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COMMENTS

JUDICIAL EFFICIENCY AND POST-CONVICTION RELIEF: A PROPOSAL FOR TEXAS

by *Ira D. Einsobn*

Despite vast public expenditures for new police methods and approaches, more police officers, higher pay, special training, and new and sophisticated equipment, the national crime rate rose 148 per cent in the 1960's.¹ In some ways as disturbing as the growth of crime itself is the growing complex of popular fears about it, accompanied by the development of a political majority which tends to view the problem in simplistic terms and demands simple solutions.² Clearly, law enforcement agencies should have all the legal authority they need to protect the community. But the rising crime rate should not dictate an increase of police authority to potentially repressive and unconstitutional levels.³ Another course is possible. Improvement in public safety might still be achieved by sensible administrative steps to make all aspects of law enforcement more efficient. As recently urged by Chief Justice Warren Burger:

Many people, though not all, will be deterred from serious crimes if they believe that justice is swift and sure. Today no one thinks that it is. If there is a general impression that the administration of justice is not working, one important result is that the deterrent effect of law and punishment is impaired or lost. If people generally—the law-abiding and the lawless alike—think the law is ineffective, two serious consequences occur: decent people express a suppressed rage, frustration and bitterness, and the others feel they can 'get by' with anything.⁴

Thus far the courts and correctional systems "remain vastly neglected battlegrounds in the war against crime. Moreover, until a great deal of thought, effort, and, unfortunately, money are devoted to these two battlegrounds, there won't be much progress in that war."⁵

Lack of access to competent legal advice by prison inmates is a substantial defect in the machinery of today's correctional systems. Because of lack of counsel, indigent inmates spend hours of what might be rehabilitative time drafting long, unintelligible petitions for post-conviction relief. These handwritten petitions, most of which have little or no basis in either law or fact, flood the courts and waste the time of judges, district attorneys, and other members of the bar—time which could be spent on the swift administration of criminal justice.

¹ Wall Street Journal, Aug. 20, 1970, at 4, col. 1.

² *Id.* An example is the recently passed administration bill designed to attack the growth of crime on the streets of the nation's capital. The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358 (July 29, 1970). The Act's "no-knock" and "preventive detention" provisions may violate fundamental constitutional principles and still do little to reduce the crime rate. Nevertheless, in this election year, Congress read the mind of its crime-conscious electorate and passed the bill with ease.

³ Wall Street Journal, *supra* note 1.

⁴ LIFE, Aug. 7, 1970, at 26.

⁵ Otten, *Crime: The Neglected Battlegrounds*, Wall Street Journal, Aug. 20, 1970, at 4, col. 3.

The following is a discussion of the *pro se* petition in light of the constitutional right (or lack thereof) to counsel in post-conviction proceedings and the effect of lack of counsel on prisoner rehabilitation, prison administration, and the administration of criminal justice. This Comment will explore other states' attempts to solve the problem of the inarticulate, frivolous petitions flooding the courts today, and the beginnings of a possible solution in Texas. Finally, a statutory solution to the problem will be presented in light of the Texas prison system, the Texas post-conviction relief statute, other states' post-conviction defender programs, and the steps already being taken in this area in Texas.

I. RIGHT TO COUNSEL FOR POST-CONVICTION RELIEF

Extent of the Right. Amendment six to the United States Constitution guarantees the accused the right to counsel "in all criminal prosecutions."⁶ This right was extended to indigent state defendants in *Gideon v. Wainwright*⁷ in 1963, but the full implications of that right at each stage of the criminal proceeding remain an open question. Via the fourteenth amendment's due process clause, this right has been extended to lineups and probation revocation proceedings.⁸ In *Douglas v. California*,⁹ via the equal protection clause, the right to counsel for indigent defendants was extended through the point of first appeal. Assigned counsel may not withdraw from such an appeal if he considers it to be frivolous unless he first submits a brief setting forth "anything in the record that might arguably support the appeal."¹⁰

Despite this broad protection of the defendant from lineup through first appeal, the courts seem to have adopted a vacillating policy toward indigents' rights when they change from "defendant" or "appellant" to "convict." Couching this policy in the language of the sixth amendment, the courts have thus far refused to extend a broad right to counsel in post-conviction proceedings, there being no "criminal prosecution" or "defense" at this stage.¹¹ This was demonstrated in *United States ex rel. Coleman v. Denno*.¹² There the defendant was convicted and sentenced to death. Through his assigned counsel he exhausted all state appellate remedies. The court of appeals held that the refusal of the state to appoint counsel to serve in post-appellate and federal court proceedings was not a denial of due process or equal protection of the law. This case was decided before *Douglas v. California*,¹³ the case which extended the right to counsel to first appeal, but certiorari was denied two months after *Douglas*.

⁶ U.S. CONST. amend. VI.

⁷ 372 U.S. 335 (1963).

⁸ *Mempa v. Rhay*, 389 U.S. 128 (1967) (probation revocation); *United States v. Wade*, 388 U.S. 218 (1967) (lineups); see Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 Sw. L.J. 488, 500 (1969) [hereinafter referred to as Steele].

⁹ 372 U.S. 353 (1963); see Steele 494.

¹⁰ *Anders v. California*, 386 U.S. 738, 744 (1967).

¹¹ See, e.g., *Juelich v. United States*, 342 F.2d 29 (5th Cir. 1965); *Dillon v. United States*, 307 F.2d 445 (9th Cir. 1962).

¹² 313 F.2d 457 (2d Cir.), cert. denied, 373 U.S. 919 (1963).

¹³ 372 U.S. 353 (1963).

Depending on the weight one gives to a denial of certiorari, this could reinforce the position that the right to counsel does not now extend past the first appeal.

