



JOINT TASK FORCE

TO REVIEW THE ADMINISTRATION
OF OHIO'S DEATH PENALTY

FINAL REPORT &
RECOMMENDATIONS

APRIL 2014

SUBMITTED FOR
CONSIDERATION TO:



MAUREEN O'CONNOR
CHIEF JUSTICE



OHIO STATE BAR
ASSOCIATION

EST 1880



Chief Justice Maureen O'Connor
Supreme Court of Ohio
65 South Front Street
Columbus, Ohio 43215

Jonathan Hollingsworth, President
Ohio State Bar Association
1700 Watermark Drive
Columbus, Ohio 43221

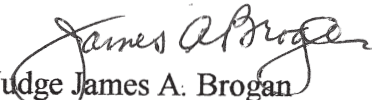
Dear Chief Justice O'Connor and Mr. Hollingsworth,

Enclosed please find the final report of the Joint Task Force to Review the Administration of Ohio's Death Penalty. The Task Force was appointed by Chief Justice O'Connor and former Ohio State Bar Association President Carol Seubert Marx in September 2011.

As requested, the Joint Task Force conducted a thorough review of the 2007 ABA report titled, "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report" and considered the current laws regarding the death penalty, the practices in other jurisdictions, the data, and the costs associated with the death penalty. The appropriateness of the death penalty as a punishment in Ohio was never considered by the Joint Task Force. Based upon its review the Joint Task Force submits recommendations that, if implemented, will improve the administration of capital punishment in Ohio.

Oh behalf of the Joint Task Force, I thank you for the opportunity to assist the Supreme Court of Ohio and the Ohio State Bar Association in the consideration of these issues. We are available to respond to any questions that you may have regarding the findings and recommendations contained in this report.

Sincerely,


Judge James A. Brogan
Chair of the Joint Task Force

Enclosure



ACKNOWLEDGEMENTS

The Joint Task Force would like to acknowledge all those who attended meetings of the Joint Task Force, provided information to the Joint Task Force, or otherwise contributed to the work of the Joint Task Force. Of particular note, the Joint Task Force would like to thank **Nancy Petro**, former Attorney General **Jim Petro**, former Supreme Court of Ohio Justice **Evelyn Lundberg Stratton**, Dr. **Thomas Brewer**, **Catherine Grosso**, **Barbara O'Brien**, **Robin Maher**, and **Tom Roberts** for appearing before the Joint Task Force and providing insight into various issues. In addition, The Joint Task Force also acknowledges the staff of the Office of the State Public Defender for their assistance in gathering statistical data.

A special thank you to all of the members of the Joint Task Force who, for various reasons, were unable to complete their terms as members: Representative **Ted Celeste**, Representative **Carlton Weddington**, **Dennis Watkins**, and **Sam Porter**.

Finally, the Joint Task Force would like to thank the staff for the Joint Task Force: **Jo Ellen Cline** (Supreme Court of Ohio), **Jessica Tobias** (Ohio State Bar Association), and **Kalpana Yalamanchili** (Ohio State Bar Association).

DEDICATION

The Joint Task Force to Review the Administration of Ohio's Death Penalty would like to dedicate this final report to the memory of Sam Porter. Mr. Porter served as a member of the Joint Task Force from its beginnings until his passing in May 2013. Mr. Porter served on several subcommittees of the Joint Task Force and never failed to contribute to the work of each of them. An attorney in private practice and a former Chair of the Ohio Public Defender Commission, Mr. Porter was a dedicated member of the Joint Task Force who was always willing and able to simplify the most difficult concepts, ask the difficult questions, and advocate for his beliefs.



JOINT TASK FORCE

TO REVIEW THE ADMINISTRATION
OF OHIO'S DEATH PENALTY

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Senator Bill Seitz

Senator Shirley Smith

Judge John Solovan

Representative Michael Stinziano

Judge Roger Wilson

Tim Young



SUMMARY OF RECOMMENDATIONS

| RECOMMENDATION | VOTE COUNT | PAGE NUMBER |
|---|------------|-------------|
| 1) Custodial interrogations, as defined by <i>Miranda v. Arizona</i> , shall be recorded and, if not recorded, then the statements made during the interrogation should be presumed “involuntary.” | 13-5 | 3 |
| 2) The Joint Task Force recommends that each coroner’s office be required to become accredited by the National Association of Medical Examiners (NAME), or have at least one person on staff or under contract who is a fellow of that organization (and who performs the procedure in the case), or have in place a contract with an accredited crime lab. | 18-1 | 3 |
| 3) The Joint Task Force also recommends that, subject to the special rule specified below, if evidence of the sort customarily subject to testing in a laboratory in a death penalty case is not originally reviewed by an accredited lab, then the defendant shall have the right to have the evidence reviewed a second time by an accredited lab. More specifically, any prosecution evidence that has not been tested in an accredited lab shall be retested in an accredited lab, at the request of the defendant and at the state’s expense. If such a request is made, there will be no reference at trial to the first test (in a non-accredited lab) except as may be necessary to establish chain of custody. Defense forensic experts shall also be required, by Supreme Court rule, to rely on testing by accredited labs, at the request of the prosecution, in death penalty cases. | 17-2 | 3 |
| 4) The Joint Task Force recommends that legislation be enacted to require all crime labs in Ohio be certified by a recognized agency as defined by the Ohio General Assembly. | 10-6 | 4 |
| 5) The Joint Task Force recommends that the legislature enact legislation to require prospective proportionality review in death penalty cases to include cases where the death penalty was charged in the indictment or information but was not imposed | 10-7 | 4 |
| 6) The Joint Task Force also recommends that the Supreme Court of Ohio mandate by court rule that, prospectively, all death eligible homicides be reported to a central data warehouse both at the charging stage and at the conclusion of the case at the trial level. | 15-1 | 5 |
| 7) The Joint Task Force recommends that the Ohio Legislature amend R.C. 2929.03(F) to include the necessity for a prosecutor’s rationale for a proposed plea agreement, on the record, for any indicted capital offense that results in a plea for a penalty less than death | 15-1 | 5 |

| RECOMMENDATION | VOTE COUNT | PAGE NUMBER |
|---|---------------|----------------|
| <p>8) Enact legislation to consider and exclude from eligibility for the death penalty defendants who suffered from “serious mental illness,” as defined by the legislature, at the time of the crime.</p> <p>Appropriate questions for the legislature to consider include:</p> <ol style="list-style-type: none"> 1. Whether “serious mental illness” is causally related to the crime? 2. Whether the determination of “serious mental illness” should be considered before trial or at some other time as determined by the legislature? 3. Whether this issue is already adequately addressed by current law? | 15-2 | 6 |
| <p>9) Enact legislation to exclude from eligibility for the death penalty defendants who suffer from “serious mental illness” at the time of execution.</p> | 12-7 | 6 |
| <p>10) Adoption of an order, in the case of a pro se defendant who is competent to stand trial but may not be competent to represent himself or herself because of a mental health illness or developmental disability, directing either the appointment of counsel to conduct the trial or to act as “stand-by counsel” or “co-counsel” to assist the pro se defendant, or to assume or resume to proceed with trial as counsel of record, in the event the defendant changes their mind about proceeding as a pro se litigant.</p> | 11-1 | 7 |
| <p>11) Adopt the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.</p> | 12-2 | 7 |
| <p>12) Adopt the Supplementary Guidelines for the Mitigation Function of Defense Team in Death Penalty Cases. This recommendation is not meant, however, to alter the standard adopted in <i>Strickland v. Washington</i>.</p> | 13-4 | 8 |
| <p>13) Enact and fund a Capital Litigation Fund to pay for all costs, fees, and expenses for the prosecution and defense of capital murder cases.</p> | 19-0 | 8 |
| <p>14) It is specifically recommended that increased funding be provided to the Office of the Ohio Public Defender, by statute, to allow for additional hiring and training of qualified capital case defense attorneys, who could be made available to all Ohio counties, except in circumstances where a conflict of interest occurs, at which time a separate list of prospective appointed counsel would be provided.</p> | 20-0 | 9 |

| RECOMMENDATION | VOTE COUNT | PAGE NUMBER |
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| 15) The Ohio legislature and Supreme Court of Ohio should implement and fund a statewide public defender system for representation of indigent persons in all capital cases for trials, appeals, post-conviction, and clemency except where a conflict of interest arises. In cases of conflicts of interest, qualified Rule 20 counsel shall then be appointed. | 13-3 | 9 |
| 16) Enact legislation to provide that private defense counsel appointed to represent death eligible defendants or those sentenced to death are equally paid throughout the state regardless of the location of the offense. | 16-0 | 9 |
| 17) Enact legislation that maintains that a death sentence cannot be considered or imposed unless the state has either: 1) biological evidence or DNA evidence that links the defendant to the act of murder; 2) a videotaped, voluntary interrogation and confession of the defendant to the murder; or 3) a video recording that conclusively links the defendant to the murder; or 4) other like factors as determined by the General Assembly. | 12-6 | 10 |
| 18) Enact legislation that does not permit a death sentence where the State relies on jailhouse informant testimony that is not independently corroborated at the guilt/innocence phase of the death penalty trial. | 19-0 | 10 |
| 19) The legislature should study how to best support families of murder/homicide victims in the short and long term. | 19-0 | 12 |
| 20) Enact legislation that allows a defendant to withdraw his or her waiver of a jury trial in either the guilt or penalty phase if either phase is reversed by a reviewing court. | 11-7 | 12 |
| 21) Amend Rule 20 of the Rules of Superintendence for Ohio Courts in the manner attached to these final recommendations as <i>Appendix B</i> . | 18-0 | 12 |
| 22) The Ohio Rules of Practice and Procedure shall be amended so that a properly presented motion must be accepted for filing for a ruling by the court in a death penalty case. | 18-0 | 12 |

| RECOMMENDATION | VOTE COUNT | PAGE NUMBER |
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| <p>23) Amend Sup.R. 20, adding Section (E). Section (E) would read as follows:</p> <p>E. Post-Conviction Counsel. Post-conviction counsel shall satisfy all of the following qualifications:</p> <ol style="list-style-type: none"> 1. Be admitted to the practice of law in Ohio or admitted to practice pro hac vice; 2. Have at least three years of civil or criminal litigation or post-conviction experience in Ohio; 3. Have specialized training, as approved by the committee, on subjects that will assist counsel in the post-conviction of cases in which the death penalty was imposed in the two years prior to making the application; 4. Have experience as counsel in the post-conviction proceedings of at least three felony convictions in the seven years prior to making the application. | 18-0 | 12 |
| <p>24) The time frame for filing a post-conviction motion should be extended from one hundred eighty (180) days after the filing of the trial record to three hundred sixty five (365) days after the filing of the trial record.</p> | 17-0 | 13 |
| <p>25) The judge hearing the post-conviction proceeding must state specifically why each claim was either denied or granted in the findings of fact and conclusions of law.</p> | 19-0 | 13 |
| <p>26) The common pleas clerk shall retain a copy of the original trial file in the common pleas clerk's office even though it sends the originals to the Supreme Court of Ohio in connection with the direct appeal.</p> | 19-0 | 13 |
| <p>27) There shall be no page limits in post-conviction petitions for death penalty cases in either the petition filed with the common pleas court or on appeal from the denials of such petition.</p> | 14-3 | 13 |
| <p>28) Amend R.C. §2953.21, as attached to this final report in <i>Appendix C</i>, to provide for depositions and subpoenas during discovery in post-conviction relief.</p> | 13-3 | 13 |

| RECOMMENDATION | VOTE COUNT | PAGE NUMBER |
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| <p>29) Mandate through the Rule 20 Committee that all attorneys who practice capital litigation must take a certain number of CLE hours on the issue of racial bias. Mandate mandatory CLE for prosecutors who prosecute death penalty cases to educate them on how to protect against racial bias in the arrest, charging and prosecution of death penalty cases. Mandate that Judges assigned to death penalty cases must also attend specialized training regarding racial bias in death cases and how to protect against it.</p> | 12-2 | 13 |
| <p>30) Mandate that any judge who reasonably believes that any state actor has acted on the basis of race in a capital case be reported to the Office of Disciplinary Counsel or, if not an attorney, to the appropriate supervisory authority.</p> | 12-2 | 14 |
| <p>31) Mandate through the Rule 20 Committee that all Rule 20 approved trainings must include at least one hour of training regarding the development of discrimination claims in death penalty cases and how to preserve Batson issues for appellate review.</p> | 13-1 | 14 |
| <p>32) Mandate that an attorney must seek the recusal of any judge where “a reasonable basis for concluding that the judge’s decision making could be affected by racially discriminatory factors” and should the judge not recuse, if the attorney still believes there is a reasonable basis for concluding that the judge’s decision making could be affected by racially discriminatory factors, then the attorney shall file an affidavit of bias with the Chief Justice of the Supreme Court of Ohio.</p> | 8-5 | 14 |
| <p>33) Based upon data showing that prosecutors and juries overwhelmingly do not find felony murder to be the worst of the worst murders, further finding that such specifications result in death verdicts 7% of the time or less when charged as a death penalty case, and further finding that removal of these specifications will reduce the race disparity of the death penalty, it should be recommended to the legislature that the following specifications be removed from the statutes: Kidnapping, Rape, Aggravated Arson, Aggravated Robbery, and Aggravated Burglary.</p> | 12-2 | 14 |
| <p>34) To address cross jurisdictional racial disparity, it is recommended that Ohio create a death penalty charging committee at the Ohio Attorney General’s Office. It is recommended that the committee be made up of former county prosecutors, appointed by the Governor, and members of the Ohio Attorney General’s staff. County prosecutors would submit cases they want to charge with death as a potential punishment. The Attorney General’s office would approve or disapprove of the charges paying particular attention to the race of the victim(s) and defendant(s).</p> | 8-6 | 14 |

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| 35) Enact legislation allowing for racial disparity claims to be raised and developed in state court through a Racial Justice Act with such a claim being independent of whether the client has any other basis for filing in that court. | 13-1 | 15 |
| 36) To ensure a more representative jury pool, enact legislation that requires every jurisdiction to create jury pools from the lists of all registered voters and all licensed drivers, who are U.S. citizens, rather than only the voter registration list. | 12-2 | 15 |
| 37) Enact a court rule that allows prosecutors and defendant’s attorneys in death penalty cases full and complete access to all documents, statements, writings, photographs, recordings, evidence, reports or any other file material in possession of the state, any agent or agency of the state, or any police agency involved in the case, or in the possession of the defendant’s attorneys which is known to exist or which, with due diligence, can be determined to exist and to allow the attorneys to inspect, test, examine, photograph or copy the same. This shall not be construed to require the disclosure of attorney work product or privileged matters, nor to the disclosure of inculpatory information possessed by the defendant’s attorneys described in Crim.R. 16 (H) (3), nor to materials protected by Crim.R. 16. | 17-0 | 15 |
| 38) Enact legislation to require a prosecutor to present to the Grand Jury available exculpatory evidence of which the prosecutor is aware. | 10-9 | 16 |
| 39) Adoption of an order requiring implementation of mandatory on the record pre-trial conferences. Further, the Joint Task Force recommends appropriate Judicial College education to emphasize the necessity for conducting such conferences, all of which must be on the record, to begin at the earliest stages of the case and to address issues pertaining to discovery, Brady disclosures, and appointment of experts. The pre-trial conference shall be ex parte upon the request of defense counsel and upon good cause shown as to matters related to defense experts but shall be on the record. After inquiry by Court as to status of discovery, counsel for state and defendant shall be ordered to declare their compliance with all discovery obligations and the State shall affirmatively assert disclosure of all exculpatory matters pursuant to Brady. | 10-5 | 16 |
| 40) The Ohio statute providing for attorney-client privilege should be amended to provide that a claim of ineffective assistance waives the privilege in order to allow full litigation of ineffectiveness claims. The waiver will be limited to the issue raised. | 18-0 | 16 |

