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Reforming Indigent Defense for Capital Defendants in Louisiana

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by

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Table of Contents

Introduction

This paper will explore the current system for providing indigent defense to capital defendants in Louisiana to identify problems with the system and propose potential solutions. First, I will analyze the historical and philosophical origins of the civil liberties contained in the sixth, eighth, and fourteenth amendments in order to establish the intent behind the civil liberties and what they seek to achieve. Specifically, I will address the Sixth Amendment right to counsel, the Eighth Amendment prohibition against cruel and unusual punishment, and the Fourteenth Amendment right to Due Process. A large part of the meaning of these civil liberties derives from their origins, and by detailing the long-standing history and philosophy behind these liberties, I will demonstrate what the system is trying to accomplish.

Next, I will describe the indigent defense system in Louisiana by first explaining the history of public defense prior to the landmark decision *Gideon v. Wainwright,* the case that made the sixth amendment right to counsel binding on the states. An analysis of Louisiana's history prior to Gideon will shed light on Louisiana's general public policy towards the right to counsel. I will discuss *Gideon v. Wainwright* and its impact on Louisiana, as well as how Louisiana's system for providing public defense changed in response to the Court's decision. The system resulting from this period lasted until the most recent reform efforts, and because problems with this system will continue to persist, a thorough understanding of the post-*Gideon* system will aid the analysis about what needs to happen for indigent defense in Louisiana to rise to national standards. I will discuss the current system with respect to the goals of the Constitution to identify shortcomings. I will also reference modern legal theory, including the American Bar Association's *Ten Principles Of a Public Defense Delivery System,*[1] as a means of establishing how Louisiana compares to national standards on indigent defense. I will end this

[1] See Appendix B.

section with a discussion about the changes recent legislative reform, Act 307, will make on the system

Next I will discuss the problems associated with the indigent defense system in Louisiana. I will begin this section with a discussion of how the new system will still fail to provide effective public defense, even after reform. I will also analyze the problems associated with capital punishment in Louisiana, from the statutes to the costs involved. I will use the deficiencies in the reformed indigent defense system to argue that further work is necessary to ensure justice.

I will end the paper with a discussion of four areas of potential reform. My reforms will derive out of identified problems with the current indigent defense system. By first identifying the historical and philosophical origins of the right to counsel, I can assess what the constitutional protections are trying to achieve. I will use this as a measure against the current system to identify areas that need reform. I will then propose four reforms to better the system and bring public defense in Louisiana up to national standards.

By reforming indigent defense to provide uniform, effective defense to all those subjected to the criminal system, not only will the individual indigent defendants benefit, and the State of Louisiana benefits as well. Providing effective defense counsel for indigents is not optional, nor is it something that the government can minimize. The Constitutional protections are supremely important and they develop out of a long history with deep philosophical roots. In order to uphold the justice inherent in the legal system, everyone deserves adequate defense. It is the State's duty to provide this, and if the State can provide these services in a more efficient manner, it would have much to gain, both in terms of time and money.

I. Historical and Philosophical Origins of Criminal Procedural Rights

The ideas contained in the Bill of Rights were not completely original on the part of the founders. They come from a long philosophical tradition. Each clause in each amendment, has an extensive history that led to its development. This section will identify the philosophical and historical origins of the right to representation clause of the sixth amendment,[2] the cruel and unusual punishments clause of the eighth amendment,[3] and the due process clause of the fourteenth amendment.[4] This is important to a discussion on indigent defense because it helps to establish what these civil rights should accomplish in practice. In order to establish what these civil liberties are trying to achieve, it is important to establish these historical and philosophical origins. Providing effective assistance of counsel is a very important government objective originating from a long history of philosophical thought and legal tradition. Providing assistance of counsel is not optional, and this section seeks to explain why.

A. Philosophical Origins of the Sixth, Eighth, and Fourteenth Amendments

The emergence of civil liberties was a hallmark of the Enlightenment Period, (1680s-1780s). Starting with Hobbes, Locke, and Rousseau, the development of the Social Contract theory was fundamental to the progression and incorporation of many civil rights into republican government. Specifically, due process requires the state to adequately provide an individual with a systematic, judicial process before stripping him of his life, liberty, or possessions. The idea of proportional punishment developed in part out of the necessity of due process. The executive

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[2] "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." Sixth Amendment, U.S. Constitution.
[3] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Eighth Amendment, U.S. Constitution.
[4] "…nor shall any State deprive any person of life, liberty, or property, without due process of law…" Fourteenth Amendment, U.S. Constitution.

power of the state to punish needs to be limited in order to uphold the contract between the State and the people to prevent tyranny.

Montesquieu furthered this view of punishment and the social contract in his work, *The Spirit of the Laws.*[5] Montesquieu critiqued the abuses of civil rights he saw in the government, stretching from Ancient Greece to his modern France, and enumerated many ideas about civil rights derived from natural law. Montesquieu asserted that the rights he described, including the right to due process of law and prohibition against excess punishment, represented the natural liberties of man endowed to him by nature. The inherent dignity of man is of the utmost importance, as is the protection of the individual against the arbitrary use of power by the government.

Beccaria, in his only novel *On Crimes and Punishment,*[6] continually cited Montesquieu as the origin of his political ideas about civil liberties, and he too used social contract theory to explain the utility of punishment. Beccaria advocated many ideas that the founding fathers eventually incorporated into the Bill of Rights: the presumption of innocence, the right to a speedy trial, protection against self-incrimination, protection against double jeopardy, the right of the defendant to know what charges he is facing, the right of the defendant to face his accusers, and the right to a fair trial. A great portion of his book was dedicated to the idea of proportionality of punishment[7] and the restriction against cruel and unusual punishments.[8]

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[5] Charles de Montesquieu & Anne M. Cohler, Basia Carolyn Miller (editors). *The Spirit of the Laws.* Cambridge: Cambridge University Press, 2002.
[6] Beccaria & Paolucci, Henry (translator). *On Crimes and Punishments.* Englewood Cliffs: Prentice Hall, 1963.
[7] "Punishments that exceed what is necessary for protection of the deposit of public security are by their very nature unjust." Ibid.
[8] Beccaria did not believe in capital punishment. First, he thought that it was inappropriate for the State to punish a murder by staging "a public one" and that the act of execution had a de-humanizing effect on the population. He also felt that life imprisonment was a more effective punishment and deterrent because he believed that it was not the intensity but the duration of punishment that made the biggest difference.

Despite his deep analysis into the aspects of a fair trial,[9] Beccaria did not specifically enumerate the right to representation. He did specify that "the criminal must be allowed opportune time and means for his defense,"[10] and the early roots of the need for representation start with this idea. Beccaria greatly influenced Voltaire and Blackstone, and both philosophers quoted him regularly in their major works.[11]

Voltaire, who met two of the founding fathers,[12] corresponded with several others,[13] and whose work was read by most of the signers of the Constitution, dramatically influenced the political ideals of our nation. Not only did he advocate many civil liberties that became incorporated into the Bill of Rights, but he also actively pursued social reform. Many cite the trials of Toulouse as Voltaire's call to action.[14] All across Europe, punitive measures grew more severe and modern human rights disappeared under the power of the government. Along with his support for the protection of due process and a restriction on excessive punishments disproportionate to the crime, Voltaire advocated for the right to counsel. Like other Enlightenment thinkers, he claimed natural law as the source of the defendant's right to counsel. In his commentary on Beccaria's *On Crimes and Punishment,* Voltaire extended Beccaria's idea that all individuals have the right to ample "time and means for his defense".[15]

> "The lawyer or counsel customarily allowed accused men is not a privilege granted by ordinances or laws; it is a liberty acquired by natural right, older than any human laws. Nature teaches every

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[9] Evidence, witnesses, accusers, depositions, oaths, presumption of innocence, right to know charges and face accuser

[10] Ibid.

[11] Voltaire and Blackstone provide the most direct bridge between the Locke, Hobbes, Montesquieu, and Beccaria and the Founding Fathers.

[12] Benjamin Franklin and Dr. Benjamin Rush

[13] Thomas Jefferson, John Adams, and James Madison

[14] This includes three trials in which Voltaire served as defense counsel against what he saw as religious authoritarianism. For more information, see Kastenberg, Joshua E. *An Enlightened Addition to the Original Meaning: Voltaire and the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment.* Temple Political and Civil Rights Law Review. Fall, 1995.

[15] Beccaria & Paolucci, Henry (translator). *On Crimes and Punishments.* Englewood Cliffs: Prentice Hall, 1963.

> man that he must depend on the talents of others when he cannot find his own way, and to call on help when he does not feel strong enough to defend himself. Our laws have taken so many advantages away from the accused that it is altogether just to conserve for them what remains, especially the right to counsel, which is the most essential part."[16]

This statement is a significant furthering and culmination of the Enlightenment philosophy that influenced Voltaire. This also draws a clear line as to the origins of the sixth amendment ideals. Counsel is not a privilege, but a right, and not a right bestowed by government, but an inherent right bestowed by nature.

William Blackstone was an English legal theorist with similar philosophical influences as Voltaire, but a legal background in English common law. Blackstone's *Commentaries on the Laws of England* aided the American colonists in making English common law fundamental to the American legal system. Along with citing Montesquieu, Beccaria, Locke, and Hobbes as sources for his philosophical ideas, Blackstone also cited the *Magna Carta*[17] and the *English Bill of Rights of 1689*[18] as sources of law that supported those enumerated civil rights.[19] Blackstone's work served as a bridge between the development of civil liberties under English common law and the implementation of those liberties in American jurisprudence.

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[16] Voltaire. *A Commentary on the Book, Of Crimes and Punishments*. The Constitution Society. <http://www.constitution.org/volt/cmt_beccaria.htm>.

[17] In 1215, the *Magna Carta* marked the first instance of the people placing restraints on the executive powers of government. This document represented certain specified rights that the government was not allowed to infringe upon, including the right to due process of law ("No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way…except by the lawful judgment of his equals or by the law of the land."), proportionality of punishment ("For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily so as to deprive him of his livlihood".), and protection against self-incrimination. This document and the demand for the enumerated rights within were in direct response to abuses, including illegal seizure of property and excessive fines, by the crown upon the people. It is evident to see some of the earliest roots of the fifth, eighth, and fourteenth amendments present in this medieval document.

[18] Blackstone, William. *Commentaries On the Laws of England.* Chicago: University of Chicago Press, 1979.

[19] Including the natural right to the protection of life and limb, the right to protection under due process of law, and right to *Habeas Corpus*.

B. Historical Origins of the Right to Counsel Clause of the Sixth Amendment

As early as 1215 in the *Magna Carta*[20] the right to trial, and the idea of the right to a fair trial began to emerge. While the *Magna Carta* did not stipulate the right to representation, it emerged in English common law as a necessary component of a fair trial.

By 1300, England had an established legal profession. However, the state only allowed counsel for misdemeanors, civil cases, and appeals;[21] the state did not allow counsel, let alone required or appointed counsel in felony cases. Edward Cooke explained this paradox[22] in two ways, "first, guilt should be so obvious that no defense would be possible; and second, the judge would act as counsel for the defendant".[23] This rationale failed in two ways. First, a layman could not be expected to properly identify areas of weakness in the State's case and then make those weaknesses clear to a jury; it is also unlikely that an untrained individual could successfully cross-examine witnesses and ensure that the State followed all procedural rules.[24] When an individual does not know what the rules are, it is difficult to enforce them.

In early colonial history, state governments broke with the English common law tradition and began to expand the right to counsel in their state constitutions.[25] The state governments began to allow counsel for all types of criminal cases, and the general idea was that the more severe the punishment for a crime was, the more necessary counsel was. Particularly for capital cases where an individual's life was at stake, the colonial governments found counsel to be absolutely necessary, if an individual was able to afford private counsel. The state did not

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[20] *The Text of the Magna Carta.* Fordham University. < http://www.fordham.edu/halsall/source/magnacarta.html>.
[21] Rackow, Felix. *The Right to Counsel: English and American Precedents*. The William and Mary Quarterly. January, 1954.
[22] The crimes for which an individual most needs an attorney were the ones in which he was allowed no counsel.
[23] Ibid.
[24] Ibid.
[25] New Hampshire, Massachusetts, Rhode Island, Connecticut, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, South Carolina, Georgia

provide public counsel. The Bill of Rights compiled and solidified the civil liberties detailed in many of the state constitutions in order to bolster ratification of the new constitution.

The sixth amendment right to counsel functions as part of a fair trial, legal requirements for which began in 1215 with *The Magna Carta*[26]. This right continued to develop in English common law and became a part of American jurisprudence first through the state constitutions and then through the Bill of Rights.

C. Historical Origins of the Cruel and Unusual Punishments Clause of the Eighth Amendment and the Evolving Standards of Decency Doctrine

The idea of proportionality with respect to punishment started in biblical times[27] with the *lex talionis*[28]. The severity and nature of the punishment should be relative to the crime committed. *The Twelve Tables of Rome,*[29] the first codified set of Western law, also established this principle. The *Twelve Tables* codified how the state punished crimes based on proportionality.[30] The idea developed that an individual had to pay for their crime, either in kind or through a system of fines.