Protection of Habeas Corpus Rights: Open Access to the Courts. Governmental responsibility to imprison only those who are guilty and the availability of the writ of habeas corpus to indigent prisoners have not, however, been completely ignored by the courts. In *Lane v. Brown*,¹⁴ decided the same day as *Douglas*, the defendant was under a death sentence in Indiana. After denial of his petition for a writ of *coram nobis*, he sought an appeal, which required a transcript. An Indiana statute stated that an indigent could not secure the transcript *pro se* or secure the appointment of another lawyer to obtain the transcript for him. The transcript could only be obtained by the public defender. The public defender refused, however, believing the appeal groundless. The Supreme Court struck down the statute as violative of equal protection of the law.¹⁵ In doing so, it cited *Griffin v. Illinois*,¹⁶ which required that a state provide a transcript to indigents where that transcript is a necessary incident to the state proceeding, and *Smith v. Bennett*,¹⁷ which struck down a state statute requiring a filing fee with an application for habeas corpus. In 1969 the Court held that indigent state prisoners have an unqualified right to a transcript for appeal after denial of a habeas corpus petition.¹⁸ The state, it was held, had no right to make an initial determination of validity merely from the pleadings. As long ago as 1941 the Court invalidated regulations requiring habeas corpus petitions to be screened by prison administrative personnel, holding it an abridgement by the state, through its officials, of the petitioner's right to apply for a writ of habeas corpus.¹⁹

In addition to the right to a transcript and the right to petition without administrative interference, counsel has been appointed on an ad hoc basis according to the difficulty and apparent validity of the issues raised by the pleadings. In *Dillon v. United States*,²⁰ the Ninth Circuit, while stating that the right to counsel does not apply to post-conviction relief because of the nature of the sixth amendment's language, extended the fifth amendment's due process clause to make appointment mandatory "when the circumstances of a defendant or the difficulties involved in presenting a particular matter are such that a fair and meaningful hearing cannot be had without the aid of counsel."²¹ In the recent case of *Johnson v. Avery* the Supreme Court stressed the "fundamental importance of habeas corpus in our constitutional scheme."²² Noting the menace to prison discipline and burden on the courts, it nevertheless held that "un-

¹⁴ 372 U.S. 477 (1963).

¹⁵ *Id.* at 485.

¹⁶ 351 U.S. 12 (1956).

¹⁷ 365 U.S. 708 (1961).

¹⁸ *Gardner v. California*, 393 U.S. 367 (1969).

¹⁹ *Ex parte Hull*, 312 U.S. 546 (1941).

²⁰ 307 F.2d 445 (9th Cir. 1962).

²¹ *Id.* at 447.

²² 393 U.S. 483, 485 (1969).

less and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly . . . [bar] inmates from furnishing such assistance to other prisoners."²³ The Court did not, however, rely on the doctrine of right to counsel. It based its decision instead on the right of unobstructed access to the courts.²⁴

Will the Right to Counsel Be Extended? We are left with the following incongruity: The fourteenth amendment's equal protection clause requires that indigents have the same opportunity as the more affluent to apply for and utilize any post-conviction procedure provided by the states. But the Supreme Court insists that the right to counsel is limited to first appeal. If the state has an otherwise acceptable habeas corpus procedure, it will not be struck down because right to counsel is not provided. Indigent prisoners have an unlimited right to transcripts where needed and a fellow inmate to assist them, but no lawyer. Perhaps the fact that *Douglas* limits the right to counsel to the first appeal, plus the *Johnson* decision's reliance on access to the courts rather than right to counsel, indicate the Court's determination not to extend the right to counsel to post-conviction proceedings.²⁵ On the other hand, to escape the onus of the sixth amendment's language and decisions which have held habeas corpus to be civil in nature,²⁶ thus eliminating the right to counsel, some courts of appeals have held that the due process clause requires appointment of counsel where the facts are complex and the case seems to be meritorious.²⁷ Combining this approach with the strong equal protection language of the right-to-transcript cases, it would be possible for the Supreme Court to extend the right to counsel to post-conviction proceedings. In addition, the language of *United States ex rel. Coleman v. Denno*²⁸ indicates that the hesitancy to extend this right may be based more on practical than constitutional considerations:

Were this . . . carried to its logical conclusion, the State would have to assign personal counsel for each of the inmates of its various prisons. To represent their clients properly, these State-appointed counsel would have to review at least on a weekly basis the . . . Supreme Court and other appellate courts looking for some case which might cause some doubt as to the constitutionality of the procedures which were used to bring their clients to their present abodes.²⁹

It remains to be seen whether the Court will extend the right to counsel. If it does, the states will be forced to face up to the complex, practical problems discussed in *Coleman*. If it does not, the handwritten petition,

²³ *Id.* at 490.

²⁴ *Id.* at 485. See also Steele 501.

²⁵ Steele 501.

²⁶ See, e.g., *Ex parte Tom Tong*, 108 U.S. 556 (1883).

²⁷ *United States ex rel. Wissenfeld v. Wilkins*, 281 F.2d 707 (2d Cir. 1960); see *Dillon v. United States*, 307 F.2d 445 (9th Cir. 1962); notes 20, 21 *supra*, and accompanying text.

²⁸ *United States ex rel. Coleman v. Denno*, 313 F.2d 457 (2d Cir.), *cert. denied*, 373 U.S. 919 (1963).

²⁹ *Id.* at 460.

its effect on prisoner rehabilitation, its burden on the courts, and the chance that already overcrowded prisons are inhabited by many whom the state is imprisoning illegally still "must give us pause."³⁰

II. PROBLEMS OF LACK OF COUNSEL: PRISON ADMINISTRATION AND REHABILITATION

The Pro Se Petition: Problems of Indigent Prisoners. By the time of his arrival at the state prison, the prisoner usually has decided that he did not have a fair trial.³¹ He has little knowledge of where to obtain legal services. He may be illiterate; if so, he will be unable to explain his problem in writing if he does happen to discover where he can seek counsel. Or, he may have no idea that there may be an answer to his problem.³² Nevertheless, the flood of handwritten petitions increases. A prisoner writing for the *California Law Review* describes the problem as stemming from a combination of legal, psychological, and economic factors.³³ Noting that most of their fellow inmates are in the same financial condition as they, prisoners become convinced that they were inadequately represented at trial because of lack of funds.³⁴ Also, as members of a subculture which is a product of the criminal law, it is not difficult to understand that they would try to use the law to reclaim their previous place in society. The prisoner's subjective belief in the righteousness of his cause and his bitterness toward the system which is keeping him incarcerated clouds the objective attitude necessary to both successful rehabilitation and success in the courts. This subjectivity leads him to see rights that do not exist. The line dims between his grievances against the vicissitudes of prison life and any legal claims he may have.³⁵

Combine these feelings with inadequate education and unavailable legal counsel, and a monumental problem in prison administration is created. Because of inadequate education he cannot intelligently analyze case or statutory law. After his first petition is turned down, or perhaps before, he obtains samples from other prisoners which are also often faulty. Or he may turn to the "jailhouse lawyers," prisoners who make a living while in prison by writing petitions for other prisoners. Because of inability to pay or because the "lawyers" do not succeed, a great deal of friction is caused within the prison. Often, "jailhouse lawyers" take advantage of

³⁰ W. SHAKESPEARE, *HAMLET*, act III, scene i, line 68.

