicting court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant. The applicant may request reconsideration of the denial for reimbursement by the convicting court.

(e) Materials submitted to the court under this section are a part of the court's record.

(f) This section applies to counsel's investigation of the factual and legal grounds for the filing of an application for a writ of habeas corpus, regardless of whether counsel is employed by the office of capital and forensic writs.

Filing of Application

Sec. 4. (a) An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.

(b) The convicting court, before the filing date that is applicable to the applicant under Subsection (a), may for good cause shown and after notice and an opportunity to be heard by the attorney representing the state grant one 90-day extension that begins on the filing date applicable to the defendant under Subsection (a). Either party may request that the court hold a hearing on the request. If the convicting court finds that the applicant cannot establish good cause justifying the requested extension, the court shall make a finding stating that fact and deny the request for the extension.

(c) An application filed after the filing date that is applicable to the applicant under Subsection (a) or (b) is untimely.

(d) If the convicting court receives an untimely application or determines that after the filing date that is applicable to the applicant under Subsection (a) or (b) no application has been filed, the convicting court immediately, but in any event within 10 days, shall send to the court of criminal appeals and to the attorney representing the state:

(1) a copy of the untimely application, with a statement of the convicting court that the application is untimely, or a statement of the convicting court that no application has been filed within the time periods required by Subsections (a) and (b); and

(2) any order the judge of the convicting court determines should be attached to an untimely application or statement under Subdivision (1).

(e) A failure to file an application before the filing date applicable to the applicant under Subsection (a) or (b) constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 4A.

Untimely Application; Application Not Filed

Sec. 4A. (a) On command of the court of criminal appeals, a counsel who files an untimely application or fails to file an application before the filing date applicable under Section 4(a) or (b) shall show cause as to why the application was untimely filed or not filed before the filing date.

(b) At the conclusion of the counsel's presentation to the court of criminal appeals, the court may:

(1) find that good cause has not been shown and dismiss the application;

(2) permit the counsel to continue representation of the applicant and establish a new filing date for the application, which may be not more than 180 days from the date the court permits the counsel to continue representation; or

(3) appoint new counsel to represent the applicant and establish a new filing date for the application, which may be not more than 270 days after the date the court appoints new counsel.

(c) The court of criminal appeals may hold in contempt counsel who files an untimely application or fails to file an application before the date required by Section 4(a) or (b). The court of criminal appeals may punish as a separate instance of contempt each day after the first day on which the counsel fails to timely file the application. In addition to or in lieu of holding counsel in contempt, the court of criminal appeals may enter an order denying counsel compensation under Section 2A.

(d) If the court of criminal appeals establishes a new filing date for the application, the court of criminal appeals shall notify the convicting court of that fact and the convicting court shall proceed under this article.

(e) Sections 2A and 3 apply to compensation and reimbursement of counsel appointed under Subsection (b)(3) in the same manner as if counsel had been appointed by the convicting court, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

(f) Notwithstanding any other provision of this article, the court of criminal appeals shall appoint counsel and establish a new filing date for application, which may be no later than the 270th day after the date on which counsel is appointed, for each applicant who before September 1, 1999, filed an untimely application or failed to file an application before the date required by Section 4(a) or (b). Section 2A applies to the compensation and payment of expenses of counsel appointed by the court of criminal appeals under this subsection, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

Subsequent Application

Sec. 5. (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 , 37.0711 , or 37.072.

(b) If the convicting court receives a subsequent application, the clerk of the court shall:

(1) attach a notation that the application is a subsequent application;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) immediately send to the court of criminal appeals a copy of:

(A) the application;

(B) the notation;

(C) the order scheduling the applicant's execution, if scheduled; and

(D) any order the judge of the convicting court directs to be attached to the application.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

(f) If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section.

