

# ***Irreversible Error***

## **Executive Summary**

This Summary has been prepared as an overview of the Black Letter Recommendations The Constitution Project's Death Penalty Committee issued in *Irreversible Error: Recommended Reforms for Preventing and Correcting Error in the Administration of Capital Punishment*. This document sets forth the proposed black letter law recommendations, as well as a short summary of each recommendation. Committee members have adopted only the Recommendations; the discussion following each Recommendation is meant to provide greater context for the reader by explaining the scope of identified problems and the rationale for the 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.**

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. 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. 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. 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. 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 conviction on defendants, their families and victims' families is beyond measure.

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.

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. 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 shall not escape or innocence suffer.” A prosecutor is required to “prosecute with earnestness and vigor,” however, the U.S. Supreme Court cautions that a prosecutor “may strike hard blows, [but] he is not at liberty to strike foul ones.” 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 the absence of explicit guidance, prosecutors’ offices across the country have taken widely divergent approaches to post-conviction claims of innocence. Institutional disincentives – such as the emphasis upon closing cases, a political climate that responds favorable to a “tough on crime” message – are likely to impede a wrongfully convicted prisoner’s effort to obtain full disclosure of potentially favorable or exculpatory evidence from prosecutors’ offices absent an explicit requirement. 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.

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.” 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 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.

**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 biological testing results. The need for this requirement is demonstrated by the United States Department of Justice’s recent failure to disclose to defendants and their attorneys the results of a nine-year review of forensic evidence resulting from misconduct at the FBI crime lab in the 1990s. Although the review of around 6,000 cases uncovered numerous crime lab errors, showing specific forensic evidence to be unreliable, these results were made available only to the prosecutors in the affected cases.

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 for 12 years that the forensic findings that contributed to his conviction were flawed. 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 American Bar Association 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 policies, 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.**
- 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.

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. The second model uses individual cases as a springboard for investigating and correcting systemic flaws. In the third model, independent commissions are created to both identify and correct the causes of wrongful convictions in individual cases and maintain pressure for continual systemic improvement.

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.

Innocence projects should become adequately funded, integral parts of the criminal justice system to ensure citizen monitoring of actual and potential abuses. Citizen monitoring can 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**

**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.**

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. The growing number of convictions that have been vacated because of DNA results has weakened the strong presumption that jury verdicts are correct.

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, 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. 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.

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.

**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. 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. Some prosecutors have also vigorously opposed giving defendants access to evidence for DNA testing, even where such evidence apparently came from the true perpetrator. 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.

**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 require 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 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 there is a failure 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. 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 offered 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 biological 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. More than 50 percent of the first 225 wrongful convictions overturned by DNA testing involved “unvalidated or improper” forensic science. 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. 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 not being legitimate.

To address these many concerns, 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).

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. The failure to test, or even submit for testing, pieces of evidence could result (and has resulted) in the wrong person being convicted or the failure to exonerate those who may already have been arrested but are awaiting trial.

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. In North Carolina, a 2010 audit found that State Bureau of Investigation ("SBI") agents withheld or distorted forensic evidence in 230 cases, including three cases that resulted in executions.

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. Only four states (Missouri, New York, Oklahoma, and Texas) require accreditation of their crime laboratories. Voluntary accreditation is in place in some jurisdictions.

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 limit a criminal defendant's ability to cross examine the scientist who conducted the test regarding the protocols used or even the technician's qualifications. These decisions make it all the more important for forensic laboratories to provide comprehensive testing 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 majority of forensic science laboratories are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency. This system leads to significant concerns related to the independence of the laboratory and its budget. Forensic scientists who serve in labs overseen 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 even affect the accuracy and results of forensic testing, but so subtly that the scientist is unaware that his or her judgment is being affected. 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.

### **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.**

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.” In that same case, *Cullen v. Pinholster*, Justice Sotomayor, joined by Justices Kagan and Ginsburg in dissent, 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.

Prior to 1996, a federal habeas court could grant a request for an evidentiary hearing if 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*, was modified by the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), which became law in 1996. Under AEDPA, if a claim is adjudicated on the merits in state court, a federal habeas court generally must limit its review to the state court record and may not conduct its own evidentiary hearing.

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. 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 of later-discovered evidence, such as biological evidence.

- 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 AEDPA, 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.” 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 and the habeas petitioner must show there was no reasonable basis for the denial of relief. AEDPA’s standard is difficult to meet and demands that state court decisions be given the benefit of the doubt, requiring petitioners to rebut the presumption of correctness of the state court’s determination by clear and convincing evidence.

