

LEGISLATIVE PROPOSAL

TO

THE BOARD OF GOVERNORS
STATE BAR OF GEORGIA

This Proposal is submitted by the Board of Directors ("Board") for the Georgia Appellate Practice and Educational Resource Center, Inc. ("Resource Center"). The Proposal seeks State Bar endorsement for continued funding for the Resource Center and that such funding be placed in the budget of the Judicial Council for the next session of the General Assembly.

In the last seven years, the Georgia Appellate Practice and Educational Resource Center, Inc. (The Resource Center) has taken on an unprecedented number of capital habeas corpus cases – a forty percent caseload increase – and has moved from a resource center model to a direct representation model.¹ Although the Resource Center could ethically and fiscally decline to take any further cases because of a caseload conflict, the Center has continued to shoulder the responsibility of representing death sentenced inmates in the absence of any right to counsel. Since the *Gibson*² decision, the Resource Center staff has been confronted with a Hobson's choice – continue to take additional cases despite the lack of resources to adequately litigate the cases or decline the cases and stand by while death sentenced inmates are forced to proceed *pro se*.³ The Resource Center

¹The shift to a direct representation model was necessitated by the inability to recruit *pro bono* counsel for the increasing number of clients in habeas proceedings.

²*Gibson v. Turpin*, 270 Ga. 855, 513 S.E.2d 186 (1999). By the slimmest of margins, the Supreme Court of Georgia held that death sentenced inmates had no constitutional right to counsel in state habeas corpus proceedings. The court did note however that a statute providing for state-funded counsel might be a good policy but that absent legislative enactment of such a provision, state-funded counsel was not constitutionally compelled.

³Habeas courts have frequently responded to the Resource Center's pleas for additional time to work up a new case with the suggestion that the Resource Center should withdraw because of a caseload conflict and allow the death sentenced inmate to

has ethically felt compelled to take on the burden of ensuring representation for all death sentenced inmates in Georgia. The Resource Center requests continuation funding for FY 2009 to continue this mission.

The Resource Center received continuation funding of \$800,000 in FY 2008 which was \$279,340 less than what was requested by the Administrative Office of the Courts. In fact, the Resource Center's funding has been frozen at \$800,000 since FY 2000. To continue to provide the same level of services to the cases in, or about to enter, state habeas corpus proceedings, the Resource Center needs a state grant of \$1,079,340 for FY 2009.⁴ The request for an increase in funding is necessary to ensure that the Resource Center could continue to offer the same level of representation that it currently provides its clients. The need for increased funding is due to four factors beyond the Resource Center's control: 1) expiration of outside funding for half of the Resource Center's staff attorneys; 2) the increased caseload the Resource Center has been obligated to assume; 3) an increase of operating expenses associated with the increased caseload; and 4) the effects of Rule 44 and the AEDPA. The combination of these four factors will prevent the Resource Center from providing continued representation at its current level without an increase in funding.

proceed *pro se*. See, *Palmer v. Head*, Case No. 2000-V-474, Superior Court of Butts County, Transcript of January 9, 2001 hearing at 13 ("If you want to get out, though, go ahead and get out, and let [Mr. Palmer] be the one who confers with [Assistant Attorney General] if you are going to"). Mr. Palmer is mentally retarded. The Center took on the representation of Mr. Palmer. The habeas court granted Mr. Palmer a new trial based upon State misconduct and ineffective assistance of counsel and the Supreme Court upheld the grant of relief. *Schofield v. Palmer*, 621 S.E.2d 726 (Ga. 2005). Had Mr. Palmer been forced to proceed *pro se* there is little doubt that he result would have been wrongfully executed.

⁴In FY 2007, the Resource Center recieved a grant from the Georgia Bar Foundation for \$300,400. For FY 2008, the Resource Center applied to the Georgia Bar Foundation for a grant of \$572,700. This application was recently approved. The Center will make a similar request for FY 2009. This grant request assumes that the Bar Foundation will provide a minimum grant of \$300,400 FY 2009. This grant request of \$1,079,340 plus the \$300,400 Georgia Bar Foundation grant would fulfill the total funding requirements for FY 2009. The Bar Foundation will announce FY 2009 grant awards no later than September 30, 2008.

