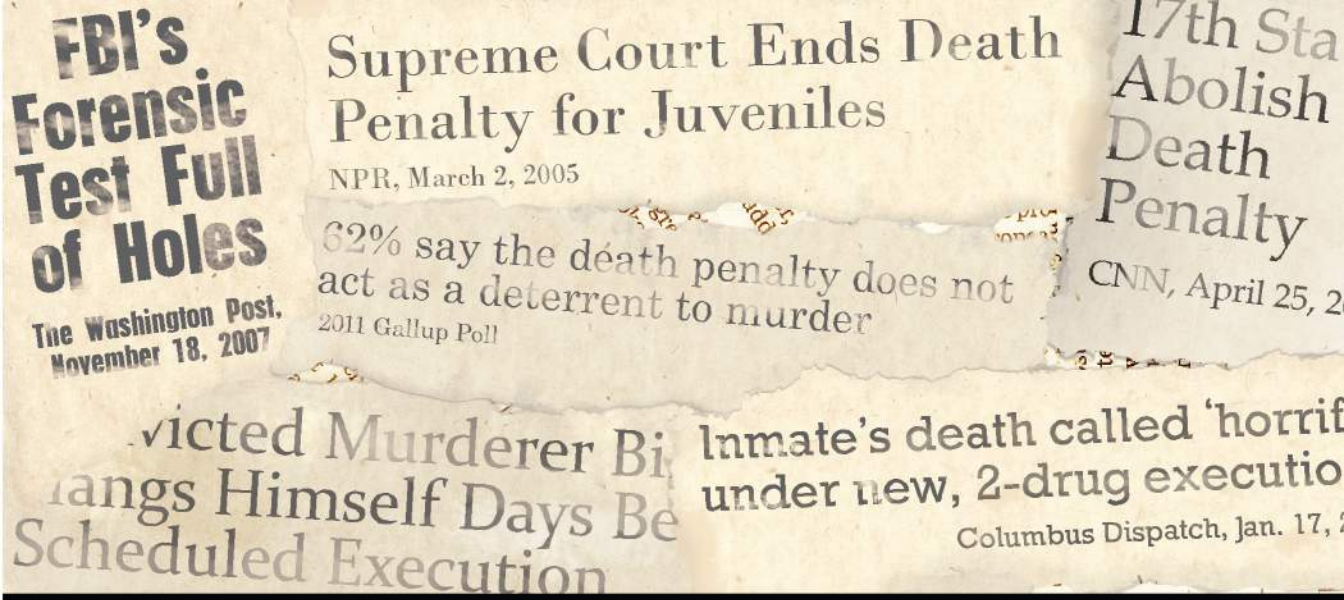
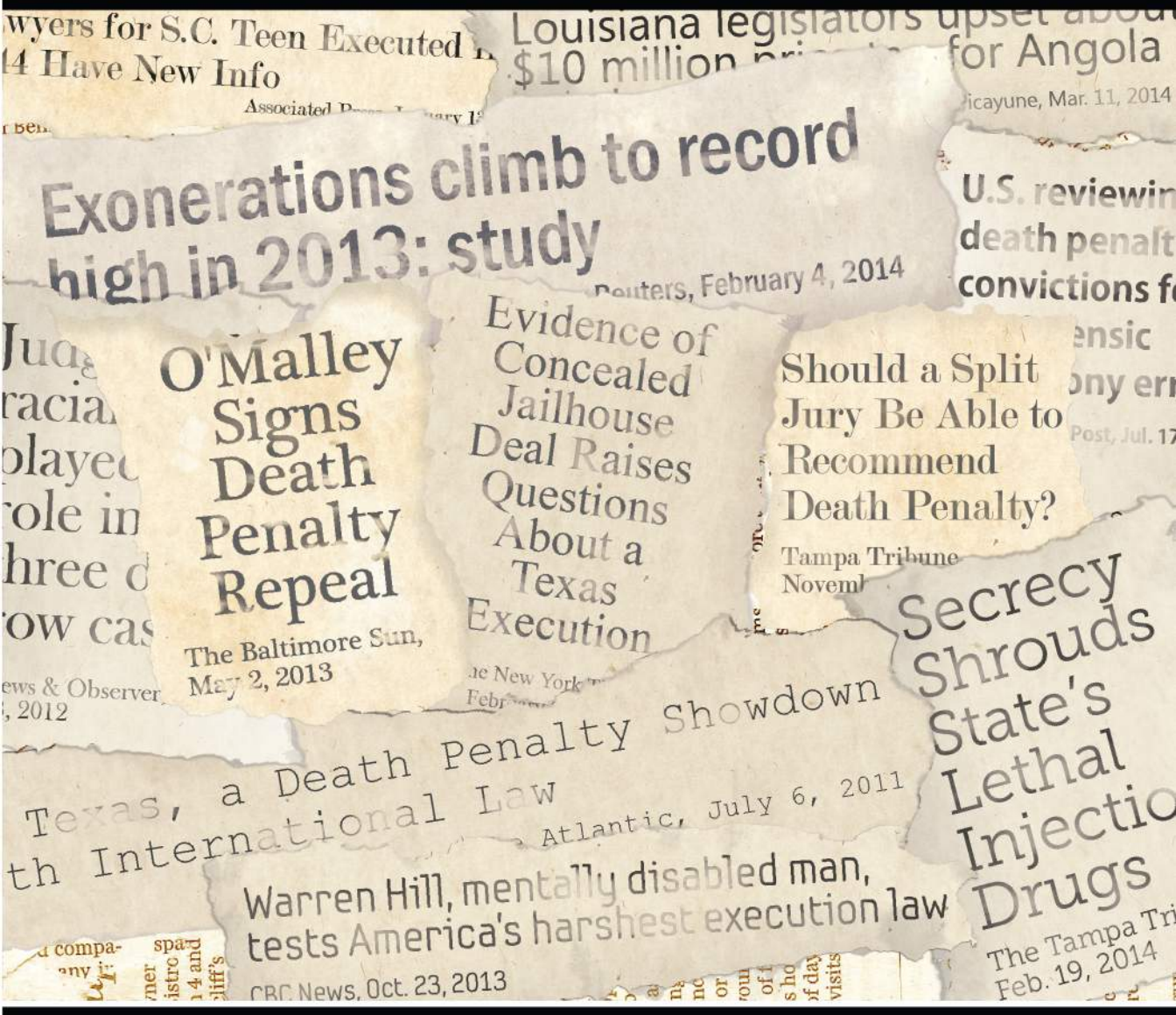



# Irreversible Error:

## Recommended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment




A Report of The Constitution Project's Death Penalty Committee

# Irreversible Error:

## Recommended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment

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# THE CONSTITUTION PROJECT STAFF

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Director of Communications

**Maria Cortina**
Hispanic Outreach Fellow

**Jennifer Donley**
Development Coordinator

**Christopher Durocher**
Government Affairs Counsel

**Louis Fisher**
Scholar in Residence

**Kayla Haran**
Program Assistant

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Communications Coordinator

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Rule of Law Program

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President

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Rule of Law Program

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Criminal Justice Program

**Stephen I. Vladeck**
Supreme Court Fellow

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**The Constitution Project promotes constitutional rights and values by forging a non-ideological consensus aimed at sound legal interpretations and policy solutions.**

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**Dr. Reginald Wilkinson**
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**Rev. Dr. Aidsand F. Wright-Riggins III**
Executive Director, American Baptist Home Mission Societies, American Baptist Churches, USA

## Past Members

Many distinguished individuals who have participated in The Constitution Project's Death Penalty Committee over the years have resigned from the Committee for a variety of reasons, including running for elective office, retirement, and other obligations. They have helped shape this and past reports and we are grateful for their contributions.

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Syndicated Columnist, 1955-2002

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Schwartz Lecturer and Senior Director, Mandel Legal Aid Clinic, University of Chicago Law School; Member, United States House of Representatives (D-IL), 1969-1973 and 1975-1979; White House Counsel, 1994-1995; Judge, D.C. Circuit United States Court of Appeals, 1979-1994; Chief Judge, 1991-1994

**Dr. LeRoy Riddick**
Adjunct Professor, Department of Pathology, University of South Alabama, 1990-2006

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Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, 1993-2000 and 2009-2012.

**Kurt L. Schmoke**
Mayor, Baltimore, 1987-1999; State's Attorney, Baltimore, 1983-1987

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President, American Baptist Churches, USA, 1996-1997

**Vin Weber**
Member, United States House of Representatives (R-MN), 1980-1992

**Rabbi Eric H. Yoffie**
President Emeritus, Union for Reform Judaism, 1996-2012

* Deceased

# ACKNOWLEDGEMENTS

We are grateful to the Atlantic Philanthropies, Blum-Kovler Foundation, Butler Family Fund, Proteus Action League, Ford Foundation, Open Society Foundations and Wallace Global Fund for their support over the years of our Death Penalty Committee and its work.

We also sincerely thank the law firm of Akin Gump Strauss Hauer & Feld LLP, which provided a team of attorneys, paralegals, legal secretaries and interns to guide The Constitution Project's Death Penalty Committee in crafting this report. The team was led by Akin Gump attorneys Julia E. Sullivan and Nicole H. Sprinzen, who provided expert guidance and significant time to this effort.

The Constitution Project also received first-rate guidance from its past reporters of *Mandatory Justice 2001* and *Mandatory Justice: The Death Penalty Revisited 2005*, Susan Bandes, Robert Mosteller, Margaret Paris and the late Andrew Taslitz, as well as social science consultant William J. Bowers. Their contributions continue to inform the Committee's research and recommendations.

# PREFACE

No matter what their political perspectives or views about capital punishment, all Americans share a common interest in justice for victims of crimes and for those accused of committing crimes. Through The Constitution Project's ("TCP") Death Penalty Committee, death penalty opponents and proponents have worked together to forge consensus-based recommendations aimed at achieving these common objectives.

For over a decade, TCP's Death Penalty Committee has provided a unique voice on death penalty policy. The Committee's members include both supporters and opponents of the death penalty. They are Democrats and Republicans, conservatives and liberals. They reflect the full range of criminal justice stakeholders, including those with experience as judges, prosecutors, defenders, law enforcement officers, policymakers, victim advocates and scholars. Committee members are motivated by a profound concern that the administration of capital punishment is deeply flawed and that years of mounting evidence demonstrate a continuing and alarming lack of accuracy and fairness. After more than a decade of work, the Committee remains devoted to its efforts to transcend the political and philosophical divisions that have long plagued this country's debate over the death penalty and to achieve consensus on meaningful measures to improve fairness and reduce wrongful convictions and executions.

The Committee has released two previous reports: *Mandatory Justice: Eighteen Reforms to the Death Penalty*, released in 2001 ("*Mandatory Justice 2001*") and an update, released in 2005, called *Mandatory Justice: The Death Penalty Revisited* ("*Mandatory Justice 2005*"). TCP and other organizations have widely distributed the Mandatory Justice reports. The consensus recommendations the Committee developed for these two reports have served as the foundation for improvements that courts and state and federal legislators around the country have instituted over the past thirteen years. With this new report, the Committee hopes to expand these efforts and also address new issues that have emerged since its last report. This report and the work of the Committee focus on the death penalty and the Committee takes no position on the application of the recommendations beyond the death penalty context.

The recommendations in *Irreversible Error*, the Committee's current report, each contain two parts. The first part is a black-letter statement urging policy and law reforms, which has been endorsed by the members of TCP's Death Penalty Committee. The second part is a discussion of the recommendations, prepared by the noted law firm Akin Gump Strauss Hauer & Feld LLP, which sets forth a more detailed legal and policy analysis supporting each of the Committee's recommendations. A draft of the full report was made available to the

Committee members as they developed their consensus statement. However, the Committee members have not been asked to endorse the specific language of the discussion portions of this report.

The Committee's efforts, and those of a host of other organizations and individuals across the country, have produced dramatic results. Notable examples of changes in constitutional law include the U.S. Supreme Court rulings that it is unconstitutional to apply the death penalty to individuals with intellectual disability[1] (*Atkins v. Virginia* (2002)) and to individuals who were minors when they committed the crime in question (*Roper v. Simmons* (2005)), both part of Recommendation No. 4 of *Mandatory Justice 2001* and *2005*. Just as significant has been the introduction of life without the possibility of parole ("LWOP") as an alternative sentencing option in capital cases in Texas and five other states. Today, the federal government, the military and all states with the death penalty make life without parole an available alternative to the death penalty, consistent with Recommendation No. 8 from the *Mandatory Justice reports*.

However, several jurisdictions have continued to maintain or have adopted outdated policies that do not reflect current best practices and that increase the risk of wrongful convictions and executions. As death penalty jurisprudence has evolved, new issues have arisen that the Committee did not address in its previous reports. For example, serious concerns about the safety and efficacy of lethal injection as a method of execution have resulted in litigation and suspensions of executions in some jurisdictions. Due to foreign and some domestic drug manufacturers now refusing to provide drugs if they are to be used for executions, prisons have also encountered difficulty in obtaining some drugs previously relied on for this purpose, thus creating acute shortages. In light of these shortages, some states have proceeded with executions using drugs never before used to execute humans. They have also used drugs whose safety and effectiveness cannot be assured because they are manufactured by "compounding pharmacies," which are not subject to FDA regulation.

The National Academy of Sciences and other well-regarded experts also have raised significant new questions about the scientific reliability of certain forensic disciplines, calling into doubt the convictions in hundreds, if not thousands, of capital and non-capital cases. Faulty eyewitness testimony and false confessions are now known to contribute greatly to wrongful convictions. Perhaps most disconcertingly, in the face of continued evidence of error, mistake and fraud in the administration of the death penalty, the Committee has observed some legislative and court developments that hinder the promotion of fairness in capital cases.

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[1] The term "mental retardation" is now disfavored by advocates and the scientific community and is being replaced with "intellectual development disability" or simply "intellectual disability." The American Association on Mental Retardation also changed its name to the American Association on Intellectual and Development Disabilities. TCP uses the term "intellectually disabled" except where discussing judicial opinions that use the term "mental retardation."

These and other practices noted in this report have transformed the way that jurors, prosecutors, judges, victim advocates and others now view capital punishment. As a result, the application of the death penalty has become more limited, and the number of new death sentences and executions has steeply declined, as has the number of jurisdictions with the death penalty.

Significantly, several jurisdictions have repealed their death penalty laws or instituted a suspension of executions within the last several years. While the Committee takes no view on whether jurisdictions should impose capital punishment, its members' views and recommendations have informed policymakers of the numerous problems endemic in the administration of the death penalty. Six states have eliminated the death penalty in the last six years, concluding that reforms are insufficient to cure identified systemic problems. Thus, they have opted to do away with capital punishment altogether.

While the past decade has been an important period of reform for the application of the death penalty in the United States, many issues must still be addressed. Juries continue to hand down death sentences and dozens of executions are carried out every year. Committee members' own experiences continue to support their conclusion that if the current system is to continue, it can and must be improved. While certain key recommendations made in the *Mandatory Justice* reports have become law, many critical procedural and legal safeguards have yet to be implemented. Moreover, as noted above, death penalty jurisprudence has continued to evolve, giving rise to new issues that require new recommendations.

As in the previous two reports, many of the recommendations in this report are aimed at improving the accuracy and fairness of capital trials. The Committee continues to emphasize that the lawyers provided to those charged with capital crimes *must* be adequately compensated, appropriately experienced and have sufficient resources to adequately and expertly represent their clients. Ineffective assistance of counsel continues to be a major reason for wrongful convictions and death sentences, and too many states continue to resist the reforms that must be made to ensure competent counsel in capital cases.

The Committee also offers a host of other recommendations to prevent and correct wrongful convictions. These include recommendations regarding the preservation, testing and presentation of forensic evidence; the creation of statutory remedies for wrongful convictions and the implementation of procedures for the systemic review to help avoid future errors; the videotaping of custodial interrogations – where practical – in order to avoid the documented problem of false and otherwise inaccurate confessions; the adoption of best practices for eyewitness identifications; the effective implementation of prosecutors' constitutional obligation to disclose exculpatory evidence; and enforcement of the Vienna Convention on Consular Relations.

The Committee continues to believe that in jurisdictions that impose capital punishment, it should be reserved for the most heinous crimes. The Committee, therefore, continues to offer

recommendations regarding death eligibility. For example, while its prior recommendation to prohibit imposition of the death penalty on those with intellectual disability is now the law of the land, jurisdictions have adopted widely divergent procedures to implement this ban. The Committee identifies and recommends best practices that various states have developed and implemented. As it did in the previous reports, the Committee recommends prohibiting capital punishment for individuals convicted of felony murder who do not personally kill, attempt to kill or intend that a killing take place. It also continues to recommend that jurisdictions not impose the death penalty on people with mental disorders that significantly impair their capacity to appreciate the nature, consequences or wrongfulness of their conduct; to exercise rational judgment in relation to the conduct; or to conform their conduct to the requirements of the law.

The Committee recommends procedural reforms to help reduce arbitrariness. It recommends that capital punishment not be imposed in the absence of a unanimous verdict both as to the death sentence, or the advisory sentence recommended to the trial judge, and as to each aggravating circumstance used to support that sentence. In the absence of a unanimous jury verdict for death, the sentence imposed should be life without the possibility of parole (and not a new sentencing trial). The trial court should instruct the jury about all available sentencing options. If a jury imposes a life sentence, the judge should not be allowed to "override" that recommendation and impose a sentence of death. The Committee also recommends reforms to procedural rules that unreasonably limit the ability to present meritorious claims in post-conviction proceedings. As it did in *Mandatory Justice 2001* and *2005*, the Committee recommends that every jurisdiction adopt a framework for the collection and use of statistical evidence regarding racial disparities in the application of capital punishment.

Finally, the Committee addresses the recent controversies regarding methods of execution, and it offers new recommendations to ensure open and transparent clemency procedures that include, at a minimum, notice, a meaningful opportunity to be heard and a written explanation of the clemency decision.

These are just some highlights of the many issues examined in this report. The Committee urges policymakers, courts, prosecutors, defenders, the media, the public and other interested parties to study this report and its recommendations with great care and to work together to achieve these critical reforms. Otherwise, this country's untenable pattern of wrongful convictions and unjust death sentences will continue.

The Committee's recommendations necessarily take into account the fallibility of our system of justice. The philosopher Albert Camus, in *Reflections on the Guillotine*, wrote about Burton Abbott, executed in California in 1957. "Today, as yesterday, the chance of error remains. Tomorrow another expert testimony will declare the innocence of some Abbott or other. But Abbott will be dead, scientifically dead, and the science that claims to prove

innocence as well as guilt has not yet reached the point of resuscitating those it kills . . . . If justice admits that it is frail, would it not be better for justice to be modest and to allow its judgments sufficient latitude so that a mistake can be corrected?" Camus' statement, written in 1957, is as true today as it was then. No matter whether we support or oppose the death penalty, we must admit that the system makes mistakes.

The Committee's fundamental mission has not changed, and it deserves restatement. Committee members believe that individuals who commit violent crimes deserve swift and certain punishment. Some of the members of the Committee believe that the range of punishments may include death; others do not. But they all agree that no one should be denied basic constitutional protections, including a competent lawyer, a fair trial and full judicial review of any conviction and sentence. The denial of such protections heightens the danger of wrongful conviction and sentencing. The recommendations that follow reflect the Committee's belief that, despite greater public understanding and the progress that has been made, the risk of error in the application of the death penalty remains all too real and much more remains urgently to be done.

Virginia E. Sloan
President
The Constitution Project
May 2014

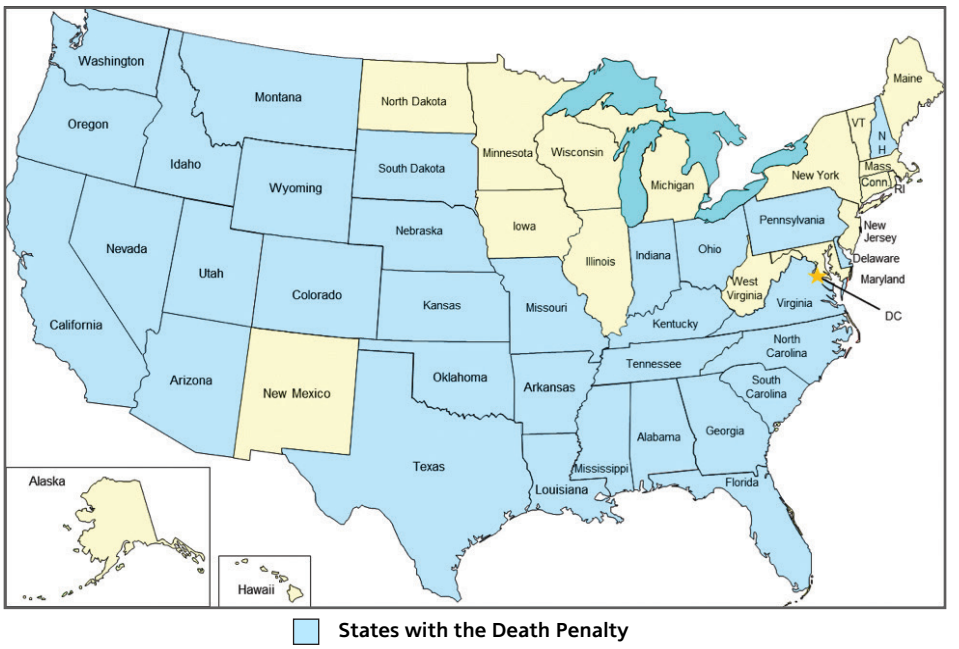
# SNAPSHOT OF LEGAL AND POLICY LANDSCAPE

Since the issuance of the Committee's *Mandatory Justice 2005* report, a number of legal and policy decisions have been made at the state and federal government levels affecting the administration of the death penalty. The Committee provides a snapshot of these developments below as they indicate the continued import and influence of the Committee's work, and also underscore the urgent need for reform and issuance of new and revised recommendations.

## Repeal and the Declining Application of Capital Punishment

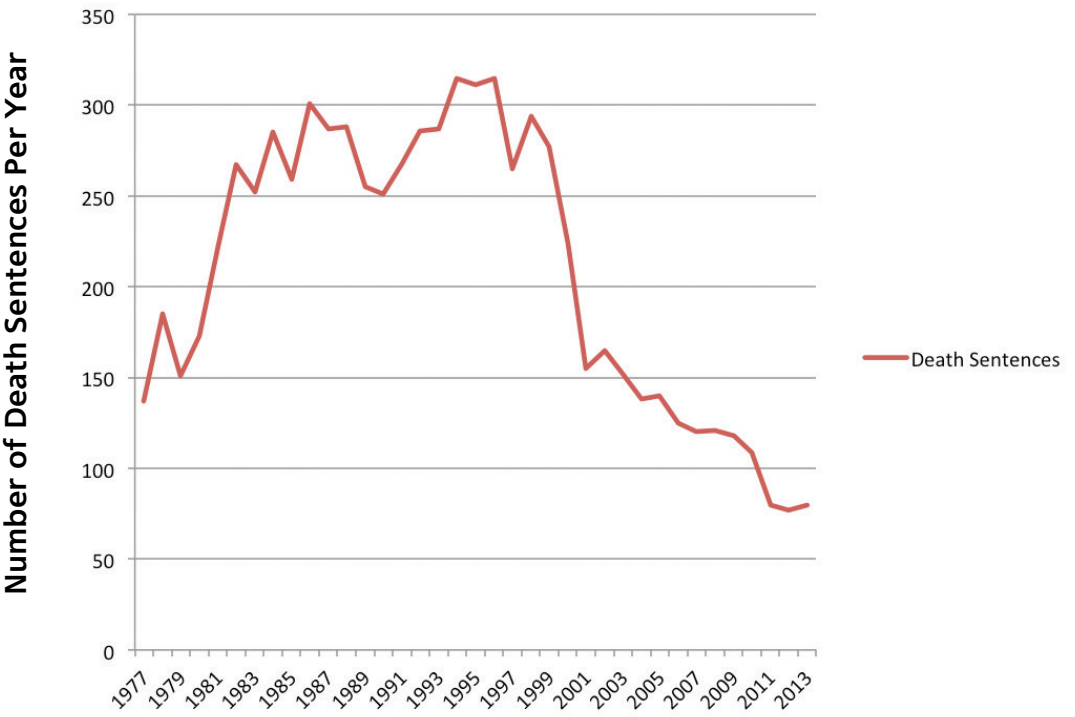
Many states have been active in limiting the application of the death penalty under state law. Since 2007, five states have repealed capital punishment entirely. New Jersey did so in 2007, passing legislation after a one-year moratorium that began in 2006 (and the governor granted clemency to the remaining inmates on death row). New Mexico followed two years later, passing legislation in 2009, with Illinois and Connecticut following suit in 2011 and 2012, respectively. With a bill passed in May of 2013, Maryland became the 16th state in the United States to abolish the death penalty. In California, a ballot referendum to fully abolish the death penalty and replace it with life without parole failed in the November 2012 election by a narrow, four-point margin. In 2011, Oregon's governor declared a moratorium on executions during the entirety of his term in office and in 2014, Washington State's governor declared a suspension of executions as well.

**States with the Death Penalty (32)**



Even in states that retain capital punishment, the penalty is imposed less and less frequently. Delaware issues more death sentences per capita than any other state, closely followed by Alabama and Oklahoma. (See Appendix 2, Figure 4). While these states, and others like Florida, California and Texas, may continue to sentence people to death relatively frequently, in most states death sentences are increasingly rare. A 2013 report by the Death Penalty Information Center found that "only 2% of the counties in the U.S. have been responsible for the majority of cases leading to executions since 1976."[2] Some of these counties represent an extraordinarily disproportionate number of death sentences. For example, Maricopa County, Arizona has "four times the number of pending death penalty cases as Los Angeles or Houston on a per capita basis."[3]

**Death Sentences Imposed Per Year 1977-2013**




Since 2006, the total number of death sentences has dramatically declined, from 123 imposed in 2006 to 80 in 2013. This decline is part of a larger trend reversing decades of growth in death sentences that ended in the late 1990s. In the last ten years, seven jurisdictions with

[2] Death Penalty Information Center, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Sentences at Enormous Costs to All, Executive Summary*, at http://deathpenaltyinfo.org/twopercentsummary.

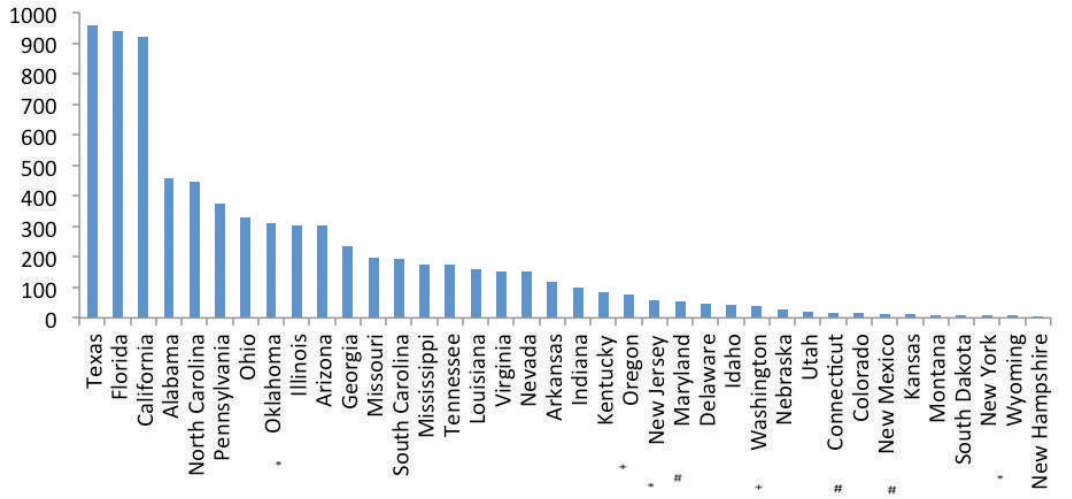
[3] *Id.*

capital punishment – Colorado, Kansas, Nebraska, New Hampshire, Oregon, Pennsylvania and Wyoming – carried out no executions. In the last five years, an additional six death penalty states carried out no executions, including Arkansas, California, Kentucky, Maryland, Montana and North Carolina. (In Maryland, as noted above, the death penalty has now been repealed.)

As many know, Texas has carried out the most executions of any state. By the close of 2013, Texas had executed over 500 people in the modern death penalty era. Yet in recent years even Texas has sentenced far fewer people to death – an average of 10 per year over the past five years, compared with an average of nearly 40 per year in the 1990s. This trend is due to myriad factors, including some of the constitutional limits discussed above. One important factor contributing to this decline is likely the introduction of an alternative sentence of life imprisonment without parole ("LWOP") in capital cases, an important reform that the Death Penalty Committee advocated in its *Mandatory Justice 2001* and *2005* reports. Since 2000, six states with the death penalty made LWOP available in capital cases. Prior to 2005, sentencing juries in Texas were presented with two options in capital cases – a death sentence or the so-called "hard 40" sentence (life with the possibility of parole after 40 years). In September of 2005, Texas replaced the "hard 40" sentence with LWOP.

Taken as a whole, the changes in federal and state law, together with the dramatic decline in death sentences, may be viewed as a clear indication of America's evolving standards of decency regarding the application of the death penalty. Although many states may exercise the death penalty for years to come, it is likely that the current trend of declining sentencing rates, legislative repeals and narrower application of the death penalty will continue.

**Death Sentences by State (1977 - March 1, 2014)**




*** Illinois, New York and New Jersey no longer have the death penalty and all death sentences were commuted to life imprisonment in these states.**

**# Maryland, Connecticut and New Mexico abolished the death penalty; however, prisoners sentenced prior to these states' repeal of capital punishment remain on death row.**

**+ Washington and Oregon are presently under a suspension of executions issued by the governor.**

## State Legislative Reforms and Judicial Decisions

There have been numerous state legislative and judicial developments relative to the implementation of the death penalty since the issuance of *Mandatory Justice 2005*. Some of the most significant developments are described below and provide a relevant backdrop for the Committee's recommendations found in this report.

In 2004, the highest state court in New York held that the state's death penalty statute violates the New York State Constitution (*People v. LaValle*), effectively invalidating the death penalty in New York. In a 2007 decision (*People v. Taylor*), the New York Court of Appeals applied the principle of *stare decisis*, meaning "let it stand," to commute the sentence of the last remaining death row inmate to life without parole. An executive order by then-Governor David Patterson required the removal of New York's execution equipment in 2008, and legislation re-establishing the death penalty recently has died in committee twice. In 2006, a federal district court ruled that California's method of execution violates the Eighth Amendment, thereby imposing a *de facto* moratorium on executions in that state (*Morales v. Tilton*). State supreme courts in Nebraska (*State v. Mata* (2008)) and Kansas (*State v. Kleypas* (2006)) also ruled that existing applications of the death penalty were in violation of the Nebraska Constitution and the federal Constitution, respectively. However, new legislation in Nebraska and a federal judicial appeal of the ruling in Kansas reinstated the death penalty in both states.

In 2009, North Carolina passed the Racial Justice Act ("RJA"), which allowed death row prisoners and capital murder defendants to challenge the application of the death penalty in their cases on the basis that race was a significant factor in the decision to seek or impose the death penalty. The RJA provided more expansive protections than those available under federal law, as it allowed reliance on statistics and other evidence showing disparities in the application of the death penalty and did not require that the prisoner prove intentional discrimination specifically in his or her case. In April 2012, a judge ruled under this act that a condemned killer's trial had been so tainted by the racially-influenced decisions of prosecutors that his sentence should be commuted to life imprisonment instead. In response to this ruling, in 2012, the North Carolina General Assembly passed a major revision of the law, which, according to reporting in the *News & Observer*, "severely restricts the use of statistics to only the county or judicial district where the crime occurred, instead of the entire state or region." In 2013, North Carolina repealed the Racial Justice Act in its entirety.[4]

[4] In 1998, Kentucky was the first state to enact a Racial Justice Act. Unlike the version of the Act North Carolina passed in 2009, the Kentucky law is not retroactive. Under Kentucky's law, a defendant can only raise a claim before his or her trial and must prove by clear and convincing evidence that race played a role in his or her specific case. The law does not permit defendants to challenge a jury's decision to impose the death penalty based on racial bias. In 2011, the American Bar Association concluded that Kentucky's Racial Justice Act "appears to have a number of restrictions limiting its effectiveness at identifying and remedying racial discrimination in the administration of the death penalty."

Other states have organized death penalty study task forces or groups or have commissioned studies to be done, focused on issues such as cost, race, fairness and accuracy. In many states, no significant legislative changes have yet to be made, although some are being actively considered. This is the case in states including New Hampshire, Ohio and Pennsylvania. These state studies have largely found inequities in the application of the death penalty and per application costs in the millions of dollars. Illinois, New Jersey and Maryland also undertook exhaustive reviews of the death penalty prior to those jurisdictions' repeal of capital punishment laws, as discussed above.

Conversely, a few states have proposed legislation to hasten the pace of executions, leading to reduced fairness and an increased risk of wrongful execution in death penalty cases. For example, in 2012, Florida adopted the "Timely Justice Act," which most commentators have asserted will speed up the execution process in the state, despite the fact that Florida has the highest number of death row exonerations in the country. Several other states, as of this writing, are considering similar legislation.

### Other Reforms

The launch of the National Registry of Exonerations has increased awareness of the systemic problem of wrongful conviction in the United States. In the death penalty context, there have been 144 exonerations from death row since 1973. In Florida alone, 24 individuals have been exonerated from death row. The Registry reports that as of 2013, the ten states with the most recorded capital and non-capital exonerations were Texas, Illinois, New York, Washington, California, Michigan, Missouri, Connecticut, Georgia and Virginia. Importantly, while DNA exonerations have declined as DNA testing has become routine, the number of non-DNA exonerations has risen dramatically in the last year.

To correct past injustices, prosecutors have established conviction integrity units in several jurisdictions, including in Dallas, Texas, Manhattan and Brooklyn, New York, Chicago and Lake County, Illinois and Santa Clara County, California for the specific purposes of identifying and correcting the causes of wrongful convictions and maintaining pressure for continual systemic improvement. In 2012, for the first time, law enforcement actively assisted in more than 50 percent of all exonerations. Some prosecutors, like the District Attorney's Office in Dallas County – through the country's first conviction integrity unit – have looked into cases where DNA is available, even in cases where no claim of innocence has been raised, and identified defendants who were innocent of the crimes for which they were convicted. Harris County, Texas, which has the highest execution rate of any county in the U.S., also established a conviction integrity unit. However, it has had difficulty reviewing older cases because the county's crime lab did not preserve much of the evidence. These units can play an important role in limiting arbitrariness in the process for deciding whether to seek a death sentence and are consistent with the Death Penalty Committee's longstanding recommendations.

Notably, improvements also have been made in some states' provision of defense counsel for those facing the death penalty. For example, in Texas, the Regional Public Defender for Capital Cases provides counsel for indigent defendants facing capital charges in participating counties and the Office of Capital Writs, established in 2010, provides representation to defendants in capital post-conviction proceedings. These are the first statewide offices created to assist in the representation of capital defendants and death row inmates in Texas. The Louisiana Supreme Court also has adopted rigorous capital case representation requirements regarding the qualifications and performance of capital defense counsel in that state. Improvements to the representation of defendants before and after conviction are critical to ensuring the fairness of proceedings and the constitutional rights of defendants.

States also have addressed discrete areas affecting the fair administration of justice, including the death penalty. Missouri, for example, now requires all crime laboratories to obtain accreditation to better ensure reliable analysis of forensic evidence. Texas also has adopted a number of reforms in recent years, including more robust criminal discovery requirements, requiring law enforcement offices to promulgate written policies on conducting eyewitness identifications and requiring testing of biological evidence before trial in criminal cases.

## U.S. Supreme Court Cases

Since 2006, the U.S. Supreme Court has issued dozens of rulings addressing the application of the death penalty, with more than 40 death penalty rulings issued in the past five years alone. Some of these rulings have restricted eligibility for the death penalty on constitutional grounds and clarified important procedural rights.

Since TCP released *Mandatory Justice 2005*, the Supreme Court has restricted eligibility for the death penalty beyond the limits set forth in *Atkins v. Virginia* (2002) (prohibiting the execution of people with intellectual disability) and *Roper v. Simmons* (2005) (prohibiting the application of the death penalty to individuals who were younger than 18 when they committed the crime in question). The Court's 5-4 decision in *Kennedy v. Louisiana* (2008) held that a person could not be eligible for the death penalty for the rape of a child that did not result in death. Although the Court did not decide whether the death penalty may be available for other non-homicide offenses, such as espionage and treason (and there is case law suggesting that the death penalty may be available in these circumstances), the *Kennedy* holding is consistent with the Committee's view that capital punishment should be reserved only for the most heinous offenses and most culpable offenders.

In addition to limiting eligibility for the death penalty, in a handful of instances, the Court has clarified and expanded the procedural rights of individuals charged with capital crimes. The Court upheld the direction to jurisdictions that in the penalty phase of a death penalty case, jurors must be able to consider and give effect to all relevant mitigating factors, including low IQ, even where the defendant's IQ is not, by itself, sufficient to

establish that the defendant has an intellectual disability (*Tennard v. Dretke* (2004)). For indigent death row inmates sentenced under state law and denied state-funded counsel for a habeas corpus appeal, *Harbison v. Bell* (2009) held that federally-funded counsel may continue representation during state clemency proceedings and receive compensation for that representation. In *Panetti v. Quarterman* (2007), the Court clarified that inmates are not competent to be executed unless they have a rational understanding of why the death sentence was imposed.

The Court also eased, in very limited circumstances, some of the procedural obstacles that were enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). In a highly unusual case, *In re Davis* (2009), the Court accepted an original petition for a writ of habeas corpus and directed the district court to hold an evidentiary hearing even though the district court would have been precluded from granting relief under AEDPA. In *Holland v. Florida* (2012), the Court determined that the one-year deadline for filing a federal petition for a writ of habeas corpus can be tolled for equitable reasons, and that an attorney's unprofessional conduct may sometimes be an "extraordinary circumstance" justifying equitable tolling. In *Maples v. Allen* (2012), the Court held that the defendant had shown the requisite "cause" to excuse his procedural default, which occurred when his lawyer abandoned him and missed a filing deadline in state court, although the Court left for consideration on remand the question of whether the defendant had demonstrated "prejudice" from the missed filing.

In *House v. Bell* (2006), the Court ruled that evidence of actual innocence could excuse a death row inmate's procedural default, a ruling the Court expanded in *McQuiggin v. Perkins* to include expiration of AEDPA's statute of limitations. In *Martinez v. Ryan* (2012) and *Trevino v. Thaler* (2013), the Court ruled that when a state's appellate review "makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, the federal courts will not bar habeas review of 'a substantial claim of ineffective assistance of counsel at trial if, in the initial-review collateral proceeding, there was no counsel or that counsel was ineffective.'"[5]

The Court also provided new avenues, in limited circumstances, to challenge a death sentence in light of the procedural obstacles often imposed under the federal habeas corpus statute. In *Hill v. McDonough* (2006), the Court allowed a death penalty defendant to challenge the protocol used by the state to administer the death penalty under 42 U.S.C. § 1983, the federal civil rights statute, even after exhausting his appeals under the federal habeas corpus statute. *Skinner v. Switzer* (2011) allowed a death row inmate seeking DNA testing of crime scene evidence to maintain an action under the federal civil rights statute.

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[5] *Trevino v. Thaler*, 569 U.S. ___, 133 S.Ct. 1911,1922 (2013) (quoting *Martinez v. Ryan*, 132 S.Ct. 1309, 1320 (2012)).

Although a number of its decisions reflected recommendations in *Mandatory Justice 2001* and 2005, not all developments at the Supreme Court were positive. In a number of death penalty cases, the Court continued to apply its ineffective assistance of counsel precedent, *Strickland v. Washington* (1984), to deny defendants relief in the face of counsel's egregious behavior. In *Cullen v. Pinholster* (2011), the Court held that AEDPA and previous precedent required deference to a state court's determination that trial counsel's failure to introduce mitigating evidence – evidence that included traumatic brain injury and mental illness severe enough to require institutionalization of the defendant at age 11 – did not constitute ineffective assistance of counsel. In his concurrence in *Smith v. Spisak* (2010), Justice Stevens acknowledged that defense counsel's closing argument "was so outrageous" that had it been made by a prosecutor "it would have rightly subjected a prosecutor to charges of misconduct," and that it "alienated and ostracized the jury," yet he joined the unanimous opinion of the Court that counsel's egregious behavior likely did not affect the outcome of the case. The varied reasoning applied in *Porter v. McCollum* (2009), in which the Supreme Court found that the lower court had "unreasonably" applied *Strickland v. Washington* and *Bobby v. Van Hook* (2009), in which the Court reversed a lower court's finding of ineffective assistance of counsel, reflects the need to reevaluate whether Strickland really protects a defendant from the unjust consequences of ineffective assistance of counsel, particularly in capital cases.

In *Medellin v. Texas* (2008), the U.S. Supreme Court addressed the issue of 51 Mexican nationals on death rows in the United States who claimed that their sentences had been imposed in violation of the Vienna Convention on Consular Relations ("VCCR"). None of the foreign nationals had been given access to their consulate while their cases proceeded, as is required under the VCCR, and ultimately each was sentenced to death. The foreign nationals had previously obtained a ruling from the International Court of Justice ("ICJ") stating that each was entitled to review of his case. However, in *Medellin*, the Supreme Court ruled that the VCCR is not enforceable as a matter of U.S. law absent enabling legislation and, therefore, the ICJ's ruling cannot trump state laws that prohibited the foreign nationals from obtaining any relief on their claims in state court. Four Mexican nationals in Texas – including Medellin – have been executed since issuance of this ruling.

## States in Need of Significant Reform

While some jurisdictions have made progress toward implementation of best practices, others persist with policies that appear harder to justify in light of changing knowledge and standards. Texas, California and Alabama remain, by far, the most active states in terms of sentencing individuals to death, and all three require significant death penalty reforms. Pennsylvania, Alabama and Texas often compensate capital defense counsel at such low levels as to make effective representation nearly impossible.

Alabama, Delaware and Florida are the only states where judicial override may be exercised, allowing the trial judge to overturn a jury's verdict of life and to instead impose a death sentence. According to the Equal Justice Initiative, over 20 percent of prisoners presently on Alabama's death row were sentenced to death through judicial override. While almost all jurisdictions require unanimity in order to find a defendant guilty, in Florida, a death sentence may be imposed by a mere majority vote (7-5), and in Alabama, a jury may vote to sentence a defendant to death by a 10-2 vote.

While many jurisdictions now require preservation of forensic evidence after conviction, many of these jurisdictions' statutes and practices are limited in significant ways. Evidence often is not required to be retained for as long as the prisoner remains incarcerated and in many cases, statutes permit destruction of evidence after conviction, as in Virginia and Kentucky. Even in states with robust post-conviction testing statutes, death row inmates have been denied access to testing because the evidence in their case is lost or missing.

Further, in most jurisdictions, a prosecutor who becomes aware of credible evidence of innocence is not required to notify the inmate or his or her counsel. Thus, for example, a U.S. Justice Department task force reviewing shoddy work by the FBI crime lab completed its review in 2004 but never made the results public. Only prosecutors were notified of the results, and they had no obligation to notify defendants or their counsel.

A 2007 study by the Georgia Innocence Project also found that 82 percent of law enforcement agencies in that state had *no* policies for eyewitness identification procedures. A 2013 study conducted in Virginia found that while Virginia had adopted an "excellent" model policy on conducting eyewitness identifications, only 6 percent of law enforcement agencies in the Commonwealth had adopted the policy. In addition, revelations of misconduct and faulty practices in crime laboratories have undermined the confidence of outcomes in thousands of cases nationwide, including capital cases. For example, in North Carolina, an audit of the State Bureau of Investigation found that the Bureau failed to disclose exculpatory forensic testing results to defendants facing the death penalty. This omission undermined the reliability of the verdicts and death sentences in the cases of at least three North Carolina prisoners who were already executed.[6]

Since 2003, the American Bar Association ("ABA") has engaged in a series of assessments of specific state capital punishment schemes. Assessment teams – comprised of law school professors, current or former prosecutors, defense attorneys, judges, state legislators and state bar representatives – conducted a review of state laws, rules, procedures, standards and guidelines relating to the death penalty in their particular state. Each state-based team compared their findings to recommendations on the administration of the death penalty described in ABA protocols on the subject and then prepared a report with their analysis and recommendations. The ABA has completed assessments in twelve states in jurisdictions that comprise almost 65 percent of the executions that have taken place in the modern death penalty era. These reviews have found that in myriad areas from arrest to execution, states

[6] Joseph Neff and Mandy Locke, *For executed men, audit's too late*, News-Observer, Aug. 19, 2010, at http://www.newsobserver.com/2010/08/19/635619/for-executed-men-audits-too-late.html.

did not sufficiently safeguard against wrongful conviction and execution and did not ensure fairness in capital proceedings.[7]

Relatedly, in 2009, the American Law Institute – the organization that promulgated the blueprint for death penalty laws in the U.S. for the last fifty years – repealed all provisions of its model penal code related to the death penalty "in light of the currently intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."[8]

[7] The ABA Assessments on the death penalty can be found at www.americanbar.org/dueprocess.

[8] American Law Institute, Message From ALI Director Lance Liebman, Oct. 23, 2009, at http://www.ali.org/_news/10232009.htm.

# ADVOCACY EFFORTS OF THE CONSTITUTION PROJECT IN FURTHERANCE OF THE COMMITTEE'S RECOMMENDATIONS

For almost 15 years, The Constitution Project ("TCP") has tirelessly promoted pragmatic, bipartisan policies before the courts, policymakers, the media and the public. Through our Death Penalty Committee, and through our *Clearinghouse on Unlikely Allies for Criminal Justice Reforms* (the "Clearinghouse"), we have reached audiences far beyond the "usual suspects" with effective advocacy and education. The Clearinghouse is comprised of Death Penalty Committee members in addition to hundreds of former prosecutors, law enforcement, corrections officials, judges and others whose voices carry particular weight in the debate over reforms to the death penalty, as well as other criminal justice issues. TCP drafts and organizes letters, amicus briefs, advocacy statements and the like for Committee and Clearinghouse members who help us to promote these reforms.

What follows are just some examples of this work over that period of time.[9]

## Safeguarding Innocence and Preventing Wrongful Executions

The Death Penalty Committee – in this report and in prior reports – has issued a number of recommendations that seek to minimize the risk of wrongful conviction and execution. TCP's work in this area has sought to prevent the serious miscarriages of justice that could be avoided through adherence to the Committee's recommendations.

Members of the Death Penalty Committee advocated for the reconsideration of **Troy Anthony Davis**' conviction and death sentence. In 2009, Committee and Clearinghouse members comprised the 27 former prosecutors and judges who served as amici in a brief to the U.S. Supreme Court successfully urging the Court to order an evidentiary hearing to consider new evidence that raised serious doubts as to Davis' guilt. Over the next two years, Committee members spoke out publicly for clemency in the case. Numerous media outlets, including *The New York Times*, *Wall Street Journal* and MSNBC, highlighted the calls for clemency from Committee members Bob Barr, a former Republican congressman and U.S. Attorney from Georgia; Judge William S. Sessions, a former federal judge and director of the FBI; Mark White, a former Governor of Texas and co-Chair of the Death Penalty

[9] Throughout this section, unless otherwise noted, the report refers to advocacy efforts made through both the Death Penalty Committee and the Clearinghouse as simply "TCP" efforts. Note, however, that TCP policy on the death penalty is only that which is developed through and adopted by our Death Penalty Committee.

Committee; and John Whitehead, head of the Rutherford Institute. Despite these efforts and those of allied organizations, the district court on remand refused to overturn the original guilty verdict, finding that Davis had not met the exceedingly high burden imposed by federal law that he prove his innocence by "clear and convincing evidence." The State of Georgia executed Davis on September 21, 2011.

### Forensic Evidence and Labs

The Committee's recommendations in this area call for enhanced preservation and testing of forensic evidence in capital cases, including, for example, reducing the barriers to new forensic testing for those on death row.

In April 2012, TCP sent a letter calling on U.S. Attorney General Eric Holder to investigate potentially faulty forensic evidence and flawed testimony by FBI analysts and to share its findings with affected defendants and their counsel. In May 2013, **Willie Jerome Manning**, who was sentenced to death in part based on faulty FBI forensic hair analysis, won a stay of execution from the Mississippi Supreme Court mere hours before his scheduled execution. This allowed his lawyers time to conduct DNA testing after the FBI informed the court of potential errors in agents' testimony. In June 2013, Judge William S. Sessions authored a newspaper editorial ("OpEd")[10] expressing concern about the reliability of testimony and forensic hair analysis in the case of **John Norman Huffington**, who was imprisoned for nearly 32 years in Maryland and had his conviction overturned by a judge after DNA testing revealed that the hair that was presented as key evidence against Huffington did not belong to him.

Clearinghouse and Committee members have been active in the case of **Hank Skinner**, a Texas death row inmate seeking post-conviction DNA testing of evidence. Committee members, including former Governor White, joined a letter to the district attorney and Governor Rick Perry requesting DNA testing for Skinner and a stay of execution until such testing had been performed. Governor White, along with Judge Sessions, also wrote an OpEd in the *Austin American-Statesman* calling for such testing.[11] After years of objecting to DNA testing, the State of Texas changed course in 2012 and consented to testing and in 2013, consented to additional testing.

### Access to Justice

The Death Penalty Committee remains concerned that procedural obstacles present one of the most serious impediments to ensuring fairness and correction of error in death penalty

[10] William S. Sessions, *DNA: A test for justice,* Baltimore Sun, June 10, 2013, at http://www.baltimoresun.com/news/opinion/oped/bs-ed-dna-testing-20130610,0,3043418.story#ixzz2hoIVc2ja.

[11] Mark White & William S. Sessions, *White, Sessions: Innocence commission needed in Texas,* Austin American-Statesman, March 12, 2013, at http://www.statesman.com/news/news/opinion/white-sessions-innocence-commission-needed-in-texa/nWpsD/.

cases. While this is an area of law that is extraordinarily complex, TCP has sought to limit the application of draconian procedural hurdles such as "default," "exhaustion" and undue deference to state court decisions based on erroneous application or interpretation of federal law.

In October 2012, TCP filed an amicus brief with the U.S. Supreme Court on behalf of **Michael Anthony Peak**, arguing that the Court should accept review of the case to clarify that the Antiterrorism and Effective Death Penalty Act does not prevent a federal court from considering a habeas corpus petition when a state court fails to apply clearly established federal law. In early 2013, the Court declined to review the case.

In May 2011, TCP and the Cato Institute filed an amicus brief with the U.S. Supreme Court on behalf of **Cory Maples**, arguing that his federal habeas corpus petition should be considered notwithstanding his procedural default because his failure to meet a critical filing deadline was the result of his counsel abandoning representation of him. The Court held that "cause" existed to excuse Maples' procedural default, although the question of resulting prejudice was left for consideration on remand. TCP subsequently filed an amicus brief in January 2013 in the U.S. District Court for the Northern District of Alabama in support of Maples, arguing that he is entitled to relief based on the ineffective representation he received during his capital murder trial. The brief noted that Alabama ranked last in the country in terms of compensation for court-appointed capital defense and that Alabama's deficient indigent defense system resulted in Maples' constitutionally inadequate representation.

In December 2009, then-TCP Board Chair Stephen Hanlon and Death Penalty Committee Co-Chair Gerald Kogan testified before the U.S. House of Representatives' Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties on the urgent need to restore full habeas corpus rights in death penalty cases. Both highlighted the increased restrictions on the availability of federal habeas review, which make it nearly impossible to correct serious constitutional violations in many death penalty cases.

