IN THE DEPARTMENT OF JUSTICE
OF THE UNITED STATES

In the matter of

GARY GRAHAM,

Complainant.

COMPLAINT CONCERNING VIOLATION
OF CIVIL RIGHTS

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INTRODUCTION

Gary Graham, a young black man, is scheduled to be executed by the State of Texas on June 3, 1993 for a crime he did not commit. Mr. Graham's case is illustrative of two grave constitutional flaws in the administration of the death penalty in Texas which call for a thorough investigation by the United States Department of Justice: (1) gross racial disparity in sentencing and (2) systemic deprivation of effective assistance of counsel for poor people.

Mr. Graham is one of three young men presently on Texas' death row who were sentenced to death in Harris County, Texas, for crimes committed when they were seventeen. All three are black. Since the death penalty was reinstated in Texas in 1976, Harris County has sent five men to death row for crimes committed when they were seventeen. Four of those young men were black and only one was white. Harris County's population is only 18% black. These facts alone (and they do not stand alone) raise serious questions about the role race played in Mr. Graham's trial, conviction and death sentence. Furthermore, Mr. Graham's case raises serious questions about Texas' ability and willingness to ensure that poor capital defendants receive the kind of legal representation mandated by the Constitution.

Mr. Graham's conviction and death sentence were based solely on the identification of a single eye-witness. No other evidence linked him to the crime. Although there were numerous other witnesses to the crime, no one was called to testify on Mr. Graham's behalf at the guilt stage of his trial. The reason no witnesses were called was not that there were no witnesses who

could testify in Mr. Graham's defense. At least nine witnesses could have testified that Gary Graham could not have committed the murder. Their testimony, which is discussed in detail below, would have raised substantial doubt about the reliability of eye-witness identification and about Mr. Graham's guilt. The evidence is now clear that no one was called to testify for Mr. Graham because neither his court-appointed counsel nor his investigator conducted an investigation of his defense.

The inadequate performance of Mr. Graham's court-appointed counsel cannot be dismissed as an isolated example of ineffective assistance of counsel. Instead it was a product of a grievously flawed indigent defense system which virtually precludes the quality of representation required under our Constitution.

Either of these infirmities in Texas' criminal justice system should raise momentous concerns about the constitutionality of Mr. Graham's conviction and death sentence. The likelihood that Texas is about to execute an innocent man in the face of these constitutional deficiencies calls for intervention.

I.

AFRICAN AMERICANS ARE SO DISPROPORTIONATELY IMPRISONED AND SENTENCED TO DEATH IN TEXAS THAT THE DEPARTMENT MUST INTERVENE TO PROTECT THE RIGHT OF AFRICAN AMERICANS TO BE FREE OF THE ODIOUS INFLUENCE OF RACIAL BIAS IN THE CRIMINAL JUSTICE SYSTEM

Racial disparities are stark and pervasive in the Texas criminal justice system. African Americans make up only **12%** of the population of Texas, yet are **48%** of its prison population. Whites,

on the other hand, make up **63%** of its general population, yet are only **29%** of the prison population. For every 100,000 African Americans in Texas, **1415** are in prison, but for every 100,000 white people, only **167** are in prison. Thus, the rate at which blacks are incarcerated is **nearly nine times** the rate at which whites are incarcerated.

These figures are a small sampling of the striking racial disparities found in Texas' criminal justice system. They are taken from a larger study by the Criminal Justice Policy Council of the State of Texas, Criminal Justice Trends in Texas: Overview by Race (April 7, 1992).[1] Examining, by race, who is arrested and imprisoned and for what crimes, the Council found that from every perspective it examined Texas' criminal justice system, black citizens were much more likely to be caught up in the criminal justice process than white citizens. Further, by comparing rates of arrest and imprisonment in 1985 and 1991, the Council found that the overrepresentation of blacks in the criminal justice system got worse over the decade of the 1980's. These disparities were even greater in the state's largest county, Harris County, which includes Houston.

The Council did not examine the racial composition of death row as a distinct component of the criminal justice system. Not surprisingly, however, there are also racial disparities on death row, though they are not as stark as the statewide disparities in

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[1] The Council is an 11-person board appointed by the governor, lieutenant governor, and speaker of the House, whose purpose is to conduct criminal justice research.

the system as a whole. For Harris County, however, the racial disparities in death sentencing are much greater, nearly as great as the disparities produced by Harris County in the overall criminal justice process. Of significance for Gary Graham, who was 17 years old at the time of the crime for which he was condemned, the racial disparities are the starkest for young people sentenced to death, statewide and in Harris County, the county of his conviction.

In bringing these disparities to the attention of the Department, Mr. Graham is cognizant of the legal and factual framework within which the disparities will be viewed. He is aware that the Supreme Court has held in McCleskey v. Kemp, 481 U.S. 279 (1987), that statistical disparities alone cannot establish that racial bias has influenced the criminal justice process in violation of the Eighth and Fourteenth Amendments to the Constitution. He is just as aware, however, that Congress has not accepted McCleskey as the final word on proof of discrimination in the criminal justice process, and that Congress tends to take more seriously the kind of stark racial disparities that permeate the criminal justice system in Texas. See, e.g., the provision in the Anti-Drug Abuse Death Penalty Act of 1988, 21 U.S.C. Sec. 848(o)(2), requiring the Comptroller General to study the "risk that the race of the defendant, or the race of the victim against whom a crime was committed, influence[s] the likelihood that defendants in [death penalty] States will be sentenced to death[,]" and to "use ordinary methods of statistical analysis, including

methods comparable to those ruled admissible by the courts in race discrimination cases under Title VII of the Civil Rights Act of 1964," in conducting this study.[2]

Further, Mr. Graham is aware that the raw disparities uncovered by the Texas Criminal Justice Policy Council are not enough, without statistical analysis, to establish that racial bias has influenced the criminal justice process. As the Council has explained in a preface to the report cited herein, "The data used in this analysis are not detailed enough to control for the effect of a range of variables related to imprisonment that may explain the disparity in the incarceration rate for different racial groups." Criminal Justice Trends in Texas: Overview by Race, "Note From the Director." Nevertheless, the raw racial disparities in the criminal justice system in Texas are the very kinds of disparities that, after being subjected to statistical analysis, almost invariably reveal that racial bias is a significant factor influencing the outcome of criminal proceedings. See, e.g., General Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities (February, 1990).[3] Moreover, the starkness of the disparities in Texas are seen by the public as evidence that racial bias -- and the multitude of

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[2] The Department is well aware that the "methods of statistical analysis" used to prove discrimination under Title VII are methods that focus upon racial disparities. See, e.g., Bazemore v. Friday, 478 U.S. 385 (1986); Burdine v. Texas Dept. of Community Affairs, 450 U.S. 248, 254 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[3] This is the study mandated by Congress in the Anti-Drug Abuse Death Penalty Act of 1988, referred to supra.

barriers created by racial bias -- influences the outcome of criminal proceedings. Thus, for example, when the Criminal Justice Policy Council released its report in 1992, Gary Bledsoe, president of the Texas branch of the NAACP, responded that he was "not surprised" by the findings. As reported in the Austin American Statesman, April 7, 1992, at A6, Mr. Bledsoe explained,

> 'If anything, those figures for African Americans are low.... The causes are socially related: poverty, lack of educational opportunities, and the feeling that they are not a participant in society....'
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> He said aspects of the judicial system also stack the deck against African American defendants, making it more likely they will be sent to prison.
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> Because many blacks are poor, Bledsoe said, they often must rely on court-appointed attorneys for legal defense.
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> 'Because the money that is paid to lawyers to defend poor minorities is so low, lawyers will not spend adequate time for their defendant,' Bledsoe said. 'The defendant feels an impetus to plead (guilty) even they don't wish to.'

Accordingly, Mr. Graham puts forth the racial disparities in Texas' criminal justice system as a substantial basis for concern and as a compelling reason -- in effect "probable cause" -- for the Department to undertake a full investigation of the influence of racial bias in the criminal justice process in Texas.

From a variety of perspectives, the report of the Texas Criminal Justice Council reveals large racial disparities of the sort noted above, disparities that have grown worse over time:

(a) In 1985, the incarceration rate for whites was 122,[4] compared to 683 for blacks, making blacks 5.6 times more likely to be incarcerated than whites.[5] However, this disparity worsened by 1991, when the incarceration rate for whites was 167, compared to 1415 for blacks. Thus, by 1991 blacks were 8.5 times more likely to be incarcerated than whites. Criminal Justice Trends in Texas: Overview by Race, at 2, 3.[6]

(b) In 1985, the proportion of blacks among people arrested was two to three times greater than the proportion of blacks in the general population in Texas, depending on the category of the offense for which the person was arrested.[7] Between 1985 and 1991, this disparity got worse. For violent offenses, 33.8% of those arrested in 1985 were black; 38.9% in 1990 were black. For drug offenses, 21.8% of those arrested in 1985 were black; 37.1% in 1990 were black. And for property offenses, 27.3% of those arrested in 1985 were black; 30.4% in 1990 were black. For all categories of crime, 26.5% of those arrested in 1985 were black; 33.5% in 1990 were black. Exhibit 2, at 6.