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| 41) The Task Force voted to urge all parties involved to work on procedures to remove any impediments to a fair and timely resolution of death penalty cases in the Ohio courts. | 12-6 | 16 |
| 42) There should be a codification of the right to have counsel present at the clemency hearing. | 15-0 | 17 |
| <p>43) Enact legislation or administrative regulation to provide that death penalty clemency proceedings in Ohio include:</p> <ul style="list-style-type: none"> A. The parole board hearing must be recorded by audio, video or court stenographer and be a public record. B. The interview of the condemned inmate must be recorded by audio, video or court stenographer and be a public record. C. The inmate’s counsel must be allowed to counsel the client in the interview; D. The parole board must reveal to counsel for the defendant and the state all documents, witnesses and information it will consider in reaching its decision; E. The inmate’s “master file” must be released to his/her counsel at least 6 months before the parole board hearing; F. Counsel for the inmate and the State must disclose and exchange all information to be relied upon at the parole hearing at least 30 days before the hearing with attorney certification and a continuing duty to disclose. G. Identify a funding mechanism, such as a capital litigation fund, for inmate’s mental health expert or state expert so that an expert can be hired in a timely manner for the parole board hearing. H. The legislature should ensure adequate funding, such as a capital litigation fund, for private counsel who prepare for and represent a condemned inmate at a Parole board hearing; I. Require annual mandatory training of all Parole Board members for a minimum of six hours by mental health and forensic science experts and by other experts relevant to death penalty issues. | <p>17-1</p> <p>16-2</p> <p>11-8</p> <p>18-1</p> <p>18-0</p> <p>18-0</p> <p>12-2</p> <p>11-1</p> <p>18-0</p> | 17 |

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| <p>44) The Ohio Judicial Conference shall, on an annual basis, work with attorneys and judges to review and revise, as necessary, the jury instructions in death penalty cases to ensure that jurors understand applicable law. In particular, the Conference shall request, on an annual basis, input from the Ohio Prosecuting Attorney’s Association, the Ohio Association of Criminal Defense Lawyers, Ohio Public Defender, and the members of the Ohio Judicial Conference.</p> | 16-0 | 19 |
| <p>45) The Ohio Judicial Conference shall review and revise as necessary the Ohio Jury Instructions to institute the use of “plain English” and “plain English” shall be used throughout capital trials.</p> | 14-1 | 20 |
| <p>46) In capital cases, jurors shall receive written copies of “court instructions” (the judge’s entire oral charge) to consult while the court is instructing them and while conducting deliberations.</p> | 16-0 | 20 |
| <p>47) The Ohio Judicial Conference shall study the Ohio Jury Instructions to make clear that a jury must always be given the option of extending mercy that arises from the evidence as cited in Justice Scalia’s dissent in Morgan v. Illinois, 504 U.S. 719, 751 citing to Woodson v. North Carolina, 428 U.S. 303-305.</p> | 10-8 | 20 |
| <p>48) The Ohio Judicial Conference shall ensure the Ohio Jury Instructions make clear the weighing process for considering aggravating circumstances and mitigating factors should not be conducted by determining whether there are a greater number of aggravating circumstances than mitigating factors.</p> | 13-4 | 20 |
| <p>49) Implementation of enhanced mandatory, educational and minimum experience and/or certification requirements for all participating legal counsel (appointed and retained) and all Ohio judges (including Common Pleas, Appellate, and Supreme Court) to allow for their participation in a capital case. The Ohio Judicial College could be utilized as the vehicle to implement the mandatory educational requirements for judges. Certain minimum standards for the appointment and performance of legal counsel (appointed and retained) in capital cases should be set forth in the rules and could, in exceptional circumstances, be waived, with the consent of the Supreme Court of Ohio, if it is determined that the attorney’s ability or the judge’s qualification otherwise exceeds the standards required by the rule. The adoption of this rule would require some amendment or modification to Sup.R. 20.</p> | 21-0 | 21 |

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| <p>50) The Joint Task Force recommends implementation of educational guidance for presiding judges as to when and how to intervene in situations of potential ineffective lawyering. Additional guidance should also be emphasized to assure effective utilization of the recusal process by participating legal counsel, when incurring issues of preconceived opinions or otherwise prejudicial positions of trial judges. For clarification, the education guidance would highlight procedures for recognizing these issues in such a way that the trial court would not damage or undermine the client’s confidence in his or her legal counsel; however, the Joint Task Force also recognizes that if ineffective assistance of counsel is found, the court has a duty to step in and address the issue.</p> | 17-4 | 21 |
| <p>51) Adoption of a rule directing that a presiding trial judge, or the Administrative Judge, in conformity with Sup.R. 20, is the appropriate authority to appoint legal counsel in a capital case.</p> | 14-5 | 21 |
| <p>52) Adoption of a rule directing that the trial judge is the appropriate authority for the appointment of experts for indigent defendants. The rule should further provide that the decision pertaining to the appointment of experts shall be made, on the record, at one of the prescribed Pre-Trial Conferences.</p> <p>If defense counsel requests, the demand for appointment of the expert shall be made in-camera ex parte, and the order concerning the appointment shall be under seal.</p> <p>Upon establishing counsels’ respective compliance with discovery obligations, the question of the appointment of experts (including determination of projected expert fees based upon analysis of expert’s time to be applied to the case as well as consideration of incremental payment of expert fees as case progresses) would be decided by the court, which decision would be subject to immediate appeal, under seal, to the appropriate Court of Appeals. The trial court judge shall make written findings as to the basis for any denial. Although concerns have been raised as to the ability of the Appellate Court to provide the anticipated, necessary expedited hearing within a reasonable time-frame, the Joint Task Force suggests that this issue be elevated to the status of a final appealable order and that the necessary expedited appellate process be spelled out in the statute.</p> | 13-5 | 21 |
| <p>53) The Supreme Court should take the lead to adopt a uniform process for the selection of indigent counsel in capital cases, including the establishment of a uniform fee and expense schedule, all of which would be included in the proposed Criminal Rule for Capital Cases (discussed below).</p> | 20-0 | 22 |

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| <p>54) Should the present process of appointment of indigent counsel by the judiciary continue, the main objective should always be to assure the best educationally experienced and qualified candidate, who is available (within the county or outside the county), and who is otherwise willing to take on the responsibilities associated with the case for an appropriate fee and accompanying expenses, is appointed. A uniform fee schedule for such services across the State of Ohio must be a necessary consideration to assure the equal protection and due process for the accused in a capital case.</p> | 21-0 | 22 |
| <p>55) Adoption of reporting standards to provide complete transparency of record, including requirements to ensure better record keeping by the trial judge and the provision of additional, detailed resource information necessary to assure strict compliance with due process, which information shall be submitted to the Supreme Court upon completion of the case. Such resource information may include unique Constitutional issues, unique evidentiary issues, significant motions, plea rationale, pre-sentence investigation, and any additional information required by the Rule 20 Committee or the Supreme Court of Ohio. Additional types of resource information could be developed as part of the mandated educational process conducted by the Ohio Judicial College.</p> | 16-0 | 22 |
| <p>56) The Joint Task Force believes that some of the recommendations above could be accomplished by the adoption of a separate Criminal Rule for Capital Cases. The Joint Task Force recommends that such a rule be adopted and provide for the mandatory training of attorneys and judges (<i>Recommendation 49</i>), the selection and appointment of indigent counsel in capital cases (<i>Recommendation 51</i>), and the enforcement of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the Supplementary Guidelines for the Mitigation Function of Defense Teams (<i>Recommendations 11 and 12</i>).</p> | 16-0 | 22 |

INTRODUCTION

In 1997, the American Bar Association (ABA) called for a national moratorium on executions until serious flaws it had identified in the criminal justice system were eliminated. The ABA urged capital jurisdictions to ensure that death penalty cases be administered fairly and impartially in accord with due process and to minimize the risk that innocent persons would be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (now the ABA Death Penalty Review Project) (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; encourages state government leaders to establish moratoriums; undertakes detailed examinations of capital punishment laws and processes; and implements reforms.

To assist the majority of capital jurisdictions that had not yet conducted comprehensive examinations of their death penalty systems, the Project decided, in February 2003, to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Ohio assessment, the Project has released state assessments of Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Tennessee, Texas, and Virginia. The assessments were not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead were intended to highlight individual state systems' successes and inadequacies.

All of these assessments of state law and practice use, as a benchmark, the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols were not intended to cover exhaustively all aspects of the death penalty, they did cover seven key aspects of death penalty administration: defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus proceedings, clemency proceedings, jury instructions, an independent judiciary, racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new areas to be reviewed as part of the assessments: preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each assessment was conducted by a state-based assessment team. The teams were comprised of, or had access to, current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else who the Project felt was necessary. Members were not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams were responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected.

The ABA issued the “Ohio Death Penalty Assessment Report” in 2007. The Ohio Death Penalty Assessment Team (hereafter referred to as the “ABA Ohio Assessment Team”) identified a number of areas in which Ohio’s death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures. (See Appendix A) The ABA Ohio Assessment Team noted that while it identified individual problems in the system, their harms were cumulative. The ABA Ohio Assessment Team also noted that problems in one area can undermine sound procedures in others.

The Supreme Court of Ohio and Ohio State Bar Association Joint Task Force to Review the Administration of Ohio’s Death Penalty was created by the Chief Justice of the Supreme Court of Ohio and the President of the Ohio State Bar Association to review the ABA Ohio Assessment Team’s Assessment Report and determine if the administrative and procedural mechanisms for the administration of the death penalty are in proper form or in need of adjustment. According to the charge given to the Joint Task Force, the purpose of the task force is to review the 2007 American Bar Association report titled “Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report” and offer an analysis of its findings; assess whether the death penalty in Ohio is administered in the most fair and judicious manner possible; and determine if the administrative and procedural mechanisms for the administration of the death penalty in Ohio are in proper form or in need of adjustment. The Joint Task Force was specifically instructed not to review whether Ohio should or should not have the death penalty. The Joint Task Force was comprised of twenty-two members including members of the General Assembly, law enforcement, prosecutors, defense lawyers, the Department of Rehabilitation and Correction, trial court judges, Court of Appeals judges, and law professors. The Joint Task Force met bi-monthly over a two year period to review the ABA Ohio Assessment Team report and formulate recommendations to be presented to the Supreme Court of Ohio and the Ohio State Bar Association.

The Joint Task Force operated through subcommittees who conducted research between meetings and made their recommendations to the full Joint Task Force for their consideration. Under Joint Task Force operating guidelines, recommendations were required to be submitted to the appropriate subcommittee for consideration before being considered by the full Joint Task Force. When a subcommittee submitted a recommendation to the full Joint Task Force, the subcommittee was required to include the vote for each recommendation and the research in support of the recommendation. If the recommendation was passed by a majority of the subcommittee but was not unanimous, the recommendation was to include the minority position and support.

Final recommendations were approved by a majority vote of the full Joint Task Force. As might be expected from a diverse group considering a controversial topic like capital punishment, unanimity was difficult to achieve. Joint Task Force members were instructed that a dissenting report could be prepared for any or all recommendations of the full Joint Task Force, and such report is submitted under separate cover from these recommendations. Commentary accompanies some of the Joint Task Force recommendations. The commentary was not voted on by the full Joint Task Force but is provided to help the reader understand the reasoning behind the recommendation.

In all, the Joint Task Force has made over fifty recommendations to improve the administration of Ohio’s death penalty.

RECOMMENDATION 1: Custodial interrogations, as defined by *Miranda v. Arizona*, shall be recorded and, if not recorded, then the statements made during the interrogation should be presumed “involuntary”.

A majority of the Task Force found provisions in Substitute Senate Bill 77 of the 128th General Assembly (hereinafter “Sub. S.B. 77”) regarding custodial interrogation inadequate to protect the rights of the accused in a criminal investigation. In a number of cases involving death row exonerees, for example, the defendant allegedly confessed to committing the capital crime. Recently, Damon Thibodeaux became the eighteenth death row inmate exonerated in the United States on the basis of DNA evidence. Thibodeaux confessed to the brutal rape and murder of his 14-year-old step-cousin after an intense nine hour interrogation by police officers who threatened he would die by lethal injection if he did not admit to the crime. Fifteen states and the District of Columbia presently require that custodial interrogations be audio or videotaped to be admissible in court against the accused. Although some Task Force members believe confessions should not be admissible if not recorded, a majority of the Task Force recommended that unrecorded statements made during an interrogation should be presumed involuntary.

RECOMMENDATION 2: The Joint Task Force recommends that each coroner’s office be required to become accredited by the National Association of Medical Examiners (NAME), or have at least one person on staff or under contract who is a fellow of that organization (and who performs the procedure in the case), or have in place a contract with an accredited crime lab.

Such a requirement would not require the coroner to refer all post mortems, and would preserve the coroner’s judgment as to which ones involved criminal activity. However, it would guarantee that the office either has successfully sought accreditation or has in place contracts with properly trained people to perform these kinds of specialized services when in the coroner’s judgment the need arises.

RECOMMENDATION 3: The Joint Task Force also recommends that, subject to the special rule specified below, if evidence of the sort customarily subject to testing in a laboratory in a death penalty case is not originally reviewed by an accredited lab, then the defendant shall have the right to have the evidence reviewed a second time by an accredited lab. More specifically, any prosecution evidence that has not been tested in an accredited lab shall be retested in an accredited lab, at the request of the defendant and at the state’s expense. If such a request is made, there will be no reference at trial to the first test (in a non-accredited lab) except as may be necessary to establish chain of custody. Defense forensic experts shall also be required, by Supreme Court rule, to rely on testing by accredited labs, at the request of the prosecution, in death penalty cases.

The Joint Task Force recommended that the following rules should apply to death-penalty eligible cases in which testing of evidence is performed under circumstances that will likely entail the total consumption or destruction of the evidence to be tested:

- i. Where the testing is performed prior to indictment, the testing must be performed in the first instance by an accredited lab;
- ii. Where the testing is performed subsequent to indictment, the testing must be performed by an accredited laboratory and the court to which the case is assigned must grant prior permission, with notice to the parties, for the test.