Issuance of Writ

Sec. 6. (a) If a timely application for a writ of habeas corpus is filed in the convicting court, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b) If the convicting court receives notice that the requirements of Section 5 for consideration of a subsequent application have been met, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b-1) If the convicting court receives notice that the requirements of Section 5(a) for consideration of a subsequent application have been met and if the applicant has not elected to proceed pro se and is not represented by retained counsel, the convicting court shall appoint, in order of priority:

(1) the attorney who represented the applicant in the proceedings under Section 5, if the attorney seeks the appointment;

(2) the office of capital and forensic writs, if the office represented the applicant in the proceedings under Section 5 or otherwise accepts the appointment; or

(3) counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code, if the office of capital and forensic writs:

(A) did not represent the applicant as described by Subdivision (2); or

(B) does not accept or is prohibited from accepting the appointment under Section 78.054, Government Code.

(b-2) Regardless of whether the subsequent application is ultimately dismissed, compensation and reimbursement of expenses for counsel appointed under Subsection (b-1) shall be provided

as described by Section 2, 2A, or 3, including compensation for time previously spent and reimbursement of expenses previously incurred with respect to the subsequent application.

(c) The clerk of the convicting court shall:

(1) make an appropriate notation that a writ of habeas corpus was issued;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) send a copy of the application by certified mail, return receipt requested, or by secure electronic mail to the attorney representing the state in that court.

(d) The clerk of the convicting court shall promptly deliver copies of documents submitted to the clerk under this article to the applicant and the attorney representing the state.

Answer to Application

Sec. 7. (a) The state shall file an answer to the application for a writ of habeas corpus not later than the 120th day after the date the state receives notice of issuance of the writ. The state shall serve the answer on counsel for the applicant or, if the applicant is proceeding pro se, on the applicant. The state may request from the convicting court an extension of time in which to answer the application by showing particularized justifying circumstances for the extension, but in no event may the court permit the state to file an answer later than the 180th day after the date the state receives notice of issuance of the writ.

(b) Matters alleged in the application not admitted by the state are deemed denied.

Findings of Fact Without Evidentiary Hearing

Sec. 8. (a) Not later than the 20th day after the last date the state answers the application, the convicting court shall determine whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist and shall issue a written order of the determination.

(b) If the convicting court determines the issues do not exist, the parties shall file proposed findings of fact and conclusions of law for the court to consider on or before a date set by the court that is not later than the 30th day after the date the order is issued.

(c) After argument of counsel, if requested by the court, the convicting court shall make appropriate written findings of fact and conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court's determination is made under Subsection (a), whichever occurs first.

(d) The clerk of the court shall immediately send to:

(1) the court of criminal appeals a copy of the:

(A) application;

(B) answer;

(C) orders entered by the convicting court;

(D) proposed findings of fact and conclusions of law; and

(E) findings of fact and conclusions of law entered by the court; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

Hearing

Sec. 9. (a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

(b) The convicting court shall hold the evidentiary hearing not later than the 30th day after the date on which the court enters the order designating issues under Subsection (a). The convicting court may grant a motion to postpone the hearing, but not for more than 30 days, and only if the court states, on the record, good cause for delay.

(c) The presiding judge of the convicting court shall conduct a hearing held under this section unless another judge presided over the original capital felony trial, in which event that judge, if qualified for assignment under Section 74.054 or 74.055, Government Code , may preside over the hearing.

(d) The court reporter shall prepare a transcript of the hearing not later than the 30th day after the date the hearing ends and file the transcript with the clerk of the convicting court.

(e) The parties shall file proposed findings of fact and conclusions of law for the convicting court to consider on or before a date set by the court that is not later than the 30th day after the date the transcript is filed. If the court requests argument of counsel, after argument the court shall make written findings of fact that are necessary to resolve the previously unresolved facts and make conclusions of law not later than the 15th day after the date the parties file proposed findings or not later than the 45th day after the date the court reporter files the transcript, whichever occurs first.

(f) ABA's Criminal Justice Section Defense Function Standard 4-6.1(b), the court of criminal appeals a copy of:

(A) the application;

(B) the answers and motions filed;

(C) the court reporter's transcript;

(D) the documentary exhibits introduced into evidence;

(E) the proposed findings of fact and conclusions of law;

(F) the findings of fact and conclusions of law entered by the court;

(G) the sealed materials such as a confidential request for investigative expenses; and

(H) any other matters used by the convicting court in resolving issues of fact; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

(g) The clerk of the convicting court shall forward an exhibit that is not documentary to the court of criminal appeals on request of the court.