³¹ This is due at least partially to the urging of his fellow inmates. H.H. Shelton, then a student at the University of Texas Law School, spent the summer of 1966 counselling prisoners at the Texas Department of Corrections. He made these observations in a paper prepared by him for a law school course, entitled "Problems and Legal Needs of Indigents Post Conviction."

³² According to Shelton, *supra* note 31, at 5, "The inmate's understanding of his rights is nearly non-existent even among the most hardened. Rumors and third-hand information provide the total of his knowledge of the law, and his main source of new information comes from newspapers and magazines."

³³ Larsen, *A Prisoner Looks at Writ-Writing*, 56 CALIF. L. REV. 343 (1968).

³⁴ One prisoner at San Quentin, referring to the famous Washington lawyer, Edward Bennett Williams, notes cynically, "For a hundred grand . . . Williams will guarantee that you don't go to the joint. If you're going to do wrong, make a bundle and buy justice like you would a hundred grand loaf of bread." *Id.* at 347.

³⁵ *Id.* at 351.

their "clients" and keep them on the hook for more remuneration.³⁶ When disagreements occur, fights break out, and prison officials are often forced to separate "lawyer" from "client." Threats for payments overdue often do not stop at the prison walls, but extend to the prisoner's family.³⁷

Despite all these problems and the continued rejection of petitions, the flow does not decrease. When foiled by the system, the indigent inmate tries to go outside it, as he did before he was incarcerated:

When decisions do not help a writ-writer, he may employ a handful of tricks which damage his image in the state courts. Some of the not too subtle subterfuges used by a small minority of writ-writers would tax the credulity of any lawyer. One writ-writer simply made up his own legal citations when he ran short of actual ones. In one action against the California Adult Authority involving the application of administrative law, one writ-writer used the following citations: *Aesop v. Fables*, *First Baptist Church v. Sally Stanford*, *Doda v. One Forty-four Inch Chest*, and *Dogood v. The Planet Earth*. The references to the volumes and page numbers of nonexistent publications were equally fantastic, such as 901 *Penal Review*, page 17,240. To accompany each case, he composed an eloquent decision which, if good law, would make selected acts of the Adult Authority unconstitutional.³⁸

These "decisions" in time freely circulated among other writ-writers, and several of the more gullible ones began to cite them too.³⁹

The Burden on Society.

*Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with, but injustice makes us want to pull things down.*⁴⁰

Neither this quotation nor the previous section is intended merely to arouse sympathy for the plight of the indigent inmate. It is intended, instead, to show that lack of competent legal advice within the prison system can have a substantial adverse effect on society. It is difficult to determine the amount of recidivism due to inaccessibility to counsel and thus to the courts, but it has been estimated that two-thirds of all released prisoners will commit another crime, usually more serious.⁴¹ Certainly the lack of counsel is not aiding any rehabilitative efforts the prison system might be making. Thus, in an era of rising administrative and construction costs, the taxpayer is wasting his money housing, and attempting to rehabilitate, some men who possibly should not be there in the first place

³⁶ Spector, *A Prison Librarian Looks at Writ-Writing*, 56 CALIF. L. REV. 365, 366 (1968). There is also a large problem in maintaining and supervising a prison law library for the entire prison population. Often the books are not kept up to date, and prisoners who use the old cases are turned down when new decisions reverse the ones they are using. The library at San Quentin, which out of necessity is open seven days per week, has seating for thirty-two men. It is used by approximately 267 men per month, this group using the library 649 times per month. The cost of supervision has resulted in under-supervision, and one result of that has been the ripping of pages out of books to take back to cells. *Id.* at 365-66.

³⁷ *Id.*

³⁸ Larsen, *supra* note 33, at 355.

³⁹ *Id.*

⁴⁰ Shelton, *supra* note 31, at 20-21, citing R.H. Smith in a pamphlet of the National Association of Legal Aid Clinics.

⁴¹ Otten, *supra* note 5, col. 3.

and others who are at least convinced of that fact. Many of these will come out of prison less prepared to be a part of society than when they entered. In addition, quieter, perhaps more rehabilitative prisoners, who may have legitimate post-conviction relief claims, are being kept in prison at the taxpayer's expense.

III. TEXAS POST-CONVICTION RELIEF PROCEDURE: THE PROBLEM LOCALIZED

In 1963 the Supreme Court handed down its decision in *Townsend v. Sain*,⁴² giving the federal courts the power to see that post-conviction claims have been properly resolved by the states. If the state procedures fall short in any way of providing a "full and fair" procedure,⁴³ the federal courts may declare those state procedures unconstitutional. *Fay v. Noia*,⁴⁴ decided the same day as *Townsend*, added to the import of that holding. The Court held in *Fay* that state remedies must be exhausted before federal habeas corpus petitions could be filed by state prisoners. However, the Court posed a pressing challenge to the states to maintain federal due process standards by warning that if those state remedies emphasize the state's interest in vindicating its own rules of procedure rather than upholding federal constitutional rights, the federal courts would hold themselves open as forums to state petitioners.

