II. HIGHLIGHTS AND KEY RECOMMENDATIONS OF THE TEXAS REPORT

A. The Texas Capital Punishment Assessment Team's Findings

It is the Texas Capital Punishment Assessment Team's unanimous view that so long as Texas imposes the death penalty, its system for doing so must be comprised of sufficient checks and balances to ensure fairness in selection of offenders to receive the death penalty, reduce to the extent possible the risk of executing the innocent, and preserve public confidence in the administration of criminal justice. Despite some progress Texas has made in the last several years—which is detailed throughout this Report—the Assessment Team has identified a number of areas in which the state's death penalty system falls far short of this imperative. In many areas, Texas appears out of step with better practices implemented in other capital jurisdictions, fails to rely upon scientifically reliable methods and processes in the administration of the death penalty, and provides the public with inadequate information to understand and evaluate capital punishment in the state.

B. Recent Improvements

Notably, Texas has made strides in several areas to improve the fairness of capital proceedings in recent years. Some of the most significant improvements are summarized below.

In 2011, Texas enacted a law requiring law enforcement agencies to "adopt . . . a detailed written policy regarding the administration of photograph and live lineup identification procedures." Pursuant to the new state law, the Bill Blackwood Law Enforcement Management Institute has developed a model policy on eyewitness identification procedures that comports with a number of better practices to lessen the risk of misidentification. Agencies whose policies and practices mirror the model policy will likely reduce misidentifications and resulting wrongful convictions. Texas law also requires law enforcement agencies to review their eyewitness identification policies every two years. Through entities like the Texas Criminal Justice Integrity Unit, law enforcement officers and prosecutors receive training regarding proper procedures for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses, among many other issues concerning wrongful conviction. Texas also recently enacted a new law aimed at remedying the effect of unreliable science on convictions in the state.

In 2013, Texas adopted the Michael Morton Act which will require prosecutors to disclose police reports and witness statements, which—as past Texas cases demonstrate—often contain exonerating or mitigating evidence. The law will likely improve the fairness of criminal proceedings by allowing defense counsel to better assess the strength of the evidence before trial. Adoption of the Act is also a public affirmation of Texas's commitment to the proper role of the prosecutor in seeking justice and ensuring that a defendant receives a fair trial.

Finally, one of the most significant advancements aimed at improving the fairness of capital proceedings was brought about by the establishment of two offices to provide capital representation throughout the state. In 2007, the Regional Public Defender for Capital Cases (RPDO) was established to represent indigent capital defendants at trial in an increasing number

of Texas's 254 counties. In 2009, the Office of Capital Writs (OCW), was created to represent indigent death-sentenced inmates during state habeas proceedings. Prior to the creation of these two offices, the State of Texas relied almost exclusively on locally-appointed counsel to represent indigent capital defendants and death-sentenced inmates. Although the most populous counties continue to rely primarily upon an appointment system in capital trials, the creation of these two offices—staffed by attorneys with demonstrated knowledge and expertise in death penalty cases—is a significant step forward in the improvement of the quality of representation available to Texas's indigent defendants and inmates in death penalty cases.

C. Areas and Recommendations for Reform

The Texas Capital Punishment Assessment Team has identified a series of individual problems within the state's death penalty system. The Team notes that some of these problems, standing alone, may not appear to be significant, but cautions that their harms are cumulative. The capital system has many interconnected parts; problems in one area may undermine Texas's use of sound procedures in others.

Texas incurs a variety of costs as result of these deficiencies which may cast a pall over the integrity of its entire criminal justice system. Mistakes in the administration of the death penalty lead to a serious public safety concern: the innocent are convicted, possibly facing execution, while a guilty perpetrator remains free to commit additional crimes. An error-prone system also incurs a high financial cost. For example, since 1992, Texas has paid over $60 million to those it has wrongfully imprisoned—money that could have been applied more effectively to find the "right guy" the first time around. In addition, the state and federal courts must spend significant time and resources correcting errors in capital cases—errors that could have been prevented—to the detriment of the vast majority of Texans who rely on the justice system every day. Indeed, preventing error is often far less expensive than correcting error. And such a flawed process exacts an intangible toll on victims' families.

Accordingly, the Texas Assessment Team agrees that the following areas are most in need of reform. These areas are followed by the recommendations for reform endorsed unanimously by the Team. All of the Texas Assessment Team's findings and recommendations for reform are found in the individual chapters contained in this Report.

PRETRIAL

Law Enforcement Identification Procedures (Chapter 2). Texas has, by way of the Bill Blackwood Institute, developed sound policies for reducing the risk of eyewitness misidentifications. In order to prevent future miscarriages of justice, Texas should build upon its recent adoption of a law requiring law enforcement to adopt written policies on conducting eyewitness identifications. This is particularly important given that from 1989 through 2012, at least 47 people in Texas whose convictions were based in significant part on eyewitness identification were later exonerated following DNA testing or the discovery of new evidence. Ten of those individuals had been sentenced to death. Further, despite the known problems with eyewitness identifications, Texas permits eyewitnesses to make identifications in court, even if a pretrial procedure was so suggestive as to require suppression, so long as the courtroom

identification has a source "independent" of the prior procedure. Finally, unlike the majority of U.S. jurisdictions, Texas does not permit the court to provide an instruction explaining the factors affecting eyewitness accuracy which would help jurors' improve their decision-making. Importantly, the State has yet to adopt an important and related recommendation from the Timothy Cole Advisory Panel on Wrongful Convictions that evidence of compliance or noncompliance with the model policy should be admissible in court.