Rules of Evidence

Sec. 10. The Texas Rules of Criminal Evidence apply to a hearing held under this article.

Review by Court of Criminal Appeals

Sec. 11. The court of criminal appeals shall expeditiously review all applications for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the applicant or the state. After reviewing the record, the court shall enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify.

TEXAS GOVERNMENT CODE, CHAPTER 78. CAPITAL AND FORENSIC WRITS COMMITTEE AND OFFICE OF CAPITAL AND FORENSIC WRITS

SUBCHAPTER A. CAPITAL AND FORENSIC WRITS COMMITTEE

Sec. 78.001. DEFINITIONS. In this subchapter:

(1) "Committee" means the capital and forensic writs committee established under this subchapter.

(2) "Office of capital and forensic writs" means the office of capital and forensic writs established under Subchapter B.

Added by Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 1, eff. September 1, 2009.

Amended by:

Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 12, eff. September 1, 2015.

Sec. 78.002. ESTABLISHMENT OF COMMITTEE; DUTIES. (a) The capital and forensic writs committee is established.

(b) The committee shall recommend to the court of criminal appeals as provided by Section 78.004 a director for the office of capital and forensic writs when a vacancy exists for the position of director.

Added by Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 1, eff. September 1, 2009.

Amended by Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 13, eff. September 1, 2015.

Sec. 78.003. APPOINTMENT AND COMPOSITION OF COMMITTEE. (a) The committee is composed of the following five members who are appointed by the president of the State Bar of Texas, with ratification by the executive committee of the State Bar of Texas:

(1) three attorneys who are members of the State Bar of Texas and who are not employed as prosecutors or law enforcement officials, all of whom must have criminal defense experience with death penalty proceedings in this state; and

(2) two state district judges, one of whom serves as presiding judge of an administrative judicial region.

(b) The committee shall elect one member of the committee to serve as the presiding officer of the committee.

(c) The committee members serve at the pleasure of the president of the State Bar of Texas, and the committee meets at the call of the presiding officer of the committee.

Added by Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 1, eff. September 1, 2009.

Sec. 78.004. RECOMMENDATION AND APPOINTMENT OF DIRECTOR OF OFFICE OF CAPITAL AND FORENSIC WRITS. (a) The committee shall submit to the court of criminal appeals, in order of the committee's preference, a list of the names of not more than five persons the committee recommends that the court consider in appointing the director of the office of capital and forensic writs when a vacancy exists for the position of director. If the committee finds that three or more persons under the committee's consideration are qualified to serve as the director of the office of capital and forensic writs, the committee must include at least three names in the list submitted under this subsection.

(b) Each person recommended to the court of criminal appeals by the committee under Subsection (a):

(1) must exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases, as described by the Guidelines and Standards for Texas Capital Counsel, as published by the State Bar of Texas; and

(2) may not have been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a criminal case.

(c) When a vacancy for the position exists, the court of criminal appeals shall appoint from the list of persons submitted to the court under Subsection (a) the director of the office of capital and forensic writs.

Added by Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 1, eff. September 1, 2009.

Amended by: Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 14, eff. September 1, 2015.

Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 15, eff. September 1, 2015.

SUBCHAPTER B. OFFICE OF CAPITAL AND FORENSIC WRITS

Sec. 78.051. DEFINITIONS. In this subchapter:

(1) "Committee" means the capital and forensic writs committee established under Subchapter A.

(2) "Office" means the office of capital and forensic writs established under this subchapter.

Added by Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 1, eff. September 1, 2009.

Amended by:

Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 17, eff. September 1, 2015.

Sec. 78.052. ESTABLISHMENT; FUNDING. (a) The office of capital and forensic writs is established and operates under the direction and supervision of the director of the office.

(b) The office shall receive funds for personnel costs and expenses:

(1) as specified in the General Appropriations Act; and

(2) from the fair defense account under Section 79.031, in an amount sufficient to cover personnel costs and expenses not covered by appropriations described by Subdivision (1).

Added by Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 1, eff. September 1, 2009.