(c) In 1985, the proportion of blacks among people

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[4] As noted, the term "incarceration rate" refers to the number of people that are imprisoned for every 100,000 people in the general population.

[5] The use of the designation "whites" does not include Latinos. The Council's report breaks out the treatment of Latino people separately.

[6] For ease of reference, a copy of the Council's report is included herewith as Exhibit 2.

[7] As noted, the proportion of blacks in the general population in Texas in 1991 was 12%. Exhibit 2, at 1.

convicted and sentenced to prison was approximately three times greater than the proportion of blacks in the general population. Between 1985 and 1991, this disparity increased quite dramatically. In 1985, 35.7% of those sentenced to prison were black; 42.2% were white. By 1991, however, these figures were reversed -- and by a wider margin: 45.6% of those sentenced to prison were black; only 30.1% were white. Exhibit 2, at 8.

(d) The breakdown of the proportion of blacks sentenced to prison by category of offense reveals even more strikingly the large increases in incarceration of black citizens. In 1985, among those sentenced to prison for violent offenses, whites composed 33% of the total; blacks, 43%. But by 1991, whites decreased to 26% of the total, while blacks grew to 48%. Exhibit 2, at 11. In 1985, among those sentenced to prison for drug offenses, whites composed 42% of the total; blacks, 28%. But by 1991, whites decreased to only 23% of the total, while blacks grew dramatically to 55%. Exhibit 2, at 10. And finally, in 1985, among those sentenced to prison for property offenses, whites composed 43% of the total; blacks, 37%. But by 1991, this pattern had reversed: whites composed only 33% of the total, while blacks grew to 42%. Exhibit 2, at 11.

In Harris County, these disparities are even worse. The incarceration rate for black people in Harris County in 1991 was the highest in the state for any racial group: 1851. Exhibit 2, at

3.[8] Whites were incarcerated in 1991 in Harris County at a rate of 209, Exhibit 2, at 3, making blacks nine times more likely to be incarcerated than whites. In 1991, blacks composed 18% of the general population of Harris County. Criminal Justice Policy Council, Sentencing Dynamics Study 17 (January, 1993). The proportion of all offenders sentenced to prison from Harris County who were black was 47% in 1985; by 1991, the proportion increased to 61%. Exhibit 2, at 13.[9] Finally, in 1985 the proportion of all offenders sentenced to prison for drug offenses from Harris County who were black was 38%. Exhibit 2, at 15.[10] By 1991, however, the proportion of all offenders sentenced to prison for drug offenses from Harris County who were black was a staggering 73%. Exhibit 2, at 15.[11]

When death-sentenced people are examined as a separate category, the statewide disparities are not as striking as the disparities for all offenses or for the categories of violent, drug, and property offenses examined separately. As of April 20, 1993, whites composed a plurality on death row, of 44.9%, and blacks were second, at 36.7%. NAACP Legal Defense and Educational

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[8] Compare the statewide incarceration rate for blacks in 1991 -- 1415. Id.

[9] Compare the statewide proportion of offenders sentenced to prison who were black -- 35.7% in 1985, and 45.6% in 1991. Exhibit 2, at 8.

[10] Compare to the same category statewide in 1985: 28%. Exhibit 2, at 10.

[11] Compare to the same category statewide in 1991: 55%. Exhibit 2, at 10.

Fund, Inc., Death Row USA, at 35 (Spring, 1993). However, figures from Harris County reveal a much greater, more troubling racial disparity. By April 1, 1993, among the persons sentenced to death and still on death row from Harris County, 55.5% were black, while only 35.0% were white. Unpublished report from Texas Resource Center (April, 1991).

Moreover, when persons who were teenagers at the time of the crime for which they were sentenced to death are examined, the racial disparities are also stark. Statewide, 50 people are on death row who fall into this category; 48% are black, and 30% are white. Id. In Harris County, as with every other category examined for racial disparity, the disparity is even worse for teenagers. Among persons on death row from Harris County who were sentenced to death for crimes that occurred when they were teenagers, eleven, or 73.3% are black, and only two, or 13.3% are white. Id. Three seventeen year olds are on death row from Harris County. One of them is Mr. Graham, who is black. The other two are also black. Id.

These racial disparities -- pervasive and stark at a statewide level, and much worse at the level of Harris County -- should not be brushed aside as somehow endemic to the criminal justice system in this country, and therefore, tolerable. In light of most of the studies that have examined these kinds of disparities through "ordinary methods of statistical analysis," see 21 U.S.C. Sec. 848(o)(2)(A), raw disparities this stark are indicative of a system that is influenced by racial bias. The everyday experience of

African Americans confirms that the criminal justice system often operates in this manner. Accordingly, the Department should embark on a thorough review of these disparities in the state of Texas and take whatever remedial steps are necessary to root out the insidious and odious influence of race in the criminal justice system of this state.

II.

TEXAS' SYSTEM OF INDIGENT DEFENSE MAKES IT VIRTUALLY IMPOSSIBLE FOR APPOINTED COUNSEL TO PROVIDE EFFECTIVE ASSISTANCE TO THEIR CLIENTS

The Supreme Court has recognized that the right to counsel under the sixth and fourteenth amendments can be denied in two distinctly different ways. Counsel may perform deficiently, making mistakes inadvertently or through ill-informed decisions that deprive their clients of the reasonable professional assistance to which they are entitled. Strickland v. Washington, 466 U.S. 668, 686 (1984). On the other hand, counsel may find themselves forced to represent clients under conditions that make it impossible to provide effective representation, no matter how ably they perform. Id. Though counsel is not at fault in these circumstances, the right to the assistance of counsel is vitiated just as much as if counsel performed inadequately.

Among the cases which the Supreme Court has used to illustrate the circumstantial deprivation of counsel is the case of the Scottsboro Boys, reported as Powell v. Alabama, 287 U.S. 45 (1932). Seven young black men traveling through Alabama on a train were

charged with the rape of two young white women. The trial court appointed all the members of the local bar to represent the defendants. Id. at 56. Because no one felt any sense of responsibility, nothing was done to prepare for trial. On the day of trial, a lawyer from Tennessee appeared specially to raise the defendants' interest in having the assistance of counsel; over his protest, he was appointed, and the trial commenced. Id. at 57-58. Faced with the claim that, despite this lawyer's efforts, the defendants had been denied the assistance of counsel, "[t]he Court did not examine the actual performance of counsel at trial, but instead concluded that under these circumstances the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair." United States v. Cronic, 466 U.S. 648, 660-61 (1984) (characterizing the decision in Powell).

Although counsel who represent poor people charged with capital murder in Texas are not often forced to represent their clients in circumstances similar to those presented in Powell, they are often forced to represent their clients under conditions that make it virtually impossible to provide effective representation. With tremendous self-sacrifice and a willingness to suffer severe financial loss, appointed lawyers can provide effective assistance. However, the conditions under which they must represent their clients create nearly insuperable barriers to effective representation.

It is this problem -- a modern-day variation on the denial of

the assistance of counsel that so troubled the Court in Powell -- to which we direct the Department's attention. Its tragic consequences are no better illustrated than in the case of the complainant, Gary Graham, who was convicted and sentenced to death for a crime that, it is now increasingly clear, he did not commit.

A. The System Used by Texas to Provide Counsel to Poor People Charged with Capital Crimes Makes It Extremely Difficult for Counsel to Provide Effective Representation.

The most comprehensive and in-depth review of the system used by Texas to provide counsel to poor people charged with capital crimes has been conducted by The Spangenberg Group of Newton, Massachusetts. In the spring of 1990, the State Bar of Texas contracted with The Spangenberg Group to study capital representation in Texas and to propose recommendations for the improvement of the system. The Spangenberg Report was formally received by the State Bar in March, 1993. Its findings are the basis for Mr. Graham's complaint against Texas' system of indigent defense in death cases.[12]

One of the most striking features of the Texas system is that the state has assumed no responsibility for it. There is no state funding of indigent defense in capital cases in Texas. SR 153.

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[12] A copy of the report is provided along with the complaint, as Appendix 1. "The findings are based upon the responses from the 263 private attorneys and judges in Texas [127 from judges, 136 from attorneys] who returned our questionnaires. They are also based upon numerous interviews and conversations in Texas with those most familiar with capital proceedings and analyzing further substantial additional secondary data. These findings are further informed by The Spangenberg Group's experience at the national and state level over the past decade." Spangenberg Report [hereafter, "SR"], at i.

"Texas is one of few states, among those which allow capital punishment, which provides no state funds for indigent defense in capital cases." Id. at 155. The result is that the counties must bear the entire financial burden of indigent defense, and they are far less able to do that alone than they could in partnership with the state. One of the worst consequences of this is that the amount of money that can be paid to appointed counsel to represent people in death cases is very low. Id. The problems associated with the low rates paid to counsel will be discussed further, but there is no question that the failure of the state to shoulder part of the cost of indigent defense in Texas plays a significant role in how low those rates are. As Spangenberg reports, "One of the chief reasons given by many district court judges in the study as to why the fee rates are so low is that the counties cannot afford an increase." SR 155.