## Custodial Interrogations

The Death Penalty Committee has long been concerned about the dangers of custodial interrogation techniques that could, even inadvertently, lead to false confessions. For this reason, the Committee continues to call upon jurisdictions to adopt safeguards, including videotaping custodial interrogations, to reduce the risk of false confessions and provide juries with the full context of any statements a defendant may have made during an interrogation.

In September 2013, TCP held a Constitution Day event that was simulcast to law school and colleges throughout the country focusing on the causes and consequences of false confessions in both capital and non-capital cases. The event featured a panel discussion, moderated by NPR's Carrie Johnson, focusing on false confessions. Renowned filmmaker Ken Burns, who co-produced the documentary "The Central Park Five" about four young men who were coerced into confessing to a crime they did not commit due to improper interrogation techniques, was joined by Shawn Armbrust, Executive Director, Mid-Atlantic Innocence Project; Professor Saul Kassin, Distinguished Professor of Psychology at John Jay College of Criminal Justice; and James Trainum, Retired Detective, Metropolitan Police Department of the District of Columbia. The panelists discussed the phenomenon of innocent people confessing to crimes they did not commit, the pressures police and prosecutors can exert on suspects and the institutional policies that can be adopted by law enforcement agencies to help address the problem. Many of the recommended safeguards that were discussed at this event are reflected in this report.

## Ensuring Reliable Eyewitness Testimony

The Death Penalty Committee has always been concerned about the importance juries place on eyewitness testimony, particularly given the well-documented unreliability of eyewitnesses. Recommendations to address this concern, which were included in the Committee's original reports, have since been expanded as a result of increased evidence regarding both the inaccuracies affecting eyewitness testimony and the effects of such testimony on juries.

As discussed earlier, TCP worked to prevent the execution of **Troy Anthony Davis**, who had been convicted and sentenced to death based almost entirely on the testimony of nine eyewitnesses, seven of whom later recanted their testimony. In an OpEd published in the *Atlanta Journal-Constitution* in September 2011, Judge Sessions concluded, "that the evidence in this case – consisting almost entirely of conflicting stories, testimonies and statements – is inadequate to the task of convincingly establishing either Davis' guilt or his innocence."[12]

In May 2010, TCP filed an amicus brief with the U.S. Supreme Court in support of a petition for *certiorari* in the case of **Darick Demorris Walker**. Walker was convicted and sentenced to death based largely on the testimony of one witness who it was discovered after trial did not see but only heard the perpetrator shoot the victim. In its brief, TCP cited the Death Penalty Committee's observation that "the power of the testimony of even a single eyewitness, combined with the demonstrated fallibility of such evidence" makes it critical

[12] William S. Sessions, *Should Davis be Executed? No.*, Atlanta-Journal Constitution, Sept. 15, 2011, at http://www.ajc.com/news/news/opinion/should-davis-be-executed-no/nQLqc/.

that prosecutors limit their reliance on a sole eyewitness and turn over to defense counsel any evidence tending to impeach the eyewitness's credibility. The Supreme Court denied Walker's petition for *certiorari*.

## Reserving Capital Punishment for the Most Heinous Offenses and Culpable Offenders

The Committee supports narrowing the class of offenders and offenses eligible for capital punishment to ensure the fair and proportionate administration of justice. This includes supporting enforcement of the prohibition on the execution of persons with intellectual disability and eliminating the punishment's application to those who did not intentionally take the life of another.

In December 2013, over 40 Clearinghouse members, including former judges and law enforcement officials, filed an amicus brief with the U.S. Supreme Court to support Florida death row inmate **Freddie Lee Hall's** petition for a writ of habeas corpus. The brief argued that Florida's method of determining whether Hall is a person with an intellectual disability – and thus is ineligible for the death penalty – runs afoul of previous Court precedents and threatens to undermine public confidence in the fair and equal administration of the death penalty. At the time of publication of this report, a decision had not been rendered in the case.

In partnership with the Tennessee Criminal Defense Lawyers Association, TCP filed an amicus brief in March 2013 at the Tennessee Supreme Court in the case of ***State v. Pruitt***. The brief argued, consistent with the Death Penalty Committee's recommendations, that imposing a death sentence on a defendant who never formed the intent to kill violates the proportionality principle of the federal and Tennessee constitutions because of its exceeding rarity. At trial, Pruitt had been sentenced to death for murder in the course of a robbery in which Pruitt, unarmed, stole a car and assaulted the victim by throwing him to the ground. The victim later died from the injuries sustained during the robbery. The Tennessee Supreme Court ultimately upheld the death sentence in Pruitt's case. However, in a dissenting opinion, two justices said they would have modified the death sentence to life in prison without parole due to the disproportionate application of capital punishment in Pruitt's case. In April 2014, TCP filed a brief for *certiorari* with the U.S. Supreme Court asking it to review the death sentence in Pruitt's case.

In 2012, Committee member and evangelical Christian leader David Gushee sent a letter to the Georgia Board of Pardons and Paroles, asking them to grant clemency to Georgia death row inmate **Warren Hill**. Hill has been unable to meet Georgia's extraordinarily high burden – beyond a reasonable doubt – to show that he is intellectually disabled and thus

ineligible for the death penalty. A Georgia court granted a stay of the execution in 2012. At a second execution date in early 2013, the U.S. Court of Appeals for the Eleventh Circuit granted a stay and noted that all doctors who had examined Hill now believe him to be intellectually disabled (including those who had testified for the prosecution that he was not intellectually disabled at the original trial). On rehearing, the Eleventh Circuit refused to consider Hill's intellectual disability claim under a lower standard of proof (adopted by all other states that have the death penalty), and the U.S. Supreme Court denied *certiorari*. Although a Georgia state house committee held a hearing on whether to change the standard, no legislation has yet been proposed that would do so. Hill remains on death row pending Georgia Supreme Court review of a challenge to a Georgia law that keeps secret the identities of those who make and supply lethal injection drugs.

## Ensuring Effective Counsel

One of the primary findings of TCP's Death Penalty Committee is that there is a crisis in providing competent, well-resourced lawyers in capital cases, and that this situation must change. TCP's advocacy efforts have sought to improve defense services in death penalty cases, consistent with the Committee's recommendations, in numerous ways.

In 2013, mandatory cuts to the federal budget, known as sequestration, cut nearly 10 percent from federal public defenders' budgets and resulted in layoffs and up to 20 days of furlough in many federal defender offices. Federal public defenders, who represent capital and non-capital defendants and were already stretched to the maximum by daunting caseloads, were asked to provide constitutionally guaranteed representation without adequate resources to federal criminal defendants unable to afford a lawyer. TCP, working with federal defenders, private attorneys and a broad coalition of advocacy organizations, successfully convinced Congress of the critical need to prioritize federal defender funding, resulting in an increase in funding for 2014 (despite continued budget shortfalls for many other federal programs).

In April 2013, Senator Patrick Leahy (D-VT), Chair of the Senate Judiciary Committee, introduced the Justice for All Reauthorization Act. The legislation requires states seeking federal criminal justice grants to submit strategic plans, developed in conjunction with stakeholders from *all* segments of the criminal justice system (including the indigent defense community), and provides technical assistance to states seeking to improve their indigent defense systems. The bill also contains improvements to federal programs that encourage states to make post-conviction DNA testing available in capital cases and improve their ability to accurately process forensic evidence. The bill also includes an exception to the Capital Representation Improvement Grant's requirement that states allocate funding for training on capital litigation equally between prosecutors and public defenders. The amendment would change the current statutory requirement to allow the Attorney General, upon a showing of

good cause, to determine a fair allocation of the funds. TCP worked closely with the Judiciary Committee and the Department of Justice to help secure these provisions.

Nine former federal judges who are members of TCP's Clearinghouse filed an amicus brief in July 2012 urging the U.S. Supreme Court to hear the Texas death penalty case of ***Trevino v. Thaler***. The judges urged the Court to grant *certiorari* due, in part, to the fact that the lower federal court based its decision denying Trevino relief on his ineffective assistance of counsel claim on facts uncovered by the court's own investigation that went beyond the record in the case. The Supreme Court agreed to hear the case and in May 2013 it ruled in Trevino's favor by reversing the Fifth Circuit's holding and remanding the case to the district court.

In November 2012, citing the Death Penalty Committee's recommendations on counsel, TCP filed an amicus brief with the U.S. Supreme Court in the case of ***Boyer v. Louisiana***, arguing that if a state neglects its obligation to provide adequate funds for the representation of a capital defendant – as it did with Jonathan Boyer – the delay in reaching trial should be attributed to the state. Despite originally accepting *certiorari*, the Court later dismissed the case as improvidently granted, avoiding the central question in the case.

Since 2005, TCP has been working to ensure that the Department of Justice adopts robust regulations regarding the appointment of competent counsel to death row inmates during state post-conviction review in those states seeking to "fast track" federal habeas corpus review. Along with our allies, TCP has pushed aggressively for regulations that contain meaningful requirements for a state's proposed plan to provide post-conviction counsel for death row inmates. This includes ensuring that counsel has relevant experience litigating capital cases and is provided adequate resources to effectively represent his or her client. As of the writing of this report, the Justice Department has issued regulations, but their implementation has been delayed under a temporary restraining order pending resolution of substantive and procedural challenges to the regulations.

## Duty of Judge and Jury

The Death Penalty Committee recommendations in this area have focused on the roles and obligations of both judges and juries in the fair and accurate administration of a capital case.

TCP has supported efforts to ensure that judges do not place limits on a jury's ability to consider mitigating evidence in death penalty cases. For example, in September 2010, TCP Clearinghouse and Death Penalty Committee members, including former prosecutors, judges and state officials, filed an amicus brief with the U.S. Supreme Court on behalf of **William Glenn Boyd** who is currently on death row in Alabama. The brief challenged the

Eleventh Circuit's *Dobbs* rule, which denies capital defendants an individualized sentencing determination if a particular aggravating factor is present in their case. The brief argued that an individualized determination is constitutionally demanded in capital cases. The Court ultimately denied *certiorari* in the case.

In July 2011, former Florida judge and Committee member O.H. Eaton, Jr. wrote an OpEd in *The Birmingham News* calling for Alabama's legislature to make it impermissible for a judge to overrule a jury's decision to recommend life in prison and to instead impose a death sentence.[13] Judge Eaton observed that "a system of judicial override creates a system in which geography, race, timing of trial and the individual judge, rather than the seriousness of the crime, determine whether one will be sentenced to death."

## Explaining and Guaranteeing the Availability of Life Without Parole

Since 2001, the Death Penalty Committee has recommended that an alternative sentence of life without parole be made available in every capital case. In July 2005, Governor Rick Perry signed a reform bill that would provide life without the possibility of parole as an alternative to a death sentence. Then-Death Penalty Committee member Paula Kurland, along with other family members of crime victims, played a critical role in convincing Texas legislators to support the bill. The measure's author, Texas State Senator Eddie Lucio, Jr., credited Kurland and other victims' advocates with helping pass the bill. The introduction of this alternative sentence, along with other factors, have contributed to a precipitous decline in death sentences in Texas.

## Role of Prosecutors

The Death Penalty Committee has issued a range of recommendations concerning the exercise of prosecutorial discretion in death penalty cases, as well as the duty of prosecutors to ensure the fair enforcement of the law. As prosecutors are the cornerstone of the justice system, the Committee's recommendations in this area are promoted through both policy advocacy and through support for those litigating capital cases.

A federal district court judge in December 2012 ordered that Virginia release death row inmate **Justin Wolfe**, citing that prosecutor misconduct, which included the coercion of a key witness in the case and the withholding of exculpatory evidence in violation of the Constitution, irrevocably tainted the case. In January 2013, a federal appeals court ruled that it would hear additional arguments in the case and TCP Clearinghouse members submitted

[13] O.H. Eaton, Jr., *Other Views: Alabama judges, not juries, should decide death sentences*, The Birmingham News, July 22, 2011, at http://blog.al.com/birmingham-news-commentary/2011/07/post_31.html.

an amicus brief, as well as a letter calling on the court to replace the special prosecutor in the case. TCP made the request out of concern that the special prosecutor did not carefully examine the evidence to reach an independent conclusion about the case, but instead relied on the earlier deliberation of the prosecutors whose misconduct and errors in judgment left Wolfe on death row for more than a decade.

Based on the Death Penalty Committee's longstanding recommendation that foreign nationals who are not provided with their consular notification rights under the Vienna Convention should not be eligible for the death penalty, TCP supported a federal legislative proposal that would provide foreign nationals currently on death row the opportunity to seek judicial review of violations of their right to consular notification and access. The legislation also would provide for review and appropriate remedies in future cases in which violations of the right to consular access allegedly occurred, if the foreign national is facing capital charges in a U.S. court. First introduced in June 2011 and most recently included in a bill introduced in July 2013, TCP continues to advocate for passage of such legislation by the U.S. Congress.

Relatedly, in January 2014, TCP condemned Texas's execution of Mexican national, **Edgar Tamayo**, who had been denied consular access after his arrest. Governor Mark White weighed in on the issue in an OpEd in the *Austin American-Statesman*.[14] White's position was noted in *The New York Times* and *The Los Angeles Times*, as well as on CNN and MSNBC, along with various other media outlets.[15] This followed previous efforts in 2011 urging the Governor of Texas and its Board of Pardons and Paroles to stay the execution of **Humberto Leal Garcia**. Leal, a Mexican national, had also been denied consular access. Unfortunately, despite calls from the Obama Administration, the Mexican government, former U.S. diplomats, retired military officials and TCP Clearinghouse voices (including former judges and prosecutors) urging the Texas Governor and Board to stay the execution, on July 7, 2011, Texas executed Leal.

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[14] Mark White, *Perry, Abbott should be true to their word in handling Tamayo case*, Austin American-Statesman, Jan. 14, 2014, at http://www.constitutionproject.org/documents/perry-abbott-should-be-true-to-their-word-in-handling-tamayo-case/.

[15] See Norman J. Ornstein, *Disarming the White House*, N.Y. Times, Jan. 21, 2014, at http://www.nytimes.com/2014/01/22/opinion/disarming-the-white-house.html?emc=eta1; Molly Hennessy-Fiske, *Planned execution in Texas draws high-profile protests*, L.A. Times, Jan. 21, 2014, at http://www.latimes.com/nation/la-na-texas-execution-20140122,0,4006879.story#ixzz2r9pNReY9; Catherine E. Shoichet & Elwyn Lopez, *Mexico to Texas on convicted cop killer: Don't execute our citizen*, CNN, Jan. 22, 2014, at http://www.cnn.com/2014/01/20/justice/mexico-texas-tamayo-execution/; Trymaine Lee, *SCOTUS refused to halt execution of Mexican citizen in Texas*, MSNBC, Jan. 22, 2014, at http://www.msnbc.com/msnbc/mexican-citizen-set-die-texas.

## Safeguarding Racial Fairness and Proportionality

The Death Penalty Committee has long called for reforms to combat the overwhelmingly disproportionate application of the death penalty based on race. These include creating safeguards in the process by which prosecutors determine which cases are charged capitally and empowering courts to review cases in light of other similarly situated defendants to determine whether there is a pervasive, systemic application of the death penalty in a racially disproportionate manner.

In August 2013, former senior United States military officials who are members of TCP's Clearinghouse filed an amicus brief with the North Carolina Supreme Court in support of **Marcus Reymond Robinson**, who was seeking to overturn his death sentence under the North Carolina Racial Justice Act. The military officials argued that racial sensitivity training programs, like those used in the military, are an effective tool to combat racial bias, and that the prosecutor's failure to participate in such training should be considered by a court in deciding whether race was a factor in seeking the death penalty. At the time this report was published, the case was still pending before the North Carolina Supreme Court.

## Executive Clemency

The Death Penalty Committee recognizes that, due to the many obstacles impeding the fairness of the administration of the death penalty, executive clemency is a critical last resort. Clemency allows the executive branch, including the President of the United States, state governors and boards of pardon, to override a death sentence in cases where serious injustices may exist but where courts, for various reasons, have been unable to provide relief.

In May 2013, former prosecutors who are Clearinghouse members urged Colorado Governor John Hickenlooper to commute **Nathan Dunlap**'s death sentence to life in prison without the possibility of parole. This letter called on the Governor to act in light of the fact that the jury was not informed that Dunlap suffers from a serious mental illness and was given no opportunity to consider the effects of that illness on Dunlap's moral culpability. On May 22, 2013, the Governor announced an indefinite stay of execution.

Members of the Death Penalty Committee and Clearinghouse also comprised the 31 former judges and prosecutors who signed a letter to Ohio Governor Ted Strickland in August 2010 in support of clemency for **Kevin Keith**. TCP urged the Governor to grant clemency in light of the failure of any court of law to cumulatively consider exculpatory evidence that was suppressed during Keith's trial, including faulty eyewitness and forensic evidence and the

confession of an alternative suspect. The letter was cited in an article in the *New York Times*[16] that discussed the unlikely allies supporting clemency for Keith and on September 2, 2010, Governor Strickland commuted Keith's sentence to life in prison without parole.

## Execution Procedures

Since the release of the Death Penalty Committee's most recent report in 2005, execution procedures, particularly the use of lethal injections, have come under greater scrutiny. For this reason, the Committee has adopted new recommendations in this report to address these concerns. Committee co-chair Gerald Kogan has previously spoken out about some of the dangers associated with lethal injection. In a June 2008 OpEd in the *St. Petersburg Times*, Justice Kogan supported Florida Governor Jeb Bush's moratorium on the death penalty after a 2006 execution "was botched so badly that it took twice the normal dosage of the lethal chemical cocktail and more than half an hour" to execute the prisoner.[17]

[16] Bob Driehaus, *Unusual Alliance Protests Execution*, N.Y. Times, Aug. 9, 2010, at http://www.nytimes.com/2010/08/10/us/10deathrow.html?_r=1&ref=us.

[17] Gerald Kogan, *Florida's justice system fails on many fronts*, Tampa Bay Times, June 30, 2008, at http://www.tampabay.com/opinion/essays/floridas-justice-system-fails-on-many-fronts/652532.

# BLACK LETTER RECOMMENDATIONS

## CHAPTER 1: SAFEGUARDING INNOCENCE AND PREVENTING WRONGFUL EXECUTION

**Recommendation 1.** Jurisdictions should require post-conviction review of credible claims of innocence.

a) Jurisdictions should adopt legislation to establish that, if it is more likely than not that no reasonable jury would convict in light of the new evidence, the defendant should be released.

b) Jurisdictions should adopt legislation to establish that, if it is more likely than not that the jury would not have convicted in light of the new evidence, the defendant should be given a new trial.

c) Exculpatory evidence relevant to a credible claim of innocence or wrongful conviction should be allowed in post-conviction proceedings notwithstanding procedural bars.

**Recommendation 2.** If a prosecutor becomes aware of new, credible, material evidence that it is reasonably likely that an innocent person has been convicted, the prosecutor should be required to:

a) notify the court and the defendant of that likelihood,

b) disclose the arguably exonerating evidence, and

c) agree to set the conviction aside if it is more likely than not that no reasonable jury would convict in light of the new evidence.

If a prosecutor becomes aware of "clear and convincing" evidence that an innocent person has been convicted, the prosecutor must pursue the applicable remedy to right the wrong.

**Recommendation 3.** The government should be required to disclose to the defense, as soon as practicable, all post-conviction forensic testing results.

**Recommendation 4.** Jurisdictions should establish procedures for systemic review of exonerations and for avoiding future errors.

a) Jurisdictions should provide mechanisms for the review of capital cases in which defendants were exonerated, for the purpose of identifying the causes of the error and for correcting systemic flaws affecting the accuracy, fairness and integrity of the capital punishment system.

b) The U.S. Department of Justice should establish and Congress should appropriate money for a specific office tasked with reviewing innocence claims.

c) Jurisdictions (including the U.S. Department of Justice) should provide mechanisms to identify, on an ongoing basis, process improvements that could help to avert wrongful convictions before they happen.

d) All stakeholders should work to increase sensitivity to innocence and wrongful conviction issues in capital cases in high schools, colleges, law schools, police academies, judicial training programs and among the broader American public.

## CHAPTER 2: FORENSIC EVIDENCE AND LABS

**Recommendation 5.** The government should preserve all evidence for at least 60 days after an execution. Evidence should not be destroyed until effective notice has been provided to defense counsel.

**Recommendation 6.** Defendants should be entitled by statute to testing of forensic evidence if the results may be relevant to a claim of innocence or wrongful conviction.

**Recommendation 7.** Law enforcement agencies should submit to DNA databanks (a) unidentified profiles obtained from evidence in a capital case and (b) DNA profiles of all convicted felons. Defendants should have access to databank searches.

**Recommendation 8.** Testimony from a forensic examiner offered in capital cases should be excluded from evidence when the examiner is not associated with an accredited forensic laboratory.

**Recommendation 9.** Congress should establish federal standards and procedures for accrediting forensic laboratories. States should either apply the federal standards or adopt their own more stringent standards. Accredited laboratories should be required to:

a) employ certified technicians,

b) use validated techniques,

c) articulate and enforce written standard protocols,

d) require examiner proficiency testing in the particular technique in question, and

e) have in place a procedure for triggering an audit of all death penalty cases when there is reason to question the validity of the original analysis, including, without limitation, when there is reason to believe that the examiner has engaged in negligence or fraud in any case (whether capital or not).

**Recommendation 10.** Forensic evidence should be tested by accredited laboratories (private or public) that function independently from law enforcement.

### CHAPTER 3: ACCESS TO JUSTICE

**Recommendation 11.** A state or federal court should entertain a post-conviction claim that a petitioner facing execution was wrongfully convicted or sentenced and should examine any evidence offered to support such a claim.

a) A claim of wrongful conviction or sentence should not be foreclosed, nor should an examination of supporting evidence be denied, on the ground that the claim or the evidence is presented too late. A court should have discretion to dismiss a claim of wrongful conviction or sentence summarily, or to refuse to hear supporting evidence, only if the petitioner is shown to be manipulating the legal process, including by concocting a fallacious claim or offering spurious evidence merely to prolong litigation.

b) A federal court should credit a previous state court decision regarding a claim of wrongful conviction or sentence only if the state court addressed the claim and the evidence supporting it with care and explained its reasoning in an opinion, and then only if nothing has come to light since the state court decision tending to undermine its reliability.

### CHAPTER 4: CUSTODIAL INTERROGATIONS

**Recommendation 12.** Custodial interrogations of a suspect in a homicide case should be videotaped or digitally recorded whenever practicable.

a) Recordings should include the entire custodial interrogation process.

b) Where videotaping or digital video recording is impracticable, an alternative uniform method, such as audiotaping, should be established.

c) Video or audio recording of the entire custodial interrogation process should not require the suspect's permission.

**Recommendation 13.** Whenever there is a failure for any reason to videotape or audiotape any portion of, or all of, the entire custodial interrogation process, and the statement was not otherwise suppressed, a defendant should be entitled, upon request, to a cautionary jury instruction, appropriately tailored to the individual case, that does the following: notes that failure,

a) permits the jury to give it such weight as the jury feels that it deserves, and

b) where appropriate, further permits the jury to use it as the basis for finding that the statement either was not made or was made involuntarily.

## CHAPTER 5: ENSURING RELIABLE EYEWITNESS TESTIMONY

**Recommendation 14.** State and federal jurisdictions should adopt legislation to require that eyewitness identifications be conducted in accordance with best practice techniques called for by prevailing scientific research. Further, jurisdictions should support research that will result in the continuing development of best practices in identification techniques.

**Recommendation 15.** Courts should suppress unreliable eyewitness identifications. The admissibility determination should be made based on objective criteria, not subjective self-reporting by the witness of his or her likelihood of accuracy at the time of the identification.

**Recommendation 16.** When courts admit eyewitness identification testimony, jurors should be given specific instructions that identify the factors that may influence reliability.

**Recommendation 17.** To give further context to the jury instructions, courts should admit expert trial testimony explaining prevailing research trends relating to the objective reliability of identification procedures and the factors that affect subjective identification reliability.

**Recommendation 18.** Jurisdictions should adopt a standardized protocol or set of best practices to be followed for all forensic interviews of children, which should include the videotaping of all interviews of children.

**Recommendation 19.** State and federal courts should admit expert trial testimony to give context to jury instructions and to explain prevailing research trends relating to the suggestibility of children and the factors that affect the reliability of children's testimony.

## CHAPTER 6: RESERVING CAPITAL PUNISHMENT FOR THE MOST HEINOUS OFFENSES AND MOST CULPABLE OFFENDERS

**Recommendation 20.** Implementation of the Eighth Amendment's prohibition against execution of individuals who have intellectual disability should be improved.

a) The defendant should be required to prove intellectual disability by a preponderance of the evidence.

b) There should be a rebuttable presumption that a person with an intelligence quotient ("IQ") below 75 is intellectually disabled and therefore ineligible for the death penalty. The prosecution should be permitted to rebut the presumption by clear and convincing evidence. An IQ above 70 can be considered in determining whether the defendant has demonstrated intellectual disability by a preponderance of the evidence.

c) Diagnostic tests requiring documentation of lack of adaptive functioning by age 18 should be excused for good cause.

d) If the court makes a pretrial determination that the evidence of intellectual disability is not sufficient to render the defendant ineligible for the death penalty, the defendant should be permitted to raise the issue at trial for de novo determination by the jury. The court's pretrial determination should not be communicated to the jury.

**Recommendation 21.** The death penalty should not be applied to persons who, at the time of the offense, suffered from severe mental disorders that significantly impaired their capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgment in relation to the conduct or to conform their conduct to the requirements of law.

a) A "significant impairment" at the time of the offense should be a threshold question at a special hearing during the penalty phase of a trial.

b) A "significant impairment" at the time of the offense should mean any significant impairment, whether or not such impairment was due to voluntary action (such as voluntary intoxication or drug use or an affirmative decision not to self-medicate).

**Recommendation 22.** A defendant who shows reckless indifference but does not personally kill, attempt to kill, or intend that a killing take place should not be eligible for capital punishment. States should exclude from death eligibility those who were convicted under a felony murder theory alone.

### CHAPTER 7: ENSURING EFFECTIVE COUNSEL

**Recommendation 23.** Every jurisdiction that imposes capital punishment should create an independent authority to screen, appoint, train and supervise lawyers to represent defendants charged with a capital crime. It should set minimum standards for these lawyers' performance. An existing public defender system may comply if it implements the proper standards and procedures.

**Recommendation 24.** Capital defense lawyers should be adequately and reasonably

compensated, with due regard for taxpayers, and the defense should be provided with adequate and reasonable funding for experts and investigators at all stages of the proceeding, including post-conviction.

**Recommendation 25.** Counsel should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, be zealously committed to the capital case and possess adequate time and resources to prepare. Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the case was not affected by the attorney's incompetence. There should be a strong presumption in favor of the attorney's obligation to offer at least some mitigating evidence at the sentencing phase of a capital trial.

### CHAPTER 8: DUTY OF JUDGE AND JURY

**Recommendation 26.** Capital punishment should not be imposed in the absence of a unanimous verdict both as to the death penalty sentence or advisory sentence and as to each aggravating circumstance used to support that sentence.

**Recommendation 27.** Judges should be prohibited from overriding a jury's recommendation of a sentence less than death.

**Recommendation 28.** Jurors should be instructed that residual doubt may be considered as a mitigating circumstance in sentencing.

**Recommendation 29.** Judges should ensure that they have adequately discharged their duty to guide jurors properly in the applicable law.

**Recommendation 30.** The trial court should instruct the jury about all available sentencing options and inform the jury as to the meaning of those sentences, including a life sentence without parole.

### CHAPTER 9: ROLE OF PROSECUTORS

**Recommendation 31.** Prosecutors should provide full discovery to the defense in death penalty cases, including all information and evidence relating to the subject matter of the offense charged, defenses or other issues in the case that are not protected by an established governmental or other testimonial privilege. Some jurisdictions refer to this as "open-file discovery." Prosecutors' offices in jurisdictions with capital punishment, irrespective of the applicable discovery standard, also must develop effective procedures for requiring law enforcement and investigative agencies to gather, properly document and provide all relevant information and evidence to prosecutors for discovery review.

**Recommendation 32.** All capital jurisdictions should establish a Charging Review Committee to review prosecutorial charging decisions in death-eligible cases. The committee should be comprised of one or more line prosecutors, at least one supervisory official, and the chief or head of the prosecuting office. Prosecutors in death-eligible cases should be required to submit proposed capital and non-capital charges to the committee. The committee would then issue binding approval or disapproval of proposed capital charges, with an accompanying explanation. Each jurisdiction should forbid prosecutors from filing a capital charge without the committee's approval.[18]

**Recommendation 33.** The Vienna Convention on Consular Relations ("VCCR") should be enforced by law enforcement officers.

a) Each death penalty jurisdiction should impose on its attorney general (or another central law enforcement officer) the duty of ensuring full compliance with the VCCR. This duty should include training law enforcement actors about consular rights and monitoring adherence to those rights. An independent authority, such as an inspector general, should report regularly about compliance to the jurisdiction's chief executive or legislative body.

b) The U.S. should re-join the Optional Protocol to the VCCR and adopt implementing legislation to give domestic effect to the Optional Protocol.

c) Every death penalty jurisdiction should enact legislation rendering foreign nationals ineligible for the death penalty if they are not provided with their consular rights in a timely fashion under the VCCR.

## CHAPTER 10: SAFEGUARDING RACIAL FAIRNESS AND PROPORTIONALITY

**Recommendation 34.** All jurisdictions that impose the death penalty should enact legislation to help ensure that racial discrimination plays no role in the capital punishment system. As a critical component of this program, each jurisdiction should adopt a framework for the rigorous collection of data on the operation of the capital punishment system and the role of race in it. A second component is to ensure racial and ethnic diversity among the decision-makers in death penalty cases, particularly defense lawyers, prosecutors, jurors and judges.

[18] Committee member Judge William S. Sessions supports issuance of an advisory rather than a binding recommendation from the committee on whether to seek the death penalty. Judge Sessions' full explanatory statement on this issue is found at the end of Chapter 9.

## CHAPTER 11: EXECUTIVE CLEMENCY

**Recommendation 35.** The executive branch should:

a) ensure that the clemency process is accessible to all death-sentenced prisoners for independent review of their claims,

b) implement open and transparent clemency procedures that include, at a minimum, notice and a meaningful opportunity to be heard for the offender and representatives of the state,

c) adopt substantive standards against which clemency applications will be evaluated, and

d) provide a written explanation of the clemency decision, including the factors that were considered important and relevant.

## CHAPTER 12: EXECUTION PROCEDURES

**Recommendation 36.** Jurisdictions should rely on the most current scientific knowledge to develop protocols that minimize the risk of pain or suffering, which currently demands the adoption of a one-drug protocol.

**Recommendation 37.** Jurisdictions should act with transparency in the development and administration of lethal injection protocols.

**Recommendation 38.** Jurisdictions should use only drugs obtained in compliance with all laws and approved by the U.S. Food and Drug Administration for use in humans and should take appropriate measures to ensure the quality of the drugs.

**Recommendation 39.** Jurisdictions should ensure that qualified medical personnel are present at executions and responsible for all medically-related elements of executions.

# CHAPTER 1
## SAFEGUARDING INNOCENCE AND PROTECTING AGAINST WRONGFUL EXECUTION

On October 25, 2013, Reginald Griffin became the 143rd person exonerated from death row in the United States. Griffin is the fourth person exonerated in Missouri. He was sentenced to death for the 1983 murder of James Bausley, a fellow inmate, while serving a twenty-year sentence for an armed assault conviction in 1981.

Two other prisoners and co-conspirators, Doyle Franks and Arbary Jackson, were also charged with the murder, and they consistently maintained that another inmate, Jeffrey Smith, was the third person involved in the stabbing, not Griffin. Franks and Jackson were also convicted of the murder, but Griffin was the only one sentenced to death. No physical evidence implicated Griffin in the murder, and evidence that was uncovered after trial revealed that guards had confiscated a sharpened screwdriver from Smith as he was leaving the area where the stabbing occurred. Griffin's conviction was based largely on the testimony of two prisoners who testified in exchange for promises from the prosecution regarding their own convictions. Ultimately, one prisoner recanted his testimony and the other prisoner's testimony was disproven.

In August 2011, the Supreme Court of Missouri ordered a new trial, finding that the prosecution violated Griffin's constitutional right to a fair trial by withholding evidence and stating that Griffin's conviction was no longer "worthy of confidence." In December 2012, Griffin was released on bond pending retrial, and less than a year later the prosecution dismissed the charges.

**Recommendation 1. Jurisdictions should require post-conviction review of credible claims of innocence.**

**a) Jurisdictions should adopt legislation to establish that, if it is more likely than not that no reasonable jury would convict in light of the new evidence, the defendant should be released.**

**b) Jurisdictions should adopt legislation to establish that, if it is more likely than not that the jury would not have convicted in light of the new evidence, the defendant should be given a new trial.**

**c) Exculpatory evidence relevant to a credible claim of innocence or wrongful conviction should be allowed in post-conviction proceedings notwithstanding procedural bars.**

Since 1973, over 140 people in 26 states have been released from death row based on evidence of their innocence, with some having served up to thirty years for crimes they did not commit. Still more have had their convictions reduced or their sentences commuted because of doubts about their guilt. Most disturbingly, there is evidence that defendants have been put to death despite significant questions regarding their innocence, undermining confidence in the entire criminal justice system.[1] There can no longer be any doubt that innocent people do get convicted of horrific crimes, spend years in prison and even face execution.

Some have argued that, rather than proving the fallibility of our system, exonerations of the innocent demonstrate that the system is working. For instance, Justice Thomas' majority opinion in the 2006 case *Kansas v. Marsh* stated, "Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success."[2] This sentiment ignores the damage caused when an innocent person is convicted of a crime. Wrongful convictions undermine society's confidence in the ability of the criminal justice system to perform its most basic function – to convict the guilty and acquit the innocent. Overturning a wrongful conviction, when possible at all, can take decades, during which time the true perpetrator often remains free to commit other offenses. The psychological trauma of wrongful

[1] For example, significant questions have been raised about the potential innocence of Cameron Todd Willingham, who was executed in 2004, and Carlos de Luna, who was executed in 1989, both by the state of Texas. *See* Cameron Todd Willingham: Wrongfully Convicted and Executed in Texas, at http://www.innocenceproject.org/Content/Cameron_Todd_Willingham_Wrongfully_Convicted_and_Executed_in_Texas.php; *see also* Investigation Reveals Texas Likely Executed An Innocent Man: Points to Eyewitness Misidentification, at http://www.innocenceproject.org/Content/Investigation_Reveals_Texas_Likely_Executed_An_Innocent_Man_Points_to_Eyewitness_Misidentification.php.

[2] *Kansas v. Marsh*, 548 U.S. 163, 193 (2006).

conviction on defendants, their families and victims' families is beyond measure. Wrongful convictions are also expensive. Innocent people, incarcerated at government expense, are prevented from making any meaningful contribution to society, while countless hours and resources are spent in the judicial system trying to correct the mistake. Moreover, often, it is only as a result of some fortuitous event that a defendant's innocence is discovered, which undermines the public's confidence in the accuracy and reliability of the system.

In many death penalty jurisdictions, including at the federal level, there are significant procedural bars that a person claiming innocence must overcome in order to present such a claim and high burdens of proof that are incredibly difficult to meet. The result is that claims of innocence are extremely difficult to litigate, even in those states where they are permitted.

Further, the U.S. Supreme Court has not definitively recognized what is called a "freestanding" actual innocence claim under the Eighth Amendment. In *District Attorney's Office of the Third Judicial District v. Osborne*,[3] the Court held that the "actual innocence claim" issue was an "open question."[4] But two months later, the Court ordered a hearing in the case of Georgia death row inmate Troy Davis on the issue of "actual innocence." Finding that the "substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing," the Court directed a federal district court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[5] In a vehement dissent, Justice Scalia wrote, "[t]oday, without explanation and without any meaningful guidance, this Court sends the District Court for the Southern District of Georgia on a fool's errand."[6] Justice Scalia insisted "[t]his Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent."[7] After conducting an evidentiary hearing, the district court found that Davis had

**Wrongful convictions undermine society's confidence in the ability of the criminal justice system to perform its most basic function – to convict the guilty and acquit the innocent.**

[3] 557 U.S. 52 (2009).

[4] *Id*. at 71.

[5] *In re Davis*, 557 U.S. 952, 952 (2009).

[6] *Id*. at 957 (Scalia, J., dissenting).

[7] *Id*. at 955 (emphasis in original).

failed to establish his "actual innocence" by "clear and convincing evidence," and Davis was executed on September 21, 2011. As a result, it appears that for individuals to successfully present claims of actual innocence in federal court they must meet the exceedingly high "clear and convincing" burden of proof.[8]

With due regard for the interest of finality, the system must be willing to acknowledge errors that could result in the execution of an innocent person. Each jurisdiction should adopt legislation that sets standards to facilitate the review of credible post-conviction claims of innocence. Specifically, jurisdictions should adopt legislation to establish that, if no reasonable jury would convict in light of the new evidence, the defendant should be released. The legislation should require that in cases where it is more likely than not that the jury would not have convicted in light of the new evidence, the defendant should be given a new trial. Statutes of limitation and other procedural rules should not bar introduction of credible evidence of innocence, regardless of when it is discovered. These recommendations strike the appropriate balance between the interests in preserving the finality of the verdict and in ensuring that convictions are accurate and just.

**Recommendation 2. If a prosecutor becomes aware of new, credible, material evidence that it is reasonably likely that an innocent person has been convicted, the prosecutor should be required to:**

**a) notify the court and the defendant of that likelihood,**

**b) disclose the arguably exonerating evidence, and**

**c) agree to set the conviction aside if it is more likely than not that no reasonable jury would convict in light of the new evidence.**

**If a prosecutor becomes aware of "clear and convincing" evidence that an innocent person has been convicted, the prosecutor must pursue the applicable remedy to right the wrong.**

Our judicial system has long placed before the prosecutor the "twofold aim… that guilt shallnot escape or innocence suffer."[9] To the first end, a prosecutor is required to "prosecute

[8] *In re Davis*, No. CV 409-130, 2010 WL 338508, at *45 (S.D. Ga. Aug. 24, 2010), *cert. denied*, 131 S. Ct. 1787 (mem.) (2011). *Sawyer v. Whitley*, 505 U.S. 333 (1992), set the standard of proof for showing "actual innocence" in the context of an erroneous jury verdict with respect to the sentencing phase of a capital trial. The *Sawyer* standard requires a petitioner to show "by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under [State] law." *Id.* at 348. On remand in *In re Davis*, the district court applied this same "clear and convincing" standard to a "freestanding" innocence claim. *See generally In re Davis*, 2010 WL 3385081.

[9] *Berger v. United States*, 295 U.S. 78, 88 (1935).

with earnestness and vigor," and to the second, the U.S. Supreme Court cautions that a prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones."[10]

Over time, the legal profession has developed rules governing a prosecutor's *pretrial* obligation to avoid a wrongful conviction, but little guidance exists in the post-conviction setting. In 2008, the American Bar Association ("ABA") adopted a model rule outlining a prosecutor's disclosure and investigation obligations in the post-conviction context when new evidence is discovered.[11] To date, Wisconsin is the only state to have adopted the ABA's model rule, though New York implemented a similar rule in 2006.[12]

In the absence of explicit guidance, prosecutors' offices across the country have taken widely divergent approaches to post-conviction claims of innocence. Institutional disincentives, however, are likely to impede a wrongfully convicted prisoner's effort to obtain full disclosure from prosecutors' offices absent an explicit requirement:

> The institutional focus of a prosecutor's office is upon closing current cases, not reevaluating old ones, and the time and resources devoted to the latter task necessarily take away from the former. Prosecutors also may face a political climate that responds favorably to a "tough on crime" message and thereby discourages the prosecutor from devoting resources to anything but the pursuit of new convictions.[13]

There also may be institutional resistance to the very idea that the prosecutor's office is responsible for the prosecution and conviction of an innocent person.[14]

The U.S. Supreme Court recognized in *Imbler v. Pachtman* that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."[15] When a prosecutor becomes aware of new, credible and material evidence suggesting a reasonable likelihood of a convicted defendant's innocence, a prosecutor's responsibilities should include a duty

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10 *Id.*

11 Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post Conviction Claims of Innocence: DNA and Beyond?*, 7 Ohio St. J. Crim. L. 771, 771 (2010) (citing *In the Matter of Amendment of Supreme Court Rules Chapter 20, Rules of Prof'l Conduct for Attorneys*, No. 08-24 (Wis. 2009), *at* http://www.wicourts.gov/sc/rulhear/DisplayDocument.html?content=html&seqNo=36849); *see also* Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 Wash. L. Rev. 35, 56 n.91 (2009).

12 Ginsburg & Hunt, *supra* note 12, at 771.

13 *Id.* at 776-77.

14 *See id.*

15 *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976); *see also, e.g.*, *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992); *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992); *Monroe v. Butler*, 690 F. Supp. 521 (E.D. La. 1988).

to disclose the evidence, to conduct an appropriate investigation, and, upon becoming convinced that a miscarriage of justice occurred, to take steps to remedy it. Evidence in the possession of a prosecutor at the time of trial that would tend to prove the defendant's innocence but was never disclosed to defense counsel would not be considered "new" evidence and therefore it would not be covered by this recommendation. Of course, that situation should not lead to an execution, as this report discusses further in Chapter 9.

**Recommendation 3. The government should be required to disclose to the defense, as soon as practicable, all post-conviction forensic testing results.**

The government should be required to disclose to the defense, expeditiously and without a request, all post-conviction forensic testing results. Compelling such disclosures is necessary, as demonstrated by the recent situation involving the U.S. Department of Justice's failure to disclose to defendants and their attorneys the results of a nine-year review of forensic evidence. The review of approximately 6,000 cases, which was in response to an inspector general's investigation of misconduct at the FBI crime lab in the 1990s, uncovered numerous crime lab errors and revealed certain forensic evidence to be unreliable. These results were made available only to the prosecutors in the affected cases. *The Washington Post* found that while many prosecutors made swift and full disclosures, many others did so incompletely, years late or not at all.[16]

**… a prosecutor's responsibilities should include a duty to disclose the evidence, to conduct an appropriate investigation, and, upon becoming convinced that a miscarriage of justice occurred, to take steps to remedy it.**

[16] *See* Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic Flaws Found by Justice Department*, Wash. Post, Apr. 16, 2012, at http://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_story.html. In another analysis of forensic testing methods, the National Academy of Sciences ("NAS") conducted a review of the FBI's bullet-lead analysis, a forensic technique the FBI employed for more than three decades. The FBI used bullet-lead analysis, for example, when a gun had been used in a crime but the bullet fragments obtained from the crime scene were too small or mangled to analyze the marks on the fragment to compare them to the gun in question. The 2004 report found that "variations in the manufacturing process rendered the FBI's testimony about the science 'unreliable and potentially misleading'" and stated that conclusions about links between a particular bullet and those found in a suspect's gun or a box of cartridge "were so overstated that such testimony should be considered 'misleading under federal rules of evidence.'" *See* John Solomon, *FBI's Forensic Test Full of Holes*, Wash. Post, Nov. 18, 2007, at http://www.washingtonpost.com/wp-dyn/content/article/2007/11/17/AR2007111701681_pf.html. Although the FBI abandoned the use of bullet-lead analysis in 2005, it communicated in a news release that it continued to stand behind the

Justice Department officials said that they met their legal and constitutional obligations when they learned of specific errors by alerting prosecutors, and that they were not required to inform defendants directly. As a result, hundreds of defendants nationwide remained in prison or on parole for crimes that might merit exoneration, retrial or retesting of evidence using DNA, because FBI forensics experts may have misidentified them as suspects.

The lack of notification prolonged the term of wrongful imprisonment for at least one exonerated person. Donald Gates spent 28 years in prison before DNA testing exonerated him in 2009, although prosecutors knew 12 years prior that the forensic findings that contributed to his conviction were flawed.[17] Benjamin Herbert Boyle was executed in 1997 – more than a year after the Justice Department began its review – even though a prosecutor's memorandum stated that he would not have been eligible for the death penalty without the FBI's flawed work.

Partly as a result of the Justice Department's handling of its reviews, the ABA and others have proposed stronger ethics rules that would require prosecutors to act on information that casts doubt on convictions and would open laboratory and other files to the defense. The proposed rules would also promote clearer reporting and evidence retention, greater involvement by scientists in setting rules for testimony at criminal trials and more scientific training for lawyers and judges.

**Recommendation 4. Jurisdictions should establish procedures for systemic review of exonerations and for avoiding future errors.**

**a) Jurisdictions should provide mechanisms for the review of capital cases in which defendants were exonerated, for the purpose of identifying the causes of the error and for correcting systemic flaws affecting the accuracy, fairness and integrity of the capital punishment system.**

**b) The U.S. Department of Justice should establish and Congress should appropriate money for a specific office tasked with reviewing innocence claims.**

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scientific foundation of the analysis. The FBI has been criticized for downplaying the NAS's conclusions and failing to "call attention to the magnitude of the FBI's internal concerns." *See id.* Only as a result of a joint investigation and news report on the subject conducted by *The Washington Post* and *CBS News* did the FBI expand its alert and increase its specificity regarding concerns about bullet-lead analysis. *See* FBI, Press Release, FBI Laboratory to Increase Outreach in Bullet Lead Cases, Nov. 17, 2007, at http://www.fbi.gov/news/pressrel/press-releases/fbi-laboratory-to-increase-outreach-in-bullet-lead-cases.

[17] *See* Spencer S. Hsu, *D.C. Man Served 28 Years. Then the Evidence that Sent Him to Prison Fell Apart*, Wash. Post, Apr. 16, 2012, at http://www.washingtonpost.com/local/crime/2012/04/16/gIQAbndgMT_story.html.

**c) Jurisdictions (including the U.S. Department of Justice) should provide mechanisms to identify, on an ongoing basis, process improvements that could help to avert wrongful convictions before they happen.**

**d) All stakeholders should work to increase sensitivity to innocence and wrongful conviction issues in capital cases in high schools, colleges, law schools, police academies, judicial training programs and among the broader American public.**

When the criminal justice system fails in its most critical function – convicting the guilty and exonerating the innocent – the government should step in to determine the causes of the failure and identify appropriate reforms. For this reason, experts in the criminal justice system have advocated the establishment of "innocence commissions" in jurisdictions where wrongful convictions have occurred. Three possible models have emerged.

**Moreover, it is important to ensure that, no matter how or by whom such commissions are established, they are not subject to political pressures over their creation, appointment of members, investigations, or findings.**

The first provides extra-judicial procedures for examining individual claims of innocence. North Carolina became the first state to create an agency specifically charged with investigating and evaluating post-conviction claims of factual innocence. Similarly, the Dallas District Attorney's Office established a Conviction Integrity Unit in 2007, intended to review and re-investigate legitimate post-conviction claims of innocence. This special division was the first of its kind in the United States. These and other state conviction review units have identified a number of innocent convicted defendants, some in cases where no post-conviction claim of innocence had even been made.

The second model uses individual cases as a springboard for investigating and correcting systemic flaws. For instance, Canada has authorized the appointment of Public Inquiry Commissions, which are independent, temporary, non-governmental bodies created to investigate the causes of a particular mistaken conviction. Likewise, individual jurisdictions, including Santa Clara County, California, have created departments specifically designed to review cases of alleged prosecutorial misconduct and set protocol to prevent future errors. Several states, including Florida, also have appointed either permanent or temporary commissions designed to study the causes of error and unfairness in the administration of the criminal justice system. These types of commissions recognize that review of individual cases, alone, cannot solve systemic flaws.

In the third model, jurisdictions have created independent commissions to both identify and correct the causes of wrongful convictions in individual cases and maintain pressure for continual systemic improvement. District Attorney Cyrus Vance, Jr. established an organization with these two goals in New York County, New York. New York's "Conviction Integrity Unit" consists of a Conviction Integrity Committee, a Conviction Integrity Chief, and an outside Conviction Integrity Policy Advisory Panel. The Conviction Integrity Unit evaluates the merits of each innocence claim, reviews practices and policies related to case assessment, investigation, and disclosure obligations, and provides insight on national best practices and evolving issues in the area of wrongful convictions.

Governors, attorneys general and legislatures have the power to appoint any of these types of commissions and state supreme courts also can do so pursuant to their inherent supervisory powers. Appropriate authorities should immediately adopt institutional mechanisms to address the multifaceted problem of wrongful convictions. Moreover, it is important to ensure that, no matter how or by whom such commissions are established, they are not subject to political pressures over their creation, appointment of members, investigations, or findings. In addition, they must have the transparency and vigilance needed to promote implementation of recommendations or monitor the need for future reforms.

Some jurisdictions have Innocence Projects, usually associated with university law or journalism schools, in which students, practicing attorneys and journalists investigate wrongful conviction claims, represent those with credible innocence claims, and develop initiatives to raise public awareness and create and implement systemic solutions. Although these Innocence Projects initially focused on DNA exonerations, they have expanded their mission to include numerous other ways to identify and correct wrongful convictions. Most rely on volunteers or students working for academic credit to handle their caseloads. Many jurisdictions have no such projects at all. Given their ability to promote citizen monitoring of actual and potential abuses, these projects should become adequately funded, integral parts of the criminal justice system in all jurisdictions.

Citizen monitoring can also be promoted by expanding public education on the dangers of convicting the innocent. High school and college courses should address these issues, police officers should be trained in identifying them and lawyers must know how to uncover and cure existing or impending errors. Law schools in particular might establish courses, as some are starting to do, focusing on the causes of and cures for wrongful convictions and on educating the public and the legal profession about the problem.

# CHAPTER 2
## Forensic Evidence and Labs

Hank Skinner was convicted in 1995 of murdering his longtime girlfriend, Twila Busby, and her two grown sons on New Year's Eve in 1993. Skinner has maintained his innocence, saying that he was passed out on alcohol and drugs that night and awoke to find the family, who lived with him, murdered.

DNA testing in November 2012 identified his DNA profile in blood found in multiple places in the house. The testing also found the DNA profile of an unknown male on a knife believed to be used in the crime and on the carpet in the bedroom that the sons shared. A new round of testing conducted in 2013 on a series of hairs, found clutched in Busby's hand, revealed that one hair belongs to Skinner and that at least two hairs belong to someone related to Busby, but not her or her sons. That evidence is consistent with the defense's theory that Busby's uncle may have committed the crime. A key piece of evidence in the crime, a windbreaker stained with blood that was found at the crime scene, was connected to the uncle, who was known to be violent and had previously assaulted Busby. Following a 2012 order by the Texas Court of Criminal Appeals requiring testing of remaining evidence, it came to light that the windbreaker had been lost by law enforcement – the windbreaker has never been tested.

**Recommendation 5. The government should preserve all evidence for at least 60 days after an execution. Evidence should not be destroyed until effective notice has been provided to defense counsel.**

Forensic testing technology has undergone rapid change and refinement in recent years, which has increased both its capability to obtain meaningful results from old evidence samples and its ability to differentiate between possible subjects. Though only five to ten percent of criminal cases involve DNA evidence,[1] the probative value of DNA testing, where available, has been steadily increasing as technological advances and growing databanks amplify the ability to identify perpetrators and eliminate suspects. A 1995 survey of forensic laboratories reported that DNA testing excluded suspects in about one-fifth to one-fourth of cases for which evidence that can be tested for DNA is available.[2] There have been 312 post-conviction DNA exonerations in the United States as of March 2014, including at least 18 people who were sentenced to death before DNA testing proved their innocence and led to their release, and another 16 people who were charged with capital crimes but not sentenced to death.[3] The growing number of convictions that have been vacated because of DNA results has weakened the strong presumption that jury verdicts are correct.

