SUPREME COURT OF PENNSYLVANIA

AND

THIRD JUDICIAL CIRCUIT OF THE U.S.

REPORT

JOINT TASK FORCE

ON

DEATH PENALTY LITIGATION

IN PENNSYLVANIA

July 1990

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EXECUTIVE SUMMARY[1]

Recent decisions of the Supreme Courts of the United States and Pennsylvania, the willingness of the Governor to sign death warrants in appropriate cases, the number of litigated capital punishment cases in Pennsylvania crystallize the fact that the Commonwealth and the federal courts soon will be faced with numerous, actively litigated death penalty cases, as well as executions. The recent experience of the state and federal courts in the southern states which are confronted with a huge number of inmates on death row displays the tremendous burden on the entire legal system caused by this litigation. Nationwide, median defense costs for federal collateral attack litigation is $120,000 per litigant, with fees and expenses in some cases as high as $1.2 million.[2] Litigation often stretches over a multi-year period. Yet retrials, mandated by state or federal review due to fundamental defects in the trial or sentencing process, are ordered in thirty-five percent of the actively litigated cases. The litigation is complex, as it involves difficult constitutional and procedural issues and matters of comity, as well as voluminous records.

As a matter of necessity, for reasons of fundamental fairness, and because of the impact these cases have on the legal system, prosecutors, defenders, state legislatures, bar associations, and state and federal courts have joined forces to consider systematic responses to a problem of major proportions.[3] Pennsylvania, now, is squarely confronted with the problem, and creative responses have been sought under the leadership of a Task Force jointly commissioned by the Supreme Court of Pennsylvania and the Third Judicial Circuit of the United States.

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[1] This summary is provided merely as a convenience to the reader. The Report is the definitive work product of the Task Force. Number references in the Summary correspond to numbered sections in the Report.

[2] This amount represents the average cost per case where no resource center is involved. In a study prepared by the ABA Post-Conviction Death Penalty Representation Project for the Florida legislature and the Governor of Florida, attorney time, expenses, and fees were surveyed at every level of the conviction/appeals/collateral attack process. The study covered a sample of 24 states. Median attorney hours were as follows: state trial court, 400; state supreme court, 200; U.S. Supreme Court (1), 65; federal district court, 305; federal circuit court, 320; and, U.S. Supreme Court (2), 180; total, 1470 hours. Similar figures were reported on support staff hours and expenses. (The Spangenberg Group, Caseload and Cost Projections for Federal Habeas Corpus Death Penalty Cases in FY 1988 and FY 1989 , Sept. 1987.)

The costs described here are for the defense of condemned prisoners. Costs to the state are not immediately apparent, but nonetheless are real. Costs borne directly by prosecution are presumably subsumed in state and county budgets but which nonetheless impact on the administration of justice by forcing reallocation of scarce resources. Constitutional and statutory mandates generally require the state or county to bear the costs of defending an indigent defendant. Thus, all branches of the state government have cooperated in the development of a systematic approach to the problem.

[3] With 116 inmates on death row, Pennsylvania has the fifth largest death row population in the nation. Fifty-six (56) cases in Pennsylvania are in an advanced stage of litigation. Assuming the median cost of defense ($120,000) and case-related expenses($4,000), the potential cost of litigation for just these cases would amount to $6.94 million. (Figures derived from the Spangenberg Group, Caseload and Cost Projections for Federal Habeas Corpus Death Penalty Cases in FY 1988 and FY 1989 , Sept. 1987.)

1.0 BACKGROUND

The Task Force was initiated by Chief Justice Robert N.C. Nix, Jr., and then-Chief Judge John J. Gibbons, on behalf of the state and federal courts in Pennsylvania. They appointed a distinguished Task Force chosen from each governmental branch of the Commonwealth, from the federal courts, from the Bar, and from community and national organizations. U.S. District Judge Alan N. Bloch (W.D. Pa) was appointed Chair of the working group. The first task was to identify specific problems confronting Pennsylvania.

A Review of the Problems

The Task Force identified the following problems being faced by Pennsylvania directly impacting on capital litigation:

(a). There is an absence of any widely accepted method for the identification, training, and appointment of counsel who are qualified to handle capital cases at the state and federal trial, appellate and post-conviction levels.

(b) Attorneys appointed at the federal habeas level are often unable to return to state court to exhaust critical issues.

(c) There is no centralized agency to track cases.

(d) There is a volume of cases ripe for state or federal post-conviction proceedings within the next two years.

(e) Few attorneys are well-versed in this area of criminal law and public defender offices are ill-equipped to deal with the potential onslaught of coming cases.

(f) There is a potential shortage of attorneys able and willing to litigate this type of case in the state and federal courts.

(g) Concerns regarding the adequacy of resource assistance and training, as well as the adequacy of compensation and reimbursement for expenses, may deter otherwise available attorneys from accepting appointment in these cases.

2.0 THE RESOURCE CENTER

The Task Force has recommended the establishment of a Resource Center as the primary method of addressing these problems. The Center would be established as a non-profit Pennsylvania corporation to be designated as a federal community defender organization as outlined in 18 U.S.C. § 3006A(g)(2)(B). Staffed initially by five attorneys and three support staff, the Resource Center would be funded by state, and federal monies allocated for its authorized activities. It would be subject to traditional methods of fiscal accountability, satisfying generally accepted accounting principles, and to audits required by the state and federal governments.

In developing the Resource Center, members of the Task Force considered pilot programs already in operation in other jurisdictions, notably California, Tennessee, Florida, and Georgia. In shaping the various models to meet Pennsylvania's unique character, guidelines were established. Though cases are being litigated and funding is generally available at most

levels of the process for continuing representation, the Task Force determined that there is a shortage of qualified capital litigators and that a primary objective of the Center is to train counsel. In contrast to models developed in other states, the Task Force suggests that an organization be established that would be primarily a "resource" as opposed to a "litigation" center, although some direct representation in the State and Federal courts of Pennsylvania would be done by the Resource Center staff attorneys.

The Responsibilities of the Resource Center

The Task Force recommends that the following responsibilities be assigned to the Center:

A. To track all capital cases through the trial, appellate and post-conviction levels to further the provision of continuing, competent representation and the gathering of relevant data.

B. Through recruitment and screening, to establish and maintain a panel of attorneys who are qualified and available to represent persons at all levels of litigation in capital cases.

C. To provide assistance to these appointed defense attorneys, and other retained defense attorneys involved in all stages of capital litigation, in identifying legal issues and preparing, appropriate legal documents and arguments on behalf of their clients.

D. To coordinate educational resources with other state and national organizations which provide legal assistance to inmates in capital cases in other states at both the state and federal levels.

E. To develop Pennsylvania specific resources, such as substantive and procedural manuals, and coordinate CLE activities concerning capital litigation.

F. To directly represent defendants in appellate and collateral attack litigation, in both state and federal courts in Pennsylvania. Resource Center staff attorneys' direct representation and participation in litigation will be limited by federal and state law to cases arising from the respective jurisdictions.

3.0 ATTORNEY QUALIFICATIONS AND COMPENSATION

The Task Force determined that a critical component in any solution to the problems of capital litigation is the provision of minimally certified and adequately compensated counsel. The Task Force recommends the adoption by both the state and federal courts of standards similar to those of American Bar Association and Philadelphia County. A statewide certification board will apply the standards in specific cases and authorize waivers where appropriate. State and federal judges will appoint attorneys who have been approved by the Board of Certification.

Qualifications

While noting that a relatively small pool of qualified attorneys currently exists, the

committee does not suggest dilution of the standards to create a larger pool. Instead, it is anticipated that a properly funded and staffed resource center, continuing legal education, and the experience of serving as associate counsel in capital cases will combine to create, gradually, a larger pool of qualified counsel.

The Task Force relied heavily on the Philadelphia County standards which have proven successful and acceptable to the courts and the prosecutorial and defense bars. In addition, the vast majority of defendants emanate from Philadelphia and Allegheny Counties and the experiences of these jurisdictions were instructive. The Task Force recognizes that the experience of smaller counties may not mirror that of the larger, urban areas, but it nonetheless recommends uniform application of standards in all counties. It is recognized that not every attorney will meet the standards in the first instance, but with waivers in appropriate cases and the training program, it is assumed that the pool of qualified counsel in all regions of the state will grow.