The Statutory Procedure. Article 11.07,⁴⁵ the Texas habeas corpus statute, was passed in answer to this Supreme Court mandate. It has been held by the Fifth Circuit to provide an effective post-conviction procedure.⁴⁶ It casts the primary burden on the convicting district court. The district judge may deny the petition from the state prisoner without an evidentiary hearing if the petition is not properly sworn to.⁴⁷ If properly sworn to, it may still be denied by the district court if the allegations, even if true, would not render the petitioner's confinement illegal, or if the allegations merely state conclusions of law without more.⁴⁸ If the judge denies a hearing, he is not required to enter an order stating the reasons for believing it necessary.⁴⁹ But when a hearing is denied, the judge frequently instructs the clerk to send a transcript to the court of criminal appeals and a copy of the order to the petitioner. The court of criminal appeals is not

⁴² 372 U.S. 293 (1963).

⁴³ *Id.* at 312.

⁴⁴ 372 U.S. 391 (1963).

⁴⁵ TEX. CODE CRIM. PROC. ANN. art. 11.07 (1967).

⁴⁶ *Phelper v. Decker*, 401 F.2d 232 (5th Cir. 1968). See also *Stepp v. Beto*, 398 F.2d 814 (5th Cir. 1968); *Van Skike v. Beto*, 398 F.2d 407 (5th Cir. 1968); *Texas v. Payton*, 390 F.2d 261 (5th Cir. 1968).

⁴⁷ E.g., where the allegations are sworn to be true only to the best of the petitioner's knowledge. TEX. CODE CRIM. PROC. ANN. art. 11.07 (1967). See also *Ex parte Kanaziz*, 423 S.W.2d 319 (Tex. Crim. App. 1968).

⁴⁸ Hon. John F. Onion, Jr., Judge, Court of Criminal Appeals of Texas, unpublished article, "State Post Conviction Remedy—Habeas Corpus."

⁴⁹ "[N]o district judge is required to entertain a petition for a writ of habeas corpus and may deny a petition presented to him without a hearing and without finding or conclusion, in which event the applicant may present his petition to another district judge or to the Court of Criminal Appeals." *Ex parte Young*, 418 S.W.2d 824, 830 (Tex. Crim. App. 1967).

required to take any action on receipt of the order denying the petition without a hearing.⁵⁰

If it appears to the district judge that there are unresolved issues of material fact as to whether the petitioner is being illegally restrained, the petitioner will be granted a hearing. At this hearing the burden is on the petitioner to show by a preponderance of the evidence that he is entitled to the relief sought.⁵¹ Witnesses may be subpoenaed and compensated.⁵² If the facts resolved by the judge at the hearing warrant such action, and if he is in a position to do so, he may, without referring the matter to the court of criminal appeals for approval, afford the petitioner rights which have been denied him. These include "counsel on appeal, record on appeal, effective aid of counsel on appeal, determination of voluntariness of a confession, and *nunc pro tunc* proceedings to supply or correct the record."⁵³ At the end of the hearing, the district judge must send to the court of criminal appeals the findings of fact and law and a transcript of the proceedings. The court of appeals may either: (1) Remand and direct the hearing court to develop certain facts more clearly,⁵⁴ or (2) "Direct that the cause be docketed and heard as though originally presented" as a petition for a writ or "as an appeal,"⁵⁵ or (3) After examining the record, "deny relief upon the findings and conclusions of the hearing judge without docketing the cause."⁵⁶ If a case is docketed, the court of criminal appeals will receive the record and "enter its judgment remanding the petitioner to custody or ordering his release as the law and facts may justify."⁵⁷

Article 11.07 in Practice. Although approved by the Fifth Circuit as providing an effective post-conviction procedure, nowhere does article 11.07 require that counsel be appointed for indigent inmates at any stage of the proceedings. This means that state prisoners are left to fend for themselves in preparing petitions; furthermore, if they get into court, there is no statutory requirement that they be represented by counsel at the evidentiary hearing, or on appeal.

Typically, the district judge receives a handwritten petition, which he may either read himself or turn over to the district attorney for him to determine whether or not there is a controverted issue of fact.⁵⁸ According to one of the assistant district attorneys who handles appeals and post-conviction matters for two Dallas County district courts, it is up to him to determine whether or not such a controverted issue of facts exists. He

⁵⁰ *Ex parte* Pennington, 433 S.W.2d 701 (Tex. Crim. App. 1968).

⁵¹ *Welch v. Beto*, 355 F.2d 1016 (5th Cir.), *cert. denied*, 385 U.S. 839 (1966).

⁵² TEX. CODE CRIM. PROC. ANN. art. 35.27 (1966).

⁵³ *Ex parte* Young, 418 S.W.2d 824 (Tex. Crim. App. 1967).

⁵⁴ *Onion*, *supra* note 48, at 17, quoting TEX. CODE CRIM. PROC. ANN. art. 11.07 (1967).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ This information as well as most of what is to follow was gained through informal interviews with several Texas judges and district attorneys. In order to encourage maximum candor, all were given the option of not being quoted; most accepted. The names of any particular sources are not particularly relevant to the subject matter.

asserts that in eighty per cent of the cases there is either no such fact issue or there is something technically wrong with the petition. In such cases there is no hearing, no lawyer is appointed, and the petition is denied. Neither is there a hearing or lawyer appointed if need for relief is obvious, for example, if a man is imprisoned under a law which has since been declared unconstitutional.

The remainder of the cases require an evidentiary hearing to determine the truth behind a controverted issue of fact, which, if true, would warrant release and which cannot be determined from inspection of court records. For example, if the petitioner claims that he had no counsel, a look at the court records will reveal whether or not that is true. On the other hand, if he claims that he wanted to appeal but that his lawyer refused, an evidentiary hearing is required.