In the event the foregoing rules are not observed, the results of the test shall be presumptively inadmissible, but the presumption may be overcome by good cause shown to the court to which the case is assigned, and if the court deems such evidence to be admissible, the court shall appropriately instruct the jury on the weight that it may choose to give that evidence. This recommendation does not apply to fingerprint evidence. “Accredited lab” means a lab that is accredited by any of the following: American Society of Crime Laboratory Accreditation Board; Forensic Quality Services, A.K.A. National Forensic Science Technology Center; or the American Association for Laboratory Accreditation (AALA).

RECOMMENDATION 4: The Joint Task Force recommends that legislation be enacted to require all crime labs in Ohio be certified by a recognized agency as defined by the Ohio General Assembly.

This is one of the reforms former Ohio Attorney General Jim Petro and his wife Nancy Petro endorse in FALSE JUSTICE 129 (2010). As the Petros note, this reform comes from a “congressionally mandated report” by the National Research Council. See *Strengthening Oversight of Forensic Science Practice* (Chapter 7) in STRENGTHENING FORENSIC SCIENCES IN THE UNITED STATES: A PATH FORWARD, Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, National Academies of Science (2009), at http://www.nap.edu/catalog.php?record_id.

RECOMMENDATION 5: The Joint Task Force recommends that the legislature enact legislation to require prospective proportionality review in death penalty cases to include cases where the death penalty was charged in the indictment or information but was not imposed.

The majority of states require some form of proportionality review for every death sentence even though it is not constitutionally required. Thirteen jurisdictions, including Ohio, compare the case in which the death sentence was imposed to other similar cases in which a death sentence was imposed.¹ Seven states compare the case to other similar cases in which the state sought a death sentence.²

¹ Ohio Rev. Code 2929.05(A): “In determining whether the sentence of death is appropriate, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.”

See e.g., *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585 (comparing case to other death sentence cases). The thirteen jurisdictions are: Alabama, Florida, Georgia, Kentucky, Missouri, Mississippi, North Carolina, Nebraska, South Carolina, Utah, Washington, and the federal government.

² Delaware, Louisiana, Montana, New Hampshire, South Dakota, Tennessee and Virginia. Each of these states has a statute that requires a proportionality review of other “similar cases.” In each state, the state supreme court interpreted “similar cases” to encompass not only cases in which the death penalty was imposed, but cases in which the jury imposed a life sentence. See e.g., *State v. Bland*, 958 S.W.2d. 651, 662 (Tenn. 1997).

Since 1981 the Ohio legislature has required consideration of whether “the sentence is excessive or disproportionate to the penalty imposed in similar cases.” *Id.* The current practice of the Ohio Supreme Court is to compare only cases in which a death sentence was imposed. This appears inconsistent with the intent of the Ohio legislature and the initial practice of the Court. In 1981 the legislature also enacted Rev. Code 2929.03(F) which requires the trial court to submit to the Ohio Supreme Court a statement of the reasons for the life or death sentence imposed. These opinions would provide a means for an effective comparison of life and death sentences by the Ohio Supreme Court. As the Ohio Supreme Court noted in 1986:

The fundamental purpose behind proportionality review is to ensure that sentencing authorities do not retreat to the pre-Furman era when sentences were imposed arbitrarily, capriciously and indiscriminately.... The system currently in place in Ohio enables this court to obtain a vast quantity of information with which to effectuate proportionality review, beginning with data pertinent to all capital indictments and concluding with the sentence imposed on the defendant....

State v. Jenkins, 473 N.E.2d, 264, 279 (Ohio 1986) (emphasis in original). The Court described the materials legislatively mandated “to aid the courts in conducting their proportionality review” and referenced Ohio Rev. Code 2929.03(F). Nonetheless, since 1987, the Court has deemed death sentenced cases the only cases relevant to the proportionality review. See *State v. Stumpf*, 32 Ohio St.3d 95, 108 (1987).

RECOMMENDATION 6: The Joint Task Force also recommends that the Supreme Court of Ohio mandate by court rule that, prospectively, all death eligible homicides be reported to a central data warehouse both at the charging stage and at the conclusion of the case at the trial level. (*Also see Recommendation 55*).

RECOMMENDATION 7: The Joint Task Force recommends that the Ohio Legislature amend R.C. 2929.03(F) to include the necessity for a prosecutor’s rationale for a proposed plea agreement, on the record, for any indicted capital offense that results in a plea for a penalty less than death.

The Joint Task Force believes that a more robust proportionality review is necessary. In 1987, the Ohio Supreme Court decided to exclude from proportionality review any case where the defendant was indicted with capital specifications, but was sentenced to less than death. *State v. Steffen*, 509 N.E.2d 383, 395 (Ohio 1987). Offenders whose criminal behavior was arguably more reprehensible than those sentenced to death may not have been indicted or found guilty with death specifications.

RECOMMENDATION 8: Enact legislation to consider and exclude from eligibility for the death penalty defendants who suffered from “serious mental illness,” as defined by the legislature, at the time of the crime.

Appropriate questions for the legislature to consider include:

1. Whether “serious mental illness” is causally related to the crime?
2. Whether the determination of “serious mental illness” should be considered before trial or at some other time as determined by the legislature?
3. Whether this issue is already adequately addressed by current law?

RECOMMENDATION 9: Enact legislation to exclude from eligibility for the death penalty defendants who suffer from “serious mental illness” at the time of execution.

The ABA Ohio Assessment Team recommended that Ohio adopt a law or rule excluding individuals with serious mental disorders, other than mental retardation, from being sentenced to death and/or executed. The ABA Ohio Assessment Team noted that Ohio has a significant number of people with severe mental disabilities on death row, some of whom were disabled at the time of the offense and others whom became seriously ill after conviction and sentence. Recently, former Ohio Supreme Court Justice Evelyn Stratton expressed the case for banning execution of persons with severe mental illness. She stated that if executing persons with mental retardation/developmental disabilities or executing juveniles offends “evolving standards of decency”, then she could not “comprehend why these same standards of decency have not yet evolved to also prohibit execution of persons with severe mental illness at the time of their crimes”. See *State v. Lang*, 129 Ohio St. 3d 512 at 565 (2012).

Justice Stratton wrote:

“Using language from the American Bar Association’s Recommendation 122A, legislators in Kentucky and North Carolina have introduced bills to bar the execution of defendants who, at the time of the offense, “had a severe mental disorder or disability that significantly impaired their capacity to (a) appreciate the nature, consequences, or wrongfulness of their conduct, (b) exercise rational judgment in relation to conduct, or (c) conform their conduct to the requirements of the law.” Kentucky H.B. No. 446, introduced in the 2009 regular session, and North Carolina H.B. 553/S.B. No. 1075 use nearly identical language.

In addition, Indiana established the Bowser Commission to examine the execution of the mentally ill. The Bowser Commission issued a report in November 2007 recommending the exemption of the severely mentally ill from the death penalty. Final Report of the Bowser Commission, Indiana Legislative Services Agency, November 2007, www.in.gov/legislative/interim/committee/reports/BCOMAB1.pdf, p.3. In 2009, Indiana’s S.B. No. 22 was introduced to prohibit the imposition of the death penalty on an individual judicially determined to have had a severe mental illness, defined as schizophrenia, schizoaffective disorder, bipolar disorder, major depression, or delusional disorder, at the time of the crime. www.deathpenaltyinfo.org. See Entzeroth at 564.

Finally, the Tennessee Disability Coalition reports that in 2011, Tennessee legislators introduced H.B. No. 2064 and S.B. No. 1692 to prohibit the execution of a person who had severe and persistent mental illness at the time of committing murder in the first degree. <http://tn.disability.org>.

Moreover, at least five leading professional associations, the American Bar Association, the American Psychiatric Association, the American Psychological Association, the National Alliance on Mental Illness, and Mental Health America, have adopted policy statements recommending prohibition of execution of persons with severe mental illness at the time of the offense. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier* (2009), 50 B.C.L. Rev. 785, 789.”

Justice Stratton urged the Ohio General Assembly to consider the criteria for determining when a person with severe mental illness should be excluded from the penalty of death. In conclusion she wrote:

“A society that denies mental health care to those who need it the most and then subsequently executes them is cruel and inhumane at its very core. All of us need to be asking: “Is this the kind of society that we envision for ourselves?” My answer is that we can and must do better.” Sue Gunawardena-Vaughn, Director of Amnesty International USA’s Program to Abolish the Death penalty, quoted in Malone, *Cruel and Inhumane: Executing the Mentally Ill*, Amnesty International Magazine, <http://www.amnestyusa.org/node/87240>.

RECOMMENDATION 10: Adoption of an order, in the case of a pro se defendant who is competent to stand trial but may not be competent to represent himself or herself because of a mental health illness or developmental disability, directing either the appointment of counsel to conduct the trial or to act as “stand-by counsel” or “co-counsel” to assist the pro se defendant, or to assume or resume to proceed with trial as counsel of record, in the event the defendant changes their mind about proceeding as a pro se litigant.

In *Indiana v. Edwards*, 554 U.S. 164, the United States Supreme Court held that the Federal Constitution does not forbid a state from insisting that a criminal defendant proceed to trial with counsel, where the state court has found the defendant mentally competent to stand trial if represented by counsel, but not mentally competent to conduct such trial. The Joint Task Force was confronted with the issue of what constitutes a finding of “not mentally competent to conduct the trial.” The Joint Task Force also recognized that the concept of “stand-by counsel” refers to an attorney providing assistance to a pro se defendant who has chosen to try his or her case; however, it is also apparent that a mentally competent pro se defendant may not be competent to conduct his or her own trial or, at some stage of the proceeding, said pro se defendant may recognize their ineffectiveness and desire the assistance of counsel. Therefore, this recommendation attempts to address each of the above-stated alternatives.

RECOMMENDATION 11: Adopt the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

RECOMMENDATION 12: Adopt the Supplementary Guidelines for the Mitigation Function of Defense Team in Death Penalty Cases. This recommendation is not meant, however, to alter the standard adopted in *Strickland v. Washington*.

In the event that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the Supplementary Guidelines for the Mitigation Function of Defense Teams are adopted, in their entirety, it will be necessary to determine whether the ABA Guidelines are merely guides for defense counsel to follow or if they are to be applied as standards to be monitored and enforced by the trial court. In either event, the trial court, in accord with Rule 20.03 of the Rules of Superintendence for the Courts of Ohio, shall take appropriate steps, on the record, to monitor and/or enforce a checklist of guidelines. Due to the number of guidelines, their complexity, issues pertaining to attorney-client privilege and the propriety of court inquiry, the degree of monitoring and/or enforcement and the manner of proceeding must be addressed by the Supreme Court of Ohio and the Ohio Judicial College in the Capital Crimes Seminar.

The Supplementary Guidelines provide more detailed guidance for judges and defense counsel about the purpose of mitigating evidence, mitigation specialists, and the work of the defense team. Created in conjunction with the ABA Death Penalty Representation Project, the Guidelines follow and incorporate by reference the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

RECOMMENDATION 13: Enact and fund a Capital Litigation Fund to pay for all costs, fees, and expenses for the prosecution and defense of capital murder cases.

The ABA Ohio Assessment Team found there was insufficient compensation for defense counsel representing indigent capital defendants and inmates. The Office of the Ohio Public Defender sets the statewide maximum hourly rate and case fee cap, but each county is authorized to and does set its own reimbursement amounts and requirements. The indigent defense system used in each county is determined by the local Board of County Commissioners although judges have sole responsibility for appointing counsel. The Ohio Public Defender provides indigent defendants' counsel in most capital case post-conviction proceedings. Compensation for appointed counsel in death penalty cases varies widely in Ohio. In some small Ohio counties, the maximum fee for defense counsel is as low as \$5,000 while in other larger counties compensation can exceed \$50,000 per counsel. Effective capital case representation requires that full and fair compensation be provided for defense investigators and experts. Maximum amounts differ widely throughout Ohio in this area as well.

The Illinois Commission on Capital Punishment in April 2002 recommended a similar fund. Illinois eventually abolished the death penalty in 2011. A capital litigation fund eliminates the possibility a death penalty prosecution could bankrupt a small county. A capital litigation fund can insure that court appointed counsel and experts receive appropriate compensation for their services. Lastly, the Fund can establish with some precision the actual costs of prosecuting death penalty cases in Ohio.

RECOMMENDATION 14: It is specifically recommended that increased funding be provided to the Office of the Ohio Public Defender, by statute, to allow for additional hiring and training of qualified capital case defense attorneys, who could be made available to all Ohio counties, except in circumstances where a conflict of interest occurs, at which time a separate list of prospective appointed counsel would be provided.

RECOMMENDATION 15: The Ohio legislature and Supreme Court of Ohio should implement and fund a statewide public defender system for representation of indigent persons in all capital cases for trials, appeals, post-conviction, and clemency except where a conflict of interest arises. In cases of conflicts of interest, qualified Rule 20 counsel shall then be appointed.

RECOMMENDATION 16: Enact legislation to provide that private defense counsel appointed to represent death eligible defendants or those sentenced to death are equally paid throughout the state regardless of the location of the offense.

There is no area of criminal law that is more complex, more subject to constant change, or fraught with more mistakes than death penalty litigation. It is not an area of law that can be occasionally practiced. The quality of representation, the available resources, and ultimate outcome cannot continue to depend upon the vagaries of which political subdivision within Ohio where one is indicted. Death penalty litigation, to be done well, must be done professionally, full-time by those who do the work day in and day out with access to the proper resources both in terms of available funding and support services including investigators, mitigation specialists, social workers, experts, and many others.

Death penalty work should not be done occasionally. The time requirements alone will dictate that most appointed counsel will be faced with the choice of working on the death case or working on a case with a paying client to maintain his or her practice. Appointing a lawyer who only handles a death penalty case once every few years is a disservice to the client, to the court, and to the justice system. This is all the more true when one considers that only a small percentage go to trial. This means a lawyer appointed to a death penalty case may only try a death penalty case once every 10 years or less. This is true in the county public defender offices as well. Most do not do death penalty work at all and those that do have very little death penalty work. For example, Hamilton County almost exclusively appoints private counsel; Franklin County does the same. Also, the Montgomery County Public Defender office only handles death penalty work as second chair and then only rarely. The Summit County Public Defender Office only handles misdemeanors. The Cuyahoga County system employs a combination of a public defender office and assigned private counsel.