The standards should be mandatory and uniformly applied statewide in both the state and federal courts. Standards should be implemented by rules promulgated by the Supreme Court, by the Judicial Council of the Third Circuit, or by the United States Court of Appeals and the individual District Courts, as appropriate. The Task Force recommends that appointing judges choose only attorneys certified by a statewide board.

Certification Board

A Board of Certification will review the qualifications of attorneys and administer pools of qualified attorneys. The Board will consider applications from attorneys, with a regional breakdown similar to that of the federal district court divisions, forming Western, Middle, and Eastern districts. The Board will certify attorneys in strict adherence to the standards, but where appropriate the Board may recognize certain kinds of experience which would be treated as equivalent to particular standards. The Board periodically may review the continuing qualifications and performance of pool attorneys and revise the list as necessary.

Compensation

A statewide compensation plan for the costs of state court litigation should be mandated. A critical component of the plan is a provision for payment of preliminary expenses via interim petitions for reimbursement. While most attorneys can await the final payment of fees, advancing expenses for lengthy litigation can be burdensome or impossible for small firms.

4.0 TRACKING

There exists a need within Pennsylvania to identify capital cases and update the status of such cases as they move through the state and federal court systems. Presently, there is no single source to collect and process information on the status of capital cases within Pennsylvania. Research indicates that in other states, where there exists no single organization which has responsibility for defending capital cases, haphazard and unreliable methods of tracking are employed.

The dual function of the proposed tracking system is to identify the existence of all state and federal capital cases in Pennsylvania at the earliest possible time in order to facilitate the appointment of qualified counsel if necessary to the case, and to maintain the status of all capital cases at all levels of the state and federal court systems in Pennsylvania. Cases will be

tracked through the state and federal trial and appellate court systems and will include dispositions by the Supreme Court of the United States.

Various options were explored but for purposes of tracking state cases, it is recommended that Supreme Court of Pennsylvania amend Rule 352, Pa.R.Crim.P., which requires the District Attorney to give notice of aggravating circumstances which trigger a capital case. The Rule should be amended to require that notice of a capital case be provided to the Resource Center at the same time.

Once the case has been reported, the Resource Center will collect data regarding the status of the case at all levels within the state and federal court systems.

As to the design of a computer tracking program, personnel within the Administrative Office of Pennsylvania Courts and the U.S. Court of Appeals are available to develop a program to meet the requirements recommended herein.

5.0 FUTURE INITIATIVES

The Task Force recommends secure, adequate and continuing funding for the Resource Center and its related activities. Various sources of funding, such as foundation grants and bar association donations, were dismissed as unreliable, because the experience nationwide has been that such sources often provide only temporary assistance. A permanent, secure source of funding is essential to the viability of the Center, and is a precondition to continuing federal funding. The most appropriate source of funding is a combination of the state and federal governments. Federal funding is available, but contingent on comparable state funding.

Over a single dissent, the Task Force recommends that funding for the Resource Center and related activities be sought in the form of a line item in the budget of the Judiciary of Pennsylvania. The proposed funding should represent 50% of the estimated budget for start-up and first year expenses (approximately $300,000), with the federal judiciary authorizing the remaining fifty percent. Future budgets should be funded in a similar way, consistent with the needs of the Center.

Conclusion:

The Task Force concludes that the establishment of the Resource Center and the implementation of other suggestions of its Report will serve the needs of the all interested parties. The issue is not the morality or legality of the death penalty; the former will remain subject to debate--the latter has been and will be tested in the courts. Nor is the issue one of favoring the interests of one group over those of another.

Instead, the problem is systemic, affecting individuals, all branches of government, and society at-large. The Task Force has focussed on proposing means to address a major problem, while accommodating a variety disparate needs and interests: the constitutionally required provision of adequate representation of counsel to capital defendants; the training and support of, and compensation for attorneys dedicated to capital litigation; the interest of finality in litigation which will be provided by better-tried cases and fewer necessary retrials; the provision of all of the above in a manner which is cost-effective in a time of scarce resources, yet in a manner which is consistent with fundamental fairness.

The document reflects substantial disagreements and compromises. All members

agree, however, that the Resource Center and related proposals should be implemented, with the only substantial dissent being in the appropriate budgetary locus of the Center. (Other disagreements with respect to exact attorney qualifications and standards are within the scope of policy properly determined by the courts.) Yet all are in agreement that in order to address a problem of major dimensions confronting the Commonwealth and the federal system, all interested authorities should act favorably on the Report and its provisions.

1.0 BACKGROUND

Recognizing a variety of complex and vexing problems with respect to death penalty litigation in Pennsylvania, Chief Justice Robert N.C. Nix, Jr., of the Supreme Court of Pennsylvania, and then-Chief Judge John J. Gibbons, of the United States Court of Appeals for the Third Circuit, convened a Task Force to consider the problems. The Task Force, comprised of distinguished members of the State and Federal Judiciary, the State Legislative and Executive branches, the Bar, academia, representatives of the American Bar Association, and court executives, met on April 18, 1989.

The Task Force identified the following primary problems:

(a) Providing competent representation of counsel at the trial, appellate, post-conviction levels of state litigation, as well as federal habeas corpus review;

(b) Monitoring the status of cases and representation in the state and federal courts;

(c) Establishing qualification standards for court appointed attorneys;

(d) Providing adequate compensation for court appointed attorneys; and,

(e) Developing means to provide continuing legal education.

The Task Force named and charged a Subcommittee to explore the problems and to propose appropriate actions. The charge to the Subcommittee reads, as follows:

" WHEREAS, the Task Force jointly convened by the Supreme Court of Pennsylvania and the United States Court of Appeals for the Third Circuit has identified the following needs with respect to the provision of counsel in death penalty cases, to wit:

(a) To monitor and track all cases involving death-sentenced inmates to assure that competent counsel are available to the inmate at all times;

(b) To recruit and screen qualified attorneys willing to be appointed in post-conviction death penalty cases;

(c) To develop training programs for all attorneys qualified and interested in accepting post-conviction death penalty cases in both state and federal courts;

(d) To provide expert legal consulting services to attorneys appointed in state and federal post-conviction cases including joint visits to the inmate, his family and friends; frequent travel to meet with counsel of record to review pleadings, motions and briefs; review of the trial transcript; review of the entire record; attendance at court hearings; provision of sample pleadings and briefs; and provision of full moot hearings before oral argument;

(e) To develop clinical programs at law schools to provide law student assistants to appointed attorneys and for educational purposes;

(f) To make available paralegals, investigators and expert witnesses as needed; and

(g) To develop a comprehensive list of local and national expert witnesses who might prove valuable to appointed counsel.

"NOW, THEREFORE, the subcommittee is charged to explore structures and processes which will solve Pennsylvania's needs with respect to the provision of counsel in cases in which indigent prisoners are sentenced to death. The subcommittee is further charged to consult and confer with representatives of the Bar, academia, the judiciary, the legislative and executive branches of government, as needed. The subcommittee is charged to report back to the Task Force with a report and recommendation at its earliest convenience.

"/s/Robert N.C. Nix, Jr.
Chief Justice
Supreme Court of Pennsylvania

/s/John J. Gibbons
Chief Judge
United States Court of Appeals
for the Third Circuit"

The Subcommittee was convened by U.S. District Judge Alan N. Bloch (W.D. Pa.). It met as a whole and in committee numerous times, and it now issues this report and recommendation to the Task Force. A primary emphasis has been to examine and propose solutions which would apply to all levels of death penalty litigation in Pennsylvania, from state trial through habeas corpus review in the federal courts. Uniformity has been emphasized in the areas of tracking methods and attorney qualifications and compensation. The Task Force views the establishment of a resource center as an essential element in the provision of constitutionally mandated, adequate representation of counsel for capital defendants. Members of the Subcommittee are listed in the appendix.

