

## Blue-Ribbon Panel Proposes Reforms of Capital Punishment

By: Marcia Coyle

May 7, 2014

With Oklahoma's botched execution still a fresh memory, a bipartisan panel of criminal justice experts is recommending 39 steps to improve administration of the death penalty, including use of a deadly dose of a single anesthetic or barbiturate instead of the drug cocktail used in states that rely on lethal injection.

Calling its study one of the most comprehensive reviews ever done of the death penalty's application, a committee of Washington-based The Constitution Project identified systemic flaws from arrest to execution and offered proposals to remedy them.

"Without substantial revisions—not only to lethal injection, but across the board—the administration of capital punishment in America is unjust, disproportionate and very likely unconstitutional," said committee member Mark Earley, a former Republican attorney general of Virginia—whose state, during his tenure, carried out 36 executions.

In its lethal-injection recommendation, the committee said a one-drug protocol, such as the overdose of barbiturates Oregon authorizes during legalized physician-assisted suicide, would decrease problems associated with giving the drug cocktail and eliminate the risks from paralyzing or painful chemical agents. Veterinarians also prefer the one-drug method for euthanizing animals because it is more humane and less error-prone.

Among the recommendations made in the report, titled "Irreversible Error," are:

- 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. Law enforcement agencies should submit to DNA databanks unidentified profiles obtained from evidence in a capital case and DNA profiles of all convicted felons. Defendants should have access to databank searches.
- Custodial interrogations of a suspect in a homicide case should be videotaped or digitally recorded whenever practical. Video or audio recording of the entire custodial interrogation process should not require the suspect's permission.
- State and federal jurisdictions should adopt legislation to require that eyewitness identifications be conducted in accordance with best practices called for by prevailing scientific research.
- There should be a rebuttable presumption that a person with an 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.

- 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 convicted under a felony-murder theory alone.
- 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.
- 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 attorney's incompetence did not affect the outcome. 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.
- Judges should be prohibited from overriding a jury's recommendation of a sentence of less than death.
- All capital jurisdictions should establish charging review committees to review prosecutorial decisions in death-eligible cases. The committee would issue binding approval or disapproval of the proposed charges.

The Constitution Project, a nonpartisan organization that seeks to build consensus on interpretations of the law and solutions to policy questions, has been involved in the study of the death penalty for more than a decade. Its death penalty committee is now co-chaired by former Florida Chief Justice Gerald Kogan, former Texas Gov. Mark White and former Oklahoma City bombing prosecutor Beth Wilkinson, a partner in the Washington office of Paul, Weiss, Rifkind, Wharton & Garrison.

The committee also comprises former state attorneys general, state judges, law enforcement officers, law professors, religious leaders and others.

The committee was aided in its research by a team of attorneys, paralegals, legal secretaries and interns from Akin Gump Strauss Hauer & Feld. That team was led by Akin Gump partner Julia Sullivan and senior counsel Nicole Sprinzen.

White called the release of the committee report particularly timely because of President Obama's comments a week ago following the botched lethal-injection execution of Oklahoma inmate Clayton Lockett. Obama said that episode was an example of just one of a number of "significant problems" in the application of capital punishment.

He said he would ask Attorney General Eric Holder and others for "an analysis of what steps have been taken not just in this particular instance but more broadly in this area. I think we do have to, as a society, ask ourselves some difficult and profound questions around these issues."

"Our comprehensive report represents a bipartisan consensus of essential reforms agreed to by both death-penalty supporters and death-penalty opponents, and provides a detailed roadmap for the Department of Justice to follow," White said.

Although he said he has not reviewed the new report, Kent Scheidegger, legal director of the conservative Criminal Justice Legal Foundation, criticized The Constitution Project's previous death-penalty reports as "uniformly one-sided."

The primary problem is capital punishment today, he said, is "that thoroughly deserved sentences of brutal murderers take far too long to carry out. The Constitution Project has ignored this problem in the past and defined 'problems' solely from the murderers' viewpoint, and we expect they will again."