While the Committee recognizes the importance of finality, it is simply unconscionable, particularly in a capital case, to enforce an unlawful conviction or sentence when a constitutional violation has occurred.

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## 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.

All fifty states and the District of Columbia have at least one police department engaged in recording interrogations in at least some cases. 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. Of the more than 312 wrongful convictions in the United States that have been overturned based on DNA evidence, nearly 25 percent involved a false confession or false incriminating statements. In each of those cases, DNA evidence proved that the confession was false. There is also evidence that false confessions occur primarily in more serious cases, especially homicide and other high-profile felony cases. In a 2004 study of 125 cases involving false confessions, more than 80 percent occurred in homicide cases, findings that suggest that the effect of false confessions may be disproportionately high in capital cases.

While the practice of videotaping custodial interrogations will not completely eliminate the risk of police obtaining a false confession, 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.

The Committee recommends the use of video with audio recording because of the ability to observe the demeanor and positioning of the interviewer and suspect, as well as the physical locality in which the interrogation is conducted, which can have a significant impact on the perceived voluntariness and reliability of the statement. Furthermore, the Committee recommends that, in those rare instances when video recording may be impracticable, either because of cost or because of limits on the availability of video equipment, law enforcement should use next-best recording methods, starting with audio recording. The report also recommends that police officers receive clear guidance that obligation to record applies to any “custodial interrogation,” a familiar term since the Supreme Court used it in *Miranda v. Arizona* in 1966.

**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:**

- a) notes that failure,

- b) permits the jury to give it such weight as the jury feels that it deserves, and, where appropriate,
- c) further permits the jury to use it as the basis for finding that the statement either was not made or was made involuntarily.

Suppressing a confession that is not videotaped is, in this Committee's view, sometimes a necessary remedy. Without that remedy, officers will have little incentive to comply with a mandate to videotape. However, suppression should not always, or automatically, be the result when the videotaping requirement is violated. For example, if the violation was accidental and only a small portion of the interrogation process was not taped, and if there is no reason to believe that there is a significant risk that the suspect's statements were untrue, suppression would seem an extreme remedy. Suppression is only appropriate for substantial violations.

Under this framework, a confession that has not been recorded may still be admissible if recording was not feasible because of exigent circumstances, the subject refused to be electronically recorded, the interrogation was conducted by another jurisdiction that does not require recording, the law enforcement officer did not have a reasonable basis to believe that the subject committed a crime or the recording equipment malfunctioned despite reasonable maintenance and timely repair. If the prosecution intends 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 an exception applies.

A cautionary instruction should be given when a statement is not recorded and is not otherwise suppressed, to consider the failure to videotape in deciding whether a confession was made or, if made, whether it was voluntary. In addition, expert testimony about false confessions should be permitted if it is relevant to the facts of the case.

## 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.**

Since 1973, 144 people in 26 states have been released from death row based on evidence of their innocence. According to the Innocence Project, eyewitness misidentification testimony was the leading cause of wrongful convictions, playing a role in 72 percent of post-conviction DNA exoneration cases. Many critics argue that the true number must be greater because in a large percentage of old cases, for a variety of reasons, DNA testing is not available.

At a minimum, jurisdictions must adopt lineup procedures that are reasonably calculated to lead to accurate identification of suspects. Currently, there are no national standards for identification procedures. As a result, procedures vary widely, even, at times, within a single police department. It is imperative that jurisdictions adopt procedures that: (1) use double-blind administration; (2) include fillers with similar characteristics to the suspect; (3) give instructions that the perpetrator may or may not be in the lineup; (4) obtain an eyewitness assertion of confidence after a lineup identification; (5) do not provide feedback regarding the selection of the perpetrator; (6) record

lineup procedures and process; and (7) utilize sequential presentation of suspects, as opposed to simultaneous presentation. The Committee recommends that state and federal legislation be adopted to require eyewitness identifications to be conducted in accordance with best practice 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.**

For the past 30 years, the Supreme Court’s test for reliable and admissible eyewitness identification testimony has not changed. In a majority of cases in which courts apply this test, courts rule that even highly suggestive procedures are outweighed by the reliability prong of the test, and let the evidence go to the jury, despite a growing body of research that calls into question the ability of witnesses to crimes to accurately remember those events. Some states have refined or rejected this test in favor of a stricter standard.