The Task Force and the Subcommittee met on April 17, 1990, to consider the draft report. After substantial discussion of the merits of the draft, the joint group approved the Report, over a single dissent. The dissent focussed on the budgetary locus of the Center and whether the Report should aggressively support additional funding and training for prosecutors. In an attempt to reach a workable accommodation, Chief Justice Nix and Chief Judge Higginbotham requested a small focus group to consider approaches which would render the Report unanimous. The focus group met and considered various options. It was concluded that a dissent would be filed. The Final Report, with the addition of footnote and the Executive Summary, is issued as approved by the Task Force, April 17, 1990. The dissent also is attached.

As a final note, the Task Force notes with sorrow the passing of a member, George Schumacher, Federal Public Defender of the Western District of Pennsylvania, who died May 1, 1990. His contributions were substantial, and his presence is missed.

2.0 NEEDS, ISSUES, AND PROPOSED SOLUTIONS IN PENNSYLVANIA

2.1 A Review of the Problems

The problems being faced by Pennsylvania directly impacting on capital litigation are:

(a) There is an absence of any widely accepted method for the identification, training, and appointment of counsel who are qualified to handle capital cases at the state and federal trial, appellate and post-conviction levels.

(b) Attorneys appointed at the federal habeas level are often unable to return to state court to exhaust critical issues.

(c) There is no centralized agency to track cases.

(d) There is a volume of cases ripe for state or federal post-conviction proceedings within the next two years.

(e) Few attorneys are well-versed in this area of criminal law and public defender offices are ill-equipped to deal with the potential onslaught of coming cases.

(f) There is a potential shortage of attorneys able and willing to litigate this type of case in the state and federal courts.

(g) Concerns regarding the adequacy of resource assistance and training, as well as the adequacy of compensation and reimbursement for expenses, may deter otherwise available attorneys from accepting appointment in these cases.

2.2 The Resource Center

The Resource Center would be established as a non-profit Pennsylvania corporation to be designated as a federal community defender organization as outlined in 18 U.S.C. § 3006A(g)(2)(B). Staffed initially by five attorneys and three support staff, the Resource Center would be funded by state, federal, and private monies allocated for its authorized activities. It would be subject to traditional methods of fiscal accountability, satisfying generally accepted accounting principles, and to audits required by the state and federal governments.[4]

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[4] Careful auditing is required by both the Pennsylvania Judiciary, under the Judicial Auditing Agency, 42 Pa.C.S.A.§3529, and the Administrative Office of the U.S. Courts, 18 U.S.C. §3006A(i).

In developing the Resource Center, members of the Task Force considered pilot programs already in operation in Tennessee, Florida, and Georgia. In shaping the various models to meet Pennsylvania's unique character, some guidelines were established.

Unlike Florida, where there is a problem with a shortage of both attorneys and funding to meet the demand, Pennsylvania may be faced with a different problem. Though cases are being litigated and funding is generally available at most levels[5] of the process for continuing representation, it is believed that the effectiveness of the representation may be affected by a shortage of trained and experienced capital litigators and the absence of any means to effectively recruit and train lawyers. The decision was made to establish an organization that would be primarily a "resource" as opposed to a "litigation" center. Some direct representation in the State and Federal courts of Pennsylvania would be done by the Resource Center staff attorneys, to complement the primary function of the Center as a resource and educational facility. The appropriate amount of direct representation will be determined by the Director in light of circumstances.

2.3 The Responsibilities of the Resource Center. The Task Force committee recommends that the following responsibilities be assigned to the Center:

2.3.1 To track all capital cases through the trial, appellate and post-conviction levels to further the provision of continuing, competent representation and the gathering of relevant data.

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[5]There is a often a gap in representation, for example, after the completion of the state appellate process and the initiation of post-conviction relief. At the initiation of federal proceedings, there may also be a gap between the exhaustion of available state remedies (appellate or PCRA) and the filing of the federal petition for writ of habeas corpus. Counsel can be appointed after the filing of the petition, but not during its preparation phase. There is provision, however, for nunc pro tunc appointment of counsel after the filing of the petition in the federal district court, provided that the inmate is indigent. Thus, subsequently appointed federal counsel may be able to be compensated for preparation.

Commentary

The Resource Center will begin to track all potential capital cases as early in the process as possible. Utilizing a number of sources, the Resource Center will attempt to identify potential capital cases at the trial level and monitor them through the entire process.

Once an individual has been sentenced to death, the Resource Center would continue to monitor the case through the appellate and post-conviction process.

In addition to assisting the work of the Resource Center, the tracking function will provide information to the several courts which have authority to appoint counsel, as well as to other governmental agencies.

2.3.2 Through recruitment and screening, to establish and maintain a panel of attorneys who are qualified and available to represent persons at all levels of litigation in capital cases.

Commentary

When it becomes apparent through case monitoring that an attorney is needed at some level in the process--trial, appeal, or post-conviction, the Resource Center would assume responsibility for identifying qualified counsel willing to be appointed. The Resource Center will use a list of qualified attorneys furnished by the Board of Certification. (See, Section 3, infra.) That Board will certify qualified attorneys for inclusion on the panel according to its procedures and rules as promulgated by the Supreme Court of Pennsylvania. Only attorneys certified by the panel shall be available for appointment in these cases.

2.3.3 To provide assistance to these attorneys, and other attorneys involved in all stages of capital litigation, in identifying legal issues and preparing, appropriate legal documents and arguments on behalf of their clients.

Commentary

When an attorney has been appointed to a capital case, the Resource Center will be available to provide a number of services. The Resource Center staff will provide information concerning the various avenues for litigation and requirements at each step.

Once issues are identified, the Resource Center will make available to the attorney, written resources such as sample pleadings and briefs. The staff of the Resource Center will develop a manual which clearly describes each step of the process, what is required of defense counsel, and the resources available.

The Resource Center staff will be available to assist in the preparation and review of briefs and pleadings throughout the litigation process. In cases in which expert assistance may be needed, the Resource Center will be available to assist in identifying this need and to provide information concerning the availability of experts.

2.3.4 To coordinate educational resources with other state and national organizations which provide legal assistance to inmates in capital cases in other states at both the state and federal levels.

Commentary

It is imperative that agencies involved in capital litigation establish and maintain a network to share educational information. The Resource Center would enhance already existing networks in order to work cooperatively with other state and national organizations involved in capital litigation. Joint projects may include a regular exchange of information through newsletters or brief sharing, joint development of mutually advantageous resources, and a division of labor among organizations to develop comprehensive resources. Networking will also allow simultaneous litigation on issues relevant to various states or regions and aid in identifying regional or national issues through shared case data.

Areas which would benefit greatly through networking would be the recruitment and training of attorneys available for appointment.

2.3.5 To develop Pennsylvania specific resources and coordinate CLE activities concerning capital litigation.

Commentary

One of the first training projects of the Resource Center staff should be the development of manuals for attorneys at every level of the process: trial, appeal, state post-conviction and federal post-conviction. The rapidly expanding library of resources on capital litigation should allow the Resource Center staff to draw from already existing material for the majority of the manual. An early task of the Resource Center will be the editing of materials and the developing of Pennsylvania-specific resources which enable the attorney to draw from existing materials. Included in the manuals should be an outline of the legal steps at all levels of the process, sample motions, an issues index, and a comprehensive and current list of resources available through the Resource Center.

In addition to preparing written resources, the Resource Center would work cooperatively with Continuing Legal Education (CLE) providers, such as the Pennsylvania Bar Institute to develop capital seminars and conferences.

The Resource Center will be active in recruiting law students interested in working as interns in the area of capital litigation.

2.3.6 To directly represent clients in appellate and collateral attack litigation, in both state and federal courts in Pennsylvania. Resource Center staff attorneys' direct representation and participation in litigation will be limited by federal and state law to cases arising from the respective jurisdictions.

Commentary

Planned primarily as a Resource Center, there will be some direct litigation of capital cases at the post-conviction stage, state or federal. Beyond the basic criteria of need, cases litigated by the Resource Center might include: those which present broad constitutional issues pertinent to a number of cases; those which involve emergency situations; those in which a court appoints the Center because it has particular familiarity with a case and\or other counsel could not go forward. Direct representation shall be limited to capital

litigants in the State of Pennsylvania and the federal courts.