The disadvantage to the uneducated, indigent petitioner has already been discussed. The above typical procedure points out, in addition, that the petitioner is at the mercy of the district attorney and judge who put him in prison to study carefully his long, handwritten, confusing petition, and to decide objectively whether or not a hearing should be held and counsel appointed. Meanwhile, the burden on the courts and taxpayer is also great. Although relying on the district attorney to decide whether a hearing is necessary, one Dallas County judge reports that he spends two afternoons per week on article 11.07 matters. The district attorney who handles appeals and post-conviction relief for that court estimates that he spends forty per cent of his time on post-conviction petitions. As of August 25, 1970, the attorney general's office since January 1 had already handled 540 post-conviction cases and had 794 pending.⁵⁹ That office handled over 900 post-conviction matters in both 1968 and 1969.⁶⁰ Out of sixteen lawyers in the attorney general's enforcement division, fourteen spend all of their time on post-conviction relief.⁶¹ If a lawyer is appointed at the evidentiary hearing stage, he must be paid \$25-\$50 per day in court.⁶² In addition, the prisoner is bench warrantred from the Texas Department of Corrections to the convicting court, a transcript of the trial is prepared (at the rate of over one dollar per page) if the fact issue may be contained therein, and witnesses are subpoenaed. One trial judge stated that "because of such post-conviction writs [he was] unable to give a speedy trial to pending cases including those involving defendants who were in jail unable to make bail."⁶³

IV. PRESENT STATE SOLUTIONS: ELSEWHERE AND IN TEXAS

Two main objectives should be sought in providing legal assistance to indigent inmates in post-conviction proceedings. The first, of course, is

⁵⁹ Letter from Robert C. Flowers, Assistant Texas Attorney General, Chief, Enforcement Division, to Ira D. Einsohn, Sept. 10, 1970. These figures represent quite an increase from the 13 habeas corpus cases handled by that office in 1959, and the none, 2, and 3 in 1961, 1962, and 1963, respectively. *Id.*

⁶⁰ *Id.* There were 921 handled in 1968 and 909 in 1969.

⁶¹ Robert C. Flowers, conversation with Ira D. Einsohn, Aug. 7, 1970.

⁶² TEX. CODE CRIM. PROC. ANN. art. 26.05 (1966).

⁶³ Onion, *supra* note 48, at 18.

insuring that indigents' access to the courts is not hindered by lack of competent counsel. The second is to relieve the burden on the courts presented by a multitude of inarticulate, groundless, and often repetitious petitions. The following is a discussion of two statewide public defender systems, two hybrid defense programs, and the beginnings of a program in Texas. The discussion is presented with a view to discovery of the success in approaching these goals.

Oregon. Since 1964, Oregon has provided a public defender for appeals and post-conviction motions. As related by a justice of the Oregon supreme court, the program was begun because of docket congestion and the need to save judicial time.⁶⁴ At the same time that a backlog of appeals was resulting in a delay of nearly two years in the hearing of a normal appeal, the state was beginning to get its share of the flood of post-conviction petitions. The petitions were of the type described above—prepared by the prisoner or a jailhouse lawyer. According to the Oregon supreme court judge, they were impossible to dispose of expeditiously. The Oregon system at the time had neither the facilities nor the time to "hold factual hearings to determine whether any of the extravagant claims had any foundation in fact."⁶⁵

A state public defender was appointed in 1964 to handle all post-conviction cases and, as time permitted, to direct appeals of criminal convictions to the supreme court. The staff now includes three lawyers, two part-time law students and three secretaries. The office files petitions in the United States Supreme Court, but is precluded from representing prisoners in federal habeas corpus proceedings or civil matters. Salaries and expenses are paid by the state with no reimbursement by the counties except for witness fees and the cost of printed briefs. The budget for two years commencing July 1, 1969, is \$158,781.

Oregon has a prison population of about 2,000, all confined in the same county. About ninety per cent are indigent. In 1965, 102 post-conviction petitions were filed; in 1966 the number dropped to 25; in 1967 to 19; and in 1968 increased to 28.⁶⁶ The public defender estimates that the number of post-conviction cases has stabilized; it now appears that the number will remain at approximately 25-50 per year.⁶⁷

This damming of the flood of *pro se* post-conviction petitions is due in large measure to the public defender's ability to convince inmates that they have no adequate or even arguable grounds for relief. The office files petitions for about ten per cent of the inmates who ask for their help. The other ninety per cent are usually convinced that they have had a fair trial

⁶⁴ Hon. W.W. McAllister, in an unpublished speech before the National Defender Conference, Washington, D.C., May 14-16, 1969, described his state's public defender program. The following information is taken from that speech.

⁶⁵ *Id.*

⁶⁶ Office of the Public Defender of the State of Oregon, Supplemental Report to Public Defender's Program Statement, at x (undated and unpublished Report of the Oregon Public Defender).

⁶⁷ Letter from Gary D. Babcock, Public Defender, State of Oregon, to Ira D. Einsohn, Aug. 21, 1970.

after talking about their case with a sympathetic member of the defender's staff.⁶⁸ The defender has been able to gain inmate confidence by reference to the trial court file and the fact that over twenty-two per cent of the petitions since the program was begun have resulted in reversals.⁶⁹

Indiana. The office of public defender was created in Indiana in 1945. Although post-conviction remedies were available, it was felt that there was no way for indigent prisoners to afford themselves of such remedies without counsel.⁷⁰ The duties of the public defender are as follows:

It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired.⁷¹

He deals, then, exclusively with post-conviction remedies for the state's 4,500 inmates. The office is in no way connected with county defender systems where counsel is appointed by the courts at county expense. The public defender enters the case only after time for appeal has expired and at the inmate's request.⁷² The defender reviews the case and decides if he should proceed or decline to represent the inmate. If he decides to decline he explains his reasons for doing so in a letter to the inmate. If the inmate is dissatisfied, he can petition the Indiana supreme court for an order to show cause why the office will not represent him. After the defender's response, the court decides whether or not there is merit to the inmate's request. If the court denies the prisoner's petition, he may apply to a federal court, claiming inadequate state remedies.⁷³

No statistics are available on the success of the program in discouraging *pro se* petitions. The public defender does feel, however, that the program has had a good deal of success. The defender's office has been instrumental in obtaining new trials, sentence corrections, and even releases. Because he does not interfere with administrative matters, he feels his office has enjoyed good relations with prison personnel.⁷⁴ Prisoners' attitudes toward him range from "friendly and co-operative to indignant and belligerent."⁷⁵ He notes that attitudes relate to the prisoner's feelings on his chances of getting out. When some prisoners are told that they cannot be helped, they "rant and rave and accuse [the defender's office] of being just one more state agency designed to keep them locked up."⁷⁶ After a

⁶⁸ Hon. W.W. McAllister, *supra* note 64, at 5.

⁶⁹ Public Defender's Report, *supra* note 66, at ii.

⁷⁰ Baker, *Post-Conviction Remedies in Indiana*, RES GESTAE, Sept. 1965, at 5.

