



Defending Liberty
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EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS:

The Missouri Death Penalty Assessment Report

An Analysis of Missouri's Death Penalty Laws, Procedures, and Practices



"A system that takes life must first give justice."

John J. Curtin, Jr., Former ABA President

March 2012, updated April 2012

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Finally, in this publication the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Missouri death penalty. The Project would appreciate notification of any factual errors or omissions in this Report so that they may be corrected in any future reprints.

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EXECUTIVE SUMMARY

I. INTRODUCTION: GENESIS OF THE ABA'S DEATH PENALTY ASSESSMENTS PROJECT

Fairness and accuracy form the foundation of the American criminal justice system. As the Supreme Court of the United States has recognized, these goals are particularly important in cases in which the death penalty is sought. Our system cannot claim to provide due process or protect the innocent unless it offers a fair and accurate system for every person who faces the death penalty.

Over the past thirty years, the American Bar Association (ABA) has become increasingly concerned that capital jurisdictions too often provide neither fairness nor accuracy in the administration of the death penalty. In response to this concern, on February 3, 1997, the ABA called for a nationwide suspension of executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the fall of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (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; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project began in February 2003 to examine several U.S. jurisdictions' death penalty systems and determine the extent to which they achieve fairness and provide due process. In its first round of assessments, the Project examined the administration of the death penalty in Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee and released reports on these states' capital punishment systems from 2006 to 2007. A summary report was also published in 2007 in which the findings of the eight reports were compiled. Due in large part to the success of the state assessments produced in the eight jurisdictions described above, the Project began a second round of assessments in late 2009. In addition to this Report on Missouri, the Project released its report on Kentucky in December 2011. The Project also plans to release reports in Texas and Virginia.

The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions but instead are intended to highlight individual state systems' successes and inadequacies. Past state assessment reports have been used as blueprints for state-based study commissions on the death penalty, served as the basis for legislative and court rule changes, and generally informed decision-makers' and the public's understanding of the problems affecting the fairness and accuracy of their state's death penalty system.

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* (Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do 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 in 2006: preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each assessment is conducted by a state-based assessment team. Team members typically include current and former judges, state legislators, current and former prosecutors, current and former defense attorneys, state bar association leaders, and law professors. Team members are not required to support or oppose the death penalty or a moratorium on executions. They are also not required to support the Protocols, but they have agreed to follow them for the purposes of this assessment.

The state assessment teams are responsible for analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. The findings of each assessment team illuminate how state death penalty systems are functioning in design and practice and identify areas of strength and areas in need of reform. Because capital punishment is the law in each of the assessment states and because the ABA takes no position on the death penalty per se, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty.

This executive summary consists of a synopsis of the findings and proposals of the Missouri Death Penalty Assessment Team. The body of this Report sets out these findings and proposals in more detail, followed by an Appendix. Citations in the Report conform to rules set forth by the Supreme Court of Missouri, and thus deviate from *The Bluebook* citation rules where appropriate. The Project and the Missouri Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Missouri death penalty. The Project would appreciate notification of any factual errors or omissions in this report so that they may be corrected in future reprints.

II. HIGHLIGHTS OF THE REPORT

A. *Overview of the Missouri Death Penalty Assessment Team's Work and Views*

To assess fairness and accuracy in Missouri's death penalty system, the Missouri Death Penalty Assessment Team researched the twelve issues that the American Bar Association identified as central to the analysis of the fairness and accuracy of a state's capital punishment system. The *Missouri Death Penalty Assessment Report* devotes a chapter to each of the following areas: (1) overview of the state's death penalty; (2) collection, preservation, and testing of DNA and other types of evidence; (3) law enforcement identifications and interrogations; (4) crime laboratories and medical examiner offices; (5) prosecutorial professionalism; (6) defense services; (7) the direct appeal process; (8) state post-conviction proceedings; (9) clemency; (10) capital jury instructions; (11) judicial independence and vigilance; (12) treatment of racial and ethnic minorities; and (13) mental retardation and mental illness.¹ Chapters begin with an introduction to provide a national perspective of the issues addressed by each chapter, followed by a "Factual Discussion" of the relevant laws and practices in Missouri.² The final section of each chapter, titled "Analysis," examines the extent to which Missouri is in compliance with the ABA Protocols.

While members of the Missouri Assessment Team have varying perspectives on the death penalty, all team members agreed to use the ABA Protocols as a framework through which to examine the death penalty in Missouri. It is the Assessment Team's unanimous view, however, that so long as Missouri imposes the death penalty, it must do so in a manner that guarantees fairness and reduces, to the extent possible, the risk of executing the innocent.

B. *Areas of Strength*

The Missouri Assessment Team commends Missouri for enacting laws, policies, and procedures that, in some areas, are in compliance or near-compliance with the ABA Protocols. In these areas, Missouri may serve as a model for other capital jurisdictions seeking to improve the level of fairness and accuracy in their capital punishment systems. Some of these areas include:

Crime Laboratory Accreditation (Chapter 4). All of Missouri's law enforcement crime laboratories have voluntarily obtained accreditation from the American Society of Crime Laboratory Directors/Laboratory Accreditation Board. Furthermore, a recently enacted Missouri law requires all Missouri crime laboratories to obtain accreditation by the end of 2012. Such accreditation promotes the accurate and reliable analysis of forensic evidence in the search for truth in criminal cases.

¹ This Report is not intended to cover all aspects of a state's capital punishment system and does not address a number of important issues, such as the treatment of death row inmates while incarcerated.

² The introductions to each chapter are similar to the introduction published in previous assessment reports and should not be construed as reflecting the views of the Missouri Assessment Team.

Provision of Defense Services (Chapter 6). Missouri has established the Missouri State Public Defender, a statewide public defender system which represents the vast majority of indigent capital defendants and death row inmates at trial, on direct appeal, and during state post-conviction proceedings. The existence of a statewide entity with a professional staff dedicated to the representation of capital defendants and death row inmates helps to ensure the fairness of capital proceedings and protection of the rights of the accused. Furthermore, Missouri has enacted some qualification standards for state post-conviction counsel in death penalty cases.

Trial Court Instructions to Jurors (Chapter 10). Missouri's capital jury instructions provide that a juror may return a life sentence, even in the absence of any mitigating circumstance and even where an aggravating circumstance has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty. Jurors in Missouri capital cases also receive written copies of court instructions, aiding in juror comprehension and decision-making in these cases.

Independence of the Judiciary (Chapter 11). The Missouri General Assembly, The Missouri Bar, and other interested parties have, in recent years, actively and thoughtfully evaluated, discussed, and debated the merits of Missouri's judicial selection process. In addition, The Missouri Bar is committed to continually educating the public regarding the importance of an independent judiciary, and it has fulfilled this commitment by sponsoring public speeches, as well as by providing print and online resources. The Missouri Bar has also recently implemented a detailed plan to defend sitting judges who are criticized for their decisions in capital and non-capital cases.

Treatment of Mentally Retarded Offenders (Chapter 13). Missouri enacted a statute banning the application of the death penalty to mentally retarded offenders in 2001, one year before the U.S. Supreme Court banned the execution of persons with mental retardation in *Atkins v. Virginia*. In accordance with ABA Recommendations and the modern, scientific understanding of mental retardation, Missouri law does not impose a specific, maximum IQ score to prove that a defendant is mentally retarded. In addition, Missouri currently provides funding through the Missouri Public Defender to allow the defense to employ qualified mental health experts in capital cases.

C. Areas and Recommendations for Reform

While members of the Missouri Death Penalty Assessment Team have divergent views about the weight to be placed on the various ABA Recommendations, the entire Assessment Team endorses several measures to ameliorate the problems identified throughout this Report. This section describes the areas viewed by the Team to be most in need of reform to meet the standards of the ABA Protocols, followed by specific recommendations endorsed by the Assessment Team for that purpose. This section is divided into six parts: (1) Aggravating Circumstances, (2) Areas for Reform at the Pretrial Stage, (3) Areas for Reform at the Trial Stage, (4) Areas for Reform at the Post-trial Stage, (5) Data Collection, and (6) Funding Issues.

Aggravating Circumstances

The U.S. Supreme Court has held that the death penalty must be reserved for a “narrow category” of the most culpable murderers to ensure that it is applied in a rational, non-arbitrary manner. To that end, statutory aggravating circumstances must be narrowly defined to ensure that the death penalty is applicable only to the worst offenders. Narrowly-defined aggravating circumstances provide needed guidance for prosecutors’ charging discretion and jury decision-making to help prevent the “wanton and freakish” imposition of death sentences. Missouri’s death penalty statute, however, enumerates seventeen aggravating circumstances, many of which are so broadly drafted as to qualify virtually any intentional homicide as a death penalty case. One study found that, for instance, the “wantonly vile” aggravating circumstance, which can be found by the jury if one of eleven conditions is met, was applicable to more than 90% of Missouri cases that could have been charged as an intentional homicide. As a result, the aggravating circumstances provide little guidance and little restraint to prosecutors with respect to capital charging. Because Missouri’s numerous aggravating circumstances fail to differentiate death penalty-eligible cases from non-death penalty-eligible cases in the “objective, evenhanded, and substantively rational way” the U.S. Supreme Court requires, there is a significant risk that death sentences will be imposed arbitrarily.

Recommendation

Missouri should substantially revise its aggravating circumstances, such that only a “narrow category of the most serious” murder cases are eligible for the death penalty, as required by the U.S. Supreme Court. Such revisions would substantially reduce the risk that the death penalty will be arbitrarily applied and would obviate the need for the Supreme Court of Missouri to consider every intentional homicide case in its death sentence proportionality review.

Areas for Reform at the Pretrial Stage

Preventing errors and deficiencies at the pretrial stage help to ensure that the guilty are apprehended, while reducing the possibility that an innocent person will be convicted or executed. Preventing errors at this stage will also help reduce the resources that must be expended to correct such mistakes in subsequent proceedings.

Law Enforcement Procedures (Chapter 3). It is crucially important for Missouri to require eyewitness identification and interrogation procedures that ensure the apprehension of the guilty and reduce the likelihood of convicting the innocent. Law enforcement officers in Missouri, however, are not required to follow or receive training on any of the *ABA Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures*. As such, eyewitness misidentifications in lineups and photospreads can occur due to officer feedback, insufficient number of lineup or photospread participants, and other deficiencies. In addition, fully recording eyewitness identification procedures and custodial interrogations will help reduce wrongful convictions. Although Missouri requires law enforcement officers to record a custodial interrogation in a murder case “when feasible,” Missouri does not require that the entire interview be recorded, and law enforcement agencies are entirely exempt from the recording requirement under a variety of circumstances.

Forensic Evidence, Crime Labs, and Medical Examiner Offices (Chapters 2, 4). As biological and forensic evidence becomes increasingly significant to criminal prosecutions, it is important to ensure that evidence is properly preserved and that crime laboratories and medical examiner offices are well-funded and receive meaningful oversight. Missouri does not, however, require law enforcement agencies to preserve all biological evidence in a capital case for as long as the inmate remains incarcerated. Our review of the state’s crime laboratories and medical examiner offices also revealed significant variations in funding among these agencies, creating a risk of error in agencies which are underfunded. Moreover, the Missouri Crime Laboratory Review Commission, which could serve the critical role of creating standardized procedures for crime laboratories, has not been funded and is only partially staffed as of the publication of this Report.

Recommendations

- Missouri should require law enforcement agencies to adopt eyewitness identification policies consistent with the *ABA Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures*.
- Missouri should amend its custodial interrogation recording statute. Officers should only be excused from the recording requirement upon a finding that officers failed to video record the interrogation in an emergency and in good faith. Moreover, the statute should require officers to audio record the interrogation in cases where the exception applies. In addition, the statute should provide a remedy for failure to record in order to promote proper recording of the entirety of the custodial interview.
- Missouri should require that all biological evidence be preserved and properly stored for as long as the defendant remains incarcerated.
- The Crime Laboratory Review Commission should have the power to create standardized systems and procedures for quality management within the crime laboratories and should be given the authority to monitor medical examiner and coroner offices.

Lack of Prosecutorial Oversight (Chapter 5). Wrongful convictions in murder and other serious felony cases have occurred in Missouri when prosecutors failed to disclose all exculpatory evidence to the defense before trial, or because prosecutors relied primarily upon unreliable confessions, uncorroborated eyewitness identifications, or untruthful jailhouse informant testimony to obtain a conviction. When documented instances of prosecutorial misconduct have been identified, these instances do not appear to have been investigated by the Missouri Office of Chief Disciplinary Counsel, the entity charged with investigating attorney misconduct.

Recommendations

- Missouri should adopt a rule or law requiring prosecutors to develop policies for and receive training on evaluating cases that rely primarily upon eyewitness identifications, confessions, or the testimony of jailhouse informants. Some of these policies could be based on those adopted by the New Jersey Attorney General’s Office, which promulgated guidelines for prosecutors in 2001 describing the manner in which eyewitness

identifications should be conducted.

- Missouri should establish a statewide entity solely charged with investigating and sanctioning misconduct by prosecutors and criminal defense counsel. This entity would be autonomous from organizations in Missouri that investigate attorney misconduct, and its decisions would be appealable to the Supreme Court of Missouri. In addition, individual prosecutor offices should establish disciplinary practices and procedures to reduce prosecutorial error and misconduct and to ensure that prosecutors who knowingly engage in misconduct are appropriately disciplined. In furtherance of this goal, prosecutors in larger jurisdictions should consider establishing Conviction Integrity Units staffed by prosecutors and charged with investigating claims of misconduct and error. Furthermore, members of The Missouri Bar, in particular trial judges, should be encouraged to report any instances professional misconduct.
- All Missouri prosecuting attorneys should develop procedures to ensure that law enforcement agencies, crime laboratories, experts, and other state actors are fully aware of and comply with the duty disclose evidence in a case, including any exculpatory information. In addition, every law enforcement officer should be required to receive training on the importance of divulging all evidence to the prosecutor in all criminal cases, especially anything that might constitute exculpatory material.

Treatment of Defendants with Mental Retardation and Mental Illness (Chapter 13). The Missouri statute banning the application of the death penalty to the mentally retarded, while commendable in some respects, does not permit the mental retardation issue to be decided in a pretrial hearing absent agreement by the trial court and the prosecution. In addition, the statute requires a defendant’s mental retardation to be “documented” before age eighteen.

Furthermore, Missouri does not prohibit the death penalty for persons who, at the time of the offense, suffered from a mental disorder due to dementia or traumatic brain injury, nor does Missouri forbid death sentences for the severely mentally ill absent a finding of not guilty by reason of insanity. People who suffer from dementia or the effects of a traumatic brain injury exhibit intellectual and adaptive skill limitations that are indistinguishable from mental retardation. While the severely mentally ill do not always suffer from intellectual deficits, they are often unable to fully understand the consequences of their conduct, exercise rational judgment, or fully conform their behavior to the requirements of the law. Yet, unlike mentally retarded persons, these persons are eligible for the death penalty under Missouri law. These problems are compounded because many actors in the Missouri criminal justice system, including law enforcement officers, prosecutors, and judges, are not required to receive training relevant to mental disorders and disabilities.

Recommendations

- Missouri law should be amended to grant capital defendants a right to a pretrial hearing on the issue of mental retardation, provided the defendant can make some preliminary showing that evidence of mental retardation exists. In addition, Missouri law should not require that a potentially mentally retarded offender prove that his/her mental retardation

was “documented” prior to age eighteen.

- Missouri should adopt a law or rule forbidding death sentences and executions with regard to everyone who, at the time of the offense had significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from dementia or traumatic brain injury. In addition, Missouri should ban the application of the death penalty to anyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (1) to appreciate the nature, consequences or wrongfulness of his/her conduct; (2) to exercise rational judgment in relation to conduct; or (3) to conform his/her conduct to the requirements of the law.
- Missouri should adopt a rule or law requiring all actors in the criminal justice system to be trained to recognize mental illness and mental disability in criminal defendants. The Public Defender, in particular, must be afforded the resources needed to ensure that it is able to train all of its capital defense counsel on recognizing, evaluating, and litigating issues related to mental health.

Areas for Reform at the Trial Stage

Errors that occur at trial often are difficult to remedy in subsequent proceedings. Improvements in this area will better safeguard the constitutional rights of those facing the death penalty and strengthen the overall fairness of capital trials.

Defense Services (Chapter 6). Because of the inherent complexities and high stakes of capital litigation, it is imperative that every capital defendant be represented by a well-trained capital defense team, consisting of two capital-qualified attorneys, a mitigation specialist, and an investigator. However, Missouri defendants charged with first-degree murder do not generally receive the benefit of specially-trained capital defense counsel until after the prosecutor files notice of aggravating circumstances, which can be as late as twenty-five days before trial. Before the prosecution files notice, a defendant is represented by a Public Defender Trial Division attorney, who may not have the training or resources necessary to prepare a capital defense and who is also handling a burdensome caseload of non-capital felony cases. In addition, Capital Division caseloads are at their highest level since 2001.

Capital-qualified counsel are especially important at trial and on appeal, the only two stages of capital litigation during which a defendant has a constitutional right to representation. Moreover, well-trained counsel at these stages reduce the need to remedy errors during state post-conviction and federal habeas corpus proceedings, thereby preserving judicial resources and reducing the number of wrongful sentences and convictions. While Missouri has established some standards governing the qualifications of attorneys representing death row inmates in state post-conviction proceedings, Missouri has not enacted any formal laws or policies governing the qualifications, training, and experience requirements for attorneys representing capital defendants at trial or on direct appeal.

Recommendations

- Missouri should require that all capital defendants receive two qualified defense counsel, a mitigation specialist, and an investigator during pretrial proceedings, at trial, on direct appeal, and during state post-conviction proceedings, consistent with the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Capital Cases* (*ABA Guidelines*). Furthermore, Missouri should adopt mandatory training requirements for all attorneys and members of the defense team who assist in any stage of a capital case.
- Missouri should establish an entity to certify that attorneys who represent capital defendants at trial and on direct appeal meet the standards of the *ABA Guidelines*. The certifying entity should allow private counsel who represent capital defendants to become certified under the *ABA Guidelines*, or equivalent standards, as an added protection to capital defendants who retain counsel. The certifying entity should maintain a roster, accessible to all capital defendants, of private attorneys who have received this certification.
- Trial judges must allow a reasonable time for capital defense counsel to prepare for trial after a prosecutor has filed notice of intent to seek the death penalty, as preparation for the sentencing phase of a capital trial requires extensive investigation into mitigating evidence.

Jury Instructions (Chapters 3, 10, 13). The Capital Jury Project’s survey of Missouri capital jurors revealed several common misunderstandings regarding capital sentencing law. For instance, 65.5% of surveyed Missouri jurors erroneously believed that the jury had to be unanimous on a finding of mitigating evidence, and 36.8% did not realize they could consider any evidence as mitigating—i.e., evidence tending to favor a sentence less than death. The Capital Jury Project’s findings further revealed that many jurors did not believe that a sentence of life in prison without parole means that the defendant will never be released from prison. Revisions to Missouri’s capital jury instructions could help to improve comprehension by persons who serve on capital juries.

Recommendations

- Missouri’s pattern jury instructions should be amended in several ways. The instructions should include comprehensible definitions of the terms “mitigating” and “aggravating” and any other words that jurors frequently misunderstand. Capital jurors should also be instructed that they need not find mitigating circumstances beyond a reasonable doubt and that they should not simply compare the number of aggravating circumstances and mitigating circumstances in reaching a sentencing decision. Jurors should also be instructed on individual non-statutory mitigating circumstances when such circumstances are supported by the evidence and the instruction is requested by the defendant. Finally, the instructions should explain to jurors that a sentence of life without parole in fact means that the defendant will die in prison. When jurors express confusion about the instructions, trial courts should direct jurors to the individual instruction that relates to their question.

- Missouri should adopt a model jury instruction relating specifically to eyewitness identification, which the trial court can tailor to the needs of an individual case. The instruction would allow the court to instruct the jury on relevant factors affecting eyewitness identification accuracy and, when appropriate, on the special issues present in cross-racial identifications. Missouri trial courts should also be permitted to instruct jurors on factors to be considered in evaluating jailhouse informant and cooperating witness testimony.
- The Missouri pattern jury instructions should be amended to instruct capital jurors that (1) a mental disorder or disability is a mitigating circumstance, not an aggravating circumstance; (2) they should not rely upon the defendant’s mental disorder or disability to conclude that the defendant represents a future danger to society (excluding mental disorders manifested primarily by repeated criminal conduct); and (3) they should distinguish between the defense of insanity and the defendant’s subsequent reliance on mental disorder or disability as a mitigating circumstance.

Areas for Reform at the Post-trial Stage

Effective post-trial procedures are essential to correct errors of constitutional magnitude that may occur in death penalty cases. Post-conviction review is also often the only available avenue to raise claims of newly-discovered evidence that may lead to a lesser sentence or reversal of a conviction.

Post-conviction DNA Testing (Chapter 2). Commendably, Missouri has enacted a statute which allows inmates to obtain post-conviction DNA testing as a means to prove their innocence. However, in order to obtain testing an inmate must comply with strict pleading requirements without the assistance of appointed counsel. Inmates may only seek testing of materials that were secured at the time of the investigation into the charged offense in the inmate’s case; testing of newly-discovered evidence is not permitted. Missouri also limits an inmate’s ability to seek post-conviction testing when new DNA testing technologies become available or when there is credible evidence that prior test results or interpretations were unreliable. Finally, the statute permits an inmate to obtain DNA testing only to show a “reasonable probability” that s/he would not have been convicted. It does not permit testing to prove that the inmate did not have the culpability necessary to be eligible for the death penalty by not engaging in aggravating conduct, such as a rape that could be proven or disproven by DNA evidence.

Finally, because Missouri does not require preservation of evidence for as long as the defendant remains incarcerated, the efficacy of the post-conviction testing statute is diminished. A Missouri death row inmate who wishes to pursue a claim of innocence will be foreclosed from doing so if the relevant evidence is destroyed or missing.

Recommendation

Missouri should amend its DNA testing statute to allow inmates to test or retest evidence if the testing requested was not available at the time of trial or if prior test results were unreliable. The

statute should also allow an inmate to obtain DNA testing of newly-discovered evidence. Furthermore, the statute should ensure testing is afforded to an inmate who is able to show that a reasonable probability exists that s/he is innocent of the offense or did not engage in aggravating conduct.

Procedural Rules During Post-conviction Proceedings (Chapters 6, 8, 13). Missouri law imposes several procedural restrictions on post-conviction review, which may preclude judicial consideration of claims of constitutional magnitude like ineffective assistance of counsel and prosecutorial misconduct. For example, Missouri law permits post-conviction counsel only ninety days, at most, from the date they are appointed in which to investigate, develop, and draft claims before filing the inmate's post-conviction motion. There are no exceptions to this deadline. Given that post-conviction claims are often factually intensive and not immediately apparent when reviewing the trial record, ninety days is generally insufficient to research, develop, and present all viable post-conviction claims, especially in a capital case.

Moreover, Missouri death row inmates are not entitled to a post-conviction evidentiary hearing at the trial court level, and at least fifteen inmates have been denied evidentiary hearings on all or some post-conviction claims since 1997. This may prevent the full development of complex and factually-intensive post-conviction issues, such as claims of ineffective assistance of counsel.

Finally, Missouri law dictates that, during a defendant's sentencing hearing, the trial court must ask the defendant a series of yes-or-no questions regarding defense counsel's performance. Although most capital defendants are unaware of the complex nature of capital litigation and the special obligations imposed on counsel in these cases, a defendant's responses to these questions may later preclude him/her from raising an ineffective assistance of counsel claim in post-conviction proceedings.

Recommendations

- Missouri should amend its post-conviction procedures in capital cases such that post-conviction counsel are promptly appointed. The requirement of the pro se post-conviction motion should be eliminated entirely. Unduly rigid filing deadlines for capital post-conviction motions should be eliminated in order to permit adequate investigation and development of claims, with an allowance for additional time upon a showing of good cause.
- Missouri should permit second or 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.
- A capital defendant's answers to the trial court's questions regarding his/her attorney's performance should not affect the defendant's ability to later raise a claim of ineffective assistance of counsel. Such issues are best reserved for post-conviction proceedings, where the claim can be fully investigated and presented by a qualified capital post-conviction attorney.

- Post-conviction proceedings should be stayed upon a finding that the inmate has a mental disorder or disability that significantly impairs his/her ability to assist counsel in such proceedings. Missouri should also provide a mechanism whereby a “next friend” can be granted standing to pursue post-conviction remedies on behalf of a seriously mentally disabled or mentally ill inmate.

Data Collection

The lack of data collection and reporting on the use of capital punishment in Missouri makes it impossible for the state to determine whether its system is operating fairly and without bias. The need for accurate information on the use of the death penalty in Missouri is underscored by the fact that many intentional homicides in the state are death-eligible.

Recommendations

- Missouri should implement a uniform, statewide system for collecting data on charging, prosecution, and conviction in all capital-eligible cases. Collected information should include, at minimum, the race of defendants and victims, the circumstances of the crime, and all aggravating and mitigating circumstances. In turn, these data should be made available to the Supreme Court of Missouri for use in conducting meaningful proportionality review and to prosecutors for use in making charging decisions and setting charging guidelines (Chapters 7, 12).
- Missouri should heed the suggestion of the Supreme Court of Missouri’s Task Force on Gender and Justice and undertake research on whether race affects the administration of the death penalty in Missouri. Where patterns of racial discrimination are found in Missouri’s criminal justice system, the state should develop and implement remedial and preventative strategies similar to the state’s efforts to ameliorate racial disparity in juvenile cases and gender bias in all cases (Chapter 12).

Funding Issues

The Missouri Death Penalty Assessment Team also identified a number of areas where a lack of sufficient funding has prevented Missouri from providing training and services necessary to ensure a fair and accurate death penalty system. In some areas, Missouri has enacted sound procedures that are weakened by insufficient resources. The Team has identified the following areas as the most in need of increased funding.

Recommendations

- The Missouri Peace Officer Standards and Training (POST) Commission lacks the funding necessary to adequately monitor whether law enforcement officers are completing required training courses. POST also lacks the funding and resources necessary to document, track, and investigate all credible claims of officer misconduct in a timely manner, to perform full background checks of all officers, and to develop and implement written guidelines regarding officer discipline. POST funding should be increased so that it can perform these functions (Chapter 3).

- The Crime Laboratory Review Commission, already authorized by law, should be fully staffed and funded (Chapter 4).
- Missouri should provide adequate funding to ensure that all prosecutors and capital defense counsel receive adequate training and professional development with respect to capital cases. Missouri should also compensate indigent capital defense counsel at a rate commensurate with the provision of high-quality legal representation, comparable to the salary scales in Missouri prosecutor offices (Chapters 5, 6).

D. Final Thoughts and Recommendations

The Missouri Death Penalty Assessment Team recognizes aspects of Missouri's capital system that aim to secure fairness and accuracy in capital sentencing. At times, in fact, Missouri has played a role in improving capital punishment laws and policies. This Report concludes, however, that Missouri should implement several reforms to ensure the fair administration of the death penalty and to guarantee that no innocent or otherwise undeserving person is sentenced to death or executed. In particular, the Missouri Death Penalty Assessment Team urges Missouri to implement as soon as practicable the Recommendations contained in the Executive Summary of this Report.

III. SUMMARY OF THE REPORT

Chapter One: An Overview of Missouri’s Death Penalty System

In this Chapter, the Assessment Team examined the demographics of Missouri’s death row, the statutory evolution of Missouri’s death penalty scheme, and the progression of an ordinary death penalty case through Missouri’s death penalty system from arrest to execution.

Chapter Two: Collection, Preservation, and Testing of DNA and Other Types of Evidence

DNA testing has proved to be a useful law enforcement tool to establish guilt as well as innocence. The availability and utility of DNA testing, however, depends on the state’s laws and on its law enforcement agencies’ policies and procedures concerning the collection, preservation, and testing of biological evidence. In this Chapter, the Assessment Team examined Missouri’s laws, procedures, and practices concerning not only DNA testing, but also the collection and preservation of all forms of biological evidence, and the Team assessed whether the state complies with the ABA’s policies on the collection, preservation, and testing of DNA and other types of evidence.

A summary of Missouri’s overall compliance with the ABA’s policies on the collection, preservation, and testing of DNA and other types of evidence is illustrated in the following chart.³

Collection, Preservation, and Testing of DNA and Other Types of Evidence							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i> ⁴	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i> ⁵	<i>Not Applicable</i>
Recommendation							
Recommendation #1: The state should preserve all biological evidence for as long as the defendant remains incarcerated.					X		
Recommendation #2: Defendants and inmates should have access to biological evidence, upon request, and be able to seek appropriate relief notwithstanding any other provision of the law.				X			
Recommendation #3: Law enforcement agencies should establish and enforce written procedures and policies governing the preservation of biological evidence.				X			

³ Where necessary, the Recommendations contained in this chart and all subsequent charts were condensed to accommodate spatial concerns. The condensed Recommendations are not substantively different from the recommendations contained in the “Analysis” section of each chapter.

⁴ Given that most of the ABA Recommendations are composed of several parts, the Assessment Team uses the phrase “partial compliance” to refer to instances in which Missouri meets a portion, but not all, of the Recommendation. This definition applies to all subsequent charts contained in this Executive Summary.

⁵ In this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Missouri death penalty. The Project would welcome notification of any omissions or errors in this report so that they may be corrected in any future reprints.

Collection, Preservation, and Testing of DNA and Other Types of Evidence (Cont'd)							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i> ⁶	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i> ⁷	<i>Not Applicable</i>
Recommendation							
Recommendation #4: Provide adequate funding to ensure the proper preservation and testing of biological evidence.						X	

The Missouri Death Penalty Assessment Team commends the state for adopting legislation that allows inmates to obtain post-conviction DNA testing as a means to prove their innocence. However, testing should also be granted on any available evidence if the inmate is able to show that a reasonable probability exists that, with the results of such testing, s/he would have received a more favorable sentence.

To protect against wrongful conviction or execution of an inmate who should not have been subject to the death penalty, Missouri must properly preserve all biological evidence in capital cases. Missouri does not preserve all biological evidence for as long as the inmate remains incarcerated. In fact, the state only requires the preservation of biological evidence that leads to a conviction. Moreover, because Missouri has over five-hundred law enforcement agencies, it is difficult to determine whether each agency is properly preserving biological evidence. Proper preservation not only safeguards against conviction of the innocent but also serves as an effective law enforcement tool for identification and conviction of the guilty.

Chapter Three: Law Enforcement Identifications and Interrogations

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. In order to reduce the number of convictions of innocent persons and to ensure the integrity of the criminal justice process, the rate of eyewitness misidentifications and of false confessions must be reduced. In this Chapter, the Assessment Team reviewed Missouri’s laws, procedures, and practices on law enforcement identifications and interrogations and assessed whether they comply with the ABA’s policies on law enforcement identifications and interrogations.

A summary of Missouri’s overall compliance with the ABA’s policies on law enforcement identifications and interrogations is illustrated in the following chart.

⁶ Given that most of the ABA Recommendations are composed of several parts, the Assessment Team uses the phrase “partial compliance” to refer to instances in which Missouri meets a portion, but not all, of the Recommendation. This definition applies to all subsequent charts contained in this Executive Summary.

⁷ In this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Missouri death penalty. The Project would welcome notification of any omissions or errors in this report so that they may be corrected in any future reprints.

Law Enforcement Identifications and Interrogations

Compliance	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the <i>ABA Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures</i> .			X		
Recommendation #2: Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses.			X		
Recommendation #3: Law enforcement agencies and prosecutor offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and the continuing lessons of practical experience.			X		
Recommendation #4: Video-record 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 video-recording is impractical, audio-record the entirety of such custodial interrogations.		X			
Recommendation #5: Ensure adequate funding for the proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.				X	
Recommendation #6: Courts should have the discretion to allow a properly qualified expert to testify both pretrial and at trial on the factors affecting eyewitness accuracy.			X		
Recommendation #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 lineup accuracy.			X		
Recommendation #8: Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance, respectively.			X		
Recommendation #9: Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.			X		

While Missouri has adopted some policies and procedures that reduce the risk of eyewitness misidentifications and false confessions, it has generally failed to fully comply with most of the ABA Recommendations in this Chapter.

Missouri law does not require law enforcement officers to conform to any of the *ABA Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (ABA Best Practices)*. For instance, officers are not required to record the identification procedure in any particular manner, refrain from providing eyewitnesses with feedback before or after their selection, or use a minimum number of foils in the procedure. Some of the local law enforcement agencies that the Assessment Team reviewed have developed procedures that improve upon state law requirements, but none of these agencies fully complied with the *ABA Best Practices*. In addition, while Missouri case law gives trial courts discretion to allow expert testimony on factors affecting eyewitness identification accuracy, it does not permit trial courts to instruct the jury on such factors.

Missouri law requires law enforcement officers to electronically record custodial interrogations. However, the statute contains broad exceptions that allow officers to avoid the requirement if they simply fail to purchase or maintain the recording equipment. Moreover, there is no remedy for defendants who are interrogated in violation of the statute. Rather, the statute prevents defendants from so much as mentioning in the presence of the jury an officer's failure to comply with the statute.

Missouri law mandates that most law enforcement officers complete a basic training course, which includes instruction on eyewitness identification and custodial interrogation techniques, to obtain an officer's license. An officer must also complete continuing education courses to maintain his/her license. Some officers in smaller counties and towns who began working in law enforcement before 2001 or 2002, however, are entirely or largely exempt from the training requirements. In addition, the course curricula for those officers who are required to complete trainings do not conform to the ABA Recommendations.

Finally, the Missouri Peace Officer Standards and Training (POST) program, which regulates the licensure of officers, lacks the funding and personnel to monitor whether officers complete necessary coursework. A 2005 report by the Missouri State Auditor found that the POST program also had failed to adequately develop and enforce many policies related to the discipline of law enforcement officers and investigation of officer misconduct. For example, the audit found that POST program officials were not performing periodic criminal background checks on licensed officers, and, as a result, they were not aware of pending criminal charges against several active duty officers. The POST program's budget only allowed for one investigator in charge of reviewing all of the complaints against every officer in the state. As of February 2011, the POST program reported that there has not been a substantial increase in its funding since the State Auditor issued her report in 2005, and the program still only has one staff member assigned to investigating officer misconduct. Deficiencies in discipline procedures such as these seriously undermine public confidence in law enforcement.

Chapter Four: Crime Laboratories and Medical Examiner Offices

Courts increasingly rely on forensic evidence. In light of the questionable validity and reliability of recent tests performed at a number of unaccredited and accredited crime laboratories across the United States, it is important to ensure that crime laboratory and medical examiner offices are accredited, forensic and medical examiners are certified, and laboratories and medical examiner offices receive adequate funding. In this Chapter, the Assessment Team examined these issues as they pertain to Missouri and assessed whether Missouri’s laws, procedures, and practices comply with the ABA’s policies on crime laboratories and medical examiner offices.

A summary of Missouri’s overall compliance with the ABA’s policies on crime laboratories and medical examiner offices is illustrated in the following chart.

Crime Laboratories and Medical Examiner Offices						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
Recommendation #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.			X			
Recommendation #2: Crime laboratories and medical examiner offices should be adequately funded.					X	

Missouri law does not require crime laboratories to be accredited, but all of Missouri’s law enforcement crime laboratories have voluntarily obtained accreditation through the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). As a prerequisite for accreditation, ASCLD/LAB requires laboratories to take certain measures to ensure the validity, reliability, and timely analysis of forensic evidence. Furthermore, Missouri passed legislation requiring all crime laboratories that receive state funding to be accredited after December 31, 2012. Finally, Missouri created the Crime Laboratory Review Commission, which is tasked with the oversight of Missouri crime laboratories. However, the Crime Laboratory Review Commission has not yet been funded or fully staffed.

Like crime laboratories, Missouri does not require county coroner offices or medical examiner offices to receive accreditation, although the Jackson County Medical Examiner’s Office has received voluntary accreditation through the National Association of Medical Examiners (NAME). Despite the NAME accreditation, misclassifications of deaths have plagued the Jackson County Medical Examiner’s Office. There is no independent review commission to monitor medical examiners or county coroners.

There also are significant variations in funding among Missouri’s crime laboratories, medical examiner offices, and county coroner offices. This patchwork of systems has led to serious backlogs, mistakes, and, in the case of county coroners, a lack of necessary equipment and facilities. There is no oversight or review of allocation decisions made by crime laboratory directors and medical examiners. Thus, some crime laboratories and medical examiner offices suffer from a lack of adequate funding, while others appear to receive adequate funds but are plagued by poor allocation decisions.

The Missouri Assessment Team notes that the Crime Laboratory Review Commission could serve as an auditor to ensure that laboratories and medical examiner offices are properly allocating funds. Additionally, the Team also cannot justify the continued use of the coroner system if such a system lacks the funding to conduct reliable and timely death investigations.

Chapter Five: Prosecutorial Professionalism

Prosecutors are held to a higher ethical standard than other attorneys and must balance their duty to protect the public with their duty to ensure that the rights of the accused are honored. The character, quality, and efficiency of the entire criminal justice system is shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers, especially in capital cases where prosecutors have enormous discretion deciding whether or not to seek the death penalty. In this Chapter, the Assessment Team examined Missouri’s laws, procedures, and practices relevant to prosecutorial professionalism and assessed whether they comply with the ABA’s policies.

A summary of Missouri’s overall compliance with the ABA’s policies on prosecutorial professionalism is illustrated in the following chart.

Prosecutorial Professionalism							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #1: Each prosecutor office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.						X	
Recommendation #2: Each prosecutor 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.						X	

Prosecutorial Professionalism (Cont'd)							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #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.						X	
Recommendation #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.				X			
Recommendation #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.						X	
Recommendation #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.						X	

The Missouri Assessment Team was unable to obtain needed information regarding capital charging practices, discovery policies, training requirements, and other policies relevant to the ABA's policies on prosecutorial professionalism. Thus, the Assessment Team could not determine whether the state is in compliance with several of the Recommendations.

However, irrespective of any policies prosecutors may have adopted regarding capital charging decisions, Missouri's current statutory aggravating circumstances are too numerous and too broad to ensure that the death penalty is only applicable to a narrow category of the worst first-degree murder cases. Under the current scheme, virtually any intentional homicide could be charged capitally. This framework makes it is nearly impossible for individual prosecutors in Missouri to consistently and fairly exercise their capital charging discretion in all cases.

Problems exist in other areas, as well. There have been a number of wrongful convictions in Missouri that were largely based on uncorroborated eyewitness misidentifications, false confessions, and untruthful jailhouse informant testimony. In other cases, defendants were wrongfully convicted when prosecutors failed to comply with their constitutional duty to disclose exculpatory evidence to the defendant or when law enforcement officers failed to disclose such evidence to the prosecution. In one particularly egregious case, a Missouri woman was wrongly

convicted of murder and nearly sentenced to death based largely on the testimony of two jailhouse informants. She remained in prison for more than sixteen years before it was revealed that the prosecutors had failed to disclose several pieces of exculpatory evidence, including the fact that one informant had received a lenient sentencing recommendation in exchange for her testimony.