Recommendations
All law enforcement agencies should at least adopt the *Model Policy*'s provisions, which provide a minimum standard for conducting identifications. Texas law should include remedies for agencies' noncompliance with state-sanctioned identification procedures. These remedies need not entail automatic exclusion of the eyewitness's identification. Further, when appropriate in an individual case, Texas courts should instruct jurors on possible factors to consider in gauging the accuracy of an eyewitness identification, as is the case in many other jurisdictions—including jurisdictions with the death penalty. Finally, Texas should not adhere to its existing "independent source rule," which permits eyewitnesses to make identifications *in court*, even if a pretrial procedure was so suggestive as to require suppression.

Law Enforcement Interrogation Procedures (Chapter 2). A review of Texas cases in the National Registry of Exonerations reveals that, from 1989 through 2012, at least five people offered confessions to law enforcement yet later were exonerated following DNA testing or the discovery of new evidence. Given the risk that an innocent person will confess to a crime, it is imperative for law enforcement officers to fully video-record a suspect's interrogation, including any questioning that precedes the formal confession and the suspect's waiver of his/her *Miranda* rights. A video-recording provides the court, jury, and prosecutor with the best means to determine whether a confession is credible, including whether law enforcement engaged in any coercive tactics in obtaining a confession.

Recommendations
Texas should adopt legislation to require all law enforcement agencies to video- or audio-record the entirety of custodial interrogations in serious felony investigations—especially those which may lead to capital charges. Noncustodial interrogations and interviews with cooperative witnesses also should be recorded. Such measures would help to conserve resources that might otherwise be spent on litigating the admissibility of confessions. To develop this legislation, the Texas Legislature ought to enlist the aid of the Bill Blackwood Law Enforcement Management Institute, which developed the state's model eyewitness identification policy in 2012. In addition, the State of Texas could draw on the experience of other states and jurisdictions that have implemented interrogation recording statutes. Limited exceptions should be permitted to ensure that the vast majority of interrogations will be recorded while also protecting public safety in those instances when a recording requirement would be imprudent or infeasible. To promote the complete recording of custodial interrogations, the statute must provide defendants with a remedy whenever law enforcement officials violate the statute by failing to make the recording.

Preservation of Biological Evidence (Chapter 3). As of August 2013, 48 convicted persons have been exonerated through DNA testing in Texas. While the State is commended for enacting a provision requiring preservation of evidence in death penalty cases, this provision is

not without significant shortcomings. Texas does not require indefinite preservation of biological evidence in violent felony cases, although the commission of a violent felony in the past can affect the decision to sentence a person to death. The statute also fails to specify who is responsible for preserving biological evidence or to require each county to adopt policies to delineate these responsibilities. Anecdotal accounts suggest that the failure to delineate responsibility has led to inadvertent destruction of evidence in some cases.

The importance of preserving biological evidence has been powerfully illustrated by the results of biological testing completed in Dallas County. The work of that county's conviction integrity unit has led to 35 exonerations, 16 of which have involved DNA testing. Dallas County was afforded this capability because the Southwestern Institute of Forensic Sciences preserved significantly more biological evidence than many other public laboratories in Texas. By contrast, the Harris County District Attorney's Office was hampered in a similar effort because biological evidence from old convictions were not preserved and thus could not be tested.

Recommendations
Texas should require indefinite preservation of biological evidence collected in any violent felony case. Furthermore, in shaping relief for a death row inmate's possible meritorious legal claims, courts or other actors—such as the Board of Pardons and Paroles—who are situated to provide equitable relief, should consider the impact the state's failure to adhere to existing preservation requirements in determining the scope of that relief.

Access to Testing of Biological Evidence (Chapter 3). Texas's current post-conviction DNA testing statute imposes a number of limitations on a death row inmate's access to testing. Among the statute's many limitations is that a death row inmate may not be afforded access to testing if such testing would show with reasonable probability that s/he should not have been sentenced to death.

Recommendations
Texas should amend its post-trial testing statute to ensure that DNA testing is available to an inmate who is seeking to show a reasonable probability exists that s/he is innocent of the offense *or* did not engage in aggravating conduct that was presented to the fact-finder during the sentencing phase of his/her capital trial. In addition, testing ought to be permitted on new evidence—subject to the rules of evidence and safeguards governing chain of custody—even if it was not secured in relation to the inmate's offense. The requirement that identity was or is an issue in the case also should be eliminated—particularly as concerns over relative culpability have significant bearing on both eligibility to be tried for capital murder, as well as the decision to sentence a defendant to death. Further, given the difficulty in foreseeing future advances in forensic science, Texas should include a provision that provides the court discretion to order post-conviction testing if it is in the interests of justice. Finally, given the possibility of error regardless of the advances of science, credible allegations of error in previous testing should give rise to access to re-testing of biological evidence. The Assessment Team also notes that the recent enactment of pretrial testing obligations in capital cases does not resolve the shortcomings cited above. This law should have no bearing on an inmate's access to testing in the post-trial context.

Crime Laboratories and Medical Examiner Offices (Chapter 4). Many of the documented occurrences of mistake and fraud in forensic analysis in Texas appear to be systemic and institutional in nature. The power of forensic science to aid in the fair administration of justice is enormous. Just as powerfully, however, is the ability of faulty or fraudulent scientific analysis to contribute to wrongful convictions. Importantly, incidents of mistake and fraud not only cast a pall over cases in which a laboratory or analyst conducted shoddy work; instead, the integrity of *many* criminal prosecutions in the state are cast—albeit unfairly—in to doubt. Texas must do more to build credibility in to its criminal justice process—particularly when a life is at stake. The current patchwork of state and local, accredited and unaccredited, and formal and informal forensic laboratory analysis does not well-serve this purpose.