Amended by: Acts 2011, 82nd Leg., R.S., Ch. 984 (H.B. 1754), Sec. 3, eff. September 1, 2011.

Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 18, eff. September 1, 2015.

Sec. 78.053. DIRECTOR; STAFF. (a) The court of criminal appeals shall appoint a director to direct and supervise the operation of the office. The director serves a four-year term and continues to

serve until a successor has been appointed and qualified. The court of criminal appeals may remove the director only for good cause. The director may be reappointed for a second or subsequent term.

(b) The director shall employ attorneys and employ or retain licensed investigators, experts, and other personnel necessary to perform the duties of the office. To be employed by the director, an attorney may not have been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a criminal case.

(c) The director and any attorney employed by the office may not:

- (1) engage in the private practice of criminal law; or
- (2) accept anything of value not authorized by law for services rendered under this subchapter.

Added by Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 1, eff. September 1, 2009.

Amended by: Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 19, eff. September 1, 2015.

Sec. 78.054. POWERS AND DUTIES. (a) The office may not accept an appointment under Article 11.071, Code of Criminal Procedure, if:

- (1) a conflict of interest exists;
- (2) the office has insufficient resources to provide adequate representation for the defendant;
- (3) the office is incapable of providing representation for the defendant in accordance with the rules of professional conduct; or
- (4) other good cause is shown for not accepting the appointment.

(b) The office may not represent a defendant in a federal habeas review. The office may not represent a defendant in an action or proceeding in state court other than an action or proceeding that:

- (1) is conducted under Article 11.071, Code of Criminal Procedure;
- (2) is collateral to the preparation of an application under Article 11.071, Code of Criminal Procedure;
- (3) concerns any other post-conviction matter in a death penalty case other than a direct appeal, including an action or proceeding under Article 46.05 or Chapter 64, Code of Criminal Procedure; or
- (4) is conducted under Article 11.073, Code of Criminal Procedure, or is collateral to the preparation of an application under Article 11.073, Code of Criminal Procedure, if the case was referred in writing to the office by the Texas Forensic Science Commission under Section 4(h), Article 38.01, Code of Criminal Procedure.

(c) Notwithstanding Article 26.04(p), Code of Criminal Procedure, the office may independently investigate the financial condition of any person the office is appointed to represent. The office shall report the results of the investigation to the appointing judge. The judge may hold a hearing to determine if the person is indigent and entitled to representation under this section.

(d) The office may consult with law school clinics with applicable knowledge and experience and with other experts as necessary to investigate the facts of a particular case.

Added by Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 1, eff. September 1, 2009.

Amended by: Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 20, eff. September 1, 2015.

Sec. 78.055. COMPENSATION OF OTHER APPOINTED ATTORNEYS. If it is necessary that an attorney other than an attorney employed by the office be appointed, that attorney shall be compensated as provided by Articles 11.071 and 26.05, Code of Criminal Procedure.

Added by Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 1, eff. September 1, 2009.

Sec. 78.056. APPOINTMENT LIST. (a) The presiding judges of the administrative judicial regions shall maintain a statewide list of competent counsel available for appointment under Section 2(f), Article 11.071, Code of Criminal Procedure, if the office does not accept or is prohibited from accepting an appointment under Section 78.054. Each attorney on the list:

(1) must exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases; and

(2) may not have been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case.

(b) The Office of Court Administration of the Texas Judicial System and the Texas Indigent Defense Commission shall provide administrative support necessary under this section.

Added by Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 1, eff. September 1, 2009.

Amended by: Acts 2011, 82nd Leg., R.S., Ch. 984 (H.B. 1754), Sec. 4, eff. September 1, 2011.

Standards – Texas and National

ABA Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report (2013), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf.

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised edition February 2003), https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.

State Bar of Texas, Guidelines and Standards for Texas Capital Counsel (2006), https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/Sate/TX_Bar_Association_adopted_version_of_ABA_Guidelines.authcheckdam.pdf. As the preface states, “The *Guidelines and Standards for Texas Capital Counsel* are a Texas-specific version of the American Bar Association’s *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, as drafted by the State Bar of Texas Standing Committee on Legal Services to the Poor in Criminal Matters.”