Endorsement of this proposal is consistent with the purposes of the State Bar of Georgia. Members of the bar are uniquely qualified to analyze the technical and public policy issues inherent in this proposal and can fulfill a duty of public service by examining these issues and making a statement to the General Assembly. Endorsement of these proposals will also improve the administration of justice in appellate and post-conviction capital proceedings in Georgia.

I.

HISTORICAL BACKGROUND

In 1985 the State Bar created the Special Committee to Review the Georgia Attorney Role in Post-Conviction Proceedings ("Special Committee") to address the problem of competent counsel for indigent, death-sentenced inmates in post-conviction proceedings. The Special Committee documented the need for counsel in such proceedings and assessed the impact of this situation on the quality and administration of justice in state and federal courts. The Special Committee proposed a multi-faceted solution involving the State Bar, the law schools, the federal courts, and the Georgia Supreme Court. The Special Committee's report and recommendation were unanimously adopted by the State Bar Board of Governors in January 1986.

Subsequent to the acceptance of the Special Committee's report, the Special Committee implemented its many components. The Georgia Supreme Court and the federal courts established procedures for the adequate representation of death-sentenced inmates in post-conviction. The federal courts agreed that when Georgia attorneys were appointed in these cases that they would receive reasonable reimbursement of fees and expenses under the Criminal Justice Act. Continuing legal education courses in this complex area of law have been provided to the volunteer attorneys. The Georgia State University College of Law initially housed the Resource Center, which is a 501(c)(3) nonprofit organization. The State Bar of Georgia was one of the three recipients in the United States of the 1988 Harrison Tweed Award from the American Bar Association for the work of the Special Committee on this project.

The Resource Center was established by the State Bar, is affiliated with the

Georgia State University College of Law,⁵ and is governed by a Board of Directors of thirteen attorneys from throughout Georgia. The Resource Center commenced operation on September 15, 1988. By August 1995, the Resource Center had grown to a staff of fourteen: eight attorneys, four investigators, and two administrative assistants, with a budget of approximately \$1,000,000. Due to Congressional withdrawal of federal funds in 1996, the staff of the Resource Center was drastically reduced to two attorneys. Through increased State funding and private funded fellowships, the Resource Center began to rebuild its staff. By 2002, the Resource Center staff had almost reached its 1995 staffing level and had thirteen employees: an executive director/attorney; six staff attorneys (two funded through NAPIL Fellowships and one funded through an ABA Fellowship); four investigators (three full time and one part time); one administrative assistant/office manager; and a part-time administrative assistant. As a result of the expiration of private fellowships during last four years, the Resource Center has lost three staff attorneys. The Resource Center is located at 303 Elizabeth Street, NE, Atlanta, Georgia, 30307.

The State Bar has actively supported this legislative proposal every year since the creation of the Resource Center. The formal and active support for this legislative proposal by the State Bar is crucial to obtain increased funding from the State.

II.

SPECIFIC LEGISLATION

No specific legislation is pending, but the Resource Center funding request will be included in the appropriations bill of the Georgia Legislature.

⁵ The Resource Center offers substantial educational benefits to the Georgia State University College of Law, Emory University School of Law and the University of Georgia Law School. The involvement of the law schools in bar-related activities enhances their prestige and reputation. The Resource Center contributes significantly to the primary mission of the law schools – to prepare the students to be competent members of the legal profession. The alliance of the law schools with the Resource Center has broadened and enhanced the opportunities available to students to gain practical legal skills in a carefully structured and closely monitored clinical setting.

III.

STATEMENT OF ISSUES

The Resource Center Lost Outside Funding for Half of Its Legal Staff

The Resource Center staff is currently comprised of the Executive Director, five (5) staff attorneys, three (3) full-time investigators, two (2) part-time investigators, and an Office Manager. The Center's office space is spartan, our equipment is antiquated and our cases are litigated on a shoe-string budget. The largest portion of our budget is allocated to staff salaries and benefits. Nevertheless, the staff is significantly underpaid and overworked. Staff salaries are considerably less than comparable public interest salaries in the Atlanta area, including the staff at the Attorney General's Office.⁶ Moreover, the staff of the Resource Center work incredibly long hours under very stressful circumstances related to defending the condemned which is exasperated by the lack of adequate resources to handle the caseload.