Recommendations
Texas Department of Public Safety (DPS) laboratories should be the standard-bearer for accurate, timely, and reliable forensic analysis in Texas. These laboratories must be better funded, particularly because many smaller and rural jurisdictions in the state must rely on DPS for forensic analysis. All laboratories conducting forensic analysis—particularly those engaged in analysis that will be admitted in a potential death penalty case—should adhere to the highest standards for casework. Because accreditation is not a foolproof method for ensuring high quality work, however, individual laboratory standards must also require continuing education of analysts performing this work. Standards must ensure regular and meaningful verification of a laboratory by an outside authority. In addition, due to the failures at individual medical examiner offices, the State should require mandatory accreditation of offices and certification of individuals who conduct such investigations. Finally, several crime laboratories fall under the authority of law enforcement in the state. In at least one instance, a medical examiner resigned from office citing law enforcement interference with death investigations. Thus, Texas should adhere to the recommendations set forth in the 2009 *National Academy of Sciences Report on Forensic Science* which recommended that "[s]cientific and medical assessment conducted in forensic investigations should be independent of law enforcement efforts either to prosecute criminal suspects or even to determine whether a criminal act has indeed been committed."

Forensic Science Commission (Chapter 4). With the creation of the Forensic Science Commission (Commission), Texas has formed a unique entity that serves as a valuable check on the reliability of forensic investigations. The events surrounding the Commission's investigation of Cameron Todd Willingham's case, however, in which subsequent forensic analyses indicated that Willingham—who was executed in 2004—may not have been responsible for the murder of his three children by arson, are troubling. The delays and obstruction which hampered the Commission's investigation into the case against Willingham do not serve the effort to avoid future miscarriages of justice.

Recommendations
Texas should adhere to the various recommendations promulgated by the Commission in its report on the dubious forensic science used to convict Cameron Todd Willingham and Ernest Ray Willis. Such recommendations include promoting national standards for arson investigation, requiring enhanced certification and collaborative training for fire investigators,

Recommendations (Cont'd)
encouraging periodic curriculum and peer review, evidence preservation, and standards for reexamination of cases.

TRIAL AND SENTENCING

Texas Capital Sentencing Structure (Chapter 10). Texas's capital sentencing procedure is remarkably different from that of other jurisdictions. In most states, after finding a defendant guilty of a capital crime, jurors must weigh aggravating and mitigating circumstances to determine whether a defendant should receive the death penalty. In Texas, jurors in the sentencing phase are first asked to determine whether the defendant represents a future danger to society; only after deciding unanimously that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" will the jury consider whether any evidence in mitigation supports a sentence less than death. As a result of this structure, the defendant's alleged future dangerousness is placed at the center of the jury's punishment decision.

The "future dangerousness" special issue is problematic in several respects. First, there is no precise explanation of the special issue's key terms. Jurors are left to comprehend "probability," "criminal acts of violence," and "society" so broadly that a death sentence would be deemed warranted in virtually every capital murder case. Second, the "future dangerousness" special issue too often turns on unreliable scientific evidence and the undue persuasive effect of highly-questionable expert testimony. Finally, life without possibility of parole now is the only capital sentencing alternative to death in the State of Texas, which ensures that all defendants convicted of capital murder will die in prison, posing no threat to free society.

Recommendation
Texas should restructure its capital sentencing procedures to abandon altogether the use of the "future dangerousness" special issue. The State should consider following the approach of the majority of capital jurisdictions, which enumerate specific aggravating and mitigating circumstances. Short of this restructuring, Texas should undertake a series of measures to limit the problems that result from the current application of the "future dangerousness" special issue. Specifically, • State-sponsored research must be conducted to compare Texas jurors' comprehension of state capital sentencing standards with that of their counterparts in other death penalty jurisdictions; • The Texas Code of Criminal Procedure must be amended to narrow and clarify the definition of "future dangerousness"; • Expert testimony as to a defendant's propensity to commit criminal acts of violence must be prohibited, whether by statute or by rule; and • Jurors must be explicitly informed that, notwithstanding a finding of future dangerousness and/or a finding of insufficient mitigating evidence, jurors never are required or compelled to sentence a defendant to death.

Recommendations (Cont'd)
Furthermore, the "mitigation" special issue should be revised extensively so that the legal relevance of mitigation in capital cases will not be lost on jurors.

Jury Instructions (Chapter 10). Texans who serve on capital juries deserve full information about their responsibilities and the scope of their options for sentencing a capital defendant. However, at present Texas jurors are not instructed that, even if the defendant is found to be a future danger, and even if the jury does not find sufficient evidence in mitigation, jurors may still return a sentence less than death. The explicit requirements of Texas law may also mislead capital jurors with respect to each juror's individual capacity to impose a sentence of life without the possibility of parole. The Texas Code bars all parties from informing a juror or prospective juror of what would transpire were the jury to disagree during sentencing phase deliberations, which conceals from these jurors their individual capacity to impose a sentence less than death.

Jurors who have served on death penalty cases in Texas have experienced significant miscomprehensions about their roles and responsibilities in determining if a defendant should be sentenced to death. A study by the Capital Jury Project showed that, for instance, 45% of interviewed Texas jurors who served on capital cases erroneously believed that death was required if the defendant's crime was "heinous, vile or depraved," while 68.4% believed that death was required if the defendant would be "dangerous in the future." As a matter of federal and state law, however, a finding of future dangerousness can *never* suffice to require the death penalty.