⁷¹ IND. ANN. STAT. § 13-1402 (1956).

⁷² Letter from Mel B. Thornburg, Public Defender, State of Indiana, to Walter W. Steele, Aug. 23, 1968.

⁷³ *Id.*

⁷⁴ Letter from Mel B. Thornburg, Public Defender, State of Indiana, to Walter W. Steele, Sept. 5, 1968.

⁷⁵ *Id.*

⁷⁶ *Id.*

cooling-off period, however, the defender feels that most become amenable and more receptive to rehabilitation. In this way the defender feels his office serves a rehabilitative purpose—a "pop-off valve" or a "friendly shoulder to cry upon for a few minutes."⁷⁷

Of interest is the fact that the prison also provides writ rooms for the inmates. Certain inmates are assigned to these rooms, and they do nothing but prepare pleadings for other inmates. The defender reports that some become very proficient, and that the quality of their work sometimes surpasses that of the bar.⁷⁸

Wisconsin. For several years the University of Wisconsin School of Law has conducted a Correctional Internship Program, using carefully selected students, who are supervised by the law school faculty. During the summer of 1966 the program was placed under the direction of the state public defender. The students accompany the public defender to interviews and afterwards they discuss the case in detail. These students are then allowed to see the inmate on their own if the inmate has follow-up information. If the public defender desires additional information, he asks the student to talk to the prisoner. While the public defender advises in the actual preparation of post-conviction petitions, students prepare a synopsis of facts and make recommendations. The public defender considers the synopsis and advises prisoners of their chances and the proper procedure.⁷⁹

In a recent ten-month period, the public defender was assigned eighty post-conviction cases by the state supreme court. He decided thirty had no merit and turned them down. Only six asked for a new attorney.⁸⁰ The students who have counselled inmates have not been as successful, according to one who served in the Wisconsin state prison in the summer of 1968. He reported that he and his friends found prisoners generally unwilling to accept their conclusions that their claims were frivolous. The students found they spent most of their time trying to convince the prisoners that their convictions would be affirmed and that the best policy would be to establish a good record in prison to show to the parole board. He reported that he did not know what effect his advice had, but seemed less than optimistic.⁸¹

Kansas. The University of Kansas operates clinic programs in the following areas: legal aid to the inmates of the United States Penitentiary at Leavenworth; legal aid to the inmates of the Kansas State Penitentiary at Lansing; some aid to the inmates of the United States Disciplinary Barracks at Fort Leavenworth; student assistance to the staff attorneys of the

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Shelton, *supra* note 31.

⁸⁰ Note, *Legal Services for Prison Inmates*, 1967 WIS. L. REV. 514, 527-28.

⁸¹ Letter from Edward L. Kimball (transmitting comments of James Hill, then a law student, who worked in the Wisconsin State Prison during the summer of 1968 counselling inmates), to Walter W. Steele, Sept. 11, 1968.

Kansas City O.E.O. legal aid staff; and as assistant probation officers in the Douglas County juvenile court.⁸² During the summer of 1968 four students worked at the state penitentiary; they processed 150 applications for assistance for a prison population of 3,700.⁸³

One of these students reported that the inmates were generally unwilling to accept the conclusion that their petitions for post-conviction relief were frivolous.⁸⁴ This stemmed, he felt, from a mistrust of the system and its appointed counsel generally. Any delay in interviewing them, plus a misunderstanding of trial tactics, burden of proof, and prior court opinions exacerbates this feeling of mistrust. He also wondered if any confidence displayed by the inmates in an interview was not gone as soon as the prisoner returned to his cell. Generally, he said, inmates listen only to that which they wish to hear. No matter to what extent the merits of their contentions were explained, their confidence in the student depended on whether or not he agreed they had valid contentions. He also doubted that an inmate's receptivity to the rehabilitative process was dependent on the affirmative or negative opinion regarding his legal contentions.

The director of the project, however, takes a more optimistic view.⁸⁵ It is his opinion that more than half of the inmates in whose cases his staff has found no merit appear to be willing to accept that evaluation. He says that by being as honest and as diligent as possible, the defenders are able to win the respect and confidence of the prisoners. He claims that Kansas judges appear to believe that the project has resulted in a reduction of the number of frivolous claims filed. In addition to weeding out frivolous claims, his office is able to assist in the preparation of meritorious claims in a way that will expedite the court's consideration. He also believes that an adequate legal services program in a correctional institution is of assistance in the rehabilitation effort:

The prisoner who is frustrated and who feels that he is not getting a fair shake is not likely to be a good subject for rehabilitation. On the other hand, if he can be convinced that his rights are being effectively protected and that someone in the system is personally interested in his problems, I should think that it would contribute significantly to the atmosphere of rehabilitation.⁸⁶

Texas. The Texas Department of Corrections (TDC) provided for an "Attorney for Inmates" in its budget before the 1969 session of the Legislature. Harry Walsh, a 1969 graduate of the University of Texas Law School, was appointed to the position.⁸⁷ His appointment was due at least in part to the United States Supreme Court opinion of *Johnson v. Avery*.⁸⁸ At the time he was appointed there was a suit pending against the TDC

⁸² Letter from Benjamin G. Morris, Associate Director, Clinic Programs, Assistant Dean of the University of Kansas Law School, to Walter W. Steele, Aug. 6, 1968.

⁸³ Letter from Charles D. Kugler, one of those students, to Walter W. Steele, Aug. 20, 1968.

⁸⁴ Letter from Michael E. Callan to Walter W. Steele, Aug. 20, 1968.

⁸⁵ Letter from Paul E. Wilson to Ira D. Einsohn, Aug. 13, 1970.

⁸⁶ *Id.*

⁸⁷ Larry Walsh, conversation with Ira D. Einsohn, Feb. 27, 1970. The following discussion is based on that interview.

⁸⁸ 393 U.S. 483 (1969). See notes 22-24 *supra*, and accompanying text.

for punishing an inmate, allegedly for assisting other inmates in filing post-conviction relief petitions. Walsh's duties consist mainly of helping inmates file these petitions.