With the recent FY 2008 grant increase from the Georgia Bar Foundation, the Center will be able to fund one new staff attorney position, one new investigator position and a part-time administrative assistance to make up for the loss of the three staff attorney positions who were funded by outside agencies. This would bring the Resource Center's staff to the FY 2002 staffing level. In FY 2002, the Resource Center lost one staff attorney position when her National Association for Public Interest Law (NAPIL) fellowship expired. At end of FY 2003, the Resource Center lost funding for two more staff attorney positions. The second attorney left when her National Association for Public Interest Law

⁶The figures below show the comparison of Center staff attorney salaries with those of comparable public interest offices in the Atlanta area (based upon five or more years experience):

Resource Center	\$62,000 - 67,000
Fulton County Public Defender	\$65,000 - 80,000
Georgia Capital Defender	\$80,000 - 90,000
Fulton County District Attorney's Office	\$63,400 - 93,000
Office of the Attorney General	\$58,000 - 88,000

(NAPIL) fellowship expired and continued funding was not available. A third attorney left when his American Bar Association Death Penalty Representation Project fellowship expired. The loss of half of our legal staff has been made the Center's mission more difficult and more stressful for the Center's overburdened and underpaid staff.

Without the requested \$1,079,340 continuation funding, the Resource Center will be unable to bring its staff back up to the FY 2002 level. Funding at the current FY 2007 level would leave the Resource Center at eighty per cent of its staffing level of FY 2002. Eventually, the staff of the Resource Center will burn-out if forced to carry this incredible caseload at current staffing level. Continuation funding of \$1,079, 340 is necessary to ensure continued representation of its current clients in state habeas corpus proceedings.

The Increase In The Resource Center's Caseload

During the past eight years there has been a forty percent increase in the number of cases entering into state habeas corpus proceedings. Consequently, there are a backlog of cases in proceedings that require a substantial amount of input and concomitant resource expenditure from the Resource Center. It is at this stage that the Resource Center must conduct the factual investigation, identify legal issues and develop those factual and legal issues at an evidentiary hearing – this work is resource intensive and costly, often requiring extensive travel to interview witnesses and locate records, expert assistance and evidentiary hearings which can last as long as or longer than the original trial. In FY2007, there was an unprecedented number of state capital habeas evidentiary hearings – twelve (12). Historically, there have been an average of four (4) state capital habeas evidentiary hearings per fiscal year. The increased time, resources and funds needed to conduct this many capital habeas evidentiary hearings is obvious, yet funding from the State has remained frozen at the FY2000 level.

Currently there are fifty one (51) cases in state habeas corpus proceedings. This is an unprecedented number of cases. Of those fifty one (51) cases, the Resource Center is solely responsible for sixteen (16), is co-counsel on an additional twenty eight (28), and is consulting with volunteer counsel on the

remaining seven (7) cases.⁷ Despite the number of cases in state habeas proceedings, the cases are moving towards final resolution at a faster rate than ever before.

Thus, the Resource Center is counsel or co-counsel in almost ninety percent of the cases and provides some assistance on the remainder. The rate of new cases entering habeas corpus proceedings in FY 2008 and 2009 will continue to add to the already overwhelming caseload. At this time, there are three (3) cases which is currently pending before the United States Supreme Court on an application for a writ of certiorari from direct appeal. There are two (2) cases pending in the Georgia Supreme Court on direct appeal. These cases will be entering state habeas corpus proceedings during FY 2008. There are an additional sixteen (16) death sentence cases pending at motion for new trial. It is anticipated that most of those cases will be entering state habeas corpus proceedings in FY 2009. Additional funding is required if the Resource Center is to maintain its current level of representation and/or assistance on these cases.

The increase in death sentences at trial and affirmances on direct appeal pushes cases into state habeas corpus proceedings at an increased pace. Consequently, the Resource Center's responsibilities increase at a commensurate rate. Increased case responsibilities without increased staff means the Resource Center can provide fewer services either to clients it directly represents or to volunteer counsel. In short, the increased front end pressure will mean a decrease in services the Resource Center is able to provide unless an increase in funding is realized.