For comparison, imagine a medical system that operated this way. When given a choice, no one with a heart problem would see a doctor who does heart surgery once every 10 years. In fact, there are no hospitals in this nation that would give privileges to such a doctor to do heart surgery. Everyone, without exception would instead go to a doctor who dedicates his or her time and practice exclusively to heart treatment. The reasons are self-evident. The same should be true when dealing with death penalty work. We must create a system that has trained full-time, professional staff. With a reduction in death indictments, there will be on average 30-35 death penalty indictments statewide each year. If Ohio wants to raise the quality

of representation it must fund and staff a group of dedicated professionals who will and can do the work full-time, not occasionally.

Finally, nothing about Recommendation 15 is new or novel. For over 40 years, national professional groups that study criminal justice issues have advocated that defense services be organized on a state-wide basis. Specifically, the ABA Standards for Criminal Justice endorse state-wide organization as the best means for service provision. Jurisdiction-wide organization and funding can address local disparities in resources and quality of representation. See NAT'L LEGAL AID & DEFENDER ASS'N, NAT'L STUDY COMMISSION ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES FINAL REPORT (1976); Nat'l Conf. of Commissioners on Unif. State Laws, Prefatory Note to UNIFORM LAW COMMISSIONERS MODEL PUBLIC DEFENDER ACT, in HANDBOOK OF THE NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 267-268 (1970); TASK FORCE ON THE ADMIN. OF JUSTICE, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 52-53 (1967); ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard (3d ed. 1992).

RECOMMENDATION 17: Enact legislation that maintains that a death sentence cannot be considered or imposed unless the state has either: 1) biological evidence or DNA evidence that links the defendant to the act of murder; 2) a videotaped, voluntary interrogation and confession of the defendant to the murder; or 3) a video recording that conclusively links the defendant to the murder; or 4) other like factors as determined by the General Assembly.

Since 1973, 143 people have been exonerated of the capital crime from which they were convicted. Anthony Porter was falsely identified as a multiple killer by two people who had often seen him around his Chicago neighborhood. Porter came within five days of being executed in Illinois when Northwestern journalism students found the real killer in Milwaukee, Wisconsin, who confessed to the crimes. Everyone on the Joint Task Force expressed their concern over wrongful convictions in death penalty cases regardless of their individual views of the merits of the death penalty. Everyone agreed that there should be enhanced reliability of the evidence presented in a death penalty case.

RECOMMENDATION 18: Enact legislation that does not permit a death sentence where the State relies on jailhouse informant testimony that is not independently corroborated at the guilt/innocence phase of the death penalty trial.

The Illinois Commission on Capital Punishment in 2002 recommended that capital punishment not be available when a conviction is based solely upon the testimony of a single eyewitness or of an in-custody informant, or an uncorroborated accomplice. (Illinois later abolished the death penalty in 2011). Texas recently introduced legislation which would bar the use of “snitch” testimony in death penalty cases if it was obtained from a witness or accomplice in return for favorable treatment or leniency.

In 2005, the American Bar Association House of Delegates adopted the following resolution: “That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting

the guilty, by ensuring that no prosecution should occur based solely upon uncorroborated jailhouse informant testimony.”³ Informants were involved in more than 15 percent of wrongful convictions overturned due to DNA. As the ABA Report accompanying the Resolution on Jailhouse Informants noted, “Problems with jailhouse informants, however, predated the recent DNA exonerations. One of the most notorious examples involved Leslie Vernon White, an inmate incarcerated in Los Angeles. “In his appearance on 60 Minutes, White admitted to consistently fabricating confessions of fellow inmates and offering perjured testimony to courts.”⁴

The ABA report related that judges have warned against the use of such testimony, including former prosecutor, Judge Trott of the Ninth Circuit, in a 2001 case:

Never has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is not only to have the best lawyer money can buy or the court can appoint, but to cut a deal at someone else’s expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration. . . .

[B]ecause of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to “get” a target of sufficient interest to induce concessions from the government. Defendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence and to create something of value, setting up and betraying friends, relatives, and cellmates alike. Frequently, and because they are aware of the low value of their credibility, criminals will even go so far as to create corroboration for their lies by recruiting others into the plot, a circumstance we appear to confront in this case.⁵

The United States Supreme Court in 1909 made similar comments concerning accomplices: “[T]he evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.”⁶ Justice Jackson stated in a 1952 case: “The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility.”⁷

³ <http://www.americanbar.org/content/dam/aba/migrated/leadership/2005/midyear/daily/108B.doc>.

⁴ Id. at 3, quoting ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 65 (2002).

⁵ *Commonwealth of N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1123-24 (9th Cir. 2001) (quoted in the ABA Report on Jailhouse Informants at 4).

⁶ *Crawford v. United States*, 212 U.S. 183, 204 (1909) (quoted in the ABA Report on Jailhouse Informants at 4).

⁷ On *Lee v. United States*, 343 U.S. 747, 757 (1952).) (quoted in the ABA Report on Jailhouse Informants at 4).

The ABA Report defined a jailhouse informant as “someone who is purporting to testify about admissions made to him or her by the accused while incarcerated in a penal institution contemporaneously.”⁸ The ABA resolved that independent corroboration should be required in *jailhouse* informant cases; “no person should lose liberty or life based solely on the testimony of such a witness.”⁹

RECOMMENDATION 19: The legislature should study how to best support families of murder/homicide victims in the short and long term.

The needs of families of murder/homicide victims, especially when the death penalty may be sought, are an area that warrants special attention. Our justice system should ensure that their needs—from the immediate aftermath of a death to the longer term—are fully addressed, be that counseling, financial, or other support services. The Ohio Attorney General has a Victim Compensation Fund, which is a valuable resource. An important step would be to assess victims’ families’ needs by surveying and talking with victims’ families across the state.

RECOMMENDATION 20: Enact legislation that allows a defendant to withdraw his or her waiver of a jury trial in either the guilt or penalty phase if either phase is reversed by a reviewing court.

RECOMMENDATION 21: Amend Rule 20 of the Rules of Superintendence for Ohio Courts in the manner attached to these final recommendations as *Appendix B*.

The result of adoption of this recommendation will be a significant increase in the number of continuing legal education hours for defense attorneys under Sup.R. 20.

RECOMMENDATION 22: The Ohio Rules of Practice and Procedure shall be amended so that a properly presented motion must be accepted for filing for a ruling by the court in a death penalty case.

RECOMMENDATION 23:

Amend Sup.R. 20, adding Section (E). Section (E) would read as follows:

E. Post-Conviction Counsel. Post-conviction counsel shall satisfy all of the following qualifications:

- 1. Be admitted to the practice of law in Ohio or admitted to practice pro hac vice;**
- 2. Have at least three years of civil or criminal litigation or post-conviction experience in Ohio;**

⁸ ABA Report on Jailhouse Informants at 4.

⁹ *Id.* at 6.

3. **Have specialized training, as approved by the committee, on subjects that will assist counsel in the post-conviction of cases in which the death penalty was imposed in the two years prior to making the application;**
4. **Have experience as counsel in the post-conviction proceedings of at least three felony convictions in the seven years prior to making the application.**

RECOMMENDATION 24: The time frame for filing a post-conviction motion should be extended from one hundred eighty (180) days after the filing of the trial record to three hundred sixty five (365) days after the filing of the trial record.

Section 2953.21(A)(1)(c)(2) would read as follows:

Except as otherwise provided in section 2953.23 of Revised Code, a petition under division (A)(1) of this section shall be filed no later than three hundred sixty-five (365) days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty five (365) days after the expiration of the time for filing the appeal.

RECOMMENDATION 25: The judge hearing the post-conviction proceeding must state specifically why each claim was either denied or granted in the findings of fact and conclusions of law.

RECOMMENDATION 26: The common pleas clerk shall retain a copy of the original trial file in the common pleas clerk's office even though it sends the originals to the Supreme Court of Ohio in connection with the direct appeal.

RECOMMENDATION 27: There shall be no page limits in post-conviction petitions for death penalty cases in either the petition filed with the common pleas court or on appeal from the denials of such petition.

RECOMMENDATION 28: Amend R.C. §2953.21, as attached to this final report in Appendix C, to provide for depositions and subpoenas during discovery in post-conviction relief.

RECOMMENDATION 29: Mandate through the Rule 20 Committee that all attorneys who practice capital litigation must take a certain number of CLE hours on the issue of racial bias. Mandate mandatory CLE for prosecutors who prosecute death penalty cases to educate them on how to protect against racial bias in the arrest, charging and prosecution of death penalty cases. Mandate that Judges assigned to death penalty cases must also attend specialized training regarding racial bias in death cases and how to protect against it.

In 1999, The Ohio Commission on Racial and Ethnic Fairness recognized that “a perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black”. Despite these statements, the ABA Ohio Assessment Team found that the State of Ohio has not further studied the issue of racial bias in capital sentencing or implemented reforms designed to help eliminate the impact of race on capital sentencing. The ABA Ohio Assessment Team conducted a racial and geographic disparity study confirming the existence of racial bias in the State’s capital system, finding that those who kill whites are 3.8 times more likely to receive a death sentence than those who kill blacks.

RECOMMENDATION 30: Mandate that any judge who reasonably believes that any state actor has acted on the basis of race in a capital case be reported to the Office of Disciplinary Counsel or, if not an attorney, to the appropriate supervisory authority.

RECOMMENDATION 31: Mandate through the Rule 20 Committee that all Rule 20 approved trainings must include at least one hour of training regarding the development of discrimination claims in death penalty cases and how to preserve *Batson* issues for appellate review.

RECOMMENDATION 32: Mandate that an attorney must seek the recusal of any judge where “a reasonable basis for concluding that the judge’s decision making could be affected by racially discriminatory factors” and should the judge not recuse, if the attorney still believes there is a reasonable basis for concluding that the judge’s decision making could be affected by racially discriminatory factors, then the attorney shall file an affidavit of bias with the Chief Justice of the Supreme Court of Ohio.

RECOMMENDATION 33: Based upon data showing that prosecutors and juries overwhelmingly do not find felony murder to be the worst of the worst murders, further finding that such specifications result in death verdicts 7% of the time or less when charged as a death penalty case, and further finding that removal of these specifications will reduce the race disparity of the death penalty, it should be recommended to the legislature that the following specifications be removed from the statutes: Kidnapping, Rape, Aggravated Arson, Aggravated Robbery, and Aggravated Burglary. (See Sentence Comparison looking at Defendant and Victim’s Race & Specs Chart, Appendix D).

RECOMMENDATION 34: To address cross jurisdictional racial disparity, it is recommended that Ohio create a death penalty charging committee at the Ohio Attorney General’s Office. It is recommended that the committee be made up of former county prosecutors, appointed by the Governor, and members of the Ohio Attorney General’s staff. County prosecutors would submit cases they want to charge with death as a potential punishment. The Attorney General’s office would approve or disapprove of the charges paying particular attention to the race of the victim(s) and defendant(s).

The Illinois Commission on Capital Punishment in April 2002 recommended that their death penalty sentencing statute be revised to include a mandatory review of death eligibility undertaken by a state-wide review committee. The Commission recommended that in the

absence of legislative action, the Governor should make a commitment to setting up a voluntary review process, supported by the presumption that the Governor would commute the death sentences of defendants when the prosecutor has not participated in the voluntary review process, unless the prosecutor can offer a compelling explanation, based on exceptional circumstances, for the failure to submit the case for review.

The Illinois state-wide review committee was to be composed of five members, four of whom would be prosecutors. The committee would develop standards to implement the legislative intent of the General Assembly with respect to death eligible cases.

The powers of the county prosecutor in Ohio are set out in R.C. 309.08. The statute would have to be amended to provide for a state-wide review committee.

RECOMMENDATION 35: Enact legislation allowing for racial disparity claims to be raised and developed in state court through a Racial Justice Act with such a claim being independent of whether the client has any other basis for filing in that court.

RECOMMENDATION 36: To ensure a more representative jury pool, enact legislation that requires every jurisdiction to create jury pools from the lists of all registered voters and all licensed drivers, who are U.S. citizens, rather than only the voter registration list.

The Sixth Amendment right to jury trial includes the right to a jury chosen from a fair cross section of the community, in particular the representation of a distinctive group in venires from which jurors are selected should be fair and reasonable in relation to the number of such persons in the community. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). Ohio Rev. Code 2313.06 allows two annual jury lists to be compiled - one from voter registration and the other from driver's license registration. However, while the final jury list must include all registered voters, it is discretionary whether it includes those with driver's licenses. The failure to include driver's license holders on annual lists reduces minority participation in jury service, and creates inconsistencies among counties with regard to these distinctive groups being included in venires. Minorities are historically underrepresented in voter registration, and motor vehicle registrations provide greater assurance of their participation, as well as a more diverse socio-economic representation.

RECOMMENDATION 37: Enact a court rule that allows prosecutors and defendant's attorneys in death penalty cases full and complete access to all documents, statements, writings, photographs, recordings, evidence, reports or any other file material in possession of the state, any agent or agency of the state, or any police agency involved in the case, or in the possession of the defendant's attorneys which is known to exist or which, with due diligence, can be determined to exist and to allow the attorneys to inspect, test, examine, photograph or copy the same. This shall not be construed to require the disclosure of attorney work product or privileged matters, nor to the disclosure of inculpatory information possessed by the defendant's attorneys described in Crim.R. 16 (H)(3), nor to materials protected by Crim.R. 16.

RECOMMENDATION 38: Enact legislation to require a prosecutor to present to the Grand Jury available exculpatory evidence of which the prosecutor is aware.

The U.S. Department of Justice requires federal prosecutors to present exculpatory evidence to the Grand Jury for its consideration.¹⁰ Ohio should enact similar rules or legislation in death penalty cases to include a requirement that exculpatory evidence concerning guilt or innocence and concerning the appropriate penalty also be presented to the Grand Jury. Examples of exculpatory evidence include, but are not limited to, inconsistent eyewitness identifications of the suspect(s), inconclusive forensic testing of evidence, evidence of the suspect's mental illness or low intelligence, or other recognized mitigating factors.

RECOMMENDATION 39: Adoption of an order requiring implementation of mandatory on the record pre-trial conferences. Further, the Joint Task Force recommends appropriate Judicial College education to emphasize the necessity for conducting such conferences, all of which must be on the record, to begin at the earliest stages of the case and to address issues pertaining to discovery, *Brady* disclosures, and appointment of experts. The pre-trial conference shall be ex parte upon the request of defense counsel and upon good cause shown as to matters related to defense experts but shall be on the record. After inquiry by Court as to status of discovery, counsel for state and defendant shall be ordered to declare their compliance with all discovery obligations and the State shall affirmatively assert disclosure of all exculpatory matters pursuant to *Brady*.

RECOMMENDATION 40: The Ohio statute providing for attorney-client privilege should be amended to provide that a claim of ineffective assistance waives the privilege in order to allow full litigation of ineffectiveness claims. The waiver will be limited to the issue raised.

RECOMMENDATION 41: The Task Force voted to urge all parties involved to work on procedures to remove any impediments to a fair and timely resolution of death penalty cases in the Ohio courts.