The goals to be achieved through direct representation include: quality representation of the defendant; enhanced staff credibility by dispelling the image of "ivory tower" litigators who do not work in the trenches; development of resources for wide circulation; and, direct education of co-counsel.

2.4 Potential Caseload

Prediction of the number of new capital trials each year is easier to predict than the number of cases in which state remedies have been exhausted and are ready for federal review. While state remedies may have been exhausted, there is no impetus to seek federal review until a death warrant has been signed. Under Pennsylvania law, a sentence of death imposed in the trial court is subject to automatic direct review by the Supreme Court of Pennsylvania. 42 Pa.C.S.A. § 9711(h)(1). Upon affirmance and proportionality review, the Supreme Court transmits the case to the Governor. Before the Governor signs a warrant, his office engages in an independent review of the record. Prior to the signing of a warrant, litigation proceeds at a moderate pace. Once a warrant is signed, the process is stepped-up, and several stages of litigation may be completed within a few weeks time. Given these procedures, it is difficult to predict exactly the flow of cases through the state trial, appellate, and collateral processes to the federal litigation stage. However, reasonable estimates, based on current statistics, can be considered.

The latest information available indicates that there are one hundred and sixteen (116) inmates on death row in Pennsylvania. The convictions and sentences of fifty-six (56) of these prisoners have been affirmed on direct appeal by the Pennsylvania Supreme Court and have been transmitted to the Governor. Of these fifty-six (56) cases, no cases are pending in the Supreme Court of the United States,[6] seven (7) cases [1 in the Court of Appeals; 2 in the

[6]The decision of the Supreme Court of Pennsylvania in case of Blystone v. Pennsylvania (U.S. No. 88-6222) was affirmed by the Supreme Court of the U.S. on February 28, 1990. A petition for writ of certiorari in a different case was denied recently.

Western District; and, 4 in the Eastern District] are pending in the federal system at various stages of habeas corpus proceedings. Of the remaining cases, forty (40) are pending in various stages of direct appeal in the Supreme Court, approximately 10 are in PCRA proceedings, with the balance of cases in the trial court. New death sentences are being entered at the rate of 15-25 per year.

The number of new death judgments, however, does not reflect the total number of state cases in which the Center could be involved in either consultation or direct representation. The Center is intended to provide assistance at the state and federal trial, appellate, and post-conviction levels. It is estimated that in an average year the Resource Center could be involved in a maximum range of 90-105 state cases.[7] This range does not reflect the estimated number of new capital trials, death judgments, and warrants. The issuance rate of warrants is a critical factor to both state and federal estimates.

The experience in other states with death penalty laws indicates that the fastest rate of signing warrants has occurred in Florida, where recently two warrants a month have been signed.[8] If the Governor of Pennsylvania were to sign warrants at similar rate, two per month,

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[7] This table indicates the number of cases in which the Center could be "involved" at the state trial, appellate, and post-conviction levels. "Involvement" indicates the range of activities from pure resource activities to direct representation.

POSSIBLE STATE WARRANTS	24	12
Capital Trials-State(est.)	60	60
New Appeals-State	20	20
New State PCRA's*	24	12
TOTAL STATE CASES	104	92

* These figures assume a number of cases equal to the number of warrants signed.

[8] Two warrants per month (one in a well-litigated case, one in a new case) have been issued. In Pennsylvania, issuance at a rate of two per month would roughly equal the number of new death sentences entering the system.

it would be expected that in mid-1991, a stream of 20-25 cases per year could enter the federal courts.[9] In an average case, it is estimated that the post-conviction relief process (Court of Common Pleas; Superior Court; Supreme Court of Pennsylvania, allocatur; and, Supreme Court of the United States, certiorari) will require a minimum of one year to complete. Assuming an issuance rate of one per month, the stream of cases could average 10-12 cases per year entering the federal courts.[10] In light of the Blystone decision, issuance of warrants can begin immediately.[11] Thus, it is reasonable to assume that the inflow of actively and extensively litigated cases to the federal courts will begin in mid-1991. Given the assumption that the signing of a warrant will propel state PCRA and federal habeas litigation, the downstream number of federal habeas cases should approximate the number of warrants signed. A range of 12 to 24 cases per year is postulated.

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[9] This table indicates the number of cases in which the Center could be "involved" at the state and federal trial, appellate, and post-conviction levels. "Involvement" indicates the range of activities from pure resource activities to direct representation.

STATE CASES		
New State Warrants	24	12
New State PCRA's*	24	12
FEDERAL CASES		
Resulting § 2254's*	24	12
Capital Trials-Federal#	1	1
New Appeals-Federal#	1	1
New § 2255's#	1	1
TOTAL FEDERAL CASES	27	15

* These figures assume a number of cases equal to the number of warrants signed.
\# The estimates on federal capital trials, appeals, and § 2255's are guesses.

[10] It is postulated that the number of warrants issued will approximate the number of PCRA and habeas cases filed as a result. While it would appear on initial review that the case inventory ought to remain relatively steady, given the facts that not every warrant will result in an execution, that some cases (particularly in the current inventory) will be subject to several levels of litigation, and that there will be a inflow of new cases, gradually the inventory of cases will increase.

[11] The Governor had held in abeyance the warrant process, pending Blystone. Recent press accounts indicate that issuance of warrants will begin the Spring of 1990.

While the warrant process is in the Governor's discretion, these estimates and the relative unavailability of qualified counsel suggest the need for prompt establishment of the Resource Center and adequate staffing. Firsthand information was related which indicates that there are attorneys within Pennsylvania who are willing to accept court-appointed assignments in capital cases but who are reluctant to do so without expert assistance available. Accordingly, the resource function has been structured, and staff requirements have been projected, to meet with what is perceived to be the greatest need: providing expert assistance to appointed counsel.

2.5 Staffing

Based on information from studies conducted by the Spangenberg Group,[12] the minimal, initial level of authorized staffing for the Resource Center should be five attorneys: a director, a senior staff attorney, and three staff attorneys. These attorneys would provide services as described herein. The Spangenberg Group materials indicate that, in providing assistance to other lawyers appointed in capital cases, Resource Center staff attorneys expend approximately 150 hours per case per year. The Spangenberg Group estimates that an experienced post-conviction death penalty attorney could provide assistance in up to 10 cases per year and still have some time during the year for training, development of brief banks and model pleadings, and the providing of other professional legal services required for the operation of the Resource Center, in addition to allowing for some direct representation of death penalty litigants in collateral proceedings.[13] It is estimated that in an average year the Resource Center could be involved in a range of 90-105 state cases and 15-27 federal cases.

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[12] The Spangenberg Group, Caseload and Cost Projections for Federal Habeas Corpus Death Penalty Cases in FY 1988 and FY 1989 (Sept. 1987), prepared for the Criminal Justice Act Division, Administrative Office of the United States Courts.

[13] The Spangenberg Group estimates 150 hrs./case. At 10 cases, or 1500 hours, roughly 75% of an attorney's yearly "billable" hours, assuming 2000 hours/year, would be attributable to case participation.

While the level of Resource Center involvement will vary, it is reasonable to assume initial involvement in at least 40-50 cases per year, because there are at present 96 potentially "active" cases in the system, with an average of 20 cases per year added. The attorneys will also be devoting a large portion of their time initially to developing training programs in order to have qualified attorneys available for appointments in proceedings in the State and Federal courts. As more cases enter the post-conviction stage, consideration will have to be given to increasing the size of the Center's professional staff (with a necessary increase in its support staff).

2.6 Benefits

The establishment of a Resource Center would positively affect the litigation of capital cases and the aforementioned problems in the following ways.

(a) The Resource Center would identify qualified attorneys and offer extensive advice and assistance to appointed counsel and other counsel representing death-eligible or death-sentenced inmates.

(b) The staff of the Resource Center would identify counsel from across the state, as well as outside the state, who are available for appointment, assist the courts involved in the appointment process, and offer support for appointed counsel. Additionally, the Resource Center would work with the bar in developing and presenting periodic continuing legal education programs and materials on the topic of capital litigation.