The substantial advances in DNA testing technology make it possible to obtain conclusive results in cases in which previous testing either was not performed or was inconclusive. This has resulted in successful post-conviction exonerations and identification of actual perpetrators in a number of cases. Unfortunately, post-conviction DNA testing is often impossible because the evidence has been lost, destroyed or contaminated due to improper storage.

**Unfortunately, post-conviction DNA testing is often impossible because the evidence has been lost, destroyed or contaminated due to improper storage.**

Most death penalty states and the federal government now require preservation of forensic evidence, but Alabama, Delaware, Idaho, Indiana, Kansas, Pennsylvania, South Dakota, Tennessee, Utah, Washington, and Wyoming do not.[4] Many states with

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1 *See* Innocence Project, Unreliable or Improper Forensic Science, http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php.

2 *See* Nat'l Inst. of Justice, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial (1996), at https://www.ncjrs.gov/pdffiles/dnaevid.pdf.

3 The Innocence Project, DNA Exonerations Nationwide, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php.

4 *See* The National Center for Victims of Crime, Evidence Retention Laws: A State-by-State

preservation requirements prescribe the period for required retention based on time, the type of crime committed, or both. Other states require only the retention of evidence obtained on or after the effective date of the applicable retention statutes, thus permitting states to destroy old evidence. Some states only mandate the preservation of evidence upon petition for retesting of evidence. The result is the destruction of large quantities of evidence in the period between conviction and a defendant's filing of a petition for post-conviction testing or retesting of physical evidence.

Physical evidence should not be destroyed until the government provides effective notice to counsel. Given the importance of DNA in exonerating the innocent and convicting the guilty, there is no compelling reason to destroy or dispose of evidence that could possibly be tested for DNA, prior to the conclusion of a capital case. If retention of a particular piece of physical evidence containing DNA evidence is impractical, reasonable care should be taken to retain representative samples of those portions of the evidence that contain DNA.

To prevent the premature destruction or disposal of physical evidence that could be subject to forensic testing or retesting, the Committee recommends that the government preserve all physical evidence until no less than 60 days after an execution.

### Recommendation 6. Defendants should be entitled by statute to testing of forensic evidence if the results may be relevant to a claim of innocence or wrongful conviction.

Even in cases where evidence has been properly preserved, there is often no guarantee that a defendant will have the opportunity to test it. Frequently, prosecutors vigorously oppose giving defendants access to evidence for DNA testing, even where such evidence apparently came from the true perpetrator. In *District Attorney's Office v. Osborne*,[5] the Supreme Court held that the due process clause does not require states to turn over DNA evidence to individuals convicted of crimes.

Although all jurisdictions allow testing under some circumstances,[6] the statutory standards are confusing and burdensome and can result in years of litigation. Some statutes impose barriers to testing that are insurmountable for most prisoners, such as restrictions against inmates who pleaded guilty or whose lawyers failed to request DNA testing at the time of trial. In Texas, for example, Hank Skinner vigorously litigated his request for DNA testing for twelve years

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Comparison (Aug. 21, 2013), at http://victimsofcrime.org/docs/default-source/dna-resource-center-documents/evidence-retention-check-chart-9-5.pdf?sfvrsn=2. Non-death penalty states without evidence retention statutes include New Jersey, New York, North Dakota, Vermont, and West Virginia. *Id.*

[5] 557 U.S. 52 (2009).

[6] For example, Kentucky courts have the inherent power to grant DNA testing if it might "correct a manifest injustice." *Garr Keith Hardin and Jeffrey DeWayne Clark*, No. 2011-SC-000722 (Ky. Apr. 25, 2013).

before the state finally consented to test any evidence it had not lost or destroyed in the course of the litigation.

To prevent prolonged litigation and the risk that potentially exculpatory forensic evidence would go unexamined or untested, despite the fact that it could prevent a wrongful execution, the Committee believes that jurisdictions should adopt statutes that provide clear standards giving convicted defendants access to evidence, and the right to test or retest, if such evidence may be relevant to a claim of innocence or wrongful conviction.

**Hank Skinner vigorously litigated his request for DNA testing for twelve years before the state finally consented to test any evidence it had not lost or destroyed in the course of the litigation.**

**Recommendation 7. Law enforcement agencies should submit to DNA databanks (a) unidentified profiles obtained from evidence in a capital case and (b) DNA profiles of all convicted felons. Defendants should have access to databank searches.**

Jurisdictions should adopt legislation that requires law enforcement agencies to submit to state and federal DNA databanks unidentified DNA profiles collected as evidence in capital cases. Law enforcement agencies should also be required to submit unidentified DNA profiles from cases for which another defendant was convicted if it reasonably appears to be related to any pending capital case. If law enforcement agencies fail to submit to a state or federal DNA databank any such DNA profiles, the defendant should have the right to petition a court for the submission and the court should have the authority to issue an order requiring the state to submit such profiles to the DNA databanks for comparison purposes. Jurisdictions should also collect and submit to DNA databanks the DNA profiles of all convicted felons. These practices would help police and prosecutors solve cold cases, as well as give death row inmates an important opportunity to establish their innocence or claim of wrongful conviction.

**Recommendation 8. Testimony from a forensic examiner in capital cases should be excluded from evidence when the examiner is not associated with an accredited forensic laboratory.**

Expert testimony plays an enormous role in the trial of criminal cases. As the introduction of physical evidence becomes more prevalent – and juries come to expect "foolproof" test results as a matter of course – concerns have grown over the reliability of both the science and the technicians that provide "expert testimony" in capital cases.

Growing concerns about "junk science" and its potential impact on the fact finder led the U.S. Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[7] to require that all scientific theories and techniques be shown to be "relevant" and "reliable" before they can be admitted into evidence through expert testimony. The Court further clarified that *all* expert testimony, scientific or not, novel or not, must be subjected to "exacting standards of reliability" under *Daubert*.[8] The need for such scrutiny has been recognized because of the widespread awareness that in a significant number of cases, questionable or improper forensic science has contributed to wrongful convictions.

The Innocence Project has reported that more than 50 percent of the first 225 wrongful convictions overturned by DNA testing involved "unvalidated or improper" forensic science.[9] According to the Innocence Project, forensic disciplines or techniques are "unvalidated or improper" if they:

1. have not been tested to establish their validity and reliability;

2. result in testimony about forensic evidence that presents inaccurate statistics, gives statements of probability or frequency in the absence of valid empirical data, interprets non-probative evidence as inculpatory, or concludes/suggests that evidence is uniquely connected to the defendant without empirical data to support such testimony; or

3. result from misconduct, either by fabricating inculpatory data or failing to disclose exculpatory data.[10]

Even where scientific methods and techniques are proven reliable, those techniques might not be properly applied to the facts of a particular case because standard lab procedures are inadequate, lab technicians fail to properly follow established procedures, or, in extreme cases, lab technicians or other personnel commit outright fraud. Although intentional fraud is rare, the integrity of forensic crime labs has been called into question in highly publicized cases, including that of Fred Zain, a West Virginia state police laboratory employee whose falsified testimony put the convictions of more than 100 people into question.[11] Challenges have also been raised by defendants on death row who were convicted, at least in part, based on the

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7 509 U.S. 579 (1993).

8 *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000).

9 The Innocence Project, Wrongful Convictions Involving Unvalidated or Improper Forensic Science that Were Later Overturned through DNA Testing 1 (Feb. 1, 2009) at http://www.innocenceproject.org/docs/DNA_Exonerations_Forensic_Science.pdf.

10 *Id.*

11 Francis X. Clines, *Work by Expert Witness Is Now on Trial*, N.Y. Times, Sept. 5, 2001, at http://www.nytimes.com/2001/09/05/us/work-by-expert-witness-is-now-on-trial.html.

testimony of former Mississippi forensic pathologist Dr. Stephen Hayne, after other murder convictions based on his testimony were overturned.[12] In Texas, Dr. Ralph Erdmann was convicted of seven felony counts of falsifying autopsy results and was forced to surrender his medical license as a result.[13]

Further, defendants have been convicted on the basis of "junk science" techniques that courts considered valid at the time of trial, but are now recognized as unreliable. Junk science claims have been raised in the case of Cameron Todd Willingham, who was executed in 2004 for setting the fire that killed his three daughters, after some experts have said that the scientific evidence of arson offered against Willingham was bogus.[14] In September 2013, a Texas habeas corpus statute took effect that permits prisoners to seek release and a new trial if junk science played a pivotal role in their convictions.[15]

**...defendants have been convicted on the basis of "junk science" techniques that courts considered valid at the time of trial, but are now recognized as unreliable.**

A scandal that came to light in 2003 involving the Houston Police Department laboratory highlights another danger – namely the lack of proper education and training of forensic examiners. In the Houston case, several DNA experts came forward accusing the DNA/Serology Unit of the Houston Police Department Crime Laboratory of performing grossly incompetent work and presenting findings in a misleading manner designed to unfairly help prosecutors obtain convictions. An audit by the Texas Department of Public Safety confirmed serious inadequacies in the laboratory's procedures, including "routine failure to run essential scientific controls, failure to take adequate measures to prevent contamination of samples, failure to adequately document work performed and results obtained and routine failure to follow correct procedures for computing statistical frequencies."[16]

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[12] Campbell Robertson, *Mississippi Autopsies By Doctor In Question*, N.Y. Times, Jan. 7, 2013, at A11.

[13] Roberto Suro, *Ripples of a Pathologist's Misconduct In Graves and Courts of West Texas*, N.Y. Times, Nov. 22, 1992, at http://www.nytimes.com/1992/11/22/us/ripples-of-a-pathologist-s-misconduct-in-graves-and-courts-of-west-texas.html.

[14] *See* Paul C. Giannelli, *Junk Science and the Execution of an Innocent Man*, 7 N.Y.U. J L. & Liberty 22 (2013).

[15] S.B. 344, 2013 Leg., 83rd Sess. (Tex. 2013) (enacted).

[16] U.S. Fed. Bureau of Investigation, Quality Assurance Audit for Forensic DNA and Convicted Offender DNA Databasing Laboratories: An Audit of Houston Police Department Crime Laboratory – DNA/Serology Section for December 12-13, 2002 (2003), at www.scientific.org/archive/Audit%20Document--Houston.pdf; *see also* Michael R. Bromwich, Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room (2007), at http://www.hpdlabinvestigation.org/reports/070613report.pdf.

Similarly, in August 2012, Annie Dookhan, a chemist at the Massachusetts State Police crime lab, was accused of improperly handling drug evidence and breaching procedures. She was ultimately charged with 27 counts of obstruction of justice and perjury. Co-workers had shared with supervisors suspicions about Dookhan, who allegedly mishandled 50,000 drug samples in 34,000 cases. Lack of oversight resulted in a failure to identify any problems for nearly nine years (even though Dookhan would frequently process more than 500 samples per month while the average analyst would process only between 50 and 150 samples). The ACLU has estimated that additional costs to Massachusetts taxpayers to pay for prosecutors, public defenders and courts to review the 34,000 cases worked on by Dookhan could total nearly $100 million.[17]

To address these many concerns, the Committee recommends that testimony from a forensic examiner offered in capital cases should be excluded from evidence when the examiner is not associated with an accredited forensic laboratory.

**Recommendation 9. Congress should establish federal standards and procedures for accrediting forensic laboratories. States should either apply the federal standards or adopt their own, more stringent standards. Accredited laboratories should be required to:**

**a) employ certified technician,**

**b) use validated techniques,**

**c) articulate and enforce written standard protocols,**

**d) require examiner proficiency testing in the particular technique in question, and**

**e) have in place a procedure for triggering an audit of all death penalty cases when there is reason to question the validity of the original analysis, including, without limitation, when there is reason to believe that the examiner has engaged in negligence or fraud in any case (whether capital or not).**

In November 2005, Congress directed the National Academy of Sciences ("NAS") to conduct a study and issue a report, *inter alia*, assessing the present and future needs of the forensic science community in the United States, and making recommendations for maximizing the use of forensic technologies and techniques to solve crimes, investigate deaths and protect the

[17] *See* Brian Ballou et al., *Former Colleague Testifies Annie Dookhan Had Access to State Lab, Drug Database*, Bos. Globe, Oct. 11, 2012, at http://www.boston.com/metrodesk/2012/10/11/state-chemist-testifies-annie-dookhan-did-not-test-drugs-shawn-drumgold-drug-case/39MJCXnIpNBRXgGdsdUwRI/story.html.

public. The NAS Report stated that what most surprised the committee responsible for the report was the consistency of the message it received:

> The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country. This can only be done with effective leadership at the highest levels of both federal and state governments, pursuant to national standards, and with a significant infusion of federal funds.[18]

Forensic science facilities often have inadequate educational programs and they typically lack mandatory and enforceable standards founded on rigorous research and testing, certification requirements and accreditation programs. Laboratories also are under-resourced and under-staffed, resulting in huge backlogs that may contribute to errors. Backlogs may discourage law enforcement personnel and organizations from submitting evidence and laboratories may restrict submissions of evidence in order to reduce backlogs.[19] The failure to test, or even submit for testing, pieces of evidence could result in the wrong person being convicted or the failure to exonerate those who may already have been arrested but are awaiting trial. Moreover, backlogs are exacerbated by increased requests for expedited laboratory results. Laboratories are thus challenged to balance requests for "older" and "cold" cases with new cases, resulting in the risk that exculpatory evidence might not come to light or might be significantly delayed. The need to retest evidence in older or cold cases is underscored by findings like those of Urban Institute researchers, who discovered that new advances in testing appeared to exculpate convicted defendants in 5% of Virginia criminal convictions between 1973 and 1987 in which evidence was available for retesting.[20]

**Forensic science facilities often have inadequate educational programs and they typically lack mandatory and enforceable standards founded on rigorous research and testing, certification requirements and accreditation programs.**

[18] Nat'l Research Council, Nat'l Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward (Aug. 2009), at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf ("NAS Report").

[19] *See id.* at 37.

[20] John Roman et al., Post-Conviction DNA Testing and Wrongful Conviction (June 2012), at http://www.urban.org/UploadedPDF/412589-Post-Conviction-DNA-Testing-and-Wrongful-Conviction.pdf.

Forensic sciences also are hindered by extreme Balkanization, which is marked by multiple types of practitioners with different levels of education and training and different professional cultures and standards for performance. The reliance on apprentice-type training and a guild-like structure of disciplines further works against the goal of a single forensic science profession. Because of a lack of clear standards and procedures, between 2002 and 2012, approximately 30 federal, state, and local crime labs, including those serving the FBI, the U.S. Army, and eight of the nation's 20 largest cities, were reported to have experienced failures that resulted in inaccurate results.[21]

**Despite increasing awareness of problems in forensic laboratories, effective implementation of reform is difficult.**

Despite increasing awareness of problems in forensic laboratories, effective implementation of reform is difficult. Currently, no federal standards exist regarding the accreditation of forensic laboratories. In February 2013, the U.S. Department of Justice and the National Institute of Standards and Technology announced the formation of the National Commission on Forensic Science to develop guidance on practices for federal, state and local forensic science laboratories. The procedures and standards offered in this guidance would be voluntary. Legislation has also been proposed in the U.S. Senate which would "establish an 'Office of Forensic Science' and a 'Forensic Science Board' to strengthen and promote confidence in the criminal justice system by ensuring consistency and scientific validity in forensic testing."[22] The Senate bill requires the Forensic Science Board to recommend standards for the accreditation of forensic science laboratories and although accreditation is not required by the bill, unaccredited labs may not receive, directly or indirectly, any federal funds, nor may any federal agency use any unaccredited lab during the course of a criminal investigation or criminal court proceeding.[23]

Only four states (Missouri, New York, Oklahoma, and Texas) require accreditation of their crime laboratories.[24] Voluntary accreditation is in place in some jurisdictions. In North Carolina, a 2010 audit found that State Bureau of Investigation ("SBI") agents withheld or

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[21] Spencer S. Hsu, *Forensic techniques are subject to human bias, lack standards, panel found*, Wash. Post, April 17, 2012, at http://www.washingtonpost.com/local/crime/forensic-techniques-are-subject-to-human-bias-lack-standards-panel-found/2012/04/17/gIQADCoMPT_story.html.

[22] *Criminal Justice and Forensic Science Reform Act of 2011*, S.2177, 113th Cong. (2nd Sess. 2014).

[23] *See id.* §§ 201-202.

[24] Mo. Rev. Stat. § 650.060 (2010); N.Y. Exec. § 995 (1994); Okla. Stat. § 74-150.37 (2003); Tex. Gov't Code Ann. § 411.0205 (2003).

distorted forensic evidence in 230 cases, including three cases that resulted in executions.[25] In response, the SBI "vowed that the agency's forensic crime laboratory would employ only the best qualified technicians who would be nationally certified in their specialty."[26] Nearly two years later, a scandal erupted when it was found that 25 of the SBI's technicians failed their certification exams, a fact that the SBI kept secret.[27] The SBI pointed out that, in the absence of a national certification in various disciplines, certification exams included questions from multiple, sometimes unrelated disciplines, contributing to the high failure rate.[28]

Private accreditation bodies, including the American Society of Crime Lab Directors/Laboratory Accreditation Board ("ASCLD/LAB") and Forensic Quality Services, do not share identical standards and are themselves subject to criticism in terms of the effectiveness of their laboratory oversight.[29] Appearances of impropriety may be common in situations where the lab seeking accreditation is also the customer paying for the accreditation inspection.[30]

**The importance of reliability, particularly in death penalty cases, calls for comprehensive national standards.**

The importance of reliability, particularly in death penalty cases, calls for comprehensive national standards. This imperative is made even more compelling by interpretations of the Sixth Amendment that can deny a criminal defendant the ability to cross-examine the scientist who conducted the forensic testing regarding the protocols used or even the technician's qualifications. In *Williams v. Illinois*,[31] the U.S. Supreme Court held that a criminal defendant had no right to cross-examine the laboratory technician who performed certain forensic tests because

25 Radley Balko, *North Carolina's Corrupted Crime Lab*, Reason, Aug. 23, 2010, http://reason.com/archives/2010/08/23/north-carolinas-corrupted-crim.

26 Mandy Locke & Joseph Neff, *SBI fights district attorneys' attempts to learn about failed tests*, Raleigh News & Observer, June 14, 2012, at http://www.newsobserver.com/2012/06/14/2137375/sbi-fights-district-attorneys.html.

27 *Id.*

28 *Id.*

29 *See generally* Memorandum from Marvin E. Schechter to The New York State Commission of Forensic Science (March 25, 2011), at http://www.newenglandinnocence.org/wp-content/uploads/2011/07/ASCLD-Lab-and-Forensic-Laboratory-Accreditation.pdf; *see also* Justin Peters, *Crime Labs Botch Tests All the Time. Who's Supposed To Make Sure They Don't Screw Up?*, Slate, Jan. 17, 2013, http://www.slate.com/blogs/crime/2013/01/17/crime_lab_scandal_crime_labs_botch_tests_all_the_time_who_s_supposed_to.html.

30 *Id.*

31 132 S. Ct. 2221 (2012).

a *separate*, state-employed scientist who had not participated in the testing testified to the actual meaning of the forensic test results. The Court thus held that the defendant had no right to cross-examine the forensic laboratory technician who performed the test regarding the parameters of the test, the process by which the test took place or even the technician's qualifications. This decision makes it all the more important for forensic testing to be conducted in accredited labs using accurate and reliable methodologies.

### Recommendation 10. Forensic evidence should be tested by accredited laboratories (private or public) that function independently from law enforcement.

The need for accredited forensic laboratories to function independently from law enforcement stems from the fact that practitioners in some forensic disciplines rely on human interpretation that could be tainted by bias.[32] Law enforcement agencies, such as police departments or prosecutors' offices, administer the majority of forensic science laboratories. Consequently, lab technicians and their supervisors ultimately report to the head of the agencies responsible for investigating, solving and prosecuting crimes.[33]

This system leads to significant concerns related to the independence of the laboratory and its budget. Forensic scientists who serve in labs overseen by law enforcement agencies or prosecutors' offices, or who are hired by those units, are subject to a general risk of bias. Bias also is introduced through decisions made about evidence collection. Initial research has shown that bias can affect the accuracy and results of forensic testing, but so subtly that the scientist is unaware that his or her judgment is being affected.[34] In some instances, laboratory personnel may feel compelled to produce results favorable to the prosecution. For example, a medical examiner in Texas reported that law enforcement had attempted to interfere with the office's death investigations.[35] Thus, operational, organizational and financial independence on the part of forensic laboratories will help maximize the accuracy of forensic testing and minimize the risks of wrongful convictions.

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[32] *See* NAS Report, *supra* note 18, at 30.

[33] *See id.* at 183.

[34] *See, e.g.*, Dan E. Krane et al., *Sequential Unmasking: A Means of Minimizing Observer Effects in Forensic DNA Interpretation*, 53 J. Forensic Sci. 1006 (2008); Itiel E. Dror & D. Charlton, *Why Experts Make Errors*, J. Forensic Identification 56 (4) 600-616 (2006); Itiel E. Dror et al., *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications*, 156 Forensic Sci. Int'l 78 (2006); Larry S. Miller, *Procedural Bias in Forensic Science Examinations of Human Hairs*, 11 Law & Hum. Behav. 157 (1987).

[35] American Bar Association, Evaluating Fairness And Accuracy In State Death Penalty Systems: The Texas Capital Punishment Assessment Report 91 (Sept. 2013), at http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf.

# CHAPTER 3
## Access to Justice

Joseph Amrine was convicted and sentenced to death for the 1985 murder of Gary Barber, which occurred while both were incarcerated at Jefferson City Correctional Center in Missouri. The only evidence linking him to the crime was the testimony of three other inmates, one of whom a guard at the correctional facility initially identified as the likely perpetrator. A federal district court denied Amrine's petition for habeas relief, finding that he was procedurally barred from raising claims that his trial lawyer was ineffective. Among his claims, Amrine asserted that his attorney failed to raise objections during the jury selection process that resulted in an all-white jury, failed to object to Amrine being kept in shackles during jury selection, inadequately investigated the case and failed to request a jury instruction on the credibility of inmate informants. Despite the fact that all three witnesses against Amrine eventually recanted their trial testimony, the federal district court ruled – and a federal appeals court affirmed – that Amrine had failed to show sufficient evidence of actual innocence to overcome the procedural bars. As a result, no court ever considered his claims of ineffective assistance of counsel.

In 2003, despite the federal court's conclusion that there was insufficient evidence of actual innocence, the Supreme Court of Missouri took the rare and extraordinary step of setting aside Amrine's conviction, based on its conclusion that there was clear and convincing evidence of actual innocence sufficient to undermine confidence in the verdict. Though the court gave the prosecutors leave to retry Amrine, they declined to do so.

**Recommendation 11. A state or federal court should entertain a post-conviction claim that a petitioner facing execution was wrongfully convicted or sentenced and should examine any evidence offered to support such a claim.**

**a) A claim of wrongful conviction or sentence should not be foreclosed, nor should an examination of supporting evidence be denied, on the ground that the claim or the evidence is presented too late. A court should have discretion to dismiss a claim of wrongful conviction or sentence summarily, or to refuse to hear supporting evidence, only if the petitioner is shown to be manipulating the legal process, including by concocting a fallacious claim or offering spurious evidence merely to prolong litigation.**

In 2011, the U.S. Supreme Court made clear that "[a]lthough state prisoners sometimes may submit new evidence in federal post-conviction proceedings, [the] statutory scheme is designed to strongly discourage them from doing so."[1] An analysis of cases pending from 2000 through 2006 found that evidentiary hearings occurred in federal post-conviction proceedings in 0.4 percent of noncapital cases and 9.5 percent of capital cases.[2] Newly discovered evidence, if considered at all, nearly always must be presented in state court, not federal court. But state courts, too, often refuse to hear new evidence that supports a death row prisoner's claim, including federal constitutional claims.

**...state courts, too, often refuse to hear new evidence that supports a death row prisoner's claim, including federal constitutional claims.**

Prior to 1996, a federal habeas court could grant a request for an evidentiary hearing when the applicant alleged material facts that, if true, would entitle the applicant to relief. That sensible rule, adopted by the U.S. Supreme Court in *Townsend v. Sain*,[3] was modified by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which was signed into law in 1996.

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1 *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011).

2 *See* Nancy J. King et al., Final Technical Report: Habeas Litigation in U.S. District Courts 35–36 (2007).

3 372 U.S. 293, 312 (1963).

AEDPA requires that, if a claim was adjudicated on the merits in state court, a federal habeas court generally must limit its review to the state court record.[4] U.S. Supreme Court Justice Sonya Sotomayor, joined by Justices Elena Kagan and Ruth Bader Ginsburg in dissent, has argued that "[s]ome habeas petitioners are unable to develop the factual basis of their claims in state court through no fault of their own," but a majority of the Court rejected her view that federal courts should consider new evidence under such circumstances, even if the evidence would clearly justify issuance of a writ.[5]

Under AEDPA, if a federal habeas petitioner has "failed to develop the factual basis of a claim in State court proceedings," a federal court may not hold an evidentiary hearing on the claim unless the petitioner shows that:

> (A) the claim relies on – (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; *and* (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.[6]

The difficulty of meeting this standard and obtaining an evidentiary hearing in federal court is illustrated by the Ninth Circuit's decision in *Rossum v. Patrick*.[7] In that case, the petitioner was convicted of murdering her husband by poison. The Ninth Circuit initially found that she had made a strong showing that her lawyer's performance was constitutionally deficient, and that the state court's finding to the contrary was unreasonable. The Ninth Circuit remanded the case to the district court for evidentiary hearings focused on the question of whether there was a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different.[8] On rehearing, however, the Ninth Circuit vacated its prior order and denied the petition on the merits, finding that, under the Supreme Court's recent interpretations of AEDPA, it had no authority to grant an evidentiary

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4 *See Cullen*, 131 S. Ct. at 1398. If the state court rejected the claim on the merits, the federal court may grant relief only if the state court's adjudication of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). If these requirements are satisfied (or do not apply), it may be possible to supplement the state court record. *See Cullen, 131 S. Ct.* at 1412 (Breyer, J., concurring in part and dissenting in part).

5 *Id.* at 1413 (Sotomayor, J., dissenting).

6 28 U.S.C. § 2254(e)(2) (2006) (emphasis added).

7 622 F.3d 1262 (9th Cir. 2010), *vacated on reh'g*, 659 F.3d 722 (2011).

8 *See Rossum*, 622 F.3d at 1265.

hearing. Judge Nancy Gertner dissented, finding that, even under AEDPA's highly deferential standard, no "fair-minded" jurist should have denied the request for an evidentiary hearing:

> It cannot be that a federal court is obligated to repeat the state court's error. Without a hearing both sides are disadvantaged. It would be unfair to the government to assume the truthfulness of the expert's untested declaration and order habeas relief. And, it would be equally unfair to Rossum to conclude that she is entitled to no relief in federal court in the face of a strong showing of a constitutional violation which the state court precluded her from developing.[9]

**It cannot be that a federal court is obligated to repeat the state court's error. Without a hearing both sides are disadvantaged.**

Some states provide only a short window of time to bring newly discovered evidence before the court. For example, Virginia provides one of the shortest time periods for petitioners to present newly-discovered evidence. Rule 1.1 of the Supreme Court of Virginia, known as the "21 Day Rule," provides, in part, that "[a]ll final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." Under this rule, just 21 days from an order of conviction, if newly discovered evidence has been discovered *and* brought to the court's attention, the trial court loses jurisdiction and has no authority to act on a motion for a new trial. Rule 1.1 makes no special provision for capital cases and can preclude the introduction of newly discovered evidence in federal court.

Virginia has carved out two narrow exceptions to the 21 Day Rule. The first exception, enacted approximately a decade ago, allows a prisoner to file a petition for a writ of actual innocence based on after-discovered biological evidence.[10] A petition for a writ of actual innocence must demonstrate the following:

> (i) The evidence was not known or available at the time the conviction became final or not previously tested because the testing procedure was not available at the Department of Forensic Science at the time;

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9 *Rossum, 659 F.3d* at 724-25 (Gertner, J., dissenting).

10 *See* Va. Code Ann. §§ 19.2-327.1 – 327.6 (2013)

(ii) The chain of custody establishes that the evidence has not been "altered, tampered with, or substituted;"

(iii) "[T]he testing is materially relevant, noncumulative, and necessary and may prove the [convicted person's] actual innocence;"

(iv) "[T]he testing requested involves a scientific method employed by the Department of Forensic Science;" and

(v) The convicted person did "not unreasonably delay the filing of the petition after the evidence or the test for the evidence became available[.]"[11]

Relief is only granted upon a court's finding that no rational trier of fact would have found guilt beyond a reasonable doubt. Consequently, the exception requires a petitioner to meet a much higher standard of proof than that required in a petition for a new trial.

The second exception to Virginia's 21 Day Rule provides an opportunity to file a petition for a writ of actual innocence based on after-discovered non-biological evidence.[12] A petitioner moving for such a writ must allege the following:

(i) the crime for which the petitioner was convicted … was upon a plea of not guilty;

(ii) the petitioner is actually innocent of the crime for which he was convicted … ;

(iii) an exact description of the previously unknown or unavailable evidence supporting the allegation of innocence;

(iv) such evidence was previously unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction became final … ;

(v) the date the previously unknown or unavailable evidence became known or available to the petitioner, and the circumstances under which it was discovered;

11 *Id.*

12 *See id.* § 19.2-327.10 - 327.14.

(vi) the previously unknown or unavailable evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction … ;

(vii) the previously unknown or unavailable evidence is material and, when considered with all of the other evidence in the current record, will prove that no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt; and

(viii) the previously unknown or unavailable evidence is not merely cumulative, corroborative or collateral.[13]

Because the rule requires the petitioner to allege that the conviction "was upon a plea of not guilty," a petition for a writ of actual innocence is not an available mechanism to raise an innocence claim where the defendant pleaded guilty due to lack of resources, to avoid the burdens and stresses of a criminal trial, for a lesser guaranteed penalty or for other reasons.

*Turner v. Commonwealth*,[14] a non-capital case, is instructive regarding the heavy burden required for the grant of a writ of actual innocence. Judge Petty explained the difference between the standard of proof required for the grant of a motion for a new trial and that required for the grant for a motion for a writ of actual innocence, stating:

> Criminal defendants seeking a new trial need only show that the after-discovered evidence would *likely* lead to a different result upon retrial. In sharp contrast, actual innocence petitioners must produce clear and convincing evidence that proves that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt" in light of the newly-discovered evidence, taken together with the rest of the evidence in the case. In other words, the new evidence must conclusively show that the petitioner's guilt is a factual impossibility.[15]

Similar to the law in Virginia, in order to succeed in establishing a claim of actual innocence in a Missouri habeas proceeding, a petitioner must "make a clear and convincing showing of actual innocence,"[16] a burden of proof that is exceedingly difficult to meet. Though there is no specific rule in Missouri allowing for a new trial based on newly discovered evidence, Rule 91 permits an individual convicted and sentence to death to file a petition for a writ of habeas corpus directly to the Missouri Supreme Court, under very limited circumstances, after state

13 *See id.* § 19.2-327.11.

14 56 Va. App. 391 (Va. Ct. App. 2010) (*en banc*).

15 *Id.* at 445-46 (Petty, J., concurring) (emphasis in original) (citations omitted)

16 *State ex rel. Amrine v. Roper*, 102 S.W.3d. 541, 548 (Mo. *en banc.* 2003).

post-conviction and federal habeas review.[17] In contrast to Missouri, Arizona provides rules allowing for the consideration of untimely filed motions for a new trial in order to consider newly discovered evidence. Pursuant to Arizona Rules of Criminal Procedure 32.1(e), any person convicted of a criminal offense or who pleaded guilty may institute a proceeding for post-conviction relief for newly discovered material facts that probably would have changed the verdict or sentence. Under Rule 32.1(e), newly discovered material facts exist if:

> (1) The newly discovered material facts were discovered after the trial; (2) the defendant exercised due diligence in securing the newly discovered material facts; and (3) the newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.[18]

In addition, Arizona Criminal Procedure Rule 32.2(b) provides that a claim for relief under Rule 32.1(e) shall not be precluded solely for being untimely. However, the court may summarily dismiss the notice of post-conviction relief "[i]f the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated … in a timely manner."[19] Arizona's approach is far superior to that of other states like Virginia and Missouri, although the "due diligence" requirement is unnecessary and unduly harsh in a capital case.

**A claim of wrongful conviction or sentence should not be foreclosed, nor should an examination of supporting evidence be denied, on the ground that the claim or the evidence is presented too late.**

To prevent the unfair administration of justice, a state or federal court should entertain a post-conviction claim that a petitioner facing execution was wrongfully convicted or sentenced and should examine any evidence offered to support such a claim. A claim of wrongful conviction or sentence should not be foreclosed, nor should an examination of supporting evidence be denied, on the ground that the claim or the evidence is presented too late.

Further, post-conviction relief, and the introduction of evidence to support such relief, should not be limited to claims of "actual innocence," nor should they be limited to certain types

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17 Mo. Sup. Ct. R. Civ. P. 91.02(b).

18 Ariz. Rev. Stat. Ann. R. Crim. P. § 32.1(c) (2000).

19 *Id.* § 32.2(b) (2000).

of later-discovered evidence, such as biological evidence. A court should have discretion to summarily dismiss a claim of wrongful conviction or sentence, or to refuse to hear supporting evidence, only if the petitioner is shown to be manipulating the legal process, for example by concocting a fallacious claim or offering spurious evidence merely to prolong litigation.

On the other hand, a situation in which competent trial counsel made a strategic decision to withhold evidence from the jury because it conflicted with the defendant's theory of the case introduced at trial, even though the evidence may tend to exonerate the accused or mitigate the sentence, would be a scenario in which a court could exercise its discretion not to hear a claim of wrongful conviction or sentence on the grounds of that evidence. A determination of competency of trial counsel would serve as a gatekeeper in such circumstances.

### b) A federal court should credit a previous state court decision regarding a claim of wrongful conviction or sentence only if the state court addressed the claim and the evidence supporting it with care and explained its reasoning in an opinion, and then only if nothing has come to light since the state court decision tending to undermine its reliability.

Under section 2254(d) of AEDPA,[20] a federal court may not grant habeas relief with respect to:

> any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[21]

If the state court does not issue a written opinion to explain its reasoning, the federal court will presume (subject to rebuttal) that the federal claim was adjudicated "on the merits"[22] and the habeas petitioner must show there was "no reasonable basis" for the denial of relief.[23] AEDPA's "difficult to meet"[24] and "'highly deferential standard' . . . demands that state-court decisions be given the benefit of the doubt."[25] Under AEDPA, a state court's determination of

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20 28 U.S.C. § 2254(d) (1996).

21 *Id.*

22 *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013).

23 *Harrington v. Richter*, 131 S. Ct. 770, 784 (2010).

24 *Id.* at 786.

25 *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

a factual issue "shall be presumed to be correct" and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."[26]

Prior to passage of AEDPA in 1996, federal courts could review *de novo* questions of federal law and mixed questions of law and fact. The U.S. Supreme Court had rejected the principle of absolute deference to state court decisions in *Brown v. Allen*,[27] finding that a state court judgment of conviction "is not *res judicata*" during federal habeas proceedings with respect to federal constitutional claims,[28] even if the state court has rejected all such claims after a full and fair hearing. *Brown v. Allen* came to be cited for the proposition that a habeas court should review questions of federal law and mixed questions of law and fact "independently," and in several subsequent cases, the Supreme Court applied a *de novo* standard of review with respect to pure and mixed legal questions.[29] In *Townsend v. Sain*,[30] for example, the Supreme Court explained that "[a]lthough the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently."[31]

During this time, when federal courts exercised plenary power to decide pure and mixed questions of federal law, the rate of reversal of state court convictions was high, indicating that state courts were making serious constitutional mistakes. In capital cases between 1976 (when the death penalty moratorium was lifted)[32] and 1991, federal courts found reversible constitutional error in 42 percent of all federally reviewed state judgments.[33] Stated differently, from 1976 through 1991, federal habeas review prevented 149 prisoners from being executed on the basis of constitutionally flawed

**The difference between life and death in most of these cases was the availability of independent federal review of just the sort that AEDPA's deference rule now precludes.**

26 28 U.S.C. § 2254(e)(1).

27 344 U. S. 443 (1953).

28 *See id*. at 458.

29 *Wright v. West*, 505 U.S. 277, 289 n.6 (1992).

30 372 U. S. 293 (1963).

31 *Id*. at 318; *see also, e.g., Miller v. Fenton*, 474 U. S. 104, 112 (1985).

32 *See Gregg v. Georgia*, 428 U.S. 153 (1976).

33 *See* Brief of Benjamin R. Civiletti, *et al.*, as Amici Curiae at Appendix B, Table I, *Wright v. West*, 505 U.S. 277 (1992) (No. 91-542), (1992 LEXIS ).

convictions or death sentences. The difference between life and death in most of these cases was the availability of independent federal review of just the sort that AEDPA's deference rule now precludes. Federal review of serious constitutional claims "serves the important function of . . . preserving for the state prisoner an expeditious federal forum for the vindication of his federally protected rights, if the State has denied redress."[34]

Professor Jim Liebman conducted a detailed study of the Georgia capital cases in which habeas relief was granted between 1976 and 1991, singling out the ones in which a rule of deference would likely have forbidden relief – *i.e.*, cases in which the state courts (1) had the same law and facts before them as the federal courts, and (2) adjudicated the constitutional claim employing appropriate procedures, without any indication of "bad faith" decision-making. The study revealed that a deference rule probably would have precluded relief in 70 percent of the cases (32 out of 46) in which the federal courts, exercising their former power to review federal constitutional claims *de novo*, found reversible error.[35]

**Meaningful federal habeas review assures that a state prisoner's federal constitutional claims will be heard in a forum free of undue local influences that sometimes affect elected state judges.**

In addition to leaving serious constitutional errors uncorrected, the deference standard increases the number of cases in which such errors occur. By design, plenary federal habeas review deters constitutional violations from being committed or condoned by state courts in the first place.[36] As one state supreme court justice testified before Congress, "the presence of potential federal review is a significant impetus for improving state . . . review processes."[37] Meaningful federal habeas review assures that a state prisoner's federal

34 *Preiser v. Rodriguez*, 411 U.S. 475, 497-98 (1973).

35 *See* Brief of B. Civiletti, *supra* note 33, at Appendix B, Table IV.

36 *Butler v. McKellar*, 494 U.S. 407, 413 (1990) ("'[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.'" (quoting *Teague v. Lane*, 489 U.S. 288, 306 (1989), quoting *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting))).

37 *Subcommittee on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong., 1st Sess. 5 (July 17, 1991) (statement of Christine M. Durham, Justice, Utah Supreme Court); *see also* Robert J. Sheran, Chief Justice, Minnesota Supreme Court, *State Courts and Federalism in the 1980's: Comment*, 22 Wm. & Mary L. Rev. 789, 790 (1981) (increases in federal habeas are "most frequently" prompted by the "failure or . . . refusal by state courts to fulfill the obligation . . . to enforce and respect federal law"); Letter from Judge Bruce R. Thompson to Senator Sam Ervin (Sept. 27, 1972) (discussed in Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners -- Reform or Revocation?*, 61 Geo. L.J. 1221, 1251-52, n.204 (1973)); Hon. Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 24 (1956).

constitutional claims will be heard in a forum free of undue local influences that sometimes affect elected state judges.[38] As Rosemary Barkett, a justice of the Florida Supreme Court and a judge on the U.S. Court of Appeals for the Eleventh Circuit, told Congress:

> Tying the hands of the federal courts in these matters of life and death may serve the interests of finality of judgment, but it . . . ignores the realities of problems in the state courts where overburdened, elected judges are responsible for maintaining a system to satisfy the needs and immediate desires of the public. Federal judges are protected by life tenure, whereas state judges are not.[39]

Furthermore, as one commentator has observed, AEDPA's current procedural framework, which offers extraordinary deference to state court decision-making, offers a "windfall" to the state court that offers little or no explanation for its decision:

> When a state court fails to explain why it rejected an inmate's constitutional claims, a federal habeas court cannot meaningfully determine whether that decision was 'contrary to' or involved 'an unreasonable application of' Supreme Court precedent. For all the federal court knows, the state court did not identify or consider the relevant Supreme Court decisions. If AEDPA's purpose was to give the state courts the benefit of the doubt if and when they make a good faith effort to identify and apply the correct constitutional doctrine articulated by the Supreme Court, then it does not seem unreasonable to require that the state court articulate why it rejected a particular claim. If it fails to explain such, then the federal court should not be constrained by [AEDPA]'s limitation on federal relief, and the issue should be reviewed de novo.[40]

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[38] The importance of federal court determination of federal constitutional issues free of local influences on state judges has been recognized. *See*, *e.g.*, 1 Farrand, The Records of the Federal Convention of 1787, at 124-25 (1911) (James Madison); The Federalist No. 81, at 522-23 (A. Hamilton) (Random House, 1937); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 377, 386-87, 415-19 (1821); Cong. Globe, 42nd Cong., 1st Sess. 460 (1871) (Rep. Coburn) ("The United States courts are further above mere local influence than the county courts; their judges can act with more independence . . . ; their sympathies are not so nearly identified with those of the vicinage; . . . they will be able to rise above prejudices or bad passions . . . more easily. . . . We believe that we can trust our United States courts, and we propose to do so."); Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 272 (1985) (tracing the Court's development since 1930s of independent review of "mixed" questions "to respond to the perceived dangers of distorted . . . law application in the state courts").

[39] *Subcommittee on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong., 1st Sess. 8-9 (May 22, 1991) (statement of Rosemary Barkett); *see also* Prepared Statement of Justice Christine M. Durham, *supra* note 37, at 3 (there is "a structural vulnerability in the state court systems to community and special interest pressures [that] are sometimes antithetical to federal constitutional guarantees") (emphasis in original); *Hearings on S. 88, S. 1757, and S. 1760 before the S. Judiciary Committee*, 101st Cong., 1st and 2d Sess. 378 (1990) (statement of James L. Robertson, Justice, Mississippi Supreme Court).

[40] John H. Blume, *AEDPA: The "Hype" and the "Bite"* 91 Cornell L. Rev. 259, 293-294 (2006).

The Committee recommends that a federal court credit a previous state court decision regarding a claim of wrongful conviction or sentence only if the state court addressed the claim and the evidence supporting it with care and explained its reasoning in an opinion, and then only if nothing has come to light since the state court decision tending to undermine its reliability. Finality is important; however, it is simply unconscionable, particularly in a capital case, to enforce an unlawful conviction or sentence when the evidence of a constitutional violation has become available. As one practitioner explained:

> The public needs to understand not only that errors will take place, but also that the laws passed in recent years that rush along and often prevent merit rulings in capital appeals and post-conviction proceedings – most notably [AEDPA] – significantly undercut the courts' ability to correct such errors before they become fatal to erroneously convicted defendants. Even before such legislation was enacted, our legal system needed additional – not fewer – judicial protections against such fatal mistakes. But instead, these laws often put courts in a position in which they are incapacitated from providing relief when they know that the Constitution has been violated in what is not harmless error – much as if one's doctor were prohibited by law from using the best care that he is capable of providing.[41]

[41] Ronald Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 Conn. L. Rev. 733, 737 (2001) (internal citations omitted).

# CHAPTER 4
## Custodial Interrogations

Earl Washington served seventeen years for a murder that he did not commit, but to which he had falsely confessed. After two days of questioning, police claimed he had "confessed" to a total of five different crimes. Only on the fourth attempt at a rehearsed confession did authorities accept Washington's statement and have it recorded in writing with Washington's signature. Of the five crimes he "confessed" to, charges for the first four were dismissed because of the inconsistencies of the testimony and the inability of the victims to identify Washington. The fifth confession was for the murder of Rebecca Lynn Williams and it was the prosecution's only evidence linking Washington to the crime. The jury returned a conviction and death sentence even though Washington did not know the race of his victim, the address of the apartment where she was killed, or that she had been raped in front of her two small children. Psychological analyses of Washington revealed that, to compensate for his intellectual disability, Washington would politely defer to any authority figure with whom he came into contact. Thus, when police officers asked Washington leading questions in order to obtain a confession, he complied. On October 2, 2000, Virginia Governor Jim Gilmore granted Earl Washington an absolute pardon for the capital murder conviction based on DNA testing results that excluded him as the perpetrator after Washington had spent 17 years in prison for a crime he did not commit. He was later declared "actually innocent" by then-Governor Tim Kaine in 2007.

**Recommendation 12. Custodial interrogations of a suspect in a homicide case should be videotaped or digitally recorded whenever practicable.**

**a) Recordings should include the entire custodial interrogation process.**

**b) Where videotaping or digital video recording is impracticable, an alternative uniform method, such as audiotaping, should be established.**

**c) Video or audio recording of the entire custodial interrogation process should not require the suspect's permission.**

Over 600 jurisdictions nationwide have now employed videotaping of custodial interrogations.[1] These jurisdictions have concluded that the practice promotes effective law enforcement, increases respect for and understanding of police practices, lessens costs associated with retrying cases, and increases the accuracy of criminal proceedings. All fifty states and the District of Columbia have at least one police department engaged in recording in at least some cases.[2] Yet the vast majority of police departments – and the investigatory agencies of the U.S. Department of Justice – do not record custodial interviews on a routine basis. This distinction is significant in terms of its impact in the real-world.

**Of the 312 wrongful convictions in the United States that have been overturned based on DNA evidence, as of March 2014, nearly 25 percent involved a false confession or false incriminating statements...**

Of the 312 wrongful convictions in the United States that have been overturned based on DNA evidence, as of March 2014, nearly 25 percent involved a false confession or false incriminating statements, according to the Innocence Project.[3] In each of those cases, DNA evidence proved that the confession was false.[4]

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1 *See* Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 Am. Crim. L. Rev. 1297, 1305-10 (2008).

2 *See* Thomas P. Sullivan, *A Compendium of Law Relating to the Electronic Recording of Custodial Interrogations*, 95 Judicature 212, 212 (2012).

3 *See* The Innocence Project, DNA Exonerations Nationwide, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php.

4 Id.

There is also evidence that false confessions occur primarily in more serious cases, especially homicides and other high-profile felony cases. More than 80 percent of the 125 false confessions documented in a 2004 study occurred in homicide cases.[5] Additionally, 20 percent of the defendants who falsely confessed and were subsequently convicted received death sentences, suggesting that the effect of false confessions may be disproportionately high in capital cases.[6]

While the practice of videotaping custodial interrogations may not eliminate the chances of police obtaining a false confession in a homicide case, research shows that it may drastically reduce the likelihood. Moreover, mandatory recording has been demonstrated to have other trial advantages, including enabling judges to assess voluntariness, facilitating the fact-finder's ability to evaluate credibility and decreasing the number of challenges to witness statements.

False confessions can mislead police, prosecutors, defense attorneys, judges and juries into wrongly focusing on an innocent suspect, which may result in a wrongful conviction. False confessions will also likely focus attention away from the true perpetrator. Not only will justice not be done, but the result may be the perpetrator going free to commit additional crimes.

Confessions routinely result in convictions because of the dramatic impact a suspect's admission of guilt to the police can have at trial. One research team concluded that "placing a confession before a jury is tantamount to an instruction to convict …."[7] Common sense and our belief in the instincts of self-preservation make us question why people would confess to a crime that they did not commit. The assumption that a person would not falsely implicate him or herself in a crime makes confessions powerful evidence, particularly in serious crimes like murder. Academic literature, newspaper accounts and case decisions, however, describe many instances in which innocent persons confessed to crimes that they did not commit.[8]

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5 The Justice Project, Electronic Recording of Custodial Interrogations: A Policy Review at 21, at http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project(07).pdf (citing Steven Drizin & Richard A. Leo, *The Problem of Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 948 (2004)).

6 *See* Electronic Recording of Custodial Interrogations, *supra* note 5 (citing Drizin & Leo, *supra* note 5, at 952 (reporting that researchers conducted an analysis of 37 innocent defendants who confessed and later took their cases to trial and whose confessions were later shown to be false; of those defendants, 8 percent were convicted and 20 percent of the convicted defendants were sentenced to death)).

7 Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denver U. L. Rev. 979, 1118 (1997).

8 *See, e.g.* Electronic Recording of Custodial Interrogations, *supra* note 5, at 9-15; *see generally* Report of the Governor's Commission on Capital Punishment 1 (April 15, 2002), at http://illinoismurderindictments.law.northwestern.edu/docs/Illinois_Moratorium_Commission_complete-report.pdf; *see also* The Constitution Project, False Confessions: When the Innocent Confess and the Guilty Go Free, http://www.constitutionproject.org/publications-resources/digital-media/.

The sorts of interrogation tactics likely to result in false confessions probably occur most often in the investigation of high profile crimes, especially in potential death penalty cases.[9] In such cases, police both have more time to investigate and face greater pressure to make an arrest.[10] The vast majority of police officers act in good faith and according to the law. However, one of the most conservative early estimates concluded that police-induced false confessions contributed to *at least* one out of every ten wrongful convictions in potential capital cases.[11] The current figure is likely far higher given modern estimates that flawed confessions play a role in nearly one fourth of all wrongful convictions.

Empirical studies reveal that the risk of the innocent confessing is highest for those most vulnerable to suggestion or where deceptive or manipulative interrogation techniques are used. For example, confessions by individuals with intellectual disabilities, mental illness or similar disabilities or by juveniles raise significant risks of false acknowledgements of guilt.[12] Individuals whose reasoning ability is compromised due to exhaustion, stress, hunger or substance abuse are also susceptible. Other causes may include threats of punishment or promises of leniency, threats of adverse consequences to a friend or loved one, police misrepresentation about the nature and quantity of the evidence of the suspect's criminal involvement, use of real or perceived intimidation or threats of force by law enforcement during an interrogation or fear by the suspect that failure to confess will yield a harsher punishment. Where the risks are higher – like in death penalty cases – the pressure to falsely confess guilt also increases.

**Where the risks are higher – like in death penalty cases – the pressure to falsely confess guilt also increases.**

Even when the police do not use psychological trickery or high-pressure tactics, isolated suspects facing lengthy interrogations can feel compelled to confess.[13] There is good reason to

9 *See* Welsh S. White, Miranda's Waning Protections: Police Interrogation Practices after Dickerson 140-46 (2001).

10 *See id.*; *see also Electronic Recording of Custodial Interrogations* at 21, *supra* note 5 (citing Drizin & Leo, 82 N.C. L. Rev. at 946.).

11 *See* Hugo M. Bedeau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21 (1987).

12 *See* Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2005) (In a study involving 340 exonerations between 1989 and 2003, 33 of the exonerated defendants were juveniles, of which 42 percent falsely confessed; and 26 were intellectually disabled, of which 69 percent falsely confessed); *see generally* Ofshe & Leo, *supra* note 7; White, *supra* note 9.

13 *See* Cass R. Sunstein, Why Societies Need Dissent 37-38 (2003) (relating an experiment in which test participants were led to believe that they had undertaken an act that they had not done based on the accusations of a false witness claiming to have seen the act).

believe that significant numbers of ordinary people under such circumstances "can be lead to agree that they have engaged in misconduct, even serious misconduct, when they are entirely innocent."[14] Moreover, a false confession may be made possible and rendered believable, ultimately leading to a conviction, when police intentionally or inadvertently feeds the suspect details of the crime that the suspect later repeats back in the confession.[15]

The U.S. Supreme Court's decision in *Miranda v. Arizona* acknowledges the risk of compelled confessions in "custodial interrogations" – those of a suspect held "incommunicado" in a "police-dominated atmosphere."[16] Accordingly, *Miranda* recognizes the constitutional right to counsel during such interrogations and mandates that police warn suspects of their rights to counsel and to silence. Suspects routinely waive these rights, however. A significant body of empirical research demonstrates that police have developed a wide range of effective tactics for encouraging *Miranda* waivers.[17] In one commentator's words, *Miranda* warnings have become weak rote recitations, "mere piece[s] of station house furniture."[18]

The Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution, which prohibit admission at trial of "involuntary" confessions obtained by the police, currently offer little protection. As recently applied by most courts, constitutional due process sets a low standard for voluntariness, turning on a case-by-case weighing of a wide range of circumstances concerning police tactics and the individual suspect's ability to resist those tactics.[19] Moreover, generally, a finding of a valid waiver of *Miranda* rights automatically renders the confessions voluntary in the view of most judges.[20]

**Sullivan states that he has yet to encounter a single officer from a department that engages in recording of interrogations who, given the option, would elect to return to taking handwritten notes during interviews…**

14 *Id.*

15 *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1066-90 (2010).