¹⁰ U.S. Attorneys' Manual 9-11.233, Presentation of Exculpatory Evidence:

In *United States v. Williams*, 112 S.Ct. 1735 (1992), the Supreme Court held that the Federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review (emphasis added).

RECOMMENDATION 42: There should be a codification of the right to have counsel present at the clemency hearing.

The Ohio Constitution gives the Governor the exclusive authority to grant reprieves, commutations, and pardons for all offenses including capital crimes. This power is exercised after receipt of a non-binding recommendation from the Ohio Parole Board. While Ohio does not provide for counsel to be appointed in clemency proceedings, the federal courts have held that federal habeas corpus counsel may represent the defendant in clemency proceedings.

RECOMMENDATION 43: Enact legislation or administrative regulation to provide that death penalty clemency proceedings in Ohio include:

- A. The parole board hearing must be recorded by audio, video or court stenographer and be a public record.
- B. The interview of the condemned inmate must be recorded by audio, video or court stenographer and be a public record.
- C. The inmate’s counsel must be allowed to counsel the client in the interview;
- D. The parole board must reveal to counsel for the defendant and the state all documents, witnesses and information it will consider in reaching its decision;
- E. The inmate’s “master file” must be released to his/her counsel at least 6 months before the parole board hearing;
- F. Counsel for the inmate and the State must disclose and exchange all information to be relied upon at the parole hearing at least 30 days before the hearing with attorney certification and a continuing duty to disclose.
- G. Identify a funding mechanism, such as a capital litigation fund, for inmate’s mental health expert or state expert so that an expert can be hired in a timely manner for the parole board hearing.
- H. The legislature should ensure adequate funding, such as a capital litigation fund, for private counsel who prepare for and represent a condemned inmate at a Parole board hearing;
- I. Require annual mandatory training of all Parole Board members for a minimum of six hours by mental health and forensic science experts and by other experts relevant to death penalty issues.

The federal courts have placed a burden on state clemency systems to operate as a safeguard for the judicial system. *Herrera v. Collins*, 506 U.S. 390, 415 (1993). The National Governor’s Association’s Center for Policy Research in its Guide to Executive Clemency Among the American States in 1998, at 177, emphasized the need to acquire complete and accurate

information in making clemency decisions. A plurality of the Supreme Court agreed that minimal due process is to be accorded in these proceedings. *Woodard v. Ohio*, 523 U.S. 272 (1998).

Reform of our present system is both appropriate and essential. “The information sorely needed in advance of clemency decisions in death penalty cases – reliable and comprehensive facts about the offender’s past and present circumstances, and all matters relevant to his or her crime – can only be ensured if regular fact-finding procedures are adopted. Procedural reforms would enhance rather than constrain or undermine the prudent exercise of executive discretion.” Note, *A Matter of Life and Death: Due Process Protections in Capital Clemency Proceedings*, 90 *Yale L. J.* 889, 908 n. 56 (1980-1982).

The ABA Standards for the Appointment and Performance of Counsel 1.1 comt.c (2003) urge defense counsel to press legal claims asserting the right to a fuller and fairer clemency process, understanding that the clemency process’ previous deference to earlier appellate court rulings regarding death-sentenced inmates “undermines the nonjudicial purposes of clemency and is a perversion of the Governor’s clemency power.” Alyson Dinsmore, “Clemency in Capital Cases: The Need to Ensure Meaningful Review”, 2002 *UCLA L. Rev.* 1825, 1843 (2002).

Some states have already adopted such practices by statute or administrative regulation. Both Pennsylvania and Montana explicitly require recording of proceedings of the Parole Board. Pennsylvania also requires recording of the inmate interview. Pennsylvania and another few states also explicitly provide for the inmate’s attorney to be present during the interview.

Tennessee provides for a psychiatric or psychological examination whenever the inmate was convicted of a sex-related offense. Tennessee, Illinois, Maryland and Montana delineate that members of the Parole Board should be trained in medicine, psychiatry, or other behavioral sciences (and other fields) or some combination thereof. (Utah provides for the Board to appoint a mental health advisor whose responsibilities include preparing reports and recommendations on all persons adjudicated guilty but mentally ill. Louisiana also authorizes the Board to employ staff with psychiatric and psychological expertise.)

The recommended reforms will assist in ensuring that clemency provides the needed ‘fail-safe’ in our criminal justice system.

RECOMMENDATION 44: The Ohio Judicial Conference shall, on an annual basis, work with attorneys and judges to review and revise, as necessary, the jury instructions in death penalty cases to ensure that jurors understand applicable law. In particular, the Conference shall request, on an annual basis, input from the Ohio Prosecuting Attorney’s Association, the Ohio Association of Criminal Defense Lawyers, Ohio Public Defender, and the members of the Ohio Judicial Conference.

Research has long indicated that capital jurors commonly have difficulty understanding jury instructions.¹¹ Interviews with jurors from death penalty cases across the country confirm this lack of understanding. In 1990 researchers at SUNY Albany, with funding from the National Science Foundation, began the Capital Jury Project, a multi-year study of actual jurors who heard and deliberated in capital cases. The researchers conducted in-depth interviews, (two to four hours) that followed a 92-page interview protocol, of more than 1,000 jurors in 354 capital trials in fourteen death-penalty states.¹² The interviews explored jurors understanding of their instructions and how and when they made their sentencing decision.¹³

The Capital Jury Project found that in every state in the study a significant percentage of capital jurors failed to follow the constitutional parameters of death penalty law including:

- Jurors did not understand their sentencing instructions, including the meaning of mitigation and its legally prescribed role in their sentencing decision;
- Jurors decided the defendant’s punishment during the guilt-or-innocence phase;
- Jurors did not consider mitigation because they believed death was the only acceptable punishment and were biased in favor of guilt and the death penalty by the jury selection process;
- Jurors believed the death penalty was mandatory;
- Jurors did not see themselves or the jury as a whole as primarily responsible for the sentencing decision; and
- Jurors voted for death because they underestimated the severity of the sentencing alternative.

¹¹ Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 549-551 (1994) (discussing juror comprehension, or lack thereof, of jury instructions); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 225 (1996); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 12-15 (1993); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 7 (1995) (discussing jurors understanding of the concept of mitigation evidence, including the scope, applicable burden of proof, and the required number of jurors necessary to find the existence of a mitigating factor).

¹² They included Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia. William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM.L. BULL. 51, 55 (2003).

¹³ See generally William Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L. J. 1043 (1995).

RECOMMENDATION 45: The Ohio Judicial Conference shall review and revise as necessary the Ohio Jury Instructions to institute the use of “plain English” and “plain English” shall be used throughout capital trials.

In 2004 the Supreme Court of Ohio Task Force on Jury Service made a similar recommendation. The Supreme Court of the State of Ohio, *Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service 11-12* (2004), available at http://www.sconet.state.oh.us/publications/juryTF/jurytf_proposal.pdf. The Task Force made this recommendation based on its own survey of jurors that indicated that a significant portion had difficulty understanding legal terminology. The findings of the Capital Jury Project, see above, document that the need for plain English jury instructions is particularly critical in death penalty cases.

RECOMMENDATION 46: In capital cases, jurors shall receive written copies of “court instructions” (the judge’s entire oral charge) to consult while the court is instructing them and while conducting deliberations.

This recommendation would require revision of both Ohio Rule of Criminal Procedure 30(A) and Ohio Rev. Code § 2945.10(G): Rule 30(A) permits, but does not require, the jury to receive a written copy or recording for use in deliberations; the Ohio statute says the final jury charge must be reduced to writing “if either party requests it before the argument to the jury is commenced.”

Making the provisions of written jury instructions automatic would make trial practice consistent across the state and would help jurors be better able to deliberate. This recommendation is consistent with the Ohio Supreme Court’s Task Force on Jury Service recommendation that jurors should be “entitled to be provided a copy of written instructions, including any preliminary instructions and final instructions.” The Supreme Court of the State of Ohio, *Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service 12-13* (2004), available at http://www.sconet.state.oh.us/publications/juryTF/jurytf_proposal.pdf. The Task Force on Jury Service noted that this would increase jury comprehension, reduce the questions jurors have during their deliberations and make their deliberations more efficient.

RECOMMENDATION 47: The Ohio Judicial Conference shall study the Ohio Jury Instructions to make clear that a jury must always be given the option of extending mercy that arises from the evidence as cited in Justice Scalia’s dissent in *Morgan v. Illinois*, 504 U.S. 719, 751 citing to *Woodson v. North Carolina*, 428 U.S. 303-305.

RECOMMENDATION 48: The Ohio Judicial Conference shall ensure the Ohio Jury Instructions make clear the weighing process for considering aggravating circumstances and mitigating factors should not be conducted by determining whether there are a greater number of aggravating circumstances than mitigating factors.

The State of Ohio requires jurors to weigh whether the aggravating circumstances outweigh the mitigating factor(s) beyond a reasonable doubt in order to sentence the defendant to death.¹⁴ The Ohio Criminal Jury Instructions advise that any mitigating factor, standing alone,

¹⁴ OHIO REV. CODE § 2929.04(B) (West 2007); see also 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(12).

is sufficient to support a sentence of life imprisonment if the aggravating factor(s) is/are not sufficient to outweigh the mitigating factor beyond a reasonable doubt.¹⁵ Furthermore, the instructions inform jurors that “[i]t is the quality of the evidence regarding aggravating circumstance(s) and mitigating factors that must be given primary consideration by you. The quality of the evidence may or may not be the same as the quantity of the evidence; that is, the number of witnesses or exhibits presented in this case.”¹⁶ While this instruction could serve to inform jurors that it is not to weigh the number of aggravators against the number of mitigators to determine if the defendant should be sentenced to death, the instructions do not explicitly state that the jury should not count the aggravators against the mitigators in determining whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

RECOMMENDATION 49: Implementation of enhanced mandatory, educational and minimum experience and/or certification requirements for all participating legal counsel (appointed and retained) and all Ohio judges (including Common Pleas, Appellate, and Supreme Court) to allow for their participation in a capital case. The Ohio Judicial College could be utilized as the vehicle to implement the mandatory educational requirements for judges. Certain minimum standards for the appointment and performance of legal counsel (appointed and retained) in capital cases should be set forth in the rules and could, in exceptional circumstances, be waived, with the consent of the Supreme Court of Ohio, if it is determined that the attorney’s ability or the judge’s qualification otherwise exceeds the standards required by the rule. The adoption of this rule would require some amendment or modification to Sup.R. 20.

RECOMMENDATION 50: The Joint Task Force recommends implementation of educational guidance for presiding judges as to when and how to intervene in situations of potential ineffective lawyering. Additional guidance should also be emphasized to assure effective utilization of the recusal process by participating legal counsel, when incurring issues of preconceived opinions or otherwise prejudicial positions of trial judges. For clarification, the education guidance would highlight procedures for recognizing these issues in such a way that the trial court would not damage or undermine the client’s confidence in his or her legal counsel; however, the Joint Task Force also recognizes that if ineffective assistance of counsel is found, the court has a duty to step in and address the issue.

RECOMMENDATION 51: Adoption of a rule directing that a presiding trial judge, or the Administrative Judge, in conformity with Sup.R. 20, is the appropriate authority to appoint legal counsel in a capital case.

RECOMMENDATION 52: Adoption of a rule directing that the trial judge is the appropriate authority for the appointment of experts for indigent defendants. The rule should further provide that the decision pertaining to the appointment of experts shall be made, on the record, at one of the prescribed Pre-Trial Conferences.

¹⁵ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(10).

¹⁶ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(12).

If defense counsel requests, the demand for appointment of the expert shall be made in-camera ex parte, and the order concerning the appointment shall be under seal.

Upon establishing counsels' respective compliance with discovery obligations, the question of the appointment of experts (including determination of projected expert fees based upon analysis of expert's time to be applied to the case as well as consideration of incremental payment of expert fees as case progresses) would be decided by the court, which decision would be subject to immediate appeal, under seal, to the appropriate Court of Appeals. The trial court judge shall make written findings as to the basis for any denial. Although concerns have been raised as to the ability of the Appellate Court to provide the anticipated, necessary expedited hearing within a reasonable time-frame, the Joint Task Force suggests that this issue be elevated to the status of a final appealable order and that the necessary expedited appellate process be spelled out in the statute.

RECOMMENDATION 53: The Supreme Court should take the lead to adopt a uniform process for the selection of indigent counsel in capital cases, including the establishment of a uniform fee and expense schedule, all of which would be included in the proposed Criminal Rule for Capital Cases (discussed below).

RECOMMENDATION 54: Should the present process of appointment of indigent counsel by the judiciary continue, the main objective should always be to assure the best educationally experienced and qualified candidate, who is available (within the county or outside the county), and who is otherwise willing to take on the responsibilities associated with the case for an appropriate fee and accompanying expenses, is appointed. A uniform fee schedule for such services across the State of Ohio must be a necessary consideration to assure the equal protection and due process for the accused in a capital case.

RECOMMENDATION 55: Adoption of reporting standards to provide complete transparency of record, including requirements to ensure better record keeping by the trial judge and the provision of additional, detailed resource information necessary to assure strict compliance with due process, which information shall be submitted to the Supreme Court upon completion of the case. Such resource information may include unique Constitutional issues, unique evidentiary issues, significant motions, plea rationale, pre-sentence investigation, and any additional information required by the Rule 20 Committee or the Supreme Court of Ohio. Additional types of resource information could be developed as part of the mandated educational process conducted by the Ohio Judicial College.

RECOMMENDATION 56: The Joint Task Force believes that some of the recommendations above could be accomplished by the adoption of a separate Criminal Rule for Capital Cases. The Joint Task Force recommends that such a rule be adopted and provide for the mandatory training of attorneys and judges (*Recommendation 49*), the selection and appointment of indigent counsel in capital cases (*Recommendation 51*), and the enforcement of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the Supplementary Guidelines for the Mitigation Function of Defense Teams (*Recommendations 11 and 12*).

CONCLUSION

The Joint Task Force to Review the Administration of Ohio's Death Penalty presents this report and recommendations to the Supreme Court of Ohio and the Ohio State Bar Association for their consideration. The Joint Task Force believes that the recommendations made by this report will promote fairness in capital cases for both the state and the defendant. In addition, the recommendations would respond to the majority of the American Bar Association's proposals from its 2007 report.





APPENDICES

APPENDIX A

2007 ABA Death Penalty Assessment Report - Recommendations

APPENDIX B

Proposed Amendments to Sup.R. 20

APPENDIX C

Proposed Amendments to Post-Conviction Statutes



APPENDIX A

2007 ABA OHIO DEATH PENALTY ASSESSMENT REPORT RECOMMENDATIONS

COLLECTION, PRESERVATION, AND TESTING OF DNA AND OTHER TYPES OF EVIDENCE

ABA Ohio Assessment Team Recommendations:

1. *The State of Ohio should require that all biological evidence be preserved for as long as the defendant is incarcerated.*
2. *All biological evidence should be made available to defendants and convicted persons upon request and in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law.*
3. *Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.*
4. *Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.*
5. *Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.*
6. *Provide adequate funding to ensure the proper preservation and testing of biological evidence. (See later discussion of Capital Litigation Fund recommendation).*

In 2001, the Center on Wrongful Convictions at Northwestern Law School analyzed the causes of the wrongful convictions of 86 death row exonerees. The Center found that 45% of these wrongful convictions resulted from eyewitness error resulting from confusion or faulty memory, 8% from false confessions, and 9% from the introduction of junk science.