Another problem associated with the state's failure to assume any responsibility for indigent capital defense is that there are no uniform standards guiding the appointment of counsel or assessment of counsel's performance for purposes of further appointment. As Spangenberg found,

> In many counties, appointment lists are not maintained according to any qualification guidelines. Of the sample of judges who had presided over a capital case in the last five years, almost 50% did not have any standards for appointing counsel to capital cases at trial. Informal guidelines of individual judges are sometimes limited to the willingness and reputation of attorneys.

SR 156. As a result, the benefits of standards for the appointment

of counsel -- the underlying assurance that the lawyers most likely to provide effective representation are appointed -- are, like adequate attorneys' fees, unavailable to poor people facing capital charges in Texas.

The state's failure to assume responsibility for indigent defense in capital cases deprives poor people facing the death penalty of yet another benefit, which is available to everyone similarly situated in every other death penalty state. There is no state-mandated public defender system in Texas. Left to choose whether to have a public defender system or a private appointment system, most counties have opted for private appointment systems. The result is that poor people facing the death penalty are deprived of the well-documented benefit of offices that specialize in capital defense. As Spangenberg reports, Texas is alone among all the death penalty states in depriving poor people of this important benefit:

> In the vast majority of Texas counties, representation in capital cases is provided by private attorneys who do not have the benefit of built-in support services and back-up resources commonly available in public defender programs. Other such states rely on local public defenders, state appellate public defenders, and statewide public defender capital divisions in addition to private appointed attorneys for indigent representation in capital cases.
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> Public defender programs provide primary representation at trial in 32 of the 36 states with capital punishment statutes and public defender programs provide secondary representation at trial in three other states.

SR 154.

The state's avoidance of its responsibility for indigent defense in capital cases results in two nearly insurmountable barriers to counsel appointed to represent people at trial. Attorney fees are so low that most lawyers lose money -- not just in relative terms but in actual out-of-pocket loss -- for every hour spent on the case. Further, litigation expenses are so limited that most lawyers have to absorb the necessary expenses themselves or not incur expenses in the first place. To appreciate the rigidity of these barriers, one must examine Texas' policies on the payment of attorney fees and expenses over the past decade.

Article 26.05 of the Texas Code of Criminal Procedure governs the compensation of court-appointed counsel. Before 1987, the statute provided as follows:

> Section 1. A counsel appointed to defend a person accused of a felony or a misdemeanor punishable by imprisonment, or to represent an indigent in a habeas corpus hearing, shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held, according to the following schedule:
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> a. For each day or a fractional part thereof in court representing the accused, a reasonable fee to be set by the court but in no event to be less than $50;
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> b. For each day in court representing the accused in a capital case, a reasonable fee to be set by the court but in no event to be less than $250;
>
> c. For each day or a fractional part thereof in court representing the indigent in a habeas corpus hearing, a reasonable fee to be set by the court but in no event to be less than $50;
>
> d. For expenses incurred for purposes of investigation and expert testimony, a

> reasonable fee to be set by the court but in no event to exceed $500;
>
> e. For the prosecution to a final conclusion of a bona fide appeal to a court of appeals or the Court of Criminal Appeals, a reasonable fee to be set by the court but in no event less than $350;
>
> f. For prosecution to a final conclusion of a bona fide appeal to the Court of Criminal Appeals in a case where the death penalty has been assessed, a reasonable fee to be set by the court but in no event to be less than $500.
>
> Section 2. The minimum fee will be automatically allowed unless the trial judge orders more within five days of the judgment.
>
> Section 3. All payments made under the provisions of this Article may be included as costs of court.
>
> Section 4. An attorney may not receive more than one fee for each day in court, regardless of the number of cases in which he appears as appointed counsel on the same day.

In operation, this statute limited attorney's fees in two significant ways. It provided no compensation for attorney time spent out of court, and it led courts to define "reasonable fee" in relation to the exceedingly low statutory minimum fees. As Spangenberg found,

> Prior to the 1987 change, fees were based entirely on 'appearances in court.' In practice, this meant that most court-appointed counsel were simply not compensated for legal work they did out of court in preparation for plea or trial. The old statute also tied 'reasonable fee' to a very low fixed rate. We are informed that in many counties, the 'but in no event to be less than (X amount)' became a de facto maximum.

SR 14.

In 1987, Article 26.05 was amended to remove the statutory minima on attorney's fees, the statutory maximum on fees for investigation and expert assistance, and the prohibition on payment of fees for out court work. Under amended 26.05, attorneys are entitled to a "reasonable ... fee" for time in court, necessary time spent out of court on the case, and the time for preparation of an appellate brief. Despite these changes, very little has changed in the compensation of counsel or in the amount of money available for investigation. Spangenberg found that "in many cases the rates were not substantially increased after the 1987 statutory change." SR 14. Specifically, he found the following:

(a) "[A] wide range of rates [is paid] around the state. In some courts, counsel is paid by the hour for both out-of-court legal work and in-court legal work. In other courts, defense counsel is only paid when they appear in-court and then on a fixed per diem basis. Still other counsel are paid for their services at trial through flat-fee. These various compensation schemes ... show that a number of district judges are unaware of or simply not following the new requirements of Article 26.05 as amended in 1987." SR 102.

(b) "Only slightly more than half of the judges indicated that they compensate counsel for out-of-court and in-court work." Id.

(c) Even in the cases in which counsel are paid at an hourly rate, the rates are unacceptably low. "Two-thirds of the judges paid at an hourly rate of $50 or less. Even the $50 rate is

below that available to court-appointed counsel in virtually all of the death penalty states in the country." SR 103.

The Spangenberg Group's explanation for the resistance of district courts to paying adequate attorney's fees for both in-court and out-of-court time has to do with the state's abdication of any responsibility for indigent capital defense. "Under [amended] Article 26.05(d) funds for appointed counsel are paid exclusively from the general fund of the county, the same source of funds for all other items in the court's budget. The result is that compensation for court-appointed counsel in Texas remains near the bottom nationwide." SR 14.

The same mind set that has led district court judges to pay attorney's fees in keeping with the pre-1987 version of Article 26.05 has also led many of them to impose artificial limits on expenses. Spangenberg found that "[i]n more than half of the respondents' jurisdictions, there is no provision for waiver of established expense limits for [expert and investigative] services." SR 46. He also found that "[e]xpert witnesses and investigators were often paid for by attorneys" <u>out of their own funds</u>. SR 159. For reason such as these, "[a]bout one-half of the attorneys who had recently handled a capital case and approximately one-third of the judges who had recently presided over a capital trial told us that there were not enough resources to pay experts and attorney expenses." <u>Id.</u>

Not only do the inadequate fees and expenses present enormous barriers to counsel who are appointed in death cases, they also

present enormous barriers to appointing qualified counsel in the first place. Spangenberg found that "[t]he average hourly rates that the[] courts reportedly pay are significantly lower than those that attorneys who have not taken capital cases in the last five years reported that they would accept as a condition for taking a capital case." SR 44. He then asked "the private attorneys who had represented indigent defendants at trial in capital cases whether, in their opinion, the current rate of compensation was adequate to attract a sufficient number of qualified attorneys to try capital cases. Two-thirds of the respondents answered that the current rate of compensation is not adequate." SR 56.

Taken together, the inadequacies of Texas' indigent defense system make it extremely unlikely that any lawyer appointed to a capital case will be able to provide effective assistance. Attorneys likely to be appointed are those who are willing to take cases for which they will be paid no more than $50 per hour -- far less than is necessary to sustain a law practice. If they have the requisite training and experience to know how to represent people effectively in death cases, it is sheer coincidence; their appointment is not likely to turn on relevant training and experience. The odds that they will be paid at all -- even a meager $50 per hour -- for the time they devote to the case out of court are about 50-50. And if they hire an investigator or expert, the odds of being reimbursed fully or even substantially for the services of the investigator or expert are far less than 50-50. Finally, these attorneys will have no easily accessed source of

support and expertise. There is no office, probably not even a close colleague, with substantial experience and expertise in defending death cases to whom they can turn for help in conducting research, strategizing the myriad issues and questions that arise in every capital case, developing a plan for investigating and actually investigating guilt-innocence and sentencing issues, and drafting pretrial motions and memoranda.

In sum, lawyers appointed to capital cases in Texas are likely to be those whose practices are not thriving, who have none of the special expertise necessary for capital defense work, who are encouraged not to work on their clients' cases out of court or to hire others to help do so, and who cannot get the help they need to do a minimally adequate job at representing their clients. Obviously, these odds may be overcome on some occasions. Qualified counsel may be appointed who is willing and able to sustain substantial financial loss in order to work the defense up the way it should be and who will seek out and secure the expertise and collegial support necessary to provide effective representation. However, representation of this sort will be the exception rather than the rule.

The system is stacked the other way, toward producing representation that is inadequate, because the system puts the lawyer in conflict with his or her client at the most basic level. To have the best chance of surviving a capital prosecution, the client needs the lawyer to be able to pursue every plausible avenue of investigation into the facts and the law. To survive

economically, however, the lawyer cannot do this. Choices must be made about where best to put extremely limited out-of-court resources, and those choices cannot be made on the basis of investigation. They must be made on the basis of assumptions -- the best guesses the lawyer can make without the benefit of information that comes from investigation and research. Whether those choices are right in any particular case is a matter of fortuity. The right to the assistance of counsel should not hang on such a slender and tenuous thread.