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[26] *The Text of the Magna Carta.* Fordham University. < http://www.fordham.edu/halsall/ source/magnacarta.html>.
[27] "But if injury ensues, you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe". Exodus 21:23-25. The New American Bible. 1991.
"Whoever takes the life of a human being shall be put to death, whoever takes the life of an animal shall make restitution of another animal. A life for a life! Anyone who inflicts injury upon his neighbor will receive the same in return". Leviticus 24:17-19. The New American Bible. 1991.
[28] *Lex talionis* refers to the law of equal and direct retribution. Hooker, Richard. *General Glossary: Lex Talionis*. Washington State University. 14 July 1999. 13 November 2008. <http://www.wsu.edu/~dee/MESO/CODE.htm>.
[29] "If a person has maimed another's limb, let there be retaliation in kind, unless he agrees to make compensation with him". *The Twelve Tables (451-450 BC).* California State University, Northridge. 20 December 2006. 13 November 2008. <http://www.csun.edu/~hcfll004/12tables.html>.
[30] "If a person has maimed another's limb, let there be retaliation in kind, unless he agrees to make compensation with him". Ibid.

The system of fines and proportionality survived into the Early Medieval Period through *The Law of the Salian Franks.*[31] In this Germanic code, criminals paid the *wergeld*, a "value set upon human life in accordance with rank and paid as compensation to the kindred or lord of a slain person,"[32] in compensation for their crime. Laws determined each *wergeld* based on the nature and severity of the crime and the rank of the victim.

The Visigothic Code,[33] dated 654 AD, continued the tradition of the *wergeld*. When an individual could not pay the *wergeld*, the *Visigothic Code* also allowed for public lashings, the number of which related to the severity of the crime. *The Anglo-Saxon Dooms,*[34] a predecessor to English common law, carried forward these Germanic traditions.

Prohibitions against excessive fines, bail, and punishment were in the *Magna Carta.*[35] Over time and particularly in response to abuses of government, including the Spanish Inquisition, the ideal of prohibition against cruel and unusual punishment, which later became part of the Eighth Amendment,[36] took root first in the English Declaration of Rights of 1688[37] and the *English Bill of Rights of 1689.*[38] The wording of the Cruel and Unusual Punishment clause of the Eighth Amendment came almost directly from the *English Bill of Rights of 1689*, and this clause was in most state constitutions at the time.

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[31] *Medieval Sourcebook: The Law of the Salian Franks.* The Internet Medieval Sourcebook. Fordham University. 1996. 20 November 2008. <http://www.fordham.edu/halsall/source/salic-law.html>.
[32] *Wergeld.* Miriam-Webster's Online Dictionary. 20 November 2008. <http://www.meriam-webster.com/dictionary/wergeld>.
[33] *Jewish History Sourcebook: The Jews of Spain and the Visigothic Code, 654-681 CE.* The Internet Jewish History Sourcebook. Fordham University. July 1998. 20 November 2008. <http://www.fordham.edu/halsall/jewish/jews-visigothic1.html>.
[34] *Medieval Sourcebook: The Anglo-Saxon Dooms, 560-975.* The Internet Medieval Sourcebook. Fordham University. 1998. 20 November 2008. <http://www.fordham.edu/halsall/source/560-975dooms.html>.
[35] *The Text of the Magna Carta.* Fordham University. < http://www.fordham.edu/halsall/ source/magnacarta.html>.
[36] The Eighth Amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Legal Information Institute. Cornell University Law School.
[37] "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". *English Bill of Rights of 1688.* The Avalon Project. Yale Law School. 2008. 1 March 2010. < http://avalon.law.yale.edu/17th_century/england.asp>.
[38] Ibid.

Starting in 1958 with *Trop v. Dulles,*[39] the Supreme Court established the evolving standards of decency doctrine. This requires courts to decide cruel and unusual punishment cases with respect to modern standards. In his opinion for the court, Chief Justice Warren stated that,

> "The words of the Amendment are not precise, and...their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[40]

Courts can nullify punishments or statutes that may have been appropriate in past times as a violation of modern standards of cruel and unusual punishment, and in the case of capital punishment, the Court requires a constant narrowing of classes of defendants because modern standards of decency require capital punishment, the worst of punishments, to be reserved for the worst of the worst criminals.

In the 1972 case *Furman v. Georgia,*[41] the United States questioned whether capital punishment constituted cruel and unusual punishment under the evolving standards of decency doctrine. The primary reason for declaring capital punishment unconstitutional was the rarity and irregularity with which juries used it. This rationale was preceded by the rationale in *Trop v. Dulles.*[42] Evidence submitted during the case indicated that minorities and the poor disproportionately received death sentences. Justice Stewart argued that,

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[39] *Trop v. Dulles*. 356 U.S. 86. In this case, the Court considered whether stripping an individual of his citizenship following a dishonorable discharge for desertion from the military constituted cruel and unusual punishment under the Eighth Amendment. The Court ruled that this punishment was both disproportionate to the crime and unusual in nature.
[40] Ibid.
[41] *Furman v. Georgia.* 408 U.S. 238 (1972).
[42] *Trop v. Dulles*. 356 U.S. 86.

> "The Eighth and Fourteenth Amendments cannot tolerate the inflicting of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[43]

Justice White continued this logic with the idea that,

> "The penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."[44]

Justice Brennan explained,

> "A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fail, as would a law that in terms said that Blacks, those who never went beyond the fifth grade in school, or those who make less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches the result in practice has no more sanctity than a law which in terms provides the same."[45]

Four justices[46] raised an issue about the intersection between the Cruel and Unusual Punishments clause of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Essentially, the justices argued that capital punishment was not for the worst offenders, but rather, the imposition of capital punishment fell disproportionately on the poor, the minorities, and the uneducated. A key difference between educated, upper-class clients with money, and the classes the Courts were attempting to protect was the quality of defense they received.

Defendants with money hire the best defense they can afford. At this time not long after *Gideon v. Wainwright,*[47] states were still struggling to provide public defense. It would be another twelve years before the issue of defining and securing an effective defense came before the court.[48] Particularly with respect to the differences in socioeconomic circumstances, the

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[43] *Furman v. Georgia.* 408 U.S. 238 (1972).
[44] Ibid.
[45] Ibid.
[46] Justice Brennan makes a similar argument to Justice White's about the infrequency of use of capital punishment.
[47] *Gideon v. Wainwright.* 372 U.S. 335 (1963)
[48] *Strickland v. Washington*. 466 U.S. 668 (1984)

Court recognized that for many poor, minority, or uneducated defendants, there was a lack of Equal Protection under the law. The Court ruled that the death penalty, given out under a lack of Equal Protection constituted cruel and unusual punishment.[49]

After the Court decided *Furman*, State legislatures had to rewrite their death penalty statutes. *Gregg v. Georgia*[50] is cited as the case that brought the death penalty back to the United States. On July 2, 1976, the Supreme Court handed down decisions on five death penalty cases addressing new Post-*Furman* statutory schemes for reinstating the death penalty. The Florida,[51] Georgia,[52] and Texas[53] statutes were upheld, and these statutes continued to serve as models for other states at the time. Along with North Carolina,[54] the Supreme Court ruled that Louisiana's death penalty statutes, which provided for mandatory sentencing of capital punishment for certain crimes, were deemed unconstitutional.[55]

In *Roberts v. Louisiana*, the Court ruled that the new Louisiana statutes on capital punishment which commanded a mandatory death penalty for any individual convicted of first degree murder was unconstitutional because the statutes did not leave the jury the option to consider mitigating evidence. Because the proceedings were not bifurcated,[56] the Court argued that juries might feel caught between following their instructions to determine whether the conditions for first-degree murder existed and disregarding the facts of the case because they did not want to give the death penalty to the defendant. While Louisiana intended this statute to help juries focus on fact finding without regard to sentencing, the Court argued that the capital

[49] *Furman v. Georgia.* 408 U.S. 238 (1972).
[50] *Gregg v. Georgia*. 428 U.S. 153 (1976).
[51] *Proffitt v. Florida.* 428 U.S. 242 (1976).
[52] *Gregg v. Georgia*. 428 U.S. 153 (1976).
[53] *Jurek v. Texas.* 428 U.S. 262 (1976).
[54] *Woodson v. North Carolina*. 428 U.S. 280 (1976).
[55] *Roberts v. Louisiana* 428 U.S. 325 (1976).
[56] The Court ruled that there needed to be separate guilt and sentencing phases in capital trials. In Louisiana at the time, there was only a guilt phase because conviction of first-degree murder, or another capital crime, resulted in a mandatory death penalty.

statutes provided both too little discretion for the juries because of the lack of bifurcated proceedings and too much discretion left to the juries through jury nullification. The Court also ruled against the statutes because they did not provide for automatic appellate review for death sentences.

The Court did recognize that compared to North Carolina, Louisiana had a much more narrow definition for first-degree murder. In his dissent, Justice Burger argued that Louisiana did satisfy the Court's requirement for a narrowing of classes of defendants because of how narrowly the statute was tailored in defining the crime. The dissenters also argued that the jury received very clear instructions as to the four different sentences available at capital proceedings.[57] The Courts did not instruct juries about the option to sentence the defendant to a lesser offense in opposition to the evidence; however, the dissenters did not think, as the majority did, that jury nullification would be such a problem so as to make capital proceedings in the state unreliable. Thus, because Louisiana did not comply with the principles from *Trop v. Dulles*[58] and *Furman v. Georgia*,[59] the State had to rewrite its capital statutes to include bifurcated trial proceedings and a system for balancing aggravating and mitigating circumstances.

D. History of the Fourteenth Amendment and the Doctrine of Incorporation

The *Magna Carta*[60] codified the idea that that the government cannot withhold liberty or property without the due process of law. Limiting the executive power of the king in order to preserve certain liberties of the people was a central thrust of the document.[61] This was also a central idea in the *English Bill of Rights of 1689* and Blackstone explained the necessity of due

[57] Guilty as charged (first degree murder), Guilty of second-degree murder, Guilty of manslaughter, Not guilty.
[58] *Trop v. Dulles*. 356 U.S. 86.
[59] *Furman v. Georgia.* 408 U.S. 238 (1972).
[60] *The Text of the Magna Carta.* Fordham University. < http://www.fordham.edu/halsall/ source/magnacarta.html>.
[61] Ibid.

process in his *Commentaries* as well. The Due Process clause of the Fourteenth Amendment stemmed from that of the Fifth Amendment, and both originated from an Enlightenment tradition in which due process of law was a necessary component of the social contract.

The legislature initiated the Fourteenth Amendment[62] after the Civil War in an attempt to increase political stability and guarantee basic civil rights for African Americans released from slavery. Through the Court's continuing interpretation of this amendment, its scope grew considerably. The Fourteenth Amendment was ratified in 1868. Early in the Twentieth Century, the Supreme Court decided a series of cases developing the Doctrine of Incorporation, the idea that the Due Process clause of the Fourteenth Amendment can make certain liberties contained in the Bill of Rights binding on the states.[63] While the Court made the Sixth Amendment binding on the states through the Fourteenth Amendment, not all amendments to the Federal Constitution have been incorporated as yet.

When Sixth, Eighth, and Fourteenth amendment rights intersect, there are new implications for capital defendants. Without an effective defense representing the sixth amendment right to counsel, there is a severe breach of Due Process under the Fourteenth Amendment, and any punishment is then considered cruel and unusual under the Eighth Amendment.

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[62] Section One of the Fourteenth Amendment contains both the Due Process Clause and the Privileges and Immunities Clause, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *14th Amendment.* Legal Information Institute. Cornell University Law School.

[63] In 1936, the Supreme Court applied the doctrine of incorporation to a Louisiana case in *Grosjean v. American Press* (297 U.S. 233). In this case, the Court ruled that the first eight amendments in the Bill of Rights were binding on the state of Louisiana as well as the Federal Government. In his opinion, Justice Sutherland writes, "We have concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."

II. Indigent Defense in Louisiana

Indigent defense in Louisiana is in a state of flux. In 2007, the state legislature passed Act 307 implementing reform to indigent defense in Louisiana. The reforms will not be fully in place until 2011. Louisiana has a long history of providing indigent defense.

The American Bar Association (ABA) set standards for public delivery systems in *Ten Principles of a Public Defense Delivery System.*[64] In this document, the ABA establishes and expands upon ten principles necessary for an effective, fair, uniform public defense system. Reform in Louisiana, including the work accomplished by the LIDAB, is based on compliance with these guidelines. For a complete listing, see Appendix B.

A. Louisiana Indigent Defense Prior to *Gideon*

Louisiana had been providing counsel to indigent defendants in limited circumstances, particularly in capital trials, for over fifty years prior to *Gideon.*[65] *State v. Simmons*[66] provides an in-depth look at how the original public defender system worked in Louisiana. Gus Simmons was charged with capital murder, but he was unable to afford an attorney. At the time, judges in each district maintained a roster of Bar members, and when a capital case arose in which the defendant was unable to afford a lawyer, the district judge assigned a lawyer from the Bar roster. Attorneys fulfilling this role were not paid for their services or reimbursed for their expenses.