Under any approach, a test for admissibility of eyewitness testimony must do two things: (1) provide an incentive to avoid suggestive procedures and penalize suggestive procedures by creating a real likelihood of suppression, appropriate jury instruction or other methods to ensure government compliance; and (2) establish criteria for determining the admissibility of a suggestive identification taking into account that self-reports of the witness’s opportunity to view, attention to detail, etc., are not a good indicator of reliability. Courts should make the admissibility determination based on objective criteria, not the witness’s subjective self-reporting of his or her likelihood of accuracy at the time of the identification procedure. Rather, police should be encouraged to collect statements from witnesses prior to the lineup regarding their viewing conditions and attention. These statements can then be used to support a reliability claim even if there is a later suggestive procedure.

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

If eyewitness identification testimony is admitted, courts should instruct juries on the various factors – both objective and subjective variables – 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.

**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.**

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. Though courts properly determine whether a particular identification procedure is likely to result in a misidentification and violate the defendant’s due process rights, 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. For these reasons, courts should admit expert testimony to explain to juries what scientific research shows about the impact of event-related factors, such as the viewing conditions at the time of the crime, and system variables, such as a potentially suggestive lineup procedure, on eyewitness identifications. Expert testimony is essential in order to fully educate jurors about these variables and their potential impact on 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. To minimize the susceptibility of children to suggestion during interviewing and the risk for false allegations in capital cases, jurisdictions should adopt standardized protocols or best practices for interviewing children who witness violent crimes.

Research has identified a number of best practices to use in interviewing child witnesses, including conducting the interview as promptly as possible after the event, using developmentally-appropriate language, establishing rapport, setting ground rules at the beginning of the interview, using free-recall and open-ended questions, limiting repetition of “closed” questions within the interview and limiting the number of interviews and interviewers. Perhaps the most important best practice to have emerged from research on child witnesses, and one that addresses many of the other best practices described, is the need to videotape 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.**

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 testimony 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. To this end, expert testimony in this area can assist the trier of fact in the reliability of a child witness.

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

**Recommendation 20. Implementation of the Eighth Amendment’s ban on execution of individuals with 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 has intellectual disability and therefore is ineligible for the death penalty. The prosecution should be permitted to rebut the presumption with 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 pre-trial 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 pre-trial determination should not be communicated to the jury.**

In 2002, 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. However, the Court has not yet addressed the specific standard of proof that a defendant would have to meet to prove intellectual disability. The Committee believes that the 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.

Cognitive and behavioral definitions of intellectual disability often include a maximum score on standardized IQ tests. Some states have adopted a rebuttable presumption that the defendant has intellectual disability based upon scores on IQ tests falling below a certain numerical threshold. Other states have adopted a rebuttal presumption that the defendant does not have intellectual disability if the score exceeds a numerical threshold. Given the stakes in a death penalty case, states should allow for a rebuttable presumption that a person with an IQ below 75 has an intellectual disability and is therefore ineligible for the death penalty.

A plurality of states requires that, to claim intellectual disability, a capital defendant must establish that it manifested by the age of 18. This is often difficult for many defendants whose school and medical records either cannot easily be found or, for a variety of reasons, never existed in the first place. In light of this, lack of documentation 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.

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. 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 whom a judge, during a pre-trial proceeding, does find to have intellectual disability.

**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).**

In 2004, the U.S. Supreme Court declared unconstitutional the execution of juveniles who commit crimes while under age eighteen. As in the case of intellectual disability, the Court rooted its holdings in the death penalty’s retributive effect and its diminished deterrent effect on juvenile offenders who generally possess lesser capacity. Although the Court has yet to declare unconstitutional the execution of offenders with serious mental illness, the same rationale underpinning the Court’s earlier rulings regarding juveniles and those with intellectual disabilities should apply for those suffering severe mental illness.

Several states have considered, though not implemented proposals that persons having a “severe mental disability” at the time of the offense be excluded from death eligibility. Mental disabilities manifested primarily by repeated criminal conduct or attributable to the acute effects of alcohol or other drugs do not, standing alone, constitute a severe mental disability for purposes of one such proposal. The 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, with clear and convincing evidence, 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, the proposal allows the defendant to 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 determination. The Committee recommends that, consistent with this 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.

**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.**

The Committee condemns using the strict liability felony murder doctrine as an eligibility criterion for the death penalty. In many death penalty states, under the felony murder doctrine, a person can be sentenced to death for an unintentional or accidental death, even one not directly caused by the defendant, if the death occurred during the commission of a felony in which the defendant was a major participant, and the defendant manifested at least “reckless indifference to human life.” The “reckless indifference” standard is far below that required to justify most death sentences, yet some states include felony murder among their death eligibility criteria. This can create perverse

outcomes – those least “deserving” of a death sentence can be sentenced to die while premeditated and intentional murderers may avoid capital punishment. As one commentator noted, felony murder treats equally the rapist who strangles his victim and the robber whose victim dies of a heart attack (and that robber’s accomplice who was not even at the scene of the crime). Such results are incompatible with the Eighth Amendment.

