December 8, 2016

Honorable Carl E. Stewart
Chief Judge, Fifth Circuit Court of Appeals
United States Courthouse
300 Fannin Street, Suite 5226
Shreveport, Louisiana 71101-3074

RE: Creation of Capital Habeas Units

Dear Chief Judge Stewart:

I am writing on behalf of the American Bar Association to support the creation of Capital Habeas Units in the Northern and Western Districts of Texas. With over 400,000 members, including 22,000 members in Texas, the ABA is the national voice of the legal profession in the United States and has long been actively engaged in advocating for the right to counsel in many arenas.

In the spring of 2016, the ABA presented testimony from our former President and from the Director of the ABA’s Death Penalty Representation Project to the Judicial Conference Ad-Hoc Committee to Review the Criminal Justice Act. As both ABA representatives noted for the Committee, the ABA has for decades been concerned with the quality and availability of defense counsel in capital cases, which led to the creation of the ABA’s Death Penalty Representation Project (“Representation Project”) in 1986.

The Representation Project oversaw the process of developing the ABA’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases in 1989 and updating those standards in 2003. In 2001, the ABA created the Death Penalty Due Process Review Project (then known as the Death Penalty Moratorium Implementation Project) to research state capital punishment systems and to publish assessments of those systems. The research of both the Representation and the Due Process Review Projects has revealed that no single factor is more essential to providing due process in capital cases than access to qualified, adequately resourced defense counsel. The ABA Guidelines and the assessments both call for the creation of capital defender offices at the state and federal levels, staffed by specially trained lawyers, investigators, and mitigation specialists. The ABA has found that these offices are the best way to provide effective and efficient capital representation.

Currently, Texas provides representation in capital habeas corpus cases in two ways: (1) through the Office of Capital and Forensic Writs (OCFW), created in 2009 in response to myriad problems identified with state-appointed habeas counsel, and (2) through court-
appointed, private counsel. Attorneys at the OCFW are statutorily limited to representing only state habeas corpus clients; thus, death row prisoners whose cases proceed to federal habeas corpus or clemency proceedings depend entirely on private appointed counsel. In addition, the OCFW is occasionally unable to take cases due to conflicts or excessive caseloads, resulting in some death row prisoners receiving private counsel appointed through the courts.

In 2013, the U.S. Supreme Court decided *Trevino v. Thaler*, which provided an equitable remedy to overcome procedural bars in federal court in certain situations where state habeas counsel was ineffective. To exercise this remedy, the prisoner must have different counsel in federal habeas proceedings who can assert state counsel’s ineffectiveness. Prior to *Trevino*, Texas state-appointed attorneys frequently remained counsel of record as the case proceeded into federal court, limiting the issues that the client could assert. In the wake of *Trevino*, that practice has nearly disappeared, greatly increasing the need for federal habeas counsel. There are also still many pre-*Trevino* clients who have had the same counsel represent them in state and federal habeas proceedings and have not been able to seek the remedy provided by *Trevino*.

The ABA’s Representation Project, which recruits pro bono lawyers to provide representation in capital cases, has received hundreds of letters from Texas death row prisoners—more than from any other state—who are desperately seeking volunteer legal assistance. These prisoners, who are almost exclusively represented by private appointed counsel, frequently report that they have not heard from their attorneys in years, that serious constitutional claims have been abandoned in pleadings, and that filing deadlines have been missed. Unfortunately, due to the extremely limited supply of volunteer law firms able to take on state and federal habeas cases, the Representation Project has not been able to locate pro bono counsel to assist many of these individuals. Although the opening of the OCFW has somewhat alleviated the need for pro bono counsel at the state level, the number of requests for federal habeas counsel in Texas cases has increased dramatically in recent years.

Compounding the problem created by the absence of Capital Habeas Units (CHUs) in Texas, the state does not currently provide a statewide independent appointing authority responsible for the selection, training, or monitoring of capital counsel. The lack of this kind of oversight violates the spirit and letter of the ABA *Guidelines*. Guideline 3.1 specifies that if the jurisdiction does not have a defender office such as a CHU, there must be an independent authority to ensure that appointed attorneys have adequate training and resources and are providing high quality representation to their clients. Since 1989, the *Guidelines* have been relied upon by state and federal judges, including the United States Supreme Court, in more than 300 reported opinions in nearly every active death-penalty jurisdiction in the country. These *Guidelines* have also been adopted by the Texas State Bar as the *Texas Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.

CHUs in the Northern and Western Districts of Texas are essential to ensure due process in Texas federal capital habeas corpus litigation. Since May of 2016, the Texas Court of
Criminal Appeals has stayed six executions on the grounds that additional investigation may be warranted. In each case, the inadequacy of previous investigation by state and federal habeas counsel has been a factor in the failure of prior proceedings to address the newly presented issues. The creation of CHUs could help solve the problems associated with these cases by ensuring that adequate investigation and representation is provided during federal habeas corpus proceedings, which would both increase judicial efficiency and ensure due process for capital defendants. Because the ABA believes high quality representation is paramount to the integrity of the American justice system, the ABA strongly recommends the creation of Capital Habeas Units in the Northern and Western Districts of Texas.

Very truly yours,

[Signature]

Thomas M. Susman
Director, Governmental Affairs Office