Despite these instances of misconduct, Missouri prosecutors have rarely been investigated, either by the statewide entities charged with disciplining attorneys who have engaged in misconduct or by local prosecutors themselves. As such, it appears that Missouri’s current attorney discipline system is inadequate for assessing professional misconduct in criminal cases.

Chapter Six: Defense Services

Effective capital case representation requires substantial specialized training and experience in the complex laws and procedures that govern a capital case, full and fair compensation to lawyers who undertake capital cases, and sufficient resources for investigators and experts. States must address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases as an integral part of a fair justice system. In this Chapter, the Assessment Team examined Missouri’s laws, procedures, and practices relevant to defense services and assessed whether they comply with the ABA’s policies on defense services.

A summary of Missouri’s overall compliance with the ABA’s policies on defense services is illustrated in the following chart.

Defense Services							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #1: Comply with Guideline 4.1 of the <i>ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)</i> —The Defense Team and Supporting Services.				X			
Recommendation #2: Comply with Guideline 5.1 of the <i>ABA Guidelines</i> —Qualifications of Defense Counsel				X			
Recommendation #3: Comply with Guideline 3.1 of the <i>ABA Guidelines</i> —Designation of a Responsible Agency.				X			
Recommendation #4: Comply with Guideline 9.1 of the <i>ABA Guidelines</i> —Funding and Compensation.				X			
Recommendation #5: Comply with Guideline 8.1 of the <i>ABA Guidelines</i> —Training.				X			

Missouri's indigent trial and appellate legal representation system consists of the Missouri State Public Defender (MSPD) and private attorneys who represent indigent defendants pursuant to contracts with MSPD. Indigent capital defendants are represented by the MSPD Capital Division or, in limited circumstances, private contract attorneys. State post-conviction counsel is provided by the MSPD Appellate/Post-Conviction Relief Division. Together, these entities provide at least one attorney for indigent defendants charged with or convicted of a capital offense at every stage of the legal proceedings, except for clemency. While Missouri does not provide for counsel to be appointed in clemency proceedings, the federal courts have held that federal habeas counsel may represent the defendant in clemency proceedings.

Although the provision of counsel throughout these important proceedings is to be commended, the system nonetheless falls short of complying with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)* for a number of reasons:

- Missouri does not guarantee every defendant the appointment of two capital attorneys, a mitigation specialist, and an investigator at every stage of the proceedings. Furthermore, defendants charged with first-degree murder do not receive the benefit of Capital Division representation until after the prosecutor files notice of aggravating circumstances, which can be as late as twenty-five days before trial.
- While Missouri imposes some qualification requirements for counsel undertaking capital post-conviction representation, there are no laws or policies governing the qualifications, training, and experience requirements for attorneys representing capital defendants at trial or on direct appeal. Capital-qualified counsel are especially important at trial and on direct appeal, the only two stages of capital litigation during which a defendant has a constitutional right to representation. Moreover, well-trained counsel at these stages reduce the need to remedy trial errors during state post-conviction and federal habeas proceedings, thereby preserving judicial resources and reducing the number of wrongful convictions and sentences.
- According to a 2009 report, due to budget constraints MSPD has not offered a training program specific to death penalty cases since 2006 and has limited the number of capital attorneys permitted to attend national training seminars. In addition, MSPD no longer provides funding for the training of contract attorneys who handle capital cases.
- Missouri does not fully compensate indigent capital counsel at a rate commensurate with the provision of high-quality legal representation or comparable to the salary scales in Missouri prosecutor offices. Furthermore, contrary to the *ABA Guidelines*, which call for appointed counsel to be fully compensated for actual time worked, it is MSPD policy to negotiate with contract counsel to determine a modified flat-fee rate, which is typically \$15,000. However, given MSPD's current financial constraints, it is possible that it will compensate contract attorneys at a lower flat-fee rate in the future.

Finally, excessive caseloads have been a continuing problem for the MSPD Trial Division, which handles capital-eligible cases until the prosecution files notice of aggravating circumstances. A 2009 report found that one of "the most significant" shortcomings of MSPD is the excessive workloads of its public defenders. Currently, Capital Division caseloads are at their highest level since 2001. The report also found that Missouri has the forty-ninth lowest per

capita spending on indigent defendants in the nation and has the lowest spending per attorney of all statewide public defender systems.

Chapter Seven: Direct Appeal Process

The direct appeal process in capital cases is designed to correct any errors in the trial court’s findings of fact and conclusions of law and to determine whether the trial court’s actions during the guilt and penalty phases were proper. One important function of appellate review is to ensure that death sentences are not imposed arbitrarily or based on improper biases. Meaningful comparative proportionality review, the process through which a sentence of death is compared with sentences imposed on similarly-situated defendants to ensure that the sentence is not disproportionate, is the primary method to prevent arbitrariness and bias at sentencing. In this Chapter, the Assessment Team examined Missouri’s laws, procedures, and practices relevant to the direct appeal process and assessed whether they comply with the ABA’s policies on the direct appeal process.

A summary of Missouri’s overall compliance with the ABA’s policies on the direct appeal process is illustrated in the following chart.

Direct Appeal Process						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
<p>Recommendation #1: In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision making process, direct appeal courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been but was not sought.</p>			X			

Missouri’s proportionality review encompasses cases in which a death sentence was sought; however, this review does not include all death penalty-eligible cases, including cases in which the death penalty could have been but was not sought.

Aggravating circumstances in Missouri’s death penalty law must be sufficiently limited and definite that the Court can reasonably conduct a meaningful proportionality review. Since reinstating the death penalty in 1977, the Missouri General Assembly has repeatedly expanded the list of statutory aggravating circumstances to a total of seventeen as of January 2012. Other capital jurisdictions, including most death penalty states that border Missouri, have fewer than seventeen aggravating circumstances. Moreover, many of Missouri’s aggravating circumstances

would likely apply to a large number of murders. A study of 247 Missouri cases in which the defendant could have been charged with first-degree murder found that the “murder for the purpose of receiving money” aggravating circumstance would apply to 45% of the sampled cases, the “engaged in a felony” aggravating circumstance would apply to more than 50% of the cases, and the “wantonly vile” aggravating circumstance would apply to more than 90% of the cases. Given that Missouri law renders the vast majority of first-degree murder cases capital-eligible, it is essential for the state’s proportionality review to require an examination of potentially capital cases to ensure that the death penalty is administered in a rational, non-arbitrary manner; to provide a check on broad prosecutorial discretion; and to prevent discrimination from playing a role in the capital decision-making process.

In addition, Missouri has not consistently collected data on the charging, prosecution, and conviction of all capital-eligible offenses in the state. A uniform, statewide system for collecting these data is necessary to ensure that all relevant cases are available for proportionality review.

Chapter Eight: State Post-conviction Proceedings

The importance of state post-conviction proceedings to the fair administration of justice in capital cases cannot be overstated. Because capital defendants may receive inadequate representation at trial and on direct appeal, and because some constitutional violations are unknown or cannot be litigated at trial or on direct appeal, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For these reasons, all post-conviction proceedings should be conducted in a manner designed to permit the adequate development and judicial consideration of all claims. In this Chapter, the Assessment Team examined Missouri’s laws, procedures, and practices relevant to state post-conviction proceedings and assessed whether they comply with the ABA’s policies on state post-conviction proceedings.

A summary of Missouri’s overall compliance with the ABA’s policies on state post-conviction proceedings is illustrated in the following chart.

State Post-Conviction Proceedings

<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #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 the applicable law.		X			
Recommendation #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.				X	
Recommendation #3: Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.		X			
Recommendation #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 bases for dispositions of those claims.	X				
Recommendation #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.					X
Recommendation #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.			X		
Recommendation #7: The state should establish post-conviction defense organizations, similar in nature to the capital resources centers defunded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.		X			

State Post-Conviction Proceedings (Cont'd)					
Compliance	In Compliance	Partial Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation					
Recommendation #8: The state should appoint post-conviction defense counsel whose qualifications are consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i> . The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.		X			
Recommendation #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.		X			
Recommendation #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.		X			
Recommendation #11: In post-conviction proceedings, state courts should apply the harmless error standard of <i>Chapman v. California</i> , requiring the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.		X			
Recommendation #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.					X

The State of Missouri has adopted some laws and procedures that facilitate the adequate development and judicial consideration of post-conviction claims. For instance, Missouri has established a statewide public defender system that provides defense counsel to indigent death row inmates in state post-conviction proceedings. The state has also enacted some qualification standards for these attorneys. In addition, the Supreme Court of Missouri has not adopted the strict *Teague* standard, which is used in federal courts to determine whether a court decision should be given retroactive effect.

However, Missouri law imposes strict time limits and other restrictive procedural rules on the post-conviction process, which may limit adequate development of death row inmates' claims and preclude judicial consideration of all serious claims of error that may have occurred at trial. Most notably, capital post-conviction counsel are afforded ninety days, at most, from the date they are appointed in which to investigate, develop, and draft claims before filing the inmate's post-conviction motion. There are no exceptions to this deadline. Given that post-conviction

claims are often factually intensive and not immediately apparent in the trial record, ninety days is insufficient time to research, develop, and present all viable post-conviction claims, especially in a capital case. Claims of ineffective assistance of counsel, for instance, will often require post-conviction attorneys to review reams of discovery material, interview and obtain affidavits from trial attorneys, confer with experts, and research legal issues.

Furthermore, Missouri law requires that all inmates file a pro se post-conviction motion before counsel are appointed. This rule wastes time in the post-conviction process, as the inmate can make little progress on his/her post-conviction claim without the assistance of an attorney. Moreover, under this rule, an inmate who is unable to timely file a post-conviction motion due to infirmity, mental illness, or other delays not the fault of the inmate will not be permitted to have his/her post-conviction claims considered on the merits.

The likelihood that valid claims will go unexamined is exacerbated when trial courts deny evidentiary hearings in capital post-conviction cases, thereby preventing the full development of complex post-conviction issues. While Missouri trial courts have granted evidentiary hearings in most capital post-conviction cases, at least fifteen death row inmates have been denied hearings on all or some of their major claims since 1997.

Missouri also does not permit second or successive post-conviction motions, even based on claims of newly-discovered evidence. While the state does have other remedies available that could allow the Supreme Court of Missouri to review possible meritorious claims that were not, or could not be, presented during post-conviction proceedings, the rules governing these remedies are often unclear, as the Supreme Court of Missouri has acknowledged. Moreover, indigent inmates have no right to appointed counsel in these proceedings, which often are scheduled shortly before execution; thus, some viable claims may go unlitigated because there is no attorney to discover and present them.

While Missouri should be commended for appointing counsel to represent inmates in state post-conviction proceedings, MSPD attorneys are not appointed by the federal courts to represent death row inmates in federal habeas and clemency proceedings. Instead, non-MSPD attorneys are appointed to represent inmates in the federal courts, and the inmate may have no representation at the conclusion of the federal proceedings. Because Missouri death row inmates are not continuously represented by counsel while they are incarcerated, viable claims that may arise during the long period between the conclusion of federal habeas proceedings and execution may go unnoticed.

Finally, Missouri law dictates that, during a defendant's sentencing hearing, the trial court must ask the defendant a series of yes-or-no questions regarding defense counsel's performance. The defendant's statements during this inquiry may preclude him/her from later raising an ineffective assistance of counsel claim in post-conviction proceedings.

Chapter Nine: Clemency

Given that the clemency process is the final avenue of review available to a death row inmate, it is imperative that clemency decision-makers evaluate all of the factors bearing on the

appropriateness of the death sentence without regard to constraints that may limit a court’s or jury’s decision-making. In this Chapter, the Assessment Team reviewed Missouri’s laws, procedures, and practices concerning the clemency process, including, but not limited to, the Missouri Board of Probation and Parole and the Governor’s process of clemency decision-making and inmates’ access to counsel, and assessed whether they comply with the ABA’s policies on clemency.

A summary of Missouri’s overall compliance with the ABA’s policies on clemency is illustrated in the following chart.

Clemency							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #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.						X	
Recommendation #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.						X	
Recommendation #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.						X	
Recommendation #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.				X			
Recommendation #5: Clemency decision-makers should consider an inmate’s possible rehabilitation or performance of positive acts while on death row.						X	
Recommendation #6: Death row inmates should be represented by counsel and such counsel should have qualifications consistent with the <i>ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases</i> .					X		
Recommendation #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.					X		
Recommendation #8: Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.					X		

Clemency (Cont'd)					
Compliance	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #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.			X		
Recommendation #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.				X	
Recommendation #11: To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.				X	

The Missouri Constitution gives the Governor the exclusive authority to grant reprieves, commutations, and pardons for capital crimes, and the Missouri Board of Probation and Parole (Board) assists the Governor by conducting an investigation and, at its discretion, making a non-binding pardon, clemency, or reprieve recommendation. Additionally, the Governor may create a Board of Inquiry to further investigate any clemency requests.

However, neither the Governor nor the Board has issued publicly-available procedures to be followed in reviewing death penalty cases. A condemned inmate does not receive a clemency hearing, and, neither the Governor nor the Board is required to publicly state the reasons for its clemency decision. As such, the Board and the Governor's processes for considering clemency are largely undefined. For example,

- The Board is responsible for conducting an investigation into death penalty cases in preparation for the clemency hearing, but the scope of this investigation is not delineated;
- Neither the Governor nor the Board is required to consider any specific factors when assessing a death-sentenced inmate's eligibility for clemency. While some factors, such as allegations of an inmate's mental disorder or disability have been considered, it is unknown if other issues, such as patterns of racial disparity apparent in an individual case, have been taken under consideration;
- There is no requirement that the Governor consider the Board's clemency recommendation and accompanying report or that s/he consider any specific factors when assessing a death-sentenced inmate's clemency petition. Indeed, in at least two instances, the Governor has denied clemency to a death row inmate after the Board recommended a grant of clemency; and
- A death-sentenced inmate is not afforded an opportunity for a hearing or to address the Governor.

Moreover, the Missouri Assessment Team was unable to determine the state’s compliance with the majority of the Recommendations contained in this Chapter due to the opaque nature of the clemency process in Missouri. The Board does not publicly conduct its activities nor is it required to release the basis for its clemency recommendation or to even state publicly whether there is a recommendation for clemency. Indeed, the Board has been described as one of the most secretive state agencies in Missouri. The Governor also is not required to state the basis for a clemency grant or denial.

The Assessment Team recognizes that greater transparency in Missouri’s clemency process arguably could make clemency decision-making more, rather than less, susceptible to unnecessary political influence. However, some steps can be taken to ensure fair application of the death penalty. For example, Missouri should require the Board to make a recommendation to the Governor on any death row inmate’s request for a pardon, reprieve, or commutation. Additionally, the Board should have the power to conduct investigations, hold hearings, and test evidence to review claims of factual innocence in capital cases. The investigation, report, and recommendation of the Board should be made available to the public. Counsel should also be guaranteed to inmates petitioning for clemency.

Chapter Ten: Capital Jury Instructions

In capital cases, jurors possess the “awesome responsibility” of deciding whether another person will live or die. Due to the complexities inherent in capital proceedings, trial judges must present fully and accurately, through jury instructions, the applicable law to be followed. Sometimes, however, jury instructions are poorly written and poorly conveyed, leading to confusion among jurors as to the applicable law and the extent of their responsibilities. In this Chapter, the Assessment Team reviewed Missouri’s laws, procedures, and practices on capital jury instructions and assessed whether they comply with the ABA’s policies on capital jury instructions.

A summary of Missouri’s overall compliance with the ABA’s policies on capital jury instructions is illustrated in the following chart.

Capital Jury Instructions						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
Recommendation #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.			X			

Capital Jury Instructions (Cont'd)					
Compliance	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #2: Jurors should receive written copies of court instructions to consult while the court is instructing them and while conducting deliberations.	X				
Recommendation #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.			X		
Recommendation #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.		X			
Recommendation #5: Trial courts should not place limits on a juror's ability to give full consideration to any evidence that might serve as a basis for a sentence less than death.		X			
Recommendation #6: 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.	X				
Recommendation #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.			X		

The Missouri Supreme Court Rules and Missouri's pattern jury instructions, the Missouri Approved Instructions – Criminal (MAI-CR), dictate the procedures by which capital jurors are instructed. Some aspects of these procedures aid capital jurors in understanding the death penalty decision-making process. For instance, jurors receive written copies of the jury instructions for use in deliberations, and jurors are instructed that they are not required to sentence the defendant to death even if they do not find that the mitigating evidence outweighs the aggravating evidence.

A study by the Capital Jury Project, however, demonstrated that a significant number of capital jurors in prior Missouri cases failed to understand many aspects of the capital sentencing law upon which they were instructed. For instance, 65.5% of interviewed Missouri jurors who

served on capital cases erroneously believed that the jury had to be unanimous on a finding of mitigating evidence, and 36.8% did not realize that they could consider any evidence as mitigating evidence.

The MAI-CR do not provide definitions of certain legal terms relevant to capital sentencing, such as “aggravating” and “mitigating,” and trial courts are not permitted to define these terms even upon the jury’s request. Missouri jurors interviewed by the Capital Jury Project also estimated that a defendant sentenced to Missouri’s capital sentencing alternative, “imprisonment for life by the Department of Corrections without eligibility for probation or parole,” would be released after serving a twenty-year sentence. Given the danger that jurors will render a sentence based on this misunderstanding, it is especially important for trial courts to emphasize that life in prison without parole means that the defendant will die in prison. Missouri trial courts, however, are not permitted to provide jurors with a more detailed explanation of this punishment. The MAI-CR also may inadvertently limit jurors’ consideration of a sentence less than death in capital cases.

Chapter Eleven: Judicial Independence and Vigilance

In some states, judicial elections, appointments, and confirmations are influenced by consideration of judicial nominees’ or candidates’ purported views of the death penalty or of judges’ decisions in capital cases. In addition, judges’ decisions in individual cases sometimes are or appear to be improperly influenced by electoral pressures. This erosion of judicial independence increases the possibility that judges will be elected, appointed, elevated, and retained in office by a process that ignores the larger interests of justice and fairness, and instead focuses narrowly on the issue of capital punishment, thus undermining society’s confidence that individuals in court are guaranteed a fair hearing. In this Chapter, the Assessment Team reviewed Missouri’s laws, procedures, and practices on the judicial appointment, election, and decision-making processes and assessed whether they comply with the ABA’s policies on judicial independence.

A summary of Missouri’s overall compliance with the ABA’s policies on judicial independence is illustrated in the following chart.

Judicial Independence and Vigilance							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #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.			X				

Judicial Independence and Vigilance (Cont'd)					
Compliance	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #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.	X				
Recommendation #3: Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases, educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, and publicly oppose any questioning of candidates for judicial appointment or reappointment concerning their decisions in capital cases. Purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.	X				
Recommendation #4: A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure that the defendant receives a proper defense.				X	
Recommendation #5: A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during a capital case should take immediate action authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.				X	
Recommendation #6: Judges should do all within their power to ensure that defendants are provided with full discovery in all capital cases. Trial courts should conduct, at a reasonable time prior to a criminal trial, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under the applicable discovery rules, statutes, ethical standards, and the federal and state constitutions and to offer the court's assistance in resolving disputes over disclosure obligations.		X			

The State of Missouri should be applauded for its efforts to maintain judicial independence. The Missouri Bar's commitment to educating the public regarding the importance of an independent judiciary, its adoption and implementation of a detailed plan for responding to serious and unfair criticism of the state judiciary, and the absence of any reported instance in which a judicial candidate or judge made promises—public or private—regarding his/her prospective decisions in capital cases illustrate how Missouri complies with the ABA's policies on judicial independence.

Yet despite this and other encouraging evidence that may be found within the Chapter, there also exists room for improvement. The Missouri Assessment Team observes, for instance, that

Missouri’s trial courts should be more vigilant in ensuring that capital defendants receive a proper defense and a fair trial. Since the death penalty was reinstated in 1977, at least twenty-eight of 145 death sentences have been reversed on direct appeal or during post-conviction proceedings; nine of these reversals were based in whole or in part on ineffective assistance of counsel or prosecutorial misconduct. This rate of death sentence reversals suggests that trial courts are not always taking effective action to ensure that capital proceedings are fair.

Finally, Missouri lacks a rule to compel judges to hold pretrial conferences in capital cases to better ensure compliance with discovery rules. Considering the documented failures by prosecutors to uphold their disclosure obligations in capital cases, trial court judges should exercise their discretion to order pretrial conferences to promote a fair and expeditious trial, including pretrial conferences regarding discovery matters. This practice also would conserve judicial resources by encouraging compliance with constitutional and state law requirements, reducing the likelihood that appellate courts will later have to sort out discovery violation allegations.

Chapter Twelve: Treatment of Racial and Ethnic Minorities

To counter the impact of race in the administration of the death penalty, the ways in which race affect the system must be identified, and strategies must be devised to eliminate discriminatory practices. In this Chapter, the Assessment Team examined Missouri’s laws, procedures, and practices pertaining to the treatment of racial and ethnic minorities and assessed whether they comply with the ABA’s policies.

A summary of Missouri’s overall compliance with the ABA’s policies on racial and ethnic minorities and the death penalty is illustrated in the following chart.

Racial and Ethnic Minorities							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #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.				X			
Recommendation #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. The 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.				X			

Racial and Ethnic Minorities (Cont'd)					
Compliance	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #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.			X		
Recommendation #4: Where patterns of racial discrimination are found in any phase of the death penalty's administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.			X		
Recommendation #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 established racially discriminatory patterns. If a prima facie case is established, the State should have the burden of rebutting it by substantial evidence.			X		
Recommendation #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 the death penalty's 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.		X			
Recommendation #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.				X	
Recommendation #8: Jurisdictions should require jury instructions that it is improper for jurors to consider any racial factors in their decision-making and that jurors should report any evidence of racial discrimination in jury deliberations.			X		

Racial and Ethnic Minorities (Cont'd)					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #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.				X	
Recommendation #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.			X		

Missouri has examined some aspects of racial discrimination in the criminal justice system. In recent years, Missouri has kept regular records of defendants who faced a capital trial, investigated the impact of racial discrimination on the juvenile justice system, and examined gender bias in the court system. The state has also adopted some preventative strategies to combat discrimination during voir dire, as well as in the investigation of crime through mandatory training of law enforcement.

Missouri has not, however, fully investigated all aspects of racial discrimination in the criminal justice system. There have been a number of independent studies on the impact of racial discrimination in Missouri's system of capital punishment. Although the questions at-issue and methodologies used in these studies differ, their various findings support the conclusion that Missouri's capital punishment system is not free from the influence of race and, indeed, that racial considerations may play an improper role in determining outcomes in capital cases. The findings tend to show that racial factors—inadvertent or otherwise—influence the prosecutor's initial charging decision, the decision to move forward with a capital trial, and the jury's decision to sentence the defendant to death.

These studies, coupled with the findings of state-based investigations on the administration of juvenile justice and on gender bias in the justice system, demonstrate the need for a contemporary investigation regarding racial discrimination in Missouri's criminal justice system.

Missouri law requires the collection of important demographical information on cases in which the death penalty was sought if the case resulted in a sentence of life without parole or a death sentence. This provides a mechanism through which important data on capital cases can be collected and analyzed. But trial judges do not always complete the reports used to collect these demographical data on death penalty cases. There also is no requirement that these data be collected and maintained with respect to cases in which the death penalty could have been, but was not sought.

Chapter Thirteen: Mental Retardation and Mental Illness

Mental Retardation

In *Atkins v. Virginia*, the U.S. Supreme Court held that it is unconstitutional to execute offenders with mental retardation. This holding, however, does not guarantee that individuals with mental retardation will not be executed, as each state has the authority to make its own rules for determining whether a capital defendant is mentally retarded. In this Chapter, the Assessment Team reviewed Missouri's laws, procedures, and practices pertaining to mental retardation in connection with the death penalty and assessed whether they comply with the ABA's policy on mental retardation and the death penalty.

A summary of Missouri's overall compliance with the ABA's policies on mental retardation is illustrated in the following chart.

Mental Retardation							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #1: Jurisdictions should bar the execution of individuals who have mental retardation, as defined by the American Association on Intellectual and Developmental Disabilities. 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.				X			
Recommendation #2: For cases commencing after <i>Atkins v. Virginia</i> 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.					X		
Recommendation #3: 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.		X					

Mental Retardation (Cont'd)							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #4: 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.				X			

Missouri enacted a statute banning the execution of mentally retarded offenders in 2001, one year before the U.S. Supreme Court decided *Atkins v. Virginia*. The statute comports with some of the ABA Recommendations, such as the following:

- The statutory definition of mental retardation conforms to some elements of the definition endorsed by the American Association on Intellectual and Developmental Disabilities (AAIDD) at the time the Missouri statute was enacted.
- The Missouri statute does not require a capital defendant to present a particular IQ score to prove mental retardation.
- While the statute places the burden of proving mental retardation on the defendant, s/he is only required to prove mental retardation by a preponderance of the evidence.

Missouri, however, fails to meet the requirements of the ABA Recommendations in several ways. For example, the Missouri statute requires evidence of the defendant’s mental retardation to be “documented,” rather than simply manifested, before age eighteen. This requirement has been expressly rejected by the AAIDD. Furthermore, the statute does not permit the mental retardation issue to be decided in a pretrial hearing absent agreement by the trial court and the prosecution, causing most mental retardation claims to be resolved by a jury after a long and costly capital trial.

Mental Illness

The Assessment Team also reviewed Missouri’s laws, procedures, and practices pertaining to mental illness in connection with the death penalty and assessed whether they comply with the ABA’s policy on mental illness and the death penalty. Mental illness can affect every stage of a capital trial. It is relevant to the defendant’s competence to stand trial, it may provide a defense to the murder charge, and it can be the centerpiece of the mitigation case. Conversely, the risk of reversible error increases when the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant’s culpability and life experience.

A summary of Missouri’s overall compliance with the ABA’s policies on mental illness is illustrated in the following chart.

Mental Illness							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #1: 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.						X	
Recommendation #2: 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.		X					
Recommendation #3: Jurisdictions should forbid death sentences and executions for everyone who, at the time of the offense, had significant limitations 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.				X			
Recommendation #4: The jurisdiction should 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.					X		
Recommendation #5: To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of 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.				X			

Mental Illness (Cont'd)					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #6: 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 this should not be considered in aggravation.			X		
Recommendation #7: 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/her capacity to make a rational decision.		X			
Recommendation #8: The jurisdiction should stay post-conviction proceedings where a prisoner under a 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.			X		
Recommendation #9: 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 case. 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.	X				

Mental Illness (Cont'd)						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
Recommendation #10: 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.			X			

Missouri has taken some steps to protect the rights of individuals with mental disorders and disabilities. The Assessment Team notes, for instance, that defense counsel typically are able to obtain funding from the Missouri State Public Defender (MSPD) to hire the mental health expert of their choice.

Nevertheless, Missouri does not provide a system in which mentally ill and disabled persons are fully protected. For example, while Missouri provides some mechanisms that protect mentally ill and disabled persons from waivers that are the result of their disability, many of these mechanisms are inadequate. Missouri case law, for instance, provides that a capital defendant who waives his/her right to trial and pleads guilty also waives the right to have a jury determine his/her sentence. While the trial court must warn the defendant that s/he is also waiving his/her right to jury sentencing, it is not required to conduct a full inquiry into whether the defendant understands the nature and possible consequences of this decision.

Missouri also does not prohibit death sentences or executions for persons who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior caused by a disability other than mental retardation, such as dementia or traumatic brain injury. Under this standard, a defendant who suffered a serious brain injury at age eighteen or older would be eligible for the death penalty, even if, as a result of the injury, s/he exhibits every other characteristic of mental retardation. Furthermore, Missouri does not forbid death sentences and executions for the severely mentally ill under any standard. Missouri courts also are not permitted to stay post-conviction proceedings when an inmate has a mental disorder or disability that significantly impairs his/her ability to assist counsel with such proceedings. This is of special concern in Missouri, where an inmate waives any right to post-conviction review if s/he does not timely file the post-conviction motion within ninety days after the conviction is affirmed on direct appeal. In addition, Missouri does not allow a “next friend” to act on a death row inmate’s behalf to pursue available remedies to set aside the conviction or death sentence, in cases 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.

Mental Conditions Generally

Finally, the Assessment Team reviewed Missouri’s procedures and practices related to issues common to mentally retarded and mentally ill capital defendants, and the Team assessed whether they comply with ABA policies. Generally, these policies relate to the manner in which actors in the criminal justice system are trained to recognize and understand mental retardation and mental illness in defendants.

A summary of Missouri’s overall compliance with the ABA policies that relate to both mental retardation and mental illness is illustrated in the following chart.

Mental Retardation & Mental Illness							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #1: All actors in the criminal justice system should be trained to recognize mental retardation in capital defendants and death row inmates.				X			
Recommendation #2: All actors in the criminal justice system should be trained to recognize mental illness in capital defendants and death row inmates.				X			
Recommendation #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 clients’ 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 skills deficiencies of a defendant who counsel believes may have mental retardation.				X			

Mental Retardation & Mental Illness (Cont'd)					
Compliance	<i>In Compliance</i>	<i>Partial Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #4: 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 clients' mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities 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 initial or subsequent 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 disabilities of a defendant who counsel believes may have mental disabilities.		X			
Recommendation #5: During police investigations and interrogations, special steps should be taken to ensure that the <i>Miranda</i> rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.		X			
Recommendation #6: During police investigations and interrogations, special steps should be taken to ensure that the <i>Miranda</i> rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.		X			

While some actors in the Missouri criminal justice system, such as corrections officers, are trained to recognize mental illnesses and disabilities in criminal defendants, many are not. Judges and prosecutors are not required to receive any training relevant to mental illnesses and disabilities; this is especially concerning given that the trial judge and prosecutor must consent before a capital defendant can be granted a pretrial hearing on their alleged mental retardation. Trial judges also are often required to rule on other issues related to mental disabilities, such as competency to stand trial and the admissibility of expert testimony. Mandatory law enforcement training in this area only instructs on how to read the *Miranda* warnings to a mentally disabled suspect; it does not include training on recognizing mental illness or mental retardation and how these conditions may affect a suspect's ability to validly waive his/her *Miranda* rights.

Although many of Missouri's capital defense counsel have been trained on issues related to mental illnesses and disabilities, capital defenders are not required to undergo such training. Moreover, MSPD budget constraints have led to the elimination of many training opportunities in recent years. Consequently, there is an increased risk that future capital defendants will be represented by attorneys who do not have the necessary skills to recognize, investigate, and litigate mental health issues.

CHAPTER ONE

AN OVERVIEW OF MISSOURI'S DEATH PENALTY SYSTEM

I. DEMOGRAPHICS OF MISSOURI'S DEATH ROW¹

A. *A Historical Perspective*

The State of Missouri reinstated the death penalty on May 26, 1977.² The first execution after the reinstatement occurred on January 6, 1989, with the execution of George Mercer at the Missouri State Penitentiary in Jefferson City.³

Between 1989 and 2012, Missouri executed a total of sixty-eight inmates.⁴ Since 1977, five individuals have petitioned the court to forgo the right to appeal their death sentence.⁵ One juvenile offender, Frederick Lashley, was executed by lethal injection in 1993 for a crime he

¹ Missouri does not house death-sentenced inmates on a “death row”; instead, inmates are housed within the general population at Potosi Correctional Center and are referred to as “Capital Punishment Inmates.” See GEORGE LOMBARDI, RICHARD D. SLUDER & DONALD WALLACE, *THE MANAGEMENT OF DEATH-SENTENCED INMATES: ISSUES, REALITIES, AND INNOVATIVE STRATEGIES* (1996), available at <http://doc.mo.gov/documents/DeathSentencedInmates.pdf>. However, for consistency and ease of use, the Missouri Report will continue to use the term “death row.”

² H.B. 90, 79th Gen. Assemb., 1st Reg. Sess. (Mo. 1977) (enacted).

³ See NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), *DEATH ROW USA 13* (2011), available at www.naacpldf.org/files/publications/DRUSA_Summer_2011.pdf [hereinafter NAACP, *DEATH ROW USA*]. See also MO. DEP'T OF CORR., *HISTORY OF THE DEATH PENALTY IN MISSOURI 2* (Jan. 26, 2010) (on file with author).

⁴ *Executions 1989–2011*, MO. DEATH ROW, <http://missourideathrow.com/executions-1989-2009> (last visited July 18, 2011); NAACP, *DEATH ROW USA*, *supra* note 3, at 10. According to the 2009 biennial report issued by the Missouri Sentencing Advisory Commission, Missouri had executed sixty-eight individuals by 2009. MO. SENTENCING ADVISORY COMM'N, *RECOMMENDED SENTENCING: BIENNIAL REPORT 2009 38* (Dec. 10, 2009), available at <http://www.mosac.mo.gov/file.jsp?id=45433>. The 2009 biennial report counts Lewis Gilbert, who was tried and convicted in Missouri for two murders. However, Gilbert was executed in Oklahoma on July 1, 2003 for a crime spree that spread across multiple states. Jessica L. Dickerson, *Ohio Man Executed for Killing a Security Guard in 1994*, OKLAHOMAN, July 2, 2003, at 5. For purposes of this Report, we will not count Lewis Gilbert in the list of those executed in Missouri.

⁵ NAACP, *DEATH ROW USA*, *supra* note 3, at 10. After Gerald Smith petitioned the court to withdraw his appeals, the Missouri State Public Defender Commission filed an appeal on his behalf. However, the U.S. Court of Appeals for the Eighth Circuit found Smith to be competent and granted him leave to forgo his remaining appeals. Smith *by and through* Mo. State Pub. Defender Comm'n v. Armontrout, 812 F.2d 1050 (8th Cir. 1987). After partially completing the appeals process, Leonard Laws requested that all future appeals be forgone. *Killers Are Put To Death in Texas and Missouri*, N.Y. TIMES, May 17, 1990, at A27. James Henry Hampton was executed after the Missouri State Public Defender brought an appeal on his behalf without his consent. The Supreme Court of Missouri found Hampton to be competent to waive his appeals and dismissed the petition. Hampton v. State, 10 S.W.3d 515 (Mo. banc 2000). John C. Smith filed a motion for post-conviction relief and subsequently moved to dismiss the petition. The Missouri State Public Defender sought to continue the petition on Smith's behalf. The Supreme Court of Missouri determined that no competency investigation was required and that the public defender had no authority to appeal on Smith's behalf. Smith v. State, 100 S.W.3d 805 (Mo. banc 2003). Bert Hunter pleaded guilty to the charged offense and was sentenced to death. Hunter subsequently participated in the appeals process, but was later executed. Hunter v. Bowersox, 172 F.3d 1016 (8th Cir. 1999).

committed at age seventeen.⁶ Inmates executed in Missouri since the reinstatement of the death penalty have been tried and convicted in twenty-one of Missouri's 115 counties.⁷ Three death row inmates have been released from death row due to evidence of their innocence.⁸ Three death row inmates have been granted clemency since 1977.⁹

Of those sixty-eight inmates who were executed, all were male, forty-one were white, twenty-six were African-American, and one was Native American.¹⁰ Fifty-two of those executed were sentenced to death for murdering a white victim, while sixteen were sentenced to death for murdering an African-American victim.¹¹ Fifty-five of the executed inmates murdered victims of their own race.¹² Eleven of those executed were African-American inmates sentenced to death for the murder of a white victim, one white inmate was executed for the murder of an African-American victim, and one Native American inmate was executed for the murder of a white victim.¹³

B. A Current Profile of Missouri's Death Row

Currently, there are forty-six inmates on Missouri's death row who were tried and convicted of first-degree murder in twenty different counties across Missouri.¹⁴ Of the forty-six inmates, twenty are African-American and twenty-six are white.¹⁵ There are currently no women sentenced to death in Missouri.¹⁶ The average length of time that an inmate spends on death row in Missouri, from incarceration until execution, is 11.11 years.¹⁷

⁶ NAACP, DEATH ROW USA, *supra* note 3, at 15. See also *Background—The Constitutionality of the Juvenile Death Penalty*, INT'L JUSTICE PROJECT, <http://www.internationaljusticeproject.org/juvConst.cfm> (last visited Feb. 17, 2012); *Delo v. Lashley*, 507 U.S. 272, 272–73 (1993). In 2005, the U.S. Supreme Court found it unconstitutional under the Eighth and Fourteenth Amendments to execute persons for offenses committed under the age of eighteen. *Roper v. Simmons*, 543 U.S. 551 (2005). *Roper* originated in Jefferson County, Missouri. *Id.*

⁷ See *Executions 1989–2011*, MO. DEATH ROW, <http://missourideathrow.com/executions-1989-2009> (last visited Feb. 17, 2012). Of those executed in Missouri, the death sentences were handed down in the following counties: St. Louis City and St. Louis County (30 executions); Jackson (6 executions); Callaway (4 executions); Clay (4 executions); Jefferson (3 executions); Boone (2 executions); Butler (2 executions); Schuyler (2 executions); St. Charles (2 executions); St. Francois (2 executions); Warren (2 executions); Audrain (1 execution); Cole (1 execution); Franklin (1 execution); Greene (1 execution); LaFayette (1 execution); Marion (1 execution); McDonald (1 execution); Moniteau (1 execution); Randolph (1 execution). *Id.*

⁸ See *Searchable Database of Executions*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state_by_state (last visited Feb. 17, 2012). Joe Amrine was exonerated and released in July 2003 after serving seventeen years; Eric Clemmons was acquitted and released in February 2000 after serving thirteen years; and the charges against Clarence Richard Dexter were dismissed and he was released in June of 1999 after serving eight years. *Id.*

⁹ Governor Mel Carnahan commuted the sentences of Bobby Lewis Shaw in 1993 and Darrell Mease in 1999, and Governor Jay Nixon commuted Richard Clay's sentence in 2011. *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Feb. 17, 2012).

¹⁰ NAACP, DEATH ROW USA, *supra* note 3, at 10.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Current Inmates*, MO. DEATH ROW, <http://missourideathrow.com/current-inmates/> (last visited Feb. 17, 2012).

¹⁵ *Id.*; NAACP, DEATH ROW USA, *supra* note 3, at 54

¹⁶ NAACP, DEATH ROW USA, *supra* note 3, at 54.

¹⁷ MO. DEP'T OF CORR., *supra* note 3.