The death penalty must be reserved for the “worst of the worst,” the most culpable of offenders. A mental state of “reckless indifference” should not be sufficient to merit the harshest of available penalties. Thus, this Committee recommends that states 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.**

Courts have found that the vast majority of 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. As a result, defendants continue to pay for the errors of their attorneys, sometimes with their lives. When competent counsel is denied to defendants, 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 precludes the assurance that the outcome is fair or reliable.

The recommendation to create an independent authority to screen, appoint, train and supervise lawyers to represent indigent defendants in capital cases 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 more a matter of luck 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 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, the recommendation calls for establishing a central appointing authority. The independence of such an appointing authority and the authority’s freedom from judicial or prosecutorial conflicts are crucial to ensure that its members can act without partisanship or bias and in a manner that achieves constitutionally adequate counsel for all capital defendants.

**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.**

Each jurisdiction should develop standards that avoid arbitrary ceilings or flat payment rates for appointed counsel, and instead take into consideration the number of hours expended plus the effort, efficiency, and skill of capital counsel. The hourly rate should reflect the extraordinary responsibilities and commitment required of counsel in death penalty cases. 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.

**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 counsel's obligation to offer at least some mitigating evidence at the sentencing phase of a capital trial.**

*Strickland's* test for determining ineffective assistance of counsel is a poorly conceived standard in all criminal cases. It is particularly unfortunate in capital cases. The harshness of *Strickland's* prejudice prong means that capital defendants whose counsel was ineffective even under *Strickland's* stringent ineffectiveness prong 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, which is extraordinarily difficult. Defendants rarely meet this standard, 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 defendant of crucial information. Instead of perpetuating this unfair standard, the burden should be shifted to the state. After a finding of attorney ineffectiveness, unless the state can show that competent counsel would not have affected the outcome of the case, the sentence ought to be reversed and the defendant re-sentenced.

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. At the trial level, jurisdictions should require that (a) 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.

**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.**

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 will improve accuracy and support the credibility to the process used to impose capital punishment. To ensure accurate, reasoned, and inclusive decisions, legislatures should require death penalty juries to render 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.**

Judicial override not only lowers the quality of sentencing decisions, it negatively impacts 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 particularly likely to make their decisions regarding guilt or innocence quickly, to invest less effort in understanding the sentencing instructions, and to deny responsibility for the defendant's punishment. 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.

Fortunately, judicial override of jury death 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. Judges should be prohibited from overriding a jury's 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. The wisdom of having such a structure may be questioned, given the reality of judicial electoral politics and the need for judges seeking election to appear tough on crime. However, a death sentence that results from a judge overriding a jury determination that the accused should live is far more difficult to justify.

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

Many jurors may be unaware of the continuing relevance of their doubts of guilt during the sentencing phase, 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.

This recommendation makes 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.**

Capital sentencing juries often labor under significant misapprehensions about the nature and scope of their obligation at the penalty phase. 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. This confusion can make it more likely that juries will sentence a defendant to death than if they understood their obligations more clearly.

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. 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.

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 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 jury instructions and refusal to clarify will be sufficient.

**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.**

All jurisdictions that impose capital punishment now have "life without parole" as an alternative sentence. 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 time that the defendant will spend in jail under each of these sentences.

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. However, juries are more likely to believe and trust the word of the court, rather than attorneys in the case, and in fact, 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.

Statements that tend to relieve jurors of their sense of responsibility for their verdict will distract the jury from its duty. 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.

## 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.**

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. Although some materials may be protected from disclosure by testimonial or discovery privileges, the vast majority of materials in a prosecutor's or investigator's files is 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.

In addition, an accountable and named prosecutor or prosecutors should be charged with reviewing all the information received to determine whether it is exculpatory. This procedure would reduce the opportunity for inadvertent failures to disclose, because a responsible officer would be charged with conducting the review and would know that he or she may be held accountable. 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 recognizes that the unique problems of national security and protecting witnesses may require limited, tightly drawn exceptions to the ordinary practices of automatic disclosure. However, to avoid erosion of the completeness of discovery, jurisdictions should require that prosecutors obtain a court order allowing them to withhold otherwise discoverable information. Thus, even a discovery framework that provides full discovery should provide opportunities for the granting of protective orders in appropriate circumstances.