(c) The provision of certified and adequately trained counsel should inure to the benefit of all participant in the litigation process: the defendant, the prosecutor, and the courts. Properly trained and qualified counsel should provide better representation for the defendant, as well as alleviating burdens on the justice system due to inadequately tried cases.[14]

(d) The Resource Center will provide assistance to counsel at the trial and post-conviction levels which may lead to the early identification and preservation of issues. The Resource Center also may serve as liaison between counsel litigating the habeas corpus petition and those litigating unexhausted issues in the state courts.

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[14] While the Task Force's charge and primary concern is with competent representation by counsel for defendants, it recognizes that additional resources will be necessary for prosecutors throughout the state. Resources, including development of training programs, can be provided through either the Pennsylvania District Attorneys Institute, the Office of the Attorney General, or both.

(e) The Resource Center will track capital litigation at all levels.

(f) The Resource Center would become the office with primary responsibility for monitoring representation in all capital trials, appeals, post-conviction proceedings, and federal habeas corpus petitions.

2.7 Funding

To truly address the problems discussed, the Resource Center will need to provide services at both the state and federal levels, therefore requiring financial support from both areas.[15]

A prerequisite to federal funding is the designation of the Resource Center as a federal community defender organization. The Resource Center, then, would request Criminal Justice Act (CJA) funds adequate to support 50% of the salaries of the Director and four full-time attorneys, and necessary support staff to provide services in the manner outlined above. Utilizing formulas developed by the Spangenberg Group, it is estimated that at least[16] $299,215 in CJA funds, or half of the estimated annual budget, would be required to adequately fund this part of the Resource Center in FY 1991 (assuming a start-up date of 7-1-91). A

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[15] As noted above, the Resource Center's workload cannot be anticipated with certainty. If cases follow a normal progression, as evidenced by capital litigation in other states, those cases that have been affirmed on direct appeal will proceed through State post-conviction remedies before federal habeas corpus petitions are filed. Given the time it will take to adjudicate those anticipated State post-conviction petitions, it is impossible to say with any degree of certainty how much of the staff attorneys' initial work will be spent aiding attorneys in federal proceedings.

Nonetheless, there will be substantial "federal" work. In anticipation of a case entering the federal system, resource center staff will have to devote substantial efforts to assisting appointed counsel in this new forum. The Resource Center may provide consultation services in connection with reviewing the record of the case and conducting any necessary factual investigation for the purpose of identifying post-conviction claims. Even while this federal work is proceeding, an unexhausted state claim may be identified that will require comparable state work to proceed on a parallel plane, i.e., providing consultation services with respect to state court proceedings. In short, a Resource Center which has sufficient funds to fully support both its state and federal work components will foster continuity of representation and, in so doing, enhance the quality of services provided while reducing the likelihood that resources will be expended on repetitious and costly efforts on the part of all involved.

[16] Advances on rentals, equipment purchases, etc., may require initial CJA funds to exceed the estimated one-half of the annual budget.

proposed Resource Center budget for FY 1991, which details the figures referenced above, is listed at section 2.11 infra.

Funding from state and federal agencies will be pursued simultaneously. The problem of improving the quality of representation must be addressed at both levels to improve it throughout the capital procedures. It is difficult to accurately separate what is a "state" issue and what is a "federal" issue. The representation of a federal habeas corpus petitioner is impacted by the representation that the petitioner receives at every level of litigation in the state system. Improved representation at the trial, appellate, and post-conviction levels may result in higher quality litigation in the state courts and will reduce the likelihood that a federal court will find it necessary to remand a case to the state courts for a new trial years after the crime. For this reason, it is imperative that adequate funding be procured to ensure the operation of the Resource Center at all levels of the capital litigation process.

2.8 Location

Because of its centrality, it is recommended that Harrisburg be the location of the Resource Center. With two law schools in proximity to the State Capital, there will be a pool from which to obtain the voluntary, and possibly paid,[17] assistance of law students. Harrisburg is also the location of the State library and law library, with their excellent research capabilities. Additionally, office space should be less expensive there than in either Philadelphia or Pittsburgh.

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[17] It may be possible for qualifying, financially needy, Pennsylvania resident students to be paid by PHEAA (Pennsylvania Higher Education Assistance Act) funds available through their law schools.

This location, and its access to major highways and rail and airline transportation, should also permit staff attorneys to get to all areas of the state for consultation in a matter of hours. It is also a central location for the capital prisoners who are housed at institutions throughout the state.

2.9 Personnel

The permanent staff of the Resource Center will initially consist of five full time attorneys, an administrative assistant, a paralegal, and a secretary. Student interns will be recruited from area law schools to provide assistance utilized where possible. The specific job responsibilities, qualifications, and annual compensation of permanent staff are outlined.

2.9.1 Director Position

Qualifications: Extensive trial and appellate experience in the defense of capital cases with the necessary administrative skills to coordinate the activities of the Resource Center staff.

Responsibilities: Overseeing the overall operation of the resource center; making personnel decisions; developing an operational budget and aiding the Board of Directors in raising the necessary finances to sustain the operation of the resource center; recruiting and appointing staff; participating in the process of certifying qualified attorneys; working directly with the staff attorneys in identifying and developing resources; aiding attorneys involved in capital litigation. Representation, as lead or associate counsel, in state or federal capital proceedings.

Compensation: $60,000

2.9.2 Senior Staff Attorney Position

Qualifications: Trial and/or appellate experience in the defense of capital cases with the ability to train other attorneys involved in capital litigation.

Responsibilities: Working directly with the Director in identifying and developing resources; assuming primary responsibility for aiding attorneys involved in litigation. Representation, as lead or associate counsel, in state or federal capital proceedings.

Compensation: $50,000

2.9.3 Staff Attorney Position

Qualifications: Capital appellate experience or substantial equivalent.

Responsibilities: Working directly with the Senior Staff Attorney in identifying and developing resources; assuming responsibility for aiding attorneys involved in capital litigation. Representation, as lead or associate counsel, in state or federal capital proceedings.

Compensation: $40,000

2.9.4 Administrative Assistant Position

Qualifications: Strong experience in case management, budget preparation, grant applications, and general office management; familiarity with the workings of the criminal justice system and possessing the necessary skills to aid in case management, data acquisition, budget preparation, and office administration.

Responsibilities: Managing the daily operation of the resource center,

developing and administering an efficient system of resource procurement, reproduction, cataloging, and distribution; working with the Director and Board of Directors in procuring funds for the ongoing operation of the resource center.

Compensation: $28,000

2.9.5 Paralegal Position

Qualifications: A degree in criminal justice, social work, psychology, or a related field, or equivalent experience; familiarity with the workings of the criminal justice system and possessing the necessary skills to aid in case management, date acquisition, and office administration.

Responsibilities: Overseeing the tracking of capital cases within the state, monitoring their progress, and bringing any significant cases to the attention of the staff attorneys; participation in research and drafting manuals; correspondence; interviewing families, witnesses, etc., with respect to developing mitigating evidence.

Compensation: $25,000

2.9.6 Secretary Position

Qualifications: Secretarial skills adequate to assume primary secretarial tasks.

Responsibilities: Working directly with the attorneys in the research, development, and distribution of resources; assisting the Administrative Assistant in the operation of the Resource

Center; receiving and screening all incoming phone calls and written correspondence and directing them to the proper member of the Resource Center staff.

Compensation: $19,000

2.10 Board of Directors

The Board of Directors of the Resource Center will oversee the operation of the project, assist in establishing the annual budget, and select the Director.

The Board will consist of six persons (five appointed, voting members, and the Director of the Resource Center ex officio) and will be representative of the criminal defense bar of Pennsylvania. Membership of the Board shall be as follows:

(a) A federal defender from the Eastern, Middle, or Western Districts of Pennsylvania appointed by the Chief Judge of the United States Court of Appeals for the Third Circuit;

(b) A county public defender appointed by the Chief Justice of Pennsylvania;

(c) A representative of the legal academic community with a background in criminal defense, chosen by the Deans of the University of Pennsylvania School of Law, Temple University School of Law, Villanova University Law School, the Widener University School of Law, the Dickinson School of Law, the Duquesne University School of Law, and the University of Pittsburgh School of Law;

(d) The President of the Pennsylvania Bar Association, or his\her designee;

(e) A member of the criminal defense bar chosen by the President of the Pennsylvania Association of Criminal Defense Lawyers; and,

(f) The Director of the Resource Center, ex officio.