His presence is made known to the inmates through the prison newspaper and by notices posted in the prison "writ rooms," small libraries where prisoners are allowed to research and write petitions. Prisoners write him requesting an appointment, and he schedules rounds to the different units of the system so that those prisoners who wish to consult with him may do so. Originally, he planned to visit each unit once per week but he now feels that once every other week will be his maximum. After the initial interview, he checks the prisoner's file and trial transcript if it is available. If he believes the contentions have merit, he prepares the petition and sends it to the appropriate court with a cover letter requesting an evidentiary hearing and appointment of counsel. Because of the time and expense involved in travel, he refuses to represent any of the inmates in court.

Prisoners' chances of success in filing their own petitions are almost nil because of judicial recalcitrance, prisoners' own inabilities—most of them are illiterate—and lack of legal materials. Each unit except the women's has a writ room. However, the rooms contain only the Penal Code and the Code of Criminal Procedure. Although prisoners have ample time to use the rooms—they may stay up all night working if they do their work the next day—he feels that because of the negative factors most, if not all, of this time is wasted. "This continuous flood of frivolous petitions to the courts is unfortunate," Walsh says. "Judges are only human. Because petitions are clogging their schedules, others who may have legitimate claims are prejudiced." Also, when parole hearings are held, both the district attorney and the convicting judge are asked to comment on the potential parolee.⁸⁹

Nevertheless, Walsh feels that for the most part he has been unable to talk many prisoners out of filing petitions themselves. He explains that prisoners have a lot of free time. Writ writing is a game that keeps their hopes alive. Those who are in for long terms with little chance of parole feel they have nothing to lose. So far, he feels, only a handful have accepted his advice. The only present lessening of writ writing is from the fact that many who would be writing them are at least waiting to talk to

⁸⁹ TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(e) (Supp. 1969) requires that the Texas State Board of Pardons and Paroles, at least ten days before ordering the parole of any prisoner, notify the sheriff, district attorney and district judge in the county where such person was convicted that such parole is being considered by the Board.

In a letter to Ira D. Einsohn, Aug. 13, 1970, Jack Ross, Chairman of the Parole Board, said that the decision granting or denying parole is independent of any legal or writ action that may be pending. All inmates who have filed writs are still considered for parole at the time set under law. The Board makes no decision as to whether a petition is frivolous or not. The Board does not ask the judge or district attorney for information relating to post-conviction relief petitions. Mr. Ross knows of no statement or implication made by a district judge or district attorney that an inmate has shown himself not to have been rehabilitated due to the large number of frivolous petitions he has filed.

Although this specific information is not sought or given, since the opinion of the local authorities is asked for and considered, in this author's opinion it still may be true that a known frivolous petition writer may be hurting his chances for parole by angering them.

him. He is not too optimistic but feels that there may be some improvement depending on the success of his petitions.

Walsh's relations with prison personnel are good. Anything he has requested, he has received without question. Probably one of the reasons that his relations are so good is that it seems he has gone out of his way to straddle the fence between administration and prisoner. He refuses to enter into prison discipline problems. He has refused to write a column for the prison newspaper, ostensibly not to offend the person who writes it now. All of this is necessary for a new program such as his, especially since it was established by the warden. But one may wonder if complete independence from the prison administration would not enable him to represent his clients more effectively.

V. A SUGGESTED PROGRAM FOR TEXAS: AN ATTORNEY FOR INMATES

It can be seen that the programs discussed above have met with varying degrees of success in solving the problems caused by a lack of counsel and the inmate-written post-conviction petition. The following is a proposal for Texas in light of those programs, the Texas post-conviction relief statute, and the particular problems of the state. The proposal is made with a view toward more effective inmate representation and greater efficiency in judicial and correctional administration.

Appointment. It would be difficult for any lawyer effectively to represent a client if he is selected and retained by one whose legal interests are adverse to those of the client he is to represent. Such a conflict of interests is inherent in the relationship of inmates to the prison administration. Despite a warden's dedication to the rehabilitative process, it remains his primary duty to be the keeper of prisoners against their will. For the most part, it will be the duty of the attorney for these inmates to claim that the warden is holding them illegally. For this reason, an attorney for inmates should not be selected by, or be on the payroll of, the warden of the Texas Department of Corrections. For similar reasons, it would not be advisable for the governor to appoint such an attorney. Like the prison warden, the governor may be dedicated to the education and rehabilitation of inmates. Nevertheless, he is the elected representative of the people, and it was the people, through another elected representative, the district attorney, who put the inmates in prison. Again the legal interests conflict. It follows that the attorney for inmates should not be elected directly by the public.

On the other hand, it is the public who will be paying the salary and expenses of the attorney and his staff. It is necessary that the attorney for inmates be selected in a manner that will assure his responsibility to the people and their interest in law and order. It would be such a feeling of responsibility that would prohibit the attorney's filing petitions he knows

to be frivolous and would constantly remind him that a large part of his job is to convince those prisoners with baseless claims not to file.

In order to protect both the interests of the public and those indigent inmates who may have valid claims, the Texas attorney for inmates should be chosen by a commission suited to seek out a man who will be able to perform the delicate task of balancing these interests. A suggested commission could be made up of the following three people: the governor, or a representative of his office, a representative of the court of criminal appeals, and a representative of the state bar association. Such a commission would be made up of three of the people most directly concerned with the problems which have created the need for the inmates' attorney.

Although the attorney for inmates would not be elected, the governor would be able to represent the interest of the people in law and order, and influence the commission to choose a man whose interests in maintaining order are compatible with his own. The court of criminal appeals, as head of the state criminal courts, is directly concerned with the functioning of those courts. The representative judge on the commission would be looking for a man with a fair and just outlook toward post-conviction relief and who would also see to it that frivolous petitions decrease, thereby saving the time and money of the criminal court system. The bar association should be looking for a man who would represent his clients enthusiastically, while at the same time giving them the sound legal advice not to petition if the claim is frivolous. While serving his clients' interests, such a lawyer would also be serving the interests of the bar.⁹⁰ If he is able to abate the flow of frivolous petitions, the state bar will be burdened with fewer appointments to appear in evidentiary hearings.