B. The Representation Afforded Gary Graham Was a Product of an Indigent Defense System That Makes It Virtually Impossible to Provide Zealous and Effective Representation.

Gary Graham's case is a tragic illustration of the Texas indigent defense system in operation.

Two lawyers, Ron Mock and Chester Thornton, were appointed to represent Mr. Graham. The version of Article 26.05 that was in effect at the time of the trial, October, 1981, was the version we have quoted in full, supra, at ___. Thus, Mr. Graham's lawyers were not entitled to be paid for any work they performed out of court, but they were entitled to be paid at least $250 each for each day they were in court.[13] They had at most $500 with which to pay for an investigator's services.

Mr. Graham was charged with the murder of Bobby Grant Lambert during an attempted robbery on May 13, 1981. Mr. Lambert, a

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[13] Court vouchers revealed that Mr. Mock and Mr. Thornton were each paid $500 per day for trial and $250 for each day, or fraction thereof, that they appeared in court before trial.

middle-aged white man, was approached by a young black man with a gun in the dimly-lit parking lot of a Houston grocery store at about 9:30 p.m. on May 13. Trial Transcript (hereafter, "T"), Vol XV, at 234. After a brief scuffle, the young man shot Mr. Lambert once in the chest and ran off. T. 324-38. Mr. Lambert managed to stumble back into the store where he died.

Mr. Graham came to the attention of the Houston police a week later when he was arrested for a robbery, then charged with a number of other robberies. One of the eyewitnesses to the crime, Bernadine Skillern, said that the assailant was clean shaven and had a close-cropped Afro, and estimated his height as 5'9". T. 349. Mr. Graham met this general description, so his photograph was placed in a photo array and shown to the eyewitnesses. No one picked him out. However, the next day Ms. Skillern picked Mr. Graham out of a lineup. T. 294, 301. None of the other eyewitnesses identified him. There was no other evidence linking Mr. Graham to the crime.

Mr. Graham told his lawyers he was innocent from the moment he first met them and never wavered in his insistence that he was innocent. As his lead trial lawyer, Ron Mock, testified at the state habeas corpus hearing in 1988,

> Never did he ever say he did it. Never did he ever say he was present. Never did he say he ever had any knowledge [of] any robbery occurring at the Safeway out there on the North Freeway. He always emphatically denied his involvement, or any involvement.

SF (Statement of Facts, Ex parte Gary Graham, No. 335378-A, 182nd Judicial District Court of Harris County, January 8, 1988), at 22.

Despite Mr. Graham's insistence that he was innocent, there was virtually no investigation of the case. As Merv West, the investigator working with Mr. Mock on Mr. Graham's case, has explained,

> I remember that from the first Ron Mock insinuated that Gary was guilty and that definitely affected my investigation. Ron usually didn't use me when he believed his client was guilty because he knew that as an ex-police officer I did not feel comfortable working trying to help someone I thought was guilty. However for some reason he made an exception in Gary's case.

Affidavit of Mervyn H. West, Exhibit A to Application for Post-conviction Writ of Habeas, filed April 20, 1993, No. 335378-B, 182nd District Court of Harris County (emphasis supplied). Clearly, Mr. Mock's attitude controlled the way Mr. West approached Mr. Graham's case. As Mr. West explained,

> Because we assumed Gary was guilty from the start we did not give his case the same attention we would routinely give a case. We just did not have time to worry about a guilty client, and I would not have felt comfortable trying to find evidence that would have proved him innocent. It may sound unfair but that's just the way it was.

Id.

It is clear from Mr. West's affidavit that his belief that Gary was guilty did not derive from investigation of the crime scene witnesses or of Gary's suggested alibi witnesses. After noting that Gary had given Mr. Mock a witness list that "contained the names of alibi witnesses, people Gary was with the night of the crime," as well as the names of witnesses who had known Gary since he was a child, Mr. West explained,

> I did not talk to any of Gary's alibi witnesses. Ron Mock was extremely busy during the period of time that Gary's case was pending. Since we both assumed Gary was guilty, I decided not to waste time trying to substantiate his alibi. Ron was real good at giving me directions in a case. If he felt like the case was a sure loser, he would point me away from a guilt/innocence investigation and concentrate on trying to plead the case out.

Id.[14]

While there was some investigation of the eyewitnesses, it was quite limited, and it was apparently done only to confirm, not to explore, Mr. Graham's guilt. The only investigation of the eyewitness testimony was Mr. West's interview of two individuals:

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[14] Mr. Mock's testimony at the 1988 state habeas corpus hearing is in conflict with Mr. West's affidavit with respect to whether Mr. Graham provided the names of alibi witnesses. Mr. Mock remembered, like Mr. West, that Mr. Graham provided a list of witnesses. SF 9. However, he remembered the witnesses as going only to mitigation. Id. Mr. Mock testified that Mr. Graham was unable to provide the names of alibi witnesses, SF 23, 25, 39, and that no one came forward on their own to help establish where Mr. Graham was that night, SF 43. At the time Mr. Mock testified to these matters, Merv West was unavailable and as a result, did not testify at the habeas corpus hearing. He was recently located, however, and provided the affidavit in Exhibit A to the state habeas petition. The only response the state made to this affidavit was to procure another affidavit from Mr. West that cautioned against reliance upon his memory due to intervening health problems which have affected his memory in some respects. Exhibit 5 to Respondent's Original Answer, filed April 23, 1993, in No. 335378-B, 182nd District Court of Harris County. The unresolved conflict between Mr. West and Mr. Mock as to whether Mr. Graham provided the names of potential alibi witnesses was one of the bases for requesting the courts to revisit the claim of ineffective assistance of counsel in failing to investigate a potential alibi defense.

Notwithstanding the conflict over whether Mr. Graham informed his counsel of the identity of alibi witnesses, what has not been denied is that Mr. Mock and his investigator conducted little investigation of Mr. Graham's innocence.

"One was a black female who was in the store on the night of the shooting, and the other was a white male who was in the parking lot." Exhibit A to state habeas petition. But even that investigation seemed intent on confirming, rather than contesting, Mr. Graham's guilt:

> The black female was helpful even though she could not identify Gary as the shooter. She thought he had a similar build to the guy who did the shooting. The white male could not identify Gary as the shooter either.

Id.[15]

This was the only investigation conducted with respect to guilt or innocence. Mr. Mock never personally interviewed a witness. SF 10. Mr. Graham's other attorney, Chester Thornton, was never involved in any way in the investigation of guilt-innocence issues. His role in the case was limited to penalty phase preparation, and in this regard he talked to several members of Mr. Graham's family. SF 52. Mr. Thornton never saw the list of potential witnesses, including alibi witnesses, that Mr. Graham developed, because it was given only to Ron Mock. See SF 9 (Mock testimony); Exhibit A to state habeas petition (affidavit of Merv West, noting that "Graham gave Ron Mock a list of people to use for his defense in this case[,] ... [and] [it] contained the names of people that were alibi witnesses").

These facts provide a chilling example of how Texas' indigent

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[15] Remarkably, the information that Mr. West derived from these two interviews was consistent with innocence, not guilt. Nevertheless, the information did not seem to raise any question about Gary's guilt for Mr. West.

defense system operates to curtail the representation of poor people facing the death penalty. Knowing that there was only $500 for an investigator, and that counsel would not be paid for any time investigating the case, Mr. Mock was faced at the outset with the fundamental choice forced upon him by the system of indigent defense in Texas: Would he disregard the financial consequences of conducting a full investigation, as called for by his client's insistence that he was innocent, or would he conduct the investigation and preparation of the case so as to minimize his out-of-pocket losses? Obviously, Mr. Mock chose the latter option. He cannot be faulted for this choice, for the right to the assistance of counsel cannot be based on a lawyer's willingness to sustain significant financial loss. The choice he made was to represent Mr. Graham within the economic boundaries circumscribed by the Texas indigent defense system.

The consequences of this choice cascaded like a river down the side of a mountain. First and foremost, Mr. Mock had to find a way to deal with Mr. Graham's insistence that he was innocent. Investigation into innocence meant extensive investigation into the crime -- finding and interviewing anyone who saw what happened -- and extensive investigation of where Mr. Graham was at the time of the crime. At a minimum, many hours of investigation were needed and most of those hours, whether spent by an investigator or by one or both of the lawyers, would go uncompensated by the court.

This was the point at which Texas' indigent defense system broke the defense. It forced defense counsel to choose between his

own economic interest and his client's need for a lengthy, expensive, but uncompensated investigation. When faced with this dilemma, it is understandable that defense counsel may seek a rationale for making the choice which, in truth, is forced upon him by sheer economic necessity. Virtually every case is vulnerable to this process. There is some aspect to the case that allows counsel to rationalize not undertaking the investigation that effective advocacy demands.

In order to rationalize not conducting any investigation in Mr. Graham's case, Mr. Mock had to deal with Mr. Graham's insistence that he was innocent, and the only way to deal with it without investigating it was discount it, to rationalize not investigating it because, for some reason, it was not true.