16 *Miranda v. Arizona*, 384 U.S. 436 (1966).

17 *See generally* White, *supra* note 9.

18 Lawrence M. Friedman, Crime and Punishment in American History 304 (1993) (quoting David Simon, A Year on the Streets (1985)).

19 *See* Andrew E. Taslitz & Margaret L. Paris, Constitutional Criminal Procedure 590-612 (2d ed. 2003) (summarizing the case law).

20 *See id.* at 645.

Thomas P. Sullivan, Co-Chair of the Illinois Commission on Capital Punishment, a former U.S. Attorney and a leading expert on recording of interrogations, has conducted extensive research on this practice, contacting over 1,000 law enforcement agencies located in all 50 states and the District of Columbia that record interrogations. Sullivan states that he has yet to encounter a single officer from a department that engages in recording of interrogations who, given the option, would elect to return to taking handwritten notes during interviews, followed by the preparation of type-written summary reports.[21] Sullivan recounts that the positive results of recording are clear:

> The use of recording devices, even when known to the suspect, does not impede officers from obtaining confessions and admissions from guilty suspects …. Police are not called upon to paraphrase statements or try later to describe suspects' words, actions, and attitudes. Instead, viewers and listeners see and/or hear precisely what was said and done, including whether suspects were forthcoming or evasive, changed their versions of events, and appeared sincere and innocent or deceitful and guilty.
>
> Experience shows that recordings dramatically reduce the number of defense motions to suppress statements and confessions …. Officers are spared from defending themselves against allegations of coercion, trickery, and perjury during hostile cross examinations. Trial and appellate judges, who repeatedly have been forced to listen to the prosecution and defense present conflicting versions of what took place during unrecorded custodial questioning, also favor recordings.
>
> … An electronic record made in the station interview room is law enforcement's version of instant replay.
>
> Jurors are coming to expect recordings when questioning takes place in police station interview rooms. When no recordings are made, defense lawyers are quick to argue that unfavorable inferences should be drawn…
>
> Most costs come from the front end, and they diminish once the equipment and facilities are in place and training has been given to detectives. In contrast, savings continue so long as electronic recording continues.[22]

Without video recordings, police and criminal defendants may tell very different stories about what happened in the interrogation room, raising difficult credibility questions. Moreover, a suppression judge cannot hear the interrogating officers' tone of voice, see the suspect's face during questioning or feel the sense of sustained pressure from hour-upon-hour of

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[21] *See* Sullivan, *supra* note 2, at 213.

[22] Thomas P. Sullivan, Police Experiences with Recording Custodial Interrogations, Northwestern School of Law, Center for Wrongful Convictions 6, 24-26 (2004), at http://mcadams.posc.mu.edu/Recording_Interrogations.pdf.

interrogation. Videotaping or similar recording of an entire interrogation is one solution to this problem and offers a number of collateral benefits:

> Videotaping police interrogation of suspects protects against the admission of false confessions for at least four reasons. First, it provides the means by which courts can monitor interrogation practices and thereby enforce the other safeguards [such as the giving of *Miranda* warnings and the prohibition against coercive questioning techniques]. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgments about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard device accords with sound public policy because the safeguard will have additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement.[23]

Video recording encourages police to continue investigating until they find the true perpetrator, thus enhancing public safety. Law enforcement can also use videotaped interrogations to improve the training of officers in proper interrogation techniques, further reducing the risks of error. All these benefits accrue, however, only if all interrogation efforts in a case are recorded, not merely the ultimate confession. As the *New York Times* explained in an editorial about the Central Park Jogger case:

> By the time five teenage suspects gave the videotaped confessions that helped convict them in the 1989 rape of the Central Park jogger, they had been through hours of unrecorded interrogation …. [T]he exoneration of the young men begs for reforming the way suspects are lead [*sic*] to rehearsed statements of guilt.
>
> According to the Innocence Project at the Cardozo School of Law at Yeshiva University, 23 percent of the people who are exonerated after conviction turn out to have falsely confessed to the crime. Many of these confessions were taped and played as compelling evidence to a jury. As the jogger case and other reversals demonstrate, innocent people can be led into confessions. Their questioners – wittingly or not – also often provide them with details that would seem to be known only to the real criminal.[24]

Since 2006, nine states have enacted laws requiring interrogation recording – Michigan (2012), North Carolina (2011), Connecticut (2011), Ohio (2010), Oregon (2010), Missouri

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[23] Welsh White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 153-554 (1997).

[24] Editorial, *Crime, False Confessions, and Videotape*, N.Y. Times, Jan. 20, 2003, at A24; *see also* Stanley Cohen, The Wrong Men: America's Epidemic of Wrongful Death Row Convictions 255-67 (2003) (describing the detailed events supporting the exoneration of the Central Park jogger defendants).

(2009), Montana (2009), Maryland (2008), and Nebraska (2008).[25] In 2009, Indiana's Supreme Court amended its rules of evidence to mandate the recording of custodial interrogations.[26] In a 2006 case, *State v. Hajtic*,[27] the Iowa Supreme Court held that electronic recording, particularly videotaping, of custodial interrogations should be encouraged, although not required. A total of 16 states and D.C. now mandate recording of custodial interrogations for certain felonies.[28] At least 12 other states are considering mandatory recording, either by legislation or supreme court rule.[29] In addition, many local governments require police departments to record custodial interrogations, while in other jurisdictions police departments have voluntarily adopted recording requirements.

With the trend toward increased recording of custodial interrogations,[30] in 2004, the American Bar Association unanimously adopted a resolution that urges law enforcement agencies across the country to videotape interrogations.[31] The National District Attorneys Association also has endorsed an expansion of videotape protocols, although the association falls short of backing legislation to mandate the change.[32] Other organizations formally

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[25] Some jurisdictions' custodial recording laws and practices permit a number of exceptions to the recording requirement, such as if the recording equipment is "not available at the location where the interrogation takes place," that substantially limit the effectiveness of a recording requirement under law. *See, e.g.*, Mo. Stat. § 590.700.3(6) (2013). Further, defendants often have minimal or no remedy for law enforcement's failure to record in violation of the statute. *See infra* notes 42 - 47 and accompanying text.

[26] Ind. R. Evid. 617.

[27] 724 N.W.2d 449 (Iowa 2006).

[28] In addition to those listed above, Illinois, Maine, New Mexico, Wisconsin, Alaska, Minnesota, New Hampshire and New Jersey require the recording of custodial interrogations. In 2002, only two states, Alaska and Minnesota, required electronic recording of custodial interviews, resulting from state supreme court rulings. The vast majority of new state requirements have been implemented in the last decade. *See* Thomas P. Sullivan, *A Compendium of Law Relating to the Electronic Recording of Custodial Interrogations*, 95 Judicature 5 (2012).

[29] At the time of printing, Arkansas, Florida, New York, North Dakota, Pennsylvania, Rhode Island and Vermont were considering a recording requirement by legislation or supreme court recommendation. South Carolina had pending legislation mandating recording of custodial interrogations. Iowa, Massachusetts, New York and Utah had statewide recommendations urging law enforcement officers to record custodial interrogations of felony suspects.

[30] Military law enforcement also has started adopting recording policies. The Air Force, Army and Navy each authorize the use of recording devices. 32 C.F.R. § 637.21. In addition, the Commission on Military Justice has endorsed recording. Victor M. Hansen & Elizabeth L. Hillman, Report of the Commission on Military Justice 13-14 (2009).

[31] Am. Bar Ass'n, Report To The House Delegates 1 (2004), http://www.americanbar.org/content/dam/aba/directories/policy/2004_my_8a.authcheckdam.pdf.

[32] *See* Nat'l. Dist. Att'ys Ass'n., *Resolution Supporting A Uniform Act Authorizing The Recording And Introduction Of An Accused's Statements And Opposing Expanding The Use Of The Exclusionary Rule Or Other Sanctions For Voluntary, Unrecorded Statements* (Mar. 21, 2009), at http://www.ndaa.org/pdf/NDAA_reso_March_2009_recorded_statements.pdf.

supporting mandatory recording include the American Civil Liberties Union, the American Federation of Police and Concerned Citizens, the American Judicature Society, the American Law Institute, the Center for Policy Alternatives, the Innocence Project, the International Association of Chiefs of Police, the Justice Project, the National Association of Criminal Defense Lawyers, the National Conference of Commissions on Uniform State Laws, and this Committee.[33] In 2013, the International Association of Chiefs of Police issued a report resulting from a joint summit on wrongful convictions conducted with the Department of Justice's Office of Justice Programs, recommending law enforcement agencies record all interviews involving major crimes, preferably with video recording but at least with audio recording.[34]

In July 2010, the National Conference of Commissions on Uniform State Laws adopted the Uniform Electronic Recordation of Custodial Interrogations Act ("UERCIA"), model legislation that reflects current best practices and which individual jurisdictions can tailor to best suit their needs and resources.[35]

The U.S. Department of Justice remains opposed to video or audio recording of custodial interrogation as a routine practice. In 2006, the FBI released a memorandum reiterating its policy against recording of interviews or confessions except in specific circumstances in which an agent can obtain management authorization for recording.[36] The memorandum, issued by the FBI Office of the General Counsel, articulated four reasons, commonly cited by law enforcement agencies, for why the FBI does not support videotaping.[37]

The memorandum first argues that recordings may interfere with rapport-building techniques. However, the memorandum also concedes that surreptitious recording would not affect this approach. Experience in localities that have used videotaping also demonstrates

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[33] *See* National Association of Criminal Defense Lawyers, http://www.nacdl.org/criminaldefense.aspx?id=31572.

[34] *See* Int'l Assoc. of Chiefs of Police, National Summit on Wrongful Convictions: Building a Systemic Approach to Prevent Wrongful Convictions 18 (Aug. 2013).

[35] The pending South Carolina bills are based on this model legislation.

[36] Similarly, the Drug Enforcement Administration and Bureau of Alcohol, Firearms, Tobacco, and Explosives also have policies against general video or audio recording.

[37] *See* Memorandum from Federal Bureau of Investigation, Office of the General Counsel, Investigative Law Unit to All Field Offices, All HQ Divisions, and All Legats (March 23, 2006), at http://www.nytimes.com/packages/pdf/national/20070402_FBI_Memo.pdf. Notably, the memorandum itself characterized the policy as a positive one – *i.e.*, a case-by-case opportunity to use recording as a law enforcement technique where and when it will further the investigation and the subsequent prosecution. However, it noted that during the time the policy has been in effect, the management approval discretion provided by the policy has been viewed negatively – *i.e.*, as an exception to the "no recording" policy. The memorandum encourages the positive approach, and therefore should itself be considered limited support – or at least not complete opposition – to a recording policy, although it is a far cry from a recording requirement.

that, although police may sometimes have a brief adjustment period, they readily learn how to interrogate effectively without hampering the willingness of suspects to talk.[38] The memorandum asserts that the practice of routine recording would become well-known, which could be a concern when interrogating members of organized crime. This argument is weak at best, given that serious repeat criminals like members of organized crime are likely to be familiar with law enforcement techniques and aware of the possibility that they are being recorded anyway.

**Experience in localities that have used videotaping also demonstrates that, although police may sometimes have a brief adjustment period, they readily learn how to interrogate effectively without hampering the willingness of suspects to talk.**

Second, the memorandum argues that in the past, agents' testimony has been accepted by judges and juries based on non-recorded recollections and reports, and therefore there is no compelling need for a change in policy. This argument ignores the reality that judges are becoming increasingly vocal about their criticism of federal agencies' opposition, and advancements in science continue to reveal wrongful convictions, including those based on false confessions, years after they occur. Sound policy decisions regarding the criminal justice system must be designed to improve the search for truth, not to ensure that one party's testimony will be admissible.

Third, the memorandum warns that recording may disclose lawful investigative methods that jurors may deem inappropriate. This argument gives rise to questions about the ethical and legal propriety of law enforcement practices. If investigators are not willing to reveal the techniques they used to get a confession, perhaps they should not use those techniques. On the other hand, if techniques used to secure a confession are not unethical or illegal, but successfully expose criminal conduct, jurors should be trusted to discern the difference in favor of successful law enforcement.

Finally, the memorandum resists a policy change that would help ensure ethical and accurate criminal convictions based on the administrative burden it would impose. The FBI General Counsel's office argues that a recording requirement would entail massive logistical coordination and transcription support, and would cause unnecessary obstacles to the admissibility of lawfully obtained statements, which, through inadvertence or circumstances beyond the control of the interviewing agents, could not be recorded. Yet the

[38] *See* Shaila K. Dewan, *New York Police Resist Videotaping Interrogations*, N.Y. Times, Sept. 2, 2003; Thomas P. Sullivan, *Three Police Station Reforms to Prevent Convicting the Innocent*, 17 APR CBA Rec, 30 (2003).

support needed for traditional two-agent interviews, and the time required to prepare and transcribe handwritten notes is just as burdensome, if not more burdensome, than recording an interview in the first instance. Additionally, recording equipment is more affordable now than ever before, easy to use and, under the model rule, a failure to record is excusable if it is impracticable or impossible. In addition, the out-of-pocket costs of video recording are often far less than the financial costs of not recording, including lengthy suppression motions, large damage judgments for the wrongly convicted, expensive investigations into alleged police abuses, and re-trying cases where there is other credible evidence of guilt but the confession is seriously tainted. The declining cost of digital video recording methods, which store images on a computer, also can eliminate the expense of storing videotapes.

**There are also numerous cases in which federal district judges have voiced their concerns about the failure of federal investigating agencies to routinely record custodial interrogations.**

There are also numerous cases in which federal district judges have voiced their concerns about the failure of federal investigating agencies to routinely record custodial interrogations. For example, one judge in a case pending in the Northern District of Ohio stated:

> … I am deeply disturbed that the FBI continues its incomprehensible policy of not recording interviews …. It makes no sense. It gives the Bureau unfair advantage …. You have an undercover operation, you wire the informant for every single drug transaction. Why do you do it? Best possible record … But you get in an interrogation room with nobody else except a 20 year old defendant and … your Bureau sees fit at that moment, the most crucial moment of any investigation, not to record what he says and what you say … that's shameful. It's intolerable in a society under any government that values the rights of its citizens to a fair trial …. It's not playing fair. I expect more from our government law enforcement agents …. Shame on the Bureau, and tell them I said so. Tell them they can do better.[39]

A study conducted in 1993 by the Department of Justice found that jurisdictions that videotaped custodial interviews reported improved quality of police interrogations, including better preparation by detectives, avoidance of distractions at the interrogation, easy

[39] *United States v. Cook*, No. 3:10-CR-522, transcript of record, at 433-35, 2011 U.S. Dist. LEXIS 74333 (N.D. Ohio Sept. 8, 2011) (District Judge James G. Carr); *see* Thomas P. Sullivan, *The Department of Justice's Misguided Resistance to Electronic Recording of Custodial Interviews*, 59 The Fed. Law. 63 (2012) (discussing the remarks of federal district judges encouraging recording of federal law enforcement interrogations).

**A study conducted in 1993 by the Department of Justice found that jurisdictions that videotaped custodial interviews reported improved quality of police interrogations…**

monitoring of interrogations by supervisors, use of taped interrogations for training, and use of taped confessions to elicit a confession from suspected accomplices.[40] Also, the study reported that there were fewer allegations by defense attorneys of coercion or intimidation. Furthermore, of the local police departments surveyed concerning the effect of videotaping in obtaining guilty pleas, 55.4 percent said it helped a lot; 27.3 percent said it helped somewhat; 17.3 percent said it had no effect. No departments reported that it hindered their ability to obtain guilty pleas. The study reported that videotaping was used to some extent by one third of all police departments in jurisdictions with populations over 50,000. Given the early date of the study, that number has undoubtedly increased significantly since then.

Under the Committee's recommendation, costs are contained because recording suspect interrogations is limited to homicides. The Committee expresses a preference for video recording because of the ability to observe the demeanor and positioning of the interviewer and suspect, as well as the physical location where the interrogation is conducted, which can have a significant impact on the perceived voluntariness and reliability of the statement. The Committee recognizes that video recording is sometimes impracticable, either because of cost or because of limits on the availability of the video equipment. In those circumstances, the Committee recommends using next-best recording methods, starting with audio recording. The UERCIA permits individual jurisdictions to make the same determination about the priority of recording methods and to tailor the legislation accordingly.[41] Clear guidance also should be given to officers about when to record because that obligation would apply to any "custodial interrogation."

**Recommendation 13. Whenever there is a failure for any reason to videotape or audiotape any portion of, or all of, the entire custodial interrogation process, and the statement was not otherwise suppressed, a defendant should be entitled, upon request, to a cautionary jury instruction, appropriately tailored to the individual case, that does the following:**

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40 *See* William A. Geller, *Videotaping Interrogations and Confessions*, NAT'L INST. JUST. 139962 (Mar. 1993).

41 The Committee's 2005 publication of *Mandatory Justice: The Death Penalty Revisited* ("*Mandatory Justice 2005*") included a recommendation for videotaping custodial interrogations that was based on the ALI Model Code of Pre-Arraignment Procedure on the same subject. In its 2005 report, the Committee added to the ALI Model Code a cautionary instruction requirement because any failure to tape inherently prejudices a defendant's ability to litigate a suppression motion.

**a) notes that failure,**

**b) permits the jury to give it such weight as the jury feels that it deserves, and**

**c) where appropriate, further permits the jury to use it as the basis for finding that the statement either was not made or was made involuntarily.**

Any framework for requiring the video or audio recording of an interrogation must include an enforcement mechanism to ensure compliance.[42] While suppressing a confession that is not electronically recorded is sometimes a necessary remedy, some jurisdictions drastically limit the availability of *any* remedy for law enforcement's failure to comply with the recording law. Missouri's recording statute, for example, states that "[c]ompliance or non-compliance with [the recording statute] shall not be admitted as evidence, argued, referenced, considered, or questioned during a criminal trial."[43] Without a meaningful remedy, officers will have little incentive to comply with the mandate. A meaningful remedy does not require that suppression should always, or automatically, be the result when the recording requirement is violated. For example, if the violation was accidental and only a small portion of the interrogation process was not electronically recorded, and if there is no reason to believe that there is a significant risk that the interrogation was untrue, suppression would seem an extreme remedy. Suppression is appropriate for substantial violations.

The UERCIA takes this approach. Under that framework, recording is not required if it is not feasible because of exigent circumstances, the subject refuses to be electronically recorded,[44] the interrogation is conducted by another jurisdiction that does not require recording, all or part of the interrogation is not recorded because the law enforcement officer does not have a reasonable basis to believe that the subject committed a crime or the recording equipment malfunctions despite reasonable maintenance and timely repair.[45] If the prosecution intends

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[42] Statutes in Ohio and Texas and supreme court rulings in New Hampshire and Texas lack meaningful recording requirements, or sanctions for failures to record.

[43] Mo. Stat. § 590.700.6 (2013).

[44] *See* Thomas P. Sullivan, *Federal Law Enforcement Should Record Custodial Interrogations*, The Champion at 8 (2007) ("[I]f a suspect realizes that a recording is to be made and declines to proceed or is reluctant to do so, the routine response of the detectives with whom we have spoken is to make a recording of the circumstances, turn the recording equipment off, and proceed with the interview using handwritten notes. This relatively rare event is consistent with the statutes and court rulings referred to … and provides the complete solution to the concern that the suspect will clam up.").

[45] In *Mandatory Justice 2005*, the Committee changed the text of UERCIA in one regard, by deleting an exception to the recording requirement where the law enforcement officer conducting the interrogation or his superior believes that electronic recording would disclose the identity of a confidential informant or jeopardize the safety of an officer, the individual being interrogated, or another individual. The Committee

to rely on one of these exceptions in seeking to admit at trial an unrecorded statement, it must prove by a preponderance of the evidence that the exception applies.[46]

Conversely, a law enforcement officer's inducement to a suspect to refuse to be recorded, a police department's failure to provide its officers and other personnel with adequate training and properly maintained equipment (such as video or audio recording equipment) or transporting a suspect to a non-recording jurisdiction in order to avoid the requirement to record should be considered a willful violation of the recording requirement and an unrecorded suspect statement should be suppressed for this reason.

A court should give a cautionary instruction to the jury when a statement is not recorded and is not otherwise suppressed, allowing the jury to consider the failure to videotape in deciding whether a confession was made or, if made, whether it was voluntary. The UERCIA includes this requirement.[47] This instruction should be available even when the police are not at fault because, even when taping the entire custodial interrogation process was impracticable, regardless of the care or good faith of the state, the absence of taping creates an undue risk of error in the fact finding process. Such an instruction should be tailored to the individual facts of a case. For example, if there is evidence from which a reasonable jury might conclude that the police willfully violated the taping rule to hide details of the interrogation process, a stronger instruction might be needed. Correspondingly, if only a small portion of the process was not taped and there is evidence from which a reasonable jury might conclude that this failure was inadvertent, and no specific evidence has been offered of inappropriate interrogation tactics occurring during the taping gap, a jury might be instructed to take those matters into account

**The jury should be instructed to give the failure to video or audiotape such weight as the jury feels it deserves, including, where appropriate, as the basis for finding that the statement was either not made or was made involuntarily.**

believes that such a situation is more appropriately dealt with by local department rule than uniform legislation because these concerns may be properly addressed by redacting or not recording parts that give rise to such risk, rather than not recording the entirety of an interview.

[46] The Illinois recording statute takes a similar approach. *See* Act of Aug. 12, 2003, Ill. Public Act No. 93-0517 (providing that non-recorded custodial interrogations are presumptively inadmissible unless the state can establish by a preponderance of the evidence that the statement was voluntary and reliable based on the totality of the circumstances).

[47] This was an addition that the Committee made to the ALI Model Code in *Mandatory Justice 2005*.

in determining the weight of the failure to tape completely. The jury should be instructed to give the failure to video or audiotape such weight as the jury feels it deserves, including, where appropriate, as the basis for finding that the statement was either not made or was made involuntarily. This determination should be a fact-based inquiry taking into account the particular circumstances relating to the failure to record the interrogation.

Expert testimony about false confessions should be permitted if it is relevant to the facts of the case. In 2012, the New York Court of Appeals ruled that expert testimony should be allowed in such circumstances, although the court ruled that the testimony would not be permitted in the case at bar because it was not relevant.[48]

In short, especially in the capital case context, the benefits of recording the entire interrogation process far outweigh its costs and will help to promote fairness, accuracy, public safety, and public confidence in the system of justice.

[48] *See People v. Bedessie*, N.E.2d 380, 947 (N.Y. 2012); *see also* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1102-06 (Oct. 2008).

# CHAPTER 5
## Ensuring Reliable Eyewitness Testimony

In 1986, Frank Lee Smith was sentenced to death for the rape and murder of an 8-year-old girl in Broward County, Florida. He was convicted on the testimony of three eyewitnesses – the victim's mother and two neighbors – who had caught only brief glimpses of the killer at night. They described the killer as a black man, about 30 years old, six feet tall with a dark complexion. Based on the eyewitnesses' recollections, police identified Smith as a potential suspect and arrested him. No physical evidence linked him to the crime.

More than a decade after his conviction, one of the neighbors recanted her testimony, after defense investigators showed her a picture of Eddie Lee Mosley, a serial rapist-murderer who lived in the same area at the time of the murder. The witness stated that Mosely was the man she saw and admitted that at the time of the original trial she had been uncertain about her identification of Smith, but felt pressure from friends and police to identify him. Based on the witness's identification of Mosley as the perpetrator, Smith's attorneys sought DNA testing to compare Smith's DNA to semen found on the victim. The DNA test cleared Smith and confirmed that Mosley was the true perpetrator.

Unfortunately, Smith died of pancreatic cancer before the DNA test was allowed. Eleven months after his death, in December 2000, Smith became the first death row prisoner in history to be posthumously exonerated by DNA.

**Recommendation 14. State and federal jurisdictions should adopt legislation to require that eyewitness identifications be conducted in accordance with best practice techniques called for by prevailing scientific research. Further, jurisdictions should support research that will result in the continuing development of best practices in identification techniques.**

Concerns about the reliability of eyewitness testimony in criminal trials have become more prevalent in the past twenty years. Numerous commentators have identified factors that influence the reliability of eyewitness testimony and catalogued wrongful convictions based on false identifications in state and federal criminal cases. The effects of unreliable eyewitness testimony are particularly devastating in capital cases because the stakes are so high.

Since 1973, 144 people in 26 states have been released from death row based on evidence of their innocence.[1] Some of the exonerees were wrongly convicted, at least in part, on the basis of flawed eyewitness testimony. Kirk Bloodsworth, for example, was convicted and sentenced to death based, in part, on false eyewitness testimony.[2] DNA evidence exonerated him in 1993, after he spent almost nine years in prison, two of them on death row.[3] According to the Innocence Project, eyewitness misidentification testimony is the leading cause of wrongful convictions, playing a factor in 72 percent of post-conviction DNA exoneration cases.[4] Many critics argue that the true number must be greater because in a large percentage of cases, biological evidence was never available for DNA testing, or has since deteriorated, been lost, or been destroyed.[5]

Inaccurate eyewitness identifications can steer police to focus their investigation on the wrong suspect, wasting precious time and resources. This can lead to the aging of evidence and allows the true perpetrator to evade police detection.[6] In a 2009 report, the Innocence Project

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1 Death Penalty Information Center, The Innocence List, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row.

2 The National Registry of Exonerations, Kirk Bloodsworth, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3032.

3 *Id.*

4 *See* The Innocence Project, DNA Exonerations Nationwide, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php.

5 *See* Gary L. Wells & Dean S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law & Hum. Behav. 1, 2 (2009). The Innocence Project reports that a review of its closed cases from 2004-2010 revealed that 22 percent of cases were closed because of lost or destroyed evidence. *See* DNA Exonerations Nationwide, *supra* note 4; *cf.* Innocence Project, Non-DNA Exonerations, http://www.innocenceproject.org/know/non-dna-exonerations.php (reporting that DNA testing is available in only five to ten percent of all criminal cases).

6 Particularly alarming in this regard are the results of field experiments showing that where the true perpetrator was not in a lineup, eyewitnesses identified as the suspect an innocent lineup participant more

found that in at least 48 percent of the misidentification cases where the actual perpetrator was later identified through DNA evidence, the perpetrator went on to commit violent crimes while the innocent person was in prison.[7]

**Limitations of human memory to accurately recall details, either immediately after viewing a crime or later, may compromise a crime victim's or witness's identification of the perpetrator.**

Certainly, human memory is flawed, and perception can be imperfect. Limitations of human memory to accurately recall details, either immediately after viewing a crime or later, may compromise a crime victim's or witness's identification of the perpetrator. Influences inherent to being a victim of or witness to a crime, such as the stress of the crime itself and of being subjected to questioning from law enforcement, can naturally affect the accuracy of the identification. Stress is heightened in situations involving a violent crime in which force or a weapon is used or where a victim dies; in other words, precisely the types of crimes that can lead to a capital charge.[8] In addition, external factors, such as the conditions under which police conduct a lineup or showup, can compromise the accuracy of an eyewitness' identification. For example, combined with a suggestively-formed lineup, suggestive instructions and an administrator who is predisposed to a particular suspect, imperfect memory can easily result in a false identification. Researchers have identified a variety of factors that may affect the accuracy of eyewitness identification in police lineups, including: the type of lineup conducted (i.e., whether it is a lineup of people or photographs, and whether it is simultaneous so all people or photos are shown at once or sequential so that they are shown consecutively); instructions given to the witness; the number and physical characteristics of fillers; whether the administrator is aware of who the suspect is in the lineup; and similarities or differences between the witness's and the suspect's age, race or ethnicity.[9]

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than one-third of the time. *See* Carol Krafka & Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. Personality & Soc. Psychol. 58 (1985).

7 *See* The Innocence Project, Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification 4 (2009), at http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf ("Reevaluating Lineups").

8 *See* Wells & Quinlivan, *supra* note 5, at 11.

9 *See* Beth Schuster, *Police Lineups: Making Eyewitness Identification More Reliable*, NIJ J. No. 258 (Oct. 2007); G.L. Wells & C.E. Luus, *Police Lineups as Experiments: Social Methodology as a Framework for Properly Conducted Lineups*, Personality and Soc. Psychol. Bull. 16 (1990).

For a defendant who is not the true perpetrator, an eyewitness identification is especially problematic, because such first-hand testimony is typically very persuasive to a jury. As a result, faulty or suggestive procedures that are not calculated to ensure accurate eyewitness identifications necessarily implicate a defendant's due process rights. Furthermore, a later-administered fair procedure cannot remedy an earlier, unfairly suggestive procedure. Accordingly, in order to obtain the most accurate eyewitness testimony, law enforcement must conduct the initial identification process with integrity.

At the most basic level, jurisdictions must adopt lineup procedures that are reasonably calculated to lead to accurate identification of suspects. Currently, there is no uniform national standard for identification procedures. Federal, state, and local procedures vary widely. In fact, many police departments have no written procedures, leading to potential inconsistency within these departments.[10] A 2007 study by the Georgia Innocence Project found that 82 percent of law enforcement agencies in that state had no policies for eyewitness identification procedures.[11]

Psychological and socio-legal research regarding best practices for eyewitness identification by police lineup in criminal cases has produced a series of generally accepted best practices, including:

*Double-blind administration.* A neutral administrator who does not know the identity of the suspect should administer photographic or in-person lineups. These "double-blind" lineups, where neither the administrator nor the eyewitness knows the suspect, eliminate the risk of intentionally or unintentionally signaling to the witness. Research has shown that even nonverbal and inadvertent hints from the administrator can have an effect on selection.[12] A U.S. Department of Justice report noted that these cues can result from the rapport that develops between investigator and eyewitness, empathy for a victim, or the eyewitness seeking guidance or affirmation from the investigator.[13] Any of these can lead to false identification.

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[10] In some jurisdiction, law enforcement officer may not even receive formal training in lineup practices. *See* Reevaluating Lineups, *supra* note 7, at 22. A 2007 study by the Georgia Innocence Project found that 82 percent of law enforcement agencies had no policies for eyewitness identification procedures. *See* Georgia Innocence Project, 2007 Georgia Innocence Project Law Enforcement Survey, at http://www.ga-innocenceproject.org/images/Eyewitness%20ID%20Report%202007.pdf.

[11] *See* Reevaluating Lineups, *supra* note 7, at 24 (citing 2007 Georgia Innocence Project Law Enforcement Survey, *supra* note 10).

[12] *See* Stanley Cohen, The Wrong Men: America's Epidemic of Wrongful Death Row Convictions 39-82 (2003); Barry Scheck et al., Actual Innocence: When Justice Goes Wrong and How to Make it Right 53-100 (2001); *see also* Reevaluating Lineups, *supra* note 7, at 18 (explaining that blind administration is based on the basic tenet of scientific research that test subjects are influenced by the expectations of those who perform the tests, and providing practical suggestions for police departments where there are limitations to obtaining an independent officer to act as a blind administrator).

[13] Nat'l Inst. of Just., U.S. Dept. of Just., Eyewitness Evidence: A Guide for Law Enforcement 11-12 (1999) ("Eyewitness Evidence").

Assurances given after an eyewitness has made an identification – with comments like "good, that's who we thought it was" or "yes, that's the guy" – can affect later stages in the process, including later self-reports of identification confidence and in-court testimony.[14] Adopting a double-blind procedure for administering lineups removes the risk that the administrator will taint the witness's identification.

*Fillers with similar characteristics to the suspect*. The composition of the lineup is as important as the procedures used to conduct the lineup. Among the suggestive lineups that have resulted in actual wrongful convictions are "a photo array in which the suspect's photo was the only one in color, a photo array in which the suspect and only one other man were shirtless (and the perpetrator had been described as shirtless), and a physical lineup in which the suspect was the only one wearing an orange prison jumpsuit."[15] Although these are extreme examples, they demonstrate the impact a poorly designed lineup can have on a witness's ability to properly identify a perpetrator.

Researchers conclude that to counterbalance the effect of eyewitness guessing, police departments should implement lineup procedures that include at least five people, in addition to the suspect, in the lineup.[16] These five fillers, who are known to be innocent of the crime in question, should have characteristics similar to the eyewitness's description of the perpetrator. As would be expected, research shows that if only one person in the lineup has those characteristics, the witness is much more likely to identify that person, based on likeness alone. In those instances where a witness's description of the perpetrator varies from the police's identified suspect, the characteristics of fillers should fit the perpetrator's description, and fillers should not be selected because they look like the suspect.[17] In this way, witnesses will be more likely to select a person from the lineup based on their memory, rather than on a comparative analysis. Care should be taken to ensure that fillers are presented in a reasonably similar manner to the suspect in terms of stance, clothing, significant features in common with the perpetrator, and any other characteristics that would otherwise isolate the suspect and make the witness more likely to select him or her.

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14 *See* Gary L. Wells et al., *Eyewitness Identification Procedures*, 22 Law & Hum. Behav. 1, 22 (1998).

15 Reevaluating Lineups, *supra* note 7, at 10.

16 *See ABA Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* (Aug. 2004), at 12 ("*ABA Statement of Best Practices*"), at http://meetings.abanet.org/webupload/commupload/CR209700/relatedresources/ABAEyewitnessIDrecommendations.pdf.

17 *See id.*; Wells et al., *supra* note 14, at 23-27; *see also* Steven D. Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?*, 18 Crim. Just. Magazine 37, 37-45 (2003). Researchers have found that using fillers who do not fit the eyewitness's description of the perpetrator dramatically increases the chances that an innocent suspect who fits the description will be selected in a lineup. Wells & Quinlivan, *supra* note 5, at 7 (citing studies).

Police should also not provide biographical information about the lineup participants to the eyewitness. Fillers should not be re-used for lineups for additional suspects to be viewed by the same eyewitness, and if there are multiple witnesses, the suspect should be placed in a different position in each lineup.[18]

*Instructions that perpetrator may or may not be in lineup*. It is critical to the reliable administration of a lineup that eyewitnesses be instructed that the perpetrator may not be in the lineup and that they are not required to identify anyone in the lineup – in other words, an eyewitness can pick "none of the above."[19] Research reveals that mistaken identifications from lineups where the perpetrator is not present are significantly higher when the witness is not given this pre-lineup instruction.[20] Conversely, the incidence of false identifications goes down when the instruction is given.[21] Called "instruction bias," the eyewitness's failure to understand the true purpose of a police lineup – to exculpate the innocent as well as to identify the actual perpetrator – can lead to a false identification through the witness's selection of the closest match to the perpetrator, rather than selection of an individual who the witness believes *is* the perpetrator.[22] This effect may result as well from multiple presentations of a suspect, which can similarly suggest to the eyewitness which person to identify, whether or not the eyewitness is confident that the suspect is the perpetrator.

**…the eyewitness's failure to understand the true purpose of a police lineup – to exculpate the innocent as well as to identify the actual perpetrator – can lead to a false identification**

*Eyewitness assertion of confidence*. After a lineup identification and prior to providing any feedback, the administrator should obtain from the eyewitness a statement of his or her

18 Reevaluating Lineups, *supra* note 7, at 18.

19 *See* Penrod, *supra* note 17, at 45; *see also* Eyewitness Evidence, *supra* note 13, at 31-32.

20 *See* Brian L. Cutler, Eyewitness Testimony: Challenging Your Opponent's Witness 34 (May 2002). In one study where the eyewitness was not instructed that the perpetrator may not be present in the lineup, 78 percent of the eyewitnesses falsely identified a suspect. Eyewitnesses falsely identified a suspect only 33 percent of the time when the eyewitnesses were instructed in advance of the lineup that the perpetrator may not be present. Wells et al., *supra* note 14, at 11.

21 Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, Law & Hum. Behav. 21, 283-97 (1997).

22 *See* Wells et al., *supra* note 14, at 23 (finding from empirical data that an explicit warning that the culprit might not be in the lineup or photospread reduces the rate of incorrect identifications in culprit-absent lineups, but does not cause an appreciable reduction of accurate identifications in culprit-present lineups).

level of confidence.[23] Researchers have determined that the confidence that an eyewitness expresses in his or her identification testimony is the most powerful determiner of whether the jury will give credence to the eyewitness's identification.[24] Events following the identification that have nothing to do with the witness's memory, such as assuring statements or repeated post-lineup questioning, can have an effect on an eyewitness' confidence in his or her lineup identification.[25] Accordingly, immediately after a witness makes an identification, before any outside influences may affect the witness, law enforcement should take a statement regarding the witness's confidence in the identification.

*No feedback regarding selection of perpetrator.* Due to the impact that assurances from law enforcement officers can have on witnesses, police departments should implement procedures that shield eyewitnesses from feedback regarding whether they selected the suspect. Where double-blind administration of a lineup is not logistically possible or where other law enforcement officers who know the location of the suspect in the lineup are in contact with the eyewitness, it is important that law enforcement have clearly established guidelines to follow to prevent intentional and inadvertent feedback. Additionally, no writings, information or comments regarding any previous arrest, indictment or conviction of the suspect, or any information connecting the suspect with the offense, should be visible or made known to the witness.

*Record lineup procedures and process*. Although video recording is the most accurate and complete form of recording, audio recording can be employed as well to record the identification procedure. Chapter 4, discusses at greater length the benefits of video and audiotaping. Where neither recording mechanism is available, the lineup administrator should create a detailed written record of the identification process, including, but not limited to, any failure to follow established procedures, and the reason for such failures.[26] Creating a record of the lineup process as it was used to identify the suspect protects the constitutional rights of the defendant by making it more likely that the appropriate procedures will be followed, providing a deterrent against the use of improper techniques and providing documentation to support challenges when police fail to follow proper techniques. From the perspective of the prosecution, documentation of the process and its outcome improves

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23 *See* Reevaluating Lineups, *supra* note 7, at 20.

24 *See* Wells et al., *supra* note 14, at 15.

25 *See ABA Statement of Best Practices*, *supra* note 16, at 13; Penrod, *supra* note 17, at 46; Cutler, *supra* note 20, at 24-25.

26 In *State v. Delgado*, 188 N.J. 48 (2006), the New Jersey Supreme Court exercised its rulemaking authority "to require that, as a condition to the admissibility of an out-of-court identification, law enforcement officers make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results." *Id.* at 63. In February 2012, the court referred the matter to the Criminal Practice Committee for the drafting of a proposed rule.

the strength and credibility of the eyewitness identification and can be significant for the investigation and any subsequent court proceedings.[27] Eyewitness identifications following these procedures are more reliable and more likely to stand up in court and on appeal.

*Sequential vs. simultaneous presentation*. There is debate about the best way to conduct identification lineups – either with sequential or simultaneous presentation of the lineup participants. In sequential lineups, there are different methods, but all have in common that the witness sees one lineup participant at a time and must continue to view all participants even if a suspect is identified before all are shown. In a simultaneous lineup, all participants are shown at the same time. Sequential lineup procedures have been developed in response to research that demonstrates that in simultaneous lineups eyewitnesses are more likely to engage in relative judgment, and to identify the individual who looks *most like* the perpetrator, rather than the individual who the eyewitness believes *is* the perpetrator.[28] Psychology experts assert that eyewitnesses are more likely to identify the guilty suspect if the lineup is sequential, and that there is a greater likelihood of misidentification if the perpetrator is not present in a simultaneous lineup than in a sequential lineup.[29]

Researchers have concluded that the procedures outlined above, used together, can reduce the number of mistaken identifications by half.[30] Moreover, there is little to no cost associated with these reforms.[31] For law enforcement, adopting the recommended identification

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27 Eyewitness Evidence, *supra* note 13, at 20, 38.

28 *See* Jeanne Schleh, The Why and How of Blind Sequential Lineup Reform 3 (2009), at http://www.co.ramsey.mn.us/NR/rdonlyres/CFFF14C4-0F44-4BD9-9995-0186E9C17085/18041/TheHowandWhyofBlindSequentialLineupReform.pdf; Reevaluating Lineups, *supra* note 7, at 21; *ABA Statement of Best Practices*, *supra* note 16, at 10; Michael J. Saks et al., *Model Prevention and Remedy of Erroneous Convictions Act*, 22 Ariz. St. L.J. 665 (2001); Wells et al., *supra* note 14, at 10-13, 31.

29 *See* Schleh, *supra* note 28, at 2. There are certain requirements for administering a sequential lineup that are particular to that format. It is critical in a sequential lineup to have a double-blind administrator. Research has shown that where they are not administered blindly, sequential lineups can actually decrease the likelihood of a correct identification. Moreover, in a sequential lineup, it is important that, even if the witness picks someone from the lineup, the administrator shows the remainder of the lineup participants to the witness. *See* Eyewitness Evidence, *supra* note 13, at 36-37.

30 Schleh, *supra* note 28, at 2. These findings about identification lineups are in sharp contrast to the conclusions regarding showups, where the eyewitness is shown only a single suspect and asked if that is the perpetrator who they recall. In *Stovall v. Denno*, 388 U.S. 293 (1967), the Supreme Court found that showups are inherently suggestive because they suggest which person to pick, but held that they may not be so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant will be denied due process. Still, experiments have shown that rates of positive identification are actually lower for showups than for lineups. *See* Nancy Steblay, et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison,* 75 Law & Hum. Behav. 523, 530 (2003). Thus, there is reason to conclude that showups are ineffective as well as unfairly suggestive.

31 For smaller law enforcement offices or departments, it may be easier to have a single lineup administrator so as not to distract from other responsibilities and to ensure timeliness of lineups. Alternatively, departments without a blind lineup administrator can implement a folder shuffle system with photographs, designed to conceal from the administrator which lineup participant a witness is viewing at any given time.

procedures increases the reliability of identifications, helping them to apprehend the actual perpetrator and present witness testimony that is more likely to stand up in court and on appeal. It is easier for law enforcement agents to explain the procedure, to testify they followed the procedure and to convince the jury that the identification was reliable. Plus, the procedures further the goal of doing justice and getting accurate perpetrator identifications, not just convictions.

Discussion of identification procedures and the ways in which traditional procedures have failed has generated considerable reforms, but many of these reforms are achieved through changes to internal procedures and there is no penalty and no redress for defendants when the procedures are not followed. The Department of Justice, through the National Institute of Justice ("NIJ"), developed a lineup protocol in 1999.[32] As a premise for its recommendations, NIJ stated that 75,000 people are charged criminally each year based on mistaken identification.[33] The reforms have the backing of the American Bar Association, but the procedures set forth in the NIJ report are not mandatory, and they only apply to federal, not state, law enforcement agencies.

While federal, state and local jurisdictions have adopted a range of procedural reforms,[34] there is no effective means for enforcing these procedures or deterring conduct that may taint an

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[32] *See* Eyewitness Evidence, *supra* note 13; *see also* Int'l Ass'n of Chiefs of Police, Training Key on Eyewitness Identification (2006), at http://www.ripd.org/Documents/APPENDIX/2/Supporting%20Materials/IP%20113%20IACP%202006.pdf; *see also* Int'l Ass'n of Chiefs of Police, National Summit on Wrongful Convictions: Building a Systemic Approach to Prevent Wrongful Convictions 18 (Aug. 2013) (joint summit between the International Association of Chiefs of Police and the Department of Justice Office of Justice Programs recommending best practices for eyewitness identification protocols consistent with the Committee's recommendations).

[33] *See* Eyewitness Evidence, *supra* note 13.

[34] The New Jersey Attorney General's office was the first to adopt these recommendations in 2001. In addition, the New Jersey Supreme Court relied on the new commonly accepted best practices in determining whether there is evidence of unreliable identification arising out of the system. *See State v. Henderson*, 27 A.3d 872 (N.J. 2011). North Carolina has adopted the most comprehensive reforms: blind-sequential procedure, proper filler selection, comprehensive witness instructions, confidence statements, training of law enforcement officers, and legal remedies in cases where law enforcement agency failed to comply with the policies. N.C. Gen Stat. Ann. § 15A-284.50 *et seq*. (2007). Other full or partial reforms have been implemented by the Wisconsin Department of Justice; Dallas, Texas; Boston and Northampton, Massachusetts; Hennepin County, Ramsey County and Minneapolis-St. Paul, Minnesota; Santa Clara County, California; Virginia Beach, Virginia; Denver, Colorado and Connecticut. *See* Innocence Project, Eyewitness Identification, http://www.innocenceproject.org/fix/Eyewitness-Identification.php. Maryland has mandated that all of its law enforcement agencies adopt written policies for eyewitness identification practices that are in compliance with NIJ standards. Md. Code Ann., Pub. Safety § 3-506 (LexisNexis 2011). Studies have been done in Connecticut, Illinois, Rhode Island, Virginia, West Virginia and Vermont. *See* Police Executive Research Forum, A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies 26 (2013). California, Kentucky and New Mexico have considered proposed legislation reforming and unifying their eyewitness identification, although the legislation has not yet passed. *See* Reevaluating Lineups, *supra* note 7, at 25.

eyewitness's identification of a suspect. In theory, identification evidence may be excluded from trial as a violation of the defendant's due process rights if it is acquired through unnecessarily suggestive procedures and there is a substantial likelihood of irreparable mistake; however, as a practical matter, courts frequently admit eyewitness identifications even if they resulted from highly suggestive procedures. Recommendation 15 discusses this in greater detail. Thus, the judicial process does not adequately deter suggestive procedures, and there is no legal compulsion for jurisdictions to adopt best practices. The Committee recommends that jurisdictions adopt mandatory procedures that implement best practice techniques called for by prevailing scientific research for conducting identification lineups. Further, jurisdictions should support research that will result in the continuing development of best practices in identification techniques.[35]

**as a practical matter, courts frequently admit eyewitness identifications even if they resulted from even highly suggestive procedures.**

**Recommendation 15. Courts should suppress unreliable eyewitness identifications. The admissibility determination should be made based on objective criteria, not subjective self-reporting by the witness of his or her likelihood of accuracy at the time of the identification.**

Since the U.S. Supreme Court's rulings in *Neil v. Biggers*[36] and *Manson v. Brathwaite*[37] more than 30 years ago, the test for reliable and admissible eyewitness identification testimony has not changed. In *Manson*, the Court held that suspect identifications that (1) result from unnecessarily suggestive procedures and (2) result in a substantial likelihood of irreparable mistaken identification in violation of the defendant's due process rights are inadmissible at trial. *Manson* was a showup case, rather than a lineup case, but its test has been applied consistently to lineup identifications as well. Under the *Manson* test, if the court does not find unnecessarily suggestive procedures were utilized, then the court will not conduct the reliability analysis. Where the court finds that unnecessarily suggestive lineup procedures were used, the court will undertake the reliability analysis. In *Biggers*, the Supreme Court established the factors for determining the reliability of eyewitness testimony: (1) opportunity to view, (2) attention, (3) description, (4) time to identification and (5) certainty.[38]

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35 The Innocence Project has proposed model legislation for jurisdictions to create a task force to recommend procedures and practices to improve the accuracy of eyewitness identifications. Reevaluating Lineups, *supra* note 7, at Appendix B.

36 409 U.S. 188 (1972).

37 432 U.S. 98 (1977).

38 *Biggers*, 409 U.S. at 199.

In *Perry v. New Hampshire* (2012),[39] the Court affirmed *Manson*'s test for reliable and admissible eyewitness identification testimony. However, as critics have argued, in a majority of cases, courts rule that even highly suggestive procedures are outweighed by the reliability prong of the test, and permit the evidence go to the jury. Significantly, three of the considered factors – view, attention and certainty – are based on subjective self-reports. A reliability determination based on subjective self-reporting is most likely to result in the identification being admitted into evidence.[40] In addition, there may be relevant circumstances that make the identification unreliable that are related to the events in question or the witness and that, under the *Manson* test, would not be considered without a court's determination that the identification procedures themselves were unfairly suggestive. Once the evidence goes to the jury, these issues still are not adequately addressed because cross-examination and expert testimony often is not permitted. The current predominant legal framework does not deter police from using suggestive identification procedures because the evidence usually is admitted nonetheless.[41]

Some states have refined or rejected the *Manson* test in favor of a stricter standard. In *State v. Henderson*,[42] the New Jersey Supreme Court noted that since *Manson*, "a vast body of scientific research about human memory has emerged" which "casts doubt on some commonly held views relating to memory" and "calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications."[43] The court found:

> … that the current standard for assessing eyewitness identification evidence does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate.[44]

In *Henderson*, the court adopted a burden-shifting approach. Under that test, the defendant must make an initial showing of some evidence of suggestiveness in what it called a "system variable" that could lead to a mistaken identification. A system variable is a factor that is within the control of the criminal justice system, namely, the identification procedures themselves. System variables are juxtaposed with so-called "estimator variables," which are factors like lighting conditions at the time of the crime or the presence of a weapon, over which the criminal justice system has no control. Once the defendant makes the required

39 132 S. Ct. 716 (2012).

40 *See* Wells & Quinlivan, *supra* note 5.

41 *See id.* at 21 (arguing that *Manson* is ineffective because its deterrent effect is largely absent).

42 27 A.3d 872 (N.J. 2011). See also *State v. Chen*, 25 A.3d 256 (2011), a companion case.

43 *Henderson*, 27 A.3d at 877.

44 *Id.* at 872.

initial showing, the state must offer proof to show the eyewitness identification is reliable – accounting for both system and estimator variables.[45] An identification will be suppressed if, based on the totality of the circumstances, the defendant has demonstrated a very substantial likelihood of irreparable misidentification. On the other hand, a New Jersey trial court can end the inquiry at any time if it determines that the defendant's initial claim is groundless.

Other states have similarly altered the *Manson* test. New York and Massachusetts require automatic suppression of unnecessarily suggestive procedures.[46] Wisconsin courts suppress showups unless they were necessary under the circumstances.[47] Connecticut mandates a jury instruction if police failed to give a pre-lineup instruction to the eyewitness that the perpetrator "might or might not be present" in the lineup.[48] Georgia precludes trial courts from instructing jurors to consider the eyewitness's confidence when evaluating the witness's testimony.[49] Kansas and Utah have refined and added factors to the *Manson* test.[50] Another, more exacting standard that commentators have suggested but no jurisdiction has adopted is one in which the prosecution has "to make the case that the identification was reliable regardless of whether a suggestive procedure was necessary or unnecessary."[51]

Under any approach, successful alternatives to *Manson* must do two things: (1) deter suggestive procedures by creating a meaningful risk of suppression, appropriate jury instruction or other cost to the government where suggestive procedures are used; and (2) establish criteria for determining the admissibility of a suggestive identification taking into

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[45] The New Jersey Supreme Court directed the Supreme Court Committee on Model Criminal Jury Charges to consider a revision to the identification model criminal jury instructions, in response to the court's ruling in *Henderson*. *See* Supreme Court Committee on Criminal Practice, Report of the Supreme Court Criminal Practice Committee on Revisions to the Court Rules Addressing Recording Requirements for Out-Of-Court Identification Procedures and Addressing the Identification Model Charges (Feb. 2, 2012), at http://www.judiciary.state.nj.us/criminal/CPCREPORTHENDERSONDELGADOREPORT.pdf; Supreme Court Committee on Model Criminal Jury Charges, Report of the Supreme Court Committee on Model Criminal Jury Charges on the Revisions to the Identification Model Charges (Jan. 9, 2012), at http://www.judiciary.state.nj.us/criminal/ModelCrimJuryChargeCommHENDERSONREPORT.pdf.