Duties. Texas' attorney for inmates would have the duty of assisting indigent inmates in the Texas Department of Corrections in the filing of what the attorney believes to be valid claims for post-conviction relief under article 11.07. This would include interviewing prisoners, filing petitions believed meritorious, urging criminal courts to give prompt consideration to such petitions and to appoint lawyers where evidentiary proceedings are called for, providing legal research assistance for those lawyers, and representing petitioners at the court of criminal appeals.

A staff of approximately fourteen lawyers would be required to handle such duties since this is the number of men the attorney general now requires to handle post-conviction relief matters coming from Texas' approximately 13,000 prisoners. Eight of these lawyers would be officed at the various units of the prison system, according to need. The remaining six would have their offices in Austin. Those at the prisons would interview prisoners who come to them or write them. While they should not solicit petitions, their availability should be made known through bulletin boards and the prison newspaper, and they should make the rounds of their particular units regularly. After extensively interviewing prisoners,

⁹⁰ His term of office should also be definite. It should be long enough to enable him to remain independent while short enough to keep him responsible to the taxpayers.

they should draft petitions for those claims they consider meritorious and try to persuade those who have no case not to file. One problem, even with what appears to be meritorious claims, is that prisoners will be able to lie to the attorneys. Since these lawyers will not be familiar with the facts, they may file petitions based on factual allegations which, if true, would be the basis for a valid claim, but which are not true. Hopefully this problem will become minimal as the attorneys gain experience, but in the interim it could be held in check by a small staff of investigators hired to check into these allegations. Through legal aid programs, students at law schools would be able to assist with this investigative task in those cities where law schools are located.

Along with being responsible for general administrative matters, the Austin office would handle the petition after it is filed. It would stay in contact with the criminal courts, district attorneys, and the attorney general, urging that prompt and fair consideration be given petitions filed by the attorneys on behalf of the inmates. From their vantage point in Austin they would be able to keep tabs on courts around the state to find out which judges are and are not complying with article 11.07. Although the attorney for inmates, because of the financial burden of extensive travel, would not represent inmates at hearings around the state, the same considerations for local appointed counsel would require that the Austin office represent the petitioners in proceedings before the court of criminal appeals in Austin. There is little reason for a court-appointed attorney to travel to Austin when the office of the attorney for inmates is as well-acquainted with the case as he. By way of further assistance to those court-appointed attorneys and the petitioners, it would also be the duty of the Austin office to keep abreast of legal developments and to pass these along to the staff of lawyers at the prison and to court-appointed lawyers. In addition, the Austin office should assist the prison staff and court-appointed lawyers with any legal research needed for a particular petition. This is another area where law student assistance could be utilized effectively.

If a petition is unsuccessful in the state courts, it would be up to the Austin office to file a new petition in federal court. Since state funds should not be used for the actual proceedings in the federal courts, the office of the attorney for inmates would not appear in federal court on behalf of state prisoners. But the office would provide the same assistance to the federally-appointed attorney as it did to the one appointed in state court, making available to him all information already accumulated and research already conducted.

Possible Effects of the Program. There is little doubt that such a program would increase the effectiveness of inmate representation. Not only would the staff be able to present clear, concise petitions to the courts, but they would also be able to use their legal abilities to base these petitions firmly in the law.

There is, however, still some question whether such a program would actually reduce the number of petitions. Despite impressive statistics in Oregon, opinions do conflict. As one judge said, "You mean to tell me that some guy up for ninety-nine years is going to stop trying to get out of jail just because some lawyer tells him his claim is frivolous?"⁹¹ Initially, this appears to be a fairly accurate evaluation. If the program is handled effectively, however, the results may be different.

As pointed out by Mr. Walsh, there is already some abatement, or at least delay, because prisoners wait to try to convince the lawyer now provided for them that their claims are meritorious. By handling most energetically those claims they consider meritorious and having some success with them, while dragging their heels on the frivolous claims, the attorneys may further cut down on the number of petitions. If the attorney for inmates tells a prisoner his claim is frivolous, the prisoner may delay filing his own petition. Possibly he will do further research or think up some new angle to present to the attorney. Meanwhile, he will be able to see that those petitions filed by the inmates' attorney are having some success. Since human nature probably will lead judges to handle clear, brief petitions from the attorneys for inmates before the handwritten ones from prisoners, those who write their own will find that the others are getting quicker results, some of it favorable. After awhile, some frivolous petitioners may simply give up, resign themselves to prison rehabilitation programs, and hope for parole.⁹²

VI. CONCLUSION

Such a program as that proposed above is certainly not a panacea for the Texas criminal court system. But it would provide the following benefits:

- (1) More effective representation for indigent inmates.
- (2) Possible increased rehabilitation through increased confidence in the "system."
- (3) A decrease in the time spent by the district judges, district attorneys, and attorney general's office on each petition.
- (4) A possible decrease in the number of frivolous petitions flowing from the Texas Department of Corrections to the courts of the state.

Numbers one and two probably are not very important to the Texas taxpayer. To most this may boil down to letting loose an increased number of guilty men on Supreme Court "technicalities." To many rehabilitation is an idealistic goal which ignores the punitive purpose of prison and "coddles" criminals. Furthermore, as to number three, it can be argued that after handling these petitions awhile, one gets used to them, so that the time saved on each one would not be so great just because it is shorter or clearer. Finally, arguments are persuasive on both sides of the question of whether the number of petitions would be reduced, despite some impressive statistics.

⁹¹ See note 58 *supra*.

⁹² There is a chance that parole may be affected by a potential parolee's harrasing the courts with frivolous petitions. See note 89 *supra*.

All of these arguments against such a program ignore a few basic facts of life: The Constitution exists. The Supreme Court exists. Article 11.07 exists as a result of both of them. There is little any of us can do to change that. Recidivism exists and threatens us all. Rehabilitation seems to be the only answer to changing that. While our court dockets remain overcrowded, taxpayers' money is being wasted on time and manpower spent trying to deal with the flood of frivolous petitions entering our courts. A post-conviction defender may not change that; there is no guarantee. But it has worked elsewhere. What such a program will do is spend the taxpayers' money in such a way as to face up to and attempt to solve the problems as they exist. Spending money to do correctly something that needs to be done is not waste. The frivolous, handwritten post-conviction relief petition is.