Texas also does not require jurors to be specifically instructed that a mental disorder or disability is a mitigating, not an aggravating, factor and that evidence of mental disability should not be relied upon to conclude that the defendant represents a future danger to society. This is especially worrisome given the underlying problems with Texas's capital sentencing scheme and the repeated use of unqualified experts to prove that a defendant is a future danger to society.

The form and substance of capital case jury selection also may improperly increase a prospective juror's inclination to sentence the defendant to death. Questions asked during jury selection may expand jurors' perceptions of what constitutes "future dangerousness" while limiting their understanding of what qualifies as mitigation. This practice can result in selection of jurors predisposed to sentence any capital defendant to death.

In addition, although Texas trial courts must provide clear jury instructions concerning the alternative punishment of life without parole, courts retain broad discretion to prohibit testimony on parole practices proffered by the defense. Moreover, Texas courts may permit the prosecution to emphasize a capital defendant's parole *ineligibility* in an attempt to persuade the jury that, in the absence of the "incentive" of parole to regulate the defendant's behavior, s/he would be more likely to commit acts of violence in the penitentiary. Prosecutors also have attempted to undermine the permanency of a life without parole sentence by stressing the law's mutability.

While trial courts may respond meaningfully to jurors' requests for clarification of instructions, Texas law permits trial courts to refuse to clarify legal concepts that are of the utmost importance

during the penalty phase of a capital case. Trial courts also may be reluctant to offer clarifying instructions for fear of reversal on appeal. Alleviating jurors' confusion as to their roles and responsibilities through revised capital case instructions will improve the quality of decision-making and it may also obviate altogether the need for judges to respond to individual juror questions.

Recommendations
Texas should revise its jury instructions typically given in capital cases. Texas's instructions should provide better explanation of issues clearly identified as problematic by the Capital Jury Project. Efforts to craft and promote discretionary pattern instructions must include input from attorneys, judges, linguists, social scientists, and psychologists. These instructions must do more than recite the language of the Texas Code of Criminal Procedure, and their use must be closely and continuously monitored to determine whether they ameliorate jurors' tendency to misunderstand their awesome responsibility to determine if the defendant will live or die. Further, the jury's discretion must be guided with respect to mitigation. Trial courts should more broadly instruct capital juries on the significant legal importance of mitigating circumstances. Jurors must also be informed that they may return a life sentence for any reason, as is the case in several other capital jurisdictions. Capital jury instructions should also clearly communicate that a mental disorder or disability is a mitigating factor, not an aggravating, factor and that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society. Finally, Texas should remove from the Code of Criminal Procedure the provision that misleads jurors about their individual capacity to affect capital sentencing decisions. Jurors should be explicitly informed that, in the event that they are not able to come to a unanimous decision with respect to the special issues, the defendant will be sentenced to life without parole.

Treatment of Persons with Mental Retardation (Chapter 13). The Texas Legislature has not enacted a statute banning the application of the death penalty to persons with mental retardation. The state's definition of mental retardation is based on the Texas Court of Criminal Appeals' decision in *Ex parte Briseno*, which uses seven factors that are not supported by any medical authority and instead rely on popular misconceptions regarding how persons with mental retardation behave. Continued use of *Briseno* to assess mental retardation creates an unacceptable risk that persons with mental retardation will receive the death penalty or be executed.

In addition, Texas trial courts do not typically permit a claim of mental retardation to be decided by the trial court in a pretrial hearing. Instead, the issue is usually decided by the jury during penalty phase deliberation. This procedure wastes time and judicial resources by requiring a long and costly capital trial for a defendant who may not be eligible for the death penalty in the first instance. It also requires jurors to consider evidence of mental retardation at the same time they are considering evidence related to the crime and other aggravating evidence, increasing the risk of juror confusion.

Finally, defendants who raise a mental retardation claim in a subsequent habeas petition must prove mental retardation by clear and convincing evidence. This elevated standard of proof should not be applied to a claim that the defendant is categorically ineligible for the death penalty under the United States Constitution.

Recommendations
Texas should enact a statute barring the application of the death penalty to persons with mental retardation. This statute must clearly define mental retardation in conformance with the definition set out by the American Association on Intellectual and Developmental Disabilities (AAIDD). It should also require that determinations of mental retardation be based on accepted clinical criteria. Consideration of the *Briseno* factors, which permit commonly-held misapprehensions about mental retardation to trump AAIDD-accepted criteria, should be forbidden. In addition, the issue of mental retardation should be determined before the capital trial, provided the defendant can demonstrate some evidence that s/he has mental retardation. The determination of mental retardation should be made by the trial judge unless the defendant requests that a jury be impaneled to decide the issue. This procedure should not preclude the defendant from offering evidence of mental retardation during the criminal trial. Finally, Texas should apply the preponderance of the evidence standard for mental retardation claims in all proceedings, including subsequent habeas petitions.

Treatment of the Severely Mentally Ill (Chapter 13). Texas law does not adequately protect defendants who suffer from mental illness and disorders from wrongful conviction or execution. For instance, Texas has not prohibited the death penalty for offenders with mental disabilities similar to mental retardation, such as dementia or traumatic brain injury, but which manifest after the age of eighteen. Texas also does not prohibit application of the death penalty on persons with severe mental disorders that significantly impair their ability to control their conduct. Because Texas's insanity defense is very narrowly defined, persons suffering from severe disorders such as schizophrenia are still eligible for capital punishment, even if their actions were based on delusions caused by their illness.