[46] *See Commonwealth v. Johnson*, 650 N.E.2d 1257 (Mass. 1995); *People v. Adams*, 423 N.E.2d 379 (NY 1981).

[47] *See State v. Dubose*, 699 N.W.2d 582 (Wis. 2005).

[48] *See State v. Ledbetter*, 881 A.2d 290 (Ct. 2005).

[49] *See Brodes v. State*, 614 S.E.2d 766 (Ga. 2005).

[50] The case of *State v. Ramirez*, 817 P.2d 774 (Utah 1991), altered the *Manson* analysis by changing the third factor so that the court evaluates the witness' capacity to observe the event, including his or her physical and mental acuity. *Ramirez* also added two factors: 1) whether the witness' identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion, and consideration of the nature of the event being observed and 2) the likelihood that the witness would perceive, remember, and relate it correctly; *see also State v. Hunt*, 69 P.3d 571 (Ks. 2003).

[51] Wells & Quinlivan, *supra* note 5, at 20.

account that self-reports of the witness's opportunity to view, attention to detail, etc., are not a good indicator of reliability. A court should make the admissibility determination based on objective criteria, not subjective self-reporting by the witness regarding the accuracy of his or her identification at the time of the lineup. Rather than relying on subjective self-reports, police should be encouraged to collect statements from witnesses regarding their viewing conditions and attention prior to a lineup. Prosecutors can then use these statements to support a reliability claim even if there is a later suggestive procedure.

**A court should make the admissibility determination based on objective criteria, not subjective self-reporting by the witness regarding the accuracy of his or her identification at the time of the lineup.**

**Recommendation 16. When courts admit eyewitness identification testimony, jurors should be given specific instructions that identify the factors that may influence reliability.**

If a court admits eyewitness identification testimony, it should instruct the jury on the various factors – both objective and subjective – that have been shown to enhance or detract eyewitness reliability. Enhanced jury instructions would help jurors evaluate eyewitness identification evidence introduced at trial. Jury instructions should identify particular factors that are relevant to the case and direct jurors to consider those factors in making decisions regarding the reliability of eyewitness identification testimony. Instructions also should direct jurors to consider whether the witness had an adequate opportunity to observe the suspect, including the length of time to observe, visibility, distance, number of times observed, length of time between observance and identification, and other relevant factors.[52] Threshold requirements for such jury instructions – for example, that there be no corroborating independent evidence or demonstrations that the characteristics would not be fully understood by the jury without the jury instructions – impose additional burdens on the defendant that serve no legitimate purpose.[53] Instead, where there is evidence in the

[52] *See* Kevin F. O'Malley et al., Federal Jury Practice and Instructions: Criminal §§ 14.10, 14.11 (5th ed. 2000) (setting forth *Telfaire* instruction); Edie Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. Applied Soc. Psychol. 252 (1988) (reporting findings from jury simulation studies designed to examine the effect that instructions have on jurors' decisions in cases in which identification testimony is central).

[53] *State v. Wright*, 206 P.3d 856 (Idaho Ct. App. 2009) (adopting detailed instruction for cases in which eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by independent evidence and the defendant offers expert testimony on psychological factors

case that implicates an estimator variable, the court should give a jury instruction identifying that variable and requiring jurors to consider it in making their reliability determination. Similarly, with respect to system variables, judges should instruct the jury in cases where there is a suggestive identification procedure that such procedures lessen the reliability of the identification testimony and can be considered in assessing the reliability of the testimony.

The ABA has advocated for greater use of jury instructions, as well as expert testimony (see Recommendation 17), in criminal cases where identity is a central issue in the case.[54] The ABA further recommends that the court give a specific instruction "tailored to the needs of the individual case" explaining the accuracy factors to be considered.[55] For example, research has demonstrated a cross-racial effect, or own-race identification bias, in criminal cases. This effect describes the tendency of eyewitnesses of one race to better recognize faces – and, therefore, suspects – of their own race or ethnic group than faces of another race or ethnic group.[56] In recognition of this effect, the ABA has recommended (1) permitting experts on witness identification and (2) providing jury instructions explaining identification accuracy factors and whether they have been shown to enhance or detract eyewitness identification reliability.[57]

Jury instructions, in that they come from judges, are an authoritative, reliable source in courtrooms. In general, juries consider the directions of judges more credible than the arguments of lawyers for the parties, battling experts or witnesses aligned with one of the parties. Jurors are more likely to discuss the effects of system and estimator variables when the judge includes those issues in his or her instructions to the jury, both drawing their attention to the variables and sensitizing them to their significance.

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shown to have potentially affected the accuracy of the identification but not fully known or understood by the jury); *see also State v. Cromedy*, 727 A.2d 457 (N.J. 1999) (finding that jury instruction addressing cross-racial identification is appropriate when the evidence is not corroborated by other evidence giving it independent reliability).

54 *American Bar Association Criminal Justice Section, Report to the House of Delegates* (Aug. 2004) ("*ABA Report*"), at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am04111c.authcheckdam.doc; *see generally ABA Statement of Best Practices*, *supra* note 16.

55 *ABA Report*, *supra* note 54, at Rec. 2.

56 *See* Gary L. Wells and Elizabeth A. Olson, *Eyewitness Testimony*, Ann. Rev. of Psychol. 54, 280 (2003); *see also* Beth Schuster, *Police Lineups: Making Eyewitness Identification More Reliable*, NIJ J. 258 (2007); Christian A. Meissner and John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory of Faces*, Psychol., Pub. Pol'y & L. 7, 270-75 (2001). The Innocence Project reported that 53 percent of misidentification cases in which race is known involve cross-racial misidentification. Cross-racial misidentifications in DNA exoneration cases involved an African-American or Latino defendant 99 percent of the time, and a Caucasian defendant only one percent of the time. Reevaluating Lineups, *supra* note 7, at 8. The significance of race in capital cases is discussed more fully in Chapter 10, *infra*.

57 *American Bar Association Criminal Justice Section, Report to House of Delegates*, (Aug. 2008), at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104d.authcheckdam.pdf; *see* David E. Aaronson and B. J. Tennery, *Cross-Racial Identification of Defendants in Criminal Cases: A Proposed Model Jury Instruction*, 23 Crim. Just. 4 (2008).

**Recommendation 17. To give further context to the jury instructions, courts should admit expert trial testimony explaining prevailing research trends relating to the objective reliability of identification procedures and the factors that affect subjective identification reliability.**

Estimator variables, or event-related factors, may not be properly addressed on cross-examination. Cross-examination is well-suited to help jurors determine the credibility of witnesses who are intentionally deceptive versus those who are truthful. However, cross-examination is ineffective – some would say virtually useless – for detecting witnesses who are trying to be truthful but are genuinely mistaken.[58] For this reason, experts are appropriately called upon to explain to the jury what scientific research shows about the impact of event-related factors on eyewitness identifications. Concerning system variables, under current law, it is the province of the court to determine whether they are likely to result in a false identification and violate the defendant's due process rights. However, even where system procedures are not so unfair that they violate the defendant's due process rights, they may have an impact on the reliability of the resulting identification. Expert testimony on both system and estimator variables is essential to fully educate jurors about these variables and their potential impact on identification reliability.

The human mind is inherently fallible, including its inability to accurately remember events or people. Additionally, witnesses will often adhere to their initial identification, sometimes when they no longer have an independent memory of the events they witnessed. On occasion witnesses may even identify a suspect based on characteristics other than their independent recollection (e.g. identifying an individual sitting in a particular chair in a courtroom, rather than based on their memory of the perpetrator). To combat these all too human tendencies and provide juries with insight into the risks they present, witness identification is an appropriate subject for expert testimony. For these reasons, the Committee recommends that expert testimony be permitted in capital cases to explain the prevailing research trends relating to the objective reliability of identification procedures and the factors that affect identification reliability.

**Recommendation 18. Jurisdictions should adopt a standardized protocol or set of best practices to be followed for all forensic interviews of children, which should include the videotaping of all interviews of children.**

Empirical research shows that children's testimony can be uniquely unreliable, both because of their mental and emotional immaturity and because they can be vulnerable to suggestive interview techniques. In order to minimize the susceptibility of children to suggestion during interviewing and to reduce the risk of false allegations in capital cases, jurisdictions should adopt standardized protocols or best practices for interviewing children who witness violent crimes.

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[58] Wells et al., *supra* note 14, at 6.

Every witness is suggestible to some degree, but children – particularly preschool-age children – are more suggestible than older children and adults.[59] Many courts, including the Supreme Court, have recognized the risks of using suggestive interview techniques and the need to take greater care when interviewing children.[60] Children also tend to be much more susceptible to pressures to conform to the expectations of others, making them more likely to make false accusations or respond inaccurately to leading questions.

This suggestibility should not preclude children from being heard as witnesses. Indeed, the vast majority of research suggests that children have good memory ability and can provide information that is both meaningful and accurate to investigators or triers of fact. However, there are significant differences between children's memories and adults' memories. For instance, adults have more complex memory retrieval strategies than children, allowing adults to recall more information independently. In addition, children do not necessarily notice or appreciate all of the details of an event and therefore may not consider it sufficiently important for storage in their memories. Children's memories also depend more on context than do adults' memories.[61] Accordingly, because of the differences between the memories of children and adults, and the higher potential for fallibility in children's memories, children's testimony must be subjected to more exacting standards when it is obtained and to higher standards of scrutiny during evaluation in both the investigative and trial processes.

**The human mind is inherently fallible, including its inability to accurately remember events or people.**

Children are particularly susceptible to suggestive questioning. Interviewers can inadvertently elicit false allegations from children as a result. The potential for these errors tends to be exacerbated when children are interviewed as witnesses following their involvement in a traumatic event, *e.g.*, witnessing a crime. It is important to minimize the occurrences and the effects of any such errors, particularly because the improper solicitation of information can lead to both the contamination of facts and the destruction of a child's credibility in the courtroom.

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[59] *See* Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 34 (2000); *see also* Amye R. Warren & Dorothy F. Marsil, *Why Children's Suggestibility Remains a Serious Concern*, 65 Law & Contemp. Probs. 127, 127-30 (2002) (concluding that suggestibility problems continue to exist in older children due to the ability to shape memories through questioning).

[60] *See Idaho v. Wright*, 497 U.S. 805, 812-13 (1990) (noting that "blatantly leading questions" and "interrogation… performed by someone with a preconceived idea of what the child should be disclosing" can affect children's memories).

[61] *See* John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 Pac. L.J. 3 (1996).

Because of the potential for influence, each jurisdiction should adopt standard protocols for interviewing children as witnesses. All parties that may at one point interview a child as a witness should employ these standard protocols, including, but not limited to, law enforcement officers, child protective services personnel and other social workers, specialized forensic interviewers, medical and mental health professionals, and even attorneys. Moreover, jurisdictions should provide extensive hands-on training to these parties to ensure that they are well-versed in the proper strategies for interviewing children.

Interviewers of children, whether they are aware of it or not, have the power to elicit false allegations, to foster or inhibit the accuracy of facts children provide, to encourage or discourage the amount of information provided, or to prevent children from disclosing any information at all.[62] Children's vulnerability in these circumstances is compounded by the desire of most children to "please" the interviewer by providing "correct" answers. If interviews are conducted a number of times, by multiple different people, contradictions and inaccuracies are even more likely to arise, as children react to the different influences of each interviewer.

**Interviewers of children, whether they are aware of it or not, have the power to elicit false allegations, to foster or inhibit the accuracy of facts children provide, to encourage or discourage the amount of information provided, or to prevent children from disclosing any information at all.**

Although the research is not entirely conclusive, several generally accepted best practices for interviewing children have emerged. Perhaps the most important of these practices is to videotape all interviews of children. The advantages to videotaping are numerous. For instance, the videotape allows the jury to evaluate for itself the interview techniques used, rather than relying on the interviewer's notes, and to determine whether the interview itself was unduly suggestive. Videotaping also tends to increase the likelihood that interviewers will follow the standardized protocol. The videotaping creates an incentive for the interviewer to use proper techniques and also provides for better monitoring, supervision, and training.[63] The videotape ensures that there is an accurate and complete record of the exchange between the interviewer and the child and minimizes the number of times a child is interviewed, as police officers, prosecutors, and defense attorneys are less likely to request additional interviews of

62 *See* Lindsay E. Cronch et al., *Forensic Interviewing in Child Sexual Abuse Cases: Current Techniques and Future Directions*, 11 Aggression & Violent Behav. 195, 196 (2006).

63 Ceci & Friedman, *supra* note 59, at 103-106.

the child. As discussed above, minimizing repeated questioning and interviews is important to maintaining the integrity of the child's testimony.[64]

Other generally-accepted best practices include:

*Conducting the Interview as Promptly as Possible*. Memories of both children and adults inevitably fade over time. Although children often can remember details of salient events well after they occur, it is generally agreed that the sooner the interview can be conducted, the less fragile the child's memory.

*Using Developmentally-Appropriate Language*. Differences in language comprehension and usage require that the interviewer use simply-phrased, straight-forward questions. In other words, the interviewer should use the active rather than the passive voice, should avoid negatives and double negatives, should use simple words and phrases and the child's own terms, and should include only one query per question.[65]

*Establishing Rapport*. It is imperative that the child feel as comfortable and relaxed as possible during the interview. According to researchers, this rapport-building does more than put the child at ease. If done correctly, rapport-building can serve as a supplement to the interview, allowing the interviewer to better understand the child's social, emotional, and cognitive development, as well as his or her communication skills and degree of understanding.[66]

*Setting Ground Rules at the Beginning of the Interview*. The interviewer should explain the interview's purpose (again, in language that the child can understand), what the child should do if he or she does not know an answer, does not understand the question, does not remember, does not want to answer, and what to do if the interviewer makes a mistake or misstates a response during the course of the interview. The ground rules also should include a discussion of the differences between the truth and a lie, including the consequences of

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[64] Failure to videotape could result in any number of consequences, including, *inter alia*, the inadmissibility of the testimony altogether, consideration of the lack of videotape as a factor in determining admissibility, or an instruction to the jury that the interviewer failed to follow proper practice and that the failure can or should be taken into account in evaluating the possibility that the child's statement was the product of suggestion. For instance, Michigan has enacted legislation mandating use of an investigative procedure, using as a model the forensic protocol developed by the Governor's Task Force. *See* Mich. Comp. Laws §722.628 (2014); s*ee generally* Governor's Task Force on Children's Abuse and Neglect & Dep't of Human Services, State of Michigan, Forensic Interviewing Protocol (3d ed. 2011), at http://www.michigan.gov/documents/dhs/DHS-PUB-0779_211637_7.pdf. Counties may use a different protocol if they so choose. Mich. Comp. Laws §722.628(8)(6) (2014).

[65] *See* Nancy E. Walker, *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility*, 65 Law & Contem. Probs. 149, 165 (2002) (citing Nancy E. Walker and Matthew Nguyen, *Interviewing the Child Witness: The Do's and the Don't, the How's and the Why's*, 29 Creighton L. Rev. 1587, 1592-93 (1996)).

[66] *See id.*

telling a lie. The interviewer should obtain the child's agreement that he or she will tell the truth. The interviewer also must explain that, because he or she was not there at the time of the incident, he or she does not know the correct details. Accordingly, the child has all of the information and it is up to the child to describe the events completely and to provide correct details. It should be clear to the child that he or she, not the interviewer, will be doing most of the talking.[67]

*Using Free-Recall and Open-Ended Questions*. Open-ended questions allow children to provide free narrative accounts, and research demonstrates that such free narrative accounts are not only more detailed, but are significantly more reliable (and more persuasive) than children's responses to direct, pointed questioning.[68] Interviewers should avoid using suggestive techniques, including leading or forced-choice questions, reinforcement (both positive and negative) for responses, and social influence (*i.e.*, telling the child what others, including his or her peers, have said).

*Limiting Repetition of "Closed" Questions Within the Interview and Limiting the Number of Interviews and Interviewers*. Multiple interviews tend to create additional stress. In addition, as discussed above, increasing the number of interviews or interviewers also increases the likelihood that suggestive questions will be asked.

### Recommendation 19. State and federal courts should admit expert trial testimony to give context to jury instructions and to explain prevailing research trends relating to the suggestibility of children and the factors that affect the reliability of children's testimony.

Children's suggestibility should not preclude them from testifying as witnesses. A jury, however, must evaluate differently the credibility of children and the reliability of a child's memory. To this end, courts should admit expert trial testimony explaining prevailing research relating to the reliability of children's testimony and the factors that affect such reliability.

Historically, expert testimony often has been excluded on the issue of children's testimony because it (1) addressed matters within the common understanding of jurors,[69] (2) was confusing, or (3) invaded the province of the jury to make credibility determinations.[70] However, even if jurors accept that children are suggestible, most jurors are not aware of the effects that interview techniques or other suggestive influences can have on children. Expert

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67 *See id.* at 167.

68 *See id.*; *see also* Cronch, *supra* note 62, at 198.

69 *See State v. Swan*, 790 P.2d 610, 632 (Wash. 1990).

70 *See Martinez-Macias v. Collins*, 810 F. Supp. 782, 814 (W.D. Tex. 1991) (stating that Texas law in 1984 prohibited the use of an expert to impeach the testimony of a witness).

testimony thus is helpful to aid the jury in identifying leading questions, understanding the effects of leading questions on a suggestible child, explaining the pressure on a child to please the interviewer, and comprehending the necessity for employing proper interview techniques.[71] To this end, some courts have recognized that expert testimony in this area can assist the trier of fact.[72]

[71] *See State v. Gersin*, 668 N.E.2d 486, 488 (Ohio 1996) (finding that most jurors lack the knowledge of accepted practices in interviewing child victims and therefore that expert testimony on this issue is admissible); see also Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 Am. Crim. L. Rev. 1271, 1285 (2005).

[72] *See id.* at 1273-74.

# CHAPTER 6
## Reserving Capital Punishment for the Most Heinous Offenses and Most Culpable Offenders

Seven mental health experts testified in post-conviction proceedings on the question of whether Warren Hill's intellectual disability rendered him ineligible for capital punishment. The four experts put on the stand by Hill said that in their opinion he was intellectually disabled; the three experts for the state testified that he was not. The state court in Georgia determined that Hill had proved his intellectual disability by a preponderance of the evidence, but that he did not meet Georgia's exceedingly high burden to prove his intellectual disability beyond a reasonable doubt – the highest quantum of proof available in American law (although the court noted that the retardation issue "is an exceptionally close one under the reasonable doubt standard"). Georgia is the only capital punishment jurisdiction to require a defendant to meet such a burden in showing that she or he has intellectual disability and thus should not be executed. Because Hill had failed to satisfy the statutory requirement of proof beyond a reasonable doubt, the Georgia state court denied him relief.

Subsequently, all three of the experts for the state who originally testified that Hill was not mentally disabled repudiated their previous testimony and provided signed affidavits stating that they now considered Hill to have intellectual disability. The Georgia state court rejected his claim again, finding that its previous rejection of the intellectual disability claim was *res judicata* (already decided). In October 2013, the U.S. Supreme Court rejected Hill's petition for a new hearing to demonstrate evidence of his intellectual disability. As of the publication of this report, Hill's execution is on hold while the Georgia Supreme Court reviews his challenge to a state law that keeps secret the identities of those who make and supply Georgia's drugs for lethal injection.

## Recommendation 20. Implementation of the Eighth Amendment's prohibition against execution of individuals who have intellectual disability should be improved.[1]

### a) The defendant should be required to prove intellectual disability by a preponderance of the evidence.

In *Atkins v. Virginia*, the U.S. Supreme Court found sufficient evidence of a national consensus against the execution of persons with intellectual disability to justify a categorical rule prohibiting such executions.[2] However, the Court has not yet addressed the specific standard of proof that a defendant must meet to prove intellectual disability.[3]

The Committee believes that a defendant should only be required to prove intellectual disability by a preponderance of the evidence, rather than clear and convincing evidence or proof beyond a reasonable doubt. The issue is similar to the question presented in *Cooper v. Oklahoma*, where the U.S. Supreme Court held that it violated due process for a state to require a defendant to prove his or her incompetence to stand trial by "clear and convincing evidence."[4] The Court found that because the issue of competence to stand trial is protected by the U.S. Constitution, the defendant need only prove his or her incompetence by a "preponderance of the evidence." This is the burden of persuasion that most states have placed on defendants who must prove that they have intellectual disability.[5] However, Colorado, Delaware and Florida all require a defendant to prove the issue of intellectual disability by "clear and convincing evidence"[6] and Georgia requires proof "beyond a

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1 The term "mental retardation" is the term utilized by the U.S. Supreme Court in its decisions. Some commentators have now taken the position that the term "intellectual development disability" or simply "intellectual disability" is more appropriate. The Committee has chosen to utilize the term "intellectual disability" except where the use of the term "mental retardation" is necessary to explain U.S. Supreme Court precedent or for clarity.

2 *Atkins v. Virginia*, 536 U.S. 304 (2002).

3 On October 21, 2013, the U.S. Supreme Court granted certiorari in *Hall v. Florida*, 109 So. 3d 704 (Fla. 2012), *cert. granted*, 82 U.S.L.W. 3233 (U.S. Oct. 21, 2013) (No. 12-10882), concerning the legal standard for determining whether a person is too intellectually disabled to be executed for a murder. Florida law prohibits anyone with an IQ of 70 or higher from being classified as intellectually disabled, regardless of other evidence to the contrary. Hall's scores on three IQ tests ranged from 71 to 80, so he was deemed eligible for execution. An opinion in the case had not yet been issued at the time of publication of this report.

4 *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

5 *See* Ala. Code § 15-24-2 (2012); Cal. Penal Code § 1376(b)(1),(2) (West 2013); Neb. Rev. Stat. Ann. § 28-105.01 (West 2012).

6 Colo. Rev. Stat. § 18-1.3-1102 (2012); Del. Code Ann. tit. 11, § 4209(d)(3)(b)-(c) (2013); Fla. Stat. Ann. § 921.137 (West 2013).

reasonable doubt."[7] These elevated burdens of persuasion place an unconstitutional burden on defendants. In *Cooper*, the Court held that due to the importance of the constitutional interest at stake, an elevated burden of persuasion was unconstitutional. Based on the Court's reasoning in *Cooper*, the burden of persuasion for the issue of intellectual disability should similarly be limited to a "preponderance of the evidence."

**b) There should be a rebuttable presumption that a person with an intelligence quotient ("IQ") below 75 has intellectual disability and therefore is ineligible for the death penalty. The prosecution should be permitted to rebut the presumption by clear and convincing evidence. An IQ above 70 can be considered in determining whether the defendant has demonstrated intellectual disability by a preponderance of the evidence, but should not be a bar to introducing evidence of intellectual disability.**

In *Atkins*, the U.S. Supreme Court relied upon the clinically accepted definitions of mental retardation used by the leading organizations in the field, the American Association on Mental Retardation and the American Psychological Association. The virtually identical definitions require a showing of significantly subaverage intellectual functioning, accompanied by deficits in adaptive behavior and onset before age 18. Most states have used these definitions; some states, however, have embraced definitions of mental retardation that are fundamentally at odds with clinical consensus.

**...some states, however, have embraced definitions of mental retardation that are fundamentally at odds with clinical consensus.**

For example, the first prong (significantly subaverage intellectual functioning) is normally determined by an IQ test and is understood as a score of two standard deviations below the mean or an IQ score of approximately 70. Importantly, given the standard error or measurement that is part of any test, it is universally accepted in the clinical community that an IQ score as high as 75 can evidence significantly subaverage intellectual functioning.[8]

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[7] Ga. Code Ann. § 17-7-131 (2012); *see Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (en banc) (holding that the Georgia standard requiring proof of intellectual disability beyond a reasonable doubt was not an unreasonable application of federal law).

[8] Definitions of intellectual disability and mental illness should take into account scientifically-validated evolutions in these terms. For example, psychological research has identified a substantial and sustained increase in IQ scores over time, known as the Flynn-effect, requiring IQ testing to be re-standardized periodically over time. *See generally* Geraldine W. Young, *A More Intelligent and Just* Atkins*: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability,* 65 Vand. L. Rev. 615 (2012).

Some states, however, have rejected this scientific consensus and have adopted strict IQ cutoffs.[9] Some states have adopted a rebuttable presumption that the defendant has an intellectual disability based upon scores on standardized intelligence tests falling below a certain numerical threshold.[10] Other states have adopted a rebuttal presumption that the defendant does not have an intellectual disability if the score exceeds a numerical threshold.[11]

Florida for example, has adopted a strict 70 cutoff. If the person alleging they are intellectually disabled does not have an IQ score of 70 or below, then the claim fails as a matter of law even if all examining experts conclude, using the clinical definition, that the person is in fact intellectually disabled. Four other states similarly impose an IQ cutoff.[12] In other states, such as Arkansas, an IQ of 65 or below creates a rebuttable presumption of intellectual disability.[13] Other states use a specific score, usually 65 or 70, only as proof that the defendant has "significant subaverage intellectual functioning."[14] South Dakota's statute finds an IQ exceeding 70 to be presumptive evidence that the defendant does not have significant subaverage intellectual functioning.[15] In *Atkins*, the U.S. Supreme Court noted that "an IQ between 70 and 75 or lower [] is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition."[16] The American Association on Intellectual and Developmental Disabilities ("AAIDD") currently includes an IQ of 70-75 or below in its definition of intellectual disability.[17]

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[9] Research has revealed that there is a measurement error rate of approximately 15 to 16 points. *See id.* at 621 n.34 (noting that Wechsler IQ and Stanford-Binet IQ have used 15 or 16 points as the standard deviation from the mean). Accordingly, definitions of intellectual disability and mental illness should take these error rates into account when ascribing numerical limits to those definitions.

[10] See Ark. Code Ann. § 5-4-618 (2012); 725 Ill. Comp. Stat. Ann. 5/114-15 (West 2013); Neb. Rev. Stat. Ann. 28-105.01 (West 2012).

[11] Idaho Code Ann. § 19-2515A (2012); Ky. Rev. Stat. Ann. § 532.140 (West 2013); N.C. Gen. Stat. Ann. § 15A–2005 (2013); Okla. Stat. Ann. tit. 21, § 701.10b (West 2013); S.D. Codified Laws § 23A-27A-26.2 (2013); Tenn. Code Ann. § 39-13-203 (2013).

[12] Brief of The American Association on Intellectual and Developmental Disabilities, et al. as Amici Curiae Supporting Petitioner, at 23 n.29, *Hall v. Florida*, No. 12-10882 (Dec. 23, 2013) ("There appear to be, at most, five States (Florida, Alabama, Virginia, Idaho, and Kentucky) that impose an inflexible ceiling at an IQ score of 70.").

[13] Ark. Code Ann. § 5-4-618 (2012).

[14] *See also* N.C. Gen. Stat. Ann. §15A-2005 (2013); Okla. Stat. Ann. tit. 21, § 701.10b (West 2013); Tenn. Code Ann. § 39-13-203 (2013).

[15] S.D. Codified Laws § 23A-27A-26.1 (2013).

[16] *Atkins*, 536 U.S. at 309 n.5.

[17] American Association of Intellectual and Developmental Disabilities, Definition of Intellectual Disability, http://aaidd.org/intellectual-disability/definition.

Given the stakes in a death penalty case, states should allow for a rebuttable presumption that a person with an IQ below 75 has intellectual disability and is therefore ineligible for the death penalty. This would help to ensure that all defendants with intellectual disability are identified and afforded the constitutional protections associated with that diagnosis. It will also control for potential errors or deviations in testing and will allow for the fact that a single subject, tested multiple times, may receive a range of scores. The prosecution should be permitted to rebut the presumption with clear and convincing evidence. This approach ensures that standardized intelligence tests are given appropriate weight, but also allows the prosecution to rebut such evidence.

In addition, in order to ensure that intellectual disability issues are properly identified and legally assessed, such claims should be permitted by defendants as well as "next friends," at least in state post-conviction, federal habeas and clemency proceedings. Research reflects that many death row inmates who waive their appeal rights – so-called death penalty "volunteers" – have mental illness, although many of these issues never come to light. Permitting "next friend" appeals will permit courts to hear and adjudicate these issues.

### c) Diagnostic tests requiring documentation of lack of adaptive functioning by age 18 should be excused for good cause.

A plurality of states require that intellectual disability must have manifested during the development period, and at least by the age of 18. At least two states (Utah and Indiana) increase the age of onset to 22 years of age. This component often must be proved by specific documentation. Colorado allows for the requirement of documentation to be excused by the court upon a finding that extraordinary circumstances exist.[18] However, in the scientific field and increasingly in court decisions, it is commonly accepted that adaptive behavior can be assessed retrospectively, based on the subject's recollections (although this approach gains credibility where corroborated by contemporaneous records).

Indiana requires that intellectual disability be documented in a court-ordered evaluative report before the age of 22.[19] This proof requirement places an impossible burden on defendants who, through no fault of their own, were not evaluated as children. Proving the age-of-onset component is often difficult for many defendants whose school and medical records either cannot easily be found or never existed in the first place. The AAIDD has identified a number of reasons that might explain the lack of an earlier, official diagnosis of intellectual disability, including:

- the individual was excluded from a full school experience;

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18 Colo. Rev. Stat. § 18-1.3-1101(2) (2012).

19 Ind. Code Ann § 35-36-9-2 (West 2013).

- the person's age precluded his or her involvement in specialized services such as special education programs;
- the person was given no diagnosis or a different diagnosis for 'political purposes,' such as protection from stigma or teasing, avoidance of assertions of discrimination, or relating to conclusions about the potential benefits or dangers of a particular diagnosis;
- the school's concern about over-representation for data-reporting purposes of specific diagnostic groups within their student population;
- parental concerns about labels;
- contextual school-based issues such as availability or non-availability of services and potential funding streams at that time; and
- the lack of referral into the diagnostic process due to cultural and linguistic differences.[20]

In light of these factors, lack of documentation of impairment of adaptive functioning by age 18 should be excused for good cause in order to eliminate unreasonable burdens on defendants who have intellectual disability, but lack the required documentation. In such cases, courts should consider any reasonable evidence of impairment irrespective of age of onset.

**d) If the court makes a pretrial determination that the evidence of intellectual disability is not sufficient to render the defendant ineligible for the death penalty, the defendant should be permitted to raise the issue at trial for *de novo* determination by the jury. The court's pretrial determination should not be communicated to the jury.**

States have established different procedures for raising and deciding intellectual disability issues. Most states address this question in a pretrial hearing process. Pretrial resolution prevents states from engaging in an unnecessary capital trial if the defendant is found to have intellectual disability before the trial begins.[21] However, some states, such as Louisiana, require the jury to determine the issue of intellectual disability during capital sentencing.[22] Several states use a bifurcated approach. In North Carolina, if the court finds the defendant

[20] John H. Blume, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases,* 18 Cornell J.L & Pub. Pol'y 690, 730 (2009).

[21] James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11, 12 (2003).

[22] La. Code Crim. Proc. Ann. art. 905.5.1 (2013).

does not have intellectual disability, the defendant may then present evidence of intellectual disability at trial.[23] A similar bifurcated approach was approved by the U.S. Supreme Court in the context of determining the validity of forced confessions.[24]

**Pretrial resolution prevents states from engaging in an unnecessary capital trial if the defendant is found to have intellectual disability before the trial begins.**

Whether or not the determination of intellectual disability can be left solely to the judge was called into question by *Arizona v. Ring*,[25] in which the Supreme Court held that the Sixth Amendment right to a jury required that Arizona's aggravating factors for the death penalty be determined by the jury. The Court held that because the aggravating factors were "the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury."[26] It has been suggested that the issue of intellectual disability could be the "functional equivalent" of an element of a crime, and as such, the Sixth Amendment would allow the defendant to demand a determination by the jury.[27]

If the court makes a pretrial determination that the evidence of intellectual disability is not sufficient to render the defendant ineligible for the death penalty, the defendant should be permitted to raise the issue at trial for *de novo* determination by the jury. The court's pretrial determination should not be communicated to the jury. This approach would preserve the economic resources of the state by preventing a capital trial in some instances, but also would provide constitutional protections to those defendants who are not found to have intellectual disability in a pretrial proceeding.

**Recommendation 21. The death penalty should not be applied to persons who, at the time of the offense, suffered from severe mental disorders that significantly impaired their capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgment in relation to the conduct or to conform their conduct to the requirements of law.**

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23 N.C. Gen. Stat. Ann. § 15A-2005 (2013).

24 *Jackson v. Denno,* 378 U.S. 368 (1964).

25 536 U.S. 584 (2002).

26 *Id.* at 609.

27 Ellis, *supra* note 21, at 15.

Two years after *Atkins*, in *Roper v. Simmons*,[28] the U.S. Supreme Court declared unconstitutional the execution of juveniles who commit crimes while under age eighteen. The Court rooted both holdings in the death penalty's retributive purpose and its diminished deterrent effect on juvenile offenders and offenders with intellectual disability, who generally possess lesser capacity. In *Atkins*, the Court reasoned:

> The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable – for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses – that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. . . . Thus, executing the intellectually disabled will not measurably further the goal of deterrence.[29]

In *Roper*, the Court followed the *Atkins* Court's reasoning closely. The Court stated in *Roper* that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders," for whom the death penalty should be reserved. Those differences include a "lack of maturity and an underdeveloped sense of responsibility" that "often result in impetuous and ill-considered actions and decisions," "more vulnerab[ility] or suscepti[bility] to negative influences and outside pressures, including peer pressure" and incompletely developed character.[30] Accordingly, the Court concluded that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[31]

Although the Court has yet to declare unconstitutional the execution of offenders with serious mental illness, the same rationale underpinning the Court's rulings in *Atkins* and *Roper* would apply in such cases.[32] *Mental Health America* estimates that 5-10 percent of all death

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28 543 U.S. 551 (2005).

29 *Atkins*, 536 U.S. at 320.

30 *Roper*, 543 U.S. at 569.

31 *Id.* at 599.

32 Bruce J. Winick, The Supreme Court's Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier 7-9, 40 (2008), at http://www.deathpenaltyinfo.org/files/umjournal08.pdf (reasoning that like intellectual disability and juvenile status, "[s]evere mental illness at the time of the offense may significantly diminish the offender's blameworthiness and amenability to deterrence," and therefore although a categorical disqualification from capital punishment may not be appropriate, an individualized determination of whether a defendant lacks sufficient culpability and deterability to allow

row inmates have severe mental illness.[33] According to a 2002 Gallup Poll, 75 percent of Americans surveyed opposed the death penalty for mentally ill defendants. Likewise, a 2009 California poll revealed that 64 percent of respondents opposed sentencing severely mentally ill defendants to death.[34] The American Bar Association, the American Psychiatric Association, the American Psychological Association and the National Association of Mental Illness all support prohibition of the death penalty for severely mentally ill offenders.[35] In 2007, the Indiana "Bowser Commission" recommended that the state exempt persons with severe mental illness from the death penalty.[36] In 2013, the Joint Task Force to Review the Administration of Ohio's Death Penalty, created by the Ohio Supreme Court and the Ohio Bar Association, recommended that a person suffering from "serious mental illness" at the time of the offense should not be eligible for the death penalty.[37]

**Although the Court has yet to declare unconstitutional the execution of offenders with serious mental illness, the same rationale underpinning the Court's rulings in *Atkins* and *Roper* would apply in such cases.**

capital punishment is appropriate); *see generally* Helen Shin, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Failure of Capital Punishment for Mentally Ill Defendants*, 76 Fordham L. Rev. 465 (2007) (arguing that there is a growing national and international consensus against subjecting mentally ill defendants to capital punishment).

33 *See* Mental Health America, Position Statement 54: Death Penalty and People With Mental Illness, at http://www.nmha.org/go/position-statements/54.

34 *See* Press Release, Univ. of Calif. Santa Cruz, New poll by UCSC professor reveals declining support for the death penalty (Sept. 1, 2009).

35 *See* American Bar Association, Recommendation 122A (Aug. 2006), at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/mental_illness_policies.authcheckdam.pdf (as supported by the American Psychiatric Association and American Psychological Association). However, the Indiana Supreme Court found that the execution of a prisoner who was mentally ill at the time of the offense was not cruel and unusual punishment under the Indiana Constitution and noted that the U.S. Supreme Court has never included mentally ill murder defendants in the same protected category as intellectually disabled murder defendants. *See Matheney v. State*, 833 N.E. 2d 454 (Ind. 2005).

36 Indiana Legislative Services Agency, Final Report of the Bowser Commission 3 (Nov. 2007), at http://www.in.gov/legislative/interim/committee/reports/BCOMAB1.pdf.

37 Alan Johnson, *Group Wants to Exclude Severely Mentally Ill from Death Penalty*, Columbus Dispatch, Sept. 27, 2013.

The Committee recommends that the death penalty not be applied to persons who, at the time of the offense, had severe mental disorders that significantly impaired their capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgment in relation to the conduct or to conform their conduct to the requirements of law.

### a) A "significant impairment" at the time of the offense should be a threshold question at a special hearing during the penalty phase of a trial.

Prior to its prospective abolition of the death penalty in 2012, Connecticut was the sole death penalty jurisdiction to adopt legislation regarding mentally ill offenders. Connecticut law excluded from death eligibility (in addition to minors and persons with intellectual disability) defendants whose mental capacity or ability to conform their conduct to the requirements of law was significantly impaired, but not so impaired in either case to constitute a defense to prosecution.[38] Although Connecticut is the only jurisdiction in the United States to have adopted such a mandate, other state legislatures have considered (but not passed) similar legislative proposals, including Kentucky, North Carolina, Indiana, and Tennessee.[39]

For example, the North Carolina legislature considered a proposal that persons having a "severe mental disability" at the time of the offense be excluded from death eligibility. Under this proposal, mental disabilities manifested primarily by repeated criminal conduct or attributable to the acute effects of alcohol or other drugs would not, standing alone, constitute a severe mental disability. The North Carolina proposal provides for a pretrial hearing, on motion by the defendant (with supporting affidavits), as to whether the defendant had a severe mental disability at the time of the commission of the offense. The burden in this hearing is upon the defendant to prove, by clear and convincing evidence, such a severe mental disability. If a trier of fact does not find in the pretrial hearing that the defendant had a severe mental disability at the time of the offense, then the defendant may introduce evidence regarding such disability during the sentencing hearing and such evidence may be considered by the jury as a special issue prior to the consideration of aggravating or mitigating factors during the penalty phase.

The Committee recommends that, consistent with the North Carolina proposal, a "significant impairment" at the time of the offense should be a threshold question at a special hearing during the penalty phase of a trial. Given the nuances of the determinations that

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38 Conn. Gen. Stat. 53a-46a(h)(3) (repealed 2012).

39 *See* Kentucky H.B. 145, 12 Reg. Sess. (Jan. 3, 2012) and H.B. 446, 06 Reg. Sess. (Mar. 20, 2006) (providing for exclusion of defendants with severe mental disorders at the time of the offense from the death penalty); Indiana S.B. 22, 116th Gen. Assem., 2nd Reg. Sess. (Jul. 1, 2010), North Carolina H.B. 137 and S.B. 309, 2009-2010 Reg. Sess., Tennessee H.B. 2064 and S.B. 1692, 107th Gen. Assem. (2011-2012) (providing that persons with severe and persistent mental illness (at the time of the murder) cannot be executed, but may receive life in prison without parole).

would need to be made to determine significant impairment at the time of the offense, the Committee recommends that all death penalty jurisdictions afford the defendant this separate hearing mechanism.

**b) A "significant impairment" at the time of the offense should mean any significant impairment, whether or not such impairment was due to voluntary action (such as voluntary intoxication or drug use or an affirmative decision not to self-medicate).**

Any determination of mental capacity should not be undermined by the fact that the offender voluntarily used alcohol or drugs, or failed to take medication, resulting in such impairment.[40] So long as the offender had diminished capacity at the time of the offense, their moral culpability may be sufficiently mitigated to be considered a "significant impairment" and therefore to warrant application of the exclusion. Other organizations, such as the ABA, recommend that a "disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision." Both the ABA and the Committee's recommendations have in common a fact-specific approach. The Committee recognizes that a single instance of severe voluntary alcoholism or failure to take anti-psychosis medications, for example, is a voluntary act that could result in the death of another and, while punishment may be appropriate, death may not be the appropriate punishment.

**Recommendation 22. A defendant who shows reckless indifference but does not personally kill, attempt to kill, or intend that a killing take place should not be eligible for capital punishment. States should exclude from death eligibility those who were convicted under a felony murder theory alone.**

Felony murder is a strict liability doctrine that relieves the prosecution of its burden of proving that the defendant had a culpable mental state with respect to the death of the victim. In order to obtain a felony murder conviction, the prosecution need only prove that the defendant had the mental state required for the underlying felony.

Using a felony murder theory, the prosecution may achieve a murder conviction if it establishes only two elements: (1) that a death occurred (2) during the course of a felony in which the defendant participated.[41] Although some jurisdictions may impose some

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[40] *See* Zachary D. Torry & Kenneth J. Weiss, *Medication Noncompliance and Criminal Responsibility: Is the Insanity Defense Legitimate?*, 40 J. Psychiatry & Law 219 (2012) (exploring the complexities of assigning criminal responsibility for the noncompliant psychiatric offender).

[41] Erwin S. Barbre, Annotation, *What Constitutes Termination of Felony for Purpose of Felony-Murder Rule*, 58 A.L.R.3d 851, § 2 (1974) ("It has been said that the primary function of the [felony murder] doctrine is to relieve the prosecution of the necessity of proving, and the jury of the necessity of finding, actual malice on the part of the defendant in the commission of the homicide...").

additional technical requirements that limit the felony murder rule's application, the doctrine remains one of strict liability primarily requiring proof of only these two elements. In most jurisdictions, these elements eliminate the bare necessity of the prosecution proving that the defendant caused the death.

The felony murder theory has been much criticized because it circumvents the typical *mens rea* (state of mind) and causation requirements for criminal culpability, even supporting the convictions of defendants who did not kill, attempt to kill or intend a killing. Nevertheless, felony murder remains an extensively used method for obtaining murder convictions. Currently, the felony murder rule remains in full force in all but a handful of states. In the majority of states with the death penalty, a defendant may be sentenced to death even if she or he was not responsible for the murder.[42]

Even if the doctrine may be used to support a murder conviction, it does not follow that a felony murder defendant should be eligible for the death penalty. The U.S. Supreme Court first took on the issue of death eligibility for felony murder defendants in *Enmund v. Florida*. There, the Court held that the Eighth Amendment precludes imposition of the death penalty on a defendant who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force will be employed.[43] The Court clarified its *Enmund* decision five years later in *Tison v. Arizona*. In *Tison*, the Supreme Court held that the death penalty may constitutionally be imposed on felony murderers so long as two caveats are met: (1) the defendant was a major participant in the felony, and (2) the defendant manifested at least "reckless indifference to human life."[44] The "reckless indifference" standard permits imposition of capital punishment on defendants who did not kill, attempt to kill or intend that a killing occur.

**In the majority of states with the death penalty, a defendant may be sentenced to death even if she or he was not responsible for the murder.**

Death penalty eligibility criteria must narrow the range of first-degree murder convictions that are potentially subject to the death penalty. The felony murder rule undermines this goal. As one commentator explained:

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42 *See* Death Penalty Information Center, State by State Database (search by state in dropdown box), http://www.deathpenaltyinfo.org/state_by_state; *see also Enmund v. Florida*, 458 U.S. 782, 789-794 (1982) (describing various states' murder and capital punishment statutes' use of felony murder).

43 *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

44 *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

> The felony murder rule disregards the normal rules of criminal culpability and provides homicide liability equally for both the deliberate rapist/killer and the robber whose victim dies of a heart attack, as well as for the robber's accomplice who is absent from the scene of the crime.[45]

In some jurisdictions, the felony murder rule can make the defendant guilty of murder when a law enforcement officer or victim mistakenly kills a third person or an accomplice during the felony. The rule applies even when the felon extracts a promise from a co-defendant to hurt no one, but the co-defendant shoots the victim anyway. The rule equates the felon for whom a killing by a co-defendant was unforeseeable with the cold-blooded murderer.[46]

The felony murder rule also promotes other irrational results. Someone who purposely kills in anger, but has not committed an additional, underlying felony, might not face the death penalty, while another who had no intention whatsoever to kill but whose co-defendant does so accidentally during a felony may nevertheless face death. Yet the former scenario is surely more egregious than the latter in terms of moral culpability. A defendant whose reckless driving results in a death is not subject to the death penalty, but a felony murderer's recklessness could result in his execution. Moreover, where the murder is intentional, a non-triggerman may even be held vicariously liable and receive the death penalty if his or her co-defendant committed the murder in an especially heinous or cruel manner. Such distinctions are difficult to justify.

A small minority of states recognize the disproportionality of imposing the death penalty on a defendant who did not kill or otherwise aid or abet a killing. For example, Alabama's capital murder statute states that:

> A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense . . . unless the defendant is legally accountable for the murder.[47]

Similarly, Arkansas's capital murder statute states that:

> It is an affirmative defense to any prosecution . . . for an offense in which the defendant was not the only participant that the defendant did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid in the homicidal act's commission.[48]

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45 Richard Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. Rev. 1103, 1115-16 (1990).

46 *See id.*

47 Ala. Code § 13A-5-40(c) (2012).

48 Ark. Code Ann. § 5-10-101(b) (2012).

Kansas's capital murder statute requires that all death eligible murders be "intentional and premeditated."[49] Further, the Kansas Supreme Court has clarified that the Kansas Death Penalty Act does not permit the imposition of the death penalty for the crime of felony murder; the crime of capital murder always requires an intentional and premeditated killing.[50] Although Virginia's capital murder statute does not restrict death eligibility in felony murders to the triggerman,[51] the Supreme Court of Virginia has held that only the triggerman is death eligible in a felony murder scenario.[52]

Other states have chosen to limit the felony murder aggravator rather than eliminate death eligibility for felony murder. Nebraska, Oklahoma and South Dakota have eliminated felony murder as an aggravator altogether. Wyoming requires that the defendant "killed another human being purposely and with premeditated malice" while engaged in the felony.[53]

The strict liability felony murder doctrine should not be used as an eligibility criterion for the death penalty. The death penalty must be reserved for the "worst of the worst," the most culpable of offenders. A mental state of "reckless disregard" should not be sufficient to merit the harshest of available penalties. To demonstrate the over-inclusiveness of the felony murder rule, it is possible for a defendant to have shown reckless indifference but not have killed, attempted to kill or intended that a killing take place. Thus, this Committee recommends that states exclude from death eligibility those who were convicted under a felony murder theory alone.

49 Kan. Stat. Ann. § 21-5401 (West 2012).

50 *State v. Scott*, 183 P.3d 801 (Kan. 2008).

51 Va. Code Ann. § 18.2-31 (2013).

52 *Harrison v. Commonwealth*, 257 S.E.2d 777 (Va. 1979).

53 Wyo. Stat. Ann. § 6-2-102(h)(xii) (2012).

# CHAPTER 7
## Ensuring Effective Counsel

"Jeffery Leonard, a 20-year old African American, was tried and sentenced to death in Kentucky under the name James Slaughter. His real name was contained in the prosecution's file and in four different places in the trial court record. But the lawyer did not investigate and, as a result, never learned his client's name or that he was brain damaged and suffered through a horrific childhood. When challenged about his representation, the lawyer testified that he had tried six capital cases and headed an organized crime unit for a New York prosecutor's office. Neither statement was true. The lawyer was later indicted for perjury. The charges were dismissed in exchange for him resigning from the bar. The Court of Appeals, still referring to Leonard by the inaccurate name, concluded that the lawyer's performance was deficient because his failure to investigate his client's background 'resulted from inattention, not reasoned strategic judgment.' Nevertheless, it upheld the death sentence based upon its conclusion that the outcome would not have been different even if the lawyer had known his client's name and presented evidence of his brain damage, childhood abuse and other mitigating factors."[1]

[1] Stephen B. Bright, *The Right to Counsel in Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right*, 11 J.L. SOC'Y 1, 22-23 (2010) (internal citations omitted).

The lack of adequate counsel to represent capital defendants is likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair and fraught with serious error – including the real possibility of executing an innocent person or one who is categorically ineligible for capital punishment. A defendant tried without adequate counsel is far more likely to be charged with and convicted of a capital crime and to receive a death sentence. Indeed, as capital litigator and Yale law professor Stephen Bright has observed, the quality of capital defense counsel seems to be the most important factor in predicting who is sentenced to die – far more important than the nature of the crime or the character of the accused.[2]

**…the quality of capital defense counsel seems to be the most important factor in predicting who is sentenced to die – far more important than the nature of the crime or the character of the accused.**

The lack of adequate counsel is a one-two punch: Having substandard counsel is more likely to result in a client receiving a death sentence and also result in an inadequate trial record from failures to investigate and to preserve error. An attorney's errors, unless they rise to the level of ineffectiveness set forth by *Strickland v. Washington* (discussed below), not only adversely affect the client at trial and sentencing, but also vastly reduce the scope of appellate review, decreasing the possibility that errors will be corrected later.[3] Furthermore, because there is no constitutional right to counsel after the first state appeal, even in capital cases, some states do not appoint counsel for post-conviction or habeas corpus review, further insulating trial errors from correction. And in those states that do appoint counsel during collateral proceedings, counsel is often under-resourced and too poorly compensated to effectively handle the extraordinary responsibility of post-conviction representation.

Key actors on the national and state levels have recently recognized the acute problems with counsel in capital cases. The Innocence Protection Act, which encourages training and resources for capital defense lawyers and provides for increased DNA testing, became law in October 2004 as part of the Justice for All Act. President George W. Bush, in his 2005 State of the Union address, declared that capital cases must be handled more carefully and that more resources should be directed to correcting the problem of inadequate defense lawyers.

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2 *See* Stephen B. Bright, *Turning Celebrated Principles into Reality*, The Champion 6 (2003); *see also* Southern Center For Human Rights, "If You Cannot Afford A Lawyer . . .": A Report On Georgia's Failed Indigent Defense System (2003), at http://www.deathpenaltyinfo.org/jan.%202003.%20report.pdf.

3 *Strickland v. Washington*, 466 U.S. 668 (1984). In 2013, the Supreme Court held that if a defendant did not have a meaningful opportunity to raise on direct appeal a claim of ineffective assistance of trial counsel, it constitutes good cause to excuse the petitioner's procedural default in federal habeas proceedings. *See generally Trevino v. Thaler*, 133 S. Ct. 1911 (2013); *Martinez v. Ryan*, 132 S.Ct. 1309 (2012).