II. THE STATUTORY EVOLUTION OF MISSOURI’S DEATH PENALTY SCHEME

A. *Missouri’s Post-Furman Death Penalty Statute*

Prior to 1972, the punishment for first-degree murder in Missouri was either death or life imprisonment.¹⁸ In 1972, the U.S. Supreme Court held in *Furman v. Georgia* that the death penalty statutes in the various states constituted cruel and unusual punishment and therefore violated the Eighth and Fourteenth Amendments to the U.S. Constitution.¹⁹

1. Missouri’s 1975 Death Penalty Sentencing Scheme

Based upon the Supreme Court of Missouri’s interpretation that *Furman* only banned discretionary capital punishment statutes, the General Assembly adopted a mandatory capital punishment scheme in 1975.²⁰ Under the 1975 scheme, capital murder was defined as “unlawfully, willfully, knowingly, deliberately and with premeditation” causing the death of another.²¹ If convicted of capital murder, the only possible punishment was death.²²

In 1976, the U.S. Supreme Court began to uphold the constitutionality of various capital punishment statutes; however, the Court found mandatory death penalty sentencing schemes unconstitutional in *Woodson v. North Carolina*.²³ Based on this finding, the Supreme Court of Missouri found Missouri’s 1975 capital sentencing scheme to be unconstitutional and reinstated imprisonment as the only available punishment for any degree of murder.²⁴

2. Missouri’s 1977 Death Penalty Sentencing Scheme

In 1977, Missouri reinstated the death penalty.²⁵ The definition of capital murder was unaltered; however, a discretionary capital sentencing scheme replaced the mandatory capital punishment provision.²⁶

The 1977 capital sentencing statute bifurcated the capital trial proceedings into guilt and punishment phases.²⁷ The trier of fact considered only the guilt of the accused during the first stage of the trial with no consideration to be made as to his/her punishment.²⁸ At the guilt phase of the trial, the trier of fact could find the defendant guilty of capital murder, first-degree murder, second-degree murder, manslaughter, or not guilty of any offense.²⁹

¹⁸ Section 559.030, RSMo 1969.

¹⁹ *Furman v. Georgia*, 408 U.S. 238 (1972).

²⁰ Section 559.009.3, RSMo 1975; *see also* State v. Duren, 547 S.W.2d 476, 479 (Mo. banc 1977).

²¹ H.B. 150, 78th Gen. Assemb., 1st Reg. Sess. (Mo. 1975).

²² *Id.* (codified as Section 559.009.3, RSMo 1975).

²³ *Woodson v. North Carolina*, 428 U.S. 280 (1976); *see also* *Gregg v. Georgia*, 428 U.S. 153 (1976).

²⁴ *Duren*, 547 S.W.2d at 480.

²⁵ Section 565.006, RSMo 1977.

²⁶ *Id.*

²⁷ Section 565.006.2, RSMo 1977.

²⁸ Section 565.006.1, RSMo 1977.

²⁹ *Id.*

If the trier of fact found the defendant guilty of capital murder, the trial proceeded to the punishment phase.³⁰ During this phase, the court conducted a sentencing hearing before the trier of fact in order for it to determine whether the offender would be sentenced to death or life imprisonment without the possibility of parole for fifty years.³¹ Both sides could present evidence in “extenuation, mitigation, and aggravation of punishment.”³²

The trier of fact was required to find at least one statutory aggravating circumstance in order to sentence the defendant to death.³³ Only those aggravators which were disclosed by the prosecutor to the defense prior to trial were admissible.³⁴ The statutory aggravating factors that existed under the 1977 capital murder scheme in Missouri were as follows:

- (1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;
- (2) The offense was committed while the offender was engaged in the commission of another capital murder;
- (3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
- (4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
- (5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;
- (6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;
- (7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;
- (8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;
- (9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; and
- (10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.³⁵

³⁰ Section 565.006.2, RSMo 1977.

³¹ Section 565.008.1, RSMo 1977.

³² *Id.*

³³ Section 565.012.5, RSMo 1977.

³⁴ Section 565.006.2, RSMo 1977.

³⁵ Section 565.012.2, RSMo 1977.

The trier of fact was also directed to consider any mitigating circumstances which may justify a sentence less than death.³⁶ The 1977 statutory mitigating circumstances were as follows:

- (1) The defendant has no significant history of prior criminal activity;
- (2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;
- (3) The victim was a participant in the defendant's conduct or consented to the act;
- (4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;
- (5) The defendant acted under extreme duress or under the substantial domination of another person;
- (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and
- (7) The age of the defendant at the time of the crime.³⁷

Under the 1977 sentencing scheme, in any case for which the death penalty was an authorized punishment, the trier of fact was instructed to consider any statutory aggravating or mitigating circumstances supported by the evidence, and any additional aggravating or mitigating circumstances "otherwise authorized by law."³⁸ The trier of fact was then instructed to determine "whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist."³⁹

The judge determined the instructions to be given to the jury, as warranted by the evidence presented.⁴⁰ The judge then charged the jury in open court, and provided the instructions in writing.⁴¹ If the accused was found guilty of capital murder, and the judge or jury recommended a death sentence, the offender was sentenced to death.⁴² If the jury recommended a death sentence, the jury must have designated, in writing, with a signature by the foreperson, the aggravating circumstances that the jury found beyond a reasonable doubt.⁴³ If the jury did not find at least one of the statutory aggravating circumstances, beyond a reasonable doubt, the death penalty could not be imposed and the convicted individual would be sentenced to life in prison without parole eligibility for fifty years.⁴⁴

³⁶ Section 565.012.1(4), RSMo 1977.

³⁷ Section 565.012.3, RSMo 1977.

³⁸ Section 565.012.1, RSMo 1977.

³⁹ *Id.*

⁴⁰ Section 565.012.4, RSMo 1977.

⁴¹ *Id.*

⁴² Section 565.008.1, RSMo 1977; *see also* section 565.006.2, RSMo 1978 ("[t]he judge shall impose the sentence fixed by the jury or judge"). This statute was repealed in 1984 and replaced by Rule 29.05, which allows the trial court to lessen any sentence it finds "excessive." *See infra* notes 45–47 and accompanying text.

⁴³ Section 565.012.4, RSMo 1977.

⁴⁴ Section 565.012.5, RSMo 1977.

3. 1980 Adoption of Rule 29.05

In 1980, the Supreme Court of Missouri adopted Rule 29.05, which gave the trial court the “power to reduce the punishment within the statutory limits prescribed for the offense if it finds that the punishment is excessive.”⁴⁵ Thus, under Rule 29.05, the trial court could sentence a defendant to life in prison without parole eligibility for fifty years, regardless of the jury’s verdict.⁴⁶ Prior to the enactment of Rule 29.05, the Missouri statutory law included mandatory language requiring the judge to sentence the defendant in a capital case in accordance with the jury’s verdict.⁴⁷

4. 1983 Amendments to Missouri’s Death Penalty Sentencing Scheme

In 1983, the Missouri General Assembly made significant changes to Missouri’s murder statutes and death penalty sentencing scheme. In an effort to conform Missouri’s death penalty sentencing scheme to the Model Penal Code,⁴⁸ the General Assembly added an explicit four-step process for determining whether an offender may be sentenced to death.⁴⁹ Four statutory aggravators were also added to the death penalty sentencing scheme at this time.⁵⁰

a. The 1983 Murder Statute

The most significant revision, included in the 1983 statutory amendments, altered the definition of capital murder.⁵¹ The 1983 amendments repealed the capital murder statute and replaced it with a statute separating murder into various degrees,⁵² of which only first-degree murder was punishable by death.⁵³ First-degree murder was codified at section 565.020 of the Missouri Revised Statutes which stated, “A person commits the crime of murder in the first degree if he

⁴⁵ Rule 29.05.

⁴⁶ Section 565.012.5, RSMo 1977.

⁴⁷ See section 565.006.2, RSMo 1978 (repealed effective Oct. 1, 1984). See also Mo. Const. art V, sec. 5 (giving power to the Supreme Court of Missouri to establish rules of “practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law”); *Ostermueller v. Potter*, 868 S.W.2d 110, 111 (Mo. banc 1993) (“Supreme Court rules govern over contradictory statutes in procedural matters unless the General Assembly specifically annuls or amends the rules in a bill limited to that purpose.”). For an explanation of the interaction between section 565.006.2 and Rule 29.05, see *State v. Roberts*, 709 S.W.2d 857, 868–69 (Mo. banc 1986).

⁴⁸ Section 565.001, RSMo 1983. See also Ellen Yankiver Suni, *Recent Developments in Missouri: The Death Penalty*, 54 UMKC L. REV. 553 (1986). In 2009, the American Law Institute formally withdrew all Model Penal Code provisions related to the imposition of capital punishment. Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. TIMES, Jan. 4, 2010, at A11, available at <http://www.nytimes.com/2010/01/05/us/05bar.html>.

⁴⁹ Section 565.030, RSMo 1983.

⁵⁰ Section 565.032.2, RSMo 1983. In addition, the 1983 amendment made a minor alteration to the second statutory mitigating factor, altering the language from “capital felony” to “murder in the first degree,” reflecting the changes made to the general death penalty statute. Compare section 565.012.3(2), RSMo 1977, with section 565.035.3, RSMo 1983.

⁵¹ Sections 565.020.1, 565.021, 565.023, RSMo 1983. Previously Missouri codified capital murder at section 565.001.

⁵² Compare sections 565.020.1, 565.021, 565.023, RSMo 1983, with sections 565.001, 565.003, 565.004, RSMo 1977.

⁵³ Section 565.020, RSMo 1983.

knowingly causes the death of another person after deliberation on the matter.”⁵⁴ Under the new murder statute only two punishments were available for an offender convicted of first-degree murder: death or life imprisonment without the possibility of parole.⁵⁵

b. The 1983 Death Penalty Sentencing Scheme

While Missouri’s 1977 death penalty sentencing scheme required the jury to determine a defendant’s punishment by *weighing* aggravating and mitigating circumstances, the 1983 amendment required the jury to make several determinations before it could sentence a defendant to death.⁵⁶ Specifically, the 1983 statute required that the punishment be fixed at life imprisonment without eligibility for probation or parole if any of the following circumstances existed:

- (1) If the trier does not find beyond a reasonable doubt at least one of the aggravating circumstances set out in subsection 2 of section 565.032;
- (2) If the trier does not find beyond a reasonable doubt that any one or more of the aggravating circumstances listed in subsection 2 of subsection 565.032, if found, together with any other authorized aggravating circumstances found, warrant the death sentence;
- (3) If the trier finds the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found by the trier; or
- (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.⁵⁷

Only if the trier of fact determined that none of the above circumstances existed would the death penalty be imposed. If the punishment assessed was death, the trier of fact must have set forth the aggravating circumstances that were found beyond a reasonable doubt in writing.⁵⁸

The amended 1983 statute also defined the evidence the trier of fact was to consider during the sentencing phase of the trial.⁵⁹ Specifically, this death penalty scheme allowed the trier of fact to consider any statutory mitigating or aggravating circumstances requested by each party and supported by the evidence, not only those enumerated in the statute.⁶⁰ The trier of fact could consider any other non-statutory mitigating or aggravating circumstances that were authorized by law, requested by a party, and supported by the evidence, “including any aspect of the defendant’s character, the record of any prior criminal convictions, and pleas and findings of guilty and admissions of guilt of any crime or pleas of *nolo contendere* of the defendant.”⁶¹

⁵⁴ Section 565.020.1, RSMo 1983.

⁵⁵ Section 565.020.2, RSMo 1983.

⁵⁶ Compare section 565.030.4, RSMo 1983, with section 565.012.1(4), RSMo 1977.

⁵⁷ Section 565.030.4, RSMo 1983.

⁵⁸ *Id.*

⁵⁹ Section 565.032.1, RSMo 1983.

⁶⁰ Section 565.032.1(2), RSMo 1983.

⁶¹ Section 565.032.1(3), RSMo 1983.

Furthermore, the statute explicitly instructed the trier of fact that it could consider the evidence from the guilt phase of the trial in the sentencing phase.⁶²

Finally, four additional statutory aggravating circumstances were added to Missouri's death penalty sentencing scheme, bringing the total number of aggravators to fourteen.⁶³ The four new statutory aggravating circumstances were

- (11) The murder in the first degree was committed while the defendant was engaged in the perpetration or in the attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195 [of the Missouri Revised Statutes];
- (12) The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness;
- (13) The murdered individual was an employee of an institution or facility of the department of corrections and human resources of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility; or
- (14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus, or other public conveyance.⁶⁴

5. 1989 Amendments to the Statutory Aggravating Circumstances

In 1989, the Missouri General Assembly added two new aggravating circumstances and altered the language of an existing aggravating circumstance.⁶⁵ The eleventh aggravator, known as the "felony murder aggravator," was altered to include inchoate offenses of the enumerated felonies.⁶⁶ The new aggravator read, "The murder in the first degree was committed while the defendant was engaged in the perpetration *or was aiding or encouraging another person to perpetrate or attempt* to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping or any offense in chapter 195 [of the Missouri Revised Statutes]."⁶⁷

In addition to broadening the eleventh aggravator, the Missouri General Assembly added two new statutory aggravating circumstances, bringing the total number of aggravators to sixteen:

- (15) The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195 [of the Missouri Revised Statutes].⁶⁸

⁶² Section 565.032.1(4), RSMo 1983.

⁶³ Section 565.032.2, RSMo 1983.

⁶⁴ Section 565.032.2(11)–(14), RSMo 1984.

⁶⁵ Section 565.032.2, RSMo 1989.

⁶⁶ Section 565.032.2(11), RSMo 1989.

⁶⁷ *Id.*

⁶⁸ Section 565.032.2(15), RSMo 1989.

- (16) The murder was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense⁶⁹

6. 1993 Amendments to Missouri’s Death Penalty Sentencing Scheme

In 1993, the Missouri General Assembly made three substantive changes to the death penalty sentencing scheme. These changes allowed for admissions of victim impact evidence,⁷⁰ altered the standard of proof necessary for imposing a death sentence,⁷¹ and made substantial changes to the required jury instructions in capital sentencing.⁷²

In response to the U.S. Supreme Court decision in *Payne v. Tennessee*,⁷³ the Missouri General Assembly revised the statute to provide that, “within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others” is admissible in the penalty phase of the trial.⁷⁴

The 1993 amendment also removed language that specified a burden of proof for one of the factfinder’s sentencing decisions.⁷⁵ Prior to 1993, the statute authorized a death sentence only where the trier of fact found *beyond a reasonable doubt* that the aggravating circumstances warranted the death penalty.⁷⁶ The 1993 amendment removed reference to the “beyond a reasonable doubt” standard.⁷⁷ Thus, without providing a burden of proof, it directed the trier of fact to consider whether the evidence in aggravation warranted the death penalty.

The 1993 death penalty sentencing scheme altered the factors that must be included in jury instructions or considered by the judge before recommending a sentence of death.⁷⁸ The new language required the judge or jury to consider whether *any* statutory aggravating circumstance enumerated in the statute had been established beyond a reasonable doubt.⁷⁹ The previous wording of that statute only required consideration of aggravating circumstances requested by the prosecution and supported by the evidence.⁸⁰ While this amendment appeared to allow consideration of any statutory aggravating circumstance, regardless of whether the circumstance was requested by the prosecution, section 565.005.1(1) continues to require the prosecution to provide notice to the defendant of any aggravating circumstances it intends to rely upon in the sentencing phase of the capital trial.⁸¹

⁶⁹ Section 565.032.2(16), RSMo 1989.

⁷⁰ Section 565.030.4, RSMo 1989.

⁷¹ Section 565.030.4(2), RSMo 1989.

⁷² Section 565.032.1, RSMo 1989.

⁷³ *Payne v. Tennessee*, 501 U.S. 808 (1991).

⁷⁴ *Id.*

⁷⁵ Section 565.030.4(1)–(2), RSMo 1993. The trier of fact’s decision on whether an aggravator exists continued to require proof beyond a reasonable doubt. *Id.*

⁷⁶ Section 565.030.4(2), RSMo 1983.

⁷⁷ Section 565.030.4(1)–(2), RSMo 1993.

⁷⁸ Section 565.032.1, RSMo 1993.

⁷⁹ Section 565.032.1(1), RSMo 1993.

⁸⁰ Section 565.032.1, RSMo 1983.

⁸¹ Section 565.005.1(1), RSMo 1993.

7. 1993 Amendments to the Statutory Aggravating Circumstances

In 1993, the Missouri General Assembly added one additional aggravating circumstance, bringing the total number of aggravating circumstances to seventeen:

- (17) The murder was committed during the commission of a crime which is part of a pattern of criminal street gang activity⁸²

No further aggravating circumstances have been added to the sentencing scheme since 1993.⁸³

B. Mandatory Review of the Death Sentence

The 1977 death penalty sentencing scheme required the Supreme Court of Missouri to conduct an automatic review of every death sentence imposed.⁸⁴ The statute directed the Supreme Court of Missouri to consider

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
- (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and
- (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.⁸⁵

To determine whether the death sentence was excessive or disproportionate, the 1977 statute directed the court to compare the circumstances of the case at bar with "all capital cases in which sentence was imposed after May 26, 1977."⁸⁶

The 1983 amendments to the death penalty statutes altered the automatic review requirements by directing the court to consider not only the defendant and crime when conducting a proportionality review, but also the strength of the evidence against the defendant.⁸⁷ The statute further directed the Court to compare the case at hand with "all cases [in] which the sentence of death or life imprisonment without probation or parole was imposed after May 26, 1977."⁸⁸ No further amendments or alterations have been made to Missouri's automatic review statute.

⁸² Section 565.032.2(17), RSMo 1993.

⁸³ Section 565.032.2, RSMo 2011.

⁸⁴ Section 565.014, RSMo 1977.

⁸⁵ Section 565.014.3, RSMo 1977.

⁸⁶ Section 565.014.6, RSMo 1977.

⁸⁷ Compare section 565.035.3(3), RSMo 1983, with section 565.014.3(3), RSMo 1977.

⁸⁸ Section 565.035.6, RSMo 1983.

C. *Restrictions on the Death Penalty*

1. The Juvenile Offender Exemption

In 1990, the Missouri General Assembly amended the first degree murder statute, making any individual under the age of sixteen at the time of the commission of the crime ineligible for the death penalty.⁸⁹

In 1994, Christopher Simmons was sentenced to death in Jefferson County, Missouri, for a murder he committed when he was seventeen years old.⁹⁰ Under the 1990 murder statute, Simmons was eligible for the death penalty.⁹¹ In 2003, however, the Supreme Court of Missouri held that Simmons could not be executed because the Eighth and Fourteenth amendments to the U.S. Constitution barred the execution of juvenile offenders.⁹² The State of Missouri appealed the decision to the U.S. Supreme Court, which held the death penalty for persons under the age of eighteen unconstitutional.⁹³

2. The Mental Retardation Exemption⁹⁴

In 2001, Missouri General Assembly barred the execution of mentally retarded offenders.⁹⁵ Under the new Missouri statute, a defendant found guilty of a death-eligible offense may present the issue of his/her mental retardation to the jury (or judge in a jury-waived trial) at the sentencing phase of the trial,⁹⁶ or to the court at a pretrial hearing, if both parties have agreed in writing.⁹⁷ If the court determines the defendant is mentally retarded, the prosecution may not seek the death penalty.⁹⁸ If the court determines the defendant is not mentally retarded, the defendant may still present the issue of mental retardation to the jury in the sentencing phase of the trial.⁹⁹ During sentencing deliberations, the jury will consider the issue of mental retardation.¹⁰⁰ If the jury finds by a preponderance of the evidence that the defendant is mentally retarded, the jury may not sentence the defendant to death.¹⁰¹

⁸⁹ Section 565.020.2, RSMo 1989.

⁹⁰ See *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. banc 2003); Leo Fitzmaurice, *Jury Will Get Case of Drowning Death*, ST. LOUIS POST-DISPATCH, June 16, 1994, at 03C.

⁹¹ Section 565.020.2, RSMo 1989.

⁹² *Simmons*, 112 S.W. 3d at 400.

⁹³ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁹⁴ This statute defines mental retardation as “a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.” Section 565.030.6, RSMo 2011.

⁹⁵ Section 565.030.4(1), RSMo 2011.

⁹⁶ *Id.*

⁹⁷ Section 565.030.5, RSMo 2011. This hearing will occur prior to commencement of the guilt phase of the trial.

Id.

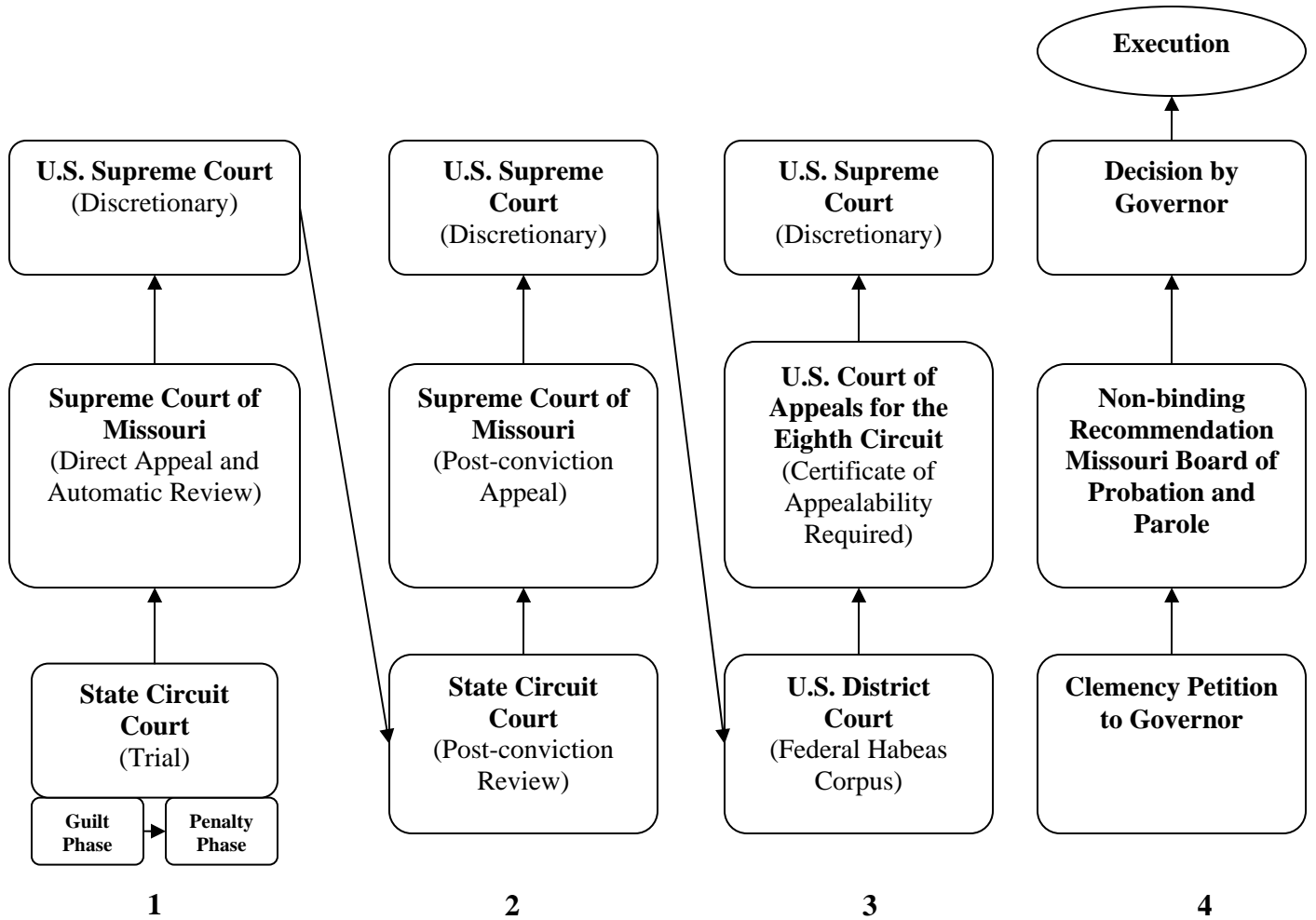
⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Section 565.030.4(1), RSMo 2011. For a discussion of Missouri’s treatment of mentally retarded offenders, see Chapter Thirteen on Mental Retardation and Mental Illness.

III. THE PROGRESSION OF A MISSOURI DEATH PENALTY CASE FROM ARREST TO EXECUTION



A. *The Pretrial Process*

1. Commencement of a Capital Prosecution

In Missouri, a capital prosecution may be commenced by (1) a complaint filed by the prosecuting attorney or (2) an indictment issued by a grand jury.¹⁰²

2. Complaint

If the prosecution is commenced based on a complaint, a probable cause statement must be included.¹⁰³ A statement of probable cause must be in writing, signed by the prosecutor, and include the name of the accused, as well as the facts constituting the offense.¹⁰⁴ The ultimate determination of whether probable cause exists rests with the judge.¹⁰⁵

3. Grand Jury Indictment

Alternatively, the prosecutor may seek, in his/her discretion, to initiate criminal proceedings by obtaining a grand jury indictment.¹⁰⁶ In Missouri, the grand jury is composed of twelve individuals and requires the concurrence of nine jurors to return a true bill of indictment.¹⁰⁷ When an indictment is secured, the clerk will issue a warrant requiring the defendant to respond to those charges included in the indictment.¹⁰⁸ The indictment must be in writing, including the signature of the grand jury foreperson and the prosecutor, and must be filed in the appropriate circuit court.¹⁰⁹ Furthermore, the indictment must include the name of the defendant, or a reasonable description “by which the defendant can be identified with reasonable certainty” if the name is unknown.¹¹⁰ It should also state the facts constituting the felony, including the date and time the alleged offense occurred, the name and statute number of the charged offenses, and the degree of the charged offense.¹¹¹

4. Initial Appearance

An individual arrested for the commission of a capital crime in Missouri will be brought before a judge “as soon as practicable” for an initial appearance.¹¹² At the initial appearance, the judge

¹⁰² See sections 545.010, 544.170, RSMo 2011; Rule 22.01, 22.03.

¹⁰³ Rule 22.02(e).

¹⁰⁴ Rule 22.03.

¹⁰⁵ See *id.* The court held in *State v. Reding* that a judge signing an arrest warrant constitutes an implicit finding of probable cause that a defendant committed a felony. *State v. Reding*, 634 S.W.2d 552, 553 (Mo. App. 1990).

¹⁰⁶ Rule 22.01.

¹⁰⁷ Mo. Const. art I, sec. 16; see also sections 540.021, 540.250, RSMo 2011.

¹⁰⁸ Section 544.060, RSMo 2011.

¹⁰⁹ Rule 23.01(a).

¹¹⁰ Rule 23.01(b).

¹¹¹ *Id.*

¹¹² Rule 22.07. The accused is brought before the court from which the warrant was issued. *Id.* See also *State v. Denny*, 619 S.W.2d 931 (Mo. App. 1981) (holding the forty day limitation stated in this rule refers only to defendant’s appearance in the circuit court, it does not undertake to set a time within which an actual circuit court arraignment must take place). Additionally, if the accused was arrested for first degree murder without a warrant,

will inform the defendant of the charges against him/her and will advise the defendant of his/her rights.¹¹³ This includes the right to remain silent and that any statement made by the defendant may be used during future proceedings.¹¹⁴ The defendant is also advised of his/her right to retain counsel.¹¹⁵ If the defendant cannot afford counsel the defendant can request the appointment of counsel.¹¹⁶ The court will then provide a public defender to represent the defendant.¹¹⁷ Missouri established the Office of the Statewide Public Defender in 1982 in order to provide counsel to indigent defendants at all critical stages of the proceedings.¹¹⁸ In 1989, a specialized unit within the public defender system was formed to represent defendants charged with capital crimes.¹¹⁹ A full description of Missouri's public defender system is found in Chapter Six.

5. Preliminary Hearing

After the initial appearance, and in lieu of a grand jury indictment, a preliminary hearing is held unless waived by the accused.¹²⁰ A defendant is not entitled to a preliminary hearing if the prosecution is initiated by way of indictment.¹²¹ The purpose of the preliminary hearing is to determine whether probable cause exists to charge the defendant with the capital offense.¹²² The prosecution and defense may present evidence relevant to the probable cause determination at the preliminary hearing.¹²³

If the court determines that probable cause exists, it will order the defendant to appear to answer the charges against him/her at arraignment.¹²⁴ The arraignment will take place as soon as practicable, but no later than forty days after the completion of the preliminary hearing.¹²⁵ If the defendant is charged with a homicide, a verbatim record of the proceeding must be prepared.¹²⁶

s/he must be released after twenty-four hours unless charges are filed and a warrant is issued. Section 544.170, RSMo 2011.

¹¹³ Rule 22.08.

¹¹⁴ *Id.*

¹¹⁵ *Id.* The defendant also has the right to waive counsel if the court determines that s/he has made a "knowledgeable and intelligent waiver of the right to assistance of counsel," and the waiver has been signed by the defendant and witnessed by the judge or clerk of the court. Section 600.051.1, RSMo 2011.

¹¹⁶ Rule 22.08; section 600.048.1(2), RSMo 2011.

¹¹⁷ Section 600.048.1(2), RSMo 2011.

¹¹⁸ J. Marty Robinson, *Assuring the Public Defense: The Right to Counsel and the State Public Defender System in Missouri, Fiscal Year 2009*, STATE OF MO. PUB. DEF'R COMM'N, ANN. REP., at 5 (Oct. 1, 2009), available at <http://www.publicdefender.mo.gov/about/FY2009AnnualReport.pdf>.

¹¹⁹ *Capital Litigation*, MO. STATE PUB. DEFENDER, http://publicdefender.mo.gov/legal/capital_division.htm (last visited July 18, 2011).

¹²⁰ Rule 22.09.

¹²¹ Section 544.250, RSMo 2011; *see also* State v. Maloney, 434 S.W.2d 487, 496 (Mo. banc 1968). It is within the discretion of the prosecution as to whether to initiate the capital prosecution via preliminary hearing or grand jury indictment. *See* Rule 22.01.

¹²² Rule 22.09(b).

¹²³ *Id.*

¹²⁴ Rule 22.09(c). If probable cause is not found to exist, the judge will dismiss the charges brought against the defendant. Rule 22.09(b).

¹²⁵ Rule 22.09(c).

¹²⁶ Rule 22.10.

6. Arraignment and Pleas

After the defendant is charged by either indictment or information, s/he will be formally arraigned.¹²⁷ At the arraignment the judge will read the charges against him/her and the defendant will be asked to enter a plea.¹²⁸ The defendant may enter a plea of not guilty, not guilty by reason of mental disease or defect, or guilty.¹²⁹ If the defendant chooses to enter a plea of guilty, the court must address the defendant in open court in order to establish that the defendant's plea is voluntary and is not the product of promises or threats.¹³⁰

7. Discovery

Either party can initiate the discovery process once the information or indictment is filed in a criminal case.¹³¹ A party's request or motion for discovery must be filed within twenty days after the arraignment, and a response must be filed within ten days of receipt of the request.¹³² There is a continuing duty on both parties to disclose new or different information as it arises.¹³³ The prosecution also has an affirmative duty to disclose exculpatory information to the defendant prior to trial.¹³⁴

8. Pretrial Conference and Pretrial Motions

The court may order one or more pretrial conferences upon motion of either party or upon its own motion.¹³⁵ The purpose of the pretrial conference is to consider matters which "promote a fair and expeditious trial."¹³⁶ The court will record any matters agreed upon by the parties; however, no admissions made by the defendant or his/her attorney during the pretrial conference may be used against the defendant, unless those admissions are put into writing and signed by the defendant and his/her attorney.¹³⁷

The accused may also file pretrial motions raising certain defenses and objections prior to entering his/her plea, or within a reasonable time thereafter.¹³⁸ Objections or defenses, which can be determined without a full hearing, may be raised prior to entering a plea by filing a motion with the court.¹³⁹ Defenses or objections alleging defects in the indictment or

¹²⁷ Rule 24.01.

¹²⁸ *Id.* The defendant must be given a copy of the indictment or information prior to entering the plea. Rule 24.01. Missouri allows for a defendant to enter his/her plea via closed circuit television from the place of his/her custody. Section 561.031, RSMo 2011.

¹²⁹ Rule 24.02(a).

¹³⁰ Rule 24.02(c).

¹³¹ Rule 25.02.

¹³² *Id.*

¹³³ Rule 25.03; *see also* State v. Wallace, 43 S.W.3d 398, 402 (Mo. App. 2001).

¹³⁴ Rule 25.03(A)(9); State v. Bebee, 577 S.W.2d 658 (Mo. App. 1979); State v. Robinson, 835 S.W.2d 303, 306 (Mo. banc 1992). *See also* Brady v. Maryland, 373 U.S. 83 (1963).

¹³⁵ Rule 24.12.

¹³⁶ *Id.*

¹³⁷ *Id.* This pretrial conference is not to be held with pro se defendants. *Id.*; *see also* State v. Hawthorne, 74 S.W.3d 826, 829 (Mo. App. 2002).

¹³⁸ Rule 24.04.

¹³⁹ Rule 24.04(b)(1).

information, or deficiencies with the institution of the prosecution, must be raised by motion prior to the commencement of the trial, typically before the accused has entered a plea.¹⁴⁰ A failure to raise those objections and defenses may constitute a waiver.¹⁴¹ Other objections or defenses such as subject matter jurisdiction, lack of jurisdiction over the individual, or failure of the indictment or information to charge an offense, can be raised at any point during the trial.¹⁴² The court will typically rule on pretrial motions prior to the commencement of the trial.¹⁴³

a. Change of Venue and Change of Judge¹⁴⁴

Capital trials in Missouri are generally held in the county where the criminal act occurred.¹⁴⁵ Missouri permits an automatic change of venue whenever both parties agree by stipulation to transfer the case.¹⁴⁶ The defendant is also automatically entitled to a change of venue if the case is brought in a county of less than 75,000 people.¹⁴⁷ The defendant may request a change of venue for cause if s/he can show that the county's jury pool is prejudiced against him/her or that the "state has an undue influence over the inhabitants of the county."¹⁴⁸

In addition to making a request for a change of venue, the parties may also file a motion for change of judge.¹⁴⁹ Each party is entitled to one automatic change prior to the preliminary hearing and another automatic change after the preliminary hearing, if the same trial judge did not preside over the preliminary hearing.¹⁵⁰ The party requesting the change does not have to set forth any reason for the request and the case is immediately transferred to another judge within the circuit.¹⁵¹ In addition, any party may file a motion to disqualify or recuse the judge for cause.¹⁵²

¹⁴⁰ Rule 24.04(b)(2).

¹⁴¹ *Id.* If certain defenses or objections are not raised during this time, the court may still grant relief on those claims at a later point if the court determines that good cause existed for not raising the objections or defenses at the appropriate time. *Id.*

¹⁴² *Id.*

¹⁴³ Rule 24.04(b)(4).

¹⁴⁴ "[A] change of judge shall be ordered in any criminal proceeding upon the timely filing of a written application therefor by any party. The applicant need not allege or prove any reason for such change. The application need not be verified and may be signed by any party or an attorney for any party." Rule 32.06. *See, e.g., State ex rel. Kemper v. Cundiff*, 195 S.W.3d 445, 447 (Mo. App. 2006).

¹⁴⁵ Section 541.080, RSMo 2011. If the offense is committed partly in one county and partly in another, or if the elements of the crime occur in more than one county, then the trial may be held in any of the counties where an element of the offense occurred. *Id.*

¹⁴⁶ Rule 32.02.

¹⁴⁷ Rule 32.03.

¹⁴⁸ Rule 32.04. The decision to grant or deny the change of venue for cause is generally within the discretion of the court and will not be disturbed unless there is a clear abuse of discretion. *State v. Baumruk*, 85 S.W.3d 644, 648 (Mo. banc 2002). "[D]iscretion is abused when the record shows that the inhabitants of the county are so prejudiced against the defendant that a fair trial cannot occur in that county." *Id.* Prejudice is "not whether the community remembers the case but whether the actual jurors of the case have fixed opinions such that they could not judge impartially whether the defendant was guilty." *Id.* at 648–49.

¹⁴⁹ Rule 32.07.

¹⁵⁰ *Id.*; Rule 32.09.

¹⁵¹ Rule 32.07.

¹⁵² *State ex rel. Kemper v. Cundiff*, 195 S.W.3d 445, 447 (Mo. App. 2006).

9. Notice of Aggravating Circumstances

In order for the prosecution to seek the death penalty against a defendant, it must, upon the defendant's request, provide notice to the defendant and the court of the aggravating circumstances it seeks to prove.¹⁵³ The notice must be filed within "a reasonable time" before trial.¹⁵⁴ The Supreme Court of Missouri has held "the statutory presumption is that where first degree murder is charged, the death penalty is an option until that punishment is affirmatively waived by the state."¹⁵⁵

B. The Capital Trial

Missouri bifurcates a capital trial into two phases: the guilt of the defendant and, when necessary, the sentencing of the defendant.¹⁵⁶

1. Guilt Phase

Every defendant in a felony case has the right to a jury trial, as guaranteed by both the U.S. Constitution,¹⁵⁷ as well as the Missouri Constitution.¹⁵⁸ However, a defendant may waive his/her right to a jury trial in any criminal case, including a death penalty case, with the permission of the court, thereby allowing the court to render a verdict and sentence.¹⁵⁹ Additionally, a defendant may agree to be tried by a jury of less than twelve members with the consent of the court.¹⁶⁰ A defendant's waiver of a jury trial, or a twelve member panel, must be "knowing, voluntary, and intelligent" and made with "unmistakable clarity."¹⁶¹

A capital jury in Missouri is comprised of twelve individuals.¹⁶² In selecting a jury for an offense that is punishable by death, the prosecution and defendant are each entitled to nine

¹⁵³ Section 565.005, RSMo 2011. *See also* State v. Mallett, 732 S.W.2d 527, 537 (Mo. banc 1987) (holding that the prosecution was not required to comply with the notice requirement because the defendant "never made the required request for disclosure").

¹⁵⁴ *Id.* A "reasonable time" is not defined in the Missouri Revised Statutes and has not been specifically determined by the Supreme Court of Missouri. *See, e.g.,* State v. Strong, 142 S.W.3d 702, 712 (Mo. banc 2004) (finding that notice filed 100 days after indictment and almost two full years before trial conformed with the notice requirements); State v. Bucklew, 973 S.W.2d 83, 96 (Mo. banc 1998) (holding that the prosecution provided the defendant with reasonable notice when the notice was filed ninety days before trial); State v. Nicklasson, 967 S.W.2d 596, 605 (Mo. banc 1998) ("The eighty-two days the state took from filing the initial charge to filing its list of aggravating circumstances did not violate due process. This is because the trial did not occur until eighteen months *after* Nicklasson received notice of the state's list of aggravating circumstances."); State v. Shafer, 969 S.W.2d 719, 734 (Mo. banc 1998) (holding that receipt of notice six months prior to trial was within a reasonable time); State v. McMillin, 783 S.W.2d 82, 102 (Mo. banc 1990) (finding that a notice of aggravators filed twenty-five days before trial did not prejudice the defendant when he knew the prosecution intended to seek the death penalty).