In *Powell v. Alabama,*[67] the Supreme Court considered "whether the defendants were in substance denied the right of counsel and if so, whether such denial infringes the Due Process

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[64] The American Bar Association. *Ten Principles of a Public Defense Delivery System.* ABA Standing Committee on Legal Aid and Indigent Defenders. February, 2002.
[65] State v. Simmons. 43 La. Ann. 991 (1891)
[66] *The State of Louisiana v. Gus Simmons.* 43 La. Ann. 991 (1891)
[67] *Powell v. Alabama.* 287 U.S. 45 (1932)

Clause of the Fourteenth Amendment."[68] The Supreme Court found that no valid counsel had been provided to the defendants; furthermore, the Court ruled that this lack of counsel constituted a violation of the defendants' Fourteenth Amendment right to due process on two grounds: the defendants were not given ample time or opportunity to procure counsel and even though the Alabama statute provides for public counsel in capital cases, the Court did not offer counsel to the defendants. *Powell* acts as a building block for *Gideon v. Wainwright* by first declaring the importance of counsel[69] and then specifying that where the right to counsel exists, it must be a substantial right.[70]

In *State v. Blankenship,*[71] the Louisiana Supreme Court incorporated the *Powell* ruling as it applies to the Louisiana statutes. Earl Blankenship was convicted of a felony[72] and sentenced to one year of hard labor. Although this was not a capital offense, the Court argued that the defendant was still guaranteed the right to counsel, if requested. The trial judge denied the defendant's request for counsel because the defendant did not file an affidavit outlining his inability to afford private counsel and his need of the state to provide public counsel. The Court ruled that the accused not only had the right to counsel, but also had the right to be notified of that right early enough in the legal proceedings for counsel to be effective. Furthermore, when the defendant lacked the affidavit for assistance of counsel, but verbally requested it of the judge, the judge should have administered an oral oath. The Louisiana Supreme Court held that indigent

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[68] Ibid.
[69] In his opinion for the court, Justice Sutherland writes, ""Even the intelligent and educated layman has small and sometimes no skill in the science of law…Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise impermissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, ha faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."
[70] The trial judge's symbolic motion to appoint the entire Alabama State Bar to the defendants did not constitute substantial counsel. The defendants were still left without an attorney at and before trial.
[71] *State v. Blankenship*. 186 La. 238. (1937)
[72] In this case, hog stealing

defendants could not be denied counsel because of their lack of knowledge about the law and how to obtain counsel.[73]

The 1955 Louisiana Constitution similarly demonstrates that the state provided counsel to indigent defendants in Louisiana for any felony case in which the defendant requested counsel and the Court found the defendant to be indigent.[74] Statutes did not require the Court to automatically appoint counsel; the defendant had to request assistance from the trial court.[75] Also, attorneys who defended capital clients were required by this Constitution to have at least five years of experience;[76] the type of experience was not specified, but this was the start to later standards about capital defense.

B. *Gideon v. Wainwright* and its Impact on Louisiana

In 1963, the United States Supreme Court decided *Gideon v. Wainwright*,[77] and the right to have counsel appointed became permanent in all states. Many consider this case as the foundation for the fundamental right to counsel. In this case, the defendant Gideon was tried for a felony and was unable to afford a private attorney; however, when he requested counsel from the Court, the trial judge refused because according to Florida law, attorneys were only appointed by the state where need existed in capital cases. Felony cases provided no guarantee of counsel. The Supreme Court decided on whether the withholding of counsel violated Gideon's sixth amendment right to counsel through the Due Process clause of the Fourteenth Amendment. In the main holding of the Court, Justice Black held that,

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[73] Justice Rogers, akin to Sutherland's comments in *Powell,* "The defendant is not a lawyer…His request for the appointment of counsel clearly indicates that he had no confidence in his own ability to try his case and felt the imperative need of expert advice an assistance in making his defense".
[74] Louisiana State Constitution, 955, Art 1§9
[75] Louisiana State Constitution, 955, Art 1§9, Note 195.
[76] Louisiana State Constitution, 955, Art 1§9, Note 198.
[77] *Gideon v. Wainwright.* 372 U.S. 335 (1963).

> "The right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner's trial and conviction without the assistance of counsel violated the Fourteenth Amendment."[78]

Thus, the Court concluded that the Due Process clause of the Fourteenth Amendment did include the sixth amendment right to counsel, and that states were therefore bound to uphold that protection. The Court also declared that in terms of the right to counsel, there is no difference between capital and non-capital offenses in terms of the protections afforded.[79] In its rationale, the Court cited *Grosjean v. American Press* as a key piece of the jurisprudence they based this ruling on.[80]

The Louisiana Legislature responded to the *Gideon* ruling by creating the indigent defender boards.[81] Each district had a board responsible for managing the public defense delivery for that district.[82] The district courts supervised the defender boards and appointed their members, who served without any compensation. This statute also authorized additional court fees to help defray the costs of providing indigent defense.[83] This first set of indigent defender boards fell out of use until their reinstatement in 1974. The reinstated boards are now the modern district boards subject to reform under Act 307.

In 1984, the U.S. Supreme Court analyzed what standard they should use to evaluate effective assistance of counsel. Numerous cases demonstrated that having an attorney did not make much of a difference if he or she was incompetent, unprepared, or without the resources to

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[78] *Gideon v. Wainwright.* 372 U.S. 335 (1963).
[79] When this case was decided, several states, including Alabama and Louisiana, recognized the right to an attorney, but this right was generally limited to capital cases or felonies.
[80] In *Grosjean*, the Supreme Court ruled that states were generally bound to uphold the first eight amendments and specifically required to uphold First Amendment protections through the Due Process clause of the Fourteenth Amendment. *Grosjean, Supervisor of Public Accounts of Louisiana v. American Press Co,. Inc,. Et Al.* 297 U.S. 233 (1936)
[81] R.S. 14§141 (1967), repealed by Act 307 (2007)
[82] Ibid.
[83] These fees were later increased and came to include many more fees already in place. This continues to be the primary mechanism for funding indigent defense at the district level.

grant effective counsel. In *Strickland v. Washington,*[84] respondent David Washington claimed that his conviction[85] should be overturned because of ineffective assistance of counsel. The Supreme Court first set out guiding principles for how to evaluate effective assistance of counsel claims in its ruling.

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the case. This requires showing that counsel's errors were so serious so as to deprive the defendant of a fair trial, a trial whose result is reliable."[86]

Thus, the Court set out a two-part standard for determining effectiveness of counsel.

This ruling made proving ineffective counsel incredibly challenging for defendants. Not only do defendants have to prove counsel was ineffective, but they also have to prove that the outcome of the case would have been different but for that ineffective counsel. Due to the subjective nature of juries, defendants claiming ineffective counsel face serious challenges arguing that a jury would have made a different decision, even in light of all of the evidence in the case. In a case that demonstrates how difficult this standard is to meet in practice, the Fifth Circuit Court of Appeals rejected a Texas claim that an attorney who slept through large parts of a capital trial was ineffective. "An attorney who slumbers at the defense table is not necessarily ineffective."[87]

Louisiana responded to the Supreme Court's decision in *Strickland* with *State v. Peart,*[88] decided in 1993. In *Peart*, the Louisiana Supreme Court considered whether the system for

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[84] Strickland v. Washington, 466 U.S. 668 (1984)
[85] Respondent went on a premeditated three-day crime spree composed of "three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft". Ibid.
[86] Ibid.
[87] Duggan, Paul. *In Texas, Defense Lapses Fail to Halt Executions.* The Washington Post. 12 May 2000.
[88] *State v. Leonard Peart* 621 So. 2d 780 (1993).

providing indigent defense in Orleans parish was constitutional. The Court first analyzed the two revised statutes that governed the creation and maintenance of the Indigent Defender Boards in each district.[89] The Court ruled that these statutes were constitutional; however, the Court recognized that the services provided to many defendants in Orleans parish did not meet constitutional requirements.[90]

Orleans parish had a public defender office with only two attorneys. The attorney who filed this case, Teissier, handled over five hundred criminal cases each year and at any given time could have been handling more than seventy active cases. Teissier rarely had any investigative support and no funding for expert witnesses and testimony. The Court agreed that because of the incredible workload being put upon Teissier, there was no way he could possibly give proper due diligence to all of his cases.

The Court noted that per the 1974 Louisiana Constitution, the legislature had the obligation to "provide for a uniform system for securing and compensating qualified counsel for indigents."[91] The Court developed two key guidelines for analyzing effective assistance of counsel claims. First, the Court argued that these types of claims must be made by individualized fact-finding. In each case, the judge must analyze whether the assistance of counsel was effective. If the judge found counsel ineffective, he should halt all proceedings until the funding and resources are made available to provide effective counsel to the defendant. Also, although the Court stopped short of reforming the indigent defense system because they felt it was the responsibility of the legislature, Justice Calogero stated in his opinion,

> "If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its Constitutional and inherent power and supervisory

[89] LSA-R.S. 15:145, 15:146, 15:304
[90] *State v. Leonard Peart* 621 So. 2d 780 (1993).
[91] 1974 Louisiana Constitution.

> jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided."[92]

Some of the remedies the Court discussed in *Peart*, but chose not to implement through its judicial power, included the creation of a statewide indigent defender board, which they eventually enacted, and a State Chief Public Defender and increased funding, which Act 307 enacted.

A key critique of *Peart*, as expressed in Justice Lemmon's dissent, is that the Court failed to give clear guidelines for what the legislature should attempt to do or achieve in reforming indigent defense. In particular, Lemmon argued that the Court should have specified maximum caseloads for public defenders.[93] Others critique the *Peart* ruling because it only gives a judge the power to stop all proceedings, not necessarily to remedy them. One unintended consequence of this has been cases delayed for extended periods of time while defendants unable to post bail wait in jail. The results can be argued as a violation of defendants' right to a speedy trial, also protected by the sixth amendment.[94]

C. Indigent Defense Prior to the Enactment of Act 307

In 1974, the legislature amended the statutes relating to the district indigent defense boards and reenacted those district boards that had fallen out of use since the creation of the district boards in 1967.[95] Each district currently has a board composed of between five and seven attorneys appointed by the district court judges.[96] The board elects a chairman and hires a

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[92] *State v. Leonard Peart* 621 So. 2d 780 (1993).
[93] Ibid.
[94] Majeeda, Snead M. *Will Act 307 Help Louisiana Deliver Indigent Defender Services in Accordance with the 6th Amendment Right to Counsel Mandate?* Loyola Journal of Public Law. Spring, 2008.
[95] R.S. 15 §144, R.S. 15 §145, repealed by Act 307, 2007
[96] Ibid.

salaried Chief Public Defender for the district who is responsible for managing the day-to-day operations of indigent defense in the district.[97]

Each judicial district has its own indigent defense board funded primarily through court costs and municipal fees. All of these fees collect into the Judicial District Indigent Defender Fund, which the district board controls. Each district has its own fund.[98] Due to the varied nature of these fees, district boards continually have difficulties with deficient funding. It is difficult to budget based on how many crimes may be committed or how many traffic tickets may be written in a given year.[99] In early 1990, Baton Rouge police officers stopped writing traffic tickets for six months because they ran out of ticket books. The Baton Rouge Public Defender Office lost six months of income.[100] Louisiana remains the only state to fund indigent defense in this way.[101]

Major problems have been reported with the district boards. In Caddo and Avoyelles parishes especially, there have been high levels of corruption uncovered.[102] Often, a defense would be compromised because the public defender was not insulated enough from the judge who both decided on cases and decided which defenders would get them. Appointments and contracts for legal services were often given out as political favors, and the quality of representation was very poor. Even in areas without corruption, caseloads were often far beyond

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[97] Ibid.
[98] R.S. 15 §146 (1976)
[99] Ibid.
[100] Cooks, Sylvia R. and Fontenot, Karen Karre. *The Messiah is Not Coming: It's Time for Louisiana to Change its Method of Funding Indigent Defense*. Southern University Law Review. Spring, 2004.
[101] The National Legal Aid and Defender Association. *In Defense of Public Access to Justice: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 Years After Gideon*. The National Association of Criminal Defense Lawyers. March, 2004.
[102] Kurth, Michael M. and Burkel, Daryl V. "Defending the Indigent in Southwest Louisiana". The National Association of Criminal Defense Lawyers. <http://www.nacdl.org/public.nsf/DefenseUpdates/Index_old/$FILE/Calcasieu_Parish_Report.pdf>.

what any attorney could handle, and as a result, there simply was not enough time, money, or other resources to provide a genuine defense.[103]

Each district has the option of one of three systems for providing indigent defense: a contract system, a public defender system, and an appointment system. In the contract system, the district negotiates a set rate, or maximum rate, with an attorney for providing public services. In the public defender system, the district maintains an office of salaried public defenders in charge of the entire caseload for that district. Even when these systems are employed, the last delivery system, the appointment system, is often also used to supplement attorneys with overburdened caseloads. Under the appointment system, the district appoints a member of the Bar to handle the case *pro bono*. The district must reimburse the appointed attorney for any fees incurred.[104]

On a state level, the Louisiana Indigent Defense Assistance Board (LIDAB) maintains a budget of $7.5 million from the state which it uses to supplement the local boards' funding and run several additional projects of its own including the Capital Appeals Project and the Capital Post-Conviction Project. Although the State board has a theoretical authority to set standards for public defense, it has few enforcement mechanisms with the very autonomous district boards. The LIDAB even refrains from using funding as a means of forcing compliance with their regulations; "the LIDAB never felt that it was in a position to use this stick…Withholding any money at all from local systems slipping back into crisis [because of funding] seemed too severe."[105] Thus, despite the fact that the LIDAB works to promote better practices in the state, there are few ways to force the district boards to cooperate.

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[103] See footnote #94.
[104] Drew, Richard. *Louisiana's New Public Defender System: Origins, Main Features, and Prospects for Success.* Louisiana Law Review. Summer, 2009.
[105] See footnote #94.