In a dramatic statement in his May 2005 State of the Judiciary Address, Louisiana Supreme Court Chief Justice Pascal F. Calogero, Jr. spoke about his court's recent finding that the state's indigent defense system was "terribly flawed."[4] He urged the legislature to remedy the situation, saying that until it makes adequate funds available, "upon motion of the defendants [in capital cases], the trial judge may halt the prosecution … until adequate funds become available to provide for these indigent defendants' constitutionally protected right to counsel."[5] Justice Calogero concluded that the "opinion does not unfairly put the courts in the position of siding with the defense [but] … simply recognized the fact that the courts, as guardians of a fair and equitable process, must not let the state take a person's liberty without due process."[6] Louisiana implemented indigent defense reform in 2007 through the Louisiana Public Defender Act, which centralized the supervision of indigent defense into a single Louisiana Public Defender Board.[7] Pursuant to its mandate under the new law, the Board promulgated "mandatory statewide public defender standards and guidelines" for the representation of individuals facing the death penalty in the state.[8]

On April 8, 2008, the U.S. Senate Judiciary Committee's Subcommittee on the Constitution held a hearing on "The Adequacy of Representation in Capital Cases."[9] Michael Greco, former President of the American Bar Association (ABA), testified that death penalty jurisdictions have "generally ignored. . . key elements" required to achieve justice in capital cases, such as lawyers with specialized training and experience in death penalty cases, fair compensation for those lawyers and funding for defense lawyers to engage necessary investigators and experts.[10] Judge Carolyn Engel Termin of the Court of Common Pleas of the First Judicial District of Pennsylvania echoed this sentiment, stating that as a sitting judge, "nothing is worse than presiding over a penalty phase of a death case in which you are watching a lawyer do a bad job."[11] Solicitor General Donald Verrilli, who was then Chair of the Supreme Court practice group at Jenner & Block, emphasized the unique character of the penalty phase in a capital case and the need for "a heightened degree of reliability."[12]

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4 Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana, 2005 State of the Judiciary Address to the Joint Session of the House and Senate Louisiana Legislature (May 3, 2005).

5 *Id.*

6 *Id.*

7 La. Rev. Stat. Ann. § 15:148 (2007).

8 *See generally* La. Admin. Code tit. 22:XV, § 9 (2010) (Capital Defense Guidelines).

9 *See The Adequacy of Representation in Capital Cases: Hearing Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 110th Cong. (2008), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:45332.pdf.

10 *Id.* at 4.

11 *Id.* at 8.

12 *Id.* at 11, 14.

Founder and Executive Director of the Equal Justice Initiative, Bryan Stevenson, lamented the "incredibly wealth-sensitive" nature of our justice system and pointed to Alabama, Oklahoma, Texas, Mississippi, Florida, Virginia and Georgia as jurisdictions with "hundreds of death row prisoners whose lawyers had their compensation capped at rates that made effective assistance impossible."[13] Stevenson concluded by noting that "none of our work to make the death penalty fair on race issues, on access issues, on resource issues can be achieved until we deal with bad lawyering."[14]

Death penalty litigation is a highly specialized, legally complex field, a "minefield for the unwary," in the words of the ABA Criminal Justice Section.[15] Adequate preparation requires not only a grasp of rapidly changing substantive and procedural doctrine, but also labor-intensive and time-consuming factual investigation. Capital defense attorneys, from the trial stage through post-conviction review and clemency, should be well-trained, experienced, and adequately compensated, and should have sufficient time and resources to perform competently when representing clients who are facing the possibility of execution. Instead, study after study documents a national crisis in the quality of counsel in death penalty cases, and calls for reform have been met with little success.[16]

Many states assign only a single lawyer to represent a capital defendant, require minimal or no experience or expertise, do not provide or require training, do not screen out lawyers with serious disciplinary records, fail to monitor performance of counsel, inadequately compensate counsel and refuse to provide funds for crucial investigators, experts and other essential resources. Unsurprisingly, few attorneys are willing to take on capital cases, and those who do are often "thoroughly incapable of mounting an effective defense during either the guilt or punishment phases of the capital case."[17]

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13 *Id.* at 6. Importantly, in 2004, Virginia created four offices staffed by lawyers specially trained in capital representation to handle death penalty trials in the Commonwealth. Va. Code § 19.2-163.7 (2013). Prior to that year, Virginia had sought the death penalty against 166 defendants and 140 of those were sentenced to death – a death sentencing rate of almost 85 percent. See American Bar Association, Virginia Death Penalty Assessment Report 142 (Aug. 2013), at http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/va_complete_report.authcheckdam.pdf. Since the creation of the capital defender offices, the death sentencing rate has been nearly cut in half and far fewer capital cases have been brought to trial in the first instance. *Id*.

14 *Id.*

15 American Bar Association, Criminal Justice Section Report, reprinted in 40 Am. U. L. Rev. 1, 69 (1990) ("ABA Criminal Justice Section Report").

16 *See generally* The Constitution Project, Justice Denied: America's Continuing Neglect Of Our Constitutional Right to Counsel (2009) ("Justice Denied"), at http://www.constitutionproject.org/pdf/139.pdf.

17 Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355, 398 (1995).

Courts have found that the vast majority of this attorney incompetence does not fall below the standard for ineffective counsel under *Strickland v. Washington*, which requires the defendant to show both that counsel's performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence.[18] Therefore, the client continues to pay for the attorney's errors, sometimes with his or her life. The state, the families of victims, and society as a whole pay the price as well. Litigation becomes increasingly protracted, complicated and costly, putting legitimate convictions at risk, subjecting the victims' families to continuing uncertainty and depriving society of the knowledge that the real perpetrator is behind bars. In short, the likelihood of error due to ineffective counsel precludes the assurance that the outcome is fair or reliable.

**Courts have found that the vast majority of this attorney incompetence does not fall below the standard for ineffective counsel under *Strickland v. Washington*...**

The Committee's recommendations seek to improve this state of affairs in three overlapping ways. First, the Committee recommends the creation of central, independent authorities to appoint, monitor, train, and screen capital attorneys, and otherwise ensure the quality of capital representation – at all stages of litigation. Second, the Committee recommends that each jurisdiction adopt standards for the appointment of counsel by these authorities and, additionally, that each jurisdiction adopt standards ensuring adequate compensation of such counsel, as well as adequate funding for expert and investigative services. Third, the Committee recommends that in capital cases, the standard of review for ineffective assistance of counsel be replaced with a more exacting standard better keyed to the particular requisites of capital representation.

**Recommendation 23. Every jurisdiction that imposes capital punishment should create an independent authority to screen, appoint, train and supervise lawyers to represent defendants charged with a capital crime. It should set minimum standards for these lawyers' performance. An existing public defender system may comply if it implements the proper standards and procedures.**

The recommendation to create an independent authority to screen, appoint, train and supervise lawyers to represent indigent defendants in capital cases is similar to recommendations made by the ABA, the National Legal Aid Defender Association

[18] *Strickland v. Washington*, 466 U.S. 668 (1984).

("NLADA") and other groups.[19] The recommendation is based on the recognition that each jurisdiction needs a formal, centralized and reasoned process for ensuring that every capital defendant receives competent counsel. Without such a process, as numerous studies have shown, competent representation becomes a matter of luck rather than a constitutional guarantee.

The recommendation provides two approaches to achieving this centralization. In jurisdictions with a public defender system or other centralized appointing authority, that authority may be fully adequate, either currently or by adding steps to ensure proper monitoring, training and other assistance. Such training and assistance should be available to all capital defense attorneys in the jurisdiction. In jurisdictions with no public defender system in place, such as most counties in Alabama, the recommendation calls for establishing a central appointing authority. It provides some flexibility in determining who appoints or sits on the central appointing authority. However, the independence of the authority and the authority's freedom from judicial or prosecutorial conflicts are crucial to ensure that its members can act without undue influence and in a manner consistent with the highest professional standards.

Many states award capital cases by contract or appointment, employing explicit or implicit incentives to these attorneys to keep their costs low and their hours on the case few. The attorneys may be chosen based on friendship with the judge, a desire not to "rock the boat," their willingness to work cheaply, their presence in the halls of the courthouse or other factors poorly correlated with zealous or even competent representation. Many of them have little knowledge of capital litigation or even criminal law in general. Many of them have little experience or skill in the courtroom. A disproportionate number of them have records of disciplinary action and even disbarment.[20] Even the best of these lawyers are placed in

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[19] *See, e.g.*, Justice Denied, *supra* note 16.

[20] *See, e.g.*, Texas Civil Rights Project, The Death Penalty in Texas: Due Process and Equal Justice . . . or Rush to Execution? (The Seventh Annual Report on the State of Human Rights in Texas) (2000) (finding that fully a third of those recently executed were represented by lawyers who were later disbarred, suspended, or otherwise sanctioned). Similarly, a recent report on the death penalty in Kentucky revealed that of the "seventy-eight individuals sentenced to death in Kentucky since 1976, at least ten have been represented by attorneys who were later disbarred (twelve percent)." American Bar Association, Kentucky Death Penalty Assessment Report 207 (Dec. 2011), at http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_ky_report.authcheckdam.pdf.

a situation in which most incentives are skewed toward doing a cursory job. Establishing independent appointing authorities to alleviate many of these problems is a crucial and central recommendation of this Committee.

**Recommendation 24. Capital defense lawyers should be adequately and reasonably compensated, with due regard for taxpayers, and the defense should be provided with adequate and reasonable funding for experts and investigators at all stages of the proceeding, including post-conviction.**

A major cause of inadequacy of capital representation is the lack of adequate compensation for those taking on demanding, time-consuming cases which, if done correctly, demand thousands of hours of preparation time. A capital case may take from 500 to 1,200 hours at the trial level alone, and an additional 700 to 1,000 hours for direct appeal of a death sentence, with hundreds of additional hours required at each successive stage.[21] Assuming an hourly wage of $100, the cost of attorney time in a typical capital case, excluding any additional services, would be about $190,000. Many jurisdictions impose shockingly low maximum hourly rates or arbitrary fee caps for capital defense.[22] Even the most dedicated lawyer will find it difficult to spend the time needed on a capital case under these conditions. As the NLADA notes, these rates impermissibly interfere with the Sixth Amendment right to counsel.[23] Moreover, courts often will not make funds available for reasonable expert, investigative, support or other expenses. Factual investigation, including witness interviews, document review and forensic (for example, DNA, blood or ballistics) testing, is a crucial component of adequate preparation for both the trial and sentencing phases of capital cases. In addition, the defense's frequent inability to hire experts on central issues in a case, such as forensics or mental health of the defendant, is another major obstacle to the fairness of the proceedings, particularly in light of far greater prosecutorial access to such resources. Attorneys should not be forced to choose whether to spend a severely limited pool of funds on their own fees or on experts and investigators.

Each jurisdiction should develop standards that avoid arbitrary ceilings or flat payment rates, and instead take into consideration the number of hours expended plus the effort, efficiency and skill of capital counsel.[24] The hourly rate should reflect the extraordinary responsibilities

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[21] Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 329, 375 (1995).

[22] See, for example, certain Ohio counties in which attorney compensation is capped at $5,000 or $6,000 despite the fact that attorneys can invest as many as 2,000 hours on a capital case. Kimball Perry, *Lawyer: More $ for capital cases; Judge: No way*, Cincinnati Enquirer, Jul. 1, 2012, at http://www.cincinnati.com/article/20120701/NEWS0107/307010069/.

[23] National Legal Aid Defender Association, Standards for the Appointment and Performance of Counsel in Death Penalty Cases 47 (1987).

[24] *Id.*

and commitment required of counsel in death penalty cases.[25] Failure to provide adequate funding and resources is a failure of the system that forces even the most committed attorneys to provide inadequate assistance. Its consequences should fall not on the capital defendant, but on the government.

**Attorneys should not be forced to choose whether to spend a severely limited pool of funds on their own fees or on experts and investigators.**

**Recommendation 25. Counsel should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, be zealously committed to the capital case and possess adequate time and resources to prepare. Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the case was not affected by the attorney's incompetence. There should be a strong presumption in favor of the attorney's obligation to offer at least some mitigating evidence at the sentencing phase of a capital trial.**

Providing qualified counsel is perhaps the most important safeguard against the wrongful conviction, sentencing and execution of capital defendants. It is also a safeguard far too often ignored. All jurisdictions should adopt minimum standards for the provision of an adequate capital defense at every level of litigation. The most crucial stage of any capital case is trial (although pretrial appointment of counsel is critical to conducting immediate investigation of issues like intellectual disability and mitigation and helping to persuade prosecutors not to seek the death penalty where that decision has not yet been made). Qualified counsel at this stage would add immeasurably to the effort to keep the trial "the main event" in the capital process, and to streamline the post-trial appellate and post-conviction procedures. But even with improved representation at trial, the need for quality legal representation at post-trial stages will continue to be great, given the unacceptability of error, the rapid changes in the substantive law and the possibilities of newly discovered evidence at later stages.

The standards for qualified counsel will vary according to the requisites of the particular stage of proceedings. There is some flexibility as to which minimum standards a jurisdiction ought to adopt. However, minimum standards should, at the least, require two attorneys on each capital case. Jurisdictions should adopt the ABA or NLADA standards for appointment of counsel in capital cases. At the trial level, these include, among other requirements, that (a)

[25] *Id.*; ABA Criminal Justice Section Report, *supra* note 15.

the lead attorney has at least five years of criminal litigation experience, as well as experience as lead or co-counsel in at least one capital case; (b) co-counsel has at least three years of criminal litigation experience; (c) each counsel has significant experience in jury trials of serious felony cases; (d) each attorney has had recent training in death penalty litigation; and (e) each attorney has demonstrated commitment and proficiency. Similar standards should be met at the appellate and post-conviction stages, although at these stages the type of relevant prior experience will vary. The important thing is that at all stages, a set of stringent and uniform minimum standards should be adopted, implemented and enforced.[26]

## The current U.S. Supreme Court standard for ineffective assistance of counsel, *Strickland v. Washington,* often permits "effective but fatal counsel"

The adoption of a more stringent standard can be accomplished by each state, either legislatively or judicially, so long as the state court relies on state rather than federal law.[27] The current U.S. Supreme Court standard for ineffective assistance of counsel, *Strickland v. Washington*, often permits "effective but fatal counsel" and requires the defendant to show both that counsel's performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence.[28] Randall Coyne and Lyn Entzeroth observe:

> Myriad cases in which defendants have actually been executed confirm that *Strickland's* minimal standard for attorney competence in capital cases is a woeful failure. Demonstrable errors by counsel, though falling short of ineffective assistance, repeatedly have been shown to have had fatal consequences.[29]

*Strickland* is a poorly conceived standard in all criminal cases. It is particularly unfortunate in capital cases for two reasons. First, the standard is inadequate simply because the

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[26] In this regard, the ABA has published *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) on the duties of the defense team at all stages of representation. The ABA's 2008 *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* covers the critical role of developing and presenting mitigation in capital cases.

[27] *See, e.g.*, *State v. Davis*, 561 A.2d 1082, 1089 (N.J. 1989) (holding that competence in the capital context should be measured with reference to the special expertise required in capital cases).

[28] Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 Geo. J. on Fighting Poverty 3, 18 (1996).

[29] *Id.*

consequences of attorney error at trial are so great in a capital case, and the opportunities for error so vast. Second, the standard, inadequate as it is in measuring the competence of attorneys at trial, has proven especially poorly suited for measuring competence in the punishment phase of a capital case.

The requirement that the capital defendant prove not only the ineffectiveness of counsel, but that this ineffectiveness prejudiced the outcome of the proceeding, is extremely hard to satisfy when the question is whether the defendant would have been sentenced to death had counsel done a better job. In case after case, attorneys who failed to present any mitigation evidence at all, or who presented a bare minimum of such evidence, were found to have satisfied *Strickland*.[30] Yet mitigation evidence is an absolutely essential part of the punishment phase of a death penalty case.[31] As capital litigation expert Welsh White has observed, "the failure to present mitigation evidence is a virtual invitation to impose the death penalty."[32] The proper development of mitigating evidence involves a complete construction of the defendant's social history, including all significant relationships and events. This duty cannot be satisfied merely by interviewing the defendant. Moreover, the utility of offering mitigation evidence cannot be determined in advance of a thorough investigation. Indeed, White asserts that every capital attorney he interviewed agreed that "developing the defendant's social history will always lead to some mitigating evidence that can be effectively presented at the penalty phase."[33] There may be the rare case in which an attorney makes an informed decision not to put on any mitigation evidence, but such a scenario is highly unlikely. Therefore, there should be a strong presumption in favor of the attorney's duty to put on some mitigation evidence.

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[30] *See, e.g.*, *Funchess v. Wainwright*, 772 F.2d 683 (11th Cir. 1985); *see Neal v. Puckett*, 239 F.3d 683 (5th Cir. 2001) (finding that trial counsel for a death row inmate with intellectual disability was ineffective for failing to present mitigation evidence and that the failure was prejudicial, but that the court would nevertheless defer to the state supreme court's interpretation of *Strickland* and uphold the sentence of death); *see also Holland v. Tucker*, 854 F.Supp.2d 1229 (S.D. Fla. Apr. 3, 2012) (denying a death row inmate's ineffective assistance of trial counsel claim despite the fact that Holland's first attorney was removed from the case after being sent to a mental health facility and his second attorney, a friend of the first, conceded the inmate's guilt in closing arguments, and instead, granting habeas relief on the grounds that Holland had been improperly denied the right to represent himself).

[31] *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

[32] Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 341 (1993); *see generally* Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 51 Hof. L. Rev. 635 (2013) (discussing the critical role of capital defense counsel at various stages before and throughout capital case proceedings and arguing "that courts interpreting the Sixth Amendment's guarantee of effective assistance of counsel should look to what competent lawyers *ought* to do rather than what some lawyers appointed to represent capital defendants actually do.").

[33] *Id.* at 342.

The harshness of *Strickland's* prejudice prong means that capital defendants whose representation was deemed by a court to be ineffective will nevertheless be executed unless they can meet the onerous standard of demonstrating a reasonable probability that, if not for attorney incompetence, they would not have been sentenced to death. Given the unpredictability of a jury's decision whether to exercise mercy in light of a particular set of facts, and given the fact that the attorney's very failure to investigate deprives the jury of crucial information, the *Strickland* standard rarely can be met.

Instead of perpetuating this unfair standard, the burden should be shifted to the state. After a finding of attorney ineffectiveness, if the state cannot show that competent counsel would not have affected the outcome of the case, the sentence ought to be reversed and the defendant re-sentenced. State appellate courts' review of the proportionality of a death sentence, in which the court compares the evidence and outcomes to cases in which the death penalty was imposed to cases in which it could have been sought or imposed but was not, may also help to alleviate the disproportionate effect of inadequate counsel.

# CHAPTER 8
## Duty of Judge and Jury

"What could explain Alabama judges' distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty? There is no evidence that criminal activity is more heinous in Alabama than in other States, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures."

Justice Sonia Sotomayor, dissenting opinion in *Woodward v. Alabama*

**Recommendation 26. Capital punishment should not be imposed in the absence of a unanimous verdict both as to the death penalty sentence or advisory sentence and as to each aggravating circumstance used to support that sentence.**

In some states, while a unanimous jury must find the defendant guilty of the death eligible crime, the jury's decision need not be unanimous at the sentencing phase of trial. The Committee opposes this practice. A requirement that juries render unanimous decisions at all phases of a death penalty trial for imposition of a death sentence will improve accuracy and support the credibility of the process used to impose capital punishment.

Twenty-two of the thirty-two states that currently impose the death penalty require that the jury unanimously find the aggravators that make the defendant death eligible and require that the jury unanimously sentence or make a unanimous recommendation of death.[1] The federal death penalty statute also requires a jury to find aggravators unanimously and make a unanimous recommendation of death.[2] Nine of the other ten states require unanimity as to one of these decisions. In these nine states, either the jury must make a unanimous finding as to the aggravators that make the defendant death eligible or the ultimate sentencing recommendation, but not both.[3] In the most egregious departure from unanimous decision-

[1] Arizona (Ariz. Rev. Stat. Ann. § 13-752(E), (H) (2013)); Arkansas (Ark. Code Ann. § 5-4-603(a) (2012)); California (Cal. Penal Code § 190.4(a)-(b) (West 2013)); Colorado (Colo. Rev. Stat. §18-1.3-1201(2)(b) (2012)); Georgia (Ga. Code. Ann. § 17-10-31(c) (2012)); Idaho (Idaho Code Ann. § 19-2515(3)(b) (2012)); Kansas (Kan. Stat. Ann. § 21-6617(e) (West 2012)); Louisiana (La. Code Crim. Proc. Ann. art. 905.7 (2013)); Mississippi (Miss. Code Ann. § 99-19-103 (2013)); New Hampshire (N.H. Rev. Stat. Ann. § 630:5(IV) (2013)); Ohio (Ohio Rev. Code Ann. § 2929.03(B), (D) (West 2013)); Oklahoma (Okla. Stat. Ann. tit. 21, § 701.11 (West 2013)); Oregon (Or. Rev. Stat. Ann § 163.150(1)(b)-(e) (West 2013)); Pennsylvania (42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (West 2013)); South Carolina (S.C. Code Ann. § 16-3-20(C) (2012)); South Dakota (S.D. Codified Laws §§ 23A-26-1, 23A-27A-4 (2013)); Tennessee (Tenn. Code Ann. § 39-13-204(g) (2013)); Texas (Tex. Code Crim. Proc. Ann. art. 37.071(2) (West 2013)); Washington (Wash. Rev. Code Ann. §§ 10.95.060, 10.95.080 (West 2013)); and Wyoming (Wyo. Stat. Ann. § 6-2-102(d)(ii) (2012)). North Carolina requires a unanimous jury recommendation to impose the death penalty. N.C. Gen. Stat. Ann. § 15A-2000 (2013). *See also Geary v. State*, 952 P.2d 431, 433 (Nev. 1998) (holding aggravators must be unanimously determined and a jury must unanimously recommend death); *State v. McKoy*, 394 S.E.2d 426, 428 (N.C. 1990) (requiring jury to determinate aggravators unanimously).

[2] 18 U.S.C. § 3593(c)–(d) (2006).

[3] Utah and Virginia require a unanimous recommendation for the death penalty but do not require a unanimous decision as to aggravating factors. Utah Code Ann. § 76-3-207(5) (West 2013); Va. Code Ann. § 19.2-264.4 (2013); *see also State v. Carter*, 888 P.2d 629, 655 (Utah 1995) (concluding that there is no requirement that the jury find separately and unanimously each aggravator relied on in imposing the death penalty); *Clark v. Commonwealth*, 257 S.E.2d 784, 791-792 (Va. 1979) (holding it is not necessary for jurors to find aggravators unanimously). Delaware, Montana, Nebraska, Alabama, Indiana, Kentucky and Missouri require only that the jury reach a unanimous decision as to aggravators. Del. Code Ann. tit. 11, § 4209(d)(1) (2013) (requiring a unanimous jury decision for aggravating factors); Mont. Code Ann. § 46-1-401(1)(b), (3) (West 2013); Neb. Rev. Stat. Ann. § 29-2520(4)(f) (West 2012); *Ex parte McNabb*, 887 So.2d 998, 1005-06

making, Florida requires only that a simple majority of jurors find an aggravating factor for the death penalty to be imposed. Florida jurors do not even have to agree on which aggravating factor exists. The death penalty may be imposed in Florida if seven of twelve jurors – just over 50 percent – each find a different aggravating factor and recommend a sentence of death.[4]

**The death penalty may be imposed in Florida if seven of twelve jurors – just over 50 percent – each find a different aggravating factor and recommend a sentence of death.**

Lack of jury unanimity for death undermines the credibility of death penalty verdicts. Courts have characterized the unanimous jury decision as "the inescapable element of due process that has come down to us from earliest time,"[5] and an "indestructible principle of our criminal law [that] the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement."[6] Jury research shows that unanimous jury decisions for death produce more accurate outcomes by forcing jurors to engage with the evidence:

> Majority-verdict deliberations tend to be more verdict-driven, meaning that the jurors are more likely to take the first ballot during the first ten minutes of deliberation and vote until they reach a verdict. Unanimous-verdict juries, on the other hand, tend to be more evidence-driven, generally delaying their first votes until the evidence has been discussed.[7]

In contrast to unanimous juries, "non-unanimous juries express less confidence in the justness of their decisions."[8]

Unanimous jury decisions for imposition of a death sentence promote accuracy and legitimacy by ensuring that all viewpoints are heard. As Justice Brennan noted, "[w]hen less

(Ala. 2004); *State v. Barker*, 809 N.E.2d 312, 316 (Ind. 2004); *Soto v. Commonwealth*, 139 S.W.3d 827, 871 (Ky. 2004); Mo. R. Crim. P. 29; *State v. Thompson*, 134 S.W.3d 32, 33 (Mo. 2004).

4 Raul G. Cantero & Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 St. Thomas L. Rev. 4, 9 (2009).

5 *Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953).

6 *Billeci v. United States*, 184 F.2d 394, 403 (D.C. Cir. 1950).

7 Kate Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After McDonald*, 101 J. Crim. L. & Criminology 1403, 1429 (2012).

8 Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000).

than unanimity is sufficient, consideration of minority views becomes nothing more than a matter of majority grace."[9] Racial minorities often form the numerical minority on the jury. To the extent that their view of the case diverges from the majority, a lack of unanimous jury requirement allows their viewpoint to be ignored because they may simply be outvoted.[10]

In 2005, the Supreme Court of Florida joined other courts that have noted the problems with a lack of unanimity in jury death penalty sentencing and appealed to the Florida legislature to fix the problem:

> We perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. The 'heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate'; *Sumer v. Shuman*, 483 U.S. 66, 107 S. Ct. 2716, 2720, 97 L.Ed.2d 56 (1987); convinces us that jury unanimity is an especially important safeguard at a capital sentence hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.[11]

To ensure accurate, reasoned and inclusive decisions, legislatures should require death penalty juries to render a unanimous verdict both to impose the death sentence or advisory sentence and as to each aggravating circumstance used to support that sentence.[12] Alternatively, if a sentencing decision is not unanimous, then the sentence imposed should be the alternative sentence available in capital cases in the jurisdiction. In the event of a lack of unanimity, there should not be a mistrial and then the possibility of a new sentencing trial, as is employed in the federal system and some state systems. A single vote against the death penalty should result in imposition of an alternative sentence, as is true in most states. However, defendants should also be permitted to make an informed waiver of jury sentencing.

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9 *Johnson v. Louisiana*, 406 U.S. 356, 396 (1972) (Brennan J. dissenting).

10 Taylor-Thompson, *supra* note 8, at 1264.

11 *State v. Steele*, 921 So.2d 538, 549 (Fla. 2005) (quoting *State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988)).

12 A bill with these requirements is under consideration by the Florida Legislature as of the time of publication of this report. *See* S.B. 334, H.B. 467, 2014 Leg., Reg. Sess. (Fla. 2014).

**Recommendation 27. Judges should be prohibited from overriding a jury's recommendation of a sentence less than death.**

Although the U.S. Supreme Court has ruled that judicial override of a jury's recommendation of a sentence less than death is constitutional,[13] the Court also has recognized the constitutional importance of the jury's role in death penalty determinations. In *Ring v. Arizona*,[14] the Court held that allowing the judge to determine aggravators violated the Sixth Amendment. In her dissent in *Ring*, Justice O'Connor recognized that the case's rationale eroded the legal justification for hybrid sentencing regimes.[15] Perhaps more to the point is Justice Breyer's concurrence, where he noted the "comparative advantage" jurors possess over judges with respect to deciding retribution because they "reflect more accurately the composition and experiences of the community as a whole."[16] It is this comparative advantage that makes the jury uniquely equipped to make the community's moral judgment at the heart of the imposition of the death sentence. The jury, which is comprised of community members and represents that community, is best positioned to "express the conscience of the community on the ultimate question of life or death."[17] As opposed to a single government official, the jury may be most likely to avoid the danger of an excessive response to the always horrible act of intentional homicide. Indeed, in states such as Alabama, where judges are elected and subjected to tough-on-crime politics that typically equate electoral success with unwavering support for the death penalty, juries may be the voice of reasoned moderation.[18]

**...where judges are elected and subjected to tough-on-crime politics that typically equate electoral success with unwavering support for the death penalty, juries may be the voice of reasoned moderation.**

Judicial override not only lowers the quality of sentencing decisions, but it also negatively affects the quality of the jury's decision-making regarding the defendant's guilt or innocence of the underlying crime. Studies have revealed that jurors in hybrid sentencing regimes are

13 *See, e.g.*, *Johnson*, 402 U.S. 356; *Harris v. Alabama*, 513 U.S. 504 (1995).

14 536 U.S. 584 (2002).

15 *Id.* at 621(O'Connor, J. dissenting).

16 *Id.* at 615 (Breyer, J. concurring).

17 *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

18 *See infra* note 26 and accompanying text.

"especially likely to make their decisions [as to guilt or innocence] quickly, to invest less effort in understanding the sentencing instructions, and to deny responsibility for the defendant's punishment."[19] Jurors in judicial override states realize that their recommendation for death or life is simply that – a recommendation. As a result, jurors in hybrid states are less likely to see themselves as responsible for the defendant's punishment.[20] Juries in states with judicial override thus tend to abdicate their role as the community's moral voice and pass the buck to the judge. The U.S. Supreme Court has acknowledged that it is problematic "to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[21]

Fortunately, judicial override of jury life sentencing decisions has become increasingly rare. Of the thirty-two states that have the death penalty, only three – Alabama, Delaware and Florida – continue to permit judicial override of jury recommendations.[22] In 2002, the same year as *Ring*, Indiana abolished judicial override.[23] In Delaware, judicial override has been used sparingly and generally has been used to reduce death sentences to life sentences. From 1991 to 2011, Delaware judges have overridden life sentences only twice, and the Delaware Supreme Court overturned both of those decisions on appeal. However, trial judges in Delaware overrode seventeen jury death sentences to life.[24] While judicial override from life to death was commonplace in Florida, a defendant has not been sentenced to death in Florida after a jury recommendation for life in thirteen years, due to the change in the appellate review standard for override decisions by the Florida Supreme Court.[25]

Alabama now stands alone as the only state where judicial override is actively exercised to impose a death sentence. From 1981 to 2011, ninety-three defendants in Alabama have been sentenced to death as a result of judicial override. While the reasons that Alabama judges have overridden life sentences to impose death cannot be conclusively established, one major cause is clear – political survival. In Alabama, "trial judges are often selected in

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19 Wanda D. Foglia & William J. Bowers, *Shared Sentencing Responsibility: How Hybrid Statutes Exacerbate the Shortcomings of Capital Jury Decision-Making*, 42 Crim L. Bull. 663 (2006).

20 *Id*.

21 *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985).

22 Although the general trend is towards unanimity in death penalty sentencing, legislative initiatives have been introduced to amend state laws currently requiring unanimity. For example, a high profile death penalty trial in Georgia resulting in a life sentence recently led to one such push to undo unanimous jury sentencing. *See* Robbie Brown, *In Georgia A Push to End Unanimity for Execution*, N.Y. Times, Dec. 17, 2008, at A18.

23 Ind. Code Ann. § 35-50-2-9(e) (West 2013).

24 Michael A. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 Mich. St. L. Rev. 793, 798-99 (2011).

25 *Id*. at 809.

hotly contested partisan elections in which judges campaign on their records of imposing death," including running campaign ads boasting that the judge had "looked into the eyes of murderers and sentenced them to death."[26] As Justice Stevens noted, elected trial judges may be "too responsive to a political climate in which judges who covet higher office – or merely wish to remain judges – constantly profess their fealty to the death penalty."[27] In the 2013 dissent from the denial of certiorari in *Woodward v. Alabama*, Justice Sotomayor cited a number of studies demonstrating the proportional increase in death sentences imposed in Alabama by judicial override during election year, and stated that the empirical evidence "casts a cloud of illegitimacy over the criminal justice system."[28]

**…elected trial judges may be "too responsive to a political climate in which judges who covet higher office – or merely wish to remain judges – constantly profess their fealty to the death penalty."**

In American death penalty jurisprudence, no rule of law requires the imposition of the death penalty on any set of facts. Thus, a determination by the jury to impose death will often be appropriate under the facts but will never be required as a matter of law. On the other hand, the imposition of death, in some instances, may not only be inappropriate but also be legally or morally improper. In some cases, it may be disproportionate or excessive or may simply be contrary to the weight of the evidence. Thus, states may appropriately authorize their trial courts to correct juries' sentencing recommendations of death when the court judges such a sentence to be excessive, while at the same time prohibiting those same trial courts from overriding a jury recommendation of a sentence less than death.

This recommendation does not speak to states that entrust death penalty sentencing to judges in the first place. For reasons discussed above, the wisdom of having such a structure may be questioned, given the reality of judicial electoral politics. However, a death sentence that results from a judge overriding a jury determination that the accused should live is far more difficult to justify. At least a minority of U.S. Supreme Court justices have expressed concern about the constitutionality of judicial override statutes in general and Alabama's statute in particular. In *Woodward*, Justice Sotomayor and Justice Breyer noted that Alabama "has been the only State in which judges have imposed the death penalty in the face of contrary

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[26] Equal Justice Initiative, The Death Penalty in Alabama: Judge Override (2011), at http://eji.org/eji/files/Override_Report.pdf.

[27] *Harris*, 513 U.S. at 519 (Stevens, J. dissenting).

[28] *Woodward v. Alabama*, No. 13-5380, ___ U.S. ___, 134 S. Ct. 405 (Nov. 18, 2013) (J. Sotomayor, dissenting) (citations omitted).

jury verdicts" and they voiced "deep concerns" about whether the practice violates the Sixth and Eighth Amendments of the U.S. Constitution.[29] Justice Sotomayor stated that, following the jury's determination that the convicted defendant should be sentenced to life imprisonment without parole, the trial judge "conducted his own sentencing proceeding" at which the State presented additional evidence concerning the mitigating circumstances presented to the jury and on the basis of the new evidence, the judge rejected the jury's finding, made his own determination that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of death.[30] Justice Sotomayor also noted that "[t]he very principles that animated [the Court's] decisions in *Apprendi v. New Jersey* and *Ring v. Arizona*" that aggravating factors required for imposition of an increased sentence must be specifically found by a jury "call into doubt the validity of Alabama's capital sentencing scheme."[31]

### Recommendation 28. Jurors should be instructed that residual doubt may be considered as a mitigating circumstance in sentencing.

In *Lockhart v. McCree*, the U.S. Supreme Court recognized that jurors who vote to convict may nevertheless entertain "residual doubts" about the defendant's guilt that would "bend them to decide against the death penalty."[32] Residual doubt is defined as any remaining or lingering doubt a jury has concerning the defendant's guilt, despite having been satisfied beyond a reasonable doubt. Jurors who are confident enough of the defendant's guilt to convict may still conclude that their level of confidence falls short of the complete moral certainty needed to take a person's life. The reasonable doubt standard permits a conviction despite the presence of genuine doubts, or the absence of absolute certainty, about the defendant's guilt of the crime. Given the irrevocable nature of capital punishment, a decision to impose the penalty requires a greater degree of reliability than is required for imposition of other penalties. Jurors should be instructed that they should not vote for the death penalty if they entertain doubts as to the defendant's factual guilt.

In *Franklin v. Lynaugh*,[33] a plurality of the Supreme Court ruled that the Eighth Amendment does not mandate the giving of a residual doubt instruction. In *Oregon v. Guzek*,[34] the Court went further to find that the defendant had no constitutional right to present residual doubt evidence to a capital sentencing jury as mitigating evidence. Notwithstanding legal precedent on the right of a defendant to present such evidence, juries do consider residual doubt as a

29 *Woodward*, 134 S. Ct. at 405 (Breyer, J. and Sotomayor, J., dissenting).

30 *Id.* at 406.

31 *Id.* at 410 (Sotomayor, J., dissenting).

32 *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) (citations omitted).

33 487 U.S. 164 (1988).

34 546 U.S. 517 (2006).

mitigating factor. "In a comprehensive study that examined 600 homicide cases in Georgia on a variety of parameters, it was found that residual doubt about guilt effectively influenced the severity of the penalty imposed and led to commuting of death sentences to life."[35]

**Among jurors interviewed who had actually served on capital cases, "[r]esidual doubt' over the defendant's guilt [wa]s the most powerful 'mitigating' fact."**

Among jurors interviewed who had actually served on capital cases, "[r]esidual doubt' over the defendant's guilt [wa]s the most powerful 'mitigating' fact."[36] Yet many jurors may be unaware of the continuing relevance of their doubts of guilt, in the absence of a jury instruction informing them.

Several states have barred, through judicial decision, the giving of a residual doubt instruction. In other states, the issue is dealt with inconsistently.[37] This recommendation addresses the issue left open by the Supreme Court by making it clear that states should not bar the giving of residual doubt instructions. It also goes further and, as a matter of common sense and fundamental fairness, encourages states to adopt rules mandating the giving of such instructions. The Committee recommends that trial judges instruct juries that lingering or residual doubt may be considered as a mitigating circumstance in sentencing.

### Recommendation 29. Judges should ensure that they have adequately discharged their duty to guide jurors properly in the applicable law.

Empirical evidence shows that capital sentencing juries often labor under significant misapprehensions about the nature and scope of their obligation at the penalty phase. From the outset, jurors may be predisposed to vote for the imposition of a death sentence. The very process of death qualification of jurors, where even the defense lawyer attempts to get prospective jurors to agree that they could hypothetically vote for death, results in juries that are biased in favor of the death penalty. Studies by the Capital Jury Project show that many jurors have already decided on a death sentence before the end of the guilt phase, or before the start of the penalty phase. These same studies have shown that many juries do not understand the "beyond a reasonable doubt" standard or the meaning of "mitigation" (and

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35 Talia Fisher, *Conviction Without Conviction*, 96 Minn. L. Rev. 833, 842 (2012).

36 Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998).

37 *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043, 1097 n.190-94 (1995); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L.J 1161, 1164-67 (1995); Jordan M. Steiker, *The Limits of Legal Language: Decision-Making in Capital Cases*, 94 Mich. L. Rev. 2590, 2596-99 (1966).

may believe it means aggravation). In addition, jurors also appear to misunderstand other jury instructions relevant to capital sentencing.

Research indicates that many jurors approach the sentencing decision in the same manner as they do the guilt decision, that is, without fully understanding that (a) mitigating factors do not need to be found by all members of the jury in order to be considered in an individual juror's sentencing decision, and (b) mitigating circumstances need to be proved only to the satisfaction of the individual juror, and not beyond a reasonable doubt, to be considered in the juror's sentencing decision.[38] This confusion can make it more likely that juries will sentence a defendant to death than if they understood their obligations more clearly.

**Studies by the Capital Jury Project show that many jurors have already decided on a death sentence before the end of the guilt phase, or before the start of the penalty phase.**

Standard pattern jury instructions that give jurors complex criteria, including lists of aggravating and mitigating factors, often leave jurors with the erroneous impression that their moral duty will be discharged if they simply tally up the number of aggravating and mitigating factors and weigh them against each other.[39] Juries often do not understand that they are not confined to considering enumerated mitigating factors, but may also consider non-enumerated and non-statutory mitigating factors. Indeed, juries are often seriously confused about what mitigation is and how it must be proved.[40] Moreover, they often believe that the factors can be weighted or tallied according to a pre-existing formula,[41] whereas in fact they must be considered in light of each juror's ultimate duty to decide whether the particular defendant, in light of all the circumstances before the jury, deserves to receive the death penalty.[42] These erroneous beliefs tend to tilt juries toward a death sentence for a variety of reasons. First, enumerated aggravating factors tend to outnumber enumerated mitigating factors. Second, any attempt to weigh these factors is difficult and misguided because the factors are not comparable, and because such an attempt obscures the true issue: whether the jurors conclude in light of all the evidence that the defendant deserves to die.[43]

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38 *See infra* note 50 and accompanying text.

39 *See generally* Steiker, *supra* note 37; *see also* Craig Haney, *Taking Capital Juries Seriously*, 70 Ind. L. J. 1223 (1995).

40 *See generally* Bowers, *supra* note 37.

41 *Woodson v. North Carolina*, 428 U.S. 280 (1976).

42 *See* Steiker, *supra* note 37.

43 *See, e.g.*, *Weeks v. Angelone*, 528 U.S. 225 (2000) (upholding an instruction that arguably left the jury with

The U.S. Supreme Court has upheld jury instructions which empirical evidence demonstrates are apt to give jurors incorrect impressions about their duties.[44] Those Court decisions should not relieve capital sentencing judges of the duty to ensure that the instructions given in their courts are as clear and accurate as possible. For example, Professor Jordan Steiker suggests the following instruction:

> The death penalty, as opposed to other serious punishments such as life imprisonment, is reserved only for those defendants who deserve the penalty, and the moral judgment of whether death is deserved remains entirely with you. The determination whether death is deserved involves consideration of any factors that suggest whether the defendant is or is not among the small group of "worst" offenders; and in deciding whether the defendant deserves the death penalty, you are required to consider not only the circumstances surrounding the crime, but also aspects of the defendant's character, background, and capabilities that bear on his culpability for the crime.[45]

Capital defendants must be permitted to counteract misconceptions that further exacerbate the tilt toward imposing death. In *Eddings v. Oklahoma*, the Supreme Court noted that the Eighth Amendment gives more latitude to the capital defendant than to the government, in that it permits the defendant to introduce unlimited mitigation evidence so that a jury can choose to be merciful for any reason or no reason at all.[46] In furtherance of *Eddings*, juries should be instructed that even if they find the aggravating circumstances outweigh the mitigating circumstances, they are never required to return a death sentence.[47]

Furthermore, judges often respond to jury requests for clarification of their obligations simply by referring the jurors back to reread the instructions. This practice, not surprisingly, is ineffective at clearing up juror confusion. Indeed, one study concluded that this practice increased the likelihood that jurors would sentence the defendant to death based on misapprehension about their duties.[48] A judge confronted with juror confusion should take affirmative steps to dispel that confusion. Simple answers to jury questions, in plain English, can significantly improve the odds that jurors will decide on a sentence based on an accurate

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the impression that it was required to sentence the defendant to death if it found the requisite aggravating factors existed); *see also id*. at 237-39 (Stevens, J, dissenting); Stephen Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 Cornell L. Rev. 627 (2000); *see generally* Bowers, *supra* note 37.

44 Garvey et al., *supra* note 43, at 627-633.

45 *See* Steiker, *supra* note 37, at 2622 n.134.

46 *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

47 *See* Florida Supreme Court, Florida Standard Jury Instructions in Criminal Cases, at http://www.floridasupremecourt.org/jury_instructions/instructions.shtml.

48 *See generally* Garvey et al., *supra* note 43.

understanding of the law. For example, Professors Steven Garvey, Sheri Lynn Johnson and Paul Marcus found the following simple clarification to significantly improve juror comprehension:

> Even if you find that the state has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison.[49]

Judges also can alleviate the problem of juror confusion by allowing a copy of the jury instructions in the jury room for jurors to reference (as long as the jury instructions are accurate and clear). As to both the original instructions and the means of clarifying juror confusion, no one formula can ensure that juries understand their duties. The important point is that the judge should not assume, particularly in light of all the evidence to the contrary, that reliance on pattern jury instructions and refusal to clarify will be sufficient. Judges must remain vigilant to ensure that they have adequately discharged their duty to guide jurors in the applicable law.

### Recommendation 30. The trial court should instruct the jury about all available sentencing options and inform the jury as to the meaning of those sentences, including a life sentence without parole.

By far one of the most powerful influences on a capital sentencing jury's decision about whether the defendant should be sentenced to death or imprisonment is its perception of whether, if imprisonment is chosen, the defendant will be released from prison, and if so, how soon. Empirical data demonstrate that, in the absence of information on this issue, juries exhibit significant confusion about whether a sentence of life imprisonment without parole really means that the defendant will never be released.[50] In light of this confusion, juries may err on the side of the harshest punishment. In both "life without parole" situations and all other sentencing situations, jurors significantly underestimate the amount of time defendants will remain in prison.[51] Their mistaken belief in this regard leads them to impose

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[49] *Id.* at 654.

[50] William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. Law Bull. 51, 80-84 (2003); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999); Peter Finn, *Given Choice, Va. Juries Vote for Life; Death Sentences Fall Sharply When Parole Is Not an Option*, Wash. Post, Feb. 3, 1997, at A1; *see also* Frank Green, *Va. Goes 20 Months Without a Death Verdict from a Jury*, Richmond-Times Dispatch, Nov. 14, 2009; Andrew Welsh-Huggins, *Ohio Prosecutors Using New Life Without Parole Option*, Associated Press, Jun. 23, 2008 (finding that indictments in capital cases have drastically reduced in Ohio and other states since life without the possibility of parole became a sentencing option).

[51] In all states that have capital punishment and in federal government cases, life without parole is now an alternative to the death penalty. However, the Supreme Court has ruled that it is unconstitutional for states to mandate life without parole for juveniles convicted of murder. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

death sentences in many cases in which they would opt for life sentences if they were better informed.[52]

Not only does confusion about sentencing options tend to increase the number of death sentences, it also exacerbates an already existing tilt toward imposition of death. Empirical evidence documents that jurors at the beginning of the penalty phase, and before hearing any penalty phase evidence at all, show a significant imbalance in favor of imposing a death sentence and may have even made a sentencing decision by that point.[53]

**...juries exhibit significant confusion about whether a sentence of life imprisonment without parole really means that the defendant will never be released.**

All jurisdictions that impose capital punishment now have "life without parole" as an alternative. Many jurisdictions also have "life" sentences as a sentencing option in homicide cases. However, without meaningful explanation of the true length of these sentencing options, including the minimum length of time those convicted of murder must serve before being eligible for parole under a life sentence, jurors may find themselves making a false and forced choice of imposing a death sentence on a defendant because of incorrect assumptions about the amount of time that the defendant will spend in jail under each of these sentences.

Whether juries are involved in sentencing in capital cases varies by state.[54] However, in some jurisdictions where the jury is involved in sentencing, the jury is not required to be told of the life without parole option.[55] In Texas and Utah, judges are mandated by statute to explain the availability of life without parole.[56] Other states have adopted model jury instructions giving

[52] Bowers & Steiner, *supra* note 50, at 605; Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993).

[53] *See* Bowers, *supra* note 37, at 1100-01; *see also* William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476 (Sept. 1998); William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 Judicature 200 (March-April 1996).

[54] The judge sentences defendants in capital cases in Montana and Nebraska. Mont. Code Ann. § 46-18-301 *et seq.;* Neb. Rev. Stat. § 29-2522. In some states, such as Alabama, Delaware and Florida, the jury gives a recommendation to the judge on the defendant's sentence and the judge issues the final sentence. In other states, the jury may determine the defendant's sentence.

[55] *See* Emma Reynolds, Phila. Fed. Defender, Survey of Life Without Parole Instructions in Death Penalty States (July 2009), at http://www.deathpenaltyinfo.org/documents/LWOPSurvey.pdf.

[56] The Texas Code of Criminal Procedure, however, bars all parties from "inform[ing] a juror or a prospective juror of the effect of a failure of [the] jury to agree" on aggravation (or the "special issues"

an explanation of life without parole and its availability. Tennessee's model instruction is a laudable example of one that explains life without parole and life sentences.[57] In other states, a defendant may request the life without parole instruction in a capital case.[58] Still others, like Kansas and Pennsylvania, have statutes that make life without parole available, but there is no requirement that the judge instruct the jury accordingly.

In *Simmons v. South Carolina*,[59] the U.S. Supreme Court held that the Due Process clause required the jury to be informed of the defendant's ineligibility for parole where the prosecutor argued for a death sentence based on future dangerousness.[60] Conversely, in cases where the defendant's future dangerousness was not an issue before the jury, there may be no due process violation resulting from a court's refusal to instruct the jury that the defendant would be ineligible for parole if he or she were sentenced to life. Although the limits of the Court's ruling have not been tested, in *State v. Sutherland*, the South Carolina appellate court held that the defendant's due process right was not violated by the trial court's refusal to instruct the jury on the meaning of life imprisonment where defense counsel had informed the jury throughout closing argument that life imprisonment for the defendant meant that he would never be released from prison.[61]

**...some states continue to bar jury instructions regarding parole eligibility in capital cases.**

In circumstances not covered by *Simmons* (where the prosecutor does not explicitly rest an argument on the defendant's future dangerousness), some states continue to bar jury instructions regarding parole eligibility in capital cases. Even those that permit such instructions do not mandate them, and generally do not ensure that juries are provided with full and understandable information. Yet jurors are greatly concerned about and influenced by parole issues even in cases in which the prosecutor does not explicitly argue the defendant's future dangerousness. Without accurate information on the issue, jurors may

presented in the Texas death penalty sentencing scheme). Tex. Code Crim. Proc. Ann. art. 37.071, §§ 2(a) (2013). This provision conceals from jurors their individual capacity to impose a sentence less than death.

57 Tenn. Code Ann. § 39-13-204(e)(2)(B) (West 2014) ("The jury shall also be instructed that a defendant who receives a sentence of imprisonment for life without possibility of parole shall never be eligible for release on parole.").

58 *See Yarborough v. Commonwealth*, 519 S.E.2d 602 (Va. 1999) (holding that defendant may request the life without parole instruction in a capital case); see also *Bruce v. State*, 569 A.2d 1254 (Md. 1990) (holding that when requested to do so, the court should give a life without parole instruction).

59 512 U.S. 154 (1994).

60 *See Shafer v. South Carolina*, 532 U.S. 36 (2001) (reaffirming *Simmons*).

61 *State v. Southerland*, 447 S.E.2d 862 (S.C. 1994).

make unsupported and inaccurate assumptions, often based on misleading media portrayals or other unreliable sources regarding the possible release of a prisoner under a life sentence, even a prisoner under a sentence of life without the possibility of parole.

In the past, refusals to tell juries about parole eligibility have often been justified as a way of protecting defendants (on the assumption that juries may give greater sentences if they know about the possibility of parole). In the capital context, however, the jury's ignorance of parole eligibility can increase the risk of a defendant receiving a death sentence based on a false choice. Capital juries have a constitutional duty to make a reasoned, moral decision on whether a death sentence is appropriate; this decision must be unencumbered by ignorance and supported by information sufficient and relevant for reliable and rational decision-making.[62] Full disclosure on the available parole options will help them discharge this duty.

Judges should instruct juries regarding available sentencing alternatives, and their true meaning. Where there is not already a requirement for judicial instruction in this regard, one should be instituted. In some jurisdictions, courts have ruled that it was sufficient for the jury to have heard of the alternatives from defense counsel or the prosecutor.[63] However, juries are more likely to give credence to the word of the court, rather than arguments presented by attorneys in the case. In fact, jurors are instructed to follow the law as explained by the judge, not the lawyers. Accordingly, juries should be instructed by the court regarding the available alternatives even if the attorneys argue the alternatives before the jury.

Courts should make no statements or instructions to the juries that would ten to relieve jurors of their sent of responsibility for their verdict.[64] Thus, it goes hand in hand with the principle that the court should instruct the jury on all available sentences in capital cases, and the true meaning of those sentences, that the judge and the attorneys in the case should not inform or otherwise indicate to the jury that the defendant's sentence can later be appealed or commuted or is not otherwise final.

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62 *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

63 *See, e.g.*, *Southerland*, 447 S.E.2d 862.

64 *See* James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000); *see, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (finding a violation of the Eighth Amendment and vacating a death sentence that was imposed as a result of a sentencing hearing in which the prosecutor argued to jury that it should not view itself as the final arbiter of the petitioner's death sentence because the sentence would be reviewed by the Mississippi Supreme Court).

# CHAPTER 9
## Role of Prosecutors

After a mistrial, John Allen Lee was convicted and sentenced to death in a second trial for a double murder. In October 2013, a Florida circuit court granted John Allen Lee's motion for a new trial on the grounds that the state withheld exculpatory evidence at trial. During hearings on the motion, both prosecutors in the case testified regarding their decision not to disclose an email regarding a possible love triangle between Lee and the victims, which could have supported Lee's defense that one of the victims killed the other. One prosecutor stated that she did not disclose the email because, in her view, it would have been inadmissible and it was hearsay. In his order granting a new trial, Judge Dubensky stated:

> "It is not the province of the prosecutor to either characterize or categorize evidence that, no matter how remote it might seem to [the prosecutor], could be exculpatory. With respect to their discovery obligation, prosecutors should not determine the consistency or inconsistency of statements made by material witnesses. Prosecutors do not rule on issues of admissibility of evidence and they certainly do not limit disclosure by determining that it is rumor or hearsay. . . . In a prosecution for first degree murder where the death penalty is sought, disclosure must be the first and last obligation."[1]

[1] Elizabeth Johnson & Lee Williams, *Second mistrial ordered in Lee murder case*, Herald-Tribune, Sept. 24, 2013, at http://www.heraldtribune.com/article/20130924/ARTICLE/130929811?p=2&tc=pg.