The point of vulnerability in Mr. Graham's case that allowed Mr. Mock to make this judgment without any investigation was that Mr. Graham was charged with a string of other crimes -- all aggravated robberies and one accompanying rape -- during the seven-day period that followed the murder of Mr. Lambert on May 13, 1981. Either the bare charges or Mr. Graham's admission to Mock that he did commit some of these crimes, SF 21-22, or both, gave Mr. Mock a basis for believing that Mr. Graham was guilty of the murder of Bobby Lambert. Mr. Mock has neither confirmed nor denied this -- though there has been an opportunity for him to do so in recent state habeas proceedings. However, there is no other available rationale for his believing Mr. Graham was guilty of the Lambert murder. Merv West has acknowledged that the other charges were the

reason -- in addition to Mr. Mock's "insinuation" that Mr. Graham was guilty -- that he believed Mr. Graham had committed the Lambert murder:

> [Two Houston police detectives] told me about the other crimes Gary was charged with and about how he was arrested. Because they knew Gary was guilty of the other crimes they thought that Gary was guilty of the murder of Bobby Lambert. After talking with Ron Mock and these detectives, I too assumed that Gary was guilty.

Exhibit A to state habeas petition. These charges are the only reason Ron Mock had for adopting the same assumption.

The rationale that supported Mr. Mock's decision not to investigate was fundamentally unreasonable. As we will demonstrate in the next section of the complaint, except for the ostensible motive of robbery, there were no common elements between the murder of Mr. Lambert and the robberies which Mr. Graham committed. There was no reason for Mr. Graham's defense lawyer to assume -- even if police officers did -- that Mr. Graham was guilty of the Lambert murder because he committed the robberies. Moreover, the only evidence against Mr. Graham was the identification by one eyewitness. Without any investigation, Mr. Graham's lawyers knew that there were at least two eyewitnesses who did not identify him. Plausible avenues for investigation were obvious and plentiful. However, the forces set into motion by the inadequacies of Texas' indigent defense system prevented Mr. Graham's lawyers from pursuing any of those avenues. And for that reason, an innocent person now is on the brink of execution.

What Mr. Graham's lawyers could have found if they had

undertaken reasonable investigation is the subject of the next and final section of this complaint.

III.

ON THE BASIS OF ALL OF THE AVAILABLE EVIDENCE IT IS CLEAR THAT GARY GRAHAM IS INNOCENT AND THAT HE WAS MISTAKENLY IDENTIFIED AS THE PERSON WHO KILLED BOBBY GRANT LAMBERT

A. The Entire Case Against Mr. Graham Rested on the Testimony of One Witness.

The only evidence against Mr. Graham was the testimony of an eyewitness to the murder, a woman named Bernadine Skillern. On the night of May 13, 1981, at approximately 9:30 p.m., Ms. Skillern parked in the dimly lit lot of a Safeway store on the northeast side of Houston. T., Vol. XV, at 234. See also Appendix A.[16] Shortly after she parked, still sitting in the driver's seat of her car, Ms. Skillern noticed Bobby Lambert, a white middle-aged man, leave the store and walk into the parking lot. Id. at 236. A young black man approached Mr. Lambert, took hold of him, and held a gun to his head. Id. at 324-26. Lambert and this person were

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[16] This discussion of the facts of Mr. Graham's case is excerpted from his petition for writ of habeas corpus. Accompanying the petition was a large appendix with exhibits that supported the discussion of the facts. The appendix has not been included with the instant complaint, because the facts of Mr. Graham's case are set forth as illustrative of the problems created by Texas' system of indigent defense, not as a prima facie case for the Department's quasi-judicial review. Should any of the documents become necessary for the Department's assessment of Mr. Graham's complaint, we will be glad to forward them. Attached as Exhibit 3 hereto is the index from the appendix to the habeas corpus petition, so that documents referred in the text may be identified.

approximately 33 - 44 feet away from Ms. Skillern's car.[17] When this occurred, Ms. Skillern blew her horn. Id. at 330. The black man then looked her way for "a split second, maybe, a second." Id. at 331. After that, the black man shot Mr. Lambert and Lambert fell on the hood of a nearby brown car. Id. The black man then walked away quickly, and as he did so, Ms. Skillern testified that she started her car and followed him to the edge of the parking lot. Id. at 336-38. As the man was about to cross the street, he hesitated and looked back at Ms. Skillern's car, then ran off. Id. at 338. At that point, Ms. Skillern was approximately a car length away from the man. Id. at 383-84. Ms. Skillern told the police that the assailant was 5'9" or 5'10" and slender, about 150 pounds, with no facial hair and a short afro. Id. at 349.

Nearly two weeks later, Ms. Skillern was shown an array of five photographs that included Mr. Graham. Id. at 288. She was not certain that she recognized anyone in these photographs but went back to Mr. Graham's photographs several times. Id. at 291. The next day, Ms. Skillern viewed a lineup of five people that also included Mr. Graham. Id. at 294. At the lineup, she identified Mr. Graham as the person who killed Bobby Lambert. Id. at 301.

B. The Only Other Trial Evidence That Appeared to Link Mr. Graham to the Crime Was Based on a False Impression.

In the guilt phase of the trial, the medical examiner

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[17] Ms. Skillern later paced the distances between relevant points in the parking lot. She testified that her pace was one-and-one-half to two feet and that the distance between her car and the spot where the assault occurred was twenty-two paces. T., Vol. XV, at 343-44.

testified that the fatal bullet was consistent with a .22 caliber bullet. T., Vol. XV, at 403. In the penalty phase, two witnesses established that Mr. Graham had in his possession a .22 caliber revolver at the time of his arrest, one week after the murder of Bobby Lambert. T., Vol. XVIII, at 414-17, 422-23 (testimony of Lisa Blackburn and Officer Meador). The association of these two facts created the impression that the fatal bullet was fired by Mr. Graham's gun. This impression was false.

Shortly after Mr. Graham's arrest, a firearms examiner in the Houston Police Department, C. E. Anderson, test-fired the gun taken from Mr. Graham and compared the test-fired bullet with the fatal bullet. Appendix B. On May 28, 1981, he concluded unequivocally that the fatal bullet "was not fired" by Mr. Graham's gun. Id. However, this evidence was not presented at the trial. Indeed, it was not known to counsel for Mr. Graham until April 26, 1993, when the Harris County District Attorney made his file available to counsel for Mr. Graham.[18]

There was absolutely no other evidence introduced at trial that linked Mr. Graham to the crime.

C. **The Observations of the Six Other Known Eyewitnesses Exonerate Mr. Graham.**

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[18] The district attorney also made his file available to defense counsel before trial. However, there is no confirmation that this report was at that time a part of the file. If it was, defense counsel failed to correct the misimpression created by the state's evidence at trial. Between trial, which concluded October 30, 1981, and April 26, 1993 -- when the district attorney opened his file to inspection by counsel for Mr. Graham in response to an advisory opinion by the attorney general -- the district attorney's file was closed to counsel for Mr. Graham.

Six people, in addition to Bernadine Skillern, are now known to have witnessed the murder of Mr. Lambert: Daniel Grady, Wilma Amos, Ronald Hubbard, Malcolm Stephens, Lorna Stephens, and Leodis Wilkerson. Taken together, their observations establish that Mr. Graham was not the person who committed the murder.

Mr. Grady and Ms. Amos testified as prosecution witnesses at trial. Mr. Hubbard, Mr. and Ms. Stephens, and Mr. Wilkerson did not testify at trial. Indeed, neither Mr. Graham nor his attorneys knew anything about these witnesses' observations until present counsel for Mr. Graham conducted a full investigation of Mr. Graham's case this year. In a variety of ways, all six witnesses' observations contradict the observations of Bernadine Skillern and demonstrate that Mr. Graham is not guilty.

Mr. Grady testified that he was parked in the Safeway lot on the night of May 13, 1981, approximately halfway between Bernadine Skillern's car and the store. T., Vol. XIV, at 194-96.[19] He waited in the car while his wife was in the store. Id. Like Skillern, he also observed the assault of Mr. Lambert. However, his vantage point was much closer. The entire incident took place approximately four feet in front of his car. Id. at 219. During the course of the incident, Mr. Grady saw the face of the black assailant several times, but he testified that he could not see him well enough to be able to identify him. Id. at 206, 209. At another point in his testimony, Mr. Grady testified, "[I] can't

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[19] See Appendix A, where we have used scale drawings to reconstruct the crime scene and sequence of events observed by the eyewitnesses.

remember what the Black man looked like." Id. at 225.

Wilma Amos testified that she was walking out of the Safeway store to her van when she noticed a white man and a black man arguing and "tussling" nearby in the parking lot. T., Vol. XIV, at 168-69, 184. See also, Appendix A. She heard a gun shot, and shortly thereafter the black man walked by her, hesitating for a moment when he reached her van. Id. at 187. Despite this encounter, she testified that she couldn't remember what he looked like. Id. at 173, 187.

> It wasn't that far from the end of my van and he just stopped and stood for a second, and I don't know how I draw a blank on how he looked because he stood there and just stared for a second or two, and then took off running....

Id. at 187.