D. What Changes Act 307 Will Make on the Indigent Defense System

In 2007, the Louisiana legislature passed Act 307, the Louisiana Public Defender Act. The Law went into effect in 2008 and will not be in full enforcement until 2011. The legislature gave four years for the implementation of this new system because of the vast logistical challenges required.[106]

One of the most positive changes is the budget for indigent defense. In 2004, the total budget was only $7.8 million. The total budget is now set at $50 million,[107] with an anticipated expansion of an additional $5 million. A total budget of $52 million was recommended by the NACDL as the amount needed to keep the system functioning properly.[108]

The State Board now has an established Public Defender with an administrative office.[109] Each district must get its annual budget approved by the LIDAB,[110] the State board can discharge the District Public Defender under certain delineated circumstances,[111] and it can also change the method of indigent defense delivery for a district in case of public defense delivery failure.[112]

The State board also has an option of potentially regionalizing all of the district boards; there would then be eleven regional boards covering eleven service regions.[113] Each region would have a public defender with a fully staffed office and would be directly under the authority of the State board.[114] There would also be a regional office with a regional public defender and support staff.[115]

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[106] See footnote #94.
[107] R.S. 15§167
[108] Lefstein, Norman. *The Movement Towards Indigent Defense Reform: Louisiana and Other States.* Loyola Journal of Public Interest Law. Spring, 2008.
[109] R.S. 15§150, R.S. 15§152
[110] R.S. 15§147
[111] R.S. 15§169
[112] R.S. 15§147
[113] R.S. 15§163
[114] Ibid.
[115] Ibid.

On a district level, the districts still maintain a great deal of autonomy, including the use and assignment of private bar members, choosing the delivery system, and managing funding.[116] Some critics wonder how much control the LIDAB will have even under these new reforms. In the drafting of this bill, it is very apparent that many compromises were made between those in favor of centralized power and those advocating autonomy of the districts.[117] As James Boren[118] said in a press release about the new system, "In a world devoid of political considerations, this bill would look very different. Compromise generally means an acceptable level of dissatisfaction on the part of all key players."[119]

The State Board took the first steps towards ensuring competency in capital trials. The State now has guidelines for certification, which attorneys must meet before representing capital defendants.[120] This includes separate standards for lead trial counsel, assistant trial counsel, lead appellate counsel, and assistant appellate counsel.[121]

The State Board now requires the district boards to supply vertical representation to clients whenever possible;[122] one attorney will work with a client throughout every stage of the criminal process. Previously, many districts handled representation via a horizontal system: an attorney was appointed to a client for only one stage of the process, e.g. arraignment. Having multiple attorneys working different stages of the same case meant that there was very little if any communication between attorney and client prior to their day in court, the attorney had less

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[116] R.S. 15§147
[117] See footnote #94.
[118] Criminal Defender, Adjunct Professor at the Paul M. Hebert Law Center, Member of the East Baton Rouge Indigent Defense Board, Board Member of the Louisiana Public Defender Board
[119] Sanchez, Walt; Steimel, George; Boren, Jim. *And it Only Took 44 Years: HB 436, the Louisiana Public Defender Board and the New Structure of Indigent Defense*. The Advocate. Louisiana Association of Criminal Defense Lawyers. Summer, 2007.
[120] *State of Louisiana Performance Standards for Criminal Defense Representation in Indigent Cases in Trial Court.* Louisiana Indigent Defense Assistance Board. 20 June 2006.
[121] Ibid.
[122] Ibid.

information about the client and therefore the type of strategy that should be employed, and many details that would benefit defendants were missed as a result.[123]

There are now stricter limits for caseloads.[124] When an attorney reaches the maximum caseload capacity, that individual can no longer take on new cases, and the district cannot assign any more cases to them. The basis for these caseload limits was established by the ABA and carried over into the guidelines and standards established by the LIDAB.[125] An attorney should not "handle more than 150 felonies, 400 misdemeanors, 200 juvenile cases, or 25 appeals."[126] For someone that handles multiple types of cases, these numbers should be used as ratios to determine maximum caseload.[127]

III. Problems

Louisiana has the highest incarceration rate per capita out of any state in the nation. This is in part because the state laws punish many crimes with incarceration. Between 1970 and 1990 as crime rates went up throughout the country, Louisiana's crime rate also went up, and the state responded by punishing a number of crimes, including drug related offenses, more harshly. In that time frame, the incarceration rate for drug offenses tripled. Louisiana continues to have a staggering number of trials, and 90% of defendants in these cases need public defenders. Louisiana also has the highest homicide rate out of any state with capital punishment. Because of its intense focus on incarceration and the large number of offenders requiring a public defense,

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[123] See footnote #104.
[124] *State of Louisiana Performance Standards for Criminal Defense Representation in Indigent Cases in Trial Court.* Louisiana Indigent Defense Assistance Board. 20 June 2006.
[125] Ibid.
[126] Ibid.
[127] See footnote #94.

indigent defense is a very big problem for the state. This is only magnified in capital cases by the complexity of the capital trial process.

Even after legislative reform, the indigent defense system and the capital punishment systems continue to have problems in Louisiana. Indigent defendants will likely continue to face ineffective counsel as the state struggles to provide public defenses for the ninety percent of criminal defendants who need them. Capital punishment in Louisiana is in an even worse situation, with 64% of capital convictions being overturned on appeal, many due to ineffective counsel. Indigent capital defendants are in the unique position to be facing the intersection of all of these issues.

A. Why the System Still Fails to Provide Adequate Defense Even After Legislative Reform

Even after legislative reform, the indigent defense system in Louisiana continues to fail to provide effective, uniform counsel throughout the state. This section will discuss the problems remaining after the legislative reform of Act 307. First, the districts still provide a majority of funding for indigent defense, and funding still primarily comes from municipal fees, which will continue to present issues. The funding is sporadic and insufficient. Another primary funding mechanism must be put in place in order for the system to become stable, and the state board needs to have greater control over funding.

The district boards retained too much autonomy in the latest round of reform. As a result, many of the problems with corruption, compensation, and competence will likely continue. The State lacks the power necessary to ensure compliance by the district boards with state policy and the district boards lack incentive to change. There is not enough oversight and evaluation on the State level, even with the new system. The only enforcement mechanism the State board

currently holds is the approval each district board's annual budget; however, there is no stipulation about what happens if that annual budget is not approved or if it fails to meet state standards. Also, since the majority of each district's funding continues to originate from traffic tickets and other municipal court fees, the State board does not seem to be contributing any substantial amount of funding which could be withheld if the annual budget was not approved. Even if the state board could withhold funding, it is unlikely that they would, given their history.

As part of their continuing autonomy, the district boards retain the right to determine how private members of the Bar contribute to indigent defense in the district. Instead, the State board should work with the State Bar Association to determine competency of counsel based on the complexity of the case and develop a controlled assigned counsel plan for assigning members of the private bar to public defense cases. This becomes particularly important in districts where public attorneys have already met caseload limits placed by the state board. Also, removing the power to appoint counsel from the private bar from the judiciary helps to insulate the independence of indigent defense.

The statutory process for regionalization seems unrealistic. The circumstances under which this may come about seem extremely limited. The LIDAB can regionalize a district or set of districts in case of natural disaster in which the district office can no longer effectively function, the district does not comply with state regulations, or per the request of the district public defender. Even if an area were regionalized, the responsibilities for the regional boards and regional directors also seem ambiguous.[128] Many responsibilities are repeated for the state, regional, and district public defenders.[129] It seems inefficient for three separate people to all produce the same report.

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[128] See footnote #94.
[129] R.S. 15§152, R.S. 15§160, R.S. 15§161

Many critics argue that the process is so difficult to actually implement that it is only pretext; regionalization looks like a concession made to those seeking greater central authority, but in reality, the process is so difficult to implement that regionalization could never really be achieved.[130] Furthermore, others argue that regionalization would actually lead to greater inefficiencies. The regional office would be further removed from each district, the caseload for the regional office would be larger than the district offices, and it could be more challenging to address issues that arise on the individual level.

The District Attorneys currently have complete discretion in determining who will be tried under capital proceedings. The entire process of a capital trial is incredibly long, complex, and expensive, but yet in many instances, it seems as if the district attorney chooses death eligible defendants for very political reasons, such as encouraging the defendants to plea to a lesser offense. The issue of insanity and mental retardation are particularly complex. The court considers individuals in either of these categories as protected classes and therefore not eligible to be tried for a capital crime; however, all too often, these individuals are not identified as part of a protected class until the capital trial process has already begun, or even later in the appeals process. The current system lacks a mechanism for identifying individuals who should not be subjected to the capital process because they are members of a protected class.

Many critics argue that the requirements for capital defense certification are not great enough or narrowly tailored enough to ensure competency for capital trials specifically. As one critic expressed it, "A close reading of these minimum standards reveals that a commercial litigation attorney who, perhaps as a favor, has tried a few low-grade felonies-maybe a few felony DWIs, drug offenses, or criminal damage to property charges-can qualify under Louisiana's scheme to represent a capital defendant by merely attending a twelve-hour

[130] See footnote #94.

seminar."[131] There is a delicate balance between ensuring competency and continuing to attract talent to the field.

The State Board created requirements for continuing education for attorneys certified to work as capital defense counsel; however, many critics argue that the twelve-hour requirement per every two years is too little to satisfy the ABA's requirement for continuing education. Also, the guidelines for what constitutes continuing education for capital defense counsel is far too broadly defined to ensure that the minimal continuing education is relevant. Capital cases involve a high level of complexity, and the current political climate, particularly in Louisiana, involves steady change. The State is currently going through great change in its defense system, but also in how to handle Supreme Court decisions such as *Atkins v. Virginia.*[132] For all of the variables that must be taken into account in a capital trial, the requirement for continuing education should at least be doubled.

Until arraignment, courts do not appoint attorneys to indigent defendants. People unable to post bail remain in jail for an average of 514 days.[133] Many critics argue that this results in violations of the defendant's right to a speedy trial. No attorney will be filing briefs and motions for the defendant, including motions for a speedy trial, because no attorney was assigned, let alone ready to take the case to trial.[134]

Thus, while the Act 307 reform efforts look promising on paper, in reality it seems as if the State has been left in a similar position from where it started. The State indigent defense board is too weak to enforce adherence to the *ABA's Ten Principles.*[135] While the new system

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[131] Kilborn, Julie Hayes. *Doctoring Up the Capital Defense System: Raising the Standards for Louisiana's Death Penalty Lawyers.* Louisiana Law Review. Fall, 2003.
[132] *Atkins v. Virginia.* 536 U.S. 304 (2002)
[133] See footnote #104.
[134] See footnote #104.
[135] See Appendix B for the *ABA's Ten Principles of a Public Defense System.*

may theoretically comply with all ten of these principles, the districts have little incentive to change and the State board has little power to enforce. This creates a recipe for continued inefficiencies under the façade of positive reform. The American Bar Association recommends[136] strong state oversight and funding in order to ensure compliance with the *Ten Principles*. I would argue that the State is not providing enough funding, the district funding sources are far too irregular, and the State Board does not hold enough power to enforce policies on the district boards.

B. The Cost of Capital Punishment in Louisiana

One of the largest problems facing Louisiana is the economic effect of pursuing the death sentence. According to the Liebman study, the national authority on capital punishment statistics, the entire capital process, including trial, incarceration, appeals, and execution, costs between $2.5 million to $5 million per defendant.[137] In Louisiana, parishes are responsible for 75% of the costs of prosecuting a capital defendant.[138]

The exact amount Louisiana spends on housing death row inmates, the capital appeals process, and the amount spent per trial is currently unknown. Jean Faria, head of the Louisiana State Public Defender Board, "is working on calculating a per-case cost for death-penalty defense."[139] According to Buddy Caldwell, Louisiana Attorney General, likens a capital trial to "playing on a $100-a-roll table instead of a nickel or dime table."[140] Even though there is no

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[136] *ABA Policy on Indigent Defense Reforms Needed to Insure Compliance with Gideon*. Standing Committee on Legal Aid and Indigent Defendants. August, 2005.
[137] Liebman, James S., Fagan, Jeffrey, and West, Valerie. *A Broken System: Error Rates in Capital Cases, 1973-1995*. 2000.
[138] With the passage of Act 308, this funding may change slightly.
[139] Millhollon, Michelle. *Economics of Execution.* The Advocate. 8 March 2009.
[140] Ibid.

definite per-trial number for capital cases in Louisiana, it is very clear that the State spends an immense amount more on capital trials than on non-capital trials.

There are several reasons why seeking the death penalty is so much more expensive to the state than seeking life imprisonment. There is a common conception that the system of appeals available to defendants is the cause for the increased cost, but 87% of the cost of capital punishment happens at the trial level.[141] Thus, for every trial where prosecutors seek the death penalty, even when evidence indicates the death penalty may not be appropriate, and despite the outcome of the guilt and sentencing phases, the state spends a very large amount of money on each capital trial.

Capital trials typically take 3.5 times longer than a non-capital trial. V*oir dire* takes much longer because the questions asked of potential jurors are generally more complex, and both the prosecution and defense are generally given more peremptory challenges. Due to the nature of the bi-furcated trial system, two trials take place in lieu of a single trial that encompasses both the guilt phase and the sentencing phase. An additional reason that capital trials are far more expensive is that both the prosecution and defense typically spend a much greater time preparing for the case due to the complexity of capital adjudication. Even if the jury finds the defendant not guilty or if the jury decides on a lesser punishment, districts still incur the high costs of the capital trial. The additional levels of scrutiny and review required for capital sentences further enhance these costs.[142]

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[141] *The High Costs of the Death Penalty.* American Civil Liberties Union Capital Punishment Project.
[142] Dieter, Richard C. *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty.* Death Penalty Information Center. Fall 1994.