Recommendations
Texas should ensure that a defendant's mental health history, including evidence of mental retardation and mental illness, is fully examined and considered by the trial court before the defendant is allowed to waive his/her rights. Before a defendant is permitted to waive his/her rights to counsel, trial, direct appeal, or habeas corpus, the trial court should be required to hold a hearing during which the defendant's mental history, education, and other relevant evidence is considered. Texas should also prohibit the application of the death penalty for persons who have significant limitations in intellectual functioning and adaptive behavior resulting from dementia or a traumatic brain injury. In addition, the state should prohibit the application of the death penalty for persons who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of

Recommendations (Cont'd)
his/her conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law. This recommendation does not include a disorder manifested primarily by repeated criminal conduct, such as antisocial personality disorder, or attributable solely to the acute effects of voluntary use of alcohol or other drugs.

POST-TRIAL

Proportionality Review (Chapter 7). A fundamental principle of capital jurisprudence in the U.S. is the need for procedural protections against the "random or arbitrary imposition of the death penalty." Meaningful comparative proportionality review helps to ensure that the death penalty is being administered in a rational and non-arbitrary manner, provides a check on broad prosecutorial discretion, and seeks to prevent discrimination from playing a role in the capital decision-making process—the key concerns underlying the U.S. Supreme Court's death penalty jurisprudence. For that reason, the majority of states with the death penalty engage in some form of proportionality review in capital cases. Texas, however, does not.

Proportionality review can identify and remedy inappropriate disparity in capital sentencing. For example, statistics compiled by the Texas Department of Criminal Justice indicate that 1,060 individuals have been given death sentences in the state since 1976 through 2011 and that these sentences are dispersed across 120 counties. However, just twenty of Texas's 254 counties account for over 76% of those individuals sentenced to death.

Recommendation
The Texas Court of Criminal Appeals, as the highest criminal court in the state, should conduct a searching and thorough proportionality review of every death sentence imposed. This review should include a comparison to similar cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not. The review should also encompass a meaningful comparison to co-defendants' or co-participants' cases, including those cases that resulted in a sentence less than death.

State Habeas Corpus Proceedings (Chapter 8). State habeas review is meant to correct constitutional errors in death penalty cases. However, Texas's capital habeas practices and procedures generally discourage thorough and transparent review of a death row inmate's claims of constitutional error.

Because they were tried and sentenced before recent reforms in the Texas capital punishment system, the vast majority of Texas death row inmates have not received the benefit of the improvements to fairness and due process that have developed over the past several years. Further, due to ineffective trial, appellate, and state habeas counsel, many inmates with claims of constitutional magnitude may be executed without a court ever reviewing their case on the merits.

Many of Texas's practices in state habeas review are out of step with the overwhelming majority of capital punishment states in the United States. Other states provide death row inmates with a significantly longer deadline, or do not impose a specific deadline at all, for filing a claim of post-conviction relief in a death penalty case. Because Texas does not impose filing deadlines on habeas applications in *non-capital* cases, the state affords the least amount of preparation time to those inmates who face the ultimate punishment. Other practices that discourage thorough review include denial of evidentiary hearings in capital habeas proceedings, reliance on "paper hearings" composed of affidavits and other documents submitted by the parties, and Texas district courts' adoption of one party's proposed findings of fact and conclusions of law verbatim.

Most capital habeas petitions are dismissed in a two- or three-page summary order issued by the Court of Criminal Appeals, whereas appellate courts in other death penalty states issue detailed opinions in capital post-conviction cases. Perhaps as a result of this practice, the Court of Criminal Appeals has failed to address claims that later led to relief in federal proceedings. This also creates a problem for death row petitioners and habeas lawyers attempting to research their cases, as there is little case law developed on capital habeas proceedings despite the frequency of death sentences imposed and executions carried out.

Procedural rules imposed by Texas can result in the court affirming a conviction and death sentence simply because of an inmate's inability to raise the claim any earlier, even though in some cases *the very information undermining the reliability of the trial was in the possession of another party and not the inmate*. While some preservation and procedural default rules are necessary to ensure that the trial court has an opportunity to correct an error before the claim is reviewed the appellate court, Texas imposes strict procedural default rules even in cases of egregious constitutional error. Once these claims are defaulted, they likely cannot be reviewed in federal court, as federal courts are generally prohibited from considering claims of error that were not reviewed in state court. Even in cases where an inmate presents a claim of actual innocence, the inmate is required to "unquestionably establish his innocence." Under this demanding standard, an inmate who could prove that it is more likely than not that s/he is innocent would *not* be entitled to a new trial.

The Assessment Team is particularly troubled by the court's inconsistent application in state habeas proceedings of the U.S. Supreme Court's *Penry* decisions. These Supreme Court decisions directly addressed the constitutionality of Texas's capital sentencing procedure. There can be no confidence in a death sentence based on an unconstitutional procedure which the U.S. Supreme Court has determined provides the jury an insufficient mechanism through which to consider evidence supporting a sentence less than death. Despite this, the court has granted relief to only some inmates who were sentenced under the unconstitutional procedure, while others remain on death row. As a result, inmates with nearly identical claims have received remarkably divergent treatment by the court.