In January 2012, in response to a request from the Joint Task Force, the Ohio Legislative Service Commission released a research memorandum reviewing the changes Ohio had made in response to the ABA Ohio Assessment Team's Assessment Report. The Commission noted that Substitute Senate Bill 77 of the 128th General Assembly (hereinafter "Sub. S.B. 77") enacted provisions that generally require the preservation of "biological evidence" for specified periods of time by "governmental retention entities". The biological evidence-preservation provisions apply to evidence likely to contain biological material that was in the possession of any governmental evidence-retention entity during the investigation and prosecution of aggravated murder.

Biological evidence is defined as a number of items which typically produce biological material. "Biological material" is defined as any product of a human body containing DNA. The law now contains a broad definition of who is a governmental-retention entity. The law requires that entity to secure that biological evidence in relation to the investigation or prosecution of aggravated murder for the period of time that the offense remains unsolved, or if a person is convicted of or pleads guilty to aggravated murder, for the latest of the following periods of time: the period of time the person is incarcerated or dies. The retention entity that possesses the biological evidence must retain the evidence in an amount sufficient to develop a DNA "profile".

The law also amended Revised Code provisions concerning post-conviction DNA testing. Eligible prison inmates have the opportunity to submit to DNA testing to obtain evidence that may be used to establish clear and convincing evidence of the inmate's innocence in an offense, or if the inmate is sentenced to death, actual innocence of an aggravating circumstance that was the basis of the death sentence. Sub. S.B. 77 further amended the requirements for the maintenance of DNA samples, adding provisions that would be applicable if an offender who was under a death sentence is no longer incarcerated.

The ABA Ohio Assessment Team's Assessment Report expressed concern that death sentenced post-conviction applicants seeking DNA testing must comply with extremely stringent requirements to have their application granted and DNA testing performed to prove their innocence. Provisions of the Revised Code provide that the Code's sections regulating post-conviction DNA testing "are not the exclusive means by which an offender may obtain post-conviction DNA testing". See R.C. 2953.84.

Sub. S.B. 77 established a Preservation of Biological Evidence Task Force (Task Force) within the Bureau of Criminal Identification and Investigation of the Attorney General's office. The Task Force must consist of officers and employees of the Bureau; a representative from the Ohio Prosecutors Association; a representative from the Ohio State Coroners Association; a representative from the Ohio Association of Chiefs of Police; a representative from the Ohio Public Defenders office, in consultation with the Ohio Innocence Project; and a representative from the Buckeye State Sheriffs Association. The law requires the Task Force to establish a system regarding the proper preservation of biological evidence in Ohio and specifies that, in establishing the system, the Task Force must do all of the following:

1. Devise standards regarding the proper collection, retention, and cataloguing of biological evidence for ongoing investigations and prosecutions.
2. Recommend practices, protocols, models, and resources for the cataloguing and accessibility of preserved biological evidence already in the possession of governmental evidence-retention entities.

The law does not mandate law enforcement agencies to adopt the system established by the Task Force. The law requires, in consultation with the Preservation of Biological Evidence Task Force, the Office of the Attorney General to administer and conduct training programs for law enforcement officers and other relevant employees who are charged with preserving and cataloguing biological evidence regarding the methods and procedures that require or relate to the preservation of biological evidence.

Sub. S.B. 77 enacted a provision that requires governmental evidence-retention entities, including, but not limited to law enforcement agencies, that possess biological evidence to prepare an inventory of the biological evidence that has been preserved in connection with the defendant's criminal case or the alleged delinquent child's delinquent child case upon written request by the defendant in any criminal case or the alleged delinquent child in any delinquent child case involving aggravated murder. The act does not require the evidence-retention facility adopt written procedures for these requests.

The ABA Ohio Assessment Team's recommendation regarding training programs and disciplinary procedures is not restricted to training and disciplinary procedures connected to the investigation and enforcement of capital cases. The ABA Ohio Assessment Team report stated that Ohio is in partial compliance with Recommendation #4, stating that law enforcement investigative personnel, including law enforcement officers, receive mandatory basic training and some law enforcement agencies are required to keep performance evaluations. The report stated that

the extent to which the training courses and performance evaluations ensure that investigative personnel are prepared and accountable for their performances is unknown. The report did not contain specific recommendations for training programs and disciplinary procedures that would ensure that investigative personnel are prepared and accountable for their performance or a method for determining whether programs and disciplinary procedures are in compliance with the recommendation.

Continuing law in Ohio requires the Ohio Peace Officer Training Commission to recommend rules to the Ohio Attorney General with respect, but not limited, to the following:

1. Minimum courses of study at approved peace officer training schools;
2. Requirements of minimum basic training for peace officers;
3. Classification of advanced in-service training programs for peace officers.

The ABA Ohio Assessment Team's fifth recommendation is not restricted to reports of misconduct in capital cases. The recommendation does not state what would constitute an adequate opportunity for citizens and investigative personnel to report misconduct in investigations. The Revised Code and Ohio Administrative Code do not contain provisions pertaining to reporting misconduct in criminal investigations. The Ohio Rules for Professional Conduct require that attorneys, such as prosecuting attorneys and defense counsel, report professional misconduct which they discover in the course of the prosecution.

LAW ENFORCEMENT IDENTIFICATIONS AND INTERROGATIONS

ABA Ohio Assessment Team Recommendations:

- (1) *Law enforcement agencies should adopt guidelines for continuity line-ups and photo spreads in a manner that maximizes their likely accuracy.*
- (2) *Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photo spreads, as well as training on non-suggestive techniques for interviewing witnesses.*
- (3) *Law enforcement agencies and prosecutors' offices should periodically update the guidelines for conducting lineups and photo spreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.*
- (4) *Videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impracticable, audiotape the entirety of such custodial interrogations.*
- (5) *Ensure adequate funding to ensure proper development, implementation and updating of policies and procedures relating to identifications and interrogations.*
- (6) *Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.*
- (7) *Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging the lineup accuracy.*

The ABA Ohio Assessment Team's recommendations indicated that these guidelines should adopt the American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures. Sub. S.B. 77 enacted laws requiring Ohio law enforcement agencies and criminal justice entities to adopt special procedures for conducting live lineups and photo lineups. These procedures essentially follow the ABA Best Practices, such as blind administration and a folder system, for conducting a photo lineup.

No changes to the Revised Code, Ohio Administrative Code, Rules of Criminal Procedure, or Rules of Evidence have been adopted or amended since the issuance of the ABA Ohio Assessment Team report that requires law enforcement officers and prosecutors to receive periodic training related to lineups, photo spreads, and non-suggestive techniques for interviewing witnesses. As noted above, the Attorney General has the authority to adopt and promulgate training rules and regulations recommended by the Ohio Peace Officer Training Commission.

While Sub. S.B. 77 enacted law requiring Ohio law enforcement agencies and criminal justice entities to adopt specific provisions for conducting live lineups and photo line ups, the act did not contain provisions pertaining to updating these procedures. No changes to the Revised Code, Ohio Administrative Code, Rules of Criminal Procedure, or Rules of Evidence have been adopted or amended since the issuance of the ABA Ohio Assessment Team report that requires law enforcement officers and prosecutors to periodically update the guidelines adopted by the law enforcement agency or prosecutor's office for conducting lineups and photo spreads.

Sub. S.B. 77 enacted law governing custodial interrogations. The act defined a "custodial interrogation" as any interrogation involving a law enforcement officer's questioning that is reasonably likely to elicit incriminating responses and in which a reasonable person in the subject's position would consider himself or herself to be in custody, beginning when a person should have been advised of the person's right to counsel and to remain silent and of the fact that anything the person says could be used against the person, as specified by the United States Supreme Court in *Miranda v. Arizona* (1966), 384 U.S. 436, and subsequent decisions, and ending when the questioning has completely finished.

As relevant to capital cases, under Sub. S.B. 77, all statements made by a person, who is the suspect of a violation of or possible violation of the offense of aggravated murder, are presumed to be voluntary if the statements are made by the person during a custodial interrogation at a "place of detention" and those statements are electronically recorded. The person making the statements during the electronic recording of a custodial interrogation has the burden of proving that any statements made during the custodial interrogation were not voluntary. There is no penalty against the law enforcement agency that employs a law enforcement officer if the law enforcement officer fails to electronically record a custodial interrogation as required. Sub. S.B. 77 defined a "place of detention" as a jail, police or sheriff's station, holding cell, "state correctional institution", "local correctional facility", "detention facility," or DYS facility. A place of detention does not include a law enforcement vehicle.

As enacted by Sub. S.B. 77, the law requires law enforcement personnel to clearly identify and catalogue every electronic recording of a custodial interrogation that is recorded pursuant to the act. If a criminal or delinquent child proceeding is brought against a person who was the subject of a custodial interrogation that was electronically recorded, law enforcement personnel must preserve the recording until the later of when all appeals, post-conviction relief proceedings, and habeas corpus proceedings are final and concluded or the expiration of the period of time within which such appeals and proceedings must be brought. Upon motion by the defendant in a criminal proceeding or the alleged delinquent child in a delinquent child proceeding, the court may order that a copy of an electronic recording of a custodial interrogation of the person be

preserved for any period beyond the expiration of all appeals, post-conviction relief proceedings, and habeas corpus proceedings. If no criminal or delinquent child proceeding is brought, law enforcement personnel are not required to preserve the related recording.

The Ohio Supreme Court has held that expert testimony of an experimental psychologist concerning the variables or factors that may impair the accuracy of atypical eyewitness identification is admissible under the Rules of Evidence, unless the expert testifies regarding the credibility of a particular witness. “The decision to admit the expert opinion testimony, however, is within the sound discretion of the trial court.” *State v. Buell*, Ohio St. 3d 124, 133 (1986).

Ohio courts have the discretion to appoint an eyewitness-identification expert for an indigent defendant. Ohio appellate court decisions have found, under certain conditions, a court’s denial to appoint an eyewitness-identification expert for an indigent defendant to be an abuse of discretion. *State v. Bradley* 181 Ohio App.3d 40, 43-44 (2009).

The General Assembly requested the Ohio Judicial Conference, in Sub. S.B. 77, to review existing jury instructions regarding eyewitness identification for compliance with the act. Sub. S.B. 77 did not require courts to adopt new jury instructions regarding eyewitness identification. Sub. S.B. 77 provides that when such evidence is presented at trial, if law enforcement fails to comply with the act’s lineup provisions, the jury must be instructed that it may consider credible evidence of non-compliance in determining the reliability of any eyewitness identification resulting from the lineup.

It is noteworthy that recently the New Jersey Supreme Court, a year after issuing a sweeping ruling aimed at resolving the “troubling lack of reliability in eyewitness identifications”, issued a number of instructions for judges to give jurors to help them better evaluate such evidence in criminal trials. For instance, in cases involving cross-racial identifications, judges were directed to tell jurors that “research has shown that people may have great difficulty in accurately identifying members of a different race.” The New Jersey Supreme Court’s ruling was widely heralded for containing the most exhaustive review of decades of scientific research on eyewitness identification. See *State v. Henderson*, 27 A. 3d 872 (N.J. 2011).

Although the Ohio Supreme Court in *Buell* spoke concerning expert testimony at trial, nothing in the law prohibits the court from conducting a pre-trial reliability hearing with the use of expert testimony on the identification issue. The United States Supreme Court recently held that due process does not require a preliminary judicial inquiry into the reliability of eyewitness testimony when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. *Perry v. New Hampshire*, 132 S. Ct. 716 at 730 (2012).

CRIME LABORATORIES AND MEDICAL EXAMINER OFFICES

ABA Ohio Assessment Team Recommendations:

1. *Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability and timely analysis of forensic evidence.*
2. *Crime laboratories and medical examiner offices should be adequately funded.*

MENTAL RETARDATION AND MENTAL ILLNESS

ABA Ohio Assessment Team Recommendations:

1. *Jurisdictions should bar the execution of individuals who have mental retardation, as defined by the American Association of Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.*
2. *All actors in the criminal justice system should be trained to recognize mental retardation in capital defendants and death-row inmates.*
3. *The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skill deficiencies of a defendant who counsel believes may have mental retardation.*
4. *For cases commencing after *Atkins v. Virginia* or the state's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.*
5. *The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.*
6. *During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.*
7. *The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.*
8. *All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.*
9. *The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client's mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental illness in their clients and understanding its*

possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skill deficiencies of a defendant who counsel believes may have mental disabilities.

10. *Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert's prior status as a witness for the state. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert's current or past status with the state.*
11. *Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.*
12. *Jurisdictions should forbid death sentences and executions for everyone who, at the time of the offense, had significant limitation in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.*
13. *The jurisdiction would forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law.*
14. *To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision or law, jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.*
15. *Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that it should not be considered in aggravation.*
16. *The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death-row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.*

17. *The jurisdiction should stay post-conviction proceedings where a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with such proceedings and the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner's sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.*
18. *The jurisdiction should provide that a death-row inmate is not "competent" for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate's own cases. It should further provide that when such a finding of incompetence is made after challenges to the conviction's and death sentence's validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.*
19. *Jurisdictions should develop and disseminate – to police officers, attorneys, judges, and other court and prison officials – models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.*

DEFENSE SERVICES

ABA Ohio Assessment Team Recommendation:

1. *Ohio should comply with the ABA Guidelines for the appointment and performance of defense counsel in death penalty cases. The ABA Ohio Assessment Team noted that the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of a capital felony in Ohio does not rest in one statewide appointing authority.*

STATE POST-CONVICTION PROCEEDINGS

ABA Ohio Assessment Team Recommendations

1. *All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and applicable law.*
2. *The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.*

3. *Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.*
4. *When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the basis for disposition of claims.*
5. *On the initial state post-conviction application, state post-conviction courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.*
6. *When deciding post-conviction claims on appeal, state appellate courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in a capital case.*
7. *The state should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.*
8. *The state should appoint post-conviction defense counsel whose qualifications are consistent with the ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.*
9. *State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.*
10. *State courts should permit second and successive post-conviction proceedings in capital cases where counsels’ omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.*
11. *In post-conviction proceedings, state courts should apply the harmless error standard of Chapman v. California, requiring the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.*
12. *During the course of a moratorium, a “blue ribbon” commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.*

The ABA Ohio Assessment Team noted that while Ohio requires counsel to be certified to represent indigent death row inmates in post-conviction proceedings, it does not set forth any requirements that are specific to post-conviction representation. R.C. 2953.21 provides for post-conviction relief and it directs the trial court not to appoint the same attorneys who represented the defendant at trial. The law provides that the court should appoint counsel properly certified under Sup.R. 20.