C. Capital Sentences Overturned on Appeal

The high costs of capital punishment seem more dramatic when looking at the outcomes of capital sentences in Louisiana. Even if the juries decide upon a death sentence, 64% of these sentences will be overturned.[143] Only 15% of those individuals given a death sentence will actually be executed,[144] and this figure is three times the national average of 5%.[145]

In 1991, the U.S. Senate Committee on the Judiciary asked Professor James Liebman from Columbia University to analyze error rates in capital punishment. Dr. Liebman's study spread over 23 years between 1973 and 1995.[146] This was the first study done of its kind and remains the authority on the subject of error rates, cost, and the death penalty. The Liebman study cited two key sources of common error: incompetent defense attorneys and prosecutorial misconduct.[147] Liebman concluded that the high rates of error at each part of the judicial process means that extensive review and opportunity for appeal are essential in order to uphold and maintain justice. For a diagram of the total appeals process, see Appendix A.

Louisiana has a lower incidence of error in capital convictions than the national average of 72.7%. That being said, a stable error rate of 64%[148] with respect to capital convictions is nothing to be proud of. Error rate refers to mistakes made during the judicial process which, because of due process violations, can cause sentences and/or convictions to be overturned on

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[143] Liebman, James S., Fagan, Jeffrey, and West, Valerie. *A Broken System: Error Rates in Capital Cases, 1973-1995*. 2000.
[144] Ibid. Others die of natural deaths, receive commutations, or receive lowered sentences on appeal.
[145] Ibid.
[146] Ibid.
[147] This paper will not speak to the issue of prosecutorial misconduct to a great degree because it is a very large problem in its own right. That being said, Louisiana has a history of prosecutorial misconduct. For instance, Orleans parish currently has a $14 million settlement against them. John Thompson served fourteen years on death row before being released after it came out that the prosecutor who tried his case withheld evidence indicating Thompson's innocence.
[148] When analyzing these numbers more closely, 46% percent of cases are reversed on direct appeal (compared to a national average of 41.7%), 7% of cases are reversed through state post-conviction (compared to a national average of 10%), and 27% of cases are reversed through habeas corpus appeals (compared to a national average of 40%).

appeal. The majority of this error comes from prosecutorial misconduct[149] and ineffective defense counsel. One reason for this lower error rate compared to the national rate is that Louisiana is in the Fifth Circuit Court of Appeals, which overturns many fewer criminal cases than other circuits.[150]

D. Louisiana Capital Punishment Statutes

The current State statutes allow for the death penalty only in the case of first-degree murder and treason.[151] Like Georgia, Louisiana uses a balancing scheme between aggravating and mitigating circumstances, statutorily defined, to guide the jury during the sentencing phase of the trial to determine if the death penalty is appropriate. Critics argue that in practice, the definition of first-degree murder and the statutorily defined aggravating factors work together to recreate mandatory death sentences for certain classes of criminals.

The definition of first-degree murder[152] contains ten provisions defining the crime. In order for a jury to convict someone of first-degree murder, they must find the defendant guilty of at least one of these ten provisions. All ten of these provisions are represented in the list of aggravating factors; in fact, once convicted of first-degree murder, certain offenses, such as murdering a prison guard, are represented by multiple statutory aggravating factors. In order to sentence someone to death, a jury must find that the defendant is guilty of first-degree murder and that the aggravating circumstances outweigh the mitigating circumstances. I would argue that because the aggravating factors are inherent in the crime itself, without heavy mitigation efforts, the statutes effectively act as mandatory death sentences.

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[149] Prosecutorial misconduct includes all behaviors in which the prosecutor acts in an unfair way. This commonly includes withholding evidence.
[150] Ibid.
[151] RS 14:113, RS 14: 30
[152] See Appendix D for a complete listing of relevant statutes.

A key implication here is that without very good criminal defense attorneys, the nuances of capital trials may result in a breach of Due Process. The statutes are designed in such a way that a capital defense attorney must press upon the jury that the aggravating factor used to define the crime of murder is inappropriate to re-use in sentencing. Furthermore, in order for mitigating circumstances to outweigh the aggravating circumstances already present, the capital defense attorney must present substantial, convincing mitigation. This is one area where the current system for indigent defense fails; there is a severe lack of resources available for mitigation expertise and it requires a great deal of experience to discredit the issue of double-counted aggravators.

I would argue that the use of the same circumstances to both convict someone of a crime and to sentence them to death could be seen as unconstitutional because there is not an effective narrowing of defendants convicted of first-degree murder as required by the Court. There is some narrowing of defendants recognized by the state in terms of protected classes. *Roper v. Simmons*[153] restricts the use of the death penalty against defendants under the age of 18 at the time the crime was committed, *Ford v. Wainwright*[154] forbids the execution of the insane, and *Atkins v. Virginia*[155] prohibits executing the mentally retarded. Regardless, the possibility exists that Louisiana is not effectively narrowing the class of death-eligible defendants, and there is currently no effective mechanism for properly identifying members of protected classes, especially with respect to insanity and mental retardation, who would therefore not be death eligible.

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[153] *Roper v. Simmons.* 543 U.S. 551 (2005)
[154] *Ford v. Wainwright* 477 U.S. 399 (1986)
[155] *Atkins v. Virginia* 536 U.S. 304 (2002)

IV. Suggested Reforms for Improving Indigent Defense in Louisiana

The progress made through Act 307 is not enough to remedy the current situation, particularly for capital defendants. There are four key changes I suggest to further the progress already made by the LIDAB and the State legislature. My solution will enhance the central authority of the State Public Defender Board, ensure competency of public capital defense counsel, provide a screening system to identify defendants that should not be death eligible, and provide greater incentive for attorneys to work in capital indigent defense.

Centralizing power under the State Board will better the entire Louisiana system by allowing the State Board to standardize indigent defense and prevent inadequate representation. Adding mechanisms to ensure individuals working in capital defense are proficient in the field will reduce the number of capital sentences and convictions overturned due to attorney error. Properly identifying defendants who should not be death-eligible and ensuring the competency of defense will act to both decrease the number of capital trials and appeals and increase the integrity of Louisiana's capital convictions. A system of tax incentives based on the Louisiana Film Tax Credit will ease some of the financial pressures on the indigent defense system and help to attract quality talent to the field while new funding measures can be initiated.

A. Empowering the State Board for Indigent Defense

The legislature needs to further amend the LA Code and empower the State Board to a point of true authority. Each district already has an indigent defense board. These boards currently have the authority to create their own policies and appoint their own officials. I would recommend that all of the district boards be directly under the authority of the State Board. Thus, not only would the State Board have to approve their budgets, but the State Board should

also have authority over the district policies, including reimbursement systems, attorney appointment systems, and adherence to the *ABA's Ten Principles.* If a district board does not meet the standards set forth by the State Board, the State Board needs the authority to take over district boards, rearrange or reappoint staff, and put trials on hold under the standards established by *Peart.*[156]

Indigent defense reform and the standardization of indigent defense are both important government objectives. Empowering the State Board to greater authority helps to achieve both of these objectives. The State Board creates new measures for reform on a regular basis to better indigent defense; however, in the current state of affairs the State Board lacks any mechanism for implementing these reforms, short of legislative action. Also, indigent defense varies widely in quality between parishes. Empowering the State Board would streamline reform and allow effective representation to be available in every parish.

The legislature should change indigent defense funding throughout the state. All fees collected from the district courts should be pooled into the State Indigent Defense Fund. Once the LIDAB approves the district budgets, the districts would receive their annual funding. If a district failed to comply with state standards, the state board should have the power to revoke funding and stop all operations of the district board in question.

District boards would still be able to maintain their autonomy provided that they adhere to state standards. If a district board violated state policy the State Board would have the option, along with revoking funding, of taking over control of the district board and making any necessary arrangements so that the District Board could function properly. LIDAB staff would audit the district board to determine the source of what is preventing the office from functioning according to state standards. The State Public Defender, along with the LIDAB, would have the

[156] *State v. Leonard Peart* 621 So. 2d 780 (1993)

authority to rearrange or terminate staff as necessary, to change the public defense delivery system, to stop all proceedings for all cases in the district requiring public defense, and to make any other changes necessary. During this process, the District Public Defender would act as a manager for any continuing operations of the district office. Once the district board began to function according to state standards, control over day-to-day activities would then be transferred back to the District Board, provided they continue to adhere to state standards.

The State Board needs to have a greatly extended budget. The State Board needs to be able to provide, and therefore also withhold, funding from the District Boards. The State Board also needs an extended support staff to work directly with the District Boards. Each District should have a supervisor from the State Board that acts both as a general liaison and an enforcer of State policy. If necessary, it could be appropriate for this person to act as district Public Defender, directly under the authority of the State Public Defender.

There are some political implications that need to be taken into account. The latest reform represents a compromise between those who want centralized authority through the State Board and those who want the district boards to maintain absolute autonomy. It may be unrealistic at the current time for my suggestion for a completely centralized, empowered State Board to be implemented by the legislature; however, that does not negate from the fact that centralized authority is necessary to create and enforce uniformity and effective representation. The current system will not be able to ensure uniformity throughout the state because it still lacks proper, effective enforcement mechanisms.

B. Establishing a Louisiana Capital Bar Association

The State Public Defense Board instituted a certification process[157] for individuals who desire to work as public capital defense counsel. Many critics argue that while these standards are a start, they are not enough to truly ensure competency per ABA standards.[158] A better system would be to establish a Louisiana Capital Bar Association. Just like admittance to the Louisiana Bar requires passing the Bar Exam, admittance to the Capital Bar Association would require both meeting the guidelines established by the LIDAB and passing a Capital Bar Exam.

Capital trials are far more complex than other litigation practicing attorneys may encounter. In order to ensure that an attorney requires all of the knowledge necessary to address all of the possible variables a capital trial may require, a comprehensive exam is necessary. The LIDAB should work in association with the Louisiana Bar Association to develop this exam.

First, the exam should establish an individual has a firm understanding of Louisiana Statutes. Because certain offenses are double counted both in the definition of first-degree murder and as aggravators, understanding the subtleties in the law is critical. A thorough understanding of how the state interprets aggravating and mitigating circumstances is particularly important because Louisiana uses a balancing system to determine if an individual should receive the death penalty. The different ways of developing a mitigation case should also be tested, including how and when to make use of expert testimony. A thorough understanding of how *voir dire* changes and becomes more extensive in capital cases should also be included.

Not only should objective knowledge about the law be tested, but an individual should also face several hypothetical cases and develop strategies for defending them. Developing a defense strategy can be highly complex. Depending on the variables of the case, an individual

[157] See Appendix E for a complete listing of these guidelines.
[158] There is actually a loophole built into the standards in which an individual does not have to meet the strict standards with recommendation from a judge and approval of the LIDAB.

may choose one of several different courses of action to develop an effective defense. The Court in *Strickland* dictated that effective assistance should be judged on a case-by-case basis accounting for different potential strategies. In the same way, the Bar Association and LIDAB could jointly assess the hypothetical responses to determine whether or not the individual demonstrated competency.

An oral or practical could also be included to test an individual's trial advocacy skills. The LIDAB values trial advocacy and sees the promotion of trial advocacy skills as an important objective. In their requirements for continuing education, some of the twelve required hours must be spent on improving trial advocacy. This could be incorporated with the hypothetical section in order for an individual to demonstrate practical communication skills along with the theoretical knowledge required. Again, the Bar Association and the LIDAB to ensure competency could jointly grade an individual's performance.

The actual format of the exam, written, oral, etc., could vary dramatically. Older, more experienced attorneys may be less inclined to take a written test similar in magnitude to the State Bar Exam that they took right out of law school. The LIDAB could work with the Capital Bar Association to develop a systematic "exam" that still appeals to experienced attorneys.

The Louisiana Capital Bar Association should be responsible for grading these exams and ensuring competency of individuals. The Capital Bar Association should work with the LIDAB and the Louisiana Bar Association for the betterment of the legal profession generally and capital defense specifically. Particularly due to the more subjective nature of the exam I am proposing, a team would need to be appointed by the LIDAB to develop the exam and initiate grading. Continuing education requirements should be increased, and if an individual does not keep up

with continuing education or goes five years or more without working on a capital case, that individual should be required to undergo re-certification before working on a capital case.

There would need to be a system for "grandfathering in" experienced capital defense attorneys. The LIDAB could certify individual attorneys who have demonstrated competency in capital defense prior to the start of the Capital Bar Exam's implementation. Provided these individuals keep up with continuing education requirements, they would never need to undergo the Capital Bar Exam. Louisiana would not want to find itself suddenly in a position without any capital defense attorneys. Orleans parish alone makes sure that the need for capital defense is great.

Some have gone so far as to suggest that capital defense attorneys should complete an apprenticeship under a current practicing, public capital defense attorney, akin to the residencies medical doctors complete before being able to practice independently. There is a fine line between ensuring competency of capital defense and making entrance into the industry so difficult so as to discourage willing individuals from working in the field. A formal apprenticeship may serve more to deter talent than to ensure competency. Informal mentorships set up through the LIDAB could enhance competency without deterring individuals from the field. An exam can ensure competency without too greatly impeding talented attorneys.

C. <u>District Capital Investigation Offices</u>

I propose that a new office be created to work with the District Attorneys in determining which defendants should be eligible for a capital trial. This office would be directly under the authority of the LIDAB, and would be assigned to a service region. Currently, the reformed statutes allow for eleven service regions to provide for specialized services for appellate,

juvenile, and death penalty cases.[159] The district capital investigation offices would be a fourth type of office servicing the service regions. Because of the large population and the numbers of homicides committed in Orleans and East Baton Rouge parishes, these districts would qualify to be defined as their own service region and would need their own Capital Investigation Offices. For areas with fewer homicides, one service region can span multiple districts. For a breakdown of capital crime by parish, see Appendix C.