¹⁵⁵ Nicklasson, 967 S.W.2d at 604-05 (interpreting section 565.005.1(1), RSMo 2011).

¹⁵⁶ Section 565.030(2), RSMo 2011.

¹⁵⁷ U.S. Const. amends. VI, XIV.

¹⁵⁸ Mo. Const. art. I, sections 18(a), 22(a).

¹⁵⁹ Mo. Const. art. I, section 22(a); Rule 27.01.

¹⁶⁰ State v. McGee, 447 S.W.2d 270, 273 (Mo. banc 1969).

¹⁶¹ State v. Sharp, 533 S.W.2d 601, 605 (Mo. banc 1976); State v. Bibb, 702 S.W.2d 462, 466 (Mo. banc 1985).

¹⁶² Mo. Const. art. I, section 22(a). *See also* section 543.210, RSMo 2011. A lesser number than twelve may be agreed upon by the parties; however, the number cannot be less than six. Section 543.210, RSMo 2011.

peremptory challenges.¹⁶³ A juror may also be challenged for cause if his/her personal views on the death penalty would substantially impair his/her objectivity to sentence the defendant.¹⁶⁴

During the guilt phase of the trial, the prosecution must present witnesses and other evidence to support the charged offense.¹⁶⁵ The defendant may elect to present witnesses and other evidence in support of his/her defense.¹⁶⁶ At the discretion of the court, both parties may enter rebuttal evidence.¹⁶⁷ Additionally, both parties are entitled to opening statements and closing arguments.¹⁶⁸ At the close of the prosecution's presentation of evidence and again at the conclusion of any defense presentation, the defendant may move for a judgment of acquittal which will be decided by the court.¹⁶⁹ If the court denies the defendant's motion, the proceedings will continue.¹⁷⁰ At the conclusion of both presentations, the court will read a series of instructions to the jury and will provide a written copy of these instructions to the jury.¹⁷¹ The jury will then be asked to render a verdict as to whether the defendant is guilty of the capital offense beyond a reasonable doubt.¹⁷²

In rendering a verdict, the jury must unanimously decide the offenses for which it finds the defendant guilty, if any.¹⁷³ The verdict must be in writing, signed by the foreperson of the jury, and declared in open court.¹⁷⁴ After the verdict is returned, and before it is recorded, the jury may be polled upon the request or motion of either party.¹⁷⁵ If, at such time the jury is no longer unanimous, the verdict will not be recorded.¹⁷⁶ If the defendant is found guilty of first-degree murder, the trial will proceed to the second stage, the sentencing/punishment phase.¹⁷⁷

2. The Sentencing Phase

For a defendant convicted of first-degree murder, the purpose of the sentencing phase is to determine the appropriate penalty: death or life imprisonment without the possibility of probation

¹⁶³ Section 494.480.2(1), RSMo 2011. Peremptory challenges are generally "the product of subjective analyses of a wide variety of character and personality traits perceived by counsel." *State v. Antwine*, 743 S.W.2d 51, 67 (Mo. banc 1987). However, the peremptory strikes may not be used with a discriminatory intent, and the reason must be "reasonably specific and clear, and related to the particular case to be tried." *State v. Shurn*, 866 S.W.2d 447, 456 (Mo. banc 1993) (citing *Batson v. Kentucky*, 476 U.S. 79, 98 (1986)).

¹⁶⁴ *See Witherspoon v. Illinois*, 391 U.S. 510 (1968); *see also Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

¹⁶⁵ Rule 27.02(g).

¹⁶⁶ Rule 27.02(j).

¹⁶⁷ Rule 27.02(k).

¹⁶⁸ Rule 27.02(f).

¹⁶⁹ Rule 27.02(h), (l).

¹⁷⁰ Rule 27.02.

¹⁷¹ Rule 28.02. The court will hold an instruction conference with both parties prior to the close of evidence. Each party can submit instructions for the court to consider. The court will inform both parties of the instructions that are being submitted to the jury prior to the instructions being read in open court. *Id.* For a full discussion of capital jury instructions in Missouri, see Chapter Ten on Capital Jury Instructions.

¹⁷² Section 565.030, RSMo 2011; *see also State v. Watson*, 839 S.W.2d 611, 616 (Mo. App. 1992).

¹⁷³ Mo. Const. art. I, section 22(a); Rule 29.01(a). *See also State v. Hadley*, 815 S.W.2d 422, 425 (Mo. banc 1991).

¹⁷⁴ Rule 29.01(a).

¹⁷⁵ Rule 29.01(d).

¹⁷⁶ *Id.*

¹⁷⁷ Section 565.030.4, RSMo 2011.

or parole.¹⁷⁸ In this phase, both parties may present evidence in aggravation or mitigation of the crime, as well as evidence “of the character of the individual and the circumstances of the crime.”¹⁷⁹ As in the guilt phase, both parties are afforded opportunities to present witnesses and other evidence.¹⁸⁰

Before a death sentence may be imposed, the prosecution must prove beyond a reasonable doubt at least one aggravating circumstance, and the jury must unanimously agree that the aggravating circumstance exists.¹⁸¹ The statutorily enumerated aggravating circumstances are

- (1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions;
- (2) The murder in the first degree was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide;
- (3) The offender by his act of murder in the first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person;
- (4) The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another;
- (5) The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty;
- (6) The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person;
- (7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;
- (8) The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty;
- (9) The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful containment;
- (10) The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another;

¹⁷⁸ Section 565.030, RSMo 2011.

¹⁷⁹ *Zant v. Stephens*, 462 U.S. 862, 879 (1983).

¹⁸⁰ Section 565.030.4, RSMo 2011.

¹⁸¹ Section 565.032.1(2), RSMo 2011.

- (11) The murder in the first degree was committed while the defendant was engaged in the perpetration or in the attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195 [of the Missouri Revised Statutes];
- (12) The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness;
- (13) The murdered individual was an employee of an institution or facility of the department of corrections of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility;
- (14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus, or other public conveyance;
- (15) The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195 [of the Missouri Revised Statutes];
- (16) The murder was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195 [of the Missouri Revised Statutes]; and
- (17) The murder was committed during the commission of a crime which is part of a pattern of criminal street gang activity as defined in section 578.421.¹⁸²

If the jury unanimously concludes that one or more of the preceding statutory aggravators exists, it must then consider both statutory and non-statutory mitigating evidence.¹⁸³ The seven statutorily enumerated mitigating circumstances are

- (1) The defendant has no significant history of prior criminal activity;
- (2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;
- (3) The victim was a participant in the defendant's conduct or consented to the act;
- (4) The defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor;
- (5) The defendant acted under extreme duress or under the substantial domination of another person;
- (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired; and
- (7) The age of the defendant at the time of the crime.¹⁸⁴

¹⁸² Section 565.032.2, RSMo 2011.

¹⁸³ Section 565.032.1(2), RSMo 2011.

¹⁸⁴ Section 565.032.3, RSMo 2011.

The defendant is entitled, as a matter of law, to have any admissible evidence in mitigation considered by the jury.¹⁸⁵ This may include relevant evidence related to “the nature and circumstances of the crime” and “the character of the defendant.”¹⁸⁶ The U.S. Supreme Court has held that “virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.”¹⁸⁷

If a jury determines that an aggravating circumstance has been proven beyond a reasonable doubt, it must then consider whether the mitigating evidence outweighs the evidence in aggravation.¹⁸⁸ After making this determination, the jury must examine all circumstances surrounding the defendant and the crime and determine whether death is the appropriate punishment.¹⁸⁹ It is only after the trier of fact has made each of these findings that a defendant may be sentenced to death.¹⁹⁰ If the defendant is sentenced to death by the jury, it is within the discretion of the trial judge to reduce that sentence to imprisonment for life without the possibility of probation or parole.¹⁹¹

In addition to the above considerations, a defendant may present the issue of mental retardation to the jury.¹⁹² If the jury determines that the defendant is mentally retarded by a preponderance of the evidence, the defendant may not be sentenced to death.¹⁹³

If the jury has unanimously found at least one statutory aggravator but is unable to reach a unanimous verdict on whether the defendant should be sentenced to death or imprisonment for life, the determination of punishment will be made by the trial judge.¹⁹⁴ If the jury is unable to reach a unanimous determination on the existence, or non-existence, of at least one aggravator, a mistrial will be declared and a new jury will be selected to determine the sentence.¹⁹⁵

¹⁸⁵ Buchanan v. Angelone, 522 U.S. 269, 276 (1998).

¹⁸⁶ State v. Richardson, 923 S.W. 2d 301, 320 (Mo. banc 1996); see also State v. Six, 805 S.W. 2d 159, 166 (Mo. banc 1991) (“The trial court has discretion during the punishment phase of trial to admit whatever evidence it deems helpful to the jury in assessing punishment.”).

¹⁸⁷ Tennard v. Dretke, 542 U.S. 274, 285 (2004) (quoting Eddings v. Oklahoma, 455 U.S. 104, 114 (1982)); see also Hutchison v. State, 150 S.W.3d 292, 304 (Mo. banc 2004). See also Lockett v. Ohio, 438 U.S. 586 (1978).

¹⁸⁸ Section 565.032.1(2), RSMo 2011.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Section 565.020.2, RSMo 2011. A formal sentencing hearing is conducted post-trial at which point the court must formally sentence the defendant. Rule 29.07(b). At this hearing, the court also will question the defendant regarding the effectiveness of the defendant’s trial counsel. Rule 29.07(b).

¹⁹² Section 565.030.5, RSMo 2011.

¹⁹³ Section 565.030.5, RSMo 2011. If both parties agree in writing, the defendant may submit the issue of mental retardation to the judge at a pretrial hearing. *Id.* If the judge does not find the defendant to be mentally retarded, the defendant may still present the issue of mental retardation to the jury during the sentencing phase. *Id.* For a full discussion of the presentation of evidence of mental retardation in Missouri capital cases, see Chapter Thirteen on Mental Retardation and Mental Illness.

¹⁹⁴ Section 565.030.4, RSMo 2011. See also State v. McLaughlin, 265 S.W.3d 257, 262–64 (Mo. banc 2008). In State v. Whitfield, the Supreme Court of Missouri determined that the judge was not able to make an independent determination of the defendant’s punishment without the jury first making all factual determinations. State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003) (citing Ring v. Arizona, 536 U.S. 584, 589 (2002)). Subsequently, the Missouri legislature responded by amending the Missouri Revised Statute and requiring the jury to deliver a special interrogatory establishing that the jury found a unanimous aggravating circumstance, allowing the judge to determine the sentence. *Id.* Compare section 565.030.4, RSMo 1993, with section 565.030.4, RSMo 2011.

¹⁹⁵ See Whitfield, 107 S.W.3d 253.

C. *Motion for a New Trial, Automatic Review and Direct Appeal by the Supreme Court of Missouri, and Rehearing and Review by the U.S. Supreme Court*

1. Motion for a New Trial

Following a conviction for first-degree murder and sentence of death, the defendant can challenge his/her conviction or death sentence by filing a motion for a new trial within fifteen days after the verdict.¹⁹⁶ In order to preserve an error for appellate review, the allegation of error must be included in the motion for new trial.¹⁹⁷ If no motion for new trial is filed, the judgment becomes final once the time for filing the motion lapses.¹⁹⁸ If a motion for new trial is filed, the judgment becomes final when the motion is denied.¹⁹⁹ If the motion for new trial is not ruled upon within ninety days, it is considered denied.²⁰⁰

2. Automatic Review of Death Sentence and Direct Appeal

Within ten days of the judgment becoming final, the defendant has the right to file notice of direct appeal of the conviction and death sentence with the Supreme Court of Missouri.²⁰¹ The notice should specify the parties, the judgment being appealed, the court in which the appeal originated, and that the appeal is being directed to the Supreme Court of Missouri.²⁰²

Within ten days of receiving the transcript, the trial court clerk must transmit the entire record and transcript, the notice of appeal, and the report prepared by the trial judge to the Supreme Court of Missouri.²⁰³

On direct appeal, the Supreme Court of Missouri will review a first-degree murder conviction and sentence of death for “prejudice, not mere error, and will reverse the trial court’s decision only when the error was so prejudicial that the defendant was deprived of a fair trial.”²⁰⁴ This standard requires that there is a “reasonable probability that the trial court’s error affected the

¹⁹⁶ Rule 29.11.

¹⁹⁷ Rule 29.11(d). If a motion for a new trial is based on facts that do not appear in the record, affidavits may be filed with the motion. Rule 29.11(f). A motion for new trial in a non-jury tried case is not required to preserve matters for appellate review. Rule 29.11(e).

¹⁹⁸ Rule 29.11(c). The standard for granting a motion for new trial is “upon good cause shown.” Rule 29.11(a).

¹⁹⁹ Rule 29.11(c).

²⁰⁰ Rule 29.11(g); *see also* State *ex rel.* Baker v. Kendrick, 136 S.W.3d 491 (Mo. banc 2004).

²⁰¹ Mo. Const. art. V, section 3 (“The [S]upreme [C]ourt of Missouri shall have exclusive jurisdiction in all cases . . . where the punishment is death.”); *see also* section 565.035.1, RSMo 2011. If the defendant does not receive a death sentence, there is no automatic review and any direct appeal would be filed with the intermediate appellate court consistent with Rule 30.01. *See* Rule 30.18; *see also* section 565.035.1, RSMo 2011.

²⁰² Rule 30.01(e).

²⁰³ Section 565.035.1, RSMo 2011. The notice should “set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed.” *Id.* The trial judge report is in the form of a standard questionnaire that is prepared and supplied by the Supreme Court of Missouri. *Id.*

²⁰⁴ State v. Taylor, 298 S.W.3d 482, 491 (Mo. banc 2009) (citing State v. Johnson, 207 S.W.3d. 24, 34 (Mo. banc 2006)).

outcome of the trial.”²⁰⁵ If the defendant failed to preserve an issue for appeal, the Court will perform a plain error analysis, reversing only for a “miscarriage of justice.”²⁰⁶

In all cases where the death penalty is imposed, regardless of whether the appellant filed a direct appeal, the Court must conduct an automatic review of the death sentence.²⁰⁷ The automatic review determines whether the death sentence was imposed under passion or prejudice, including whether the evidence supports the jury or judge’s finding of the statutory aggravating circumstances, as well as whether death appears to be an excessive or disproportionate penalty when compared to similar cases, given the strength of the evidence, the circumstances of the offense and the characteristics of the defendant.²⁰⁸ The Court will include in its analysis “a reference to those similar cases which it took into consideration.”²⁰⁹ The statute requires that this review include records of all cases in which “the sentence of death or life imprisonment without the possibility of probation or parole was imposed.”²¹⁰

After completing the automatic review and considering any direct appeal the Supreme Court of Missouri can (1) affirm the sentence of death; (2) set the sentence aside and resentence the defendant to life imprisonment; or (3) set the sentence aside, remanding for a retrial on either guilt or punishment.²¹¹

3. Discretionary Review by the U.S. Supreme Court

If the Supreme Court of Missouri affirms the conviction and sentence of death during direct appeal, the appellant has ninety days after the decision is entered to file a petition for a writ of certiorari with the U.S. Supreme Court.²¹² The Court may review the case for federal constitutional errors and misapplication of federal law.²¹³ If the U.S. Supreme Court chooses to review the case, it “may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review,” and may also remand for further proceedings if necessary.²¹⁴ If the U.S. Supreme Court affirms the conviction and sentence, the defendant may initiate state post-conviction proceedings under Missouri state law.²¹⁵

²⁰⁵ *Johnson*, 207 S.W.3d at 34.

²⁰⁶ Rule 29.12; *see also Johnson*, 207 S.W.3d at 34. Plain error is defined as error “affecting substantial rights . . . when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.” Rule 29.12. Miscarriage of justice “requires that appellant go beyond a mere showing of demonstrable prejudice to show manifest prejudice affecting his substantial rights.” *State v. Hornbuckle*, 769 S.W.2d 89, 93 (Mo. banc 1989).

²⁰⁷ Section 565.035.1, RSMo 2011.

²⁰⁸ Section 565.035.3, RSMo 2011.

²⁰⁹ Section 565.035.5, RSMo 2011; *see also State v. Davis*, 318 S.W.3d 618 (Mo. banc 2011).

²¹⁰ Section 565.035.6, RSMo 2011. “The assistant shall provide the court with whatever extracted information the court desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.” *Id.*

²¹¹ Section 565.035.5, RSMo 2011.

²¹² 28 U.S.C. §§ 1257, 2101(c) (2011).

²¹³ 28 U.S.C. § 1257 (2011).

²¹⁴ 28 U.S.C. § 2106 (2011).

²¹⁵ Section 547.360(1), RSMo 2011; Rule 24.035, 29.15.

D. State Post-conviction Relief

1. Initial Post-Conviction Motions

Upon the appellate court issuing a final order affirming a conviction and death sentence, a Missouri death row inmate has ninety days to file a post-conviction motion to vacate, set aside, or correct the sentence under Missouri Rules of Court 24.035 and 29.15.²¹⁶ The motion must be filed in the circuit court where the sentence was imposed.²¹⁷ If the inmate fails to file the motion within the ninety-day time period, it will result in a complete waiver of the motion and any claims which could have been raised in the motion.²¹⁸

If the initial motion is filed pro se, the Missouri State Public Defender (MSPD) will make a determination of the inmate's indigency.²¹⁹ If the inmate is determined indigent, MSPD generally will be appointed to represent the defendant in the proceedings.²²⁰ If MSPD is appointed, the case will be assigned to the Appellate/Post-conviction Review Division.²²¹

Once counsel is appointed, s/he must review the pro se motion to determine whether the grounds alleged are sufficiently supported by the facts and whether any additional grounds for relief may be available to the inmate.²²² If counsel determines that the motion is not sufficiently supported or additional grounds exist, s/he must file an amended motion within sixty days of appointment.²²³ If counsel determines that no amended motion is necessary, s/he must file a statement with the court explaining the steps taken to ensure the original motion is sufficient.²²⁴

Once the amended motion is filed, or time for filing the amended motion has passed, the circuit court will determine whether the inmate is entitled to an evidentiary hearing.²²⁵ The court will hold a hearing unless the files and records of the case "conclusively show the movant is entitled to no relief."²²⁶ At the conclusion of the hearing, the judge will issue findings of fact and conclusions of law on each of the issues presented in the motion.²²⁷

²¹⁶ Rules 24.035, 29.15. Missouri Rule of Court 24.035 is the procedure for relief after a guilty plea, while Rule 29.15 is the procedure for relief after a trial. The procedures are also codified at RSMo 547.360. The texts of the three codifications are substantially identical.

²¹⁷ Rules 24.035, 29.15.

²¹⁸ Rules 24.035(b), 29.15(b).

²¹⁹ Section 547.370.1, RSMo 2011.

²²⁰ *Id.* MSPD may contract with a private bar attorney to represent the inmate during the post-conviction proceedings. See STATE OF MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2010 ANNUAL REP. 77 (Oct. 1, 2010), available at <http://www.publicdefender.mo.gov/about/FY2010AnnualReport.pdf>.

²²¹ See *Appellate/Post-Conviction Relief Division*, MO. STATE PUB. DEFENDER, http://publicdefender.mo.gov/legal/capital_division.htm (last visited July 19, 2011). For a full description of MSPD and the Appellate/Post-conviction Relief Division, see Chapter Six on Defense Services.

²²² Rules 24.035(e), 29.15(e).

²²³ Rules 24.035(g), 29.15(g).

²²⁴ Rules 24.035(e), 29.15(e).

²²⁵ Rules 24.035(h), 29.15(h).

²²⁶ *Id.*

²²⁷ Rules 24.035(j), 29.15(j). If the court determines that no evidentiary hearing is necessary, the court must issue findings of fact and conclusions of law. *Id.*

Upon a denial of post-conviction relief, the inmate may appeal to the Supreme Court of Missouri.²²⁸ Rules 24.035 and 29.15 prohibit successive or second post-conviction motions.²²⁹

2. Rule 91 State Habeas Corpus

An inmate also may file a request for state habeas corpus relief under Rule 91.²³⁰ Rule 91 provides an inmate with a means to “inquire into the cause” of his/her restraint.²³¹ In order to seek review under this provision, the inmate must generally show that the grounds for relief were not procedurally defaulted or were previously unknown to the inmate.²³² An inmate may be entitled to review of an otherwise procedurally defaulted claim if s/he can show “(1) a claim of actual innocence[,] or (2) a jurisdictional defect[,] or (3)(a) that the procedural default was caused by something external to the defense—that is, a cause for which the defense is not responsible[,] and (b) prejudice resulted from the underlying error that worked to his actual and substantial disadvantage.”²³³

E. Federal Habeas Corpus

A petitioner wishing to challenge his/her conviction and death sentence as a violation of federal law may file a petition for a writ of habeas corpus with the appropriate federal judicial district.²³⁴ Missouri has two federal districts: the Eastern and Western Districts.²³⁵ The petitioner is entitled to appointed counsel to prepare his/her petition if s/he “is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.”²³⁶ In order to obtain relief on the petition for a writ of habeas corpus, the petitioner must have raised

²²⁸ Rules 24.035(k), 29.15(k).

²²⁹ Rules 24.035(l), 29.15(l). *See also* Thurman v. State, 859 S.W.2d 250, 252 (Mo. App. 1993).

²³⁰ Rule 91.

²³¹ *Id.*

²³² White v. State, 779 S.W.2d 571 (Mo. banc 1989).

²³³ Brown v. State, 66 S.W.3d 721 (Mo. banc 2002). *See also* Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. banc 2000) (citing State *ex rel.* Simmons v. White, 866 S.W.2d 443, 445–46 (Mo. banc 1993)); Wilson v. State, 813 S.W.2d 833 (Mo. banc 1991).

²³⁴ 28 U.S.C. §§ 2254, 2241(d) (2011); RULE 3(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; FED. R. APP. P. 22(a).

²³⁵ 28 U.S.C. § 105 (2011). The Eastern District includes three different divisions: Eastern, Northern and Southeastern Divisions. The Eastern District includes the following counties: Adair, Audrain, Bollinger, Butler, Cape Girardeau, Carter, Chariton, Clark, Crawford, Dent, Dunklin, Franklin, Gasconade, Iron, Jefferson, Knox, Lewis, Lincoln, Linn, Macon, Madison, Maries, Marion, Mississippi, Monroe, Montgomery, New Madrid, Pemiscot, Perry, Phelps, Pike, Ralls, Randolph, Reynolds, Ripley, Saint Charles, Saint Francois, Saint Genevieve, Saint Louis, Schuyler, Scotland, Scott, Shannon, Shelby, Stoddard, Warren, Wayne, Washington, and the city of St. Louis. 28 U.S.C. § 105(a)(1)–(3) (2011). The Western District includes five different divisions: Western, Southwestern, Saint Joseph, Central and Southern. The Western District is composed of the following counties: Andrew, Atchison, Barton, Barry, Bates, Benton, Boone, Buchanan, Caldwell, Callaway, Camden, Carroll, Cass, Cedar, Christian, Clay, Clinton, Cole, Cooper, Dade, Dallas, Davies, De Kalb, Douglas, Gentry, Greene, Grundy, Harrison, Henry, Hickory, Holt, Howard, Howell, Jackson, Jasper, Johnson, Laclede, Lafayette, Lawrence, Livingston, McDonald, Mercer, Miller, Moniteau, Morgan, Newton, Nodaway, Oregon, Osage, Ozark, Pettis, Platte, Polk, Pulaski, Putnam, Ray, Saint Clair, Saline, Stone, Sullivan, Taney, Texas, Vernon, Webster, Wright, and Worth. 28 U.S.C. § 105(b)(1)–(5) (2011).

²³⁶ 18 U.S.C. § 3599(a)(2) (2011); McFarland v. Scott, 512 U.S. 849, 856–57 (1994) (citing 21 U.S.C. § 848(q)(4)(B) (repealed)).

all relevant federal claims in state court, as the failure to exhaust all state remedies available on direct appeal and state post-conviction is grounds to dismiss the petition.²³⁷

The petition must be filed in the federal district court where the petitioner is in custody or in the district where the petitioner was convicted and sentenced.²³⁸ The deadline for filing the petition is one year from any date on which (1) the judgment became final; (2) the state impediment that prevented the petitioner from filing was removed; (3) the U.S. Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review; or (4) the underlying facts of the claims could have been discovered through due diligence.²³⁹ The one-year time limitation may be tolled if the petitioner is pursuing a properly filed application for state post-conviction relief or other collateral review.²⁴⁰

The petition must name as respondent the state officer keeping the petitioner in custody.²⁴¹ The petition must include every ground available for relief, the facts supporting each ground, and what relief is requested.²⁴² In addition to the petition, the petitioner must promptly file certified copies of his/her indictment, plea, and judgment that are material to the questions that s/he raises in the petition.²⁴³

If the petitioner challenges the state court's determination on a factual issue, the petitioner has the burden of rebutting, by clear and convincing evidence, the federal law presumption that state court factual determinations are correct.²⁴⁴ However, if the petitioner raises a claim that the state court previously determined on the merits, s/he will not be granted relief unless s/he proves that the state court adjudication of the claim either "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the [U.S.] Supreme Court[]; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."²⁴⁵

Once the petition is filed, a district court judge reviews it to determine whether, based on the face of the petition, the petitioner is entitled to relief in the district court.²⁴⁶ If the judge finds that the petitioner is not entitled to relief, the judge may summarily dismiss the petition.²⁴⁷ In contrast, if

²³⁷ 28 U.S.C. § 2254(b)(1) (2011). Under certain circumstances, a federal district court can stay a petition that raises both exhausted and unexhausted constitutional violations to allow the petitioner an opportunity to present his unexhausted claims in state court. *Rhines v. Weber*, 544 U.S. 269 (2005).

²³⁸ 28 U.S.C. §§ 2254, 2241(d) (2011); RULE 3(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; FED. R. APP. P. 22(a).

²³⁹ 28 U.S.C. § 2244(d)(1) (2011).

²⁴⁰ 28 U.S.C. § 2244(d)(2) (2011).

²⁴¹ RULE 2(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁴² RULE 2(c)(1)–(5) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT. The petition must be printed, typewritten or legibly handwritten, as well as signed under penalty of perjury by the petitioner, or someone authorized under the federal habeas statute to sign for the petitioner. *Id.*

²⁴³ 28 U.S.C. § 2249 (2011).

²⁴⁴ 28 U.S.C. § 2254(e)(1) (2011). "If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination." 28 U.S.C. § 2254(f) (2011).

²⁴⁵ 28 U.S.C. § 2254(d) (2011).

²⁴⁶ RULE 4 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁴⁷ *Id.*

the judge finds that the petitioner may be entitled to federal habeas corpus relief, the judge will order the respondent to file an answer replying to the allegations contained in the petition.²⁴⁸

The answer must reference every allegation included within the petition, and must also “state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.”²⁴⁹ The answer should also direct the court’s attention to relevant transcripts and their location.²⁵⁰ The petitioner may also request that additional transcripts be made part of the record.²⁵¹

Additionally, either party may request the invocation of discovery proceedings.²⁵² The party making the request must provide the court with reasons for the request.²⁵³ The judge will only grant the request for good cause shown and has the authority to limit the scope of discovery.²⁵⁴ The judge may also direct, or the parties may request, expansion of the record by providing additional evidence relevant to the merits of the petition.²⁵⁵ The expansion may include letters predating the filing of the petition, documents, exhibits, answers to written interrogatories, and affidavits.²⁵⁶

Upon review of the state court proceedings and the evidence presented, the judge must determine whether an evidentiary hearing is required.²⁵⁷ The judge may not hold an evidentiary hearing on a claim in which a petitioner failed to develop the underlying facts in the state court proceedings unless

(A) the claim relies upon: (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.²⁵⁸

If the court decides that an evidentiary hearing is unnecessary, it will rule on the petition without additional evidence.²⁵⁹ If the court determines that an evidentiary hearing is warranted, it must appoint an attorney to the petitioner if s/he qualifies.²⁶⁰ The hearing must be conducted as soon

²⁴⁸ RULES 4 & 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁴⁹ RULE 5(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁵⁰ RULE 5(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁵¹ RULE 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁵² RULE 6(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁵³ *Id.*

²⁵⁴ RULE 6(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁵⁵ RULE 7(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁵⁶ RULE 7(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁵⁷ RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁵⁸ 28 U.S.C. § 2254(e)(2) (2011); *Williams v. Taylor*, 529 U.S. 420, 432 (2000) (“Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.”).

²⁵⁹ RULE 8(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁶⁰ RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

as practicable, giving the attorneys enough time to investigate and prepare.²⁶¹ During the evidentiary hearing, the judge will resolve any factual discrepancies that are material to the petitioner's claims. Based on the evidence presented, the judge may grant the petitioner a new trial, a new sentencing phase, a new direct appeal, or deny relief.²⁶²

In order to appeal the district court judge's decision, the applicant must file a notice of appeal with the district court within thirty days after the judgment.²⁶³ If the petitioner seeks to appeal, s/he must also request a certificate of appealability from either a federal district or circuit court judge.²⁶⁴ A judge may issue a certificate of appealability only for those claims on which the petitioner has made a substantial showing of the denial of a constitutional right.²⁶⁵ If the certificate of appeal is granted, the appeal proceeds to the U.S. Court of Appeals for the Eighth Circuit.²⁶⁶

The Eighth Circuit will proceed based on the "record of appeal" which includes (1) original documents filed in district court, (2) transcripts of any proceedings, and (3) certified copies of docket entries prepared by the district clerk.²⁶⁷ In addition, the Eighth Circuit requires the district court clerk to compile and submit the record, including all relevant transcripts, exhibits, and other relevant record materials.²⁶⁸ In rendering its decision, the Eighth Circuit will consider the record, briefs submitted by the parties, as well as any oral arguments that were heard.²⁶⁹ The court will attempt to issue an opinion in every appeal within ninety days after argument.²⁷⁰ Although rarely granted, the appellant may request a rehearing from the panel issuing the decision or a rehearing by the Eighth Circuit en banc.²⁷¹

Once the Eighth Circuit renders a decision, the adversely affected party may file a petition for a writ of certiorari in the U.S. Supreme Court.²⁷² The U.S. Supreme Court may either grant or deny review of the petition. If the Court grants review of the petition it may deny the petitioner relief or order a new guilt phase, a new sentencing phase, or other procedures in the lower federal courts or the state court.

²⁶¹ *Id.*

²⁶² 28 U.S.C. § 2106 (2011).

²⁶³ FED. R. APP. P. 4(a)(1)(A).

²⁶⁴ 28 U.S.C. § 2253(c)(1) (2011); FED. R. APP. P. 22(b)(3).

²⁶⁵ 28 U.S.C. § 2253(c)(2) (2011).

²⁶⁶ 8th Cir. I.O.P. § I.A. (2009). The Eighth Circuit includes the following states: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. *Id.* at (A).

²⁶⁷ 8th Cir. I.O.P. § IV.G.

²⁶⁸ 8th Cir. I.O.P. § IV.G.1.

²⁶⁹ 8th Cir. I.O.P. §§ IV.I, K. It is possible that the Eighth Circuit may determine that the case can be decided without oral argument, in which case the clerk will remove the case from the calendar. 8th Cir. I.O.P. § IV.K.

²⁷⁰ 8th Cir. I.O.P. § V.A.

²⁷¹ 8th Cir. I.O.P. § V.D. "Petitions for rehearing are not favored by the court and are granted infrequently. Petitions for rehearing en banc require a substantial expenditure of time by judges who have not participated in the case . . ." *Id.* Furthermore, the issue of whether the case should be reheard en banc is distinct from whether the case should be reheard by the original appeals panel. *Id.* The Eighth Circuit Operating Procedures state that "[a] panel may rehear a case if it questions whether its decision was correct;" however, the "court may rehear a case en banc if the case 'is of such significance to the full court that it deserves the attention of the full court.'" *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 262–63 (1953)). See FED. R. APP. P. 35 & 40; 8TH CIR. R. 35(A) & 40(A) for the requirements and procedures to seek a rehearing by a panel and rehearing en banc.

²⁷² 28 U.S.C. § 1254(1) (2011).

If the petitioner seeks to file a second or successive habeas corpus petition with the district court, s/he must first move for an order from the Eighth Circuit Court of Appeals authorizing the district court to consider the application.²⁷³ The motion will be heard by a three-judge panel of the Eighth Circuit Court of Appeals.²⁷⁴ The panel must specifically assess whether the petition makes a prima facie showing that the claim presented in the second or successive petition was not previously raised and that the new claim (1) relies on a new, previously unavailable constitutional rule that was made retroactive by the U.S. Supreme Court, or (2) rests on a factual predicate that could not have been discovered previously through the exercise of due diligence, where those facts, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.²⁷⁵ Any second or successive petition that presents a claim raised in a prior petition will be dismissed.²⁷⁶

The motion will either be granted or denied within thirty days after it was filed.²⁷⁷ The Eighth Circuit's decision to grant or deny the motion for authorization to file a second or successive petition is not appealable, nor available for a rehearing or writ of certiorari.²⁷⁸ If the Eighth Circuit chooses to grant the motion, the second or successive petition will proceed through the same process as the initial petition.²⁷⁹ In extraordinarily rare circumstances, a petitioner may file for grant of an original writ of habeas corpus with the U.S. Supreme Court.²⁸⁰

The petitioner may seek final review of his/her conviction and sentence by filing a petition for clemency.²⁸¹

F. Clemency

Under the Missouri Constitution, when an individual is convicted and confined to prison, the Governor has the power to grant him/her clemency in the form of a reprieve, commutation, or pardon.²⁸² When a clemency petition is submitted by an inmate, the Missouri Board of Probation and Parole (Board) will conduct an investigation to determine whether there is sufficient information available to make a recommendation to the Governor regarding the clemency application.²⁸³ If necessary, the Board may conduct its own investigation, including developing a “summary of the present offense and criminal history, institutional conduct and accomplishments while confined, assessment of medical and/or mental health needs, and statements from the prosecuting attorney, judge, defense attorney, and victim.”²⁸⁴ Upon completion of the investigation, the Board will submit a report to the Governor, including its

²⁷³ 28 U.S.C. § 2244(b)(3)(A) (2011).

²⁷⁴ 28 U.S.C. § 2244(b)(3)(B) (2011); *see also* 28 U.S.C. § 48 (2011).

²⁷⁵ 28 U.S.C. § 2244(b)(2)(A)–(B) (2011).

²⁷⁶ 28 U.S.C. § 2244(b)(1) (2011).

²⁷⁷ 28 U.S.C. § 2244(b)(3)(D) (2011).

²⁷⁸ 28 U.S.C. § 2244(b)(3)(E) (2011).

²⁷⁹ 28 U.S.C. § 2244 (2011).

²⁸⁰ *In re Troy Davis*, 130 S.Ct. 1 (2009).

²⁸¹ Mo. Const. art. IV, section 7; section 552.070, RSMo 2011.

²⁸² Mo. Const. art. IV, section 7; section 552.070, RSMo 2011.

²⁸³ Section 217.800, RSMo 2011.

²⁸⁴ *Executive Clemency*, MO. DEP'T OF CORR., <http://doc.mo.gov/division/prob/ExecClem.php> (last visited July 20, 2011).

recommendation of whether clemency should be granted.²⁸⁵ However, the Governor is not bound by the Board’s recommendation and the act of granting clemency is a “matter of grace” resting within the discretion of the Governor.²⁸⁶ Since 1976, only two death row inmates have been granted clemency in Missouri.²⁸⁷

G. Execution

After all appeals are concluded, the Supreme Court of Missouri will set a time for the execution.²⁸⁸ If no motions are filed, the execution is set for no less than sixty-five days from the court’s affirming the death sentence during its automatic review.²⁸⁹ If a post-conviction motion to appeal the conviction and/or sentence is filed, the date for execution is not less than sixty-five days from the date the motion is overruled.²⁹⁰ Executions will be stayed while the inmate pursues direct appeal, state post-conviction relief, and certiorari to the Supreme Court.²⁹¹ If an execution is stayed, the Supreme Court of Missouri will set the execution date after the stay is no longer in effect.²⁹² Notice of the execution date must be given to the defendant, his/her counsel, the Governor, and the Director of the Department of Corrections and Human Resources (Director).²⁹³

Once the Supreme Court of Missouri has determined that there are no reasons to delay the execution of the sentence, the Court will issue a warrant to the Director requiring the execution to take place on a specified date.²⁹⁴

In Missouri, the two possible methods of execution are lethal gas or lethal injection.²⁹⁵ In order for the executions to occur, the Director will assemble an execution team.²⁹⁶ The execution team administers the lethal gas or lethal chemicals with the assistance of medical personnel.²⁹⁷ The

²⁸⁵ Section 217.800, RSMo 2011.

²⁸⁶ State *ex rel.* Lute v. Mo. Bd. of Prob. & Parole, 218 S.W.3d 431 (Mo. banc 2007).

²⁸⁷ See *supra* note 9.

²⁸⁸ Rule 29.08(d).

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Section 546.710, RSMo 2011.

²⁹⁵ Section 546.720.1, RSMo 2011. While lethal gas is listed as a possible method of execution in the Missouri statute, no inmate has been executed via this method since Missouri reinstated the death penalty in 1977. See MO. DEP’T OF CORR., *supra* note 3.

²⁹⁶ Section 546.720.2, RSMo 2011.

²⁹⁷ *Id.* For the purposes of the execution team, medical personnel need not be doctors. Taylor v. Crawford, 487 F.3d 1072, 1082 (8th Cir. 2007). “A physician, nurse, or pharmacist prepares the chemicals, which are injected by nonmedical department employees. A physician, nurse, or emergency medical technician holding either an ‘EMT-intermediate or EMT-paramedic’ certification inserts the intravenous lines, establishing both a primary and a secondary IV (which must be a peripheral line) unless the prisoner’s physical condition prevents the use of two lines.” *Id.* Further, medical personnel must continually monitor the execution. *Id.*

identities of those involved in the execution must remain confidential.²⁹⁸ The execution will be under the supervision and direction of the Director.²⁹⁹

The Chief Administrative Officer for the Missouri Department of Corrections, or someone s/he has appointed, must be present during the execution.³⁰⁰ The Director is responsible for inviting the Attorney General of Missouri, and at least eight “reputable” citizens to be witnesses.³⁰¹ The defendant may choose up to five relatives, friends, clergy or religious leaders, or peace officers to attend the execution.³⁰² However, no one under the age of twenty-one will be allowed to witness the execution.³⁰³

Upon the execution, the Chief Administrative Officer for the Department of Corrections will sign and return the death warrant to the court, providing documentation that the execution occurred, which includes the time, mode, and manner of the execution.³⁰⁴

²⁹⁸ Section 546.720.3, RSMo 2011. The execution protocols of the Missouri Department of Corrections are not published, however a summary of the protocols is available in *Clemmons v. Crawford*. 585 F.3d 1119, 1123–24 (8th Cir. 2009).