The ABA Ohio Assessment Team recommended that all post-conviction proceedings at the trial level be conducted in a manner designed to permit adequate development and judicial consideration of all claims. The Team recommended that the state should provide meaningful discovery in these

proceedings and adequate time for counsel to pursue evidence developed in the discovery process. The Team recommended that appellate courts should address explicitly the issues of fact and law raised by the claims and issue opinions explaining the disposition of those claims. The Team recommended that the State should amend its law to allow petitioners to use the public records laws to obtain materials in support of their claims.

RACIAL AND ETHNIC MINORITIES

ABA Ohio Assessment Team Recommendations:

1. *Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.*
2. *Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.*
3. *Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.*
4. *Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.*
5. *Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce this law, jurisdictions should permit defendants and inmates to establish prima facie cases of discrimination based upon proof that their cases are part of an established racially discriminatory pattern. If a prima facie case is established, the state should have the burden of rebutting it by substantial evidence.*
6. *Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.*
7. *Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during voir dire.*
8. *Jurisdictions should require jury instructions indicating that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.*

9. *Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision making could be affected by racially discriminatory factors.*
10. *States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the state proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.*

PROSECUTORIAL PROFESSIONALISM

ABA Ohio Assessment Team Recommendations:

1. *Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.*
2. *Each prosecutor's office should establish procedures and policies for evaluating cases that rely on eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.*
3. *Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.*
4. *Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.*
5. *Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.*
6. *The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.*

The ABA Ohio Assessment Team recommended that the State of Ohio more vigorously enforce the rule requiring prosecutors to disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates punishment. In *Brady v. Maryland*, 373 U.S. 83 (1963) the United States Supreme Court held that “the suppression by the prosecutor of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment.” The Northwestern study indicated that seventeen percent of the wrongful death penalty convictions were caused by police or prosecutor misconduct.

In *Kyles vs. Whitley*, 514 U.S. 419 (1995) the state contended that a more lenient standard of materiality should apply where the “favorable evidence in issue was known only to police investigators and not to the prosecutor.” Rejecting that contention, the Court noted that: “No one doubts that police investigators sometimes fail to inform a prosecutor of all they know, but neither is there any serious

doubt that procedures and regulations can be established to carry the prosecutors' burden and to ensure communication of all relevant information on each case to every lawyer who deals with it."

Many prosecuting attorneys provide "open discovery" whereby everything they are provided by the police they provide to defense counsel. This mitigates a later claim of prosecutorial misconduct in the discovery phase of the prosecution. These prosecutors recognize they may obtain protection from providing certain discovery under Crim.R. 16(D) upon a proper showing

In 1989, the Alabama Supreme Court held that capital cases are by their nature sufficiently different from other cases to justify the exercise of judicial authority to order the State to maintain an on-going "open file" policy in regard to discovery subject to the safeguard of the state's criminal rules. *Ex parte Monk*, 557 So. 2d 832 (Ala. 1989). Texas and North Carolina have recently passed "open discovery" laws and recently Tennessee's death penalty study committee recommended unanimously an "open file discovery act". S.B. 1402/H.B. 1456.

CLEMENCY

ABA Ohio Assessment Team Recommendations:

1. *The clemency decision making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.*
2. *The clemency decision making process should take into account all factors that might lead the decision maker to conclude that death is not the appropriate punishment.*
3. *Clemency decision makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death-row inmate.*
4. *Clemency decision makers should consider the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence of lingering doubt about the inmate's guilt.*
5. *Clemency decision makers should consider an inmate's possible rehabilitation or performance of positive acts while on death row.*
6. *Death-row inmates should be represented by counsel and such counsel should have qualifications consistent with the ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases.*
7. *Prior to clemency hearings, counsel should be entitled to compensation, access to investigative and expert resources and provided with sufficient time to develop claims and to rebut the State's evidence.*
8. *Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.*
9. *If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision makers, their decisions or recommendations should be made only after in-person meetings with petitioners.*

10. Clemency decision makers should be fully educated and should encourage public education about clemency powers and limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.
11. To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.

CAPITAL JURY INSTRUCTIONS

ABA Ohio Assessment Team Recommendations:

1. Jurisdictions should work with attorneys, judges, linguists, social scientists, psychologists and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand revised instructions to permit further revision as necessary.
2. Jurors should receive written copies of court instructions to consult while the court is instructing them and while conducting deliberations.
3. Trial courts should respond meaningfully to jurors' requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors' questions about applicable law.
4. Trial courts should instruct jurors clearly on available alternative punishments and should, upon the defendant's request during the sentencing phase, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.
5. Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.
6. Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Jurisdictions should implement Model Penal Code section 210.3(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.
7. In states where it is applicable, trial courts should make clear in jury instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.

The ABA Ohio Assessment Team noted that due to the complexities inherent in capital proceedings, trial judges must present fully and accurately, through instructions, the applicable law to be followed. The Team also recommended that trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. The Team recommends that Ohio implement the Model Penal Code's provision that residual doubt concerning the defendant's guilt would, by law,

require a sentence less than death. Lastly, the Team recommends that the judge explain the terms “life without parole”, “life imprisonment”, and “parole”.

JUDICIAL INDEPENDENCE

ABA Ohio Assessment Team Recommendations:

1. *States should examine the fairness of their judicial election/appointment process and should educate the public about the importance of judicial independence and the effect of unfair practices on judicial independence.*
2. *A judge who has made any promise regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.*
3. *Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases; bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases; bar associations and community leaders should publicly oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases, and purported views on the death penalty or on habeas corpus should be litmus tests or important factors in the selection of judges.*
4. *A judge who observes ineffective lawyering by defense counsel should inquire into counsel’s performance and, where appropriate, take effective actions to ensure the defendant receives a proper defense.*
5. *A judge who determines that prosecutorial misconduct or other unfair activity has occurred during a capital case should take immediate action to address the situation and to ensure the capital proceeding is fair.*
6. *Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.*

The ABA Ohio Assessment Team recommended that Ohio examine the fairness of the judicial elections/appointment process and should educate the public about the importance of judicial independence and the effect of unfair practices on judicial independence. The Team noted that Ohio’s partially partisan, partially non-partisan judicial election format for judges, combined with the high cost and increasingly political nature of judicial campaigns, has called into question the fairness of the judicial selection process in Ohio.

Numerous judges and judicial candidates have run advertisements touting their experience in death penalty cases, their support of the death penalty, and their being “tough on crime”. A ballot initiative in Ohio in 1987 for a judicial merit selection system lost 2-1 at the ballot box. The Joint Task Force took no position regarding the wisdom of merit selection. The ABA Ohio Assessment Team recommended that a judge who observes ineffective lawyering by defense counsel should inquire into counsel’s performance and where appropriate take action to ensure the defendant receives a proper defense.

APPENDIX B

PROPOSED AMENDMENTS TO SUP.R. 20

RULE 20. Appointment of Counsel for Indigent Defendants in Capital Cases.

I. Scope of rules

(A) Rules 20 through 20.05 of the Rules of Superintendence for the Courts of Ohio shall apply in cases where an indigent defendant has been charged with aggravated murder and the indictment includes one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. These rules shall apply in cases where a juvenile defendant is indicted for a capital offense, but because of the juvenile's age, cannot be sentenced to death.

(B) The provisions for the appointment of counsel set forth in Sup. R. 20 through 20.05 apply only in cases where the defendant is indigent and counsel is not privately retained by or for the defendant.

(C) If the defendant is entitled to the appointment of counsel, the court shall appoint two attorneys certified pursuant to Sup. R. 20 through 20.05. If the defendant engages one privately retained attorney, ~~the court shall not appoint a second attorney pursuant to this rule~~ then the appointing authority shall follow ABA Guideline 4.1(B).

(D) The provisions of Sup. R. 20 through 20.05 apply in addition to the reporting requirements created by section 2929.021 of the Revised Code.

II. Appointment of counsel for indigent defendants in capital cases

(A) Trial counsel

At least two attorneys shall be appointed by the court to represent an indigent defendant charged with aggravated murder and the indictment includes one or more specifications of aggravating circumstances listed in R.C. 2929.04(A). At least one of the appointed counsel shall maintain a law office in Ohio and have experience in Ohio criminal trial practice. The counsel appointed shall be designated "lead counsel" and "co-counsel" and must meet the qualifications set forth in Sup. R. 20.01.

(B) Appellate counsel

At least two attorneys shall be appointed by the court to appeal cases where the trial court has imposed the death penalty on an indigent defendant. At least one of the appointed counsel shall maintain a law office in Ohio. Appointed counsel shall meet the qualifications for appellate counsel set forth in Sup. R. 20.01.

(C) Post Conviction Counsel

Attorneys appointed to represent an indigent capitally convicted person shall meet the requirements of Sup.R. 20 unless an institutional organization such as the Ohio Public Defender represents such person; in such a situation, at least one supervising attorney shall meet the requirements of Sup.R. 20.

(D) Exceptional circumstances

If an attorney does not satisfy the requirements of divisions (A) or (B) of this section, the attorney may be certified as lead counsel, co-counsel, or appellate counsel if it can be demonstrated to the satisfaction of the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases that competent representation will be provided to the defendant. In so determining, the committee may consider all of the factors in Sup. R. 20.01 and any other relevant considerations.

III. Procedures for court appointments of counsel**(A) Appointing counsel**

Only counsel who have been certified by the committee shall be appointed to represent indigent defendants charged with aggravated murder and the indictment includes one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. Each court may adopt local rules establishing qualifications in addition to and not in conflict with those established by Sup. R. 20.01. Appointments of counsel for these cases should be distributed as widely as possible among the certified attorneys in the jurisdiction of the appointing court.

(B) Workload of appointed counsel

(1) In appointing counsel, the court shall consider the nature and volume of the workload of the prospective counsel to ensure that counsel, if appointed, could direct sufficient attention to the defense of the case and provide competent representation to the defendant.

(2) Attorneys accepting appointments shall provide each client with competent representation in accordance with constitutional and professional standards. [See Sup.R. 20.03(A) and the ABA Guidelines] Appointed counsel shall not accept workloads that, by reason of their excessive size, interfere with the rendering of competent representation or lead to the breach of professional obligations.

(C) Notice to the committee

(1) Within two weeks of appointment, the appointing court shall notify the committee secretary of the appointment on a form prescribed by the committee. The notice shall include all of the following:

- (a) The court and the judge assigned to the case;
- (b) The case name and number;
- (c) A copy of the indictment;
- (d) The names, business addresses, telephone numbers, and certification of all attorneys appointed;
- (e) Any other information considered relevant by the committee or appointing court.

(2) Within two weeks of disposition, the trial court shall notify the committee secretary of the disposition of the case on a form prescribed by the committee.

The notice shall include all of the following:

- (a) The outcome of the case;
- (b) The title and section of the Revised Code of any crimes to which the defendant pleaded or was found guilty;
- (c) The date of dismissal, acquittal, or that sentence was imposed;
- (d) The sentence, if any;
- (e) A copy of the judgment entry reflecting the above;
- (f) If the death penalty was imposed, the name of counsel appointed to represent the defendant on appeal;
- (g) Any other information considered relevant by the Committee or trial court.

(D) Support services

The appointing court shall provide appointed counsel, as required by Ohio law or the federal Constitution, federal statutes, and professional standards, with the investigator, mitigation specialists, mental health professional, and other forensic experts and other support services reasonably necessary or appropriate for counsel to prepare for and present an adequate defense at every stage of the proceedings including, but not limited to, determinations relevant to competency to stand trial, a not guilty by reason of insanity plea, cross-examination of expert witnesses called by the prosecution, disposition following conviction, and preparation for and presentation of mitigating evidence in the sentencing phase of the trial. Lead counsel bears overall responsibility for the performance of the defense team and shall allocate, direct, and supervise the work in accordance with Sup. R. 20 through 20.04 and professional standards. In addition, all counsel bear a responsibility to comply with Sup. R. 20 through 20.04 and professional standards.

RULE 20.01. Qualifications Required for Appointment as Counsel for Indigent Defendants in Capital Cases.

(A) Generally

Every attorney representing a capital defendant shall have all of the following:

- (1) Demonstrated commitment to providing high quality legal representation in the defense of capital cases;
- (2) Substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing capital cases;
- (3) Skill in the management and conduct of complex negotiations and litigation;
- (4) Skill in legal research, analysis, and the drafting of litigation documents;

- (5) Skill in oral advocacy;
- (6) Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, arson, forensic pathology, and DNA evidence;
- (7) Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
- (8) Skill in the investigation, preparation, and presentation of mitigating evidence;
- (9) Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

(B) Lead counsel

Lead counsel shall satisfy all of the following:

- (1) Be admitted to the practice of law in Ohio or admitted to practice pro hac vice;
- (2) Have at least five years of civil or criminal litigation or appellate experience;
- (3) Have specialized training, as approved by the committee, on subjects that will assist counsel in the defense of persons accused of capital crimes as provided in Sup.R. 20.01(A)(6), (7), and (8) in the two-year period prior to making application;
- (4) Have at least one of the following qualifications:
 - (a) Experience as “lead counsel” for the defense in the jury trial of at least one capital case;
 - (b) Experience as “co-counsel” for the defense in the jury trial of at least two capital cases.
- (5) Have at least one of the following qualifications:
 - (a) Experience as “lead counsel” in the jury trial of at least one murder or aggravated murder case;
 - (b) Experience as “lead counsel” in ten or more criminal or civil jury trials, at least three of which were felony jury trials;
 - (c) Experience as “lead counsel” in three murder or aggravated murder jury trials; one murder or aggravated murder jury trial and three felony jury trials; or three aggravated or first- or second-degree felony jury trials in a court of common pleas in the three years prior to making application.

(C) Co-counsel

Co-counsel shall satisfy all of the following:

- (1) Be admitted to the practice of law in Ohio or admitted to practice pro hac vice;
- (2) Have at least three years of civil or criminal litigation or appellate experience;
- (3) Have specialized training, as approved by the committee, on subjects that will assist counsel in the defense of persons accused of capital crimes as provided in Sup.R. 20(A)(6), (7), and (8) in the two years prior to making application;
- (4) Have at least one of the following qualifications:
 - (a) Experience as “co-counsel” in one murder or aggravated murder jury trial;
 - (b) Experience as “lead counsel” in one first-degree felony jury trial;
 - (c) Experience as “lead” or “co-counsel” in at least two felony jury or civil jury trials in a court of common pleas in the three years prior to making application.