Had Mr. Grady and Ms. Amos been shown photo arrays and lineups that included Mr. Graham, their testimony that they did not identify him as the assailant would have been very significant. Each was much closer to the assailant than Ms. Skillern and had a better opportunity to observe him than she did. Thus, their non-identifications could well have carried more weight than Ms. Skillern's identification. In fact, this is what occurred, yet this information was omitted from these two witnesses' trial testimony.

Ms. Amos was shown a photographic array and was asked to view a lineup. Appendix C. No one that she saw in the array or the lineup looked like the person who committed the crime. Id. Mr. Grady died between the trial and the time that present counsel

tried to interview him, in April, 1993. Appendix D. However, Mr. Grady's widow informed counsel that her husband had viewed a lineup. Id.[20] There is no record of the array or the lineups viewed by these witnesses. The district attorney's file makes no reference to either witness viewing photo arrays or lineups. However, it is reasonable to infer that the lineups included Mr. Graham, since the lineup with Ms. Skillern did.

These witnesses' failure to identify Mr. Graham is significant and is also consistent with their trial testimony that they could not remember what the assailant looked like. Ms. Amos' experience is illustrative and revealing. On the night of the crime, she was interviewed by one of the investigating officers, who noted the following:

> Mrs. Amos described the suspect as a N/M in his 20's, short dark hair, clean shaven, wearing black slacks and a white coat. Mrs. Amos is certain she can identify the suspect.

Appendix E. Two days later, in a written statement, Ms. Amos was not quite as certain of her ability to identify the assailant: "If I were to see the black man that did the shooting[,] I possibly could identify him again." Appendix F. Thereafter, if Ms. Amos viewed the photo array and lineup within the same time frame as Ms. Skillern, she would have viewed them within approximately two weeks of the crime. If at that point no one was in the array or the lineup that fit her fading memory of the assailant -- as she has

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[20] Since Mr. Grady did not testify that he identified the assailant in a lineup, it is reasonable to infer that he, like Ms. Amos, did not see anyone that looked like the person who committed the crime.

sworn was the case -- her ability to remember how the assailant looked could easily have faded to the point where she was at trial, when she testified that she could not remember how he looked. Nevertheless, her examination of an array and lineup that included Gary Graham, and her perception that he was not the assailant, would have been significant. However, no one asked her whether she had viewed Mr. Graham in an array and lineup.

Ms. Amos' inability to remember at trial what the assailant looked like did not necessarily mean that she would have been unable to rule someone out as the assailant. Common sense tells us that one may not be able to give a verbal description of someone's appearance and may not be confident enough of someone's appearance to connect him to a crime, yet may be perfectly confident of ruling that person out as an assailant. That is precisely what happened here. In April, 1993, when Ms. Amos was asked -- for the first time as far as we know -- to examine photographs of Gary Graham at the time of the crime and to determine whether he might have been the assailant, she declared, "I ... am certain that Gary Graham was not the man who shot Bobby Lambert." Appendix C. Accordingly, Ms. Amos' silence about Gary Graham in her trial testimony was highly significant.[21]

Ms. Amos also made a crucial observation about the assailant that was not reported in her trial testimony. The occasion for this observation was her face-to-face encounter with the assailant

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[21] Although we cannot establish that Mr. Grady's silence was of equal significance -- due to his intervening death -- that cannot be ruled out.

shortly after the shooting. As recounted in her affidavit, Appendix C, Ms. Amos still remembers quite vividly her face-to-face encounter with the assailant beside her van:

> When he got to where I was standing, he looked me right in the eye. We were about five feet away from each other. He stood looking towards me for a few seconds, and I asked him to please leave me alone. He still had a gun in his hands. He looked at us and then left. I got a real good look at him since he was standing in front of us.

Appendix C, at 1. She also remembers something important about this man: he was not much taller than her.

> The man who shot Bobby Lambert was about one or two inches taller than me. He was standing right in front of me and our eyes were almost level. He could not have been taller than 5'6", and was probably closer to 5'5". I am about 5'2 1/2" and was wearing flat shoes. I am positive the shooter was not a tall man.

Id.

Obviously, eyewitnesses can be mistaken about the height of the people they observe. However, Ms. Amos' estimate of the height of the man who killed Mr. Lambert was made under the conditions most favorable to making a reliable estimate. She was standing at the time of her observation, and she established a point of reference for estimating the assailant's height. As an expert in eyewitness identification, Dr. Curtis Wills, has explained, these are conditions that tend to produce more reliable estimates of height. Appendix G. Further, Ms. Amos' estimate of the assailant's height was confirmed by every other eyewitness who is

still alive -- except for Ms. Skillern.[22]

Ronald Hubbard worked at the Safeway and was standing outside in front of the store when he heard a gunshot. Appendix H. From his vantage point, he saw the assailant running off but never saw his face very clearly. Id. Nevertheless, Mr. Hubbard did take note of the assailants height: he estimated it as 5'6". Id.[23] Notes from the investigating police officers' interview with Mr. Hubbard the day after the murder provide even more details about the person he observed:

> [Mr. Hubbard] stated that he had gone into the parking lot of the store to collect shopping carts. He noticed a B/M in his early 20's, 5'5", 120-130 lbs, short Afro hair, clean shaven, wearing a white blazer and black slacks.

Appendix I.

Two other eyewitnesses, Malcolm and Lorna Stephens, drove into the Safeway parking lot immediately after the shooting. See Appendices J and K. The assailant ran right in front of their car, and they nearly hit him. Id. Mr. Stephens estimated the person's height as 5'5". Appendix J. Ms. Stephens estimated it as less than her husband's height of 5'7". Appendix K.

Finally, Leodis Wilkerson was also in the Safeway parking lot at the time Mr. Lambert was killed. At the time, he was 12 years

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[22] Mr. Grady did not testify about the assailant's height, and because he is now dead, we cannot know what his observations might have been.

[23] Since Mr. Hubbard's estimate of the assailant's height was made while Mr. Hubbard was standing, it is more reliable than Ms. Skillern's estimate, which was made while she was seated in her car. See Appendix G.

old. Exhibit 4.[24] Mr. Wilkerson, who is now 24 years old, observed the entire crime. Id. Critically, he remembers the following about the assailant's height: "The young black guy was short. He was shorter than the guy he shot." Id. This observation is extremely significant, for Mr. Lambert was only 5'6". T., Vol. XV, 399.

Significantly, the police reported Mr. Graham's height at that time as 5'9". See T., Vol XV, at 297. Ms. Skillern estimated the assailant's height as 5'9"-5'10". However, Ms. Skillern was at a disadvantage in estimating the assailant's height. She was 33-44 feet away, and she was sitting down. According to Dr. Wills, estimates of height made by people who are sitting down tend to be taller than the person actually is. Appendix G. All the other eyewitnesses who observed the assailant's height -- including three whose estimates were more likely to be reliable than Ms. Skillern's estimate -- agreed that the assailant was no more than 5'5" or 5'6". Accordingly, the most accurate estimate of the assailant's height, 5'5", would have excluded Mr. Graham as a suspect.

All the other living eyewitnesses reported another consistent observation that contradicted the testimony of Ms. Skillern about her experiences that night. As noted above, Ms. Skillern testified that she drove after the assailant through the parking lot

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[24] The affidavit of Mr. Wilkerson is included herewith as an exhibit because he had not been located at the time the habeas petition was filed, so there is no appendix to the petition that includes his affidavit. He was first identified when the district attorney disclosed his file to us on April 26, 1993. He was a witness with whom the police worked in trying to identify the assailant.

following the shooting. However, none of the other eyewitnesses saw a car following or driving behind the assailant as he ran off. See Appendices C (Amos), H (Hubbard), J (Malcolm Stevens), and K (Lorna Stevens). Because Ms. Amos and Mr. and Ms. Stevens were directly in the path of the assailant's flight, they naturally would have taken notice of a vehicle attempting to follow the assailant. See Appendix A (crime scene diagrams). On the other hand, Mr. Hubbard observed the course of the assailant's flight from a position that allowed him to see much of the parking lot. Because of this, he likely would have noticed any vehicle that appeared to be in pursuit of the assailant. Appendix H.

By far, the most dramatic contradiction of Ms. Skillern's identification of Mr. Graham has been provided by Malcolm Stephens. As we have noted, Mr. Stephens observed the assailant as he fled from the scene of the shooting. The assailant ran in front of Mr. Stephens' car, hesitated to look at Mr. Stephens as Mr. Stephens put his brakes on to avoid hitting him, and continued running out of the Safeway parking lot. Appendix J. Mr. Stephens described the assailant as a "young black guy ... about 5'5"[,] ... compact, but not big[,] ... [with] short hair, and [no] beard or anything like that." Id. Immediately after this person ran off, Mr. and Ms. Stephens saw Mr. Lambert staggering toward the store. Id. Given the sequence of events, there is no doubt that the person who ran in front of the Stephens' car was the person who killed Mr. Lambert.