²⁹⁹ Section 546.730, RSMo 2011.

³⁰⁰ *Id.*

³⁰¹ Section 546.740, RSMo 2011.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ Section 546.750, RSMo 2011.

CHAPTER TWO

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

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

DNA testing is a useful law enforcement tool that can help establish and confirm guilt. Furthermore, wrongfully-convicted inmates can prove their innocence through DNA testing and analysis. In 2000, the American Bar Association adopted a resolution urging federal, state, local, and territorial jurisdictions to ensure that all biological evidence¹ collected during a criminal investigation is preserved and made available to defendants and convicted persons seeking to establish their innocence.² Since then, almost all fifty states have adopted laws concerning post-conviction DNA testing.³ However, standards for preserving biological evidence and allowing post-conviction DNA testing vary widely among jurisdictions.

In response to these varied standards, as well as reports of errors and misconduct in public and private DNA testing facilities, the ABA adopted the *ABA Criminal Justice Standards on DNA Evidence* in 2006.⁴ The standards provide a detailed procedure for procurement, testing, use, and preservation of and entitlement to biological evidence. When a defendant has been convicted of a murder, rape, or other serious offense, these standards require that any available biological material be retained in a manner that will preserve the DNA evidence for as long as the defendant remains incarcerated. At the post-conviction stage, the standards permit a person convicted of a serious crime to request testing or retesting of biological evidence, as long as the person meets certain pleading criteria. Once the testing is complete, the standards entitle the petitioner to a hearing to determine the available remedies based upon the test results. If the person is indigent and files for DNA testing, counsel should be appointed.

Without the preservation of material evidence it is extremely difficult for a convicted inmate to prove his/her innocence. Every law enforcement agency should establish written procedures,

¹ “Biological evidence” is defined as evidence that is provided by specimens of a biological origin that are available in a forensic investigation. Such specimens may be found at the scene of a crime or on a person, clothing, or weapon. Some . . . come from the crime scene or from an environment through which a victim or suspect has recently traversed. Other biological evidence comes from specimens obtained directly from the witness or suspect, such as blood, semen, saliva, vaginal secretions, sweat, epithelial cells, vomitus, feces, urine, hair, tissue, bones, and microbiological and viral agents.

COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 128 (2009), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [hereinafter NAS REPORT 2009].

² See ABA, RECOMMENDATION 115, 2000 Ann. Mtg. (adopted July 10–11, 2000), available at http://www.americanbar.org/content/dam/aba/migrated/moratorium/policy/2000s/2000_AM_115.authcheckdam.pdf.

³ *Post-Conviction DNA Testing*, INNOCENCE PROJECT, <http://www.innocenceproject.org/Content/304.php> (last visited Dec. 28, 2011).

⁴ See ABA, ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE 12 (3d ed. 2007) (Standard 16-6.1(a)–(b)), available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/dna_evidence.authcheckdam.pdf.

made available to all personnel and designed to ensure compliance with the law, for collecting, preserving, and safeguarding biological evidence.⁵ Agencies should regularly update their procedures as new or improved techniques and methods are developed. The procedures should impose professional standards on all state and local officials responsible for handling or testing biological evidence, and should be enforceable through the agency's disciplinary process.⁶

Training should emphasize the risk of unjust legal consequences due to the loss or compromise of evidence. It also should acquaint law enforcement officers with actual cases where illegal, unethical, or unprofessional behavior led to the arrest, prosecution, or conviction of an innocent person.

⁵ See 1 ABA, ABA STANDARDS FOR CRIMINAL JUSTICE, URBAN POLICE FUNCTION (2d ed. 1979) (Standard 1-4.3) (“Police discretion can best be structured and controlled through the process of administrative rule making, by police agencies.”); *id.* (Standard 1-5.1) (police should be “made fully accountable” to their supervisors and to the public for their actions).

⁶ See *id.* (Standard 1-5.3(a)) (identifying “[c]urrent methods of review and control of police activities”).

I. FACTUAL DISCUSSION: MISSOURI OVERVIEW

Since the reinstatement of the death penalty in 1977, seven Missouri inmates have been exonerated through post-conviction DNA testing.⁷ In 2001, the Missouri General Assembly enacted section 547.035 of the Missouri Revised Statutes to provide mechanisms for inmates to challenge their convictions by filing post-conviction motions for DNA testing.⁸

A. *Collection and Preservation of DNA Evidence*

1. Collection of Evidence

Law enforcement agencies in Missouri are responsible for identifying, collecting, and transporting all forensic evidence in a criminal investigation to one of Missouri's crime laboratories.⁹ The Missouri State Highway Patrol Forensic Laboratory (MSHP-FL) provides technical assistance and support to all law enforcement agencies on the proper collection of forensic evidence.¹⁰ The *MSHP-FL Forensic Evidence Handbook (Handbook)* is distributed to law enforcement agencies throughout the state and includes instructions for the collection, storage, and preservation of biological evidence.¹¹

2. Preservation Requirements

Section 650.056 of the Missouri Revised Statutes requires any evidence “leading to a conviction” that has been or could be tested for DNA to be preserved by the law enforcement agency charged with investigating the offense.¹² The statute does not provide a specific duration for the preservation of the DNA evidence.¹³ However, in all cases in which a sentence of death or life imprisonment is imposed, the clerk of the circuit court in which the case originated is required to

⁷ *Exonerations by State: Missouri*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/state.php?state=mo> (last visited Dec. 29, 2011). None of the seven inmates exonerated by DNA testing were sentenced to death. *Id.* However, Joseph Amrine, a former Missouri death row inmate, was exonerated after the Supreme Court of Missouri found “clear and convincing evidence of [his] innocence.” *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548–49 (Mo. banc 2003). Amrine was not exonerated based on DNA evidence. *Id.* at 544.

⁸ Section 547.035, RSMo 2011. *See also* *Weeks v. State*, 140 S.W.3d 39, 43 (Mo. banc 2004). Prior to 2001, to obtain DNA testing an inmate had to request the evidence directly from the prosecutor. Bill McClellan, *A Bright Bit of News in the Lonely Lobbying for Death-Row Inmate*, ST. LOUIS POST-DISPATCH, June 19, 1996, at 1B (noting that the St. Louis Circuit Attorney's Office has the “final say” on the release of DNA evidence).

⁹ Missouri has six law enforcement crime laboratories: Missouri State Highway Patrol Forensic Laboratory, Independence Missouri Police Department Crime Laboratory, Kansas City Police Department Crime Laboratory, St. Charles County Sheriff's Department Criminalistics Laboratory, St. Louis County Police Department Crime Laboratory, and St. Louis Metropolitan Police Department Crime Laboratory. For a discussion of Missouri's crime laboratories, see Chapter Four on Crime Laboratories and Medical Examiner Offices.

¹⁰ *See generally* MO. STATE HIGHWAY PATROL FORENSIC LAB., FORENSIC EVIDENCE HANDBOOK iii (2007), available at <http://www.mshp.dps.missouri.gov/MSHPWeb/Publications/Handbooks-Manuals/documents/SHP-145.pdf> [hereinafter MSHP FORENSIC HANDBOOK].

¹¹ *Id.* at iii, 13–31.

¹² Section 650.056, RSMo 2011. This section applies to all serious felonies, including first-degree murder. *Id.*

¹³ *See id.*

maintain permanently the entire case record, including all original documents and evidence filed with the court throughout the direct appeal and post-conviction processes.¹⁴

3. Agencies Responsible for the Preservation of Evidence

Law enforcement agencies in Missouri that collect evidence during a criminal investigation are responsible for holding, maintaining, and preserving that evidence, at least throughout the criminal trial.¹⁵ All police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Missouri certified by the Commission on the Accreditation of Law Enforcement Agencies (CALEA)¹⁶ are required to adopt written procedures for criminal investigations.¹⁷ Specifically, each agency must have written procedures on collecting, preserving, processing, and avoiding contamination of physical evidence.¹⁸ Twenty-three of Missouri's 523 law enforcement agencies have been accredited or are in the process of obtaining accreditation by CALEA.¹⁹

In addition to the law enforcement accreditation, all of Missouri's law enforcement crime laboratories have obtained voluntary accreditation through the Crime Laboratory Accreditation

¹⁴ See MO. SUP. CT. OPERATING R. 8.02(N), 8.04.2(C)(4)(b); see also MO. SUP. CT. OPERATING R. 8.02(B) ("The custodian of records is presumed to be the clerk of court; however the custodian may be specifically designated by local court rule . . .").

¹⁵ Section 650.056, RSMo 2011.

¹⁶ *The Commission*, CALEA, <http://www.calea.org/content/commission> (last visited on Dec. 29, 2011) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: International Association of Chiefs of Police, National Organization of Black Law Enforcement Executives, National Sheriffs' Association, and Police Executive Research Forum). To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of (1) enrolling in one of CALEA's accreditation programs and executing an Accreditation Agreement; (2) completing a thorough self-assessment to determine whether the law enforcement agency complies with the accreditation standards and developing a plan to come into compliance; (3) an on-site assessment by a team, selected by the Commission, to determine compliance who will submit a compliance report to the Commission; and (4) a hearing where a final decision on accreditation is rendered. See *Steps in the Accreditation Process*, CALEA, <http://www.calea.org/content/steps-accreditation-process> (last visited on Dec. 29, 2011).

¹⁷ COMM'N ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42.2.1, 83.2.1 (5th ed. 2009) [hereinafter CALEA STANDARDS].

¹⁸ *Id.*

¹⁹ *CALEA Client Database*, CALEA, <http://www.calea.org/content/calea-client-database> (last visited Jan. 13, 2012) (using second search function and designating "US" and "MO" as search criteria to determine the number of agencies that have earned or are in the process of earning accreditation from CALEA's Law Enforcement Accreditation Program). The following law enforcement agencies have been awarded certification by CALEA: Chesterfield Police Department, Clayton Police Department, Florissant Police Department, Gladstone Department of Public Safety, Jackson Police Department, Jefferson County Sheriff's Office, Joplin Police Department, the Kansas City Police Department at the University of Missouri, Lee's Summit Police Department, Missouri State Highway Patrol, Richmond Heights Police Department, Shrewsbury Police Department, Springfield Police Department, St. Louis County Police Department, St. Louis Metropolitan Police Department, the St. Louis Police Department at the University of Missouri, the University of Missouri Police Department in Columbia, and Webster Groves Police Department. *Id.* The following law enforcement agencies are in the process of being accredited by CALEA: Blue Springs Police Department, Creve Coeur Police Department, Maplewood Police Department, and Poplar Bluff Police Department. *Id.* For a discussion of Missouri law enforcement accreditation, see Chapter Three on Law Enforcement Identifications and Interrogations.

Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).²⁰ ASCLD/LAB specifically requires laboratories to have a written or secure electronic chain of custody record with all necessary data and a secure area for overnight and long-term storage of evidence.²¹ All evidence must be marked for identification, properly sealed such that the contents cannot readily escape, and be protected from loss, cross-transfer, contamination, and deleterious change.²² A full description of Missouri's forensic crime laboratories is found in Chapter Four on Crime Laboratories and Medical Examiner Offices.

B. DNA Testing

1. Pretrial DNA Testing

Missouri discovery rules require the prosecution to disclose to the defendant any physical evidence it plans to introduce at trial and any evidence that was obtained from the defendant.²³ Additionally, the prosecution must disclose any evidence that “tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce punishment.”²⁴ Furthermore, the prosecution must produce “[a]ny reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons.”²⁵ If the defendant seeks access to physical evidence that does not fall within these categories, the defendant may move for a court order requesting disclosure.²⁶ The court must order disclosure if it “finds the request to be reasonable.”²⁷ Defendants may seek testing of physical evidence, free of charge, at any Missouri law enforcement crime laboratory; however, it is the policy of the Missouri State Public Defender (MSPD) and the Midwest Innocence Project to request testing from out-of-state private laboratories.²⁸

2. Post-conviction Motions for DNA Testing

Section 547.035 provides that any person in the custody of the Department of Corrections “claiming that forensic DNA testing will demonstrate the person’s innocence” may file a motion in the sentencing court requesting DNA testing of any testable evidence that was secured in relation to the crime.²⁹

²⁰ See *ASCLD/LAB Accredited Laboratories*, AM. SOC’Y OF CRIME LAB. DIRECTORS/LAB. ACCREDITATION BD., <http://www.ascl-d-lab.org/accreditedlabs.html#mo> (last visited Dec. 28, 2011). In addition to the law enforcement laboratories, two private Missouri laboratories have obtained ASCLD/LAB accreditation. *Id.*

²¹ AM. SOC’Y OF CRIME LAB. DIRECTORS/LABORATORY ACCREDITATION BOARD, 2008 MANUAL 20–23 (2008) (on file with author) [hereinafter *ASCLD/LAB-LEGACY 2008 MANUAL*].

²² *Id.*

²³ Rule 25.03(A)(6).

²⁴ Rule 25.03(A)(9).

²⁵ Rule 25.03(A)(5).

²⁶ Rule 25.04(A).

²⁷ *Id.*

²⁸ Telephone Interview by Rachel Bays with Greg Mermelstein, Appellate/PCR Div. Dir., Mo. State Pub. Defender Sys. (Nov. 24, 2010) (on file with author).

²⁹ Section 547.035, RSMo 2011.

a. Timeline for Filing Post-conviction Petitions for DNA Testing

An individual may seek post-conviction DNA testing by filing a motion at any time after s/he is placed in the custody of the Department of Corrections.³⁰ Upon receipt of the motion, the clerk of court must “immediately deliver” a copy of the motion to the prosecution.³¹

b. Standards for Obtaining an Order for DNA Testing

To obtain post-conviction DNA testing, the movant must allege facts demonstrating the following five elements:

- (1) There is evidence upon which DNA testing can be conducted; and
- (2) The evidence was secured in relation to the crime; and
- (3) The evidence was not previously tested by the movant because:
 - (a) The technology for the testing was not reasonably available to the movant at the time of the trial;
 - (b) Neither the movant nor his or her trial counsel was aware of the existence of the evidence at the time of trial; or
 - (c) The evidence was otherwise unavailable to both the movant and the movant’s trial counsel at the time of trial; and
- (4) Identity was an issue in the trial; and
- (5) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.³²

The Supreme Court of Missouri has interpreted the meaning of the phrase “identity was an issue at trial” as referring to any case in which the inmate claims that s/he did not commit the alleged acts.³³ However, the Court has also held that inmates who have pled guilty are eligible for post-conviction DNA testing “if the movant demonstrates that up to the time of the plea . . . identity was at issue.”³⁴

³⁰ State *ex rel.* Nixon v. Jaynes, 63 S.W.3d 210, 216 n.6 (Mo. banc 2001) (“This relief is available without time limits and without regard to claims of error in the original trial . . .”). See also section 547.035, RSMo 2011.

³¹ Section 547.035.3, RSMo 2011.

³² Section 547.035.2(1)–(5), RSMo 2011.

³³ State v. Ruff, 256 S.W.3d 55, 57 (Mo. banc 2008). However, post-conviction DNA testing is unavailable to inmates to prove alternate theories of the crime, such as self-defense. See, e.g., State v. Fields, 186 S.W.3d 501, 503 (Mo. App. 2006) (finding that DNA testing was unavailable to the inmate because he did not contest the fact that he shot the victim); Phillips v. State, 178 S.W.3d 679, 682 (Mo. App. 2005) (finding that the inmate was not entitled to post-conviction DNA testing to support his self-defense claim because identity was not at issue); State v. Waters, 221 S.W.3d 416, 418 (Mo. App. 2006) (holding that the inmate was not entitled to post-conviction DNA testing to prove an alternate theory of consensual sex).

³⁴ Weeks v. State, 140 S.W.3d 39, 46–47 (Mo. banc 2004).

c. Disposition of a Post-conviction DNA Petition

If the court finds the motion insufficient or the allegations conclusively refuted by the available files and records, then the motion will be denied.³⁵ If the motion is deemed legally sufficient, the prosecution will be ordered to show cause as to why the motion should not be granted.³⁶ After reviewing the motion, the court must conduct an evidentiary hearing unless the files and records conclusively show that the movant is not entitled to relief.³⁷ If a hearing is ordered, the inmate will be appointed counsel if s/he is indigent.³⁸ At the hearing, the movant bears the burden of proving each of the required elements by a preponderance of the evidence.³⁹

If the movant proves a reasonable probability exists that s/he would not have been convicted if exculpatory results were obtained by the DNA testing and that s/he is entitled to relief, the court must order the requested testing.⁴⁰ Regardless of whether a hearing is held, the court must issue findings of fact and conclusions of law on the merits of the motion.⁴¹

Where the court orders DNA testing and the results confirm the movant's guilt, s/he will be required to reimburse the court for testing expenses, and additional time may be added to his/her sentence.⁴² However, if the results demonstrate the movant's innocence, s/he must file a motion for release with the sentencing court.⁴³ If the prosecution opposes the motion for release, the court will grant a hearing, during which the movant must prove by a preponderance of the evidence that s/he is innocent of the crime for which s/he is in custody.⁴⁴

After a denial of a motion for post-conviction DNA testing or a motion for release, the inmate may appeal following the procedures set forth for post-conviction motions under Rules 29.15 and 24.035.⁴⁵

³⁵ Section 547.035.4, RSMo 2011.

³⁶ *Id.*

³⁷ Section 547.035.6, RSMo 2011.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Section 547.035.7, RSMo 2011.

⁴¹ Section 547.035.8, RSMo 2011. *See also* Clayton v. State, 164 S.W.3d 111, 116 (Mo. App. 2005) (requiring the findings of fact and conclusions of law to be extensive enough for a meaningful appellate review).

⁴² Section 650.058.2, RSMo 2011; *see also* Section 217.262.1, RSMo 2011.

⁴³ Section 547.037.1, RSMo 2011.

⁴⁴ Section 547.037 RSMo 2011; *see also* Bey v. State, 272 S.W.3d 378, 383 (Mo. App. 2008).

⁴⁵ Weeks v. State, 140 S.W.3d 39, 43–44 (Mo. banc 2004) (“Although section 547.035 does not specifically set out a standard of review, it provides that a motion for DNA testing is a post-conviction motion governed by the rules of civil procedure insofar as applicable. Rules 29.15 and 24.035 set out the applicable standard of review for other post-conviction motions.”); Snowdell v. State, 90 S.W.3d 512, 513–14 (Mo. App. 2002) (“Section 547.035.1 states that the rules of civil procedure will govern these proceedings. Therefore, we will apply the same civil standards as in other post-conviction proceedings to this appeal.”). *See also* Rules 29.15, 24.035. In all cases, including when the defendant is sentenced to death, the appeal will be heard by Missouri’s intermediate appellate court, the Missouri Court of Appeals. State v. Kinder, 122 S.W.3d 624, 628–29 (Mo. App. 2003).

d. Limitations on Multiple Petitions

There is no explicit bar against filing successive or subsequent motions for post-conviction DNA testing in Missouri.⁴⁶ An inmate is permitted to bring subsequent petitions for DNA testing if s/he can show that technological developments shed doubt on previous findings.⁴⁷

C. Location and Type of DNA Testing

When the court grants an inmate's petition for post-conviction DNA testing, the testing must be performed by a facility mutually agreed upon by the inmate and the prosecution, subject to the court's approval.⁴⁸ However, if the parties are unable to agree, the court will designate a facility.⁴⁹

Missouri has six law enforcement and three private crime laboratories that conduct DNA testing.⁵⁰ MSHP-FL is Missouri's largest crime laboratory, with divisions throughout the state. MSHP-FL conducts several types of DNA testing.⁵¹

By December 31, 2012, any laboratory in Missouri that performs DNA testing of evidence for criminal trials must be accredited by an agency approved by the Department of Public Safety.⁵² A full explanation of accreditation of Missouri crime laboratories is found in Chapter Four on Crime Laboratories and Medical Examiner Offices.

D. Costs of DNA Testing

Missouri statutory law does not specify the party responsible for the cost of DNA testing. However, in practice, if the court orders DNA testing or if law enforcement submits evidence for DNA testing and the testing is done by a state law enforcement laboratory, the cost will be covered by the laboratory's operating budget.⁵³ However, if the court grants an inmate's post-

⁴⁶ *Belcher v. State*, 299 S.W.3d 294, 297 (Mo. banc 2009) (“While Rules 24.035 and 29.15 have unyielding time restrictions and prohibit successive motions, section 547.035 has neither.”).

⁴⁷ *Id.* *But see Kinder*, 122 S.W.3d at 632 (“We perceive no legislative intent to allow serial retesting of evidence due to a change in DNA technology.”).

⁴⁸ Section 547.035.7, RSMo 2011.

⁴⁹ *Id.*

⁵⁰ For a discussion of Missouri's crime laboratories, see Chapter Four on Crime Laboratories and Medical Examiner Offices.

⁵¹ MSHP-FL conducts the following types of DNA testing: Restriction Fragment Length Polymorphisms (RFLP), DQA/Polymarker (PCR), Amplified Fragment Length Polymorphism (AMPFLP) D1S80, and Short Tandem Repeats (STR). MO. STATE HIGHWAY PATROL FORENSIC LAB., DNA SECTION TRAINING MANUAL 7-1 (2007), available at http://www.cstl.nist.gov/strbase/tools/MSHP_DNA_TrainingManual072006.pdf [hereinafter DNA SECTION TRAINING MANUAL]. While MSHP-FL does not conduct mitochondrial DNA testing (mtDNA) on site, it will assist law enforcement in securing mtDNA testing if necessary. *Crime Lab FAQs*, MO. STATE HIGHWAY PATROL, <http://www.mshp.dps.mo.gov/MSHPWeb/PatrolDivisions/CLD/faqs.html> (last visited Jan. 3, 2012).

⁵² Section 650.060.1, RSMo 2011. Currently, all Missouri law enforcement crime laboratories and two private laboratories have voluntarily obtained accreditation. For information on Missouri crime laboratory accreditation, see Chapter Four on Crime Laboratories and Medical Examiner Offices.

⁵³ See section 650.105, RSMo 2011.

conviction motion for DNA testing and the results are unfavorable to the inmate, s/he will be responsible for the testing expenses.⁵⁴

MSPD routinely sends biological evidence to out-of-state private laboratories.⁵⁵ Funding for such testing is contemplated in the MSPD budget.⁵⁶

⁵⁴ Section 650.058.2, RSMo 2011.

⁵⁵ Interview with Greg Mermelstein, *supra* note 28.

⁵⁶ *Id.*

II. ANALYSIS

A. Recommendation #1

Preserve all biological evidence⁵⁷ for as long as the defendant remains incarcerated.

Missouri has codified a preservation requirement for biological evidence “leading to a conviction of a felony” that can be or has been tested for DNA.⁵⁸ The statute does not include a time limit for or any exceptions to the preservation requirement.⁵⁹ Any DNA evidence that does not specifically lead to a conviction, however, could be destroyed prior to an inmate’s post-conviction proceedings.⁶⁰ Similarly, the failure to provide a time limit for the preservation requirement could result in evidence being destroyed shortly after a conviction. For example, in 2008 Dallas Cox was charged with the non-capital murder of Stephen Akin.⁶¹ Prior to Cox’s trial, a second defendant pleaded guilty to manslaughter in connection with Akin’s murder.⁶² As a result of the guilty plea, the police department destroyed the physical evidence related to the case.⁶³ Consequently, the trial court dismissed the charges against Cox.⁶⁴ The Missouri Court of Appeals reversed the trial court’s dismissal, reasoning that the police department did not act in “bad faith.”⁶⁵

Additionally, because the only evidence that must be preserved is evidence that “can be tested for DNA,” potentially exculpatory evidence could be destroyed prior to the discovery of advanced technological measures that could allow testing on previously untestable evidence.⁶⁶ For example, mitochondrial DNA (mtDNA) analysis allows testing on DNA samples that were previously determined to be insufficient to test.⁶⁷ As such, previously untestable biological evidence may now be tested using the more advanced mtDNA technique.⁶⁸

⁵⁷ “Biological evidence” is defined as evidence that is provided by specimens of a biological origin that are available in a forensic investigation. Such specimens may be found at the scene of a crime or on a person, clothing, or weapon. Some . . . come from the crime scene or from an environment through which a victim or suspect has recently traversed. Other biological evidence comes from specimens obtained directly from the witness or suspect, such as blood, semen, saliva, vaginal secretions, sweat, epithelial cells, vomitus, feces, urine, hair, tissue, bones, and microbiological and viral agents.

NAS REPORT 2009, *supra* note 1, at 128.

⁵⁸ Section 650.056, RSMo 2011.

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ State v. Cox, 328 S.W.3d 358, 360 (Mo. App. 2010).

⁶² *Id.*

⁶³ *Id.* at 361. The evidence that was destroyed included Cox’s shoes, evidence collected during the autopsy, the medical report, photograph’s of Cox’s hands, and photographs of the victim in the hospital. *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See* section 650.056, RSMo 2011.

⁶⁷ NAS REPORT 2009, *supra* note 1, at 130–31.

⁶⁸ *Id.* While the mtDNA testing method is available at some FBI laboratories, it is not yet available at any Missouri law enforcement crime laboratory. Kelly Wiese, *DNA Testing: New Methods Look Deeper into DNA*, MO. LAW. MEDIA, Dec. 21, 2009.

The original language of section 650.056 required the Missouri State Highway Patrol (MSHP) to be the central repository for all evidence preserved in accordance with the statute.⁶⁹ However, in 2006 the General Assembly revised section 650.056 to require each investigating law enforcement agency to maintain possession of biological evidence collected during the investigation.⁷⁰ Missouri has 523 law enforcement agencies, each with its own standards and policies for the preservation of biological material.⁷¹ In order to increase consistency among the law enforcement agencies, the Missouri State Highway Patrol Forensic Laboratory (MSHP-FL) disseminates the *MSHP-FL Forensic Evidence Handbook*, which includes preservation and collection protocols, to all law enforcement agencies in Missouri.⁷² However, adherence to the MSHP-FL protocols is voluntary.⁷³ Furthermore, there are no statewide requirements or protocols on the proper methods or techniques for preserving or collecting biological evidence.

For instance, Theodore Kleine was originally tried for two counts of first-degree murder in 1970.⁷⁴ The trial resulted in a hung jury.⁷⁵ Prosecutors retried Kleine in 2009, at which point he was convicted on the two counts of first-degree murder and sentenced to life in prison.⁷⁶ Kleine attempted to test biological evidence found on the victim, which according to the Missouri Court of Appeals “presumably would have identified the actual perpetrator.”⁷⁷ However, the evidence was unable to be tested “because the samples had degraded due to lack of refrigeration.”⁷⁸ The Court of Appeals upheld the convictions because “the State did not act in bad faith.”⁷⁹ By creating and enforcing uniform procedures for the collection and preservation of biological evidence, Missouri can better ensure that the integrity of evidence is maintained.

Similarly, Missouri does not have any statutory provisions limiting the consumption of biological evidence during the testing procedure. The Supreme Court of Missouri has held that it is not a violation of the defendant’s due process rights for the State to consume an entire biological sample during initial testing.⁸⁰ A defendant may file a motion for a protective order prior to the testing to ensure there is sufficient biological material for additional testing.⁸¹ However, initial testing may be completed prior to the defendant’s arrest or initial discovery proceedings. Therefore, it is possible that a biological sample will be consumed before the defendant receives notice of the existence of the sample.

⁶⁹ Section 650.056, RSMo 2001 (amended 2006).

⁷⁰ Section 650.056, RSMo 2011.

⁷¹ Missouri law enforcement agencies consist of the Missouri State Highway Patrol, 115 county sheriff agencies, 391 local police departments, and sixteen university police departments. *See* Missouri Law Enforcement Agency Compilation (on file with author).

⁷² *See* MSHP FORENSIC HANDBOOK, *supra* note 10, at iii.

⁷³ *See generally id.*

⁷⁴ State v. Kleine, 330 S.W.3d 805, 808 (Mo. App. 2011).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 809.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ State v. Ferguson, 20 S.W.3d 485, 496 (Mo. banc 2000).

⁸¹ *See* Rule 25.11.

Prior to the enactment of section 650.056, Missouri did not require the preservation of biological evidence for DNA testing.⁸² As such, prior to July 2, 2001, no uniform rule described the type of evidence requiring preservation, the length of time such evidence required preservation, or who was responsible for preservation. Approximately thirty of the inmates currently on Missouri's death row were sentenced prior to the enactment of the preservation statute.⁸³

In one case, the failure to preserve evidence resulted in a dismissal of a murder charge. In 1991, Clarence Dexter was convicted and sentenced to death.⁸⁴ In 1997, the Supreme Court of Missouri overturned Dexter's conviction and sentence.⁸⁵ Immediately prior to his retrial in 1999, prosecutors dismissed the charges because they were unable to find several important pieces of evidence that defendant sought to have tested.⁸⁶

In 2006 and 2007, two bills were introduced in the Missouri House of Representatives that would have required all DNA evidence collected during an investigation to be preserved for as long as the defendant remained incarcerated.⁸⁷ Furthermore, the proposed legislation would have required an automatic stay of execution for death row inmates whose requests for DNA testing were granted but the testing was not accomplished because "the DNA evidence was lost, destroyed, or damaged."⁸⁸ Both bills were defeated in committee.⁸⁹

Conclusion

Missouri is not in compliance with Recommendation #1. Missouri only requires the preservation of biological evidence that was collected in connection with the investigation of an offense, that led to a conviction, and that can be tested for DNA. The state does not require the preservation of all biological evidence for as long as the defendant remains incarcerated.

The Missouri Assessment Team notes that the proper preservation of biological evidence not only protects the innocent from wrongful conviction but also serves as an important law enforcement tool for identifying the guilty. Therefore, the Team recommends that Missouri enact a statute that requires all biological evidence be preserved and properly stored for as long as the defendant remains incarcerated.

⁸² See section 650.056, RSMo 2001.

⁸³ *Current Inmates*, MO. DEATH ROW, <http://missourideathrow.com/current-inmates/> (last visited Jan. 4, 2011).

⁸⁴ *State v. Dexter*, 954 S.W.2d 332, 334 (Mo. banc 1997).

⁸⁵ *Id.* (holding that the prosecutor's comments on the defendant's post-*Miranda* silence violated his Fifth Amendment right against self-incrimination).

⁸⁶ Benita Y. Williams, *Lost Evidence a Ticket to Freedom for Husband Accused of Murder*, KAN. CITY STAR, June 8, 1999, at A1.

⁸⁷ H.B. 1519, 93rd Gen. Assemb., 2nd Reg. Sess. (Mo. 2006); H.B. 584, 94th Gen. Assemb., 1st Reg. Sess. (Mo. 2007).

⁸⁸ Mo. H.B. 1519; Mo. H.B. 584.

⁸⁹ See *House Bill 1519*, MO. HOUSE OF REPRESENTATIVES, <http://www.house.mo.gov/content.aspx?info=/bills061/bills/HB1519.htm> (last visited Jan. 4, 2011); *House Bill 584*, MO. HOUSE OF REPRESENTATIVES, <http://www.house.mo.gov/content.aspx?info=/bills091/bills/HB589.htm> (last visited Jan. 4, 2011).

B. Recommendation #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. Jurisdictions should provide access to post-conviction DNA testing to comport, at a minimum, with the standards and procedures set forth in the *American Bar Association Criminal Justice Standards on DNA Evidence, Standard 6.1, Post-conviction Testing* (reproduced below, in relevant part, with slight modifications).

1. Availability of Post-conviction DNA Testing

- a. A person who has been convicted of a serious crime, including a person convicted based on a guilty plea, should be permitted to have DNA evidence in the possession of the prosecution or one of its agents tested or retested after conviction if:
 - i. the testing requested was not available at the time of trial, there is credible evidence that prior test results or interpretation were unreliable, or the interests of justice require testing or retesting; and
 - ii. the results of testing or retesting could create a reasonable probability that the person is innocent of the offense, did not have the culpability necessary to subject the person to the death penalty, or did not engage in aggravating conduct that caused a mandatory sentence or sentence enhancement.

2. Procedure for Post-conviction DNA Testing

- a. When a person files an application for testing or retesting, the prosecution should be notified and, if the person is indigent and does not have counsel, counsel should be appointed.
- b. The application should be denied unless the person, after consultation with counsel, files a sworn statement declaring that he or she is innocent of the crime, did not have the culpability necessary to be subjected to the death penalty, or did not engage in the aggravating conduct that caused a mandatory sentence or sentence enhancement.
- c. If the person files the statement, a hearing should be held to determine whether the person has met the requirements of Section (1)(a) the request for testing or retesting should be granted.
- d. After the results of any testing are reported to the parties, an applicant should be permitted to seek a second hearing to determine what relief, if any, is appropriate.
- e. An applicant should have the right to appeal or seek leave to appeal any adverse decision made pursuant to this standard.

Missouri provides two potential opportunities for individuals to obtain DNA testing of biological evidence in their cases: (1) defendants may obtain physical evidence for DNA testing during pretrial discovery; and (2) inmates may seek post-conviction DNA testing.

DNA Testing During Pretrial Discovery

Missouri law provides that the prosecution must provide the defendant with any physical material that “the state intends to introduce into evidence at the hearing or trial or which were obtained from or belong to the defendant”⁹⁰ and any material that “tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce punishment.”⁹¹

If the defendant seeks access to evidence within the control of the prosecution that is not otherwise discoverable, the defendant may petition the court to order the prosecution to disclose the additional evidence.⁹² The court must grant the defendant’s motion if it “finds the request to be reasonable.”⁹³

DNA Testing During Post-conviction Review

Missouri, pursuant to section 547.035, authorizes a “person in the custody of the department of corrections claiming that forensic DNA testing will demonstrate that person’s innocence” to move the court for post-conviction DNA testing.⁹⁴ Section 547.035 does not distinguish between inmates who were convicted after a trial and those who pleaded guilty.⁹⁵ The Supreme Court of Missouri held that a plain reading of section 547.035 demonstrates the legislature’s intent for the statute to apply to all inmates regardless of whether s/he was convicted after a guilty plea or a trial.⁹⁶

Limits on Post-conviction DNA Testing

Evidence Must Be Secured in Relation to the Charged Offense

In addition to showing that testable DNA evidence exists, the inmate must further show that the sought DNA evidence was secured in relation to the offense for which the inmate was convicted.⁹⁷ As such, the only evidence that a defendant may seek to have tested must have been secured at the time of the investigation and as part of the investigation into the charged offense.⁹⁸ Inmates may not seek testing of newly-discovered evidence or evidence that could be used as a comparator.⁹⁹

For example, in a motion for post-conviction DNA testing, an inmate sought to compare the DNA profile on a piece of evidence collected at the scene of the crime for which he was

⁹⁰ Rule 25.03(A)(6).

⁹¹ Rule 25.03(A)(9).

⁹² Rule 25.04.

⁹³ *Id.*

⁹⁴ Section 547.035.1, RSMo 2011.

⁹⁵ *Id.* See also *Weeks v. State*, 140 S.W.3d 39, 45 (Mo. banc 2004).

⁹⁶ *Weeks*, 140 S.W.3d at 45–46.

⁹⁷ Section 547.035.2(2), RSMo 2011.

⁹⁸ *Hudson v. State*, 190 S.W.3d 434, 440–41 (Mo. App. 2006).

⁹⁹ *Id.* at 440–41 (interpreting section 547.035.2(2), RSMo 2011).

convicted with the DNA profile of another person charged with a similar offense to prove that a different person committed the offense.¹⁰⁰ The Missouri Court of Appeals held that

the legislature did not intend for the statute to apply to *new evidence* that might tend to show the defendant's innocence, requiring a new trial. Rather . . . the legislature did not want an innocent person to be convicted on evidence that would have rendered a different result if only it had been DNA tested.¹⁰¹

This statutory provision places an unnecessary limitation on an inmate's ability to seek DNA testing and increases the risk of executing a person who could demonstrate his/her innocence through DNA testing.

Availability of Testing at the Time of Trial

Section 547.035 requires the movant to prove that the "evidence was not previously tested by the movant because" (1) the technology for the testing was not reasonably available to the movant at trial; (2) neither the movant nor his/her trial counsel were aware that the evidence existed at trial; or (3) the evidence was otherwise unavailable to the movant or his/her trial counsel at trial.¹⁰²

Missouri courts first acknowledged DNA evidence in 1991.¹⁰³ However, the Supreme Court of Missouri held that an inmate tried after DNA testing technology was generally available may still be able to prove that the technology was not reasonably available at the time of trial.¹⁰⁴ The Court held that the standard for determining whether the DNA technology was reasonably available is a subjective test based upon the facts particular to the movant and that it is "not a question of objective scientific feasibility."¹⁰⁵

However, Missouri appears to limit an inmate's ability to seek subsequent DNA testing when new and advanced DNA testing technologies become available or when there is credible evidence that prior test results or interpretations were unreliable.¹⁰⁶ The Missouri Court of Appeals refused to allow a death row inmate to retest evidence when a new DNA testing

¹⁰⁰ See *Hudson*, 190 S.W.3d at 434. The appellant sought DNA testing of a cigarette butt found at the crime scene in order to compare the profile with one collected in relation to a separate offense committed three years later. *Id.* at 437–39. The appellant alleged that the comparison of the two DNA profiles would prove a different person committed the offense in his case. *Id.*

¹⁰¹ *Id.* at 441 (emphasis added).

¹⁰² Section 547.035.2(3), RSMo 2011.

¹⁰³ The first case that accepted DNA testing technology in Missouri was *State v. Davis*, 814 S.W.2d 593 (Mo. banc 1991).

¹⁰⁴ *Weeks v. State*, 140 S.W.3d 39, 48 (Mo. banc 2004).

¹⁰⁵ *Id.* ("The legislature did not choose to severely restrict the impact of the statute, or to set a specific limiting date.").