Hand-in-hand with broader discovery requirements goes the necessity for meaningful penalties for failures to comply. 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 make specific findings of fact justifying the imposed sanction. It is very 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.

**Recommendation 32. All capital jurisdictions should establish a Charging Review Committee (“CRC”) 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.<sup>1</sup>**

The lack of uniformity and the presence of bias in death penalty cases could be ameliorated if jurisdictions reviewed and approved 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 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”). 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.

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<sup>1</sup> 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 of the complete report.

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**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.**

The Vienna Convention on Consular Relations (“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. These are mutual obligations that also apply to foreign authorities when they arrest or detain U.S. citizens abroad. 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.

Consular access is important, because 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 capital trial, and provide experts and other investigation resources.

In 2005, the U.S. withdrew from the VCCR’s Optional Protocol, which gave the International Court of Justice (“ICJ”) jurisdiction over claims from foreign countries whose citizens have been convicted in the U.S. in violation of the VCCR. As a result, foreign countries can no longer seek redress against the U.S. in the ICJ, but it also means that 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. A few years before the U.S.’s withdrawal, 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. Unfortunately, the U.S. Supreme Court has ruled that these foreign nationals have no recourse in federal courts absent enabling legislation.

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. To give effect to the VCCR, the U.S. should re-join the Optional Protocol and adopt implementing legislation that would pre-empt state criminal law procedures inconsistent with the VCCR and ensure full compliance with the ICJ ruling. 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 or prohibit prosecutors from seeking the death sentence in the absence of consular notification.

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## 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 its 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.

Studies have consistently shown glaring racial disparities in the administration of capital punishment. A 2003 Maryland study showing that the state's death penalty system is tainted with racial bias led to a *de facto* moratorium on the death penalty and successful efforts to repeal capital punishment in the state. The Maryland study found that while only 28% of Maryland's population is black, 67% of the state's death row is black, and 100% of these capital cases involve white victims. A 2013 study by the U.S. Sentencing Commission confirms the existence of glaring racial disparities in the U.S. justice system.

Given the complexity of the problem, the Committee acknowledges the difficulty of crafting a single recommendation to remedy it. Instead, the Committee encourages jurisdictions to take the needed first step of gathering data, and from there, to experimenting with solutions. Whatever legislative solutions or initiatives are favored by a particular jurisdiction, each jurisdiction should ensure racial and ethnic diversity among the decision-makers in death penalty cases, particularly defense lawyers, prosecutors, jurors and judges.

## 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.

Since 1976, 268 clemencies have been granted in capital cases for humanitarian reasons, including doubts about the defendant's guilt or conclusions regarding the death penalty process. Clemency procedures vary widely among jurisdictions. In some jurisdictions, hearings are not required, and when they are held, the condemned prisoner may not be allowed to make a personal appearance. There is no constitutional right to counsel in clemency proceedings. The American Bar

Association Death Penalty Due Process Review Project found that “[m]ost states do not require the clemency decision-maker to explain the reasons why clemency was or was not granted.” Clemency procedures lack standards, are discretionary and are unreviewable.

The arbitrariness of most clemency procedures threatens to violate the fairness of particular proceedings as well as the relative treatment of similarly situated persons and cases. The Committee supports the need for basic procedural standards in clemency proceedings. 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.

## **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; this currently demands the adoption of a one-drug protocol.**

The lethal injection system most states implemented creates 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. Drug preparation often requires numerous steps and many opportunities for error, especially if the execution team members are not trained medical professionals.

The Committee 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 two or 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.

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. Further, any changes to lethal injection protocol 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.**

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 a valid court order in connection with any relevant litigation or specific information.

**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.**

The specific drugs used in lethal injections should be approved by the federal U.S. Food and Drug Administration (“FDA”). Although many states require the use of sodium thiopental in their lethal injection procedures, a worldwide shortage of the drug 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. Only one company, however, manufactures pentobarbital, and that company has implemented strict procedures to prevent departments of correction from acquiring the drug for use in executions. As a result, some states have acquired supplies of pentobarbital from sources outside the United States or from compounding pharmacies. Compounding pharmacies have traditionally been regulated by the states, not by the FDA. 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.

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 and a required check of the expiration date before use to ensure that the drugs retain their effectiveness for their intended purposes. These quality assurance measures, and their implementation, should be reviewed periodically and revised 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 are susceptible to error. Such errors can, and have, resulted in botched executions.

Execution team members who are responsible for medically-related functions, like preparing drugs, preparing 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 currently-licensed, currently-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 conflict with various professional medical societies’ policies or codes of medical ethics, some of which prohibit medical professionals from participating in execution procedures.