After he provided this information, between April 20, and

April 24, 1993, Mr. Stephens saw Gary Graham on television. What he saw troubled him deeply. On April 24, 1993, he explained the significance of this experience in a supplemental affidavit, which is attached hereto as Appendix L:

> I saw two stories about Gary Graham's case on television this week, one on Channel 11 and one on 'City Under Siege.' Both stories had Gary Graham on them. They had him on videotape from the prison where he is now, and they had pictures of how he looked back in 1981 when the murder took place. When I saw these pictures, I knew that Gary Graham was not the person I saw run in front of my car at the Safeway parking lot the night the man was shot there. I am sure of that.

After this experience, Mr. Stephens realized that "they have the wrong person for this murder." Id. This realization made him determined to disclose additional information that he had not disclosed previously out of reluctance "to become too deeply involved in this case." Id.

The additional information known by Mr. Stephens is that he had further contact with the person who killed Mr. Lambert long after the murder. This contact has allowed him to be certain that the person who killed Mr. Lambert was not Gary Graham. As he has explained in his supplemental affidavit,

> A little over a year after the murder, sometime in 1982, I ran into the guy who I saw in front of my car that night at the Safeway. I met him several times more after that, in 1983 and in 1985. I first met him at an apartment complex near Little York and Northline. I talked with him for about five minutes. He seemed to be somebody I knew but I couldn't place him at first. After I learned more about him, I put it together: he was the guy that ran in front of my car at the Safeway the night of the murder.

> This guy looked just the same as he did that night at the Safeway. He was a young black man, with brown skin, short hair, and no facial hair. He was well built, about 160 pounds, and short, about 5'3" or 5'4". He had a mean look in his face, but he did not sound mean when he talked. I am sure that I would recognize him again today if I saw him.

Appendix L.

To test Mr. Stephens' observations, counsel for Mr. Graham showed him the various photographs of Mr. Graham that were available at the time of the murder of Mr. Lambert. Mr. Stephens responded, "After seeing all the pictures of Gary Graham, I am still totally certain that he is not the person who ran in front of my car." Id. Upon being shown the composite sketch of the assailant which Bernadine Skillern helped police artists put together, however, Mr. Stephens immediately noted that the composite looked like the assailant -- but not like Mr. Graham:

> After seeing the sketch, I can say that is how the person looked who ran in front of my car -- the same guy that I saw several times during 1982, 1983, and 1985. Gary Graham does not look anything like this guy.

Appendix L. Copies of the photographs of Mr. Graham and the composite sketch of the assailant are attached hereto as Appendix M. It is quite apparent that the person depicted in the composite does not look at all like Gary Graham.

Accordingly, the other eyewitnesses' observations -- not identifying Mr. Graham in photo arrays and lineups that likely included him, noting that the assailant was substantially shorter than Mr. Graham was at the time of the murder, noting that no car followed the assailant as he fled from the parking lot after the

shooting, and affirmatively declaring that Mr. Graham was not the assailant and that the assailant was still at large as of 1985 -- call into grave question whether anything Bernadine Skillern observed and reported was reliable. These observations alone go far beyond the showing of actual innocence required by Kuhlmann. However, there is more evidence that undermines Ms. Skillern's testimony even further.

D. The Eagerness of Ms. Skillern to Help the Police and the Manifest Suggestiveness of the Identification Procedure So Erode the Reliability of Her Identification That Virtually No Reasonable Juror Could Have Found Mr. Graham Guilty Beyond a Reasonable Doubt.

In his report concerning eyewitness testimony, Dr. Wills notes that an eyewitness's motivation to help, particularly to help law enforcement by putting oneself at risk, decreases the accuracy of an identification. Appendix G. This quality was present in Ms. Skillern and made her particularly vulnerable to a suggestive identification procedure. When the police exposed her to such a procedure, her identification was one that virtually no reasonable juror could find reliable.

The police presented Ms. Skillern with two photo arrays and a live lineup. The photo arrays had the effect of directing Ms. Skillern toward Mr. Graham. As we have noted, Ms. Skillern described the assailant as having no facial hair and a "short, compact afro." T., Vol. XV, at 349. In the first photo array, which did not include Mr. Graham, all of the persons depicted had

facial hair and longer, looser afros. See Appendix N.[25] Thus, Ms. Skillern would have seen no one even meeting her general description in this array. In the second array, which included Mr. Graham, three of the persons had facial hair, and of the remaining two, only Mr. Graham had a "short, compact afro." See Appendix O. The other person without facial hair had an extremely loose, bushy afro. Id.

Further, of the ten photographs included in these arrays, the dates of the photograph are shown directly on eight. Only two of these eight are dates in 1981; however, neither matches Ms. Skillern's general description of the assailant. See Appendix O. The remaining six photographs were taken between 1975 and 1980. See Appendices N and O. Finally, of the two photographs which are undated, one is of a person with facial hair and a loose, medium-length afro -- not fitting Ms. Skillern's description -- and the other is Mr. Graham, who fits the general description.

Accordingly, the photo arrays inexorably directed Ms. Skillern toward the photograph of Mr. Graham. That Ms. Skillern kept coming back to Mr. Graham's photograph, as reported by Detective Ellis, T., Vol XV, at 291, was, therefore, as much the product of the suggestivity of the photo arrays as of Ms. Skillern's memory of a

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[25] In Appendix O, we have four of the five color photographs that were shown to Ms. Skillern in the first array. See T., Vol. XV, at 284-86. The fifth color photograph from that array could not be located by the court clerk's office. Accordingly, we have included a black-and-white photocopy of that photograph, State's Exhibit 56, from our copy of the trial exhibits. That copy is not adequate to depict the presence or absence of facial hair, but it does depict a person with a loose, bushy afro.

particular person.

If the photographs of the live lineup observed by Ms. Skillern, Appendix P, are compared to the photo arrays, Appendices N and O, another highly suggestive feature of the process would have jumped out. It appears that Mr. Graham is the only person who was both depicted in the photo arrays and in the live lineup. Accordingly, the lineup may have been nothing more than a test of Ms. Skillern's short-term memory -- remembering the person to whom she was directed in the photo arrays and matching that person with the only person who appeared again in the lineup. A comment by her to the police officer who was with her during the lineup confirms the likelihood of this. As the officer noted,

> [W]hile the witness Skillern was being driven to her home after the showup by Owen, she told Owen that she recognized the suspect she picked as being in the photo showup she view[ed] the previous night.

Appendix Q.

Further compromising the reliability of Ms. Skillern's identification was her strong desire to help the police solve the crime. As Dr. Wills has pointed out, Ms. Skillern's decision to follow the assailant after he shot Mr. Lambert reflected a very strong desire to help law enforcement. See Appendix G.[26] This desire virtually guaranteed that Ms. Skillern would identify

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[26] It does not matter whether Ms. Skillern actually followed the assailant. All the other eyewitnesses' observations suggest that she did not follow him. See discussion, supra. Her need to suggest that she followed the assailant, even though she did not actually follow him, reflects just as powerful a motivation to help law enforcement -- and to be so perceived. Appendix G.

someone as the assailant, whether or not that person was the actual assailant observed by Ms. Skillern. Id. The police assured that the identification would be of Mr. Graham when they set up the photo array and lineup procedures to focus Ms. Skillern's attention on Mr. Graham. Id.

Accordingly, there is a substantial risk that, because of her own motivation and the suggestiveness of the identification procedure, Ms. Skillern's identification of Mr. Graham was thoroughly unreliable.

E. Alibi Witnesses Were Available Who Were Credible and Whose Credibility Is Bolstered by the Utter Weakness of Ms. Skillern's Identification.

With the reliability of Ms. Skillern's identification shaken to the core, the credibility of witnesses who claimed to be with Mr. Graham several miles away from the site of the crime at the time the crime took place is enhanced exponentially. These witnesses -- Loraine Johnson, William Chambers, Dorothy Shields, and Mary Brown -- were all friends or relatives of Gary. As such, they might have been subject to impeachment and disbelief. However, each could have given a detailed account of the time they were all together with Gary, from late in the afternoon on May 13, 1981, to after midnight on May 14, 1981. See Appendices R, S, T, and U. While Gary and William Chambers ran a couple of errands during this time, on each occasion they went on foot to a nearby liquor store or grocery store, returned in fifteen minutes or less, and had their sought-after purchases with them. Id.

Moreover, their ability to be certain that they were together

on May 13, not a day or two before or after May 13, rested on this day being the mid-point between two birthdays of significance, May 11 and May 15, and on Loraine Johnson having had a severe toothache that day. Id. Shortly after they heard that Mr. Graham had been charged with the murder -- on or about May 29, 1981 -- they reconstructed the events of May 13. See Videotaped Interviews of the Alibi Witnesses, labeled Appendix V.

Further enhancing the credibility of these witnesses is the effort that they undertook to be heard on behalf of Mr. Graham at his trial. Although Mr. Graham's trial defense team made no effort to contact any of the alibi witnesses, Mr. Graham's grandmother, Joanna Houston, monitored what was happening in the case. As Loraine Johnson explains in Appendix V, at the appropriate time, Ms. Houston provided bus fare for her and she went to the trial to testify on behalf of Gary. However, her efforts were rebuffed by Gary's lawyer, and she was not called as a witness.