**Recommendation 31. Prosecutors should provide full discovery to the defense in death penalty cases, including all information and evidence relating to the subject matter of the offense charged, defenses or other issues in the case that are not protected by an established governmental or other testimonial privilege. Some jurisdictions refer to this as "open-file discovery." Prosecutors' offices in jurisdictions with capital punishment, irrespective of the applicable discovery standard, also must develop effective procedures for requiring law enforcement and investigative agencies to gather, properly document and provide all relevant information and evidence to prosecutors for discovery review.**

The U.S. Supreme Court stated in *Gregg v. Georgia* that "death is different."[2] This basic recognition is the impetus for the Committee's recommendation that discovery obligations in capital cases should be more exacting than in other criminal cases. Rather than the limited disclosure of information required by federal and most state rules of criminal procedure and legislation prescribing the content and timing of disclosures, the defense in cases where the defendant is death-eligible should be provided *full discovery*.

Some jurisdictions refer to this as "open-file discovery." Rather than adopt that or any other specific term in this report on the grounds that the principles at work may be misunderstood, the Committee uses the term "full discovery." The government, as a prosecuting body, may retain certain testimonial and discovery privileges (like the attorney-client or deliberative process privilege) for certain materials in specific circumstances in death penalty cases, and therefore the "open-file" label may not be appropriate. Nonetheless, the vast majority of materials in a prosecutor's or investigator's files are generally not protected by such privileges and therefore should be produced to the defense through discovery procedures. Requiring anything less than full discovery creates a situation where relevant information may be withheld, creating the real risk that the truth will be hidden and, as a result, increasing the risk of executing an innocent person, or a person who should not have been subject to the death penalty or sentenced to death.

**Requiring anything less than full discovery creates a situation where relevant information may be withheld, creating the real risk that the truth will be hidden...**

Prosecutors are required by law to provide the defense all material, exculpatory and impeachment evidence; evidence that the prosecution will use in its case-in-chief; material

[2] 428 U.S. 153 (1976).

obtained from or belonging to the defendant; and all statements of witnesses testifying for the prosecution. In *Brady v. Maryland*[3] and *Giglio v. United States*,[4] the U.S. Supreme Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments require the production of exculpatory and impeachment evidence favorable to the defendant and material to the issues of guilt or punishment, without the need for a request for the information by the defense. The Supreme Court in *Brady* held that evidence is deemed "material" to a defendant's case where the government's failure to disclose it would undermine confidence in the verdict. The U.S. Constitution is violated if the information is not disclosed, regardless of the bad or good faith of the prosecutor, and irrespective of whether the prosecutor has actually collected the information from investigators. The Federal Rules of Criminal Procedure require the disclosure to the defense – where requested – of information, documents and materials if they are "material to preparing the defense," or the government intends to use the evidence in its case-in-chief at trial, or the evidence was obtained from or belongs to the defendant.[5] But the high stakes involved make these rules insufficient in the death penalty context.

Expanding discovery in criminal cases has long been advocated by the American Bar Association and other groups supporting reform.[6] In addition, some states, like North Carolina[7] and Florida,[8] have taken significant steps to expand discovery obligations in criminal cases through the adoption of discovery rules in their state criminal procedure codes that greatly expand the government's discovery obligations beyond the requirements of the U.S. Supreme Court, the federal rules and other states. North Carolina, the state with the broadest discovery framework, requires the state, upon request, to make available to the defendant "the *complete* files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant," unless specifically excepted from the requirement or ordered by the court.[9]

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3 373 U.S. 83 (1963).

4 405 U.S. 150 (1972).

5 Fed. R. Crim. P. 16.

6 *See* American Bar Association, Model R. Prof. Cond. 3.8(d) (requiring disclosure of evidence and information known to the prosecutor that tends to "negate guilt" or "mitigate the offense"); American Bar Association, Criminal Justice Section Std. 11-2.1 (providing that the prosecution should, within a reasonable time before trial, disclose prescribed materials relating to the case and the subject matter of the offense); and The Justice Project: Expanded Discovery in Criminal Cases: A Policy Review (2007), at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Expanded%20discovery%20policy%20brief.pdf; *see generally* Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 Hastings L.J. 1321 (2011).

7 N.C. Gen. Stat. Ann. § 15A-901 *et seq.* (2013).

8 Fla. R. Crim. P. 3.220.

9 N.C. Gen. Stat. § 15A-908(a) (2013) (emphasis added).

In addition, states are increasingly broadening criminal discovery rights even where they have not enacted an overarching full, or open-file, discovery policy. Ohio, Colorado, New Jersey, Arizona, Massachusetts and Texas all have taken some steps in this regard.[10] Federal legislation was introduced in 2012 to require discovery of all "favorable information" to the defendant that is "within the possession, custody, or control of the prosecution team" or "the existence of which is known, or by the exercise of due diligence would become known" to the government prosecutor.[11] Alternatively, a "relevance" standard could be used, measuring the evidence by its relevance to the case or charged offense. Whatever the merits of such proposals across the full range of criminal litigation, the case for broad discovery is very strong – indeed imperative – in capital cases.

Although the adoption of full discovery principles in some jurisdictions will challenge accepted norms, the Committee believes that the provision of full discovery will be of great benefit to the prosecution in assuring the public of the fairness both of the process and of finality. It will eliminate questions about whether all favorable information has been supplied. Moreover, providing full discovery will minimize challenges on appeal to the scope and nature of discovery that was provided in the trial phase.

**...providing full discovery will minimize challenges on appeal to the scope and nature of discovery that was provided in the trial phase.**

Regardless of whether a particular jurisdiction provides full discovery in ordinary criminal litigation, discovery should be full in capital cases. In all jurisdictions, the rule in capital cases should be full discovery under which, at an early stage, all documents, information and materials in the possession or control of the government – including the prosecutors, investigators and other government agencies – are automatically and routinely made available to the defense. And, of course, hand-in-hand with the obligation for prosecutors to provide full discovery to the defense is the obligation for investigators, police, relevant government agencies and prosecutors in adjacent jurisdictions to provide to capital case prosecutors all relevant material in their possession or control so that they can be reviewed for discovery.

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[10] Ohio R. Crim. P. 16 (2010); Colo. R. Crim. P. 16 (1999); N.J. Ct. R. 3:13-3.(2011); Ariz. R. Crim. P. 15 (2009); and Mass. R. Crim. P. (2004); Texas Code Crim. P. 39.14 (2013). Although unsuccessful, there have also been multiple efforts to revise New York's criminal discovery rules.

[11] Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. § 2 (2012).

Many of the failures of the prosecution to provide *Brady* material are the result either of a prosecutor never seeing the exculpatory information or of the prosecutor seeing it but not recognizing its exculpatory nature. Accordingly, to make any full discovery requirement meaningful and effective, investigators should be given the express duty to retain and organize all information and materials obtained during the investigation. The prosecutor should have the express responsibility of assembling all relevant information by requesting all agencies that participated in investigating the case or examining evidence to provide all relevant documents, information and materials to the prosecutor for inclusion in the file. Practices of investigators and investigative agencies that encourage reports not to be prepared in written form to avoid disclosure should be explicitly prohibited. Instead, requirements that significant results and facts be documented in writing and preserved should be adopted. Prosecutors and investigators should be obligated to perform reasonable due diligence to inform themselves of relevant information and materials that may be in the government's possession, custody or control but not in the immediate possession of the core prosecution team, and to collect that evidence and make it available for discovery.

In addition, an accountable and named prosecutor or prosecutors should be charged with reviewing all the information received to determine whether it is exculpatory. Inadvertent failures to disclose evidence would be reduced by this procedure because a responsible officer would be charged with conducting the review and would know that he or she may be held accountable for failures to disclose. If arguably discoverable evidence is unearthed, it should be delivered either to the defense or to a neutral judicial officer who would inspect it to determine whether disclosure is required.

The Committee believes that because of prosecutors' legal and ethical training, they are uniquely equipped to assist investigative agencies in appreciating their responsibilities under *Brady*. Therefore, a program of institutional instruction has an important role in the success of the effort to ensure compliance with discovery requirements – both under a *Brady/Giglio* framework and under a full disclosure framework. Instruction should cover the benefits of proper disclosure and the components and requirements of the applicable discovery framework. The message must be received by all law enforcement and investigative agencies of the importance of full and candid disclosure to the prosecution of all information potentially helpful to the defense. In this regard, in 2010, the U.S. Department

**The message must be received by all law enforcement and investigative agencies of the importance of full and candid disclosure to the prosecution of all information potentially helpful to the defense.**

of Justice implemented a comprehensive new criminal discovery program imposing new policies, practices and training for federal prosecutors and investigative agents.

The Committee recognizes that emergency situations and the unique problems of national security and protecting witnesses may require limited, tightly drawn exceptions to the ordinary practices of automatic required disclosure. However, to avoid erosion of the completeness of discovery, relief from those requirements should be solely by court order. Thus, even a discovery framework that provides full discovery should provide opportunities for the granting of protective orders in appropriate circumstances. An exacting standard should be required before a protective order is granted. Such an order should not be granted unless withholding discovery is necessary to protect the safety of the witness, to protect other specified individuals or to achieve similarly specific and compelling justifications in support of public safety. Even in special situations, jurisdictions must implement procedures that require contemporaneous, written recordation of the prosecution's justification for departing from the standard practice.

Hand-in-hand with broader discovery requirements goes the necessity for meaningful penalties for failures to comply. The seriousness of penalties for non-compliance should correspond with the seriousness of the violation and its effect, which is the execution of the defendant in a death penalty case. In addition to the court's ability to exercise its contempt powers, courts should be empowered to enter any other appropriate order, up to and including declaring a mistrial or dismissal of the case, with or without prejudice. Courts should be required to make specific findings of fact justifying the imposed sanction. It is likely that courts will be reticent to find willful violations, so the possibility of sanction should not concern prosecutors and law enforcement officials who fight very hard but fairly. The existence of the penalty is, however, potentially important to deter those who purposefully cross legal and ethical boundaries.

The reforms described above will constitute a major change in discovery practices in many jurisdictions. They will also require special efforts and procedures that entail costs to the system. However, the number of capital cases is relatively small in every jurisdiction, and they are already a special focus for the courts.

**Recommendation 32. All capital jurisdictions should establish a Charging Review Committee to review prosecutorial charging decisions in death-eligible cases. The committee should be comprised of one or more line prosecutors, at least one supervisory official, and the chief or head of the prosecuting office. Prosecutors in death-eligible cases should be required to submit proposed capital and non-capital charges to the committee. The committee would then issue binding approval or disapproval of proposed capital charges, with an accompanying explanation. Each jurisdiction should forbid prosecutors from filing a capital charge without the committee's approval.**[12]

In the states where the vast majority of capital cases are adjudicated, charging decisions are (a) decentralized (each prosecuting office deciding for itself when and where capital charges are appropriate), (b) discretionary (American tradition grants prosecutors virtually unrestrained discretion to make binding charging decisions), and (c) largely unreviewed by courts (separation of powers concerns traditionally produce judicial reluctance to review executive branch charging decisions). These attributes of American criminal justice are deeply imbedded, and they affect profoundly how the death penalty operates.

The lack of uniformity and presence of bias in death penalty cases could be ameliorated if jurisdictions were to review and approve prosecutors' charging decisions in a centralized fashion. Centralized and recorded review of charges in all death eligible cases would permit jurisdictions to collect and analyze data about those cases. Data analysis would enable jurisdictions to track, among other things, the kinds of characteristics on which its prosecutors rely – legitimately and illegitimately – when deciding whether to charge death eligible conduct as a capital offense. Individual prosecutors could be provided with these data, enabling them to improve their charging decisions by seeking the death penalty only for the "worst of the worst" rather than for disadvantaged or disfavored classes of offenders. Moreover, a centralized mechanism requiring approval of all capital charges would help prosecutors avoid inadvertent bias and inconsistency in the most important decisions that they make.

Centralized review can be accomplished relatively easily. The Committee proposes that each jurisdiction create a Charging Review Committee ("CRC"). A CRC should be comprised of one or more line prosecutors, at least one supervisory official and the chief or head of the prosecuting office. In all death eligible cases, prosecutors would be required to submit to the committee both proposed capital and non-capital charges and written explanations setting forth their charging rationales. In each case, the CRC would respond with written recommendations and commentary and the CRC's decision not to approve capital charges

[12] Committee member Judge William S. Sessions supports issuance of an *advisory* rather than a binding recommendation from the CRC on whether to seek the death penalty. Judge Sessions' full explanatory statement on this issue is found at the end of Chapter 9.

would be binding.[13] Prosecutors would be forbidden from filing a capital charge without the CRC's approval. To improve the workings of the CRC, and to create a record of capital charging, the CRC should report periodically to the jurisdiction's chief executive, legislative and judicial officers.

This recommendation does not require centralized approval of plea offers in capital cases because plea bargaining opportunities often arise in the last moments before (or during) trial. Nevertheless, jurisdictions should recognize that consistency and fairness in the application of the death penalty depends to a considerable extent on how prosecutors exercise their discretion while engaging in plea bargaining. For this reason, each jurisdiction should have a mechanism to monitor guilty pleas in capital cases and create a database to enable review of these pleas. In addition, the federal government should not assume jurisdiction from state courts in order to enable the death penalty to be sought. Another means to achieve more consistent charging decisions is to conduct true proportionality review, discussed further in Chapter 10, which may be conducted, in part, by review of the data collected through the processes advocated by this recommendation.

The concerns underlying this recommendation have been widely recognized, and the adoption of a statewide review process has been urged on state legislators in several instances.[14] The federal system already requires that United States Attorneys receive written permission from the Attorney General before seeking the death penalty.[15]

### Recommendation 33. The Vienna Convention on Consular Relations ("VCCR") should be enforced by law enforcement officers.

In July 2011, the U.S. Supreme Court denied a stay of execution for Humberto Leal Garcia, Jr. in a 5-4 decision. The stay would have permitted Congress to consider pending legislation that would have required states to comply with the Vienna Convention and inform foreign citizens about their right to contact their foreign consulate upon arrest. In 2008, the U.S. Supreme Court ruled, in Medellin v. Texas, that states were not obligated to comply with the Vienna Convention absent federal law.

Mexican officials have stated that they would have ensured Leal had competent trial counsel if they had been able to speak with him after his arrest. Leal claimed he did not learn of his

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13 *Id.*

14 *See* Report of the Governor's Commission on Capital Punishment, Recommendation 30 (April 15, 2002), at http://illinoismurderindictments.law.northwestern.edu/docs/Illinois_Moratorium_Commission_complete-report.pdf (recommending mandatory review of death eligibility undertaken by a state-wide review committee); *see also* Thomas P. Sullivan, *Death Penalty: For Capital Punishment, More Reforms Necessary*, Chi. Trib., Jan. 4, 2004.

15 *See* U.S. Department of Justice, U.S. Attorney's Manual § 9-10.020 (updated July 2011), at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm.

right to consular access until two years after his conviction, and he learned of it from a fellow prisoner. The state argued that Leal never revealed his Mexican citizenship at the time of his arrest (he had lived in the United States since age 2), and his defense team never raised the consular access issue at or before trial. Leal was executed on July 7, 2011 and Texas has since executed two more Mexican nationals who had been denied consular assistance before they were sentenced to death.

**a) Each death penalty jurisdiction should impose on its attorney general (or another central law enforcement officer) the duty of ensuring full compliance with the VCCR. This duty should include training law enforcement actors about consular rights and monitoring adherence to those rights. An independent authority, such as an inspector general, should report regularly about compliance to the jurisdiction's chief executive or legislative body.**

Article 36 of the VCCR requires that foreign nationals detained for any reason shall be notified "without delay" of their right to communicate with consular officers of their home country. Under Article 36, if a detained foreign national invokes consular rights, "the competent authorities of the receiving State shall, without delay, inform the consular post. . . ."[16] These are mutual obligations that also apply to foreign authorities when they arrest or detain U.S. citizens abroad. As such, the U.S. Bureau of Consular Affairs directs U.S. officials to, in general, "treat a foreign national as you would want a U.S. citizen to be treated in a similar situation in a foreign country. This means prompt and courteous compliance with the above requirements."[17]

The policies underlying the VCCR are similar to those underlying the right to counsel guaranteed by the U.S. Constitution – protecting the legal rights of detainees and preventing their mistreatment. The investigation, prosecution and outcome of a criminal case will likely be prejudiced if foreign nationals are interrogated and make inculpatory statements before they are given access to their consulates.[18] This prejudice is particularly significant in capital cases because confessions induced in the absence of legal assistance may lead to wrongful executions.

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[16] Organization of American States, Vienna Convention on Consular Relations art. 36(b), Apr. 24, 1963, at http://www.oas.org/legal/english/docs/Vienna%20Convention%20Consular.htm.

[17] Bureau of Consular Affairs, U.S. Department of State, Consular Notification and Access 2 (Mar. 2014), at http://travel.state.gov/content/dam/travel/CNAtrainingresources/CNAManual_Feb2014.pdf.

[18] The International Court of Justice ("ICJ") has declined to hold that the VCCR requirement of notification "without delay" necessarily requires notification before interrogation. *See Avena & Other Mexican Nat'ls (Mexico v. United States of America)*, 2004 I.C.J. 12, 49 (Mar. 31). Instead, the notice requirement is tied to the point at which the authorities realize, or have grounds to think, that the person is a foreign national.

Even though the U.S. Constitution provides a right to counsel in capital cases, consular officers may be better suited than American law enforcement officials to communicate effectively with foreign nationals and secure counsel quickly. Moreover, consular officers may be better able to locate witnesses (especially those who live in the foreign country) who may be crucial at both the guilt and sentencing stages of a death penalty trial, and provide experts and other investigation resources.

The Committee believes that the term "without delay" requires notice as soon as law enforcement or other government officials realize, or have grounds to think, that an arrested person is a foreign national.[19] The federal and state law enforcement agencies that have created training manuals, websites and other materials to educate their employees about the VCCR should be commended.[20] Given continuing noncompliance, however, those jurisdictions with the death penalty should make greater efforts to educate and monitor law enforcement actors. Each entity should impose responsibility for education and monitoring on its central legal authority – typically the attorney general – who should be required to report regularly about those activities and about rates of compliance with consular rights. These reports should be made to the entity's chief executive or its legislative body.

### b) The U.S. should re-join the Optional Protocol to the VCCR and adopt implementing legislation to give domestic effect to the Optional Protocol.

In 2005, the U.S. withdrew from the Optional Protocol to the VCCR ("Optional Protocol"), which grants jurisdiction to the International Court of Justice ("ICJ") to resolve disputes with respect to the VCCR. The U.S. withdrawal from the Optional Protocol occurred in response to the ICJ decision in *Mexico v. United States of America*, whereby Mexico sought to halt the execution of 54 Mexican nationals in the United States who had not been informed of their consular rights. The ICJ found that the U.S. had failed to inform 51 of these Mexican nationals of their rights under the VCCR and held that the U.S. had to review and reconsider the convictions and sentences of such Mexican nationals.[21] The U.S. Supreme Court subsequently held, in *Medellin v. Texas*, that without implementing legislation, ICJ decisions do not constitute binding federal law that preempt state criminal procedures in the U.S.[22]

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[19] This is the interpretation of the "without delay" standard adopted by the ICJ in *Mexico v. United States of America,* 2004 I.C.J. at 49-50.

[20] California, in particular, requires its law enforcement officers to provide notification of consular rights "upon arrest and booking or detention for more than two hours" of a foreign national. Cal. Penal Code § 834c(a)(1) (West 2013).

[21] *Mexico v. United States of America*, 2004 I.C.J. at 53-55.

[22] *Medellin v. Texas*, 552 U.S. 491 (2008).

After the U.S. withdrawal from the Optional Protocol in 2005, the ICJ no longer has jurisdiction over claims from foreign countries whose citizens have been convicted in the U.S. in violation of the VCCR. Likewise, the U.S. can no longer utilize the ICJ to enforce the rights of U.S. citizens that are convicted in foreign courts without the benefit of consular access. Nonetheless, the U.S. is still a party to the VCCR and still must comply with the VCCR in order to uphold its international law obligations. In order to give effect to the VCCR, the U.S. should re-join the Optional Protocol and adopt implementing legislation that would preempt state criminal law procedures inconsistent with the VCCR and ensure full compliance with the ICJ ruling in *Mexico v. United States of America*. In addition, states should create meaningful compliance incentives. These might include exclusionary rules barring the introduction of evidence obtained in the absence of consular notification.

**c) Every death penalty jurisdiction should enact legislation rendering foreign nationals ineligible for the death penalty if they are not provided with their consular rights in a timely fashion under the VCCR.**

Federal and state governments should make defendants who have not received consular notification ineligible for the death penalty. Death penalty ineligibility will encourage law enforcement authorities to comply with the VCCR and preserve the possibility of future relief for those foreign nationals. In several ICJ cases filed against the U.S., foreign nations complained that they discovered VCCR violations only years after their nationals were sentenced to death – a tragic state of affairs that can easily be avoided if states adopt the Committee's proposed ineligibility rule.

**Death penalty ineligibility will encourage law enforcement authorities to comply with the VCCR and preserve the possibility of future relief for those foreign nationals.**

### Explanatory Statement of Judge William S. Sessions on Recommendation 32

I fully agree that states must implement mechanisms to combat disproportional application of the death penalty and reduce the influence of improper factors in capital charging decision-making. The use of an internal committee (Capital Review Committee) to consider all available evidence prior to determining whether to seek the death penalty is an appropriate and efficient mechanism to support proportionality. However, because states have entrusted elected or appointed prosecutors with the solemn responsibility of determining whether to seek the death penalty in a particular case, I believe that such a committee's recommendation must be *advisory*, rather than binding. The final decision whether to seek the death penalty must remain with the elected or appointed prosecutor.

# CHAPTER 10
## Safeguarding Racial Fairness and Proportionality

In 1997, Duane Buck was convicted of shooting three people, killing two of them. During his trial in Harris County, Texas, the prosecutor elicited and relied on testimony from a psychologist that African Americans are statistically more likely to commit violence, and that Buck was more likely to be dangerous in the future because of his race. A few years after Buck was convicted, then-Texas Attorney General John Cornyn (now a U.S. Senator) singled out the psychologist for his improper and racially biased testimony in multiple trials. In 2000, Cornyn recommended that the defendants in six cases in which the psychologist offered similar testimony linking race to the likelihood of future dangerousness, including Buck, be granted new capital sentencing hearings. While the death sentences in all of the other cases were vacated and each was given a new sentencing hearing, Buck has not received such relief. The only surviving victim – Buck's stepsister - and one of the prosecutors from Buck's trial have asked for a new sentencing. More than 100 civil rights leaders, elected officials, former prosecutors and former Texas Governor and Death Penalty Committee Co-Chair Mark White have also called for a new sentencing. Mr. Buck's legal team petitioned the Texas Court of Criminal Appeals for a new sentencing hearing for Buck, which the court denied in November 2013. Buck remains on Texas's death row and has filed appeals to the U.S. Supreme Court and federal district court.

**Recommendation 34. All jurisdictions that impose the death penalty should enact legislation to help ensure that racial discrimination plays no role in the capital punishment system. As a critical component of this program, each jurisdiction should adopt a framework for the rigorous collection of data on the operation of the capital punishment system and the role of race in it. A second component is to ensure racial and ethnic diversity among the decision-makers in death penalty cases, particularly defense lawyers, prosecutors, jurors and judges.**

Study after study consistently has shown glaring racial disparities in the administration of capital punishment. For example, a 2011 study of the application of the death penalty in the military courts revealed that "minority service members are more than twice as likely as whites – after accounting for the crimes' circumstances and the victims' race – to be sentenced to death."[1] A 2003 Maryland study showing that the state's "death penalty system is tainted with racial bias" led to a moratorium on the death penalty and serious efforts to repeal capital punishment in the state.[2] A 2013 study by the U.S. Sentencing Commission confirms the existence of glaring racial disparities in the U.S. justice system: prison sentences of black men are nearly 20 percent longer than those of white men who commit similar crimes.[3] Though the problem is complex, it is difficult to dispute that racial disparities and racial discrimination hang over our nation's capital punishment system and raise serious questions about its fairness.

The Maryland study, discussed above, also found that geography plays a significant role in the charging of capital crimes and the sentencing of defendants to death.[4] Indeed, only a few counties are the source of the vast majority of death sentences, as reflected in Figure 7 in the Appendix of this report. Although evidence of geographic disparities is easier to examine through review of the available data on death sentences, these disparities are not contemplated at the time of sentencing. Rather, death sentences continue to be imposed at a high rate in just a few jurisdictions.

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1 Editorial, *The Military and the Death Penalty*, N.Y. Times, Sept. 1, 2011, at A28; *see also* David C. Baldus et al., *Racial Discrimination in the Administration of the Death Peanlty: The Experience of the United States Armed Forces (1984-2005)*, 101 J. Crim. L. & Criminology 1227 (2012).

2 Scott Shane, *A Death Penalty Fight Comes Home*, N.Y. Times, Feb. 6, 2013, at A14; Press Release, Death Penalty Information Center, Maryland Study Finds That Race and Geography Play Key Roles in Death Penalty (Jan. 7, 2003), at http://www.deathpenaltyinfo.org/PR-DPICMarylandStudy.pdf; *see also* Raymond Paternoster et al., An Empirical Analysis of Maryland's Death Sentencing System With Respect to the Influence of Race and Legal Jurisdiction, at http://www.newsdesk.umd.edu/pdf/finalrep.pdf. Maryland subsequently repealed the death penalty in 2013.

3 Joe Palazzolo, *Racial Gap in Men's Sentencing*, Wall. St. J., Feb. 15, 2013, at A3.

4 *See generally* Paternoster, et al., *supra* note 2.

These disparities have diminished the public's faith in the fairness of the death penalty. A September 2000 poll showed that 64 percent of Americans supported a moratorium on executions until the issue of the fairness of capital punishment could be resolved.[5] A 2013 Gallup poll similarly showed support for the death penalty at a 40-year low, driven in part by negative attitudes about how fairly the death penalty was applied.[6] If executions are to be a part of our justice system, they must be undertaken in an even-handed fashion. Moreover, the public must be assured that race, or any other improper factor such as ethnicity or gender, is never the deciding factor in determining who will live and who will die.

Given the complexity of the problem, the Committee acknowledges the difficulty of crafting a single recommendation to remedy it. There is evidence that even subconscious or implicit bias plays a role in sentencing, which is particularly likely to affect deliberations where there are no or only a small number of people of color on a jury. Instead, the Committee encourages jurisdictions to take the needed first step of gathering data, and from there, experimenting with solutions. Whatever legislative solutions or initiatives a particular jurisdiction favors, each jurisdiction should ensure that people of color are part of every decision-making process within the criminal justice system.

The first and most important of these remedial steps is the rigorous gathering of data on the operation of the jurisdiction's capital punishment system and the role or potential role of racial discrimination or geography in it. Some states have implemented data collection pursuant to legislation aimed at combating racial profiling.[7] The work of such teams in New York and New Jersey are promising guides to how such data-gathering systems should be developed.[8] One critical aspect of a successful data-gathering system is that it operates on an ongoing and continuous basis to compile data over time.

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5 *See* Death Penalty Information Center, National Polls and Studies, http://deathpenaltyinfo.org/national-polls-and-studies (last visited Dec. 2, 2013) (*citing* Press Release, The Justice Project, (Sept. 14, 2000)); *see also* Gallup Organization, Poll Analysis, Slim Majority of Americans Think Death Penalty Fairly Applied in the Country (June 30, 2000), at http://www.gallup.com/poll/2761/slim-majority-americans-think-death-penalty-applied-fairly-country.aspx.

6 Jeffrey M. Jones, U.S. Death Penalty Support Lowest in More Than 40 Years (Oct. 29, 2013), at http://www.gallup.com/poll/165626/death-penalty-support-lowest-years.aspx.

7 Conn. Gen. Stat. Ann § 54-1m (West 2013) (Connecticut law requiring each municipal police department to record traffic stop information, including race of the driver, nature of traffic stop and outcome of the traffic stop).

8 In 2007, the New Jersey Death Penalty Study Commission issued a report that examined whether the selection of defendants or sentencing in New Jersey for capital trial was arbitrary, unfair, or discriminatory in any way. The Committee recommended to the state legislature that the death penalty be abolished, an action the legislature took in 2007. *See* New Jersey Legislature, New Jersey Death Penalty Study Commission: Overview of the Commission and Its Work, at http://www.njleg.state.nj.us/committees/njdeath_penalty.asp. In 2004, the New York Assembly Committees on Codes, Judiciary and Correction commenced a series of five public hearings to solicit information on issues relevant to the death penalty including race. *See* Assembly Standing Committee on Codes et al., The Death Penalty in New York (2005), at http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf.

Jurisdictions cannot identify and remedy discrimination without detailed data, particularly in contemporary America when bias or prejudice most likely operate at an unconscious rather than a purposeful level. Comprehensive data collection is critical because information that would tend to suggest that discrimination and bias played a role in capital prosecutions is often outside the trial record and, therefore, not plainly obvious upon review. For example, ordinarily, the race of the jurors dismissed by prosecutors and defense counsel is not included in the record. Nor is the race of defendants, or victims, whose cases are chosen or not chosen for capital punishment throughout a state and across jurisdictions, readily available in centralized and searchable databases. All of this information, as well as additional data points, can only be made available and analyzed if there is a specific decision or requirement to collect it and specific steps are taken for its collection. Data collection also permits states to capture and analyze other important information, such as which aggravating factors were or were not present, background information on the defendant and myriad other factors that, when examined, may reveal important facts about the practical operation of a jurisdiction's death penalty system that would not otherwise be discernable.

Once jurisdictions have gathered comprehensive data on capital prosecutions, and made it publicly available, they, along with outside researchers, will be able to identify any factors that result in the disparate application of the punishment. Jurisdictions can then carefully consider and act on the results and design solutions to any revealed problems. The U.S. Supreme Court has suggested that legislatures are the appropriate bodies for this task. In *McCleskey v. Kemp*, the Court found that a complex statistical study indicating that racial considerations entered into the decision to sentence the defendants to death did "not demonstrate a constitutionally significant risk of racial bias." [9] One reason for the Court's unwillingness to intervene in light of statistical evidence is the Court's judgment that "[l] egislatures . . . are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the court.'"[10]

In 2009, North Carolina passed the "Racial Justice Act," which allowed an individual sentenced to death to challenge his or her sentence using statistical evidence of racial bias in the state's application of the death penalty.[11] If the defendant could prove that capital charges were sought or imposed more frequently for individuals of one race than other races or as punishment for crimes against victims of one race than other races, or if race was a significant factor in decisions to exercise peremptory challenges in jury selection, the judge

9 *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987).

10 *Id.* at 319 (quotations omitted).

11 N.C. Gen Stat. Ann. § 15A-2010 *et seq* (2013) ("no person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race").

was required to convert the defendant's sentence to life in prison.[12] In April 2012, a North Carolina court found that race was, in fact, "a significant factor in the prosecution's use of peremptory strikes" in one death-sentenced inmate's case and therefore granted the inmate's motion for relief under the Act and converted his sentenced to life without the possibility of parole.[13] The legislature amended the Act in the summer of 2012 to limit the presentation of statistical evidence to the county or prosecutorial district at the time the death penalty was sought or imposed.[14] The legislature subsequently repealed the Act entirely in the summer of 2013. While repeal of the Act is an unfortunate development, North Carolina's experiment encouraged other states as well as Congress to consider similar bills.

The Committee also recommends that jurisdictions ensure that people of color are included among the decision-makers within the criminal justice system. In recent years, the Supreme Court has reaffirmed its commitment to its decision in *Batson v. Kentucky*[15] that peremptory challenges striking jurors of a particular race, without a sufficient, race-neutral rationale, violate the Equal Protection Clause of the U.S. Constitution.[16] Efforts should be redoubled, through vigorously enforcing *Batson v. Kentucky* and through effective application of fair cross-section requirements, to ensure racially and ethnic diverse grand juries (where grand juries exist) that indict and petit juries that decide guilt and punishment. Given the ever-increasing diversity of the American citizenry, each jurisdiction should ensure that people of color are included within the ranks of defense counsel, prosecutors, jurors and judges involved in capital decision-making processes.

The process of safeguarding fairness in the application of the death penalty and assuring the public that the system operates without racial discrimination is admittedly very challenging. Moreover, it is critical to address fairness and public confidence that discrimination plays no role in the decisions on who should live and who should die. These issues are among the most important confronting the death penalty system, and any set of meaningful reform efforts must address these questions as forthrightly as possible. This Recommendation will not fully address the challenges of reducing racial disparities, but it is a reasonable place to begin.

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12 N.C. Gen Stat. Ann. §§ 15A-2011(b)(1)-(3), 15A-2012(3) (2009).

13 *North Carolina v. Robinson*, No. 91 CRS 23143 (N.C. Sup. Ct. Apr. 20, 2012), at http://www.deathpenaltyinfo.org/documents/RobinsonRJAOrder.pdf. In the late 1990s, Kentucky implemented a "Racial Justice Act," although the Kentucky Act has yet to be applied to vitiate a death sentence. Ky. Rev. Stat. Ann. § 532.300 (West 2013). Kentucky's law has likely had less effect than North Carolina's because it requires the defense to raise the issue of racial motivation in seeking the death penalty pretrial, and thus before the penalty has been imposed. *Id.* § 532.300(4).

14 N.C. Gen Stat. Ann. § 15A-2011(c) (2012).

15 476 U.S. 79 (1986).

16 *See Snyder v. Louisiana*, 552 U.S. 472 (2008).

In addition, implementing meaningful proportionality review – comparing the characteristics of the crime, aggravating factors and mitigating factors – between and among cases in which a death sentence was imposed or could have been imposed but was not, is the only way to achieve true proportionality between and among defendants and crimes. Proportionality review approximating this approach (although only comparing cases in which a death sentence was imposed) was conducted by Justice Stewart in the U.S. Supreme Court's 1976 plurality opinion in *Gregg v. Georgia*, upholding Georgia's death penalty law.[17] Subsequently, in *Pulley v. Harris*, the Court held that proportionality review was not required of every capital case.[18] In light of *Pulley*, even states that did engage in proportionality review began to abbreviate their review, resulting in perfunctory review of death sentences when comparative proportionality review was conducted.[19] Former U.S. Supreme Court Justice John Paul Stevens lamented that "the likely result of such a truncated review" in states that do not "cabin the jury's discretion in weighing aggravating and mitigating factors[,] is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment."[20] While proportionality review may not be considered a requirement under the Eighth Amendment, the absence of meaningful, comparative review of death sentences imposed increases the likelihood of an unconstitutional punishment.

[17] *Gregg v. Georgia*, 428 U.S. 153, 202 (1976) (opinion of Stewart, J.).

[18] *Pulley v. Harris*, 465 U.S. 37 (1984).

[19] *Walker v. Georgia*, 555 U. S. ____ (2008); 129 S.Ct. 453, 456 (2008) (Stevens, J., on the denial of certiorari).

[20] *Id.* at 457.

# CHAPTER 11
## Executive Clemency

The Georgia Board of Pardons and Paroles set out its current standard for clemency in 2007, while granting a stay of execution for Troy Davis: "[The Board] will not allow an execution to proceed in this State unless and until its members are convinced that there is no doubt as to the guilt of the accused." Nonetheless, Troy Davis was executed on September 21, 2011 amid serious doubts about whether Davis was actually responsible for the murder of police officer Mark MacPhail.

Officer MacPhail was shot and killed while off duty in the early morning hours of August 19, 1989, after coming to the aid of a homeless man at a Greyhound bus station in Savannah, Georgia. Several people, including Davis and Sylvester "Redd" Coles, were hanging out near a Burger King parking lot adjoined to the bus station. Coles started arguing with Larry Young, a homeless man. Young was assaulted by someone in the group and called for help. Officer MacPhail, serving off-duty as a security guard at the bus station, responded. As he came running to Young's aid, he was shot and killed. Testimony at trial was in consensus that MacPhail was shot and killed by the same man who had attacked Young. The day after the shooting, Coles went to the police station with his lawyer and said that Davis was the shooter.

Since Davis' conviction, most of the state's witnesses have either contradicted their trial testimony against Davis or admitted their testimony was false. Two new witnesses have implicated Coles in the shooting. In addition, a new analysis of physical evidence that had been presented to the Board of Pardons and Paroles in 2008, which the state alleged showed the presence of blood on a pair of shorts recovered from Davis' home, adds more doubt to the state's case against Davis. The Board denied clemency to Davis in 2008 after the Georgia Bureau of Investigation submitted this piece of evidence to the Board. Thereafter, a DNA and serology expert reviewed the full report and in 2010, after reviewing the new expert analysis, a federal court concluded that the shorts, in fact, did not link Davis to the murder of Officer MacPhail, finding that it was not clear that the substance was blood and even if it was blood, it was unknown to whom it belonged.

**Recommendation 35. The executive branch should:**

**a) ensure that the clemency process is accessible to all death sentenced prisoners for independent review of their claims,**

**b) implement open and transparent clemency procedures that include, at a minimum, notice and a meaningful opportunity to be heard for the offender and representatives of the state,**

**c) adopt substantive standards against which clemency applications will be evaluated, and**

**d) provide a written explanation of the clemency decision, including the factors that were considered important and relevant.**

Executive clemency can be granted in distinct forms, with different consequences for the defendant. A death row prisoner typically seeks a commutation or reduction of his or her capital sentence to life imprisonment, either with or without parole eligibility. A reprieve temporarily postpones or delays a scheduled punishment and typically is requested to allow time for additional judicial or executive review of a conviction or sentence. A pardon sets aside the conviction.

Since 1976 through 2012, 273 clemencies have been granted in capital cases for humanitarian reasons, including doubts about the defendant's guilt or conclusions regarding the death penalty process.[1] Many of those resulted from broad grants of clemency, including: Governor Pat Quinn of Illinois, in 2011 (all inmates); Governor Jon Corzine of New Jersey in 2007 (all inmates); Governor George Ryan of Illinois in 2003 (all inmates); Governor Richard Celeste of Ohio in 1991 (8 inmates); and Governor Toney Anaya of New Mexico in 1986 (all inmates).[2]

Executive clemency serves a vital role in the administration of justice. As Justice Holmes observed:

> A pardon in our day is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.[3]

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1 Death Penalty Information Center, Clemency, http://deathpenaltyinfo.org/clemency.

2 *Id.*

3 *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

The U.S. Supreme Court's lead opinion in *Gregg v. Georgia* recognized that a state capital punishment system that did not comprehend executive clemency "would be totally alien to our notions of criminal justice."[4] Later, in *Herrera v. Collins*, the Court observed that "all ... States that authorize capital punishment have constitutional or statutory provision for clemency,"[5] and emphasized that "[e]xecutive clemency has provided the 'fail safe' in our criminal justice system."[6] A more recent decision described clemency as "traditionally available to capital defendants as a final and alternative avenue of relief. . . ."[7]

In *Herrera v. Collins*, the Court declined to hold that a freestanding claim of actual innocence, absent some other independent constitutional violation, can serve as the basis for federal habeas corpus relief, relying in part on the "fail safe" of executive clemency. Thus, the responsibility to investigate post-conviction claims of actual innocence rests heavily upon the executive clemency process. "When a sentence of death is at stake, it becomes all the more vital that these processes serve the interests of justice; that mercy is meted out as appropriate; and that claims of actual innocence, which under established judicial policy may be ineligible for federal habeas corpus relief, do not fall on deaf ears."[8]

Executive clemency decisions typically are made in the last few days and even in the frantic hours and minutes before a scheduled execution. Clemency procedures vary widely among jurisdictions. In some jurisdictions, hearings are not required, and even in jurisdictions where hearings are held, the condemned prisoner may not be permitted to appear in-person before the decision-maker. Further, there is no constitutional right to counsel for petitioners seeking clemency.

Upon its extensive evaluation of 12 states' death penalty systems, which included states that have executed the majority of prisoners in the modern death penalty era, the American Bar Association ("ABA") Death Penalty Due Process Review Project found that:

> Most states fail to require any specific type or breadth of review in considering clemency petitions; [c]lemency decision-makers have denied clemency stating

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4 *Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976) (opinion of Stewart, J).

5 *Herrera v. Collins*, 506 U.S. 390, 414 (1993).

6 *Id.* at 415.

7 *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 398 (1998) (plurality opinion). *See also* Fay v. Noia, 372 U.S. 391, 476 (1963) (Harlan, J., dissenting) (arguing that the death-sentenced defendant in that case should seek relief "with the New York Governor's powers of executive clemency, not with the federal courts"); *Thompson v. Oklahoma*, 487 U.S. 815, 869 (1988) (Scalia, J., dissenting) (arguing that the execution rate for juveniles has been low, in part, because of "the exercise of executive clemency").

8 Texas Appleseed and Texas Innocence Network, The Role of Mercy: Safeguarding Justice in Texas Through Clemency Reform 4 (2005), at www.texasappleseed.net and www.texasinnocencenetwork.org ("Role of Mercy").

> that all relevant issues have been vetted by the courts[,] in fact, however, claims that may often warrant a grant of clemency have not or cannot be reviewed on the merits in the court system; [s]tates do not provide a right to counsel in clemency proceedings, and [f]ew states require the clemency decision-maker to meet with the inmate or the inmate's counsel.[9]

Thus, clemency has been described as "standardless in procedure, discretionary in exercise, and unreviewable in result,"[10] as well as a "Wizard of Oz process" that is "fraught with 'haphazardness' that immediately would be condemned as arbitrary if it surfaced elsewhere in the capital-punishment process."[11]

In *Ohio Adult Parole Authority v. Woodard*, the U.S. Supreme Court acknowledged that minimal due process protection exists for clemency petitioners convicted of capital crimes.[12] Since this opinion, however, clemency petitioners' due process rights have been interpreted very narrowly. For example, in *Bacon v. Lee,* the Supreme Court of North Carolina found no due process violation when the governor deciding clemency was the Attorney General at the time the inmate was sentenced to death. As one report states, "[t]he system created by *Herrera* and *Woodard* is one in which the federal judiciary relies very heavily on systems of executive clemency to ensure that innocent people are not wrongly convicted or even put to death, while at the same time it requires very little in the way of procedural or substantive safeguards to ensure that clemency processes function effectively."[13] The current system of "wide discretion, unchecked by procedural standards, may not be able to properly serve its role as a failsafe for miscarriages of justice."[14]

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9 *See* ABA Death Penalty Due Process Review Project, The State of the Modern Death Penalty in America 11 (Nov. 2014), at http://www.americanbar.org/content/dam/aba/migrated/keyfindings_2.authcheckdam.pdf.

10 Alyson Dinsmore, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 Ucla L. Rev. 1825, 1827 (2002).

11 James R. Acker & Charles S. Lanier, *May God – or the Governor – Have Mercy: Executive Clemency and Executions in Modern Death Penalty Systems*, 36 Crim. L. Bull. 200, 225-26 (2000) (citations omitted).

12 523 U.S. 272, 276 (1998). In *Woodard*, a death row inmate claimed Ohio's clemency procedures violated his Fourteenth Amendment due process rights. *Id.* at 277. In a plurality opinion, four justices concluded that inmates are not afforded due process rights in clemency proceedings, citing clemency as an extrajudicial act of grace. *See id.* at 275, 285. However, a four-justice concurring opinion found that "some *minimal* procedural safeguards apply in clemency proceedings" because a death row inmate maintains an interest in his life. *Id.* at 288–89 (O'Connor, J., concurring). In a concurring and dissenting opinion, Justice Stevens supported a due process finding, stating that "these proceedings are not entirely exempt from judicial review," *id.* at 290, and that "it is abundantly clear that respondent possesses a life interest protected by the Due Process Clause." *Id.* at 292 (Stevens, J., concurring in part and dissenting in part). Justice Stevens maintained that "only the most basic elements of fair procedure are required," *id.*, and concluded that "procedures infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence" violate due process. *Id.* at 290–91.

13 549 S.E.2d 840, 849-50 (N.C. 2001); *see generally* Role of Mercy, *supra* note 8.

14 Brittney Cunningham, *Empty Protection and Meaningless Review – The Need to Reform California's Stagnant Capital Clemency System*, 44 Loy. L.A. L. Rev. S265, S268 (2011) (citations omitted).

For example, with respect to claims of actual innocence in clemency proceedings, the Texas Board of Pardons and Paroles ("BPP") has largely abdicated its role to consider such claims in clemency proceedings. Although not statutorily mandated, the BPP maintains a rule stating that before any clemency application for a pardon based on innocence is considered, it must first have the unanimous written recommendation of the trial officials, which are the district attorney's office that prosecuted the case, the chief of the law enforcement agency that investigated the case and the judge of the court that presided over the case.[15] According to Texas Appleseed and the Texas Innocence Project:

> This rule is not found in any other examined state's statutory or administrative regulations governing clemency. Only one other state, Alabama, requires the recommendation of a trial official before a presently incarcerated inmate can be pardoned on grounds of innocence. Alabama, however, requires only the recommendation of either the judge or prosecuting attorney, not both. Moreover, Texas is the only state where the Board requires an applicant for a pardon for innocence to provide a certified order or judgment of a court and a certified copy of the findings of facts with respect to the new evidence.[16]

The Texas executive branch has essentially abandoned its role as a failsafe for wrongful execution in death penalty cases and instead has delegated its authority to assess claims of actual innocence to other entities – such as the district attorney's office (which prosecuted the defendant) and the judiciary (which sentenced him). The clemency process should be accessible to all death-sentenced prisoners for independent review of all claims, particularly claims of actual innocence.

The traditional role of clemency has been to dispense mercy, irrespective of guilt or innocence. The most common reasons offered in support of favorable clemency decisions involve doubts about the offender's guilt, whether the offender has intellectual disability or mental illness and equitable considerations in light of less harsh sanctions imposed against other participants in the same crime. Indeed, clemency can serve as a stop-gap measure against many of the concerns discussed throughout this report. However, in practice, evidence and claims never considered on their merits due to ineffective assistance of counsel, procedural default, anti-successor rules, insurmountable burdens of proof, client waivers and the lack of true proportionality review very rarely are rectified through clemency review.

This state of affairs may be due, in part, to a widespread perception that sparing a death-sentenced offender is politically risky for an official who aspires to future public office. Several observers have warned that a governor's decision to commute a death sentence may be

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15 37 Tex. Admin. Code Ann. § 143.2 (West 2012).

16 Role of Mercy, *supra* note 8, at 35.

tantamount to political suicide.[17] Racial considerations, which have proven so vexing in the context of capital charging and sentencing decisions, also appear to play an invidious role in the clemency process. A *ProPublica* report published in December 2011 found that white criminals seeking presidential pardons over the past decade have been nearly four times as likely to succeed as minorities.[18] African-Americans have had the poorest chance of receiving the president's ultimate act of mercy, according to an analysis of previously unreleased records and related data.[19] *ProPublica*'s analysis showed that other factors also appeared to influence petitioners' success rate. For example, married applicants were twice as likely to succeed and those with congressional support were three times as likely to receive a pardon.[20]

The Committee supports the need for basic procedural standards in clemency proceedings to provide a necessary safeguard against miscarriages of justice. The Committee recommends that the executive branch (a) ensure that the clemency process is accessible to all death sentenced prisoners for independent review of their claims; (b) implement open and transparent clemency procedures that include, at a minimum, notice and a meaningful opportunity to be heard for the offender and representatives of the state; (c) adopt substantive standards against which clemency applications will be evaluated; and (d) provide a written explanation of the clemency decision, including the factors that were considered important and relevant.

Arbitrariness is a core concern of due process and equal protection as it affects both the fairness of particular proceedings as well as the relative treatment of similarly situated persons and cases.[21] The existence of transparent procedures, substantive criteria to guide decision-making, and a written explanation of each clemency decision are essential tools to limit arbitrariness and ensure that clemency operates as the intended safeguard within the criminal justice system. Although the written explanation of clemency decisions may never be publicly available or further reviewed, the Committee supports the preparation of a written explanation to the extent that there is a reason for further review in a particular case, and on the basis that the act of preparing a written explanation is itself conducive to the deliberative process and can aid that process.

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17 Acker & Lanier, *supra* note 11, at 210-11.

18 Dafna Linzer & Jennifer LaFleur, *Presidential Pardons Heavily Favor Whites*, ProPublica, Dec. 3, 2011, at http://www.propublica.org/article/shades-of-mercy-presidential-forgiveness-heavily-favors-whites.

19 *Id.*

20 *Id.*

21 *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998).

# CHAPTER 12
## Execution Procedures

In January 2014, Ohio executed Dennis McGuire with a never before used two-drug combination of midazolam and hydromorphone. The execution lasted 26 minutes and, according to a member of the press who witnessed the execution, "McGuire struggled, made guttural noises, gasped for air and choked for about 10 minutes before succumbing to [the] new two-drug execution method."[1] In that same month, Oklahoma executed Michael Wilson using a three-drug cocktail, which included an injection of pentobarbital in lieu of sodium thiopental – the drug previously used to reduce unnecessary pain and suffering in execution, but which has not been available for use in executions since 2009. He reportedly said "I feel my whole body burning" during the execution.[2]

Over the last several years, many domestic and foreign pharmaceutical companies have objected to the use of their products in executions[3] and European governments, which are adamantly opposed to capital punishment, have sought to restrict export of drugs to the U.S. that will be used in executions.[4] These developments have led to acute shortages of the drugs used by nearly all capital jurisdictions in lethal injection. In the face of these shortages, states procured substandard supplies of sodium thiopental, resulting in the Drug Enforcement Agency's seizure of multiple states' supplies. In response, states have turned to compounding pharmacies, which are often unregulated and whose contaminated products have resulted in illness and death of medical patients across the U.S.[5] The very laws and rules governing execution are fluid in many states, fluctuating based on the availability of myriad drugs that could potentially be used to execute an inmate. States have enacted laws to shield execution protocols from freedom of information requests – or even invoked a "state secret" doctrine – to prohibit public dissemination of information on the lethal injection process or origin of lethal injection drugs.[6]

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1 Alan Johnson, *Inmate's death called 'horrific' under new, 2-drug execution*, Columbus Dispatch, Jan. 17, 2014.

2 Charlotte Atler, *Michael Lee Wilson Executed Using Pentobarbital, Prison Officials Tell TIME*, TIME.com, Jan. 10. 2014, at http://nation.time.com/2014/01/10/oklahoma-convict-who-felt-body-burning-executed-with-controversial-drug/#ixzz2vy3GtazY.

3 Deborah W. Denno, *Lethal Injection Chaos Post*-Baze 34-40 (Nov. 13, 2013), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328407 (forthcoming publication 102 Georgetown L. J., 5 (2014)) (describing various drugmakers' decisions to cease or limit manufacture and end use of their pharmaceuticals in executions, including Hospira, Lundbeck, Hikma and German healthcare provider Fresenius Kabi).

4 *Id.* at 34-40.

5 *See infra* note 29.