¹⁰⁶ See *State v. Kinder*, 122 S.W.3d 624, 632 (Mo. App. 2003) ("We perceive no legislative intent to allow serial retesting of evidence due to a change in DNA technology."); *but cf.* *Belcher v. State*, 299 S.W.3d 294, 297 (Mo. banc 2004). In *Belcher*, the Supreme Court of Missouri held that section 547.035 has no time limits. *Id.* at 297. To support this point, the Court stated in dicta that the statute "contemplates technological developments that will permit later testing." *Id.* However, the Supreme Court of Missouri has not overruled *Kinder*. Furthermore, we have found no case in the Supreme Court of Missouri or the Missouri Court of Appeals that have allowed the retesting of evidence using more advanced DNA testing techniques.

technique replaced an older, less reliable testing technique.¹⁰⁷ The court held that although the Restriction Fragment Length Polymorphism testing at the time of the movant’s trial may have produced a “questionable outcome,” the movant was not entitled to test the evidence with the more accurate Polymerase Chain Reaction testing technique.¹⁰⁸ The court interpreted section 547.035 to require the movant to show that s/he “did not test the evidence because scientifically reliable DNA testing technology was unavailable, not merely because a specific method of testing was unavailable.”¹⁰⁹ The court further explained that the legislature attempted to balance “the need for finality of a conviction” with the “real concern that DNA testing could produce exonerating results.”¹¹⁰ In contrast, the Innocence Project’s model statute for post-conviction DNA testing allows testing of previously tested evidence if the evidence “can be subjected to additional DNA testing that provides a reasonable likelihood of more probative results.”¹¹¹ Similarly, several states—including Kansas, Nebraska, Texas, and Wyoming—have enacted DNA testing statutes that specifically allow testing of previously-tested evidence when new technology could provide a reasonable probability of more accurate or probative results.¹¹²

Reasonable Probability That the Inmate Would Not Have Been Convicted

Section 547.035 does not permit testing to prove that the inmate did not have the culpability necessary to subject him/her to the death penalty, for example, by not engaging in aggravating conduct. An inmate may request testing only to show “a reasonable probability exists that [s/he] would not have been convicted if the exculpatory results had been obtained through the requested DNA testing.”¹¹³ Unlike the *ABA Criminal Justice Standards on DNA Evidence*, the Innocence Project’s Model Statute for Obtaining Post Conviction DNA Testing, or the statutes of several states, the Missouri statute does not allow defendants to request DNA testing and analysis to show that there is a reasonable probability that the defendant would not have been sentenced to death if testing and analysis produced favorable results.¹¹⁴

¹⁰⁷ *Kinder*, 122 S.W.3d at 626, 634.

¹⁰⁸ *Id.* at 631–32.

¹⁰⁹ *Id.* at 632 (interpreting section 547.035.2(3), RSMo 2001).

¹¹⁰ *Id.*

¹¹¹ MODEL STATUTE CONCERNING ACCESS TO POST-CONVICTION DNA TESTING § 5(C)(2) (Innocence Project 2010), available at http://www.innocenceproject.org/docs/2010/Access_to_Post-conviction_DNA_Testing_%20Model_Bill_2010.pdf; see also MISS. CODE § 99-39-9 (2011) (adopting the same language for post-conviction DNA testing in Mississippi).

¹¹² See KAN. STAT. § 21-2512(a)(3) (2011) (stating that evidence previously tested “can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results”); NEB. REV. STAT. § 29-4120(1)(c) (2011) (stating that previously tested evidence “can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results”); TEX. CODE CRIM. PROC. art. 64.01(b)(2) (2011) (stating that previously-tested evidence “can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test”); WYO. STAT. § 7-12-303(c)(viii) (2011) (providing that previously tested evidence can be retested if the result of the original testing was inconclusive, the new testing may resolve an issue not resolved by the prior testing, or the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice).

¹¹³ Section 547.035.2(5), RSMo 2011.

¹¹⁴ MODEL STATUTE CONCERNING ACCESS TO POST-CONVICTION DNA TESTING § 5(A) (Innocence Project 2010), available at http://www.innocenceproject.org/docs/2010/Access_to_Post-conviction_DNA_Testing_%20Model_Bill_2010.pdf; MISS. CODE § 99-39-9(1)(d) (2011) (allowing testing to move for a “lesser sentence”); KAN. STAT. § 21-2512(c) (2011) (allowing testing if the inmate can show s/he was “wrongly convicted or sentenced”); NEB. REV.

Identity at Issue at Time of Trial

In addition to showing that s/he would not have been convicted if testing produced exculpatory results, the inmate must also show that “[i]dentity was an issue in the trial.”¹¹⁵ The Supreme Court of Missouri has interpreted this provision to apply only to cases where “the defendant claims that he did not commit the acts alleged.”¹¹⁶ Conversely, inmates are not entitled to testing if “the defendant admits his actions but puts forth an affirmative defense.”¹¹⁷ The Court has found that it may be more difficult for an inmate to meet this standard if s/he pleaded guilty; however, the inmate is entitled to present facts that demonstrate that identity was at issue prior to entering the guilty plea.¹¹⁸ This is an especially important provision as 25% of the DNA exonerations nationwide involved false confessions,¹¹⁹ some of which resulted in guilty pleas.¹²⁰

Pleading Requirements and Hearings

Section 547.035 requires movants to comply with stringent pleading requirements to successfully file for and obtain a hearing on a motion requesting post-conviction DNA testing.¹²¹ The inmate must file a motion in the sentencing court alleging facts under oath that demonstrate each statutory requirement.¹²² Upon receipt of the motion, the clerk of the sentencing court will deliver a copy of the motion to the prosecution.¹²³ Unless the court finds that the motion is facially insufficient or that files and records of the case conclusively show that the inmate is not entitled to testing, the court will order the prosecution to show cause why the motion should not be granted.¹²⁴ Once the prosecution responds to the show-cause order, the court will review the motion, prosecution response, transcripts, files, and record.¹²⁵ If the court finds that the movant is conclusively not entitled to relief, the motion will be denied.¹²⁶ Otherwise, the court must order a hearing on the motion.¹²⁷ Once a hearing is granted, indigent inmates will be appointed

STAT. § 29-4120(5) (same); WYO. STAT. § 7-12-303(c)(i) (2008) (allowing testing if the result is reasonably likely to diminish a “sentencing enhancement” or an “aggravating factor in a capital case”).

¹¹⁵ Section 547.035.2(4), RSMo 2011.

¹¹⁶ State v. Ruff, 256 S.W.3d 55, 57 (Mo. banc 2008).

¹¹⁷ *Id.*

¹¹⁸ Weeks v. State, 140 S.W.3d 39, 47–49 (Mo. banc 2004).

¹¹⁹ *False Confessions & Recording of Custodial Interrogations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/False_Confessions__Recording_Of_Custodial_Interrogations.php (last visited Jan. 4, 2012).

¹²⁰ See, e.g., *Johnny Lee Wilson*, THE MIDWESTERN INNOCENCE PROJECT, <http://www.innocenceprojectmidwest.org/index.php/johnny-lee-wilson> (last visited Jan. 4, 2012). Wilson, a Missouri exoneree, confessed to murder and entered an *Alford* plea, which he later withdrew. *Id.* Seven years after being convicted of the murder, Wilson was exonerated and pardoned by the Governor. *Id.*

¹²¹ See section 547.035, RSMo 2011.

¹²² Section 547.035.2, RSMo 2011.

¹²³ Section 547.035.3, RSMo 2011.

¹²⁴ Section 547.035.4, RSMo 2011.

¹²⁵ Section 547.035.5–.6, RSMo 2011.

¹²⁶ Section 547.035.6, RSMo 2011.

¹²⁷ *Id.*

counsel.¹²⁸ Any appointment of counsel prior to the court granting a hearing will be deemed premature.¹²⁹

A hearing on the motion will be conducted on the record; however the inmate need not be present.¹³⁰ At the hearing, both parties may introduce evidence supporting or refuting the allegations in the motion.¹³¹ To succeed on the motion, the movant must prove every statutory element by a preponderance of the evidence.¹³²

Whether or not a hearing was held, the court must issue “findings of fact and conclusions of law.”¹³³ These findings and conclusions, at minimum, “must allow meaningful appellate review.”¹³⁴

Motion for Release and Restitution

If DNA testing was conducted pursuant to section 547.035, and the results demonstrate the inmate’s innocence, the inmate may file a motion for release.¹³⁵ If the prosecution consents to the motion, the inmate is released from custody.¹³⁶ If, however, the prosecution contests the motion, the court must conduct a release hearing.¹³⁷ If the inmate is indigent, s/he will be appointed counsel for the release hearing.¹³⁸ The movant must prove by a preponderance of evidence that the results of the DNA testing prove that s/he is innocent of the offense.¹³⁹ Regardless of whether the motion is granted or denied, the court is required to issue “findings of fact and conclusions of law.”¹⁴⁰

Appeal from a Denial of a Motion for Post-conviction Testing

Upon denial of either a motion for DNA testing pursuant to section 547.035 or a motion for release pursuant to section 547.037, the inmate may appeal the decision to the Missouri Court of Appeals.¹⁴¹ The appellate court will review whether the lower court’s findings of fact and

¹²⁸ *Id.*

¹²⁹ Snowdell v. State, 90 S.W.3d 512, 514 (Mo. App. 2002).

¹³⁰ Section 547.035.6, RSMo 2011.

¹³¹ *Id.*

¹³² *Id.*; State v. Waters, 221 S.W.3d 416, 418 (Mo. App. 2006).

¹³³ Section 547.035.8, RSMo 2011.

¹³⁴ Clayton v. State, 164 S.W.3d 111, 112 (Mo. App. 2005).

¹³⁵ Section 547.037.1, RSMo 2011.

¹³⁶ Section 547.037.3, RSMo 2011.

¹³⁷ Section 547.037.4, RSMo 2011.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Section 547.037.6, RSMo 2011. If the inmate can prove actual innocence, s/he may also file a petition for habeas corpus review with the Supreme Court of Missouri. See, e.g., State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. banc 2003) (“This Court, sitting as an original habeas court, determines based on this record that under these rare circumstances, there is clear and convincing evidence of Amrine’s innocence. As such, confidence in his conviction and sentence are so undermined that they cannot stand and must be set aside.”). *Id.* at 548–49. For a discussion of Missouri habeas corpus, see Chapter Eight on State Post-conviction Proceedings.

¹⁴¹ Weeks v. State, 140 S.W.3d 39, 43–44 (Mo. banc 2004) (“Although section 547.035 does not specifically set out a standard of review, it provides that a motion for DNA testing is a post-conviction motion, governed by the rules of civil procedure, as applicable.”); Snowdell v. State, 90 S.W.3d 512, 513–14 (Mo. App. 2002) (“Section

conclusions of law were clearly erroneous.¹⁴² There are no bars in Missouri to successive or secondary petitions for post-conviction DNA testing.¹⁴³

Conclusion

Missouri is in partial compliance with Recommendation #2. The Missouri Death Penalty Assessment Team commends the State of Missouri for providing an avenue for post-conviction DNA testing that is free of any time restrictions. However, in order to receive review on the merits of the motion for DNA testing, movants must comply with stringent pleading requirements and must do so without legal counsel. Furthermore, Missouri has placed several limitations on who may seek DNA testing and what evidence may be tested. These limitations increase the chances that an innocent individual will be executed.

The Assessment Team recommends that Missouri amend section 537.035 to allow an inmate to obtain DNA testing of any evidence that may prove that s/he is innocent or lacked the culpability necessary to subject him/her to the death penalty, such as by disproving an aggravating factor.

Recommendation #2 provides a model DNA testing statute. This statute is similar to the DNA testing statutes in several other states. The current Missouri DNA testing statute lacks several of the important protections that are included in the model statute. Therefore, the Assessment Team recommends that the state adopt a DNA testing statute similar to the model statute included in this Recommendation. Specifically, the state should ensure that the DNA testing statute allows inmates to test or retest evidence if the testing requested was not available at the time of trial or prior test results were unreliable. Furthermore, the statute should ensure testing be afforded to an inmate who is able to show that a reasonable probability exists that s/he is innocent of the offense or did not engage in aggravating conduct that caused the sentence of death.

C. Recommendation #3

Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.

The Commission on the Accreditation of Law Enforcement Agencies (CALEA) requires accredited law enforcement agencies to adopt a written directive establishing procedures to be used in criminal investigations, including procedures regarding collecting, preserving, processing, and avoiding contamination of physical evidence.¹⁴⁴ Twenty-three Missouri law enforcement agencies have been accredited or are in the process of obtaining accreditation by

547.035.1 states that the rules of civil procedure govern these proceedings. Therefore, we will apply the same civil standards as in other post-conviction proceedings to this appeal.”). *See also* Rules 29.15, 24.035. Although the Supreme Court of Missouri has exclusive jurisdiction over direct appeals and original post-conviction motions in death penalty cases, the appellate courts have jurisdiction over section 547.035 and section 547.037 appeals because the punishment of death has already been imposed and the motion for DNA testing is an “independent action.” *State v. Kinder*, 122 S.W.3d 624, 628–29 (Mo. App. 2003).

¹⁴² *Weeks*, 140 S.W.3d at 44 (citing *State v. Brown*, 998 S.W.2d 531, 550 (Mo. banc 1999)).

¹⁴³ *Belcher v. State*, 299 S.W.3d 294, 297 (Mo. banc 2009) (“While Rules 24.035 and 29.15 have unyielding time restrictions and prohibit successive motions, section 547.035 has neither.”).

¹⁴⁴ CALEA STANDARDS, *supra* note 17, at 42.2.1, 83.2.1.

CALEA.¹⁴⁵ All Missouri accredited law enforcement agencies should have a written directive establishing procedures governing the preservation of biological evidence. However, there are approximately five-hundred law enforcement agencies in Missouri which are not accredited or in the process of obtaining accreditation through CALEA, and as such, are not required to establish written directives for the preservation of biological evidence.

Additionally, all Missouri law enforcement crime laboratories are accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).¹⁴⁶ As a prerequisite to ASCLD/LAB accreditation, laboratories are required to adopt specific procedures relating to the preservation of evidence.¹⁴⁷

In light of these accreditation requirements, MSHP-FL has established a *Quality Management System Manual*, a *DNA Section Training Manual*, and a *Forensic Evidence Handbook*.¹⁴⁸ The *Quality Management System Manual* contains standard operating procedures regarding quality control, the proper storage and security of physical evidence, methods to ensure the avoidance of contamination of physical evidence during testing, the proper procedures to ensure the chain of custody, and training and qualification standards for laboratory staff.¹⁴⁹ The *DNA Section Training Manual* includes specific procedures and techniques for DNA testing.¹⁵⁰ The *Forensic Evidence Handbook*, which is disseminated to all law enforcement agencies, explains specific collection and preservation techniques.¹⁵¹

The St. Charles Criminalistics Laboratory also has written procedures for the preservation of evidence during the testing process.¹⁵² While we were unable to determine the contents of the written procedures for Missouri's other crime laboratories and law enforcement agencies, it is assumed that all CALEA and ASCLD/LAB accredited agencies have written procedures for the preservation and collection of biological evidence. We were unable to confirm the existence of specific policies and procedures in non-accredited law enforcement agencies.

Conclusion

Missouri is in partial compliance with Recommendation #3. The Missouri Death Penalty Assessment Team applauds MSHP-FL for its attempts to educate local law enforcement agencies on the proper collection and preservation of biological evidence. Furthermore, the Assessment

¹⁴⁵ CALEA Client Database, CALEA, <http://www.calea.org/content/calea-client-database> (last visited Dec. 28, 2011) (using second search function and designating "US" and "MO" as search criteria to determine the number of agencies that have earned or are in the process of earning accreditation from CALEA's Law Enforcement Accreditation Program).

¹⁴⁶ See ASCLD/LAB Accredited Laboratories, AM. SOC'Y OF CRIME LAB. DIRECTORS/LAB. ACCREDITATION BD., <http://www.asclcd-lab.org/accreditedlabs.html#mo> (last visited Dec. 28, 2011).

¹⁴⁷ ASCLD/LAB-LEGACY 2008 MANUAL, *supra* note 21 at 24–25.

¹⁴⁸ MO. STATE HIGHWAY PATROL FORENSIC LAB., QUALITY MGMT. SYSTEMS MANUAL (2010) (on file with author) [hereinafter QUALITY MGMT. SYSTEMS MANUAL]; DNA SECTION TRAINING MANUAL, *supra* note 51; MSHP FORENSIC HANDBOOK, *supra* note 10.

¹⁴⁹ QUALITY MGMT. SYSTEMS MANUAL, *supra* note 148.

¹⁵⁰ DNA SECTION TRAINING MANUAL, *supra* note 51.

¹⁵¹ MSHP FORENSIC HANDBOOK, *supra* note 10.

¹⁵² Telephone Interview by Rachel Bays with Brian Hampton, Dir., St. Charles Cnty. Sheriff's Dep't Crime Lab. (Nov. 2, 2010) (on file with author).

Team commends the twenty-three law enforcement agencies that have obtained or are in the process of obtaining CALEA accreditation.

However, law enforcement accreditation is voluntary and only MSHP-FL is required to follow its collection and preservation protocols. Missouri does not ensure that law enforcement agencies have proper procedures in place for preserving biological evidence. Statewide preservation requirements are particularly important in light of section 650.056, which vests the preservation responsibilities with each investigating law enforcement agency.

The Missouri Assessment Team recommends every law enforcement agency adopt written procedures governing the preservation of biological evidence. The Assessment Team further notes that statewide uniform procedures for the preservation of biological evidence would ensure that the best preservation procedures are followed by each law enforcement agency.

D. Recommendation #4

Provide adequate funding to ensure the proper preservation and testing of biological evidence.

Missouri's 523 law enforcement agencies are responsible for the preservation of biological evidence.¹⁵³ Each of Missouri's law enforcement agencies are funded by their local counties, except MSHP, which is primarily funded through General Assembly appropriations.¹⁵⁴ We were unable to determine each law enforcement agency's allocation of funding for the preservation of evidence. A discussion of law enforcement funding is found in Chapter Three on Law Enforcement Identifications and Interrogations.

The testing of biological evidence is, generally, conducted by one of Missouri's six law enforcement crime laboratories. The law enforcement crime laboratories are primarily funded by state or county appropriations, state grant funds, or federally funded competitive grant awards. A general discussion of crime laboratory funding is found in Chapter Four on Crime Laboratories and Medical Examiner Offices.

Missouri crime laboratories have received numerous federal grants specifically awarded for DNA testing. Under the Paul Coverdell Forensic Science Improvements Grants Program (Coverdell Program), Missouri crime laboratories have received funding to "improve the quality, timeliness, and credibility of forensic science services for criminal justice purposes."¹⁵⁵ From 2005 to 2009, Missouri law enforcement entities received \$1,895,586 from the Coverdell Program.¹⁵⁶ The National Institute of Justice's Forensic DNA Backlog Reduction Program

¹⁵³ Section 650.056, RSMo 2011.

¹⁵⁴ For a description of MSHP-FL funding, see Chapter Four on Crime Laboratories and Medical Examiner Offices.

¹⁵⁵ *Coverdell Forensic Science Improvement Grants Program*, NAT'L INST. OF JUSTICE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/welcome.htm> (last visited Jan. 5, 2012).

¹⁵⁶ *Fiscal Year 2009 Coverdell Report to Congress: Funding Table*, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, available at <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2009-funding-table.xls>; *Fiscal Year 2008 Coverdell Report to Congress: Funding Table*, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, available at <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2008->

(Backlog Reduction Program) has also awarded Missouri crime laboratories substantial funding in order “to reduce forensic DNA sample turnaround time, increase the throughput of public DNA laboratories and reduce DNA forensic casework backlogs.”¹⁵⁷ From 2004 to 2010, Missouri crime laboratories received \$8,481,284 from the Backlog Reduction Program.¹⁵⁸

Even with this funding, Missouri crime laboratories are burdened with increasing caseloads, creating significant backlogs in some laboratories. For example, as of August 2010, the Kansas City Crime Laboratory had a backlog of 332 cases, with an average turnaround time of seven months.¹⁵⁹ Additionally, MSHP-FL had 497 rape kits waiting to be tested in 2009.¹⁶⁰

Apart from the backlog, Missouri crime laboratories do not have the funding necessary to provide the most advanced testing techniques. While the MSHP-FL provides a wide range of DNA testing services, no law enforcement crime laboratory in Missouri provides mitochondrial DNA (mtDNA) testing.¹⁶¹ The mtDNA testing method can be used on biological samples that were either too degraded or too small to be analyzed using older testing methods.¹⁶² Accordingly, mtDNA testing is particularly helpful for hair sample analysis or evidence that was not properly preserved.¹⁶³ MSHP-FL will assist law enforcement agencies in securing mtDNA testing through the Federal Bureau of Investigation Crime Laboratory or a private crime laboratory.¹⁶⁴ However, in 2009 the MSHP-FL Technical Director explained that, in order to provide mtDNA testing, MSHP-FL would “almost have to build a brand-new lab.”¹⁶⁵

Conclusion

We do not have sufficient information to determine whether Missouri is in compliance with Recommendation #4. Because Missouri does not have a central repository for evidence, and because Missouri has 523 different law enforcement agencies, each with its own budget, we are unable to determine whether Missouri provides adequate funding to ensure the preservation and testing of biological evidence.

funding-table.xls; *Fiscal Year 2007 Coverdell Report to Congress: Funding Table*, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, available at <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2007-funding-table.xls>; *Fiscal Year 2006 Coverdell Report to Congress: Funding Table*, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, available at <http://www.nij.gov/nij/topics/forensics/lab-operations/capacity/nfsia/fy06-coverdell-funding.xls>; *Fiscal Year 2005 Coverdell Report to Congress: Funding Table*, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, available at <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2005-funding-table.xls>.

¹⁵⁷ See *Backlog Reduction Funding Awards, 2004–2010*, DNA INITIATIVE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/backlog-reduction-funding.htm> (last visited Jan. 5, 2011).

¹⁵⁸ *Id.*

¹⁵⁹ Michele Rooney, *Crime Lab Backlog Hurting Investigations*, KMBC-TV (Aug. 6, 2010), available at <http://www.kmbc.com/video/24544610/detail.html>.

¹⁶⁰ Laura Strickler, *Thousands of Rape Kits Wait to Be Tested*, CBS NEWS (Nov. 10, 2009), available at http://www.cbsnews.com/stories/2009/11/10/cbsnews_investigates/main5605770.shtml?source=related_story.

¹⁶¹ Wiese, *supra* note 68.

¹⁶² NAS REPORT 2009, *supra* note 1, at 130–31.

¹⁶³ *Id.*

¹⁶⁴ *Crime Lab FAQs*, MO. STATE HIGHWAY PATROL, <http://www.msHP.dps.mo.gov/MSHPWeb/PatrolDivisions/CLD/faqs.html> (last visited Jan. 3, 2012).

¹⁶⁵ Wiese, *supra* note 68.

The Missouri Death Penalty Assessment Team recommends, however, that Missouri provide additional funding to the MSHP-FL in order to expand its services to include mtDNA testing, which is one of the more recent advancements in DNA testing. Access to mtDNA testing would allow law enforcement, prosecutors, and defense attorneys to test and analyze previously untestable samples, thereby leading to more accurate arrests and convictions.

CHAPTER THREE

LAW ENFORCEMENT IDENTIFICATIONS AND INTERROGATIONS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Among individuals proved innocent through DNA testing, eyewitness misidentification and false confessions have been two of the leading causes of wrongful convictions. From 1989 through 2003, approximately 205 previously convicted “murderers” were exonerated nationwide.¹ In about 50% of these cases, there was at least one eyewitness misidentification, and 20% involved false confessions.²

When a person is wrongfully convicted of murder, the injustice is twofold: an innocent person is incarcerated and possibly sentenced to death, and a guilty criminal remains free.³ For these reasons, the American Bar Association recommends a number of law enforcement practices to improve the accuracy of eyewitness identification and custodial interrogation procedures.

Lineups and Showups

Studies have shown that the manner in which lineups and showups are conducted affects the accuracy of eyewitness identification.⁴ To decrease the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, the American Bar Association promulgated best practices for promoting the accuracy of eyewitness identification.⁵ To avoid misidentification, the lineup or photospread should include foils—participants in the lineup or photospread other than the suspect—chosen for their similarity to the eyewitness’s description.⁶ Moreover, the administering officer should be unaware of the suspect’s identity and should tell the eyewitness that the perpetrator may not be in the lineup. Caution in administering lineups and showups is especially important because flaws may easily taint later lineup and at-trial identifications.⁷

¹ See Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 529 (2005).

² *Id.* at 544.

³ See, e.g., Richard E. Meyer, *A Tragic Conviction: How Justice System Can Go Wrong*, L.A. TIMES, Mar. 17, 1985, at 1 (detailing the case of Melvin Lee Reynolds, who falsely confessed to the murder of a child in Missouri and was sentenced to life in prison, allowing the actual perpetrator, serial killer Charles Ray Hatcher, to remain free and murder another victim).

⁴ See, e.g., Steven Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?*, 18 CRIM. JUST. 36, 37 (Spring 2003).

⁵ ABA, BEST PRACTICES FOR PROMOTING THE ACCURACY OF EYEWITNESS IDENTIFICATION PROCEDURES, 2004 Ann. Mtg. (adopted Aug. 9–10, 2004), available at http://www.americanbar.org/content/dam/aba/migrated/moratorium/policy/2000s/2004_AM_111E.authcheckdam.pdf.

⁶ See C.A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification and the Selection of Distractors for Lineups*, 15 LAW & HUM. BEHAV. 43 (1991).

⁷ See BRIAN L. CUTLER, EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT’S WITNESSES 13–17, 42–44 (2002).

Law enforcement agencies should consider using a sequential lineup or photospread, rather than presenting everyone to the eyewitness simultaneously.⁸ In the sequential approach, the eyewitness views one person at a time and is not told how many persons s/he will see.⁹ As each person is presented the eyewitness states whether or not the person is the perpetrator.¹⁰ Once an identification is made in a sequential procedure, the procedure stops.¹¹ The eyewitness thus is encouraged to compare the features of each person viewed with the eyewitness's recollection of the actual perpetrator rather than comparing the faces of the various people in the lineup or photospread to one another in a quest for the "best match."

Law enforcement agencies also should videotape or digitally record identification procedures, including the eyewitness's statement regarding his/her degree of confidence in the identification. In the absence of a videotape or digital recorder, law enforcement agencies should photograph and prepare a detailed report of the identification procedure.

Custodial Interrogations

Of the 205 murder exonerations, forty-one of the exonerees gave false confessions, some of which were the product of police coercion.¹² Other reported reasons for false confessions include duress, deception, fear of physical harm, ignorance of the law, and lengthy interrogations.¹³ Researchers also have found a correlation between a suspect's age and mental health and the probability of a false confession.¹⁴

Electronically recording interrogations from their outset—not just from the point at which the suspect has agreed to confess—can help avoid erroneous convictions. Complete recording is increasing in the United States and around the world. Law enforcement agencies that make complete recordings have found the practice beneficial to law enforcement.¹⁵ Complete recording may avert controversies about what occurred during an interrogation, deter law enforcement officers from using dangerous and/or prohibited interrogation tactics, and provide courts with the ability to review the interrogation and the confession.

Officer Training

Initial training of law enforcement is likely to become dated rapidly, particularly due to advances in scientific and technical knowledge about effective and accurate law enforcement techniques.

⁸ *Id.* at 39.

⁹ *See id.* at 39.

¹⁰ *Id.*

¹¹ *Id.*

¹² *See Gross, supra* note 1, at 544, 544 n.47 ("In over half the false confessions [] coercion is apparent from the record we have . . .").

¹³ *Id.* at 544–45. *See also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 963–74 (2004).

¹⁴ *See Gross, supra* note 1, at 545.

¹⁵ *See* Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1127 (2005) ("In the past few years, the many benefits of complete audio or video recording of custodial interviews have become increasingly apparent to all parties.").

It is crucial, therefore, that officers receive ongoing, in-service training that includes review of previous training and instruction in new procedures and methods.

Even the best training and the most careful and effective procedures will be useless if the investigative methods reflected in the training or required by agency procedures or state law are unavailable.¹⁶ Appropriate equipment, expert advice, investigative time, and other resources should be reasonably available to law enforcement personnel when law, policy, or sound professional practice calls for them. Thoroughness in criminal investigations should also be enhanced by utilizing the training standards and disciplinary policies and practices of Peace Officer Standards and Training Councils,¹⁷ and through the priorities and practices of other law enforcement oversight groups.¹⁸ Jurisdictions also should provide adequate opportunity for citizens and investigative personnel to report serious allegations of negligence or misconduct by law enforcement officers as well as forensic service providers.

¹⁶ See generally ABA, *Standards on Urban Police Function*, in 1 ABA STANDARDS FOR CRIMINAL JUSTICE, at 1-7.1 to 1-7.11 (2d ed. 1980) (regarding “adequate police resources”).

¹⁷ Peace Officer Standards and Training Councils are state agencies that set standards for law enforcement training and certification and provide assistance to the law enforcement community.

¹⁸ Such organizations include the U.S. Department of Justice, which is empowered to sue police agencies under the Violent Crime Control and Law Enforcement Act of 1994. See 42 U.S.C. § 14141 (2011); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815 (1999). In addition, the Commission on Accreditation for Law Enforcement Agencies, Inc., (CALEA) is an independent peer group that has accredited law enforcement agencies in all fifty states. Similar, state-based organizations exist in many places, as do government-established independent monitoring agencies. See generally CALEA, <http://www.calea.org/> (last visited May 25, 2011). Crime laboratories may be accredited by the American Society of Crime Laboratory Directors–Laboratory Accreditation Board (ASCLD/LAB) or the National Forensic Science Technology Center (NFSTC). See generally ASCLD/LAB, <http://www.asclcd-lab.org> (last visited May 25, 2011); NFSTC, <http://www.nfstc.org/> (last visited May 25, 2011).

I. FACTUAL DISCUSSION: MISSOURI OVERVIEW

The Director of the Missouri Department of Public Safety (Director) and the Peace Officer Standards and Training (POST) Commission are jointly responsible for the management of the Missouri POST Program, which regulates the licensure and training of law enforcement officers in Missouri.¹⁹ The Director and the POST Commission are tasked with establishing rules related to law enforcement officer qualifications, including education and training requirements.²⁰ Additionally, the Director and the POST Commission regulate the standards for Missouri's law enforcement training centers and instructors.²¹ Many of Missouri's law enforcement agencies also have voluntarily obtained accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). Moreover, federal and state law governs pretrial identifications and custodial interrogations conducted by law enforcement officers. Finally, some local law enforcement agencies' policies regulate pretrial identification and custodial interrogation procedures.²²

A. *Missouri Peace Officer Standards and Training Program*

1. POST Law Enforcement Officer Licensure Process

The Missouri POST Program regulations mandate that, to become a licensed, full-time law enforcement officer, candidates must achieve a passing score on the Missouri Peace Officer License Exam (MPOLE) and complete a basic training course.²³ The MPOLE is a 200-question exam composed of multiple choice and true-or-false questions.²⁴ Subject areas tested include criminal investigation and constitutional law.²⁵ A candidate must score at least 70% to pass.²⁶ In addition to these requirements, a licensed officer must be at least twenty-one years of age, be a U.S. citizen, and have obtained a high school diploma or its equivalent.²⁷ Law enforcement officers commissioned on or before August 28, 2001 in political subdivisions "having less than four full-time paid peace officers or a population less than two thousand" are exempt from the licensure process.²⁸

¹⁹ Sections 590.010–590.501, RSMo 2011; *Peace Office Standards and Training*, MO. DEP'T OF PUB. SAFETY, <http://www.dps.mo.gov/dir/programs/post> (last visited Jan. 10, 2012). The POST Commission's eleven-member board consists of ten Missouri law enforcement officers of various ranks as well as one public member. *POST Commission*, MO. DEP'T OF PUB. SAFETY, <http://www.dps.mo.gov/dir/programs/post/commission.asp> (last visited Jan. 10, 2012).

²⁰ Section 590.030, RSMo 2011.

²¹ Section 590.060, RSMo 2011.

²² See *infra* notes 60–74 and accompanying text.

²³ 11 CSR 75-13.020(3).

²⁴ *Missouri Peace Officer License Exam Process*, MO. DEP'T OF PUB. SAFETY, <http://www.dps.mo.gov/dir/programs/post/documents/POST%20License%20Exam%20Recruit%20Handout.pdf> (last visited Jan. 11, 2012).

²⁵ *Id.*

²⁶ 11 CSR 75-13.050(5).

²⁷ 11 CSR 75-13.020(1).

²⁸ Section 590.020.3(4), RSMo 2011. This exemption specifically does "not apply to any commission within a county of the first class having a charter form of government." *Id.* Other types of law enforcement officers exempted from the licensure process are (1) persons without the power of arrest, (2) persons seeking or holding public office, (3) persons commissioned as "park ranger[s] not carrying a firearm," (4) "reserve officer[s] continually holding the same commission since August 15, 1988," and (5) "any person[s] continually holding any commission as a full-time peace officer since December 31, 1978." Section 590.020.3(1)–(6), RSMo 2011.

Missouri regulations require most full-time local law enforcement officers to complete a 480-hour basic training course to obtain a license, while officers in larger cities and counties must complete a 600-hour training course.²⁹ However, if an officer began working in law enforcement in a third-class county before July 1, 2002, that officer need only have completed 120 hours of basic training, assuming that the officer’s county government chose to forego the 480-hour requirement.³⁰ As of January 2011, eighty-nine of Missouri’s 114 counties are third-class counties and, therefore, eligible to use the 120-hour training requirement.³¹

2. POST’s Continuing Education Requirements

POST regulations mandate that all full-time licensed law enforcement officers complete forty-eight hours of continuing law enforcement education (CLEE) every three years.³² Twenty-four of the CLEE hours must be from POST-licensed providers.³³

3. POST-licensed Basic Training Centers

In order to obtain POST licensure as a basic training center, the POST Commission and the Director must approve the applying academy.³⁴ All training centers must meet several minimum requirements. This includes maintenance of lesson plans and class schedules as well as submission to a “programmatic audit by the Director” every three years.³⁵ As of February 2011,

²⁹ 11 CSR 75-13.010(1) (listing peace officer classifications); 11 CSR 75-14.030(1) (listing the minimum number of basic training hours for each peace officer classification). *See also* Section 590.040, RSMo 2011 (“The POST commission shall set the minimum number of hours of basic training for licensure as a peace officer [at] no lower than four hundred seventy and no higher than six hundred . . .”).

³⁰ Section 590.040.1, RSMo 2011. Until recently, Missouri law required considerably less training for local law enforcement officers. From 1979 to 1993, local peace officers in all but Missouri’s largest counties and cities only needed 120 hours of training to become licensed. Section 590.105.1 RSMo, 1989 (amended 1993, repealed 2001) (“In no event [] shall the director require . . . more or less than one hundred twenty hours of such training for any other peace or reserve officer.”). A 1993 amendment to this law established gradually increasing minimum-hour requirements to obtain certification as a peace officer, culminating with a 450-hour requirement “as of August 28, 1996.” Section 590.105.1(3) RSMo, 1994 (repealed 2001). A special provision, however, allowed officers in Missouri’s third-class counties to become licensed under the old 120-hour standard. Section 590.105.4, RSMo, 1994 (repealed 2001). In 1997, twenty-three sheriff’s departments and sixty-four police departments were still using this lesser training standard. Paul A. Campo, *The Need for Reform of Missouri’s Peace Officer Training Requirements: A Historical, Economic and Legal Perspective*, 66 UMKC L. REV. 681, 692 (1998). Moreover, until 2001, an officer in a “political subdivision having a population of less than two thousand persons or which does not have at least four full-time paid peace officers” was entirely exempt from any training or licensing requirements. Section 590.150, RSMo 1989 (repealed 2001). Some leaders of Missouri’s law enforcement community, including a former POST Program Director, were highly critical of the former training requirements. *See* Campo, *supra*, at 690–91 (“POST Program Director Chris Egbert described [the ‘opt-out’ provision by which third-class counties could opt-out of the 450 hour standard and instead choose the 120 hour standard] as ‘ludicrous.’”). While the training requirements have since been changed, grandfathering provisions in the newer statutes ensure that there may still be law enforcement officers in Missouri with little or no training. *See* Sections 590.020.3(4), 590.040.1(4), RSMo 2011.

³¹ *Counties by Classification*, MO. ASS’N OF COUNTIES, http://www.mocounties.com/countyinfo/MAC_CountyClassification2011.pdf (last visited Jan. 11, 2012).

³² 11 CSR 75-15.010(1)–(2).

³³ 11 CSR 75-15.010(5).

³⁴ 11 CSR 75-14.010.

³⁵ 11 CSR 75-14.020(1)(H), (3).

there are eighteen POST-licensed training centers in Missouri.³⁶ POST also establishes the Mandatory Basic Training Curricula for the training centers, which is incorporated by reference into the Missouri Code of State Regulations.³⁷

B. CALEA

CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States.³⁸ Eighteen law enforcement agencies in Missouri have been accredited by CALEA, while another four are in the process of obtaining accreditation.³⁹

To obtain accreditation, a law enforcement agency must complete a comprehensive process that consists of (1) enrolling in the program by completing an Agency Profile Questionnaire; (2) completing a self-assessment to determine whether the law enforcement agency complies with the accreditation standards and, if not, developing a plan for compliance; and (3) participating in an on-site assessment by CALEA.⁴⁰ After these steps have been completed, the Commission will hold a hearing to render a final decision on the agency's accreditation.⁴¹

³⁶ *State Licensed Training Centers*, MO. DEP'T OF PUB. SAFETY, <http://www.dps.mo.gov/dir/programs/post/training.asp> (last visited Jan. 11, 2012). The licensed centers are Central Missouri Police Academy and Institute for Public Safety, Drury University Law Enforcement Academy, Eastern Missouri Law Enforcement Training Academy, Jefferson College Law Enforcement Academy, Kansas City Regional Police Academy, Law Enforcement Training Institute at the University of Missouri, Metropolitan Community College Blue River Police Academy, Mineral Area College Law Enforcement Academy, Missouri Department of Conservation Training Academy, Missouri Sheriffs' Association Training Academy, Missouri Southern State University Law Enforcement Academy, Missouri State Highway Patrol Law Enforcement Academy, Missouri Western State University Regional Law Enforcement Academy, Moberly Area Community College Law Enforcement Training Center, Southeast Missouri State University Law Enforcement Training Academy, Springfield Police Department Academy, St. Louis County and Municipal Police Academy, and St. Louis Police Academy. *Id.* Additional organizations are licensed to provide continuing education. *Id.*

³⁷ 11 CSR 75-14.030(3).

³⁸ *The Commission*, CALEA, <http://www.calea.org/content/commission> (last visited Jan. 11, 2012) (noting that the Commission was established by the International Association of Chiefs of Police, National Organization of Black Law Enforcement Executives, National Sheriffs' Association, and Police Executive Research Forum).

³⁹ *CALEA Client Database*, CALEA, <http://www.calea.org/content/calea-client-database> (last visited Jan. 13, 2012) (using second search function and designating "US" and "MO" as search criteria to determine the number of agencies that have earned or are in the process of earning accreditation from CALEA's Law Enforcement Accreditation Program). The following law enforcement agencies have been awarded certification by CALEA: Chesterfield Police Department, Clayton Police Department, Florissant Police Department, Gladstone Department of Public Safety, Jackson Police Department, Jefferson County Sheriff's Office, Joplin Police Department, the Kansas City Police Department at the University of Missouri, Lee's Summit Police Department, Missouri State Highway Patrol, Richmond Heights Police Department, Shrewsbury Police Department, Springfield Police Department, St. Louis County Police Department, St. Louis Metropolitan Police Department, the St. Louis Police Department at the University of Missouri, the University of Missouri Police Department in Columbia, and Webster Groves Police Department. *Id.* The following law enforcement agencies are in the process of being accredited by CALEA: Blue Springs Police Department, Creve Coeur Police Department, Maplewood Police Department, and Poplar Bluff Police Department. *Id.*

⁴⁰ *Steps in the Accreditation Process*, CALEA, <http://www.calea.org/content/steps-accreditation-process> (last visited Jan. 11, 2012).