That these witnesses could not have been easily dismissed is established not only by these events, but also by their performance on recent polygraph examinations. All four have passed polygraph examinations concerning their accounts of their time with Gary on May 13, 1981. See Appendix W (polygraph reports for all four witnesses). While not admissible in court, the results of these polygraph examinations confirm that these witnesses would have been seen as credible by at least some jurors. Certainly in combination with the pervasive questions about the reliability of Bernadine Skillern's identification, these witnesses' credibility would have

been formidable.

F. Mr. Graham Has Always Insisted That He Is Innocent

From the moment he was charged with the murder of Bobby Lambert to today, Gary Graham has adamantly denied any involvement in the crime. At every step along the way, every lawyer who has represented Mr. Graham has been quite clear about Mr. Graham's insistence that he is innocent. We have already noted that his lead trial lawyer, Ron Mock, testified at the state habeas corpus hearing in 1988 that "[h]e always emphatically denied his involvement, or any involvement."
SF 22.

When Doug O'Brien began representing Mr. Graham on appeal shortly after he was convicted, he insisted that he was innocent and immediately complained about his trial lawyers' failure to challenge the State's case of guilt. Mr. O'Brien remembers this early contact with Mr. Graham quite vividly:

> Upon my appointment to Mr. Graham's case I met with him in the Harris County jail. I explained to him how the appeals process worked and talked with him about his case. He was very upset about his conviction and felt very strongly that his attorneys Ron Mock and Chester Thornton did not do a good job of representing him at his trial. He told me that he was totally innocent of the capital case and that Mr. Mock and Mr. Thornton had failed to call any of the witnesses that he had told them about. He said that he had a number of witnesses who could testify that it was impossible for him to have committed the murder because he was with them that night. He said he gave the names of some of the witnesses to Mock and told him that by talking to them other names could be obtained. I told Mr. Graham that under Texas law his complaint was basically one of ineffective assistance of

> counsel and could not be addressed until the direct appeal was complete.

Appendix Z (affidavit of Doug O'Brien).

Finally, when the Texas Resource Center began working with Mr. O'Brien on Mr. Graham's case, Mr. Graham quickly let Resource Center lawyers know that he was innocent:

> In his numerous conversations with me, Mr. Graham has always forcefully maintained his innocence of the murder of Bobby Lambert. He has never suggested that he was involved in any way in that crime, not even to the point of asking "hypothetical" questions that might assume his guilt. On the contrary, Gary has insisted that he was in the company of friends and family on the night of the murder, and that he spent the entire evening with them.

Appendix Y (affidavit of Robert C. Owen).

G. The Collateral Offenses Committed by Mr. Graham Support His Insistence that He Is Innocent of the Murder of Bobby Lambert.

From the time Mr. Graham was first charged with capital murder to the present, his conceded guilt for a string of robberies that were committed in the week after the Lambert murder has unfairly influenced the process of determining whether he is guilty of the murder of Bobby Lambert. Although our system of jurisprudence demands that individual offenses be considered and proven separately, the law of Texas does give expression to the common sense assumption that extraneous crimes may become relevant where they establish a unique style of operation on the part of the defendant. Such a pattern might permit an inference of guilt where the case at bar is strikingly similar to other offenses known to have been committed by the defendant. Likewise, as in the case of

Gary Graham, such "signature" crimes raise an inference of innocence where the case at bar departs significantly from the distinctive pattern of the defendant's known offenses. The robberies to which Mr. Graham plead guilty differ so markedly from the crime witnessed by Bernadine Skillern as to operate as further evidence of Mr. Graham's innocence.

From the sworn testimony of ten witnesses who were robbed by Mr. Graham in the days immediately following the murder of Bobby Lambert, it is clear that there was a distinct pattern to these offenses:

1. Mr. Graham approached all of these witnesses in deserted areas, or brought them to secluded places before robbing them. Linda Jennings and a friend were approached at a near-empty car wash.[27] Emory Dedman[28], Richard Carter[29], Mohsen Nematolli[30] and Richard Sanford[31] were all getting in or out of their cars in deserted parking garages. Where Mr. Graham did make contact in a public place, he took care to find more privacy before revealing his plans and a weapon. He got into Gregory Jones' van[32]; had Yale Salsgiver drive him to an empty parking lot[33]; drove Ernest Doakes

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[27] Vol. 17, pg. 99.

[28] Vol. 17, pp. 75-76.

[29] Vol. 17, pg. 265.

[30] Vol. 18, pg. ??

[31] Vol. 18, pg. 226.

[32] Vol. 17, pg. 302.

[33] Vol. 18, pg. 469.

away from the apartment building where they met[34]; and hired Lisa Blackburn to drive him to an abandoned apartment in her taxi cab[35]. Mr. Graham never displayed a weapon in a public area, as did the perpetrator in the Bobby Lambert shooting.[36]

2. It was Mr. Graham's habit to engage people in innocent conversations before he robbed them. In each case, he engaged them in conversations--asking for directions, help starting his car, or a ride. He asked Linda Jennings to sell him the car she was driving[37]. He offered a marijuana cigarette to Gregory Jones[38]. Yale Salsgiver was asked for directions and a ride[39], as were Emory Dedman[40] and Richard Sanford[41]. Gary offered to sell a belt buckle to Mohsen Nematolli for $50.00[42], and asked Lisa Blackburn if she needed help pumping gas[43]. He chatted and joked with Richard Carter for fifteen minutes[44]. These accounts of Mr. Graham's disarming style stand in stark relief to the scene

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[34] Vol. 17, pg.254.

[35] Vol. 18, pg. 384.

[36] Testimony of Bernadine Skillern, Vol. 15, pp. 327-330.

[37] Vol. 17, pg.104.

[38] Vol. 17, pg. 300.

[39] Vol. 18, pg. 466.

[40] Vol. 17, pg. 78.

[41] Vol. 18, pg. 228.

[42] Vol. 18, pg. 449.

[43] Vol. 18, pg. 383.

[44] Vol. 17, pg. 270.

described by Bernadine Skillern, in which the gunman came from behind and grabbed his victim before a word had been exchanged.[45]

3. Mr. Graham's robberies all took place inside vehicles. He got into the cars of Linda Jennings[46], Greg Jones[47], Yale Salsgiver[48], Ernest Doakes[49], Moshen Nematolli[50], Richard Sanford[51] and Lisa Blackburn[52]. The robbery of Emory Dedman took place inside Gary's van[53], and Richard Carter was called over to the trunk of the car Mr. Graham was driving[54].

4. Though not all of these robberies took place without violence, Mr. Graham typically did not assault his victims, and where violence was used, it was qualitatively different from that directed at Bobby Lambert. Linda Jennings, Emory Dedman, Richard Carter, Ernest Doakes, and Richard Sanford were untouched. Mohsen Nematolli was hit once with the butt of a gun. When Mr. Graham hit

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[45] Testimony of Bernadine Skillern, Vol. 15, pp. 327-8. Testimony of Daniel Grady, Vol. 14, pg. 201.

[46] Vol. 17, pg. 104.

[47] Vol. 17, pg. 302.

[48] Vol. 18, pg. 466.

[49] Vol. 17, pg. 253.

[50] Vol. 18, pg. 459.

[51] Vol. 18, pg. 232.

[52] Vol. 18, pg. 384.

[53] Vol. 17, pg. 82.

[54] Vol. 17, pg. 273.

Gregory Jones with a gun, it discharged inadvertently[55]. Yale Salsgiver struggled with Mr. Graham and momentarily disarmed him[56]. Lisa Blackburn alleges that she was raped[57] (though this charge was dismissed). In no case did Mr. Graham resort immediately to violence, as did the killer of Bobby Lambert, who grabbed Mr. Lambert and immediately drew his gun.[58] With the exception of the alleged and unproven sexual assault of Ms. Blackburn, each incident of violence was a controlled effort to facilitate escape. The killer of Bobby Lambert, on the other hand, purposefully raised his gun "with the arm fully extended," and shot, when he could just have easily run from the scene.[59]

Accordingly, if Mr. Graham had been the assailant of Bobby Lambert, the crime would have taken place in quite a different manner. He would have engaged Mr. Lambert in conversation, asked him for a ride, taken him away from the crowded Safeway, and released him unharmed. Far from proving him guilty of the Lambert murder, these other crimes further substantiate Mr. Graham's longstanding claim of innocence.

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[55] Vol. 17, pg. 308.

[56] Vol. 18, pp. 470-71.

[57] Vol. 18, pg. 394.

[58] Testimony of Bernadine Skillern, Vol. 15, pg. 327. Testimony of Daniel Grady, Vol. 14, pp. 201-204.

[59] Testimony of Bernadine Skillern, Vol. 15, pp. 332-3. Testimony of Daniel Grady, Vol. 15, pp. 204-5.

CONCLUSION

For these reasons, Mr. Graham respectfully requests that the Department:

1. Initiate a full investigation into the systemic deprivations of constitutional rights complained of herein;

2. Initiate appropriate legal actions to enforce compliance with the Constitution; and

3. Undertake any other action as called for by the nature of the constitutional violations complained of, including, without intending any limitation, appearing as an amicus curiae in ongoing legal proceedings, meeting with the Governor and/or Attorney General of Texas, and reporting to any interested member of Congress the results of the Department's investigation.

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