Recommendations
Texas should amend its capital habeas statute to • Extend the filing deadline for an inmate's petition; • Provide that habeas proceedings should not commence until direct appeal proceedings, including review by the U.S. Supreme Court, have concluded; • Require the district court to conduct a live evidentiary hearing on any claims for which there is a dispute of material fact; and • Require the district court to draft independent findings of fact and conclusions of law in each case. In order to successfully implement these reforms, Texas should establish a dedicated capital law clerk office to assist Texas district court judges in capital cases. The federal pro se law clerk offices, established by many federal judicial districts, could serve as a model for this system. Furthermore, the Court of Criminal Appeals should publish detailed, publicly-available opinions in capital habeas cases fully explaining the bases for its disposition. For those past cases in which the Court of Criminal Appeals has adopted the findings of the district court in a summary order, the district court's findings should be made available on the Court of Criminal Appeals website. The court also should reexamine the strict application of procedural default rules in Texas capital cases to ensure that death row inmates are not executed despite serious questions of constitutional error. Texas has a long history of providing capital habeas petitioners with deficient and incompetent counsel. A death row inmate should not be forced to waive a claim of constitutional significance due to his/her attorney's poor performance. Further, Texas should adopt the harmless error standard when considering claims of constitutional error in state habeas proceedings. This standard will help to avoid cases in which the harmless error doctrine is invoked and the defendant is denied relief, notwithstanding a clear error undermining the confidence in the outcome of the trial. Finally, all remaining death row inmates who were sentenced to death prior to the U.S. Supreme Court's mandated changes to Texas's capital sentencing scheme should be granted new sentencing hearings so that their punishment can be reassessed under a constitutional standard.

Clemency (Chapter 9). Texas should have confidence that the final safeguard to prevent wrongful execution is a meaningful one. Its current clemency process—which permits the Board of Pardons and Paroles (Board) to make a decision without a hearing, permits the Board to make a recommendation to deny or grant clemency without meeting as a body, and does not provide a right to counsel—does not serve this function. Texas's clemency process may not only result in minimal review, but it also may contribute to the extraordinarily high denial rate of clemency petitions in Texas. As of August 1, 2013, Texas has executed 503 inmates in the modern death penalty era and has commuted the sentence of only two inmates facing imminent execution. By comparison, the state with the second highest number of executions after Texas—Virginia—has executed 110 inmates while commuting the sentence of eight inmates.

The U.S. Supreme Court has stated that "[e]xecutive clemency has provided the 'fail safe' in our criminal justice system ensuring that claims of innocence do not go uninvestigated, and that offenders are shown mercy as justice requires." Various members of the Board of Pardons and Paroles, however, have explicitly stated that it is not their role to determine the guilt or innocence of the petitioner. Moreover, Texas clemency decision-makers appear to have repeatedly denied clemency stating that all relevant issues have been vetted by the courts; however, as many Texas cases demonstrate, in the modern death penalty claims that may often warrant a grant of clemency have not or *cannot* be reviewed on the merits in the court system.

Recommendations
Texas law should be amended to require the Board of Pardons and Paroles to conduct a public hearing, attended by all members of the Board, in any case in which clemency is sought by a death row inmate. No recommendation for or against clemency can be made until the hearing is concluded and the Board has offered an opportunity to meet with the inmate and his/her counsel. The Board of Pardons and Paroles should also adopt guidelines directing its members to independently review all clemency applications and consider all factors that might lead a decision-maker to conclude that death is not the appropriate punishment. A set of standards or guidelines by which clemency petitions are evaluated would help create common ground among Board members, better insulate the Board from political considerations or impacts, and assist advocates who represent death row inmates in the preparation of clemency applications. As clemency is the last opportunity for a prisoner facing execution to receive a reprieve from this unalterable punishment, Texas should assign counsel to assist death row inmates in preparation and presentation of their clemency petitions. The state should ensure that funding is sufficient to compensate counsel and provide for investigative and expert resources. This effort may be aided considerably by the use of law school clinics. Legal developments in Texas and in other jurisdictions may also have significant relevance and bearing on the Board's recommendation for a reprieve or commutation of sentence. Accordingly, the Board could be well-served by use of a designated legal officer whose responsibility it is to collect and advise the Board on legal trends in the administration of the death penalty in all capital clemency cases.

External Review of Wrongful Convictions and Erroneous Death Sentences (Chapter 5). There have been 12 persons exonerated from death row in Texas and overall Texas leads the nation in exonerations and wrongful convictions in criminal cases at large. Presently, however, no entity in Texas evaluates the causes of such errors to develop methods for preventing and correcting errors in the future.

Recommendation
Texas should adopt a recent proposal in the Texas Legislature to thoroughly investigate the myriad causes of wrongful conviction in the state. Elements of the recently-proposed Timothy Cole Exoneration Review Commission would accomplish this purpose. The State should adopt such legislation, also ensuring that members of the Commission are comprised of all affected stakeholders, including members with expertise from the judiciary, prosecution, defense, and forensic science communities. The exoneration commission would be charged with investigating

Recommendations (Cont'd)
"all cases in which an innocent person was convicted and exonerated" in order to "identify the cause of wrongful convictions" and "consider and develop solutions and methods to correct the identified errors and defects through legislation, rule, or procedural change."

PROFESSIONALISM: Defense, Prosecution, and the Courts

Defense Services (Chapter 6). Since 1976, half of all Texas death sentences have originated in just four counties: Harris, Dallas, Bexar, and Tarrant. In these counties, no public defender office has been established to handle capital cases.[3] Although Texas has improved its delivery of indigent defense services in capital cases, the most active death penalty jurisdictions in the state continue to rely on list-qualified appointed counsel. This is a fragmented, uneven system of representation for capital defendants at trial and on direct appeal. List-qualified habeas counsel is also appointed in cases in which the Office of Capital Writs is unable to undertake habeas representation. Many of the recent safeguards enacted by the Texas legislature concerning eyewitness identifications and discovery reform cannot be effectively enforced without the guiding hand of competent counsel.