⁴¹ *Id.*

The CALEA standards are used to “certify various functional components within a law enforcement agency—Communications, Court Security, Internal Affairs, Office Administration, Property and Evidence, and Training.”⁴² Specifically, the standards require the creation of written directives regarding the identification and interrogation of suspects, which means that the eighteen CALEA-accredited law enforcement agencies throughout the State of Missouri should have adopted such written directives.⁴³

C. *Laws and Procedures Governing Eyewitness Identifications*

1. Federal Constitutional Law

Pretrial eyewitness identifications, such as those taking place during lineups, showups, and photospreads, are governed by the constitutional due process guarantee of a fair trial.⁴⁴ A due process violation occurs and suppression of an out-of-court pretrial identification is required where (1) the identification procedure employed by law enforcement was unnecessarily suggestive, and (2) considering the totality of the circumstances, the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.⁴⁵ If a court finds that law enforcement’s pretrial identification procedure was unnecessarily suggestive, it must then consider whether there was a substantial likelihood of irreparable misidentification.⁴⁶

In determining whether there was a substantial likelihood of irreparable misidentification, courts consider the following factors: (1) the opportunity of the eyewitness to view the criminal at the time of the crime, (2) the eyewitness’s degree of attention, (3) the accuracy of the eyewitness’s prior description of the criminal, (4) the level of certainty demonstrated by the eyewitness at the confrontation, and (5) the length of time between the crime and the confrontation.⁴⁷

2. Missouri Law

In general, Missouri law does not require any specific eyewitness identification procedures beyond what is demanded by the U.S. Constitution. Moreover, our review of Missouri case law did not reveal a single instance in which a Missouri appellate court found an identification procedure to violate due process.⁴⁸

Missouri case law does require law enforcement officers to make “reasonable efforts” to find lineup or photospread participants with physical characteristics similar to the suspect, but cases in which the suspect is the only participant with an “inherent physical abnormality or distinctive

⁴² COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES: THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM, at v (4th ed. 2001) [hereinafter CALEA STANDARDS].

⁴³ *Id.* at 42-2 (Standard 42.2.1), 42-3 (Standard 42.2.3).

⁴⁴ *See* Neil v. Biggers, 409 U.S. 188, 196–99 (1972).

⁴⁵ *Biggers*, 409 U.S. at 196–99; *State v. Middleton*, 995 S.W.2d 443, 453 (Mo. banc 1999) (citing *State v. Vinson*, 800 S.W.2d 444, 446 (Mo. banc 199); *State v. Hornbuckle*, 769 S.W.2d 89, 93 (Mo. banc 1989)).

⁴⁶ *Vinson*, 800 S.W.2d at 446.

⁴⁷ *Biggers*, 409 U.S. at 199; *Middleton*, 995 S.W.2d at 453.

⁴⁸ Individual examples are discussed in the Analysis section of this Chapter.

appearance” are typically upheld.⁴⁹ Moreover, the Missouri Court of Appeals has held that “[d]issimilarity in physical appearance, alone, is insufficient to establish” that an eyewitness identification procedure is impermissibly suggestive.⁵⁰ Missouri courts also have endorsed showups, a procedure in which the eyewitness confronts the suspect without any foils, often at the scene of the crime shortly after the crime occurs.⁵¹

Additionally, Missouri courts have developed rules regarding eyewitness identification expert witnesses and jury instructions. When eyewitness identifications are presented to a jury, the trial court has discretion in deciding whether to allow an expert to testify on factors affecting eyewitness accuracy, although the practice is not usually permitted.⁵² In addition, trial courts are not permitted to give jury instructions that are specific to eyewitness identification procedures. Missouri’s pattern jury instructions, the Missouri Approved Instructions, provide a general instruction on witness believability.⁵³ The instruction, however, applies to all types of witnesses, and does not list any factors specifically related to the accuracy of eyewitness identifications.⁵⁴ Furthermore, the Notes on Use appended to the Missouri Approved Instructions, which the Missouri Court of Appeals have adopted as law, state that “no other or additional instruction may be given on the believability of witnesses, or the effect, weight, or value of their testimony.”⁵⁵

3. CALEA and Missouri POST Requirements

The CALEA standards do not require CALEA-certified agencies to adopt specific guidelines for conducting lineups and photospreads. For example, CALEA Standard 42.2.3 requires law enforcement agencies to create a written directive that “establishes steps to be followed in conducting follow-up investigations,” including “identifying and apprehending suspects,”⁵⁶ but provides no guidance as to the content of the directive.

POST’s Mandatory Basic Training Curricula provides prospective officers with some instruction on eyewitness identification procedures.⁵⁷ The curricula instruct that lineups and photospreads

⁴⁹ See *State v. Cooks*, 861 S.W.2d 769, 772 (Mo. App. 1993) (citing *State v. Cooper*, 708 S.W.2d 299, 305 (Mo. App. 1986)).

⁵⁰ *Id.* at 772 (citing *State v. Reasonover*, 700 S.W.2d 178, 182 (Mo. App. 1985)).

⁵¹ See, e.g., *State v. French*, 528 S.W.2d 170, 173 (Mo. App. 1975).

⁵² See *State v. Lawhorn*, 762 S.W.2d 820, 822–23 (Mo. banc 1988) (holding that a trial court did not abuse its discretion in refusing to allow an expert to testify on cross-racial identification and other factors affecting eyewitness accuracy).

⁵³ See MAI-CR3d 302.01.

⁵⁴ See *id.* For example, an instruction in *State v. Johnson* based on the Missouri Approved Instructions read as follows:

In determining the believability of a witness and the weight to be given to testimony of the witness, you may take into consideration the witness’ manner while testifying; the ability and opportunity of the witness to observe and remember any matter about which testimony is given; any interest, bias, or prejudice the witness may have; the reasonableness of the witness’ testimony considered in the light of all the evidence in the case; and any other matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness.

State v. Johnson, 231 S.W.3d 870, 876 (Mo. App. 2007).

⁵⁵ *Johnson*, 231 S.W.3d at 877 (quoting MAI-CR3d 302.01, Notes on Use 3).

⁵⁶ CALEA STANDARDS, *supra* note 42, at 42-3.

⁵⁷ See MO. POST COMM’N, *Constitutional Law, in MANDATORY BASIC TRAINING CURRICULA* (2010) (on file with author).

must contain foils with “similar appearance” to the suspect.⁵⁸ A showup is defined as “the most suggestive of the eyewitness identification methods and is generally only allowed as evidence if the identification is made very soon after the crime occurred and without apparent coaching or pressure on [the] witness.”⁵⁹

4. Local Law Enforcement Policies

There are over 300 law enforcement agencies in Missouri, each with its own eyewitness identification procedures. A survey of every law enforcement agency in the state is beyond the scope of this assessment. We were, however, able to obtain information regarding eyewitness identification procedures from the St. Louis County Police Department, the St. Louis Metropolitan Police Department, and the Kansas City Police Department.

The St. Louis County Police Department mandates that all lineups and photospreads must contain at least four participants, and all participants “shall be of similar physical appearance . . . and wear similar clothing.”⁶⁰ Furthermore, eyewitnesses “shall not view the suspect” before the lineup or photospread, and each eyewitness must be questioned separately.⁶¹ The officer must prepare a report on the lineup and photograph the participants.⁶² Similarly, officers must preserve copies of computer-generated photospreads as evidence.⁶³ Department policy further provides that “[i]f a suspect is apprehended a short time after the crime, the officer should transport the witness(es) to the location of the suspect for an on scene show-up if it is reasonably possible to do so.”⁶⁴

The St. Louis Metropolitan Police Department requires at least two persons, other than the suspect, to participate in a lineup.⁶⁵ In addition, “persons in the line-up must resemble each other, as nearly as possible, in age, sex, color of skin, physical appearance and dress.”⁶⁶ The officer conducting the lineup must inform the eyewitness that the suspect may not be in the lineup, and the lineup must be photographed.⁶⁷ Law enforcement officers must generate photospreads using six persons, following a procedure similar to that which governs lineups.⁶⁸ Department policy permits showups “when there [are] compelling reasons,” such as when the suspect is apprehended shortly after the crime occurred.⁶⁹

Kansas City Police Department policy states that, in addition to the suspect, at least three “fill-ins” should participate in a lineup “[i]f possible.”⁷⁰ All participants “must be of the same race”

⁵⁸ *Constitutional Law Glossary*, in MANDATORY BASIC TRAINING CURRICULA, *supra* note 57.

⁵⁹ *Id.* (emphasis omitted).

⁶⁰ ST. LOUIS COUNTY POLICE DEP’T, DEPARTMENTAL GENERAL ORDER 10-4 (2010) (on file with author).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ ST. LOUIS METRO. POLICE DEP’T, SPECIAL ORDER 8-01 (2010) (on file with author).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ KANSAS CITY POLICE DEP’T, INVESTIGATION BUREAU MEMORANDUM NO. 00-2 (2000) (on file with author).

and cannot be “attired in a manner that solely distinguishes” one person from another.⁷¹ Officers also are instructed to find fill-ins who resemble the suspect.⁷² Eyewitnesses first view the suspects individually, then as a group.⁷³ The procedure must be videotaped.⁷⁴ We were unable to obtain any Kansas City Police Department policies regarding photospreads or showups.

D. Laws and Procedures Governing Custodial Interrogations and Confessions

1. Federal Constitutional Law

Custodial interrogations are governed by the Fifth and Sixth Amendments to the United States Constitution.⁷⁵ In *Miranda v. Arizona*, the U.S. Supreme Court held that the Fifth Amendment protection from self-incrimination requires law enforcement officers to inform a suspect of his/her right to remain silent and right to an attorney prior to a custodial interrogation.⁷⁶ Courts must consider the totality of the circumstances to determine whether a suspect is “in custody,” but “the ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.”⁷⁷ “Interrogation” is defined as “express questioning” as well as “any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response.”⁷⁸ A suspect may waive his/her *Miranda* rights, provided that waiver is knowingly and intelligently made.⁷⁹ However, if an officer interrogates a suspect after that suspect effectively invokes his/her rights, or if the suspect is not informed of his/her rights, any statements made during the interrogation may be suppressed.⁸⁰ A related Sixth Amendment protection provides that once a defendant has been formally charged with a crime by way of indictment, arraignment, or the like, law enforcement officers and their agents, including informants, may not “deliberately elicit” incriminating information from that defendant regarding the charged crime.⁸¹

In addition, the constitutional guarantee of due process requires that, to be admissible, a defendant’s confession must be voluntary.⁸² The court must consider the totality of the circumstances to determine whether the defendant’s statements “were the product of his free and rational choice.”⁸³ However, “[c]oercive police activity is a necessary predicate to finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause.”⁸⁴ The court will

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966); *United States v. Gouveia*, 467 U.S. 180, 187–88 (1984).

⁷⁶ *Miranda*, 384 U.S. at 478–79.

⁷⁷ *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

⁷⁸ *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

⁷⁹ *Miranda*, 384 U.S. at 479.

⁸⁰ *Id.* at 478–79. But see *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264 (2010) (“[A] suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police.”).

⁸¹ *Kuhlmann v. Wilson*, 477 U.S. 436, 457–58 (1986).

⁸² *Schneekloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

⁸³ *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968).

⁸⁴ *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

consider such factors as the length and location of the interrogation, the number of law enforcement officers in attendance, the presence or absence of legal counsel, and whether the confession was written by the defendant when determining whether law enforcement used coercive tactics.⁸⁵

2. Missouri Law

Missouri courts interpret the federal constitutional prohibition against coercive police conduct to mean that the interrogating officer cannot use “threats of harm or promises of worldly advantage” to obtain a confession.⁸⁶ Officers may use deception to obtain a confession, “unless the deception offends societal notions of fairness or is likely to procure an untrustworthy confession.”⁸⁷

In 2009, the Missouri General Assembly enacted a statute requiring “[a]ll custodial interrogations of persons suspected of committing or attempting to commit murder in the first degree [or] murder in the second degree”⁸⁸ to be “recorded when feasible.”⁸⁹ A “recording” is defined as “any form of audiotape, videotape, motion picture, or digital recording.”⁹⁰ There are six specific circumstances in which the statute does not require the custodial interrogation to be recorded:

- (1) If the suspect requests that the interrogation not be recorded;
- (2) If the interrogation occurs outside the state of Missouri;
- (3) If exigent public safety circumstances prevent recording;
- (4) To the extent the suspect makes spontaneous statements;
- (5) If the recording equipment fails; or
- (6) If recording equipment is not available at the location where the interrogation takes place.⁹¹

Law enforcement agencies must “adopt a written policy to record custodial interrogations” that conforms to the statute.⁹² The statute specifically states that “[n]othing in this section shall be

⁸⁵ See *id.* at 163–64, 163 n.1 (discussing and providing examples of “the crucial element of police overreaching”).

⁸⁶ *State v. Johnson*, 207 S.W.3d 24, 45 (Mo. banc 2006) (quoting *State v. Williamson*, 99 S.W.2d 76, 79 (Mo. 1936)).

⁸⁷ *State v. Davis*, 980 S.W.2d 92, 96 (Mo. App. 1998) (holding that a police officer’s promise that “nobody” would see defendant’s videotaped confession did not rise to the level of impermissible coercion).

⁸⁸ Section 590.700.2, RSMo (2011). The statute also applies to a number of other violent felonies. *Id.*

⁸⁹ *Id.* The statute defines “custodial interrogation” as “the questioning of a person under arrest, who is no longer at the scene of the crime, by a member of a law enforcement agency along with the answers and other statements of the person questioned.” The definition specifically excludes the following:

- (a) A situation in which a person voluntarily agrees to meet with a member of a law enforcement agency;
- (b) A detention by a law enforcement agency that has not risen to the level of an arrest;
- (c) Questioning that is routinely asked during the processing of the arrest of the suspect;
- (d) Questioning pursuant to an alcohol influence report; [and]
- (e) Questioning during the transportation of a suspect.

Section 590.700.1(1), RSMo 2011.

⁹⁰ Section 590.700.1(2), RSMo 2011.

⁹¹ Section 590.700.3, RSMo 2011.

⁹² Section 590.700.4, RSMo 2011.

construed as a ground to exclude evidence” and that law enforcement’s failure to comply with the statute “shall not be admitted as evidence, argued, referenced, considered or questioned during a criminal trial.”⁹³ The only remedy for noncompliance with the statute is for the Governor to, in his/her discretion, “withhold any state funds appropriated to the noncompliant law enforcement agency if the governor finds that the agency did not act in good faith in attempting to comply” with the law.⁹⁴

The Supreme Court of Missouri has held that a law enforcement officer may testify against a defendant as an expert regarding the veracity of a typical suspect’s confession, provided that the testimony is “generic” and does not “directly impugn[]” the defendant’s credibility.⁹⁵ The Missouri Court of Appeals, in considering the application of this law to defense experts, has held that “allow[ing] [] expert testimony [regarding interrogation techniques, how such techniques influence criminal suspects, and whether the techniques correlate to false confessions] invades the jury’s proper realm.”⁹⁶

Missouri law states that defendants are entitled to a jury instruction regarding the believability and voluntariness of a confession, if so requested.⁹⁷ The Missouri Approved Instruction is the only instruction on the veracity of confessions that may be given, even if the defendant requests a more specific instruction.⁹⁸

3. CALEA and Missouri POST Requirements

As with eyewitness identification procedures, the CALEA standards do not require certified agencies to adopt specific guidelines for interrogating suspects.⁹⁹ The standards mandate that law enforcement agencies adopt a written standard that “establishes procedures to be used in . . .

⁹³ Section 590.700.6, RSMo 2011.

⁹⁴ Section 590.700.5, RSMo 2011.

⁹⁵ State v. Skillicorn, 944 S.W.2d 877, 892 (1997), *overruled on other grounds by* Joy v. Morrison, 254 S.W.3d 885 (Mo. banc 2008).

⁹⁶ State v. Davis, 32 S.W.3d 603, 608–09 (Mo. App. 2000).

⁹⁷ State v. Harris, 781 S.W.2d 137, 141 (Mo. App. 1989) (citing MAI-CR3d 310.06, Notes on Use 2). MAI-CR 310.06 provides as follows:

Evidence has been introduced that the defendant made certain statements relating to the offense for which he is on trial. If you find that a statement was made by the defendant, and that at that time he understood what he was saying and doing, and that the statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement, then you may give it such weight as you believe it deserves in arriving at your verdict. However, if you do not find and believe that the defendant made the statement, or if you do not find and believe that he understood what he was saying and doing, or if you do not find and believe that the statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement, then you must disregard it and give it no weight in your deliberations.

MAI-CR3d 310.06 (internal parentheses and line breaks omitted).

⁹⁸ MAI-CR3d 310.06, Note on Use 4 (“No definition of ‘freely and voluntarily’ should be given and no further instruction should be given on the effect of various other facts, such as violence, physical or mental coercion, threats, promises, etc., shown in evidence.”).

⁹⁹ CALEA STANDARDS, *supra* note 42, at 42-2.

interviews and interrogation[s],” but CALEA provides no guidance as to what those procedures should be.¹⁰⁰

POST’s Mandatory Basic Training Curricula includes a four-hour course on the interrogation process.¹⁰¹ In addition, constitutional law coursework includes instruction on *Miranda* warnings and the voluntariness of confessions.¹⁰²

4. Local Law Enforcement Policies

We obtained information regarding written custodial interrogation policies from the St. Louis County Police Department, the St. Louis Metropolitan Police Department, and the Kansas City Police Department. However, these policies only explain in general terms existing federal and state law requirements.¹⁰³

All three of the departments we surveyed, however, have developed policies related to consular access for detained foreign nationals in accordance with the Vienna Convention on Consular Relations.¹⁰⁴ The Kansas City, St. Louis Metropolitan, and St. Louis County police departments all require officers to notify the nearest consular office when they detain a foreign national, and they must inform that detained foreign national of his/her right to consular access.¹⁰⁵ Although the Vienna Convention requires consular access,¹⁰⁶ confessions made in violation of the treaty remain admissible under federal and Missouri law.¹⁰⁷

E. Investigating and Reporting Officer Misconduct

1. POST’s Authority to Discipline Officers

The Director has the power to discipline any licensed law enforcement officer in Missouri for a number of transgressions, such as the commission a criminal offense.¹⁰⁸ POST, however, only

¹⁰⁰ *Id.*

¹⁰¹ *Interrogation Process, in MANDATORY BASIC TRAINING CURRICULA, supra note 57.*

¹⁰² *Constitutional Law Handouts, in MANDATORY BASIC TRAINING CURRICULA, supra note 57.*

¹⁰³ See KANSAS CITY POLICE DEP’T, LEGAL BULLETIN 96-1 (1996) (on file with author); ST. LOUIS CNTY. POLICE DEP’T, DEPARTMENTAL SPECIAL ORDER 10-328 (2010) (on file with author); ST. LOUIS METRO. POLICE DEP’T, SPECIAL ORDER 8-01 (2010) (on file with author).

¹⁰⁴ Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 36, Dec. 14, 1969, 21 U.S.T. 77, 596 U.N.T.S. 261.

¹⁰⁵ KANSAS CITY POLICE DEP’T, PROCEDURAL INSTRUCTION 06-8 (2006) (on file with author); ST. LOUIS CNTY. POLICE DEP’T, DEPARTMENTAL SPECIAL ORDER 09-37 (2009) (on file with author); ST. LOUIS METRO. POLICE DEP’T, SPECIAL ORDER 8-01 (2010) (on file with author).

¹⁰⁶ See Vienna Convention on Consular Relations, *supra* note 104.

¹⁰⁷ *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 337 (2006); *Cardona-Rivera v. State*, 33 S.W.3d 625, 626–27 (Mo. App. 2000).

¹⁰⁸ Sections 590.080–.090, RSMo 2011. The Director has cause to discipline a licensed officer who:

- (1) Is unable to perform the functions of a peace officer with reasonable competency or reasonable safety as a result of a mental condition, including alcohol or substance abuse;
- (2) Has committed any criminal offense, whether or not a criminal charge has been filed;
- (3) Has committed any act while on active duty or under color of law that involves moral turpitude or a reckless disregard for the safety of the public or any person;

has one staff member assigned to investigate officer misconduct.¹⁰⁹ In addition, a 2005 report by the Missouri State Auditor found that POST had failed to adequately develop and enforce many policies related to the licensure and discipline of law enforcement officers.¹¹⁰

2. Civilian Review Boards

Missouri empowers local governments to establish civilian review boards “with the authority to investigate allegations of misconduct by local law enforcement officers towards members of the public.”¹¹¹ While the boards have no direct disciplinary authority, they have the power to

make findings and recommend disciplinary action [to the chief law enforcement official] upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability.¹¹²

The cities of Columbia and Springfield have created civilian review boards under this statute.¹¹³ Similarly, civilians staff the Kansas City Police Department Office of Community Complaints.¹¹⁴ This office, however, is under the authority of the Kansas City Board of Police Commissioners.¹¹⁵

-
- (4) Has caused a material fact to be misrepresented for the purpose of obtaining or retaining a peace officer commission or any license issued pursuant to this chapter;
 - (5) Has violated a condition of any order of probation lawfully issued by the director; or
 - (6) Has violated a provision of this chapter or a rule promulgated pursuant to this chapter.

Section 590.080.1, RSMo 2011. The director may immediately suspend an officer who:

- (1) Is under indictment for, is charged with, or has been convicted of the commission of any felony;
- (2) Is subject to an order of another state, territory, the federal government, or any peace officer licensing authority suspending or revoking a peace officer license or certification; or
- (3) Presents a clear and present danger to the public health or safety if commissioned as a peace officer.

Section 590.090.1, RSMo 2011.

¹⁰⁹ Telephone Interview by Mark Pickett with Jeremy Spratt, Program Manager, Mo. Dep’t of Pub. Safety (Feb. 22, 2011) (on file with author).

¹¹⁰ See CLAIRE MCCASKILL, OFFICE OF THE MO. STATE AUDITOR, REP. NO. 2005-10, PEACE OFFICER STANDARDS & TRAINING PROGRAM (LICENSING, TRAINING, & COMPLAINT INVESTIGATION ASPECTS) (2005) [hereinafter MO. STATE AUDITOR REP.].

¹¹¹ Section 590.653.1, RSMo 2011.

¹¹² Section 590.653.2, RSMo 2011.

¹¹³ *Citizens Police Review Board*, CITY OF COLUMBIA, MO., <http://www.gocolumbiamo.com/Council/Commissions/description.php?bcid=14> (last visited Jan. 12, 2012); *Police Civilian Review Board*, CITY OF SPRINGFIELD, MO., <http://www.springfieldmo.gov/boards/detail.jsp?id=40> (last visited Jan. 12, 2012).

¹¹⁴ *Office of Community Complaints*, KANSAS CITY POLICE DEP’T, <http://www.kcmo.org/police/OfficeofCommunityComplaints/index.htm> (last visited Jan. 12, 2012).

¹¹⁵ *Id.*

II. ANALYSIS

A. Recommendation #1

Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the *American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* (which has been reproduced below, in relevant part and with slight modifications).

Missouri statutory and case law provides few standards for eyewitness identification procedures.¹¹⁶ Accordingly, Missouri courts have affirmed several cases in which law enforcement officers used an identification procedure that does not meet the reliability standards set forth in the *American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* (ABA Best Practices).¹¹⁷

Eighteen law enforcement agencies in Missouri have obtained certification by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA), an independent accrediting authority.¹¹⁸ The CALEA standards, however, do not require the certified agencies to adopt specific guidelines for conducting lineups and photospreads.¹¹⁹ While all of the law enforcement agencies that we surveyed have adopted some policies governing eyewitness identification procedures, none of these policies are in full compliance with the *ABA Best Practices*.

1. General Guidelines for Administering Lineups and Photospreads

- a. **The guidelines should require, whenever practicable, that the person who conducts a lineup or photospread and all others present (except for defense counsel, when his/her presence is constitutionally required) should be unaware of which of the participants is the suspect.**

Missouri law does not preclude law enforcement officers or eyewitnesses from knowing the identity of the suspect when conducting a lineup or photospread.¹²⁰ None of the local law enforcement agencies that we reviewed require or recommend that the officer conducting the lineup be unaware of which participant is the suspect.¹²¹ Additionally, one local law enforcement agency appears to require the officer conducting the lineup to be aware of the suspect's identity. St. Louis County Police Department policy states that “[a]ll line-ups shall be . . . administered by the investigating commissioned employee,” who presumably identified

¹¹⁶ See *supra* notes 48–55 and accompanying text.

¹¹⁷ See, e.g., *State v. Middleton*, 995 S.W.2d 443, 453–55 (Mo. banc 1999). Other cases are discussed below. See *infra* notes 120–190 and accompanying text.

¹¹⁸ See *supra* note 39 and accompanying text.

¹¹⁹ See *supra* note 56 and accompanying text.

¹²⁰ *State v. Allen*, 274 S.W.3d 514, 525 (Mo. App. 2008) (stating that there is “no Missouri law that requires the identification procedures be administered by someone outside of the investigation”).

¹²¹ See ST. LOUIS METRO. POLICE DEP’T, SPECIAL ORDER 8-01 (2010) (on file with author); KANSAS CITY POLICE DEP’T, INVESTIGATION BUREAU MEMORANDUM NO. 00-2 (2000) (on file with author).

the suspect for inclusion in the identification procedure.¹²² Even a law enforcement officer who strives to avoid communicating the suspect's identity to the eyewitness may unwittingly do so if s/he is personally aware which participant is the suspect.¹²³

- b. The guidelines should require that eyewitnesses should be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make.**

When eyewitnesses are provided with the above cautionary instructions, they are less likely to feel as if they must identify someone, thereby reducing the likelihood that they will guess the identity of the suspect.¹²⁴ By contrast, when law enforcement officers tell an eyewitness that the suspect is in the lineup or photospread, the eyewitness may feel pressure to identify someone, even if the actual perpetrator is not present.¹²⁵ Steven Toney, for instance, was convicted of rape based on an identification procedure in which a St. Louis County police officer told the victim that “the man she had identified [in a previous photospread] would be in the lineup.”¹²⁶ In 1996, after spending thirteen years in prison, DNA evidence exonerated Toney.¹²⁷

Missouri law does not require law enforcement officers to provide any of these recommended instructions to eyewitnesses. Specifically, the Missouri Court of Appeals has held that “an identification is not impermissibly suggestive because a witness is told by the police that the photo lineup contains a picture of the suspect.”¹²⁸

Some local law enforcement agencies, however, have adopted policies related to the manner in which officers instruct eyewitnesses during identification procedures. St. Louis Metropolitan Police Department policy states that the officer conducting the lineup, photospread, or showup must inform the eyewitness that the “person(s) you are looking for may not be” present.¹²⁹ The other departments we reviewed, however, fall short of meeting the standards of the *ABA Best Practices* on this issue.

The departments we sampled also fail to require eyewitnesses to describe the certainty of the identification in their own words. St. Louis County Police Department policy only requires the officer's report to “indicate the level of confidence expressed by the witness evaluated in terms of the witnesses' [sic] statement, conduct and other relevant observations,” whereas the *ABA*

¹²² ST. LOUIS CNTY. POLICE DEP'T, DEPARTMENTAL GENERAL ORDER 10-4 (2010) (on file with author).

¹²³ Penrod, *supra* note 4, at 37, 45.

¹²⁴ *Id.* at 45.

¹²⁵ *See id.*

¹²⁶ State v. Toney, 680 S.W.2d 268, 276 (Mo. App. 1984), *rev'd in part on other grounds*, Toney v. Gammon, 79 F.3d 693, 697 (8th Cir. 1996), *overruled on other grounds by* State v. Carson, 941 S.W.2d 518 (Mo. banc 1997).

¹²⁷ Joe Holleman, *Man Wrongly Convicted Savors Freedom at Last: Brentwood Man Served 13 Years in Rape Case*, ST. LOUIS POST-DISPATCH, Aug. 11, 1996, at 1D.

¹²⁸ State v. Allen, 274 S.W.3d 514, 525 (Mo. App. 2008) (citing State v. Jones, 917 S.W.2d 622, 624 (Mo. App. 1996)).

¹²⁹ ST. LOUIS METRO. POLICE DEP'T, SPECIAL ORDER 8-01 (2010) (on file with author).

Best Practices require the eyewitness to state their level of confidence in their own words.¹³⁰ The Kansas City Police Department mandates that officers “not coach witnesses for identification,” but it does not have any further guidelines on how eyewitnesses should be instructed.¹³¹

2. Foil Selection, Number, and Presentation Methods

- a. **The guidelines should require that lineups and photospreads should use a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition.**
- b. **The guidelines should require that foils should be chosen for their similarity to the witness’s description of the perpetrator, without the suspect’s standing out in any way from the foils and without other factors drawing undue attention to the suspect.**

Missouri law does not require a minimum number of foils in lineups or photospreads, nor are foils necessarily required to resemble the suspect. Missouri courts have held that in-person and photographic identification procedures in which the suspect is the only person viewed by the witness are “not necessarily unduly suggestive.”¹³² In addition, while Missouri case law states that officers must make “reasonable efforts” to find foils who resemble the suspect, “[d]issimilarity in physical appearance, alone, is insufficient to establish” that an eyewitness identification procedure is impermissibly suggestive.¹³³ For instance, the Missouri Court of Appeals held that a procedure was not impermissibly suggestive where the suspect was the only person with “crossed-eyes” and the only person wearing glasses in a photospread.¹³⁴ The same court has upheld cases in which the eyewitness viewed both a physical lineup and a photospread, and the suspect was the only person appearing in both procedures.¹³⁵ Such a two-part process has even been upheld when the eyewitness only identifies the suspect in the second procedure.¹³⁶

The local law enforcement agencies we surveyed have developed their own policies on foil selection. The St. Louis County and St. Louis Metropolitan police departments require officers to select foils whose physical appearance and clothing are similar to the suspect.¹³⁷ Similarly, Kansas City Police Department policy provides that officers must “attempt to get fill-ins as near the age, height, and weight of the suspect as possible.”¹³⁸

¹³⁰ ST. LOUIS CNTY. POLICE DEP’T, DEPARTMENTAL GENERAL ORDER 10-4 (2010) (on file with author).

¹³¹ KANSAS CITY POLICE DEP’T, INVESTIGATION BUREAU MEMORANDUM NO. 00-2 (2000) (on file with author).

¹³² *State v. Allen*, 274 S.W.3d 514, 525 (Mo. App. 2008) (citing *State v. McElvain*, 228 S.W.3d 592, 601 (Mo. App. 2007)).

¹³³ *State v. Cooks*, 861 S.W.2d 769, 772 (Mo. App. 1993).

¹³⁴ *Id.* at 771–72.

¹³⁵ *State v. Williams*, 277 S.W.3d 848, 851–52 (Mo. App. 2009) (citing other cases, in addition to the case at bar, where the Missouri Court of Appeals upheld a procedure in which the suspect was the only person appearing in both a lineup and a photospread).

¹³⁶ *Id.*

¹³⁷ ST. LOUIS CNTY. POLICE DEP’T, DEPARTMENTAL GENERAL ORDER 10-4 (2010) (on file with author); ST. LOUIS METRO. POLICE DEP’T, SPECIAL ORDER 8-01 (2010) (on file with author).

¹³⁸ KANSAS CITY POLICE DEP’T, INVESTIGATION BUREAU MEMORANDUM NO. 00-2 (2000) (on file with author).

All of the surveyed departments have policies regarding the number of required foils as well. Both the Kansas City and the St. Louis County police departments require a minimum of four participants in a lineup, including the suspect.¹³⁹ Their policies do not state how many persons must participate in a photospread.¹⁴⁰ The St. Louis Metropolitan Police Department requires a minimum of three persons to participate in a lineup and six persons to be included in a photospread, including the suspect.¹⁴¹ While the *ABA Best Practices* do not recommend a strict number of minimum foils, one study found that the error rate in six-person lineups might be higher than 10%.¹⁴²

We also note that Missouri law enforcement officers' failure to use a sufficient number of foils and failure to select foils who resemble the suspect may have contributed to wrongful convictions in the past. Antonio Beaver, for instance, spent ten years in prison for a violent carjacking in St. Louis City.¹⁴³ The victim described her assailant as "a man with a baseball cap and gap in his front teeth."¹⁴⁴ Six days later, Beaver volunteered to participate in a lineup after a St. Louis police officer saw him and thought he fit the victim's description.¹⁴⁵ The lineup only had four participants, including Beaver; moreover, Beaver was the only participant with a dental imperfection and only one of two participants wearing a baseball cap.¹⁴⁶ At trial, he was convicted based solely on the eyewitness identification.¹⁴⁷ The Missouri Court of Appeals held that the trial court did not err when it failed to suppress the identification procedure.¹⁴⁸ In 2007, however, DNA testing revealed that Beaver was innocent, and he was released.¹⁴⁹ Despite his exoneration, St. Louis Metropolitan Police policy still only requires three total lineup participants.¹⁵⁰

We further observe that a review of Missouri case law reveals that Missouri law enforcement officers often use showups, an identification procedure in which the eyewitness directly confronts the suspect, often in an informal setting, such as at a crime scene.¹⁵¹ Such a procedure circumvents any state or local policy regarding the selection and presentation of foils, as foils are not used in a showup. The suspect also may be in police custody or in handcuffs at the showup, suggesting to the eyewitness that s/he is looking at the "right man." Social scientific research has demonstrated "clear evidence that show-ups are more likely to yield false identifications than are properly constructed lineups" because "they convey to the eyewitness which person is the suspect."¹⁵² The Supreme Court of Missouri, by contrast, has held that showups help to

¹³⁹ KANSAS CITY POLICE DEP'T, INVESTIGATION BUREAU MEMORANDUM NO. 00-2 (2000) (on file with author); ST. LOUIS COUNTY POLICE DEP'T, DEPARTMENTAL GENERAL ORDER 10-4 (2010) (on file with author).

¹⁴⁰ *Id.*

¹⁴¹ ST. LOUIS METRO. POLICE DEP'T, SPECIAL ORDER 8-01 (2010) (on file with the author).

¹⁴² *See* Penrod, *supra* note 4, at 45.

¹⁴³ Heather Ratcliffe, 'This Feels Strange to Have My Freedom', ST. LOUIS POST-DISPATCH, Mar. 30, 2007, at A1.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *State v. Beaver*, 963 S.W.2d 474, 474 (Mo. App. 1998) (per curiam).

¹⁴⁹ Ratcliffe, *supra* note 143.

¹⁵⁰ ST. LOUIS METRO. POLICE DEP'T, SPECIAL ORDER 8-01 (2010) (on file with author).

¹⁵¹ *See, e.g., State v. French*, 528 S.W.2d 170, 173 (Mo. App. 1975).

¹⁵² Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 631 (1998).

“assur[e] reliability” of eyewitness identifications.¹⁵³ While this case predates most of the social scientific research on eyewitness identification procedures, it remains valid law. The Missouri Peace Officer Standards and Training (POST) Mandatory Basic Curricula does instruct prospective officers that showups are the most suggestive identification procedure.¹⁵⁴ However, the St. Louis County Police Department, rather than cautioning against showups, recommends their use in any situation where “a suspect is apprehended a short time after the crime.”¹⁵⁵

Missouri court decisions have generally held that showups, in most circumstances, are not impermissibly suggestive. The Missouri Court of Appeals upheld a procedure wherein police drove the eyewitness, a burglary victim, past the scene of the crime to view the suspect, who was standing beside a police car.¹⁵⁶ In another case, law enforcement took the victim of an assault

to the highway where the defendant had been stopped by police and told to look at the car and three black males. Defendant was laying [sic] on the grass, handcuffed, and surrounded by five marked police cars whose lights were flashing. One at a time, each man was brought over to the police officer’s car in which the victim sat and placed under spotlights to be identified.¹⁵⁷

The court found that this procedure was not impermissibly suggestive.¹⁵⁸

Some courts have reasoned that showups are beneficial because they allow the eyewitness to determine whether the suspect is the actual perpetrator immediately after the crime occurs; the suspect then may be arrested or released as soon as possible.¹⁵⁹ An eyewitness identification may be more reliable if conducted immediately after the crime occurs.¹⁶⁰ In Missouri, however, showups are permissible even when they occur long after the crime has been committed. In *State v. Middleton*, a capital case, officers showed a photospread to an eyewitness shortly after the crime took place.¹⁶¹ The eyewitness “picked out [defendant] Middleton’s photograph as resembling” the perpetrator, but told police “he did not believe it was the right man” due to differences in Middleton’s build and hair.¹⁶² Three months later, after Middleton was arrested for the crime, a prosecutor subpoenaed the same eyewitness to appear at Middleton’s preliminary hearing.¹⁶³ Before the hearing, the prosecutor asked the eyewitness if he could identify the perpetrator in the hallway of the courthouse.¹⁶⁴ The eyewitness stood in the hallway until Middleton, who was escorted to his hearing in handcuffs, came into view.¹⁶⁵ Based on this

¹⁵³ *State v. Hamblin*, 448 S.W.2d 603, 610 (Mo. 1970) (quoting *Russell v. United States*, 408 F.2d 1280, 1284 (D.C. Cir. 1969)).

¹⁵⁴ *Constitutional Law Handouts*, in MANDATORY BASIC TRAINING CURRICULA, *supra* note 57.

¹⁵⁵ ST. LOUIS CNTY. POLICE DEP’T, DEPARTMENTAL GENERAL ORDER 10-4 (2010) (on file with author).

¹⁵⁶ *State v. Secrease*, 859 S.W.2d 278, 279 (Mo. App. 1993).

¹⁵⁷ *State v. Overstreet*, 694 S.W.2d 491, 494–95 (Mo. App. 1985).

¹⁵⁸ *Id.* at 495.

¹⁵⁹ *See, e.g.*, *State v. Bynum*, 680 S.W.2d 156, 158 (Mo. banc 1984).

¹⁶⁰ *See* Heather D. Flowe et al., *The Role of Eyewitness Identification Evidence in Felony Case Dispositions*, 17 PSYCHOL., PUB. POL’Y & L. 140, 155 (2011).

¹⁶¹ *Middleton*, 995 S.W.2d at 453–54.

