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.

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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.

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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

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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.