With respect to the right to counsel, Texas law does not establish the right to two qualified attorneys at *every* stage of the legal proceedings: no more than one attorney will be appointed to represent a defendant on direct appeal or during state habeas proceedings. There is no right to counsel during clemency proceedings and Texas law appears to prohibit the Office of Capital Writs from providing defense services at this stage.

Appointment and Monitoring of Counsel in Death Penalty Cases

The criteria developed by the Texas legislature for qualification of defense counsel in capital cases fall short of ensuring high-quality legal representation, emphasizing experiential requirements which may do very little to improve the quality of representation since many of the worst lawyers are "those who have long taken criminal appointments and would meet the qualifications." No defender organization or statewide independent appointing authority is responsible for the selection, training, or monitoring of capital counsel.

Instead, Texas law generally empowers the presiding judge to make all attorney appointments, as well as to approve or deny funding requests by defense counsel for expert or ancillary services. This system not only permits the assignment of counsel to capital cases to be influenced by factors irrelevant to ensuring effective representation, but also unnecessarily complicates the judge's role as neutral arbiter, inviting uneven treatment of capital cases. Such an arrangement may induce counsel to provide less-than-zealous representation for fear of antagonizing the presiding judge on whom their livelihood depends.

Further, list-qualified counsel are not rigorously screened and monitored, nor does a complaint and remedy process for cases in which counsel did not provide high-quality legal representation exist. The ill-effects of this system remain well-documented: attorneys who have missed filing

[3] As of July 2012, the public defender office in Dallas County had not represented a capital defendant since 2001.

deadlines in past capital cases remain on the appointment lists. Moreover, there is no requirement under Texas law that mitigation specialists, investigators, and other non-attorneys participating in a capital case on behalf of the defense receive continuing professional education appropriate to their areas of expertise.

Compensation

Counties relying on appointed counsel may distinguish between in-court and out-of-court work and some counties impose caps on compensation. In- and out-of-court rate disparities, along with flat fees, may induce counsel to bring a case to trial, as opposed to negotiating a plea agreement that, in many capital cases, is in the best interest of the client. Qualified counsel also may opt not to represent capital defendants out of concerns that their considerable efforts will not be fairly compensated. Flat fees also pose an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee. Furthermore, the hourly compensation rates in Texas's most active death penalty counties fall below the hourly compensation rate for attorneys appointed to represent indigent death-sentenced inmates under federal law.

Recommendations

Provision of Counsel

To ensure high-quality legal representation for every capital defendant and death-sentenced inmate in Texas, the State should guarantee that every person facing the death penalty has access to two qualified attorneys, an investigator, and a mitigation specialist at every stage of the proceedings, including state habeas and clemency proceedings. Counsel must be appointed at the earliest stage, even if capital charges have not been filed but the case could be death-eligible.

Qualifications, Selection, and Evaluation of Capital Counsel

Texas must better ensure that appointed counsel possess the knowledge and skills necessary to meet the uniquely complex and demanding challenges of capital representation. Texas should adopt statewide qualification standards that include an assessment of the applicant's knowledge, skills, and commitment to zealous advocacy as set forth by the *ABA Guidelines* and the State Bar of Texas's *Guidelines and Standards for Texas Capital Counsel*. Texas should empower regional or county authorities to make selection and evaluation determinations with respect to list-qualified appointed counsel. As with the appointing authorities established in other capital jurisdictions, these local authorities should be comprised of individuals with demonstrated knowledge and expertise in capital representation, and their membership should be, to the extent possible, independent of the elected judiciary.

Attention also must be paid to monitoring the performance of capital counsel. What constitutes tolerable attorney competency in a non-capital case may be fatal in the capital context. To this end, Texas must adopt performance standards for capital counsel, with particular emphasis on required training and acceptable attorney workloads. Finally, Texas must implement mechanisms for monitoring the performance of list-qualified appointed counsel.

Recommendations (Cont'd)
Compensation and Funding Texas should unburden their trial courts of the difficult pecuniary decisions in determining the compensation amounts for list-appointed counsel and ancillary services in death penalty cases. This authority could be transferred to, for example, the Office of Court Administration. In so doing, the state's judges would be empowered to focus on thier role as "an arbiter of facts and law for the resolution of disputes," improving the public's confidence in the impartiality of the judiciary in criminal cases. To ensure a sufficient pool of qualified attorneys is available and willing to be appointed to represent indigent capital defendants and death-sentenced inmates, and to ensure that all counsel are able to provide high-quality legal representation to those who may face or are facing the death penalty, jurisdictions within Texas should • Remove the distinction in compensation rates between in-court and out-of-court services. Flat fees should be prohibited and counsel should be compensated for actual time and services performed; • Ensure that compensation provided to counsel is reasonable, including providing comparable compensation for defense services at trial, on direct appeal, and during state habeas and clemency proceedings; • Compensate counsel for representing a death-sentenced inmate during clemency proceedings; and • Compensate investigative, expert, and other ancillary services so that high-quality representation is provided at every stage of the legal proceedings, including the stages of state habeas and clemency. The Assessment Team also encourages Texas to continue to fully fund the Office of Capital Writs so that it has the necessary resources to accept capital appointments and hire well-qualified attorneys and support staff, including mitigation specialists and investigators.