Given the continued increase in death sentences imposed, death sentences

⁷This document only deals with the Resource Center's caseload in state habeas proceedings. There are currently twenty eight (28) cases pending in federal habeas corpus proceedings. The Resource Center is actively involved in sixteen (16) of these cases – as sole counsel in eight (8) and co-counsel in five (5) – which are pending in the Middle and Southern Districts of Georgia. The Resource Center currently is receiving some federal funding for work done in federal court. This funding, however, is just enough to finance the litigation of these cases in federal court proceedings. These cases and the resulting funding and staffing problems are not addressed in this request for continuation of state funding.

affirmed, and cases still pending in state post conviction proceedings, there is a commensurate need to increase the funding of the Resource Center to accommodate its role in the estimated additional seventeen (17) cases that will likely enter state habeas corpus proceedings in FY 2007 and FY 2008.

The Substantial Increase in Litigation Costs

The Resource Center will struggle to remain in budget this year. Nevertheless, the increased caseload means a commensurate increase in investigation and litigation expenses. In order to take on some of the additional cases projected to be entering state habeas corpus proceedings in FY 2008, the continuation funding of \$1,079,340 is required.⁸

The Effect of the AEDPA, Superior Court Rule 44 And Lack of Volunteer Counsel

The increase in caseload is not the only problem that affects the Resource Center's allocation of resources. There has also been a significant increase in the pace of litigation of state and federal habeas corpus cases in Georgia.⁹ This increased pace has also negatively impacted on the Resource Center's ability to provide representation to all death sentenced inmates in habeas corpus proceedings.

In 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act (AEDPA). The AEDPA's provisions dealing with Federal Habeas Corpus were enacted with the specific intent to speed the pace of habeas corpus appeals in death penalty cases. Although the AEDPA deals strictly with cases being litigated in federal court, the statute of limitations provisions for filing in federal court act as a de facto statute of limitations for filing in state court. In order to ensure a habeas petitioner will have recourse in federal courts should his state

⁸This grant request includes \$55,000 to absorb the increase in litigation expenses.

⁹Attorney General Baker acknowledges that "death penalty cases are now moving more quickly than at any other time in modern Georgia history." www.thurbertbaker.com. The incredible work by the staff of the Resource Center has been a significant factor in this more effective and efficient system.

post conviction attack fail, the petitioner must file a federal habeas corpus petition within one year of his conviction becoming final.¹⁰ For all practical purposes, each and every death sentenced inmate in Georgia must file his state habeas corpus petition within that one year, and more accurately, early enough to ensure that there will be time to investigate and prepare a federal habeas corpus petition should his state challenge fail. Thus, the AEDPA has significantly sped up the state habeas corpus process.

Once a petition is filed initiating state post conviction proceedings, Superior Court Rule 44 imposes strict deadlines for the filing of motions and amendments, the time in which to conduct an evidentiary hearing and in which to file briefs. The Rule is designed to ensure that cases are initiated, presented and decided upon within a one year period. Rule 44 has significantly increased the pace at which these cases are now proceeding through state habeas corpus review.

These new time limits make it even more difficult to recruit volunteer *pro bono* attorneys to represent death sentenced prisoners in Georgia. Attorneys who are unfamiliar with the hyper-technical aspect of habeas corpus litigation are unwilling to assume responsibility for a death penalty case without assurances that they will receive substantial assistance from the Resource Center.¹¹ As the pool of

¹⁰The AEDPA does allow for the tolling of time while a “properly filed state post conviction proceeding is pending.”

¹¹The Resource Center staff provides extensive hands on assistance to volunteer counsel. In cases with volunteer counsel, the Center’s current practice is to be co-counsel of record. The responsibilities associated with consulting with inexperienced volunteer attorneys runs the gamut from reading the record and spotting issues to investigating cases and presenting witnesses in evidentiary hearings to writing post hearing memoranda. In short, the consulting aspect of the Resource Center assistance is only slightly less demanding than being solely responsible or co-counsel for the entire case. Nevertheless, use of volunteer counsel can be extremely advantageous if they can cover investigation and litigation expenses and handle in court litigation. Most volunteer counsel can not do all of this, but a few can. The volunteer counsel can range from large firms with resources to small firms or sole practitioners who can only offer their talents and time. The Center’s recruitment effort is now left almost exclusively to the ABA Death Penalty Representation Project which has been very supportive of the Center’s work. The ABA Death Penalty Representation Project has found it very difficult to

volunteer attorneys dwindles, the responsibility for representing Georgia's death sentence inmates falls squarely on the shoulders of the Resource Center. As the Resource Center takes on more and more direct representation responsibilities, its ability to assist volunteer counsel is diminished. Without assurances of assistance, volunteer counsel can not be recruited and the vicious cycle continues. Volunteer counsel continue to play an important role in ensuring representation of all death sentenced inmates in state habeas corpus proceedings.