The Louisiana Code should be amended to require a report from the Capital Investigation Offices detailing their findings for a particular defendant and their recommendations as to whether or not the district attorneys should pursue the death penalty. The district attorneys would retain the discretion to decide whether or not to follow the recommendation made by the Capital Investigation Office, but the report generated by the Capital Investigation Office would be available both during the criminal trial and on appeal. This could actually help the district attorneys by providing them with a legitimate reason for not pursuing the death penalty. As elected officials, it is generally politically unpopular to appear "soft on crime".

This office would be funded through the LIDAB and would conduct any investigation or expert testing necessary to determine factors such as mental retardation, insanity, and anything else that would cause someone to be deemed death ineligible under the Court System. The Capital Investigation Offices would become involved upon arrest for a potentially capital crime. An investigatory office would ensure that each defendant has a personalized assessment as to the appropriateness of a capital charge against him/her, and the issue of funding for specialized services such as expert testimony and psychiatric testing would also be simplified. Instead of district public defense offices being responsible for this, the State Board would provide funding for this through the Investigative Offices. This would relieve pressure from the district budgets.

[159] R.S. 15§164

The Investigative Office would also serve to fulfill one of the ABA's *Ten Principles*, that the prosecution and defense should have equal access to resources. Currently, the District Attorneys' offices have far better resources, benefits, and compensation than most public defense offices. The Capital Investigation Offices would supplement the resources of the Public Defense offices both in terms of time and tangible monetary resources.

Again, there are some political implications that need to be taken into account. Enhancing rights and services to those accused of capital crimes is never a popular political decision, particularly for District Attorneys and Legislators as elected officials. However, enhancing the integrity of capital convictions by only bringing capital charges against those who are eligible provides a layer of security against faulty convictions. With the success of innocence projects increasing nationally, many people deeply fear executing the innocent, including those who under Supreme Court jurisprudence should never have been threatened with the death penalty to begin with.

Another very serious political implication that would have to be taken into account is the political power of the Louisiana District Attorneys. The Louisiana Association of District Attorneys would likely lobby to prevent the creation of this regulatory office as it threatens the discretionary power of the district attorneys to make decisions on what charges to pursue. This paper cannot speak to all of the possible political complications that may result if the LA District Attorneys Association feels threatened; regardless, the Capital Investigation Office would enhance indigent defense to such a degree it would actually benefit the prosecution. Because nobody wants to waste the precious time or money of the Court system, it is possible that the LA Bar Association and the LIDAB could garner enough support to overcome opposition.

D. Using the Louisiana Film Tax Credit System as a Model for Incentivizing Indigent Defense

The Louisiana Film Tax Credit has been very successful at creating a thriving film industry in Louisiana, now known as "Hollywood South."[160] Different percentages are paid in tax credits for different types of film industry projects.[161] Investors and companies receive a certain percentage of the amount of business done in the state back in tax credits. These tax credits are transferrable and there is a growing market for them. Investors and film companies sell the credits to brokers at less than full value; the brokers sell them at less than full value to private citizens. According to a report by the Legislative Fiscal Office, the majority of the tax credits being used on tax returns originate from private citizens who purchased the tax credits from a broker and are looking to offset their personal income tax liability.[162] For a full breakdown of the economic impact of the Louisiana Film Tax Credit, see Appendix F.

By using this tax credit system as a model, Louisiana could incentivize indigent defense work without any direct expenditure. The LIDAB is working on revising funding measures in Louisiana, but while this work is in progress, a tax credit system could ease some of the pressure on the system. The goal of creating a tax credit system for indigent defense would be to attract large firms to train qualified attorneys to do *pro bono* work. Increasing the participation of the private bar would help to ease caseloads on public defenders, and although the base rate of pay is low, tax credits would give greater incentive for attorneys to take criminal *pro bono* cases.

This system would provide great benefit to the State by increasing compensation for indigent defenders without greatly expanding the budget for indigent defense. Particularly at the

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[160] Bailey, Matthew J. *Hollywood South: Why Film Credits are Good for Louisiana.* State Tax Notes Magazine. 2 June 2008.

[161] Investors receive 25% of cost of projects less than $300,000. Companies receive 10% of the cost of hiring Louisiana residents. Production teams receive 15% of money spent in the state, and until January 2009, companies received 40% of the cost of infrastructure project under $25 million. Ibid.

[162] Albrecht, Greg. *Film and Video Tax Incentives: Estimated Economic and Fiscal Impacts.* State of Louisiana Legislative Fiscal Office. March 2005.

present time when the state is struggling with an economic crisis, an innovative solution to improve indigent defense is even more necessary. These tax credits would represent a cost to the state, but instead of being an upfront, out-of-pocket expense, the state would simply receive less money at the end of the year.[163] Because of the process involved in approving and transferring credits, not all tax credits are used at the end of the year. In the same way that mail-in rebates are used at a lower rate than direct price reductions, the state can provide a great incentive while only having to pay for a portion of it in the end. Furthermore, revenue originating from tax credits is not subject to federal taxation. This further enhances the potential incentivizing effect of these tax credits.

Some changes would need to be made to adapt the Louisiana Film Tax Credit System to the legal industry. The key principle is that the tax credits would be awarded based on the amount of business done in the state. Attorneys would receive thirty cents in tax deductions for every dollar earned working on indigent defense. Firms would receive 10% of the amount spent on employing Louisiana residents that work on these projects, including clerks and paralegals, as tax deductions. These tax credits would be transferable in the same way as the Film Tax credits. If companies or private attorneys did not need the credits to offset tax liability, the credits could be sold for additional revenue.

In order to prevent abuse of these credits, individual attorneys or firms would apply to the state for these credits. The LIDAB should act as a regulating agency and work with the state to approve public defense projects. This would also allow the LIDAB to ensure that the attorneys accepting these *pro bono* cases met their qualification standards.

The numbers and the magnitude of the film tax credit compared to how this would

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[163] Bailey, Matthew J. *Hollywood South: Why Film Credits are Good for Louisiana.* State Tax Notes Magazine. 2 June 2008.

function for indigent defense are not of primary importance. We want to provide tax credits for the purpose of providing additional compensation for indigent defenders. Tax Credits are preferable compared to increasing total rate of pay for a couple of reasons. First, income received has already been counted as income and thus is not subject to additional taxation. Second, some Tax credits will not be redeemed, thus creating a greater incentive than the state will actually have to pay for in the end. Finally, costs are accrued at the end of the year with income tax filings, creating no immediate costs to the state. The numbers will be very different from the film tax credit because the film tax credit rewards large investments in the state. On the contrary, this program will reward a certain industry by supplementing payment. Even so, we see that the film tax credit does create a sufficient incentive to encourage business, and for a detailed breakdown of the Economic Impact to the state, see Appendix F.

There are much larger economic issues that I believe are outside the scope of this paper, as well as beyond my personal expertise. The entire funding system for indigent defense in Louisiana should be completely redone. Stable funding outside of traffic tickets and municipal fees needs to be established, and the State needs to play a greater role in funding indigent defense. According to the ABA, the Federal Government should also be playing a larger role in funding indigent defense. It is entirely possible, however, that an overhaul of the indigent defense funding system would require a Constitutional Convention. Our State is already struggling to realign the budget because so much money distributed in inefficient ways is constitutionally protected. My suggestions rely on increased state funding on a number of points. Political realities require that I acknowledge that increasing rights and funding for criminals is never a popular political decisions and would be even more difficult at the present time because of the economic trouble the state is already in.

Conclusion

In Louisiana, 90% of all criminal defendants require public defense. The current system for providing indigent defense is highly unstable. The parishes fund over 75% of the costs of providing public defense via traffic tickets, court costs, and other municipal fees. The irregularities in the budget cause insufficiencies in the system; without a stable budget, many parishes struggle over how many attorneys to keep on staff and how much money to set aside for special services such as expert testimony and mitigation specialists. Many parishes, including Orleans, Caddo, and Avoyelles, regularly have public defenders with caseloads exceeding recommended limits. This results in the attorney being unable to provide an adequate defense.

The cost and complexity of capital trials is staggering. Although a specific per-case cost for capital cases has not yet been calculated, the entire capital process, from arraignment through appeals and even execution, is projected to be two to three times higher than a non-capital trial, including the cost of incarcerating an individual for life. Although Louisiana has an execution rate of three times the national average, we still only execute 15% of individuals with death sentences. Thus, 85% of the cases where a death sentence is given never result in execution. Many of these cases are thrown out on appeal; 64% of all capital sentences are reversed in the appeals process, many because of errors on the part of the indigent defenders.

A large percentage of cases are reversed because the individuals have mental retardation or insanity issues and should never have faced capital charges to begin with. The current system fails to properly identify which defendants are ineligible for the capital trial process because of protected classes identified by the Supreme Court in *Atkins v. Virginia, Roper v. Simmons,* and *Ford v. Wainwright.*

In my thesis, I propose a multi-part effort for reform. First, I believe the system of delivering indigent defense should be reorganized. The legislature needs to further amend the LA Code and empower the State Board, the Louisiana Indigent Defense Assistance Board (LIDAB), to a point of true authority. Each district already has an indigent defense board. These boards currently have the authority to create their own policies and appoint their own officials. I would recommend that all of the district boards be directly under the authority of the State Board. Thus, not only would the State Board have to approve their budgets, but the State Board should also have authority over the district policies, including reimbursement systems and attorney appointment systems. If a district board does not meet the standards set forth by the State Board, the State Board needs the authority to take over district boards, rearrange or reappoint staff, and put trials on hold under the standards established by *State v. Peart.* Each District should have a supervisor from the State Board that acts both as a general liaison and an enforcer of State policy. If necessary, it could be appropriate for this person to act as district Public Defender, directly under the authority of the State Public Defender.

I recommend a tax credit system based on the Louisiana Film Tax Credit. Attorneys that work on indigent cases will not be taxed on the income earned from the parish, the attorney or firm that he works for will also receive transferrable tax credits based on the amount earned. Tax credits are commonly transferred from film companies to individuals or businesses looking to offset tax liability. Law firms, especially in the New Orleans area, are already brokering these deals. This system would encourage large firms to appoint attorneys to indigent defense. The firm can use the tax credits to offset liability or sell them to increase the profitability of providing public defense.

To address issues of competency, I recommend that the Louisiana Indigent Defense Assistance Board (LIDAB) work together with the Louisiana Bar Association to establish a Capital Bar, admission to which would be dependent on certification requirements already in place and the passage of the Capital Bar Exam. The Capital Bar Exam would test all potential areas of the complexity of capital defense, including, but not limited to, developing mitigation, all potential pre-trial and post-trial filings, and trial advocacy. Ensuring competency would likely reduce the number of cases reversed on appeal due to mistakes made by defense counsel.

Finally, I recommend the creation of a Capital Investigation Office. These offices would be assigned to one or more parishes, depending on density of capital cases, and they would work concurrently with the District Attorneys office to determine the eligibility of defendants potentially facing capital charges. This office would investigate the age of defendant, the possibility of insanity or mental retardation issues, and the basic nature of the crime. This office would report on the eligibility of an individual to face capital charges, and the reports generated in this process, including psychiatric testing and medical history, could also be used at trial by the public defenders. This office would be directly under the authority of the LIDAB. Not only would this office prevent the State from pursuing a capital conviction against an ineligible individual, which would result in the sentence being turned over on appeal, but they would also ease some of the financial strain on the parishes by providing some specialized expert evidence and witnesses at trial.

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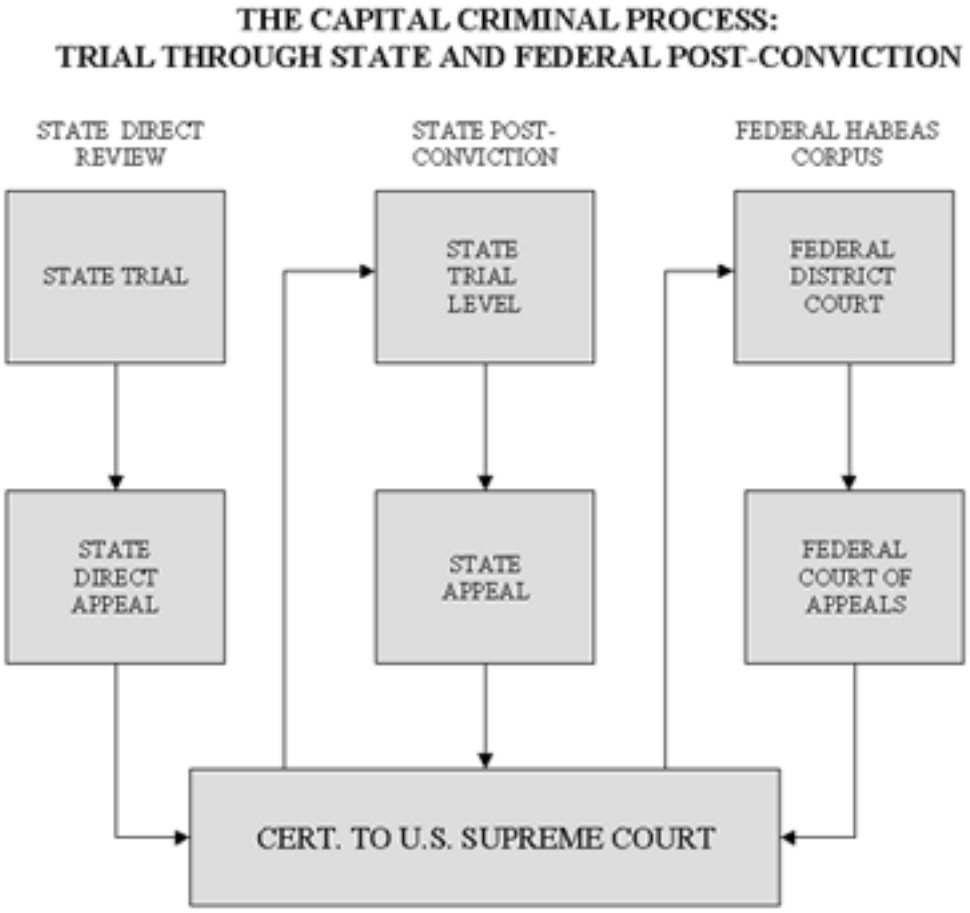
Appendix A: The Capital Criminal Process: Trial Through State and Federal Post-Conviction



Appendix B: The American Bar Association's *Ten Principles of a Public Defense Delivery System*

1: The public defense function, including the selection, funding, and payment of defense counsel, is independent.