6 Georgia law classifies as a "confidential state secret" the "identifying information of any person

**Recommendation 36. Jurisdictions should rely on the most current scientific knowledge to develop protocols that minimize the risk of pain or suffering, which currently demands the adoption of a one-drug protocol.**

Lethal injection is the act of injecting an inmate with a fatal dose of drugs for the purpose of causing the inmate's immediate death. Lethal injection is used for capital punishment by the federal government and every one of the 32 states where the death penalty has not been abolished. In 2007, the U.S. Supreme Court in *Baze v. Rees* found that execution by a three-drug cocktail of sodium thiopental, pancuronium bromide, and potassium chloride does not violate the U.S. Constitution.[7] At the time of the Supreme Court's *Baze* decision, most death penalty states used the three-drug combination for lethal injections.[8] The sodium thiopental induces unconsciousness; the pancuronium bromide causes muscle paralysis and respiratory arrest; and the potassium chloride stops the heart.[9]

- *Sodium Thiopental* is an ultra-short acting barbiturate that is used for anesthesia induction. When sodium thiopental reaches the brain, it causes an unconscious state. A full medical dose of sodium thiopental reaches the brain in 30 seconds. The dose used for lethal injection is around 2-5 grams, much higher than the typical anesthesia dose of 0.35 grams.[10]

- *Pancuronium Bromide*, also called *Pavulon*, is a non-depolarizing muscle relaxant. After it is injected into a person's bloodstream, the entire muscle system is paralyzed and the respiratory system is shut down. It has no anesthetic properties and does not reduce pain. Such paralysis would preclude a person from communicating pain or distress. The dose used for lethal injection is 0.2 mg/kg, sufficient to causes 4 to 8 hours of paralysis.[11]

- *Potassium Chloride* is an electrolyte. A lethal injection of potassium chloride affects the electrical conduction of the heart muscle and ultimately stops the cardiac cells from generating impulses. A lethal dose is 100 mEq, about 10 times the usual intravenous dosage.[12]

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or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence…" Ga. Code § 42-5-36(d)(2) (2013).

7 *Baze v. Rees*, 553 U.S. 35 (2008).

8 *Id.; see also* Death Penalty Information Center, State by State Lethal Injection, at www.deathpenaltyinfo.org.

9 *Baze,* 553 U.S. at 44.

10 *See Ex Parte O'Brien*, 190 S.W.3d 677, 681 & n.12 (Tex. Crim. App.) (Cochran, J., concurring).

11 University of California School of Law Death Penalty Clinic, *The Drugs and the Process*, at http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/documents/kit/drugs.pdf.

12 University of California School of Law Death Penalty Clinic, *History of Lethal Injection Protocol*, at

The three drugs must be administered in the proper order to achieve the desired effect and minimize pain and suffering. The injection of "pancuronium bromide and potassium chloride, either separately or in combination, would result in a terrifying excruciating death," if injected into a conscious person.[13] Without the proper dose of anesthesia, the inmate will experience both the conscious suffocation caused by the pancuronium bromide and the excruciating pain caused by the potassium chloride, but will appear peaceful to observers.[14] Thus the proper administration of anesthesia is crucial for the humane execution of an inmate.

The lethal injection systems most states implement create a high risk of improper administration of anesthesia. One problem is that the administered dosage of anesthesia does not completely anesthetize all inmates, some of whom have been drug abusers for many years. Another problem is improper drug preparation. Before injecting sodium thiopental, the execution team must prepare the drug and load it into syringes. One dose of thiopental must be mixed from six separate kits of 0.5 grams of powder, each of which must be mixed individually.[15] This process requires numerous steps and many opportunities for error, especially if the execution team members are not trained medical professionals.[16]

Administering the thiopental into the vein also poses issues. There have been numerous reports of execution team members being unable to find inmates' veins. In one report from Ohio, the execution team failed for two hours to find a suitable vein to execute a prisoner.[17] In another case, the needle was improperly inserted toward the prisoner's hand rather than his body, causing the drug's reaction to be delayed.[18] Problems also can occur upon the insertion of the IV into the vein. Certain drugs require different rates of injection and inserting the drug too vigorously can affect how fast the chemicals are absorbed by the body. These risks would be diminished with proper facilities and medically trained personnel, but without such, the three-drug cocktail poses a risk of avoidable inmate pain and suffering.

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http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/documents/kit/history.pdf.

13 *Harbison v. Little*, 511 F. Supp. 2d 872, 884 (M.D. Tenn. 2007).

14 Brief for Petitioners at 10-11, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439), 2007 WL 3307732 at *10-*11.

15 Brief for Petitioners at 12, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439), 2007 WL 3307732 at *12.

16 *See, e.g.*, *Morales v. Tilton*, 465 F. Supp. 2d 927, 980 (N.C. Cal. 2006) ("Among other things, [execution] team members' admitted failure to follow the simple directions provided by the manufacturer of sodium thiopental further complicates the inquiry as to whether inmates being executed have been sufficiently anesthetized).

17 Michael L. Radelet, Examples of Post-*Furman* Botched Executions (March 27, 2014), at http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions#_edn43.

18 Elizabeth Cohen, Lethal Injection Creator: Maybe It's Time to Change Formula, CNN, at http://articles.cnn.com/2007-05-07/health/lethal.injection_1_sodium-thiopental-lethal-injection-lethal-three-drug-cocktail?_s=PM:HEALT.

Moreover, as states devise new methods of execution and procure new sources of execution drugs in light of shortages, *Baze* has effectively been rendered moot. The Committee, therefore, urges states to develop methods that attempt to minimize the risk of physical pain or suffering beyond that which is inherent in an execution. States are urged to adopt a one-drug protocol that achieves death by an overdose of a single anesthetic or barbiturate, as opposed to the three-drug method. A one-drug method would decrease the problems associated with drug administration and eliminate the risks from using paralyzing or painful chemical agents. In Oregon, the only state with legalized physician-assisted suicide, patients take an overdose of barbiturate.[19] The one-drug method is also preferred over the three-drug method by veterinarians for euthanizing animals because the one-drug method is more humane and less prone to error.[20]

The choice of the specific drugs used in lethal injections should be revisited periodically. States should base their choices on the latest scientific knowledge about the effects of such drugs and not base their decisions on the availability of drugs alone. Further, any changes to lethal injection protocols should include meaningful input from recognized and legitimate scientific experts on the effects of such drugs on humans.

### Recommendation 37. Jurisdictions should act with transparency in the development and administration of lethal injection protocols.

Over the last several years, states have scrambled to revise existing protocols and adopt new ones for execution by lethal injection. According to Professor Deborah Denno, who examined over 300 cases involving litigation over the method of execution in light of *Baze* and execution drug shortages, death penalty states have "modif[ied] virtually any aspect of their lethal injection procedures with a frequency that is unprecedented among execution methods in this country's history. There have been more changes in lethal injection protocols during the past five years than there have been in the last three decades."[21]

Execution warrants in many of these states have been issued, even though the drugs needed to execute the prisoner are not available. As Denno points out, states have "turn[ed] to increasingly nontraditional sources of drugs, such as compounding pharmacies," resulting

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[19] Daniel Engber, *How Does Assisted Suicide Work?*, SLATE, Oct. 6, 2005, at http://www.slate.com/articles/news_and_politics/explainer/2005/10/how_does_assisted_suicide_work.html (noting that the patient takes one of two kinds of barbiturates – Seconol or Nembutal).

[20] For example, "Due to the risk that pancuronium bromide could cause an animal to suffocate to death while paralyzed but fully awake, the use of the drug on animals for purposes of euthanasia is prohibited in Tennessee by the Nonlivestock Humane Death Act." *Harbison*, 511 F. Supp. 2d at 883 (quoting Tenn. Code Ann. § 44–17–301, *et seq*.).

[21] Denno, *supra* note 3, at 5.

in "overwhelming criticism and legal challenges."[22] Many of the new methods of execution significantly depart from the protocol evaluated by the U.S. Supreme Court in *Baze*.

In response, the states "have intensified their efforts to obscure information regarding the development and implementation of their lethal injection protocols."[23] This poses an unacceptable risk that inmates will face an unnecessarily cruel and painful death, violative of the U.S. Constitution. States such as Arkansas, Georgia, South Dakota and Tennessee have recently passed laws to keep secret the sources of drugs to be used in execution.[24] After Michael Lee Wilson's execution, discussed earlier in this chapter, the Oklahoma corrections department "refused to say where Wilson's injection was made, who sold it to the state and whether it had been tested."[25] Such secrecy undermines the public's faith in the integrity of the justice system as it conceals from the public, lawyers, and those facing execution critical information about the lawfulness and reality of states' execution procedures.

In lieu of current practices, the initial investigation, drafting, review, adoption, revision and implementation of lethal injection protocols should be handled in a transparent manner that allows for appropriate levels of legal, media and public scrutiny. States should allow for public review and comment before finalizing a protocol. States should make their protocols readily available to the public and media, including by posting on their department of correction website. Such transparency should include the nature, characteristics and origins of the specific drugs used in lethal injections.

All administrative decisions related to lethal injection protocols should be made in a manner that complies with the provisions of any applicable administrative procedure act, although such compliance alone may not be sufficient to achieve the appropriate level of transparency. All public records related to lethal injections should be treated as subject to the provisions of any applicable public disclosure law. Such transparency need not include the identities of specific persons involved in the administration of executions. However, such specific information, along with details of prison security arrangements in connection with a pending execution, or other information that might give rise to a significant security risk, should be made available, under seal if necessary, upon issuance of a valid court order.

**Recommendation 38. Jurisdictions should use only drugs obtained in compliance with all laws and approved by the U.S. Food and Drug Administration for use in humans and should take appropriate measures to ensure the quality of the drugs.**

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22 *Id.* at 58.

23 *Id.* at 59.

24 *Id.* at 52-54.

25 Katie Fretland, *Oklahoma scrambles to find lethal injections for two imminent executions*, Colorado Independent, Mar. 18. 2014, at http://www.coloradoindependent.com/146553/oklahoma-scrambles-to-find-lethal-injections-for-two-imminent-executions.

The specific drugs used in lethal injections should be approved by the federal Food and Drug Administration ("FDA"). Although many states require the use of sodium thiopental in their lethal injection procedures, the shortage of the drug for executions has caused states to scramble to find alternative supplies or to begin using a different drug as a replacement. States have begun using pentobarbital in place of sodium thiopental.[26] However, pharmaceutical company Lundbeck, the Danish manufacturer of pentobarbital, will not supply the drug for executions in the U.S.[27]

As a result, some states, including Arizona, California and Georgia, have acquired pentobarbital from sources outside the United States, including Dream Pharma, a company in the United Kingdom that operated out of the back of a driving academy.[28] This extralegal acquisition caused a controversy regarding what role the FDA should play in regulating the supply of drugs used in executions. It also appears that even more states have resorted to the use of compounding pharmacies to obtain drugs for execution by lethal injection. Compounding pharmacies have traditionally been regulated by the states, not by the FDA.[29] Consequently, states are requesting drugs from the very entities that the state is responsible for regulating. Lax state regulations mean that drugs produced in compounding pharmacies have been subjected "to less rigorous testing, and may include contaminants that cause significant pain."[30]

The Committee believes that states and the FDA should ensure that lethal injection drugs are lawfully obtained in compliance with all relevant laws. In addition to using FDA-approved drugs, states should take additional measures to ensure the effectiveness of the specific drugs used in lethal injections, including appropriate procedures to ensure the proper transportation, handling, storage and use of the drugs. States should implement a strict "chain of custody" requirement to minimize the risk of adulteration or contamination of the drugs. They should also require a check of the expiration date before use to ensure that the drugs retain their effectiveness for their intended purposes.

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26 State by State Lethal Injection, *supra* note 8.

27 Atler, *supra* note 2.

28 Death Penalty Information Center, Picture of Dream Pharma, at http://www.deathpenaltyinfo.org/picture-dreampharma.

29 Andrew Pollack, *Checks Find Unsafe Practices at Compounding Pharmacies*, N.Y. Times, Apr. 12, 2013. In November 2013, Congress passed a law to clarify and enhance the FDA's role in overseeing compounding pharmacies, but the bill falls "short of giving the agency fuller regulatory power." Sabrina Tavernise, *Bill on Drug Compounding Clears Congress a Year After a Meningitis Outbreak*, N.Y. Times, Nov. 18. 2013.

30 Atler, *supra* note 2. In 2012, for example, "tainted injectable drugs from a compounding pharmacy in Massachusetts caused a meningitis outbreak that killed 64 people across the country, according to the Centers for Disease Control and Prevention." Pollack, *supra* note 29.

Qualified personnel who are independent of the correctional agency responsible for the administration of executions should conduct or supervise the development and implementation of these quality assurance measures. States should periodically review the quality assurance measures and their implementation and revise them when necessary.

**Recommendation 39. Jurisdictions should ensure that qualified medical personnel are present at executions and responsible for all medically-related elements of executions.**

The physical process of preparing drugs, syringes, IVs, etc. involved in a lethal injection execution may be straightforward, but it is susceptible to error. Such errors can, and have, resulted in botched executions. For example, in 2006, Florida executed Angel Diaz by lethal injection. After the first injection was administered, Diaz continued to move, and was squinting and grimacing as he tried to mouth words. A second dose was administered, and 34 minutes passed before Diaz was declared dead. At first a spokesperson for the Florida Department of Corrections claimed that this was because Diaz had a form of liver disease.[31] After performing an autopsy, the medical examiner stated that Diaz's liver was undamaged, but that the needle had gone through Diaz's vein and out the other side, so the deadly chemicals were injected into soft tissue, rather than the vein.[32]

Execution team members who are responsible for medically-related functions, like preparing drugs and syringes, setting IVs, administering drugs, assessing the medical state of the inmate and declaring the time of death should have the appropriate medical training and expertise that allows them to properly perform these functions. Such training and expertise should, at a minimum, require that team members are licensed, practicing doctors, nurses or emergency medical technicians who are responsible for performing functions in their day-to-day practice that are similar to those they will perform at the execution.

This requirement may, however, conflict with various professional medical societies' policies or codes of medical ethics. For example, since 1992, the American Medical Association's Code of Medical Ethics has specifically forbidden any participation by medical doctors in executions, with the exception of prescribing sedation beforehand and later signing the death certificate.[33] The National Association of Emergency Medical Technicians issued a similar position statement strongly opposing the participation in capital punishment by an

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[31] Terry Aguayo, *Florida Death Row Inmate Dies Only After Second Chemical Dose*, N.Y. Times, Dec. 15, 2006; *see also* Radelet, *supra* note 17.

[32] *Id.*

[33] American Medical Association, Opinion 2.06 – Capital Punishment, at http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page.

emergency medical technician, paramedic or other emergency medical practitioners.[34] At the same time, some states, such as Georgia and Oregon, have laws forbidding sanctions against medical professionals who participate in executions. Oregon, in fact, affirmatively stipulates that medical professionals be involved in the execution procedure.[35] Doctors and other medical professionals should not be compelled to violate medical ethics. The result may be that medical professionals will not be able to be present for executions and therefore a state may not be able to complete an execution while adhering to these recommendations. However, so high are the risks of conducting executions without the involvement of medical professionals that the Committee maintains its recommendations for medical professionals to be present and responsible for all medically-related elements of executions despite this possibility.

[34] National Association of Emergency Medical Technicians, NAEMT Position Statement: EMT or Paramedic Participation in Capital Punishment, at http://www.naemt.org/Libraries/Advocacy%20Documents/1-26-10%20EMT%20or%20Paramedic%20Participation%20in%20Capital%20Punishment.sflb.

[35] Alan Gustafson, *State DOC Makes Changes to Execution Procedure*, Statesman Journal, Nov. 18, 2011, at http://www.statesmanjournal.com/article/20111118/NEWS/111180329/State-DOC-makes-changes-execution-procedure.

# Appendix I
## State by State Lethal Injection

Courtesy of the Death Penalty Information Center and available at
http://www.deathpenaltyinfo.org/state-lethal-injection
(last visited Mar. 24, 2014)

### State-by-State Lethal Injection Information

| State | Used Pentobarbital in Executions? | Used One-Drug Protocol? | Latest Information |
|---|---|---|---|
| Alabama | Yes | No | Sodium thiopental seized by DEA in March 2011 (ACLU of Northern CA, 5/17/11)<br><br>Began using pentobarbital in three-drug protocol on May 19, 2011 (Reuters, 5/19/11) |
| Arizona* | Yes | Yes | Began using pentobarbital in three-drug protocol on May 25, 2011 (AP, 5/25/11)<br><br>Switched to one-drug protocol (pentobarbital) on February 29, 2012 (AP, 2/29/12)<br><br>Execution protocol has been changed to allow witnesses to watch all of the execution. Previously, witnesses could not watch the insertion of IV lines (Associated Press, 6/7/12)<br><br>Reports that state has at least enough pentobarbital for two more executions (AP, 9/19/12) |

| State | Used Pentobarbital in Executions? | Used One-Drug Protocol? | Latest Information |
|---|---|---|---|
| Arkansas* | No | Intends to | Turned over sodium thiopental to DEA in July 2011 (AP, 7/21/11)<br><br>Obtained unspecified amount of sodium thiopental from British company (AP, 1/21/11)<br><br>Executions on hold because lethal injection law violates state constitution (2012)<br><br>Legislature passed law rewriting execution protocol, calls for one-drug procedure, but does not specify drug (AP, 2/20/13)<br><br>Announced plans to use phenobarbital in executions. No other state has used or plans to use the drug in executions. (AP, 4/16/13) State has now abandoned plans to use phenobarbital. (Arkansas News Bureau, 6/17/13). |
| California* | No | No | Obtained sodium thiopental from British company, enough for 86 executions (AP, 1/21/11)<br><br>Executions on hold due to lethal injection challenge in courts; the governor has recommended that the Dept. of Corrections consider changing to a 1-drug protocol |

| State | Used Pentobarbital in Executions? | Used One-Drug Protocol? | Latest Information |
|---|---|---|---|
| California, cont.* | | | A Superior Court judge rejected requests to set execution dates, saying he did not have jurisdiction to order the one-drug procedure that has never been used in California (AP, 9/11/12)<br><br>State is no longer defending its 3-drug protocol and intends to implement a 1-drug protocol (Mercury News, 7/11/13) |
| Colorado | No | No | Executions on hold due to lethal injection challenge in courts and action by the governor staying executions over concerns about the death penalty generally<br><br>Pentobarbital is included as a backup for sodium thiopental in Colorado's lethal injection protocol (Associated Press, 8/23/13) |
| Connecticut | No | No | Uses three-drug protocol; death penalty abolished, but 11 inmates remain on death row |
| Delaware | Yes | No | Began using pentobarbital in three-drug protocol on July 29, 2011 (delawareonline.com, 7/29/11) |
| Florida | Yes | No | Began using pentobarbital in three-drug protocol on September 28, 2011 (Washington Post, 9/29/11) |

| State | Used Pentobarbital in Executions? | Used One-Drug Protocol? | Latest Information |
|---|---|---|---|
| Florida, cont. | | | Announced plans to use midazolam as the first drug in a new three-drug protocol. Began using midazolam in executions on October 15, 2013 |
| Georgia* | Yes | Yes | Used foreign-bought sodium thiopental in 2 executions before sodium thiopental was seized by DEA in March 2011 (ACLU of Northern CA, 5/17/11)<br><br>Began using pentobarbital in three-drug protocol on June 23, 2011 (Reuters, 6/23/11)<br><br>Supply of 17 vials of pentobarbital (enough for about 6 executions) expires March 1, 2013 (AP, 2/18/13)<br><br>Began using one-drug protocol on February 21, 2013 (The Guardian, 2/21/13) |
| Idaho | Yes | Yes | Began using pentobarbital in three-drug protocol on November 18, 2011<br><br>First used one-drug method (pentobarbital) on June 12, 2012 |
| Indiana | No | No | Uses three-drug protocol |
| Kansas | No | No | Statute does not specify drugs; no executions since in modern era |

| State | Used Pentobarbital in Executions? | Used One-Drug Protocol? | Latest Information |
|---|---|---|---|
| Kentucky | Intends to | Intends to | Sodium thiopental was seized by DEA in April 2011 (ACLU of Northern CA, 5/17/11); a state judge has ordered the prison system to consider using a 1-drug protocol<br><br>New execution method calls for 1- or 2-drug (midazolam and hydromorphone) lethal injection, depending on availability of drugs. Both protocols would employ intravenous application. New protocol takes effect 2/1/13, but must be approved by a judge before executions can resume. (AP, 1/31/13) |
| Louisiana | Intends to | Intends to | Announced change to one-drug procedure using pentobarbital (Baton Rouge Advocate, 2/6/13)<br><br>Execution scheduled for 2/13/13 has been stayed. Judge requires additional information on new execution procedure (AP, 2/7/13)<br><br>Announced change to two-drug execution procedure- midazolam and hydromorphone (Times-Picayune, 1/27/14) |
| Maryland | No | No | Executions on hold until lethal injection procedures are enacted; death penalty abolished, 5 inmates remain on death row |

| State | Used Pentobarbital in Executions? | Used One-Drug Protocol? | Latest Information |
|---|---|---|---|
| Mississippi | Yes | No | Began using pentobarbital in 3-drug protocol on May 10, 2011 (AFP, 5/10/11)<br><br>5th U.S. Circuit Court of Appeals has agreed to hear challenge to Mississippi's lethal injection protocol; executions on hold (Associated Press, 8/4/12)<br><br>Said it will use pentobarbital from a compounding pharmacy as the first drug in a 3-drug protocol (AP, 3/20/14) |
| Missouri | Yes | Yes | Announced plans to switch to one-drug protocol using 2 grams of propofol(Missouri Department of Corrections, 5/15/12)<br><br>Announced plans to switch to pentobarbital, which will be obtained from a compounding pharmacy (AP, 10/22/13)<br><br>Began using pentobarbital in one-drug protocol on November 20, 2013 |
| Montana | No | No | Modified protocol to allow for use of pentobarbital (KXLH.com, 8/15/11) |

| State | Used Pentobarbital in Executions? | Used One-Drug Protocol? | Latest Information |
|---|---|---|---|
| Montana, cont. | | | District Court judge ruled Montana's execution procedure unconstitutional (Canadian Press, 9/6/12)<br><br>Proposed two-drug protocol is being challenged in court (ACLU of Montana, 7/15/13) |
| Nebraska* | No | No | Obtained sodium thiopental from Indian company, enough for 166 executions (Lincoln Journal Star, 1/21/11 and 1/27/11)<br><br>Carey Moore execution stayed to allow time for legal challenge of imported sodium thiopental (Lincoln Journal Star, 5/25/11)<br><br>Obtained new supply (485 grams, or enough for about 100 executions) of sodium thiopental from Swiss company (AP, 11/3/11)<br><br>Naari AG, the Swiss company that produced Nebraska's supply, asked Nebraska to return it. Naari gave the drug to an Indian man "who said he wanted to use it and eventually sell it as an anesthetic in Zambia," and did not intend it to be used in executions. (CBS News, 11/30/11). The FDA has ordered NE to turn over any foreign |

| State | Used Pentobarbital in Executions? | Used One-Drug Protocol? | Latest Information |
|---|---|---|---|
| Nebraska, cont.* | | | Sodium thiopental. NE has refused. FDA is appealing federal court ruling requiring it to recall foreign thiopental (2012) |
| Nevada | No | No | Executions on hold due to lethal injection challenge in courts |
| New Hampshire | No | No | Statute does not specify drugs; no executions in modern era |
| New Mexico | No | No | Abolished death penalty in 2009, two inmates remain on death row and may face execution by lethal injection |
| North Carolina | Intends to | Intends to | Executions on hold due to lethal injection challenge in courts<br><br>Secretary of Public Safety Frank Perry approved a one-drug protocol for lethal injections (WRAL, 11/5/13) |
| Ohio | Yes | Yes | Began using pentobarbital in one-drug protocol on March 10, 2011 (Washington Post, 3/11/11)<br><br>Supply of pentobarbital expires September 2013 (AP, 9/19/12) |

| State | Used Pentobarbital in Executions? | Used One-Drug Protocol? | Latest Information |
|---|---|---|---|
| Ohio, cont. | | | Department of Rehabilitation and Correction has requested that doctors participate in executions and be protected from professional sanctions for doing so (AP, 2/15/13)<br><br>Announced plans to obtain pentobarbital from a compounding pharmacy (AP, 10/4/13)<br><br>Began using a 2-drug protocol (midazolam and hydromorphone) on January 16, 2014 (New York Times, 1/16/14) |
| Oklahoma | Yes | No | Began using pentobarbital in three-drug protocol on December 16, 2010 (CBS News, 12/17/10)<br><br>Pentobarbital available for 20 executions (AP, 9/19/12) |
| Oregon | No | No | Reselling execution drugs through reverse wholesaler after Gary Haugen execution was cancelled (The Oregonian, 1/3/12) |
| Pennsylvania | No | No | Statute does not specify drugs |
| South Carolina* | Yes | No | Sodium thiopental was seized by DEA in April 2011 (ACLU of Northern CA, 5/17/11) |

| State | Used Pentobarbital in Executions? | Used One-Drug Protocol? | Latest Information |
|---|---|---|---|
| South Carolina, cont.* | | | Began using pentobarbital in three-drug protocol on May 6, 2011 (Reuters, 5/6/11) |
| South Dakota* | Yes | Yes | Department of Corrections officially altered lethal injection procedures to allow for a one-, two- or three-drug execution process. Changes to procedure will allow either sodium thiopental or pentobarbital to be used in one-drug protocol, or as initial drug in other protocols. State has obtained a supply of pentobarbital (Sioux Falls Argus Leader, 10/22/11)<br><br>Began using pentobarbital in one-drug protocol on October 15, 2012 (Associated Press, 10/16/12) |
| Tennessee* | Intends to | Intends to | Sodium thiopental was seized by DEA in March 2011 (ACLU of Northern CA, 5/17/11)<br><br>Has no supply of sodium thiopental or pancuronium bromide (AP, 1/14/13)<br><br>Announced plans to switch to a one-drug protocol using pentobarbital (AP, 9/28/13) |

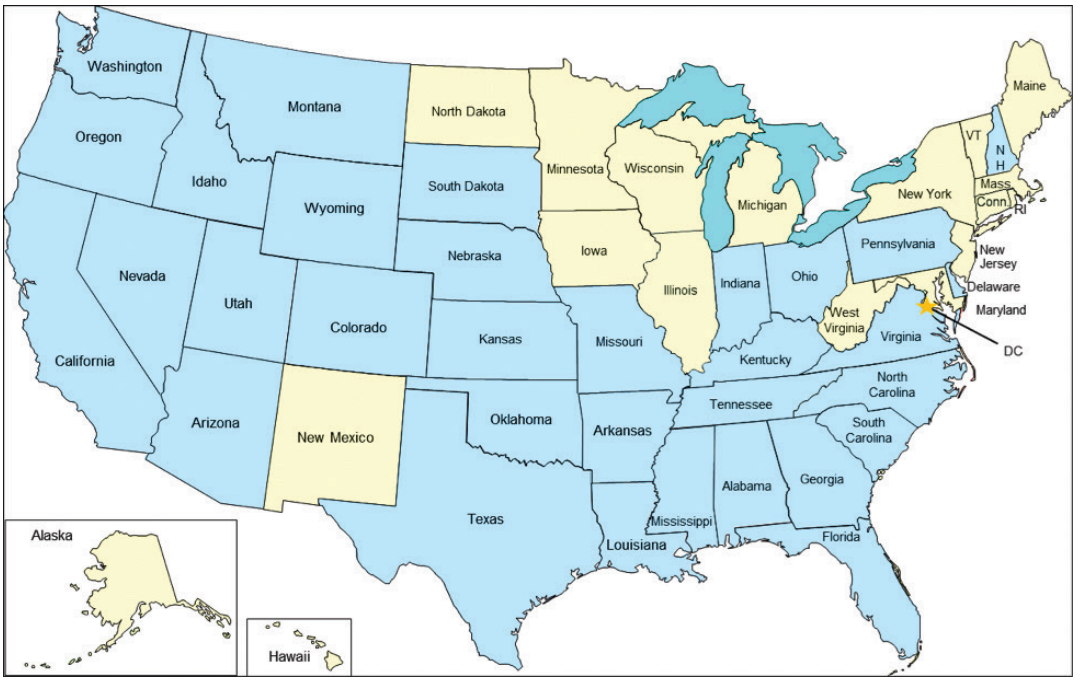
| State | Used Pentobarbital in Executions? | Used One-Drug Protocol? | Latest Information |
|---|---|---|---|
| Texas | Yes | Yes | Began using pentobarbital in three-drug protocol on May 3, 2011 (Wall Street Journal, 5/4/11)<br><br>As of May 21, 2012, Department of Criminal Justice has enough lethal injection drugs for 23 executions (Associated Press, May 21, 2012)<br><br>Began using pentobarbital in one-drug protocol on July 18, 2012 (BBC News, July 18, 2012)<br><br>Enough pentobarbital for 23 executions (AP, 9/19/12); drugs expire in September 2013 and state is seeking alternatives.<br><br>Announced it will continue to use pentobarbital but did not indicate the source for the drug (AP, Sept. 20, 2013). Source revealed to be a compounding pharmacy (AP, 10/2/13) |
| Utah | No | No | Uses three-drug protocol |
| Virginia | Yes | No | Began using pentobarbital in three-drug protocol on August 18, 2011 (Washington Post, 8/18/11) |
| Washington | No | Yes | Choice of 1- or 3-drug protocol; used one-drug (sodium thiopental) in execution of Cal Brown on 9/10/10 |

| State | Used Pentobarbital in Executions? | Used One-Drug Protocol? | Latest Information |
|---|---|---|---|
| Wyoming | No | No | Uses three-drug protocol |

* marks states that received letters in April 2012 from the FDA requesting that they turn over their foreign-sourced lethal injection drugs, in accordance with the U.S. District Court ruling in *Beaty v. FDA* (Lincoln Journal Star, 4/18/12)

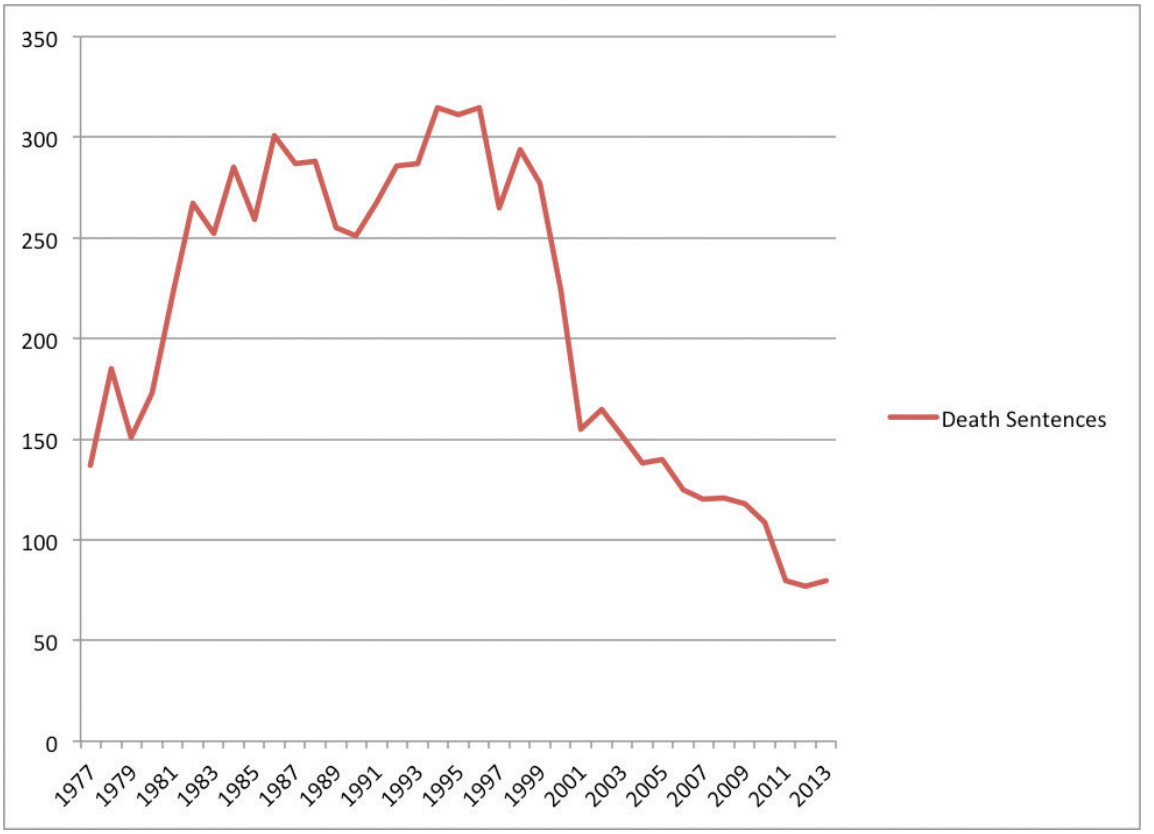
# Appendix II
## Death Penalty Statistics

# Figure 1
## States with the Death Penalty as of January 1, 2014

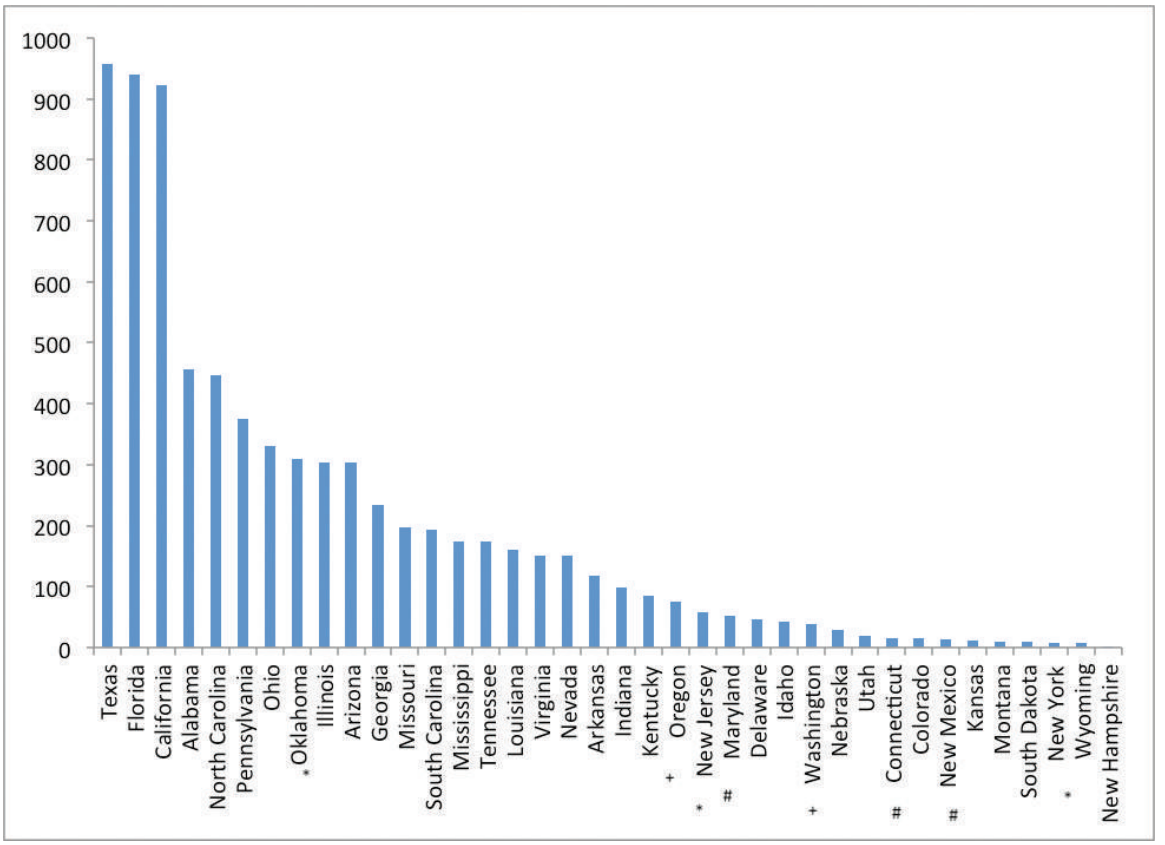



*The death penalty is also an available punishment in federal law and the military.*

# Figure 2
## Death Sentences by Year 1977-2013



# Figure 3
## Death Sentences by State (1977 - March 1, 2014)

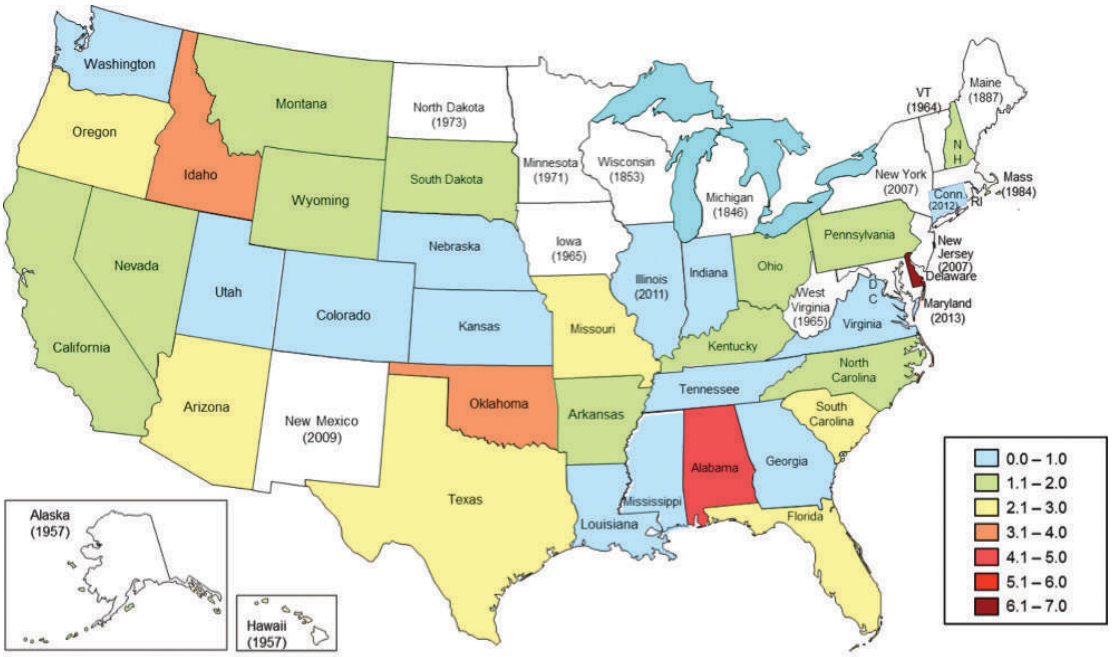



*** Illinois, New York, and New Jersey no longer have the death penalty and all death sentences were commuted to life imprisonment in these states.**

**# Maryland, Connecticut, and New Mexico abolished the death penalty; however, prisoners sentenced prior to these states' repeal of capital punishment remain on death row.**

**+ Washington and Oregon are presently under a suspension of executions issued by the governor.**

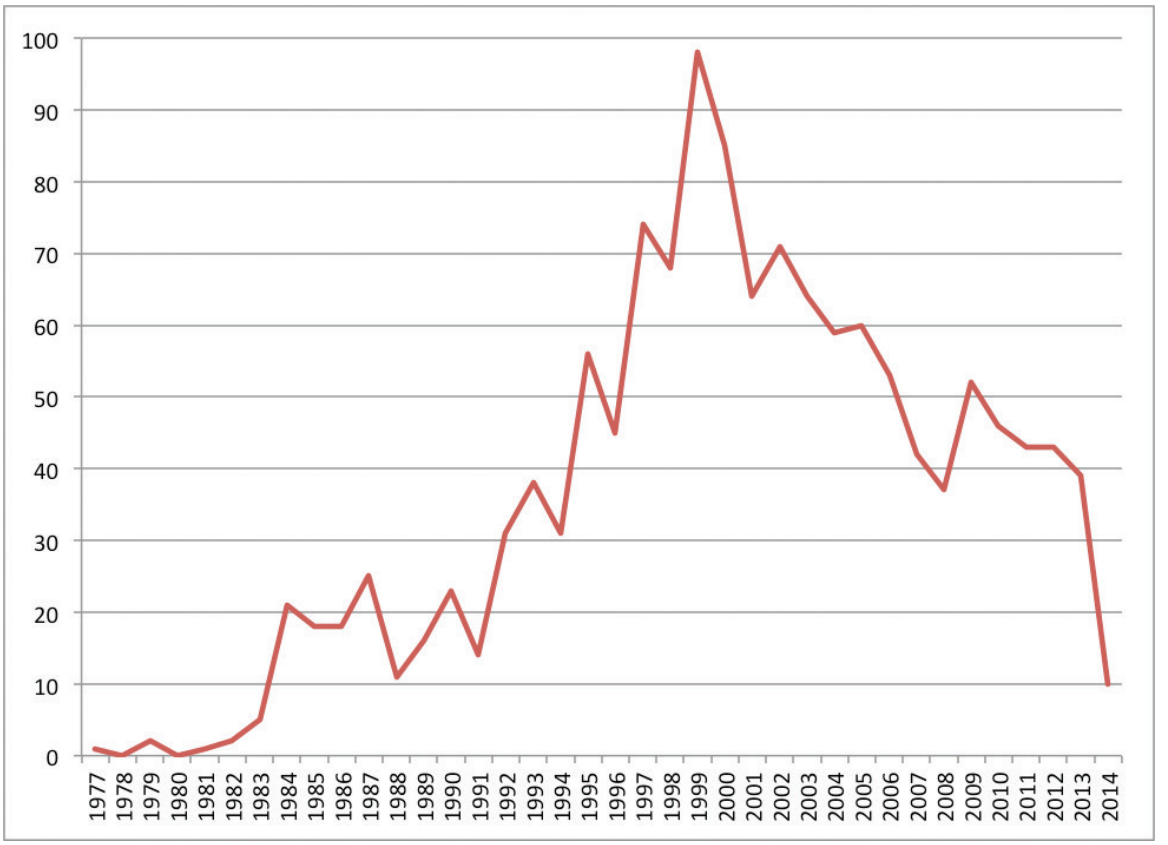
# Figure 4
## Death Sentencing Rate Average* 2005 – 2010



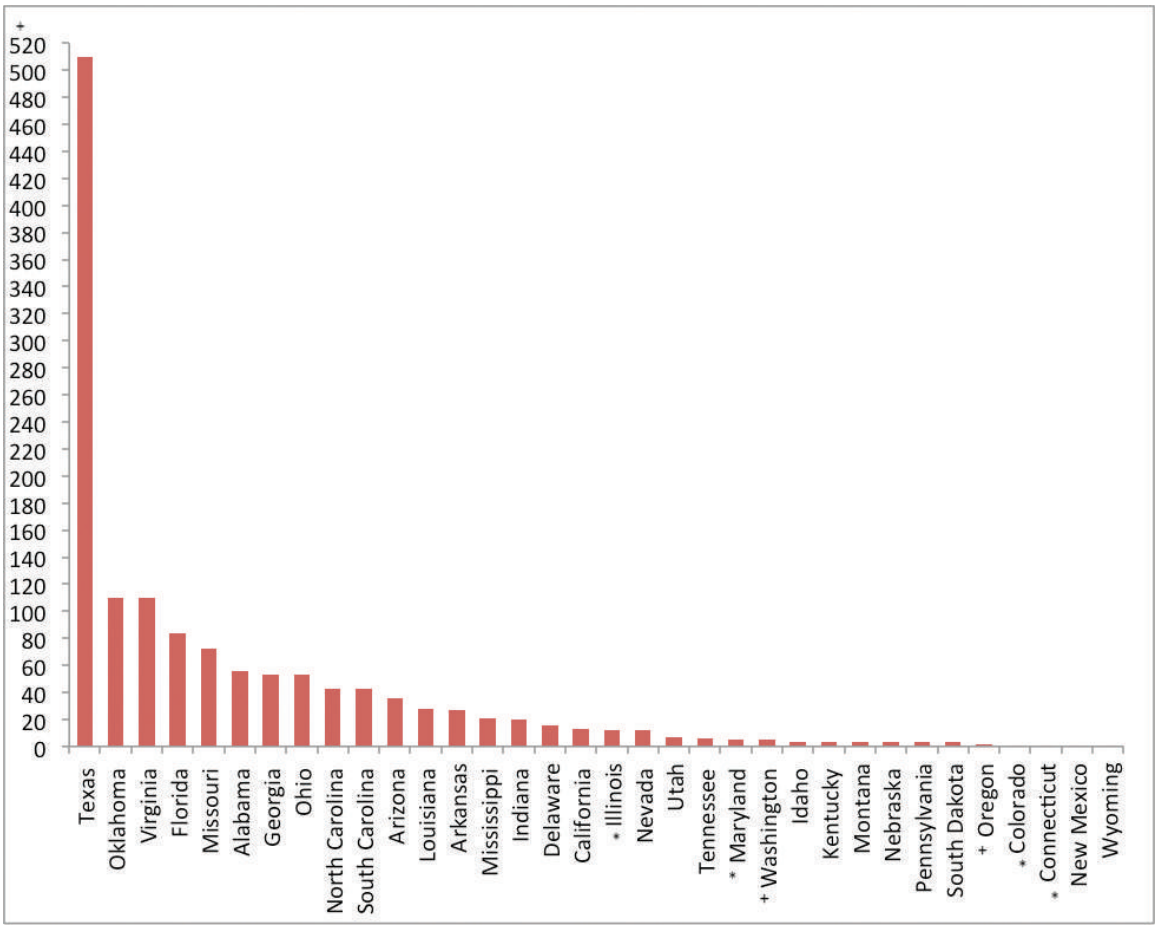

*Dates below state names show year capital punishment was abolished in that state.*

***The death sentencing rate is the number of death sentences given as compared to the number of murders in each state.**

# Figure 5
## Executions by Year (1977 - March 1, 2014)



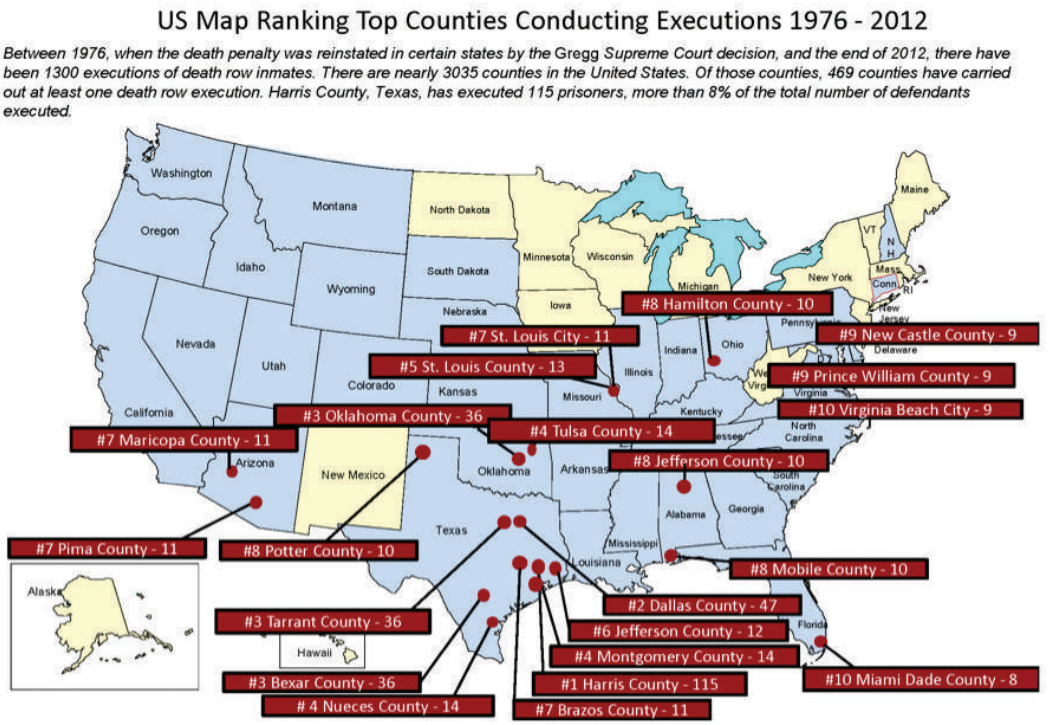
# Figure 6
## Death Sentences Imposed 2005 – 2010




*** Illinois, Maryland, Connecticut, and New Mexico abolished the death penalty between 2007 and 2013.**

**+ Washington and Oregon are presently under a suspension of executions issued by the governor.**

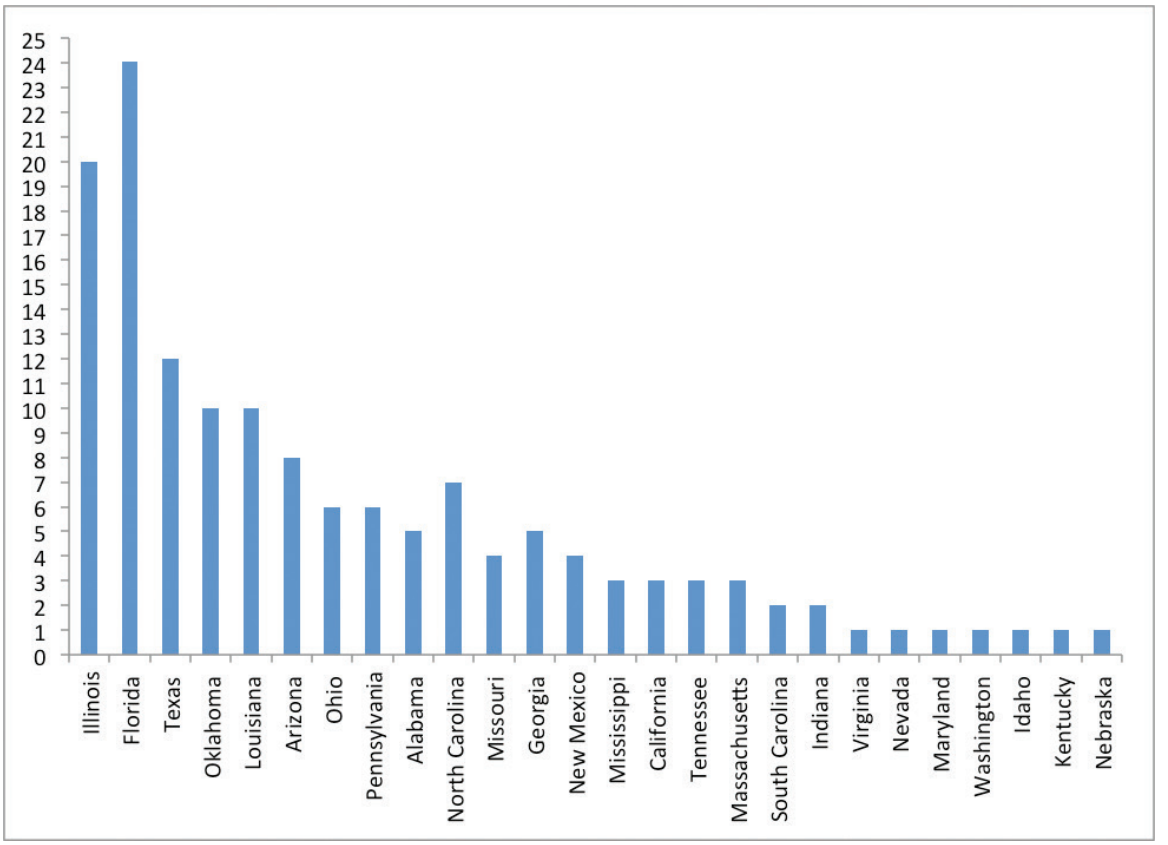
# Figure 7
## Executions by Year (1977 - March 1, 2014)




**This illustration is courtesy of the Death Penalty Information Center, available at**

http://www.deathpenaltyinfo.org/images/twopercent-map2.jpg

# Figure 8
## Exonerations by State (1976 - March 1, 2014)



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1200 18th Street, NW, Suite 1000 Washington, DC 20036 | Tel: 202.580.6920 | Fax: 202.580.6929 | info@constitutionproject.org