Conclusion

Without an increase in the continuation funding, the Resource Center – and the system – will be unable to withstand the increased caseload. The request for continuation funding of \$1,079,340 for FY 2009 is necessary if the Resource Center is to continue to ensure representation of its current clients in state habeas corpus proceedings. A recent performance audit requested by the Senate Appropriations Committee and conducted by the Department of Audits found that Center attorneys handled more cases and expended less money per case than similar organizations in other states. The Center is the most cost effective and efficient model of ensuring that death sentenced inmates are represented in state habeas proceedings and in assuring that only those deserving of death are actually executed.¹²

recruit volunteer and can only now recruit counsel if the Resource Center will agree to co-counsel the case or commit the resources to actively consult with volunteer counsel – without a Resource Center, there would be no volunteer counsel.

¹²According to the Columbia University study of error rates in capital cases from 1973 - 1995, Georgia had an 80% reversal rate (65% of those reversals occurred in habeas corpus proceedings). Since 1996, 23 death penalty cases have resulted in post-conviction reversals and two of those reversals have resulted in a death sentence – 13 of them have resulted in a life sentence, 1 died of natural causes and the other 7 are still pending (2 involve juveniles who can not be resentenced to death). During that same period, 20 death sentences have been carried out. The significance of this rate of error is obvious. Imagine what would happen to a private business, if half of its products were defective. In two recent grants of habeas corpus relief, the habeas courts granted each petitioner a new trial based upon State misconduct and ineffective assistance of counsel – proving that the system can only be fundamentally fair if there is a Resource Center to provide checks and balances to the system in state habeas capital review.

In 1988, the State Bar and the state and federal courts worked together to address the problem of the lack of counsel for death-sentenced inmates in habeas corpus proceedings. The solution to this problem was the establishment of the Resource Center. For the past eighteen (18) years, the Center's professional staff¹³ has mastered this unique and complex area of law, developed expertise in crime scene investigation, mental health issues and mitigation presentation, and assembled a library of resources (motions, briefs, and case tracking data). The Resource Center is an integral part of Georgia's death penalty system, is the most efficient and cost effective means to moving the cases to final adjudication, and is a necessary safeguard to wrongful execution. In short, the effectiveness, efficiency and credibility of the system depends on the Resource Center.

IV.

SUMMARY OF EXISTING LAW

We do not believe there is any existing law applicable to this proposal.

V.

PROPONENTS OR OPPONENTS

The State Bar of Georgia has supported full funding for the Resource Center since its inception in 1986. The Georgia Supreme Court has also supported funding for the Resource Center, as has the Board of Governors and the Judicial Conference of the United States.

¹³Each staff member has significant experience in capital defense. The Director has over eighteen seventeen (18) years of capital defense experience. The staff attorneys have a cumulative total of over twenty eight years (28) of capital defense experience between them, eleven (11), nine (9), five (5), four (4) and three (3) years experience. The investigative staff is amongst the most experienced in the country with over sixty eight (68) years of capital defense investigative experience. The experience levels of the individual investigators are twenty two (22), nineteen (19), twelve (12), eleven (11) and four (4) years. One of the investigators is a Master of Social Work (MSW) and another is an attorney. The Office Manager has been with the Center since shortly after its inception.

There are no known opponents of this proposal.

VI.
OTHER COMMITTEES AND SECTIONS

A copy of this proposal will be sent to the following other committees or sections which may have an interest in the legislation: the Advisory Committee on Legislation; the Special Committee on Post-Conviction Capital Representation; the Criminal Law Section; and the Individual Rights Section of the State Bar. These committees and sections have previously supported funding for the Resource Center.

VII.
CONCLUSION

For the above-stated reasons, the Board of Directors of the Georgia Resource Center petitions the State Bar of Georgia for endorsement of State continuation funding of \$1,079,340 for the Resource Center and that such funding be placed in the budget of the Judicial Council for the next session of the General Assembly.

Submitted: November 30, 2007

Respectfully submitted,

Thomas H. Dunn
Executive Director

Robert B. Remar
Chair/President of the Board of Directors

Vice-President of the Board of Directors