Disclosure of Evidence (Chapters 5 & 11). The failure of some Texas prosecutors to disclose evidence to the defense has led to several wrongful convictions—including cases in which the actual perpetrator remained at large and was able to commit additional crimes. While inadvertent *Brady* violations will likely be reduced under Texas's new Michael Morton Act, the new law is but a first step toward robust and comprehensive discovery in Texas criminal cases. This is particularly true in death penalty cases as the prosecution possesses material not only relevant to guilt or innocence, but also relevant to mitigating punishment—all of which must be timely disclosed to the defense.

Recommendations
Texas should adopt additional measures to build upon the foundation laid by the Michael Morton Act. The entire case file, including investigation notes, should be disclosed to defense counsel with limited exception for a particularized showing of need for protection of witnesses. Strengthening disclosure requirements will enable more just and accurate outcomes to be reached, the risk of wrongful convictions reduced, and the public's confidence in judicial

Recommendations (Cont'd)
independence and vigilance in Texas's criminal system improved. District Attorneys also should develop procedures to ensure that law enforcement agencies, crime laboratories, experts, and other state actors are fully aware of and comply with the duty to disclose *all* evidence in a particular case. Ultimately, prosecutors should have in their possession a complete copy of the investigating agencies' case file or must conduct a full inspection of the complete contents of the file. As a great deal of discretion remains with the prosecutor in determining what material should be disclosed under the new law, in capital cases the trial court should also be permitted to conduct in camera inspection of the prosecutor's file to ensure that all *Brady* and other discoverable material has been disclosed. Prosecutors should be required to affirm that all *Brady* material has been disclosed. In addition, trial judges should monitor discovery in capital cases, resolving disputes as they occur and ensuring that the case is progressing. Given the limitations faced by defense counsel in obtaining discovery post-trial, all disclosure obligations under law should be applicable to state habeas proceedings.

Investigation and Sanction of Conduct (Chapters 5 & 6). Currently, no formal mechanism exists for lodging complaints against defending or prosecuting attorneys in capital cases short of alleging professional misconduct pursuant to the Texas Rules of Disciplinary Procedure. While the Assessment Team acknowledges that only some violations—those committed with extreme or reckless carelessness, or higher degrees of fault—are appropriately met with individual discipline, it does not appear that the State Bar of Texas has consistently disciplined ineffective defense lawyers or prosecutors who engage in misconduct in capital cases. Derogations of duty, even where unintentional, must be consistently and reliably identified so that defense counsel, prosecutors, judges, and other actors in the criminal justice system can learn from past errors and prevent errors in the future.

Recommendation
The State Bar of Texas (SBOT) disciplinary process for attorneys in capital cases must be assessed and strengthened. As suggested by the Texas District County and Attorney Association, "the State Bar [should] develop more robust data reporting for the purposes of identifying grievances involving prosecutors and detecting any trends, shortcomings, or changes needed in relation to those grievances." SBOT must ensure that investigations of ineffective counsel or prosecutorial misconduct are conducted by individuals "knowledgeable in the intricacies of criminal justice." Finally, SBOT should consider measures to make the grievance process accessible to prisoners.

Training of All Actors in the System (Chapters 5, 6 & 11). In order to ensure the fairness of death penalty proceedings, judges, prosecutors, and defense counsel who handle capital cases must undergo training particularized to their unique roles and responsibilities in a death penalty case. For example, while judges are appropriately cautious about injecting themselves into the proceedings on the side of one party or another, a trial court ultimately must serve as a backstop to the adversarial system, thus ensuring that the rights of all parties are protected—especially in

cases where a defendant's life is at stake. The occurrences of ineffective lawyering and unfair prosecutorial conduct in capital cases raise questions, however, as to whether judges take enough precautions to ensure the fairness of the proceedings. Trial judges have failed to sustain objections when prosecutors have, in their closing arguments, referred to inadmissible evidence, or erroneously described the acts of the defendants in some cases. They have also failed to notice or correct wrongdoing on the part of defense counsel.

Recommendations

Courts

Routine training should be required of any trial judge who may handle capital cases to address the particular legal issues incident to such cases. Facilitated by the Texas Center for the Judiciary and comparable educational institutions, this training should emphasize to participating judges the corrective action the trial court may take upon observing unfair conduct by the prosecution or defense.

Defense Counsel

Pursuant to its authority under Texas law, the Texas Indigent Defense Commission should promulgate additional rules to require capital defense counsel to complete, at regular intervals, a comprehensive training program covering at least the topics set out in the *ABA Guidelines* and the State Bar of Texas's *Guidelines and Standards for Texas Capital Counsel*. Non-attorneys who wish to be eligible to participate on defense teams must also receive continuing professional education appropriate to their areas of expertise.

Prosecutors

Texas should impose training requirements, accompanied by adequate funding to support participation in such trainings, for Texas prosecutors assigned to capital cases. Trainings related to the prosecutor's role in capital cases should reflect the prosecutor's obligation to seek justice and ensure a fair trial—imperatives which recently gave rise to the State's passage of the Michael Morton Act.

All Texas prosecutors also should be required to receive training on how to evaluate the accuracy of eyewitness identifications, confessions, and jailhouse informant testimony. Prosecutors should be aware of the ways in which unconscious and unintentional cognitive biases can undermine their effort to conscientiously scrutinize police investigations. Research has demonstrated that training as well as internal procedures can minimize the negative effects of cognitive bias. Accordingly, prosecutorial training should address the dangers of cognitive bias as well as instruct prosecutors on methods to guard against the influence of cognitive bias in their decision-making.