The Board of Directors will serve staggered [three year] terms with vacancies to be filled by the by the persons or the organizations which originally appointed the member. Board

members shall not be compensated for their service. They shall, however, be entitled to reimbursement of expenses reasonably incurred in the performance of their duties.

2.11 Proposed Budget for Pennsylvania Death Penalty Resource Center. We project the following budget for fiscal year 1991:

Expense Category	Cost
Personnel	
Director/Attorney	$ 60,000
Senior Staff Attorney	$ 50,000
3 Staff Attorneys	$120,000
Administrative Assistant	$ 28,000
Paralegal	$ 25,000
Secretary	$ 19,000
SUBTOTAL	$302,000
Fringe Benefits @ 34%	$102,680
Temporary help	$ 10,000
Expert services	$ 17,000
-Investigators	$ 5,000
-Psychiatrists	$ 7,000
-Other Experts (such as ballistics, accountants, handwriting, etc.)	$ 5,000
TOTAL PERSONNEL COSTS	$431,680
Operating Expenses	
Travel	$ 10,000
-General(case related)	$ 8,000
-Administrative	$ 2,000
Training	$ 7,000
Telephone	$ 15,000
-Local	$ 5,000
-Long Distance	$ 10,000
Postage	$ 3,000
Freight/Federal Express	$ 1,750
Equipment Maintenance	$ 5,000
Contractual Maintenance (eg.,Lexis)	$ 7,500
Office Space Rental (3,000 sq. ft @ $10/sq. ft.)	$ 30,000
Office supplies	$ 8,000

Printing & Reproduction	$ 2,000
Library Subscripts	$ 1,000
Malpractice Insurance	$ 2,000
Audit	$ 3,000
TOTAL OPERATING EXPENSES	$ 95,250

Start-Up Costs

Library	$ 10,000
Furniture	$ 25,000
Equipment	$ 36,500
-Photocopier	$ 14,000
-FAX	$ 2,500
-Computers	$ 20,000
TOTAL START-UP COSTS	$ 71,500
TOTAL PROJECT COSTS (INCLUDING START-UP)	$598,430

3.0 ATTORNEY QUALIFICATIONS AND COMPENSATION

3.1 Overview

The Task Force committee reviewed American Bar Association (ABA), Philadelphia County, and Allegheny County standards for certification of death penalty litigators and for compensation. In summary, the committee recommends the adoption by both the state and federal courts of standards similar to those of Philadelphia County, as modified. A statewide certification board will apply the standards in specific cases and authorize waivers where appropriate, e.g., where an attorney has substantial litigation or other specialized experience. State and federal judges will appoint attorneys who have been approved by the Board of Certification.

The Task Force relied heavily on the Philadelphia County standards which have proven successful and acceptable to the courts and the prosecutorial and defense bars. In addition, the vast majority of defendants emanate from Philadelphia and Allegheny Counties and the experiences of these jurisdictions were instructive. The Task Force recognizes that the experience of smaller counties may not mirror that of the larger, urban areas, but it nonetheless recommends uniform application of standards in all counties. It is recognized that not every attorney will meet the standards in the first instance, but with waivers in appropriate cases and the training program, it is assumed that the pool of qualified counsel in all regions of the state will grow.

In its discussions, the Task Force considered the question of whether minimum certification standards would create new substantive rights or issues for collateral attack. Indeed, comments to an earlier draft addressed these concerns, as well. While creative litigants may always present many novel issues, appellate courts traditionally have reviewed ineffective assistance of counsel claims focussing only on the performance of the attorney in a specific case not the presence or absence of minimum qualifications. Appellate review centers on allegations

of fact-specific conduct or omissions, together with prejudice of constitutional dimensions emanating therefrom. The Task Force deems a successful collateral attack based on an issue of attorney certification highly improbable given the governing case law of the Supreme Courts of the United States and Pennsylvania and the Court of Appeals.

3.2 Qualifications

The qualification standards of Philadelphia County meet and exceed, in certain instances, those suggested by the American Bar Association. While concerned that a relatively small pool of qualified attorneys currently exists, the committee does not suggest dilution of the standards to create a larger pool. Instead, it is anticipated that a properly funded and staffed resource center, continuing legal education, and the experience of serving as associate counsel in capital cases will combine to create, gradually, a larger pool of qualified counsel.

The standards should be mandatory and uniformly applied statewide in both the state and federal courts. (See Standards, Section 3.5, infra) Standards should be implemented by rules promulgated by the Supreme Court, by the Judicial Council of the Third Circuit, or by the United States Court of Appeals and the individual District Courts, as appropriate.[18] Appointing judges will choose attorneys certified by a statewide board of certification. An attorney's willingness to have his/her name placed on the Statewide roster would constitute a certification that he/she is willing to undertake one capital case per year outside of the attorney's county of practice," i.e., over and above any cases to which he/she might be appointed in his/her home county. The idea is to develop a pool of lawyers who are willing to engage in limited travel in order to assist smaller counties that lacked attorneys who are qualified to handle capital cases. Thus, while each county would try to develop a pool of local

[18] The process of (Rule-making implementation) is a supervisory function of the Supreme Court and the Court of Appeals. There are adequate provisions for public comment on any proposed rule or standard. See, Pa.R.J.A. No. 103; 28 U.S.C. § 2071 et seq.

attorneys who met Statewide qualification criteria, there would also exist a pool of attorneys who are willing to travel outside of their county. Any attorney who qualified to handle capital cases within his/her home county would also have the option to have his/her name included on the Statewide roster, i.e., an attorney could not opt to be included on the Statewide list even though qualified to handle capital cases. However, if an attorney opted to have his/her name on the Statewide list, it would mean that the attorney would be willing to do one case per year in a nearby county. Certification, according to the appropriate standards, can be for trial, appellate, PCRA, and federal collateral attack proceedings.

It is presumed that in most cases both lead and associate counsel will be appointed. In very small counties, where capital cases are infrequent, there may be few or no qualified attorneys. Where no local, qualified attorneys are available, necessary appointments should be in conjunction with an appointment of local counsel. Local counsel will gain valuable associate counsel experience, and qualified lead counsel from another county can benefit from the local attorney's knowledge.

3.3 Certification Board

A Board of Certification will review the qualifications of attorneys and administer pools of qualified attorneys. The Board will consider applications from attorneys, with a regional breakdown similar to that of the federal district court divisions, forming Western, Middle, and Eastern districts. The Board will certify attorneys in strict adherence to the standards, but where appropriate the Board may recognize certain kinds of experience which would be treated as equivalent to particular standards. The Board periodically may review the continuing qualifications and performance of pool attorneys and revise the list as necessary.

The Board would be comprised of members chosen as follows:

(a) A federal defender chosen by the Chief Judge of the United States Court of Appeals;

(b) A county defender chosen by the Chief Justice of the Supreme Court of Pennsylvania;

(c) A member of the criminal defense bar chosen by the Supreme Court of Pennsylvania;

(d) A member of the bar selected by the President of the Pennsylvania Bar Association;

(e) A member of the criminal defense bar chosen by the President of the Pennsylvania Association of Criminal Defense Attorneys; and,

(f) The Director of the Resource Center, ex officio.

Thus, there would be six (6) Members of the Board, five voting members, with staggered terms, and the Director. It is suggested that the terms be staggered over a three (3) year period. Vacancies will be filled by the person(s) or agency which originally appointed the member.

3.4 Compensation

A statewide compensation plan for the costs of state court litigation should be mandated.[19] The plan should permit the payment of preliminary expenses via interim petitions for reimbursement. While most attorneys can await the final payment of fees, advancing expenses for lengthy litigation can be burdensome or impossible for small firms.

[19] Compensation for litigation in the federal courts, whether in direct criminal representation or collateral attack, is governed by the Criminal Justice Act, 18 U.S.C. § 3006A, and 21 U.S.C. § 848(q).