(D) Appellate counsel

Appellate counsel shall satisfy all of the following qualifications:

- (1) Be admitted to the practice of law in Ohio or admitted to practice pro hac vice;
- (2) Have at least three years of civil or criminal litigation or appellate experience in Ohio;
- (3) Have specialized training, as approved by the committee, on subjects that will assist counsel in the appeal of cases in which the death penalty was imposed as provided in Sup.R. 20.01(A)(6), (7), and (8) in the two years prior to making application;
- (4) Have experience as counsel in the appeal of at least three felony convictions in the three years prior to making application.

(E) Post Conviction

Post conviction counsel shall satisfy all of the following:

- (1) Be admitted to the practice of law in Ohio or admitted to the practice pro hac vice;
- (2) Have at least three years of civil or criminal litigation or appellate experience in Ohio unless employed by an institutional office such as the Ohio Public Defender and then shall be supervised by an otherwise qualified Sup.R. 20 attorney.

(3) Have specialized training, as approved by the committee, as provided in Sup.R. 20.01(A)(6), (7), and (8).

(F) Definition

As used in this rule, “trial” means a case concluded with a judgment of acquittal under Rule 29 of the Ohio Rules of Criminal Procedure or submission to the trial court or jury for decision and verdict.

RULE 20.02 Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases.

(A) Committee creation

There shall be a Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases.

(B) Appointment of committee members

The committee shall be composed of five attorneys. Three members shall be appointed by a majority vote of all members of the Supreme Court of Ohio; one shall be appointed by the Ohio State Bar Association; and one shall be appointed by the Ohio Public Defender Commission.

(C) Eligibility for appointment to the committee

Each member of the committee shall satisfy all of the following qualifications:

- (1) Be admitted to the practice of law in Ohio;
- (2) Have represented criminal defendants for not less than five years;
- (3) Demonstrate a knowledge of the law and practice of capital cases;
- (4) Currently not serving as a prosecuting attorney, city director of law, village solicitor, or similar officer or their assistant or employee, or an employee of any court.

(D) Overall composition

The overall composition of the committee shall meet both of the following criteria:

- (1) No more than two members shall reside in the same county;
- (2) No more than one shall be a judge.

(E) Terms; vacancies

The term of office for each member shall be five years, each term beginning on the first day of January. Members shall be eligible for reappointment. Vacancies shall be filled in the same manner as original appointments. Any member appointed to fill a vacancy occurring prior to the expiration of a term shall hold office for the remainder of the term.

(F) Election of chairperson

The committee shall elect a chairperson and such other officers as are necessary. The officers shall serve for two years and may be reelected to additional terms.

(G) Powers and duties of the committee

The committee shall do all of the following:

- (1) Prepare and notify attorneys of procedures for applying for certification to be appointed counsel for indigent defendants in capital cases;
- (2) Certify attorneys as qualified to be appointed to represent defendants in capital cases;
- (3) Periodically provide all common pleas and appellate court judges and the Ohio Public Defender with a list of all attorneys who are certified to be appointed counsel for indigent capital defendants;
- (4) Periodically review the list of certified counsel, all court appointments given to attorneys in capital cases, and the result and status of those cases;
- (5) Develop criteria and procedures for retention of certification including, but not limited to, mandatory continuing legal education on the defense and appeal of capital cases;
- (6) Monitor the performance of attorneys providing representation in capital proceedings on a monthly basis once the committee is notified of an appointment under Sup.R. 20(3)(C) to ensure high quality legal representation;
- (7) Investigate and maintain records concerning complaints about the performance of attorneys providing representation in capital cases and take appropriate corrective action pursuant to Rule 20.03 of the Rules of Superintendence;
- (8) Expand, reduce, or otherwise modify the list of certified attorneys as appropriate and necessary;
- (9) Review and approve specialized training programs on subjects that will assist counsel in the defense and appeal of capital cases;
- (10) Recommend to the Supreme Court of Ohio amendments to this rule or any other rule or statute relative to the defense or appeal of capital cases;
- (11) Adopt best practices for representation of indigent defendants in capital cases and disseminate those best practices appropriately.
- (12) Investigate and maintain records concerning whether counsel applying or re-applying for certification has been found constitutionally ineffective in any criminal case by any reviewing court and take appropriate corrective action pursuant to Sup.R. 20.03.

(H) Meetings

The committee shall meet at the call of the chairperson, at the request of a majority of the members, or at the request of the Supreme Court of Ohio. A quorum consists of three members. A majority of the committee is necessary for the committee to elect a chairperson and take any other action.

(I) Compensation

All members of the committee shall receive equal compensation in an amount to be established by the Supreme Court of Ohio.

RULE 20.03. Monitoring of Counsel; Removal.**(A) Duty of court**

The appointing court shall monitor the performance of all defense counsel to ensure that the client is receiving representation that is consistent with the American Bar Association's "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" and referred to herein as "high quality representation." The court, in addition to any other action it may take, shall report an attorney to the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases who has not provided high quality representation. Where there is a complaint from a judge that an attorney has not provided high quality representation, the committee shall investigate the complaint. The committee will not start an investigation while counsel is still appointed in the matter.

(B) Investigation of complaint

The chairperson shall appoint a member of the committee or appoint an attorney qualified as lead counsel under this rule, who will investigate complaints made by a judge that defense counsel appointed pursuant to this rule failed to provide high quality representation under this rule.

(1) As part of the investigation of a complaint from a judge, the attorney shall be notified and given an opportunity to respond.

(2) After an investigation and after the attorney has been given an opportunity to respond to the factual allegations, the members of the committee, excluding the investigator and chairperson, will meet and vote whether a violation of rules 20 through 20.05 has occurred and whether the violation requires removal from the list of qualified attorneys.

Before taking action making an attorney ineligible to receive additional appointments, the committee shall provide written notice that such action is being contemplated, and give the attorney an opportunity to respond. If there is no apparent merit to the allegation the complainant will be advised and the matter will be closed.

(3) If an attorney is deemed ineligible to remain on the list of attorneys qualified to accept appointments, the attorney may appeal the decision of the committee to the chairperson. Upon appeal, the chairperson will review all applicable allegations, findings, and responses and determine whether a violation has occurred and whether appropriate action was taken and issue a decision. The decision of the chairperson is final.

(C) Revocation

An attorney whose certification has been revoked pursuant to this rule shall be restored to the roster only in exceptional circumstances. The findings made by the committee are not related to or part of the grievance process governing all attorneys in Ohio and the findings made by the committee are only for the purpose of determining continued eligibility for appointment.

RULE 20.04. Programs for Specialized Training.

(A) Programs for specialized training in the defense of persons charged with a capital offense

(1) Attorneys seeking to qualify to receive appointments shall be required to satisfactorily complete a comprehensive training program, approved by the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, in the defense of capital cases. To be approved a program should include, but not be limited to, presentations and training in the following areas:

- (a) Relevant state, federal, and international law;
- (b) Pleading and motion practice;
- (c) Pretrial investigation, preparation, and theory development regarding trial and sentencing;
- (d) Jury selection;
- (e) Trial preparation and presentation, including the use of experts;
- (f) Ethical considerations particular to capital defense representation;
- (g) Preservation of the record and of issues for post-conviction review;
- (h) Counsel's relationship with the client and his family;
- (i) Post-conviction litigation in state and federal courts;
- (j) The presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;
- (k) The unique issues relating to the defense of those charged with committing capital offenses when under the age of eighteen;
- (l) The best practices for representing an indigent capital defendant adopted by the committee pursuant to division (G)(11) of Rule 20.02 of the Rules of Superintendence for the Courts of Ohio;
- (m) Death penalty appellate and post-conviction litigation in state and federal courts.

(B) Programs for specialized training in the appeal of cases in which the death penalty has been imposed

- (1) To be approved by the committee, a death penalty appeals seminar shall include instruction devoted to the appeal of a case in which the death penalty has been imposed.
- (2) The curriculum for an approved death penalty appeal seminar should include, but is not limited to, specialized training in the following areas:
 - (a) An overview of current developments in death penalty law;
 - (b) Completion, correction, and supplementation of the record on appeal;
 - (c) Reviewing the record for unique death penalty issues;
 - (d) Motion practice for death penalty appeals;
 - (e) Preservation and presentation of constitutional issues;
 - (f) Preparing and presenting oral argument;
 - (g) Unique aspects of death penalty practice in the courts of appeals, the Supreme Court of Ohio, and the United States Supreme Court;
 - (h) The relationship of counsel with the appellant and the appellant's family during the course of the appeals;
 - (i) Procedure and practice in collateral litigation, extraordinary remedies, state post-conviction litigation, and federal habeas corpus litigation;
 - (j) The best practices for representing an indigent capital defendant adopted by the committee pursuant to Sup. R. 20.02(G)(11).

(C) Application for training approval

The sponsor of a program for specialized training under division (A) or (B) of this rule shall apply for approval from the committee at least sixty days before the date of the proposed seminar. An application for approval shall include the curriculum for the seminar and include biographical information of each member of the seminar faculty.

(D) Verification of attendance

The committee shall obtain a list of attendees from the Supreme Court Commission on Continuing Legal Education that shall be used to verify attendance and grant credit for each committee-approved seminar. Credit for purposes of this rule shall be granted to instructors using the same ratio provided in Rule X of the Supreme Court Rules for the Government of the Bar of Ohio.

(E) Accreditation of other programs

The committee may accredit programs other than those approved pursuant to divisions (A) and (B) of this rule. To receive accreditation, the program shall include instructions in all areas set forth in divisions (A) and (B) of this rule. Application for accreditation of an in-state program may be made by the program sponsor or a program attendee and shall be made prior to the program. Application for accreditation of an out-of-state program may be submitted by the program sponsor or a program attendee and may be made prior to or after completion of the program. The request for credit from a program sponsor

shall include the program curriculum and individual faculty biographical information. The request for credit from a program attendee shall include all of the following:

- (1) Program curriculum;
- (2) Individual faculty biographical information;
- (3) A written breakdown of sessions attended and credit hours received if the seminar held concurrent sessions;
- (4) Proof of attendance.

(F) Specialized Training for Sup. R. 20 certification

(1) To be certified as lead or co-counsel or to retain certification, an attorney shall complete at least ~~twelve~~ twenty-four hours of committee-approved specialized training every two years. To maintain certification as lead counsel or co-counsel, the twelve hours shall be devoted to instruction in the trial of capital cases.

(2) To be certified as appellate or post conviction counsel or to retain certification as appellate or post conviction counsel, an attorney shall complete at least ~~twelve~~ twenty-four hours of committee-approved training every two years. At least six of the ~~twelve~~ twenty-four hours shall be devoted to instruction in the appeal of capital cases or post conviction matters in capital cases.

(3) To obtain or maintain certification as lead counsel, co-counsel, appellate counsel or post conviction counsel at least two hours of the required twenty-four hours must be devoted to instruction in compliance with Sup.R. 20.01(A)(6), (7), and (8) each reporting period for a total of six hours.

(4) On or before the last day of December, each certified counsel shall complete the applicable specialized training requirements of divisions (A) and (B) of this rule. The committee shall review the list of certified counsel for the prior two years and revoke the certification of any attorney who has not complied with the specialized training requirements of this rule. An attorney whose certification has been revoked shall not be eligible to accept future appointment as counsel for an indigent defendant charged with or convicted of an offense for which the death penalty can be or has been imposed.

~~(4)~~(5) The committee may accredit an out-of-state program that provides specialized instruction devoted to the investigation, preparation, and presentation of a death penalty trial or specialized instruction devoted to the appeal of a case in which the defendant received the death penalty, or both. Requests for credit for an out-of-state program may be submitted by the seminar sponsor or a seminar attendee. The request for credit from a program sponsor shall include the program curriculum and individual faculty biographical information. The request for credit from a program attendee shall include all of the following:

- (a) Program curriculum;
- (b) Individual faculty biographical information;
- (c) A written breakdown of sessions attended and credit hours received if the seminar held concurrent sessions;
- (d) Proof of attendance.

~~(5)~~ (6) An attorney who has previously been certified but whose certification has been revoked for failure to comply with the specialized training requirements of this rule must, in order to regain certification, submit a new application that demonstrates that the attorney has completed twelve hours of committee approved specialized training in the two year period prior to making application for recertification.

APPENDIX C

PROPOSED AMENDMENTS TO POST-CONVICTION STATUTES

2953.21 Post conviction relief petition.

(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States which creates a reasonable probability of an altered verdict, and any person who has been convicted of a criminal offense that is a felony and who is an offender for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(c) As used in divisions (A)(1)(a) and (b) of this section, "former section 2953.82 of the Revised Code" means section 2953.82 of the Revised Code as it existed prior to the effective date of this amendment.

(d) At any time prior to or in conjunction with the filing or litigation of a petition for post conviction, the petitioner is entitled to discovery in seeking post conviction relief. In addition to discovery provided by Rule 16 of the Rules of Criminal Procedure, the Petitioner is entitled to depositions and the right to issue subpoenas in the following circumstances:

(i) For witnesses who testified at trial, or were disclosed by the state prior to trial, except this does not apply if the witness was unavailable for trial or would not voluntarily be interviewed by the defendant: the petitioner must show clear and convincing evidence that a witness is material and that a deposition of a witness or the issuing of a subpoena is of assistance in order to substantiate petitioner's claim that there is a reasonable probability of an altered verdict.

(ii) For all other witnesses, the petitioner must show good cause that a witness is materials and that a deposition of a witness or the issuing of a subpoena is of assistance in order to substantiate petitioner's claim that there is a reasonable probability of an altered verdict.

(e) Within ten (10) days after the docketing of the request for post conviction discovery, or within any other time that the court may set for good cause shown, the prosecuting attorney shall respond by answer or motion.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one ~~hundred eighty days~~ year after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one ~~hundred eighty days~~ year after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the request for post conviction discovery and the petition is filed shall docket the request for post conviction discovery and the petition and bring it promptly to the attention of the court. The clerk of the court in which the request for post conviction discovery and the petition is filed immediately shall forward a copy of the request for post conviction discovery and the petition to the prosecuting attorney of that county.

(C) If a court grants a petitioner's request for a deposition under division (D)(2) of this section, the court shall notify the petitioner or petitioner's counsel and the prosecuting attorney. The deposition shall be conducted pursuant to divisions (B) through (E) of Rules 15 of the Rules of Criminal Procedure. The prosecuting attorney shall be allowed to attend and participate in any deposition.

~~(D)~~ (D) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs.

If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

~~(D)~~ (E) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

~~(E)~~ (F) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

~~(F)~~ (G) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

~~(G)~~ (H) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division ~~(E)~~ (F) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division ~~(E)~~ (F) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

~~(H)~~ (I) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

~~(I)~~ (J)(1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division ~~(I)~~ (J)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division ~~(I)~~ (J)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted

of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division ~~(H)~~ (J) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06 , 120.16 , 120.26 , or 120.33 of the Revised Code and those appointed counsel meet the requirements of division ~~(H)~~ (J) (2) of this section. ~~(H)~~ (K) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.





The Supreme Court of Ohio
& the Ohio State Bar Association
April 30, 2014