2: Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

3: Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request of counsel.

4: Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

5: Defense counsel's workload is controlled to permit the rendering of quality representation.

6: Defense counsel's ability, training, and experience match the complexity of the case.

7: The same attorney continuously represents the client until completion of the case.

8: There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

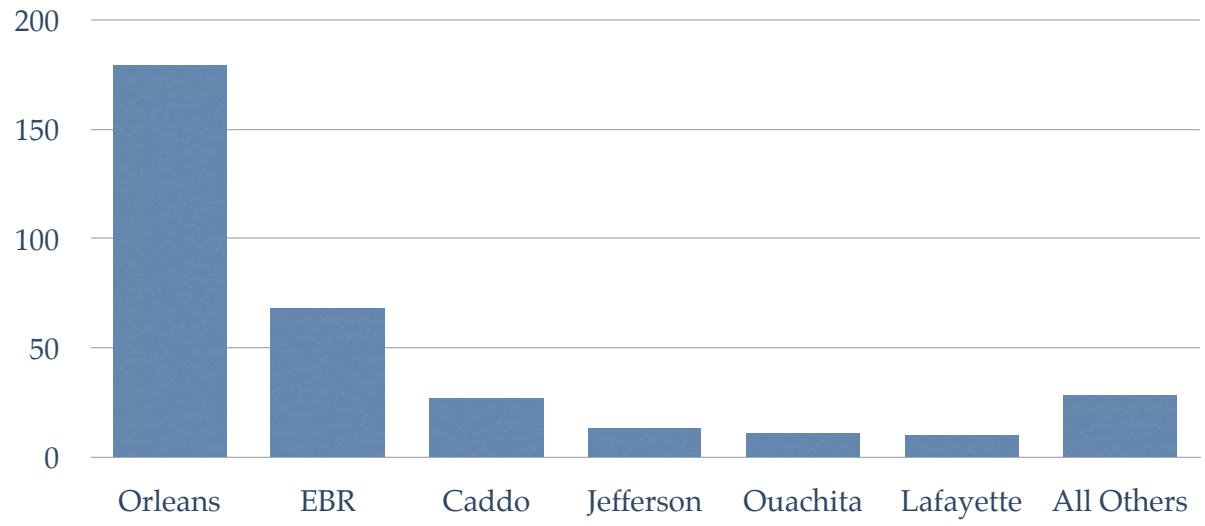
9: Defense counsel is provided with and required to attend continuing legal education.

10: Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

For the complete document, including commentary, please refer to:
http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf

Appendix C: Breakdown of Homicides by Parish

Number of Homicides v. Parish



PARISH	City/TOTALS	# Homicides 2008
Ascension	Gonzales	1
	TOTAL	**1**
Avoyelles	Marksville	1
	Moreauville	0
	TOTAL	**1**
Beauregard	De Ridder	0
	TOTAL	**0**
Bossier	Bossier City	6
	TOTAL	**6**
Caddo	Blanchard	0
	Shreveport	27
	TOTAL	**27**
Calcasieu	Dequincy	0
	Iowa	0
	Vinton	1
	Westlake	0
	TOTAL	**1**
De Soto	Mansfield	0
	Stonewall	0
	TOTAL	**0**
East Baton Rouge	Baker	1
	Baton Rouge	67
	Zachary	0
	TOTAL	**68**

East Carroll	Lake Providence	1
	TOTAL	**1**
East Feliciana	Clinton	0
	TOTAL	**0**
Evangeline	Basile	0
	Mamou	0
	TOTAL	**0**
Grant	Pollock	0
	TOTAL	**0**
Iberville	Plaquemine	2
	TOTAL	**2**
Jefferson	Westwego	0
	Gretna	5
	Harahan	1
	Kenner	7
	TOTAL	**13**
Jefferson Davis	Elton	0
	Jennings	3
	TOTAL	**3**
La Salle	Olla	1
	TOTAL	**1**
Lafayette	Lafayette	10
	TOTAL	**10**
Lafourche	Golden Meadow	0
	Thibodeaux	2
	TOTAL	**2**
Lincoln	Ruston	1
	TOTAL	**1**
Livingston	Denham Springs	0
	French Settlement	0
	TOTAL	**0**
Madison	Tallulah	0
	TOTAL	**0**
Orleans	New Orleans	179
	TOTAL	**179**
Ouachita	Monroe	11
	Sterlington	0
	West Monroe	0
	TOTAL	**11**
Rapides	Pineville	0
	TOTAL	**0**
Red River	Coushatta	0
	TOTAL	**0**
Sabine	Many	0
	TOTAL	**0**
St. Martin	Breaux Bridge	0
	TOTAL	**0**
St. Mary	Franklin	0

	Morgan City	1
	TOTAL	**1**
St. Tammany	Covington	1
	Mandeville	0
	Pearl River	0
	Slidell	0
	TOTAL	**1**
Tangipahoa	Amite	0
	Hammond	0
	Kentwood	0
	Ponchatoula	0
	Tickfaw	0
	TOTAL	**0**
Terrebone	Houma	0
	TOTAL	**0**
Union	Bernice	0
	Farmerville	0
	TOTAL	**0**
Washington	Bogalusa	5
	Franklinton	2
	TOTAL	**7**
Webster	Cullen	0
	Minden	0
	TOTAL	**0**
West Baton Rouge	Addis	0
	Brusly	0
	Port Allen	0
	TOTAL	**0**

Appendix D: Louisiana Capital Punishment Statutes

R.S. 14§30. First degree murder

A. First degree murder is the killing of a human being:

(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, assault by drive-by shooting, first degree robbery, second degree robbery, simple robbery, terrorism, cruelty to juveniles, or second degree cruelty to juveniles.

(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman, peace officer, or civilian employee of the Louisiana State Police Crime Laboratory or any other forensic laboratory engaged in the performance of his lawful duties, or when the specific intent to kill or to inflict great bodily harm is directly related to the victim's status as a fireman, peace officer, or civilian employee.

(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.

(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

(5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim who is under the age of twelve or sixty-five years of age or older.

(6) When the offender has the specific intent to kill or to inflict great bodily harm while engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance listed in Schedules I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.

(7) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the activities prohibited by R.S. 14:107.1(C)(1).

(8) When the offender has specific intent to kill or to inflict great bodily harm and there has been issued by a judge or magistrate any lawful order prohibiting contact between the offender and the victim in response to threats of physical violence or harm which was served on the offender and is in effect at the time of the homicide.

(9) When the offender has specific intent to kill or to inflict great bodily harm upon a victim who was a witness to a crime or was a member of the immediate family of a witness to a crime committed on a prior occasion and:

(a) The killing was committed for the purpose of preventing or influencing the victim's testimony in any criminal action or proceeding whether or not such action or proceeding had been commenced; or

(b) The killing was committed for the purpose of exacting retribution for the victim's prior testimony.

(10) When the offender has a specific intent to kill or inflict great bodily harm and the offender has previously acted with a specific intent to kill or inflict great bodily harm that resulted in the killing of one or more persons.

B. (1) For the purposes of Paragraph (A)(2) of this Section, the term "peace officer" means any peace officer, as defined in R.S. 40:2402, and includes any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, commissioned wildlife enforcement agent, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

(2) For the purposes of Paragraph (A)(9) of this Section, the term "member of the immediate family" means a husband, wife, father, mother, daughter, son, brother, sister, stepparent, grandparent, stepchild, or grandchild.

(3) For the purposes of Paragraph (A)(9) of this Section, the term "witness" means any person who has testified or is expected to testify for the prosecution, or who, by reason of having relevant information, is subject to call or likely to be called as a witness for the prosecution, whether or not any action or proceeding has yet commenced.

C. Penalty provisions.

(1) If the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. The provisions of C.Cr.P. Art 782 relative to cases in which punishment may be capital shall apply.

(2) If the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. The provisions of C.Cr.P. Art 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply.

Amended by Acts 1973, No. 109, §1; Acts 1975, No. 327, §1; Acts 1976, No. 657, §1; Acts 1979, No. 74, §1, eff. June 29, 1979; Acts 1985, No. 515, §1; Acts 1987, No. 654, §1; Acts 1987, No. 862, §1; Acts 1988, No. 779, §2, eff. July 18, 1988; Acts 1989, No. 373, §1; Acts 1989, No. 637, §2; Acts 1990, No. 526, §1; Acts 1992, No. 296, §1; Acts 1993, No. 244, §1; Acts 1993, No. 496, §1; Acts 1999, No. 579, §1; Acts 1999, No. 1359, §1; Acts 2001, No. 1056, §1; Acts 2002, 1st Ex. Sess., No. 128, §2; Acts 2003, No. 1223, §1; Acts 2004, No. 145, §1; Acts 2004, No. 649, §1; Acts 2006, No. 53, §1; Acts 2007, No. 125, §1; Acts 2009, No. 79, §1, eff. June 18, 2009.

CCRP 905.3-Art. 905.3. Sentence of death; jury findings

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

Added by Acts 1976, No. 694, §1; Acts 1985, No. 231, §1; Acts 1988, No. 779, §1, eff. July 18, 1988.

CCRP 905.4 Art. 905.4. Aggravating circumstances

A. The following shall be considered aggravating circumstances:

(1) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, second degree kidnapping, aggravated burglary, aggravated arson, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, second degree robbery, simple robbery, cruelty to juveniles, second degree cruelty to juveniles, or terrorism.

(2) The victim was a fireman or peace officer engaged in his lawful duties.

(3) The offender has been previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.

(4) The offender knowingly created a risk of death or great bodily harm to more than one person.

(5) The offender offered or has been offered or has given or received anything of value for the commission of the offense.

(6) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony.

(7) The offense was committed in an especially heinous, atrocious or cruel manner.

(8) The victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eyewitness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(9) The victim was a correctional officer or any employee of the Department of Public Safety and Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

(10) The victim was under the age of twelve years or sixty-five years of age or older.

(11) The offender was engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance listed in Schedule I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.

(12) The offender was engaged in the activities prohibited by R.S. 14:107.1(C)(1).

(13) The offender has knowingly killed two or more persons in a series of separate incidents.

B. For the purposes of Paragraph A (2) herein, the term "peace officer" is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, commissioned wildlife enforcement agent, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Added by Acts 1976, No. 694, §1. Amended by Acts 1979, No. 74, §2, eff. June 29, 1979; Acts 1985, No. 515, §2; Acts 1985, No. 748, §1; Acts 1987, No. 655, §1; Acts 1987, No. 862, §1; Acts 1989, No. 371, §1; Acts 1995, No. 1179, §1; Acts 1995, No. 1274, §1; Acts 2006, No. 86, §1; Acts 2009, No. 79, §1, eff. June 18, 2009.

CCRP 905.5 Art. 905.5. Mitigating circumstances

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

Added by Acts 1976, No. 694, §1.

Appendix E: Capital Certification Requirements

LOUISIANA STANDARDS ON INDIGENT DEFENSE
CHAPTER 7
STANDARDS RELATING TO THE PROVISION OF COUNSEL TO INDIGENTS ACCUSED OF CAPITAL CRIMES

Purpose and Scope of Standards. The following standards are designed to ensure that the constitutional right to the effective representation by counsel is provided to indigent persons accused of capital crimes. The certification process described herein is designed to provide for a systematic and publicized method for distributing assignments in capital cases as widely as possible among qualified members of the bar and providing for the largest possible pool of certified counsel.

These standards address principles of eligibility and certification of trial and appellate counsel involved in the defense of indigent clients accused of capital crimes, including educational requirements, workload standards, and support.

Part I. General Principles of Certification Eligibility. The following standards shall be applied to attorney certification under any part of this chapter:

Standard 7-1.1. Eligibility. The attorney shall be familiar with the practice and procedure of the criminal courts of Louisiana and shall be a member in good standing of the Louisiana Bar or admitted to practice pro hac vice.

Standard 7-1.2. Evidentiary Matters. The attorney shall be familiar with the use of expert witnesses and evidence, including but not limited to, psychiatric and forensic evidence.

Standard 7-1.3. Initial Training. Within one year of an initial application for certification under the standards of this Chapter, the attorney shall complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

Standard 7-1.4. Continuing Training. To maintain certification, counsel shall, every two years from the date of certification, successfully complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

Part II. Trial Lead Counsel. To be certified to serve as trial lead counsel, an attorney shall also satisfy the following minimum standards.