These Texas Guidelines and Standards provide an in-depth recitation of the standard of care demanded of capital post-conviction counsel in a more amplified fashion than the corresponding ABA Guidelines. See generally Guideline 12.2(B) [“Duties of Habeas Corpus Counsel”], 69(10) Texas Bar Journal 976-982 (Nov. 2006).

ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008), https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/2008_July_CC1_Guidelines.authcheckdam.pdf (specifically noting that they “were developed in cooperation with the ABA Death Penalty Representation Project to assist its work and to reflect prevailing professional norms.”).

State Bar of Texas, Supplementary Guidelines and Standards for the Mitigation Function of Defense Teams in Texas Death Penalty Cases (2015), at p.1, https://www.texasbar.com/AM/Template.cfm?Section=Past_Issues&Template=/CM/ContentDisplay.cfm&ContentID=30513 (“Inherent in the approach to competent capital defense dictated by the Guidelines and Standards is the recognition that the mitigation function is multi-faceted and multi-disciplinary, even though ultimate responsibility for the investigation of such issues rests irrevocably with counsel. Because the mitigation function is of utmost importance in the defense of capital cases, and because counsel must rely on the assistance of experts, investigators and mitigation specialists in developing mitigating evidence, the Standing Committee on Legal Services to the Poor in Criminal Matters determined that these Supplementary Guidelines and Standards for the Mitigation Function of Defense Teams in Texas Death Penalty Cases would provide useful guidance to judges and defense counsel on selecting, funding and working with mitigation specialists in death penalty cases.”).

Highlights of the American Bar Association 2003 Death Penalty Guidelines and Guidelines and Standards for Texas Capital Counsel:

Guidelines describe the national/Texas standards: “The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.” ABA Guideline 1.1 (A).

Apply to post-conviction review proceedings. *See* Guideline 1.1 (B). *See also* Texas Guideline 1.1(B) (same).

Require “Each jurisdiction should adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with these Guidelines.” The plan must set forth how the Guidelines will be met ensuring zealous advocacy and without political interference. Guideline 2.1.

Require a Responsible Agency that is an Independent Authority” which is “independent of the judiciary and it, and not the judiciary or elected officials, should select lawyers for specific cases.” Guideline 3.1

The Responsible Agency ensures clients receive “high quality legal representation,” and should perform the following duties:

1. Recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;
2. Draft and periodically publish rosters of certified attorneys;
3. Draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;
4. Assign the attorneys who will represent the defendant at each stage of every case, except to
5. Monitor the performance of all attorneys providing representation in capital proceedings;
6. Periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;
7. Conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and
8. Investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.

Guideline 3.1(E).

Legal representation shall be provided by a Defense Team that has “no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist,” and “at

least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.” Guideline 4.1(A).

Lead counsel shall be designated and that person “bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards.” Guideline 10.4.

Defense counsel shall be qualified as set out in Guideline 5.1.

Guidelines require a “workload level that enables counsel to provide each client with high quality legal representation in accordance with these Guidelines.” Guidelines 6.1, 10.3.

Guidelines require the Responsible Agency to monitor performance and have procedures for investigating and addressing complaints. Guideline 7.1.

Guidelines mandate sufficient training as outlined in Guideline 8.1.

Guidelines mandate funding that allows implementation of the Guideline requirements. Guideline 9.1.

Guidelines require that the “Responsible Agency should establish standards of performance for all counsel in death penalty cases.” Guideline 10.1.

Guidelines mandate prompt and continuous communication with the client. Guideline 10.5.

Guidelines impose additional obligations when representing a foreign national. Guideline 10.6.

Guidelines require “thorough and independent investigations” conducting “a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.” Guideline 10.7.

Counsel has a duty to all appropriate legal claims. Guideline 10.8.

Counsel is directed to seek agreed-upon disposition. Guideline 10.9.1.

Guidelines direct counsel “to maximize the client’s ability to obtain postconviction relief.” Guideline 10.14

Counsel has the duty “to seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation.” Guideline 10.15.1.