3.5 Proposed State-Wide Qualification Standards for Court-Appointed Counsel in Capital Cases

3.5.1 Standards for Certification in Capital Homicide Trials

3.5.1.1 General Principle

The Board of Certification should seek attorneys from the criminal defense bar who can demonstrate excellence in homicide litigation. In all capital homicide cases, an attorney qualified as lead counsel must be appointed from the list of qualified attorneys maintained by the Death Penalty Certification Board. It is presumed that both lead and associate counsel will be appointed in most cases.

3.5.1.2 Qualifications for Lead Counsel

To be certified lead counsel, it is required that an attorney demonstrate that he/she:

(a) Has been admitted to the Bar of the Pennsylvania Supreme Court (or to the bar of the federal district court) or admitted to practice pro hac vice;

(b) Is an active practitioner with at least five years' litigation (trial and/or appellate) experience and demonstrated expertise in the field of criminal law in this or any other jurisdiction;

(c) Has prior experience as sole or lead counsel in no fewer than ten criminal jury trials of serious and complex cases which were tried to completion in this or any other jurisdiction;

(d) Has been sole or lead counsel in the trial of at least one homicide case, tried to completion; or, has participated as associate counsel in at least two homicide trials tried to completion in this or any other jurisdiction;

(e) Is familiar with the practice and procedure of the Pennsylvania Supreme Court, or the federal district court and the United States Court of Appeals for the Third Circuit;

(f) Is familiar with, and experienced in the use of expert witnesses and scientific and medical evidence, including, but not limited to, psychiatric and pathological evidence;

(g) Has attended and successfully completed within the last two years at least one training or educational program on criminal advocacy which

focused on the trial of cases in which the death penalty is sought and which includes training in federal habeas corpus jurisprudence. (This requirement may be waived if the attorney has demonstrated outstanding performance as lead counsel in two or more death penalty trials within the preceding two years.)

3.5.1.3 Qualifications for Associate Counsel

To be certified as associate counsel, it is required that an attorney demonstrate that he/she:

(a) Has been admitted to practice before the bar of the Pennsylvania Supreme Court (the federal district court) or has been admitted to practice pro hac vice;

(b) Is an experienced and active practitioner with at least three years' litigation (trial and/or appellate) experience and demonstrated expertise in the field of criminal law in this or any other jurisdiction;

(c) Has prior experience as sole or lead counsel or co-counsel in at least *five criminal jury trials of serious and complex* cases which were tried to completion in this or any other jurisdiction;

(d) Has been sole counsel, lead counsel, or co-counsel in a homicide trial in this or any other jurisdiction, which resulted in a verdict; or, has attended and successfully completed within the last two years at least one training or education program on criminal advocacy which focused on the trial of cases in which the death penalty is sought.

3.5.2 Standards for Certification--Death Penalty Appellate Counsel

3.5.2.1 General Principles

(a) The Board of Certification should seek attorneys from all sectors of the bar who can demonstrate excellence in appellate advocacy to represent appellants under sentence of death.

(b) The court ordinarily should appoint two attorneys. To be appointed associate counsel, an attorney should be qualified to handle state PCRA or federal motions to vacate sentence, (28 U.S.C.§ 2255) cases where death penalty is not authorized.

3.5.2.2 Qualifications for Counsel Certified to Represent Appellants Under Sentence of Death

An attorney may be certified to represent an appellant under sentence of death only if that attorney:

(a) Has been admitted to the bar of the Supreme Court of Pennsylvania (United States Court of Appeals for the Third Circuit) or has been admitted to practice before that Court pro hac vice;

(b) Has had primary responsibility for at least five briefs submitted to any appellate court;

(c) Has presented oral argument to an appellate court on at least three occasions involving criminal cases;

(d) Submits to the Board of Certification at least one appellate brief that was written primarily by himself/herself and demonstrates to the Board excellence in written legal advocacy;

(e) Is familiar with the practice and procedure of the Pennsylvania Supreme Court (United States Court of Appeals for the Third Circuit);

(f) Demonstrates, by training or experience, knowledge of principles of criminal and constitutional law as they apply to death penalty cases, as well as familiarity with state PCRA and/or federal habeas corpus jurisprudence.

3.5.3 Standards for Certification Post-Conviction Relief[20] Counsel–PCRA; § 2254; § 2255

3.5.3.1 General Principles

(a) The Screening Committee should seek attorneys from all segments of the bar who can demonstrate excellence in litigation to represent post-conviction petitioners under sentence of death.

(b) The court ordinarily should appoint two attorneys to represent the petitioner.

(c) The Board of Certification shall certify attorneys eligible to be placed on death penalty PCRA panels, or death penalty "habeas corpus" panels, 28 U.S.C. §§ 2254, 2255, of the United States District Courts of Pennsylvania. The Board will ascertain who among these attorneys are willing to accept appointments in death penalty post-conviction

[20] The term "post-conviction," except where it explicitly applies to a specific state or federal statute, is understood to encompass both state and federal avenues of post-conviction relief.

petitions, subsequent appeals, and federal "habeas corpus" petitions, 28 U.S.C. §§ 2254, 2255.

(d) There is a presumption in favor of continuity of representation of counsel in the post-conviction process. PCRA counsel will ordinarily continue representation in subsequent federal proceedings, unless counsel or the petitioner objects. When a state petitioner, whose federal habeas corpus petition, 28 U.S.C. § 2254, has been dismissed for failure to exhaust state court remedies, was represented by counsel appointed under the Criminal Justice Act, that petitioner should be represented by the appointed attorney in subsequent state proceedings, unless either the petitioner or the attorney objects.

3.5.3.2 Qualifications for Counsel Appointed to Represent Prisoners Under Sentence of Death in Post-Conviction Petitions

An attorney may be appointed to represent a post-conviction petitioner under sentence of death only if that attorney:

(a) Has been admitted to the bar of the Supreme Court of Pennsylvania (the federal district court) or has been admitted to practice pro hac vice;

(b) Is an active practitioner with at least five years' litigation (trial and/or appellate) experience in this or any other jurisdiction;

(c) Has experience as sole or lead counsel in no fewer than ten trials or other hearings before a judge or other judicial officer where contested factual issues were actually decided;

(e) Submits to the Screening Committee at least one sample of legal writing for which he/she was primarily responsible. This writing must advocate the position of a party in an adversary proceeding and must demonstrate excellence in written legal advocacy;

(f) Is familiar with the practice and procedure of the Pennsylvania Supreme Court, and with PCRA, and/or federal habeas corpus, 28 U.S.C. §§ 2254, 2255, jurisprudence;

(g) Has taken at least one training or educational program, within the past two years, which focused on state and federal post-conviction litigation in death penalty cases. (This requirement may be waived if the attorney demonstrates to the Screening Committee knowledge of the principles of Pennsylvania and federal death penalty post-conviction litigation.)

3.5.4 Experience Exception To Standards

If any applicant fails to meet any of the above specific standards, the Board of Cerification, after examining the applicant's qualifications and conducting a personal interview with nthe applicant, may rate the applicant to be qualified if the applicant's experience, knowledge and training are clearly equivalent to the standards for the category in which applicant seeks qualification.[21]

3.5.5 State Compensation Rates for Court-Appointed Counsel

3.5.5.1 The appointment of certified counsel in homicide cases in which the State seeks the death penalty shall be made in accordance with these guidelines and applicable Rules.

3.5.5.2 The court ordinarily will appoint lead and associate counsel in cases in which the State seeks the death penalty.

3.5.5.3 (a) Assigned counsel may make a written request to obtain investigative, expert or other services necessary to an adequate defense. Upon finding that such services are necessary, the court shall authorize counsel to obtain such services on behalf of a defendant.

(b) In order to expedite reimbursement to counsel for services rendered by investigators or other experts authorized by the court at the conclusion of such expert services rendered on behalf of the

[21] It is likely that appropriate waivers will be more necessary during the implementation phase of the standards. Given aggressive training and support by the statewide bar, more attorneys gradually will meet certification standards.

defendant, counsel may submit a petition and order for reimbursement to counsel of such expert fees. Said petition and order shall be submitted to either the trial judge, if there is a trial, or to the judge presiding over the disposition of the matter and may be submitted at any stage of the proceedings. The petition and order for reimbursement must contain all information and exhibits relevant to the reimbursement of expenses as may be prescribed by rule. Upon submission by counsel of the petition and order for reimbursement, the appropriate judge will review the petition and authorize payment to counsel of such expert fees as are considered reasonable and necessary. The reviewing judge will then forward the petition and order for reimbursement to the proper payment authority for prompt payment.