Standard 7-2.1. Eligibility Criteria. Trial lead counsel shall:(A) Be an experienced and active trial practitioner with at least five years of litigation experience;

(B) Have prior experience as lead counsel in no fewer than nine jury trials tried to completion; of these nine jury trials, at least five must have involved felonies or two must have involved the charge of murder; and

(C) Have prior experience as lead counsel or associate counsel in at least one case in which the death penalty was sought and was tried through the penalty phase or have prior experience as lead counsel or associate counsel in at least two cases in which the death penalty was sought and where, although resolved prior to trial or at the guilt phase, a thorough investigation was performed for a potential penalty phase.

Part III. Trial Associate Counsel. To be certified to serve as trial associate counsel in a capital case, an attorney shall also satisfy the following minimum standards.

Standard 7-3.1. Eligibility Criteria.

Trial associate counsel shall: (A) Be an experienced and active trial or appellate practitioner with at least three years of litigation experience; and

(B) Have prior experience as lead counsel in no fewer than three felony jury trials which were tried to completion, including service as lead or associate counsel in at least one homicide trial.

Part IV. Appellate Lead Counsel. To be certified to serve as lead counsel in the appeal of a capital case, an attorney shall also satisfy the following minimum standards.

Standard 7-4.1. Eligibility Criteria. Unless certified in accordance with Part VI of this Chapter, appellate lead counsel shall:

(A) Be familiar with the practice and procedure of the Louisiana Supreme Court in the appeal of capital cases;

(B) Be an experienced and active trial or appellate practitioner with at least three years experience in the field of criminal defense;

(C) Have prior experience within the last three years as lead counsel in the appeal of no fewer than three felony convictions in federal or state court; and

(D) Have prior experience within the last three years as lead counsel or associate counsel in the appeal or post-conviction application, in federal or state court, of at least one case where a sentence of death was imposed.

Part V. Appellate Associate Counsel. To be certified to serve as associate counsel in the appeal of a capital case, an attorney shall also satisfy the following minimum standards.

Standard 7-5.1. Eligibility Criteria. Unless certified in accordance with Part IV of this Chapter, appellate associate counsel:

(A) Shall be familiar with the practice and procedure of the Louisiana Supreme Court in the appeal of capital cases; and

(B) May have less experience than an attorney qualified to serve as lead appellate counsel, although such attorney shall have demonstrated adequate proficiency in appellate advocacy in the field of felony defense.

Part VI. Alternative Certification Procedure. Notwithstanding Parts II through IV of this Chapter, a district court judge may move the Board to certify as trial lead counsel, trial associate counsel, or appellate lead counsel, an attorney who does not strictly satisfy the specific standards above.

Standard 7-6.1. District Court Judge Recommendation. An attorney recommended by a district court judge for certification under Part VI of this Chapter shall include the following original documents in support of his or her application:

(A) A written and signed recommendation for certification from a district court judge having jurisdiction over felony matters and who is familiar with the applicant's qualifications and experience as an attorney. The recommendation from the district court judge shall: (1) certify that the applicant is in substantial compliance with the minimum standards required in this Chapter; (2) set forth in detail those qualifications and experience which cause the judge to recommend the applicant; and (3) set forth the particular facts and circumstances, familiar to the judge, which demonstrate the applicant's competency and commitment to handle a capital case. The trial judge's recommendation may consider, among other facts and circumstances supporting certification of the applicant:

(a) The number of felony and misdemeanor jury trials, tried to completion, handled by the applicant;

(b) The number of felony and misdemeanor cases handled by the applicant;

(c) The number and nature of appellate cases handled by the applicant;

(d) The applicant's handling of complex and time consuming civil litigation before the recommending trial judge;

(e) The applicant's ability to rely on available and sufficient resources in preparation for a capital case;

(f) The applicant's demonstrated commitment to pro bono work on a continuing basis;

(g) The applicant's experience as a prosecutor; and

(h) Additional matters which the recommending judge deems appropriate for consideration.

(B) A written and signed certification by the applicant that he or she will promptly and diligently work to satisfy those standards of Parts II-IV which are not required for certification under Part VI of this Chapter.

(C) A written and signed certification by the applicant that he or she, if certified under Part VI of

this Chapter, will not represent at trial an indigent client charged with a capital crime or file a brief as appellate lead counsel prior to successfully completing a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

(D) A written and signed certification by the applicant that he or she meets the appropriate requirements under Standard 7-6.2 for trial lead counsel, Standard 7- 6.3 for trial associate counsel, or Standard 7-6.4 for appellate lead counsel.

Standard 7-6.2. Alternative Requirements; Trial Lead Counsel. An attorney seeking certification as trial lead counsel under Part VI of this Chapter, shall:

(A) Satisfy Standards 7-1.1, 7-1.2, and 7-2.1(A) of this Chapter; (B) Substantially satisfy Standard 7-2.1(B) or 7-2.1(C); and (C) In the case of certification by the Louisiana Indigent Defender Board, the applicant, prior to the start of trial in a capital case he or she has been appointed to handle, must successfully complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

Standard 7-6.3. Alternative Requirements; Trial Associate Counsel.

An attorney seeking certification as trial associate counsel under Part VI of this Chapter, shall:

(A) Satisfy Standards 7-1.1, 7-1.2, and 7-3.1(A) of this Chapter;

(B) Substantially satisfy Standard 7-3.1(B) of this Chapter; and

(C) In the case of certification by the Louisiana Indigent Defender Board, the applicant, prior to the start of trial in a capital case he or she has been appointed to handle, must successfully complete a minimum of 12 hours of Board- approved training primarily involving advocacy in the field of capital defense.

Standard 7-6.4. Alternative Requirements; Appellate Lead Counsel.

An attorney seeking certification as appellate lead counsel under Part VI of this Chapter, shall:

(A) Satisfy Standards 7-1.1, 7-1.2, 7-4.1(A) and 7-4.1(B) of this Chapter;

(B) Substantially satisfy Standard 7-4.1(C) or 7-4.1(D); and

(C) In the case of certification by the Louisiana Indigent Defender Board, the applicant, prior to filing a brief in the appeal of a capital case he or she has been appointed to handle, must successfully complete a minimum of 12 hours of Board- approved training primarily involving advocacy in the field of capital defense.

Part VII. Monitoring; Removal. Attorneys certified within the guidelines of this Chapter shall be monitored to ensure eligibility.

Standard 7-7.1. Status and Training Criteria. An attorney who fails to maintain his or her status

and educational requirements as defined in Part I of this Chapter shall not be considered certified for purposes of appointment in capital cases. An attorney may seek recertification once the criteria of Part I are satisfied.

Standard 7-7.2. Ineffectiveness. Where there is compelling evidence that an attorney has inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to an indigent client's case, the attorney shall not be considered certified for purposes of appointment in capital cases. In this instance, an attorney shall be given an opportunity to respond in writing to specific charges of ineffectiveness.

Standard 7-7.3. Review of Active Representation. Representation of an accused establishes an inviolable attorney-client relationship. Thus, an attorney's eligibility to represent an indigent client may not be reviewed, except by a court of proper jurisdiction, on the basis of conduct involving a case in which the attorney is presently actively representing the indigent client.

Standard 7-7.4. Recertification. An attorney decertified under Standard 7-7.2 shall not be recertified unless the decertification is shown to have been erroneous or it is established by clear and convincing evidence that the cause of the failure to meet basic responsibilities has been identified and corrected.

Part VIII. Number of Attorneys for Capital Defense. The following number of attorneys should be appointed in cases involving an indigent defendant charged with a capital crime or where an appeal has been lodged in a case where the death penalty has been imposed.

Standard 7-8.1. Trial Counsel. In cases where a defendant is charged with a crime for which the death penalty may be imposed, not less than two certified trial attorneys, one of which must be certified trial lead counsel in accordance with this Chapter, shall be assigned to represent the defendant.

Standard 7-8.2. Appellate Counsel. In cases where the death penalty has been imposed on an indigent defendant and an appeal has been taken, an attorney, certified as appellate lead counsel in accordance with this Chapter, shall be assigned to represent the defendant. It is recommended, but not mandated, that a certified appellate associate counsel be assigned to assist in the appeal, although the degree of participation of the associate counsel may be less than lead counsel.

Part IX. Workload. The following standards shall serve as guides to attorneys eligible for appointment in capital cases.

Standard 7-9.1. Professional Obligation. Attorneys accepting appointments pursuant to these standards should provide each indigent client with quality representation in accordance with constitutional and professional standards. Capital counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

Standard 7-9.2. Determination of Workload. To determine maximum workload, an attorney should consider, among other factors, quality of representation, speed of turnover of cases,

percentage of cases tried, extent of support services available, court procedures, and involvement in complex litigation.

Part X. Support Services.

Standard 7-10.1. Securing Support Services. Counsel appointed to represent a capital defendant should secure all proper and necessary support services, including, but not limited to, investigative, expert, mitigation, and any other support services necessary to prepare and present an adequate defense. An attorney should use all available support services and facilities needed for an effective performance at every stage of the proceedings, including pretrial, trial and sentencing. Counsel should seek financial and technical assistance from all possible sources, including the district indigent defender board and the Capital Program, Expert Witness/Testing Fund, and District Assistance Fund of the Louisiana Indigent Defender Board.

Part XI. Compensation.

Standard 7-11.1. Compensation of Staff, Contract, and Appointed Counsel. Staff, contract, and appointed counsel should be compensated in accordance with the guidelines established in the Louisiana Standards on Indigent Defense: Standards Relating to the Qualification and Compensation of Staff, Contract, and Appointed Counsel Involved in Indigent Defense.

Part XII. Certification Procedure. Any attorney who desires to be certified under the guidelines of this Chapter shall do so in accordance with the policies and procedures established and promulgated by the Louisiana Indigent Defender Board.

Appendix F: The Economic Impact of the Louisiana Film Tax Credit

FILM AND VIDEO TAX INCENTIVES
Estimated Economic and Fiscal Effects
Differences From Baseline Projection

Estimated Impact with a Balanced Budget Imposed

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Total Employment	158	2,366	4,168	3,651	3,607	3,414	3,203	2,989	2,785	2,596
Motion Picture Industry	102	1,508	2,670	2,537	2,387	2,277	2,174	2,077	1,985	1,900
All Other Industries	56	858	1,498	1,114	1,220	1,137	1,029	912	800	696
Total Labor & Proprietor Income	$5,257,000	$81,940,000	$161,600,000	$188,300,000	$189,100,000	$191,400,000	$191,300,000	$189,600,000	$187,100,000	$184,500,000
Wage & Salary Disbursements	$2,663,000	$41,050,000	$83,900,000	$106,100,000	$108,200,000	$110,700,000	$111,000,000	$110,000,000	$108,100,000	$106,000,000
Proprietor & Other Labor Income	$2,596,000	$40,890,000	$77,680,000	$82,150,000	$80,900,000	$80,700,000	$80,260,000	$79,660,000	$79,000,000	$78,500,000
State Revenues	$728,200	$4,633,000	$8,926,000	$11,450,000	$10,710,000	$10,630,000	$10,430,000	$10,180,000	$9,916,000	$9,636,000
Tax Credits Realized	$0	$0	($15,700,000)	($79,100,000)	($58,960,000)	($58,960,000)	($58,960,000)	($58,960,000)	($58,960,000)	($58,960,000)
Net State Tax Effect	$728,200	$4,633,000	($6,774,000)	($67,650,000)	($48,250,000)	($48,330,000)	($48,530,000)	($48,780,000)	($49,044,000)	($49,324,000)
Tax Recovery Ratio			56.9%	14.5%	18.2%	18.0%	17.7%	17.3%	16.8%	16.3%
Local Revenues	$814,000	$4,153,000	$7,798,000	$9,724,000	$9,757,000	$10,118,000	$10,340,000	$10,468,000	$10,533,000	$10,548,000

Estimated Impact with No Balanced Budget Imposed

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Total Employment	158	2,366	4,490	5,255	4,804	4,606	4,387	4,165	3,951	3,755
Motion Picture Industry	102	1,508	2,670	2,537	2,388	2,277	2,175	2,077	1,985	1,901
All Other Industries	56	858	1,820	2,718	2,416	2,329	2,212	2,088	1,966	1,854
Total Labor & Proprietor Income	$5,257,000	$81,940,000	$163,500,000	$198,300,000	$197,800,000	$200,300,000	$200,600,000	$199,200,000	$197,000,000	$194,700,000
Wage & Salary Disbursements	$2,663,000	$41,050,000	$85,310,000	$113,500,000	$114,500,000	$117,300,000	$118,000,000	$117,100,000	$115,500,000	$113,500,000
Proprietor & Other Labor Income	$2,596,000	$40,890,000	$78,200,000	$84,820,000	$83,060,000	$82,960,000	$82,610,000	$82,060,000	$81,520,000	$81,120,000
State Revenues	$731,500	$4,636,000	$9,147,000	$12,550,000	$11,570,000	$11,510,000	$11,320,000	$11,070,000	$10,810,000	$10,540,000
Tax Credits Realized	$0	$0	($15,700,000)	($79,100,000)	($58,960,000)	($58,960,000)	($58,960,000)	($58,960,000)	($58,960,000)	($58,960,000)
Net State Tax Effect	$731,500	$4,636,000	($6,553,000)	($66,550,000)	($47,390,000)	($47,450,000)	($47,640,000)	($47,890,000)	($48,150,000)	($48,420,000)
Tax Recovery Ratio			58.3%	15.9%	19.6%	19.5%	19.2%	18.8%	18.3%	17.9%
Local Revenues	$818,000	$4,158,000	$7,974,000	$10,607,000	$10,470,000	$10,868,000	$11,117,000	$11,266,000	$11,352,000	$11,388,000