3.5.5.4 Upon the conclusion of counsel's representation, or any segment thereof, the judge sitting at the trial of the case, if there is a trial, or to the judge presiding over the disposition of the matter shall, after the filing of the claim and sworn statement, allow such counsel all reasonable personal and incidental expenses, and compensation for services rendered.

3.5.5.5 Counsel in state proceedings shall be compensated for services rendered at a rate not exceeding seventy five ($75.00) per hour for time reasonably expended in court, and fifty dollars ($50.00)[22] per hour for time reasonably expended out of court. When two counsel have been assigned, their claims for compensation and reimbursement shall be stated separately.

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[22] The recommended rates reflect the budget constraints facing the local counties. The higher rates in the federal courts, a rate of $125/hour for in-court and out-of-court time reflects the current rates approved by federal courts throughout the country.

3.5.5.6 Counsel so appointed must file with the judge an affidavit that he has not, directly or indirectly, received, nor entered into a contract to receive, any compensation for such services from any source other than herein provided, or any other affidavit required by law.

4.0 TRACKING

There exists a need within Pennsylvania to identify capital cases and update the status of such cases as they move through the state and federal court systems. Presently, there is no single source to collect and process information on the status of capital cases within Pennsylvania.

The dual function of this proposed tracking system is to identify the existence of all state and federal capital cases in Pennsylvania at the earliest possible time in order to facilitate the appointment of qualified counsel if necessary to the case, and to maintain the status of all capital cases at all levels of the state and federal court systems in Pennsylvania. A computer based system needs to be designed which would consist of the collection and processing of factual information necessary to support these two functions. Cases will be tracked through the state and federal trial and appellate court systems and will include dispositions by the Supreme Court of the United States, if applicable. Collateral reviews, regardless of the number in both the state and federal systems, and all appeals therefrom, will be included. The system must necessarily allow for cross-indexing, given the fact that a case takes on a different number and caption depending on where it is initiated. The information on the system should be available to the bench, bar and public.

The information to be included in the case tracking system would be similar to that appearing in a docket and include, but not be limited to, the following: caption of the case, the county of origin, the case number, defense counsel's name, address and telephone number, trial date, or argument or hearing date whichever is applicable, disposition by the fact finder and/or court, the date for filing of briefs or motions such as post-trial motions and the filing of appellate briefs, when the record is lodged with the appellate court, whether a warrant of execution has issued and date of execution, and whether a stay has been granted. This outline of information is only illustrative; the actual details of the system ultimately will be determined

during the design phase.

Research has indicated that other states, where there exists no unified defender's organization which has responsibility for defending capital cases, employ methods such as reviewing newspaper clippings to become aware of the filing of a capital case, as well as by word of mouth. These methods are viewed as insubstantial and haphazard at best. Thus, to carry out the purposes of this tracking system, it is critical to become aware of the existence of capital cases at the earliest opportunity. Various options were explored but for purposes of tracking state cases, it is recommended that Rule 352 of the Pennsylvania Rules of Criminal Procedure be amended as appropriate and utilized in carrying out this function. This Rule provides that the Commonwealth, i.e., the District Attorney, must notify the defendant in writing of any aggravating circumstances which it intends to submit at the sentencing hearing, at or before the time of arraignment unless the Commonwealth becomes aware of the existence of an aggravating circumstance subsequent thereto, or that the time for notice is extended by the court for cause shown.[23] Utilization of the Rule seems to be the most expeditious means to accomplish the objective and would represent a sound mechanism for reporting. The Rule should be amended to require that notice of a capital case be provided to the Resource Center at the same time. It is understood that amending the Rule is within the discretion of the Supreme Court of Pennsylvania. Initiatives should be undertaken to submit a rule change to the Court for its consideration.

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[23] Rule 352, Pa.R.Crim.P., reads as follows:

> Rule 352. Notice of Aggravating Circumstances
>
> The Commonwealth shall notify the defendant in writing of any aggravating circumstances which the Commonwealth intends to submit at the sentencing hearing. Notice shall be given at or before the time of arraignment, unless the attorney for the Commonwealth becomes aware of the existence of an aggravating circumstance after arraignment or the time for notice is extended by the court for cause shown.

Once the case has been reported to the Resource Center, it is incumbent upon that entity to pursue the collection of data regarding the status of the case. The Resource Center must take the initiative by contacting defense counsel, or whatever other sources necessary to ensure that the information on the case is current and complete. This applies to all levels within the state and federal court systems.

With respect to the notification of the existence of federal original jurisdiction capital cases and habeas corpus capital cases, reporting procedures be implemented regarding original capital cases complementary to those already in place in the Third Circuit Court of Appeals for habeas corpus capital cases. Rule 29 of the Third Circuit Rules and Procedures, and Chapter 15 of the Internal Operating Procedures of the U.S. Court of Appeals for the Third Circuit govern the procedure for capital habeas corpus cases as well as the administration of those cases. Rule 29 requires the filing in the U.S. District Court of a Certificate indicating that the case is capital in nature, which in turn is transmitted to the Third Circuit. The Third Circuit Judicial Council or local district courts should develop rules requiring the filing, by the United States Attorney, of a certificate of death penalty case at the time of arraignment. See Fed.R.Crim.Pro. Rule 10; 21 U.S.C. § 848(h). On the Circuit level, a designee will monitor all federal capital cases and transmit such information to the Resource Center. Thereafter, the Resource Center should exercise initiative to complete necessary information and maintain case status.

As to the design of the computer program, personnel within the Administrative Office of Pennsylvania Courts and the U.S. Court of Appeals are available to develop a program to meet the requirements recommended herein. The Courts' computer specialists have indicated that the system can be developed to run on a personal computer at a minimum cost.

Members of the Task Force will continue to design this function of the Resource Center and are prepared to implement the tracking function as quickly as possible.

5.0 FUTURE INITIATIVES

Possible alternatives for securing adequate and continuing funding for the Resource Center and its related activities were considered. Various sources of funding, such as foundation grants and bar association donations, were dismissed as unreliable, because the experience nationwide has been that such sources often provide only temporary assistance. A permanent, secure source of funding is essential to the viability of the Center, and is a precondition to continuing federal funding. The most appropriate source of funding is a combination of the state and federal government. Federal funding is available, but contingent on comparable state funding.[24] Accordingly, the Subcommittee was instructed to explore appropriate sources of state funding, and it makes the following recommendations.

Funding for the Resource Center and related activities should be sought in the form of a line item in the budget of the Judiciary of Pennsylvania. The proposed funding should represent 50% of the estimated budget for start-up and first year expenses (approximately $300,000), with the federal judiciary authorizing the remaining fifty percent. Future budgets should be funded in a similar way, consistent with the needs of the Center.

Upon final issuance of this Report of the Death Penalty Task Force, it should be presented to the Supreme Court of Pennsylvania for approval and subsequent inclusion in the budget of the Pennsylvania Judiciary. (Submission to Pennsylvania legislature and to the Governor, then, will follow the traditional means of budget preparation, adoption, and final appropriation.) The Report should also be submitted to the Judicial Council of the Third Circuit and the Judicial Conference of the United States for approval and authorized funding.

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[24] The Resource Center Plan must be approved by the Judicial Council of the Third Circuit, the Defender Services Committee of the Judicial Conference, and the Judicial Conference of the U.S. Funding will be administered by the Defender Services Division of the Administrative Office.

The target state budget cycle is FY'91-'92 (July 1, 1991--June 30, 1992). That target will require consideration and approval by the Supreme Court prior to its budget submission for FY'91-'92. Budget preparation typically begins in the fall preceding the new fiscal year. A continuing committee should be appointed to pursue all steps necessary to the final implementation of the Resource Center. Members of the Task Force, the Chief Justice, the Chief Judge, and other interested parties should stand ready to testify about the need for the Center or to explicate aspects of the Report during the implementation period.

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