¹⁶² *Id.* at 454.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

viewing, the eyewitness identified Middleton as the perpetrator.¹⁶⁶ On appeal, the Supreme Court of Missouri found that the identification procedure was reliable.¹⁶⁷

3. Recording Procedures

- a. **The guidelines should require that, whenever practicable, the police should videotape or digitally video record lineup procedures, including the witness's confidence statements and any statements made to the witness by the police.**
- b. **The guidelines should require that, absent videotaping or digital video recording, a photograph should be taken of each lineup and a detailed record made describing with specificity how the entire procedure (from start to finish) was administered, also noting the appearance of the foils and of the suspect and the identities of all persons present.**
- c. **The guidelines should require that, regardless of the fashion in which a lineup is memorialized, and for all other identification procedures, including photospreads, the police shall, immediately after completing the identification procedure and in a non-suggestive manner, request witnesses to indicate their level of confidence in any identification and ensure that the response is accurately documented.**

When law enforcement officers video-record an eyewitness identification procedure, it allows the jury or judge to more easily assess the manner in which the procedure was administered and the level of confidence in the eyewitness's identification.¹⁶⁸ Similarly, requiring officers to request and document the eyewitness's level of confidence ensures that a complete, contemporaneous statement of belief is preserved for the factfinder.¹⁶⁹ Missouri law, however, does not require law enforcement officers to electronically record, photograph, or otherwise memorialize identification procedures in any particular manner. Specifically, the Missouri Court of Appeals found an eyewitness's lineup identification to be admissible when law enforcement had destroyed a photograph of the procedure before trial.¹⁷⁰ The same court further held that law enforcement officers are not "required to make a written record of the witnesses' responses at the moment of identification."¹⁷¹

However, each of the local law enforcement agencies we surveyed do have some policy in place regarding recordation of eyewitness identification procedures. Most notably, the Kansas City Police Department requires its officers to "[v]ideotape the lineup for future use."¹⁷² This policy is not fully in accordance with the *ABA Best Practices* as it does not require electronic recording of the eyewitness's confidence statements, nor does it require eyewitnesses to state their level of confidence in their own words. The St. Louis Metropolitan Police Department requires officers to photograph lineups,¹⁷³ and eyewitnesses must complete a form that states whether they have

¹⁶⁶ *Id.*

¹⁶⁷ State v. Middleton, 995 S.W.2d 443, 454 (Mo. banc 1999).

¹⁶⁸ Wells et al., *supra* note 152, at 640.

¹⁶⁹ Penrod, *supra* note 4, at 46.

¹⁷⁰ State v. Williams, 277 S.W.3d 848, 852 (Mo. App. 2009).

¹⁷¹ State v. Allen, 274 S.W.3d 514, 526 (Mo. App. 2008).

¹⁷² KANSAS CITY POLICE DEP'T, INVESTIGATION BUREAU MEMORANDUM NO. 00-2 (2000) (on file with author).

¹⁷³ ST. LOUIS METRO. POLICE DEP'T, SPECIAL ORDER 8-01 (2010) (on file with author).

identified a suspect and whether they are certain of the identification.¹⁷⁴ The St. Louis County Police Department also requires lineups to be photographed, but it provides no instruction on how the eyewitness's statement should be memorialized.¹⁷⁵

4. Immediate Post-lineup or Photospread Procedures

- a. The guidelines should require that police and prosecutors should avoid at any time giving the witness feedback on whether he or she selected the “right man”—the person believed by law enforcement to be the culprit.**

When a law enforcement officer tells the eyewitness that s/he has chosen the “correct” suspect, the eyewitness often becomes much more confident in his/her choice.¹⁷⁶ While this increased confidence is not related to the actual accuracy of the identification, that confidence may be reflected in the eyewitness's testimony at a trial or hearing.¹⁷⁷ Nonetheless, Missouri law states that it is not impermissibly suggestive for an officer to make a “corroborating comment” after an eyewitness identifies the person believed by law enforcement to be the culprit.¹⁷⁸ Furthermore, while the Kansas City and St. Louis Metropolitan police departments have broad policies that prohibit officers from coaching witnesses, it is unclear whether these policies prohibit officer feedback after the witness has identified the alleged perpetrator.¹⁷⁹

Conclusion

Missouri is not in compliance with Recommendation #1. While the local law enforcement agencies we reviewed have adopted some policies that improve upon state law requirements, policies in their entirety do not adhere to the *ABA Best Practices*, nor does Missouri law require law enforcement agencies to adopt procedures equivalent to the *ABA Best Practices* on eyewitness identification procedures.

Missouri's failure to adopt policies in compliance with the *ABA Best Practices* may well have contributed to wrongful convictions in the past. There have been at least seven individuals in Missouri convicted based on an eyewitness identification who were later exonerated through DNA testing, although DNA exonerations are rare and do not represent the actual number of wrongful convictions that may have occurred.¹⁸⁰ Six of these seven persons were prosecuted in St. Louis County and City, where both police departments' eyewitness identification policies do

¹⁷⁴ Email Interview by Mark Pickett with Aimee Pierce, Police Planner I, St. Louis Metro. Police Dep't (Feb. 18, 2011) (on file with author).

¹⁷⁵ ST. LOUIS CNTY. POLICE DEP'T, DEPARTMENTAL GENERAL ORDER 10-4 (2010) (on file with author).

¹⁷⁶ Wells et al., *supra* note 152, at 626.

¹⁷⁷ *See id.*

¹⁷⁸ *State v. Allen*, 274 S.W.3d 514, 525 (Mo. App. 2008) (citing *State v. Jones*, 917 S.W.2d 622, 624 (Mo. App. 1996)).

¹⁷⁹ *See* KANSAS CITY POLICE DEP'T, INVESTIGATION BUREAU MEMORANDUM No. 00-2 (2000) (on file with author); Interview with Aimee Pierce, *supra* note 174.

¹⁸⁰ *Missouri Cases of Innocent People Convicted Based on Eyewitness Misidentification and Later Exonerated by DNA*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Missouri_Cases_of_Innocent_People_Convicted_Based_on_Eyewitness_Misidentification_and_Later_Exonerated_by_DNA.php (last visited Jan. 12, 2012).

not meet the standards of the *ABA Best Practices*.¹⁸¹ Although these seven Missouri innocence cases were non-capital, they demonstrate the critical problem with eyewitness misidentifications: an innocent person is sent to prison while a guilty person goes unpunished.

A Missouri bill introduced in 2009 would have required law enforcement agencies to “consider practices to enhance the objectivity and reliability of eyewitness identifications and to minimize the possibility of mistaken identifications” by (1) requiring the officer conducting the lineup to be unaware of the suspect’s identity; (2) having the eyewitness state his/her level of confidence in his/her own words; (3) reducing “verbal or nonverbal reactions” by the officer to the eyewitness; (4) requiring foils to resemble the suspect; and (5) video-recording the entire identification procedure.¹⁸² The Missouri General Assembly, however, never enacted the bill into law.¹⁸³ To help avoid wrongful convictions in the future, the Missouri Assessment Team strongly recommends that the Missouri General Assembly adopt similar legislation as a first step toward full statewide adoption of policies in compliance with the *ABA Best Practices*. In addition, the Missouri POST Program, or another Missouri agency, should develop and promulgate rules based on the *ABA Best Practices* that law enforcement officers must follow.

In addition, Missouri case law endorsing showup procedures subverts Recommendation #1 in many ways. Showups do not require the participation of foils, and unlike a well-constructed lineup or photospread, officers do not administer showups in a controlled environment. The informal, impromptu nature of the procedure often singles out the suspect and prevents officers from video-recording the identification. Yet current Missouri case law permits showups long after the crime takes place and allows the eyewitness to view the suspect while s/he is handcuffed or held down by police.¹⁸⁴

Furthermore, while showups need not be completely prohibited, we strongly encourage changes to Missouri law that would limit the extent and manner in which law enforcement can use showups.¹⁸⁵ Law enforcement may be permitted to conduct showups in situations where, for example, an identification is necessary to obtain probable cause for an arrest, or when administered immediately (i.e., within one or two minutes) after the crime occurs. When officers are permitted to conduct showups, however, they must follow procedures that minimize the suggestiveness of the identification. Officers should not, for instance, be permitted to conduct the showup while the suspect is in handcuffs or in a police car, and an eyewitness must be instructed that the suspect may or may not be the real culprit.

¹⁸¹ The disproportionate number of exonerees from St. Louis City also is likely due to the DNA Justice Project, introduced by Circuit Attorney Jennifer Joyce, which allows some inmates who were prosecuted in St. Louis City to obtain DNA testing. Jim Salter, *Prosecutor Looks for Mistakes in Old Cases*, COLUMBIA MISSOURIAN, Aug. 1, 2005. It is unclear how many additional persons convicted based on eyewitness identifications would be exonerated if Missouri implemented a similar project throughout the state.

¹⁸² H.B. 589, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009).

¹⁸³ *HB 589, MO. HOUSE OF REPRESENTATIVES*, <http://www.house.mo.gov/content.aspx?info=/bills091/bills/HB589.htm> (last visited Jan. 12, 2012) (listing last action as referral to the House Crime Prevention Committee).

¹⁸⁴ *See, e.g.*, *State v. Middleton*, 995 S.W.2d 443, 453–54 (Mo. banc 1999); *State v. Overstreet*, 694 S.W.2d 491, 494–95 (Mo. App. 1985).

¹⁸⁵ *See, e.g.*, *State v. Henderson*, 27 A.3d 872, 903 (N.J. 2011) (noting that a special master appointed to examine the validity of New Jersey’s eyewitness identification practices stated that showups are a “‘useful—and necessary—technique when used under appropriate circumstances,’” but that they “‘carry their ‘own risk of misidentifications,’” and also that lineups are a preferred identification procedure).

Other states have acted to limit the extent to which law enforcement officers are permitted to use showups to obtain an eyewitness identification. The Supreme Court of Wisconsin, for instance, has held that evidence obtained from showups is unreliable and inadmissible “unless, based on the totality of the circumstances, the showup was necessary.”¹⁸⁶ Furthermore, “[a] showup will not be necessary . . . unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array.”¹⁸⁷ Some showups, however, are still permissible under the Wisconsin standard. For instance, if police stop a person “suspected of committing a crime, but the police do not have the requisite probable cause to arrest and then to conduct a lineup or photo array, a showup could be considered necessary.”¹⁸⁸ The Supreme Court of Wisconsin reached this conclusion after a thorough review of recent social scientific research on identification procedures and instances of wrongful convictions based on unreliable showups.¹⁸⁹ The Supreme Court of New Jersey also recently reviewed its own state’s identification procedures and held that, due to the heightened risk of misidentification, “showup administrators should instruct witnesses that the person they are about to view may or may not be the culprit and that they should not feel compelled to make an identification.”¹⁹⁰

Similar standards for showups in Missouri would help to limit the likelihood of an erroneous eyewitness identification.

B. Recommendation #2

Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses.

Missouri POST Training Requirements

The Missouri POST Commission regulates law enforcement officers’ continuing education requirements and the training centers that teach continuing education courses.¹⁹¹ Officers must complete forty-eight hours of continuing education every three years.¹⁹² POST’s training materials, however, do not instruct officers to use eyewitness identification or custodial interrogation techniques that adequately reduce the risk of misidentifications and false confessions. POST’s Mandatory Basic Training Curricula instruct officers that foils used in an identification procedure must appear similar to the suspect and that showups are especially suggestive.¹⁹³ The curricula are otherwise general and do not prescribe a methodology similar to the *ABA Best Practices*.¹⁹⁴ Similarly, the training materials for custodial interrogations are

¹⁸⁶ State v. Dubose, 699 N.W.2d 582, 584 (Wis. 2005).

¹⁸⁷ *Id.* at 584–85.

¹⁸⁸ *Id.* at 594 n.11.

¹⁸⁹ *Id.* at 591–595.

¹⁹⁰ *Henderson*, 27 A.3d at 903.

¹⁹¹ See 11 CSR 75-14.010; 11 CSR 75-15.010.

¹⁹² 11 CSR 75-15.010(2).

¹⁹³ *Constitutional Law Handouts*, in MANDATORY BASIC TRAINING CURRICULA, *supra* note 57.

¹⁹⁴ See *id.*

limited to instruction on constitutional and state law imperatives, such as the general prohibition on coerced confessions.¹⁹⁵

Furthermore, not all of Missouri law enforcement officers may be completing the required continuing education courses. In 2005, the Missouri State Auditor found that “POST personnel do not require [law enforcement] agencies to maintain proof that the officers received the required [continuing] education, and POST does not audit this information to ensure that it is accurate.”¹⁹⁶ In its response, POST confirmed the Auditor’s findings and noted that it lacked the resources and staff to confirm that officers had completed the required coursework.¹⁹⁷ POST has not increased its staff size since the time of the audit.¹⁹⁸

Exemptions from Full Training Requirements

We further observe that some law enforcement officers in Missouri are entirely or largely exempt from all of POST’s licensing and training requirements. When the Missouri General Assembly updated its law enforcement training statutes in 2001, it required most full-time officers to complete at least 470 hours of basic training to obtain a license.¹⁹⁹ However, law enforcement officers commissioned on or before August 28, 2001, in political subdivisions “having less than four full-time paid peace officers or a population less than two thousand” are entirely exempt from all state license requirements, including training.²⁰⁰ Furthermore, officers “licensed and commissioned within a county of the third classification before July 1, 2002,” only need to complete 120 hours of training to obtain their license if their county elected to opt out of the normal training requirements.²⁰¹ Missouri currently categorizes eighty-nine of its small counties as third-class.²⁰²

Due to the complex grandfather provisions described above, it is possible that some officers who began work in law enforcement before 2002 or 2001 are investigating cases, including capital murder cases, with little or no training. Our review of Missouri’s current death row population revealed between three and nine inmates who were prosecuted in third-class counties.²⁰³ The majority of these crimes were investigated before the legislature updated the training statute in 2001.²⁰⁴ To help ensure that serious crimes in rural areas are investigated by experienced officers, many regions in Missouri have created “major case squads,” which allow several law

¹⁹⁵ *See id.*

¹⁹⁶ MO. STATE AUDITOR REP., *supra* note 110, at 7. *See also infra* notes 299–312 and accompanying text.

¹⁹⁷ *Id.* at 8.

¹⁹⁸ Interview with Jeremy Spratt, *supra* note 109.

¹⁹⁹ Section 590.040.1, RSMo 2011.

²⁰⁰ Section 590.020.3(4), RSMo 2011.

²⁰¹ Section 590.040.1(4), RSMo 2011.

²⁰² *See Counties by Classification*, MO. ASS’N OF COUNTIES, http://www.mocounties.com/countyinfo/MAC_CountyClassification2011.pdf (last visited Jan. 11, 2012).

²⁰³ Memorandum from the ABA Death Penalty Moratorium Implementation Project on Mo. Death Row Inmates Prosecuted in Third-Class Counties (Feb. 24, 2011) (on file with author). A Missouri county’s classification may change frequently based on the assessed property values in the individual county. Thus, we were only able to determine with absolute certainty that three death row inmates were prosecuted in third-class counties. Based on our assessment of property values, however, it is likely that nine persons on death row were prosecuted in third-class counties. *Id.*

²⁰⁴ *Id.*

enforcement agencies to join together and form a special task force comprised of more experienced officers.²⁰⁵ The Lake of the Ozarks Major Case Squad, for instance, is comprised of officers from sixteen local law enforcement agencies in Camden, Laclede, Miller, and Morgan counties.²⁰⁶ Prospective squad members must complete an additional forty-hour training course in “advanced investigative procedures.”²⁰⁷ From 2008 to 2010, the Ozarks Major Squad investigated two homicides in its region.²⁰⁸ Although there are currently fifteen major case squads operating in Missouri, Missouri law does not require local law enforcement agencies to form or use major case squads to investigate serious cases.²⁰⁹ It also appears that officers who serve in major case squads are not required to receive any specialized training in interrogation or eyewitness identification procedures.

Conclusion

Missouri is not in compliance with Recommendation #2. Although the POST Commission mandates that law enforcement officers complete continuing education courses, POST’s training materials for eyewitness identification and custodial interrogation procedures do not comply with the *ABA Best Practices*. As the recent audit reveals, POST had not adequately monitored whether officers have actually completed required continuing education coursework. Finally, some officers may be largely or completely exempt from all POST training requirements, severely limiting the amount of training they received on custodial interrogation and eyewitness identification techniques. In 1993, the 120-hour training requirement, which is still in place for some officers, ranked last in the United States in terms of state-mandated training hours.²¹⁰ We applaud those Missouri law enforcement agencies that have formed major case squads to investigate serious cases. It is unknown, however, the extent to which these squads receive any special training in interrogation or eyewitness identification techniques.

The POST Commission should revise its training materials such that officers learn interrogation and eyewitness identification techniques that comply with the *ABA Best Practices*. In addition, we strongly recommend that the Missouri General Assembly increase POST’s funding so that it can adequately monitor whether officers are completing required courses. The General Assembly should also simplify and revise the law enforcement training statutes to ensure that minimal training requirements are standardized for all local law enforcement officers and to guarantee that no current or future officer is permitted to serve without sufficient training.

C. Recommendation #3

Law enforcement agencies and prosecutors offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.

²⁰⁵ Email from Jason Lamb, Exec. Dir., Mo. Office of Prosecution Servs. (June 20, 2011) (on file with author).

²⁰⁶ Email from Jason Lamb, Exec. Dir., Mo. Office of Prosecution Servs. (June 22, 2011) (on file with author).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See Email from Jason Lamb, Exec. Dir., Mo. Office of Prosecution Servs. (June 20, 2011) (on file with author).

²¹⁰ Campo, *supra* note 30, at 688.

Missouri law does not require law enforcement agencies or prosecutors to regularly update their eyewitness identification procedures. The local law enforcement agencies we reviewed also have failed to update their policies to include advances in social scientific research. The Kansas City Police Department has not updated its eyewitness identification procedures since 2000.²¹¹ Since that time, there have been significant advances in the relevant social scientific research that the department could have incorporated into its policies.²¹² While the St. Louis County²¹³ and St. Louis Metropolitan²¹⁴ police departments updated their identification procedures in 2010, these updates failed to incorporate recent advances in social scientific research as explained in Recommendation #1. For instance, the St. Louis Metropolitan Police Department only requires three persons to participate in a lineup, even though recent social scientific research demonstrates high misidentification rates in lineups with as many as six participants.²¹⁵

Missouri is not in compliance with Recommendation #3. A Missouri bill introduced in 2009 would have required law enforcement agencies to update their eyewitness identification policies every two years.²¹⁶ The Missouri General Assembly, however, did not pass the bill into law.²¹⁷ The Legislature should consider passing this bill—or a similar one—that would require law enforcement agencies to periodically update their eyewitness identification procedures.

Recent developments in New Jersey may be instructive as to how Missouri law enforcement agencies could incorporate scientific advancements into its eyewitness identification procedures. In 2008, the Supreme Court of New Jersey reviewed a case in which the defendant claimed an eyewitness had mistakenly identified him as an accomplice to murder.²¹⁸ Recognizing the “vast body of scientific research about human memory” that had emerged in the past three decades, the Court appointed a special master to “evaluate scientific and other evidence about eyewitness identifications” as compared to the state’s existing standards on the admissibility of such identifications.²¹⁹ The special master considered testimony from seven witnesses over the course of a ten-day hearing, as well as over 360 exhibits and 200 published scientific studies on human memory.²²⁰ Upon review of the extensive report compiled by the special master, the Supreme Court of New Jersey found that “system” and “estimator” variables affect the accuracy of identifications.²²¹ System variables are those that are controlled by the state, such as whether the administering officer knows the identity of the suspect, and other variables like those described

²¹¹ KANSAS CITY POLICE DEP’T, INVESTIGATION BUREAU MEMORANDUM NO. 00-2 (2000) (on file with author).

²¹² See, e.g., Amina Memon et al., *The Cognitive Interview: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years*, 16 PSYCHOL., PUB. POL’Y & L. 340 (2010).

²¹³ ST. LOUIS CNTY. POLICE DEP’T, DEPARTMENTAL GENERAL ORDER 10-4 (2010) (on file with author).

²¹⁴ ST. LOUIS METRO. POLICE DEP’T, SPECIAL ORDER 8-01 (2010) (on file with author).

²¹⁵ *Id.*; see Penrod, *supra* note 4, at 45; see also *supra* 132–167 and accompanying text.

²¹⁶ H.B. 589, 95th Gen. Assemb, 1st Reg. Sess. (Mo. 2009).

²¹⁷ HB 589, MO. HOUSE OF REPRESENTATIVES, <http://www.house.mo.gov/content.aspx?info=/bills091/bills/HB589.htm> (last visited Jan. 12, 2012).

²¹⁸ *State v. Henderson*, 27 A.3d 872, 877 (N.J. 2011).

²¹⁹ *Id.*

²²⁰ *Id.* at 884–85.

²²¹ *Id.* at 916 (“[T]he science abundantly demonstrates the many vagaries of memory encoding, storage, and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications.” (internal quotations omitted)).

in Recommendation #1.²²² Estimator variables are those beyond the control of the criminal justice system, such as factors related to the incident, the suspect, or the witness.²²³

Upon review of the special master’s report, the Court held that, when a defendant demonstrates some evidence of suggestiveness, the trial court should consider all relevant system and estimator variables at a pretrial hearing.²²⁴ While this would subject a greater number of identifications to pretrial review, the Court stated that “[a] trial court can end the hearing at any time . . . if the court concludes that the . . . allegation of suggestiveness is groundless.”²²⁵ At the hearing, the prosecution must offer proof that the identification is reliable, based on system and estimator variables, and the final burden remains on the defendant to prove “a very substantial likelihood of irreparable misidentification.”²²⁶ If the trial court finds “a very substantial likelihood of irreparable misidentification” under the totality of the circumstances, the identification must be suppressed.²²⁷

The Supreme Court of New Jersey explained that “broader hearings will provide more meaningful deterrence. To the extent officers wish to avoid a pretrial hearing, the officer must avoid acting in a suggestive manner.”²²⁸ If the identification is admitted, the Court also directed that “enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case.”²²⁹

The appointment of a special master to undertake a similarly thorough review of Missouri’s identification procedures would improve eyewitness identification accuracy and encourage better, uniform practices among law enforcement in the state. It would also assist Missouri courts in establishing a modern framework for accurately assessing the validity of eyewitness identifications, thereby reducing the likelihood of convicting the innocent, while increasing the likelihood of convicting the guilty.

D. Recommendation #4

Video-record the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for

²²² *Id.* at 896–903 (describing system variables such as blind administration, pre-identification instructions, lineup construction, avoiding feedback and recording confidence of the eyewitness, multiple viewings, simultaneous and sequential lineup accuracy, composites, and showups). The *Henderson* Court also recounted that, “[t]o its credit, the [New Jersey] Attorney General’s Office incorporated scientific research on system variables into the guidelines it issued in 2001 to improve eyewitness identification procedures.” *Id.*

²²³ *Id.* at 904–10 (describing estimator variables such as stress, weapon focus, duration, distance and lighting, eyewitness and perpetrator characteristics, memory decay, actions of private actors such as descriptions given by other eyewitnesses, and speed of the identification).

²²⁴ *State v. Henderson*, 27 A.3d 872, 919 (N.J. 2011) (“[T]he revised framework should allow all relevant system and estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness . . .”).

²²⁵ *Id.* at 878.

²²⁶ *Id.* at 920 (citing *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977)).

²²⁷ *Id.*

²²⁸ *Id.* at 922.

²²⁹ *Id.* at 924.

questioning, or, where video-recording is impractical, audio-record the entirety of such custodial interrogations.

Missouri's Custodial Interrogation Recording Statute

The Missouri General Assembly enacted a statute in 2009 that requires law enforcement officers to video- or audio-record a custodial interrogation in a murder case “when feasible.”²³⁰ The statute, however, does not specify whether the whole interrogation, including the reading and waiver of rights, must be recorded.²³¹ Moreover, if “the recording equipment fails” or is “not available at the location where the interrogation takes place,” law enforcement agencies are entirely exempt from the recording requirement.²³² These exceptions stand in contrast to the Recommendation, which states that when video-recording is impractical, law enforcement should audio-record the interrogation.

We also note that defendants have no remedy when law enforcement officers violate the statute. The statute currently states that failure to comply with the recording requirement “shall [not] be construed as a ground to exclude evidence Compliance or noncompliance with this [statute] shall not be admitted as evidence, argued, referenced, considered or questioned during a criminal trial.”²³³ The only reprimand available under the statute allows the Governor to, at his/her discretion, withhold state funds from the noncompliant law enforcement agency.²³⁴

The remedy is a critical part of the recording statute. There are two primary benefits to recording custodial interrogations: the trier of fact has a better opportunity to assess the defendant's confession and law enforcement officers are encouraged to avoid coercive tactics because they are being recorded. These benefits, however, are significantly diminished if officers know that they will face no serious repercussions for failing to follow the law.

False Confessions in Missouri

Coercive tactics have led to false confessions in Missouri. Johnny Lee Wilson, for instance, falsely confessed to a brutal murder in Aurora, Missouri, in 1986.²³⁵ Wilson had been implicated in the crime by a local youth known by police to be a “very skilled liar.”²³⁶ Although the investigating officers knew Wilson to be a mentally impaired person who was in special education classes in high school, they arrested him and interrogated him for several hours.²³⁷ During the interrogation, the officers asked Wilson leading questions about the murder and threatened him when his answers were inconsistent with the officers' theory.²³⁸ Due to this pressure, Wilson offered police “a collection of discombobulated facts about the murder [that]

²³⁰ Section 590.700, RSMo 2011.

²³¹ *See id.*

²³² Section 590.700.3(5)–(6), RSMo 2011.

²³³ Section 590.700.6, RSMo 2011.

²³⁴ Section 590.700.5, RSMo 2011.

²³⁵ *Wilson v. Lawrence County*, 260 F.3d 946, 949 (8th Cir. 2001).

²³⁶ *Id.* at 949 (internal quotations omitted).

²³⁷ *Id.* at 949–50.

²³⁸ *Id.* at 950.

evolved into a confession.”²³⁹ The U.S. Court of Appeals for the Eighth Circuit later held that “no officer could have reasonably thought this conduct consistent with Wilson’s constitutional rights.”²⁴⁰

Wilson entered an *Alford* plea to avoid the death penalty.²⁴¹ In 1988, the actual killer, a convicted murderer, confessed to the crime.²⁴² Despite this new information, the Supreme Court of Missouri upheld a trial court decision denying Wilson post-conviction relief.²⁴³ In 1995, however, Missouri Governor Mel Carnahan granted Wilson a full pardon “because it [was] clear he did not commit the crime for which he ha[d] been incarcerated.”²⁴⁴

In another case, Melvin Lee Reynolds confessed to kidnapping and murdering four-year-old Eric Christgen in St. Joseph, Missouri, in 1979.²⁴⁵ Officers interrogated Reynolds several times.²⁴⁶ During one interrogation, they administered sodium amytal, also known as “truth serum,” to Reynolds.²⁴⁷ After a final fifteen-hour interrogation, during which officers told Reynolds that his girlfriend would not marry him if he did not stop “telling lies,” Reynolds confessed.²⁴⁸ Although portions of Reynolds’s statement were recorded, many were not, including his denials and recantations.²⁴⁹ At trial, the recorded portions of Reynolds’s statements were played for the jury.²⁵⁰ He subsequently was convicted of second-degree murder and sentenced to life in prison.²⁵¹ The Supreme Court of Missouri affirmed the conviction, holding that Reynolds voluntarily confessed to the murder.²⁵² Four years after the murder, however, serial killer Charles Ray Hatcher confessed to the crime, and Reynolds was released.²⁵³ While Reynolds remained incarcerated for Hatcher’s crime, Hatcher was free to kill again. Two-and-a-half years after Reynolds went to prison, Hatcher kidnapped, raped, and murdered an eleven-year-old girl, having found her two blocks from where he had kidnapped Eric Christgen.²⁵⁴

Expert Testimony on Confessions

As the Reynolds case demonstrates, jurors are not always able to accurately assess the veracity of a confession, even when portions of it are recorded. While the Assessment Team views full video-recording as the best means to ensure that confessions can be accurately evaluated by the factfinder, we further note that Missouri law does not allow a defense expert to testify at trial regarding the veracity of a confession. In *State v. Skillicorn*, the first Missouri case to directly

²³⁹ *Id.*

²⁴⁰ *Id.* at 953.

²⁴¹ *Wilson v. Lawrence County*, 260 F.3d 946, 949 (8th Cir. 2001).

²⁴² Terry Ganey, *Pardoned Man Wants to ‘Pick Up My Life’*, ST. LOUIS POST-DISPATCH, Sept. 30, 1995, at 1A.

²⁴³ *Wilson v. State*, 813 S.W.2d 833, 834 (Mo. banc 1991).

²⁴⁴ *Wilson*, 260 F.3d at 949.

²⁴⁵ Meyer, *supra* note 3.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *State v. Reynolds*, 619 S.W.2d 741, 743 (Mo. 1981).

²⁵² *Id.* at 744–45.

²⁵³ Meyer, *supra* note 3.

²⁵⁴ *Id.*

address the issue, the Supreme Court of Missouri held that a law enforcement officer may testify against a defendant on issues related to the veracity of a confession as long as the testimony is “generic” and does not “directly impugn[]” the defendant’s credibility.²⁵⁵ In *Skillicorn*, the prosecutor asked the testifying Federal Bureau of Investigation (FBI) agent whether suspects who are being interrogated typically “downplay their involvement” in the crime.²⁵⁶ The agent replied, “Yes. That’s quite often the case. We call it minimizing.”²⁵⁷

Subsequent Missouri Court of Appeals cases, however, have applied the *Skillicorn* standard to categorically exclude defense expert testimony regarding the veracity of confessions, even when the proffered testimony is generic.²⁵⁸ In one case, for instance, the trial court did not allow a defense expert to “testify about interrogation techniques, how such techniques influence criminal suspects, [] whether the techniques correlate to false confessions . . . [,] how and why false confessions occur[,] and principles to use to evaluate the reliability of a confession.”²⁵⁹ This proffer appears to meet the *Skillicorn* standard, as it relates to “generic” factors that affect the credibility of confessions, rather than to the defendant’s specific statements.²⁶⁰ Nevertheless, the appellate court found that while the expert’s “extensive experience would equal that of an FBI agent,” the testimony was inadmissible because it was “specific” to the defendant’s case.²⁶¹

Conclusion

Missouri is in partial compliance with Recommendation #4.

Although Missouri has adopted a custodial interrogation recording statute, its provisions fall short of the full requirements of the Recommendation in two important areas: the exceptions to the recording requirement and the lack of remedies for non-compliance. The statute’s exceptions allow officers to circumvent the recording requirement entirely by failing to purchase or maintain recording equipment.²⁶² Moreover, when an exception applies, officers are exempt from the recording requirement altogether, whereas the Recommendation states that officers should audio-record the interrogation when video is impractical.²⁶³ The Missouri statute not only lacks a remedy should law enforcement fail to comply with the statute, but it also provides that noncompliance with the statute cannot be “admitted as evidence, argued, referenced, considered or questioned” at trial.²⁶⁴

As with eyewitness misidentifications, false confessions lead to two related injustices: an innocent person is imprisoned while a guilty criminal remains free to commit more crimes. Cases such as those of Johnny Lee Wilson and Melvin Lee Reynolds demonstrate that there is a

²⁵⁵ *State v. Skillicorn*, 944 S.W.2d 877, 892 (1997), *overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo. banc 2008).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *See, e.g., State v. Davis*, 32 S.W.3d 603, 607–09 (Mo. App. 2000).

²⁵⁹ *Id.* at 608.

²⁶⁰ *See Skillicorn*, 944 S.W.2d at 892.

²⁶¹ *Davis*, 32 S.W.3d at 609.

²⁶² Section 590.700.3(5)–(6), RSMo 2011.

²⁶³ *Id.*

²⁶⁴ Section 590.700.6, RSMo 2011.

real risk of these injustices in Missouri. Accordingly, Missouri should revise the interrogation recording statute. First, the General Assembly should amend the statute's exceptions. While any interrogation recording statute will require exceptions for exigent circumstances, Missouri's statute grants an exception any time the recording equipment fails or is not available.²⁶⁵ Any agency that does not buy or properly maintain recording equipment appears to be exempt from the statute under these exceptions. The General Assembly should revise this exception to require a finding that officers failed to video-record the interrogation in an emergency and in good faith. Moreover, the statute should require officers to audio-record the interrogation in cases where the exception applies.

Second, the statute should provide a remedy for failure to record in order to promote proper recording of the entirety of the custodial interview. In its current form, defendants who are interrogated in violation of the Missouri statute have no available recourse. In fact, the statute may place additional constraints on a defendant's ability to challenge unrecorded confessions, as it states that "compliance or non-compliance" with the recordation requirement cannot be admitted into evidence at trial for any purpose.²⁶⁶

The remedy need not be total exclusion of all unrecorded statements. In neighboring Illinois, unrecorded interrogations are presumed inadmissible, but that presumption "may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances."²⁶⁷ The model interrogation recording statute, proposed by attorneys Thomas P. Sullivan and Andrew W. Vail, would allow unrecorded confessions to be admitted into evidence but require a jury instruction on law enforcement's failure to comply with the statute.²⁶⁸ The proposed Sullivan and Vail instruction reads as follows:

The law of this state required that the interview of the defendant by law enforcement officers which took place on [insert date] at [insert place] was to be electronically recorded, from beginning to end. The purpose of this requirement is to ensure that you jurors will have before you a complete, unaltered, and precise record of the circumstances under which the interview was conducted, and what was said and done by each of the persons present.

In this case, the interviewing law enforcement agents failed to comply with that law. They did not make an electronic recording of the interview of the defendant. No justification for their failure to do so has been presented to the court. Instead

²⁶⁵ Section 590.700.3(5)-(6), RSMo 2011.

²⁶⁶ Section 590.700.6, RSMo 2011.

²⁶⁷ 725 ILL. COMP. STAT. 5/103-2.1(f) (2011).

²⁶⁸ Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interrogations as Required by Law*, 99 J. CRIM. L. & CRIMINOLOGY 215, 221 (2009). We also note that the Missouri Approved Instructions provide a jury instruction on the veracity of a confession. Missouri's current jury instruction on the veracity of confessions states that jurors should consider whether the defendant "understood what he was saying and doing, and [whether] the statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement" in deciding what, if any weight to give the statement. MAI-CR3d 310.06. The court must give the instruction if requested by either party. *State v. Harris*, 781 S.W.2d 137, 141 (Mo. App. 1989) (citing MAI-CR 3d 310.06, Note on Use 2).

of an electronic recording, you have been presented with testimony as to what took place, based upon the recollections of law enforcement personnel [and the defendant].

Accordingly, I must give you the following special instructions about your consideration of the evidence concerning that interview.

Because the interview was not electronically recorded as required by our law, you have not been provided the most reliable evidence as to what was said and done by the participants. You cannot hear the exact words used by the participants, or the tone or inflection of their voices.

Accordingly, as you go about determining what occurred during the interview, you should give special attention to whether you are satisfied that what was said and done has been accurately reported by the participants, including testimony as to statements attributed by law enforcement witnesses to the defendant.²⁶⁹

Sullivan and Vail have extensively studied different jurisdictions' approach to recording custodial interrogations.²⁷⁰ The authors developed this remedy after consulting with over 600 law enforcement officers on the issue.²⁷¹ Adopting a remedy for failure to record along the lines of either the Illinois model or the Sullivan and Vail model would provide a stronger incentive for officers to comply with the law, without risking automatic exclusion of any unrecorded custodial interrogation. In addition, requiring a jury instruction as the remedy would alert the jury to the risk of false confessions and provide the court with a means to ensure that a confession is voluntary.

E. Recommendation #5

Ensure adequate funding to ensure proper development, implementation, and updating policies and procedures relating to identifications and interrogations.

Because Missouri has over 300 separate law enforcement agencies, each with its own budget, we were unable to obtain sufficient information regarding the budgets of local law enforcement agencies to determine whether their funding is adequate to ensure the development of interrogation and identification policies. Thus, we could not determine what portion of law enforcement budgets, if any, was devoted to the development of policies related to identification and interrogation procedures. As such, we are unable to conclude whether Missouri is in compliance with Recommendation #5.

We observe, however, that the POST Commission regulates the Mandatory Basic Training Curricula, which serves as the foundation for Missouri law enforcement officers' basic training courses.²⁷² POST has not consistently updated the curricula materials relating to identifications

²⁶⁹ Sullivan & Vail, *supra* note 268, at 226.

²⁷⁰ *Id.* at 221.

²⁷¹ *Id.* at 220 n.24.

²⁷² See 11 CSR 75-14.030(1).

and interrogations. For instance, POST has not revised the outline for the “Interrogation Process” course since 1996.²⁷³ A handout in the curricula explaining constitutional limits on interrogations was written in 1980.²⁷⁴ The curricula also lacked any materials on Missouri’s custodial interrogation recording statute, which became law in 2009.²⁷⁵

Moreover, a report written by the Missouri State Auditor in 2005 revealed that POST had failed to comply with many of its own directives.²⁷⁶ While this report did not address POST’s training materials per se, it indicated that POST lacked the funding and staff to fulfill many of its directives.²⁷⁷ Currently, POST only has five full-time staff members, the same number as at the time of the 2005 audit.²⁷⁸ POST’s funding has also not changed significantly since the audit.²⁷⁹ Given the numerous deficiencies identified by the audit, POST is plainly in need of more resources so that it can make certain that law enforcement officers are well-trained, as well as to ensure convictions and executions are legitimate. Accordingly, the Assessment Team recommends that the Missouri General Assembly allocate more funding to POST so that it can fully update its identification and interrogation procedures.

F. Recommendation #6

Courts should have the discretion to allow a properly qualified expert to testify both pretrial and at trial on the factors affecting eyewitness accuracy.

In *State v. Lawhorn*, the Supreme Court of Missouri held that a “trial court did not abuse its discretion in refusing to permit” a qualified expert to testify at trial on factors affecting eyewitness accuracy.²⁸⁰ While this holding appears to imply that a Missouri trial court has the discretion to admit or deny expert testimony on eyewitness identification, the *Lawhorn* Court was otherwise highly critical of such testimony.²⁸¹ The Court noted that an “expert’s assistance” on issues of witness credibility is generally not warranted, as the matter is “within the general realm of common experience of members of a jury,” even when the expert’s proffered testimony addresses the difficulty of cross-racial identifications.²⁸² The Court further stated that “the introduction of expert testimony [on eyewitness accuracy] would be a superfluous attempt to put the gloss of expertise, like a bit of frosting, upon inferences which lay persons were equally capable of drawing from the evidence.”²⁸³

²⁷³ *Interrogation Process*, in MANDATORY BASIC TRAINING CURRICULA, *supra* note 57.

²⁷⁴ ANDREW DAVID, *Danny Escobedo and Ernesto Miranda: Confessions and Rights Before Trial*, in FAMOUS SUPREME COURT CASES (1980), in *Constitutional Law Handouts*, in MANDATORY BASIC TRAINING CURRICULA, *supra* note 57.

²⁷⁵ See Section 590.700, RSMo 2011.

²⁷⁶ MO. STATE AUDITOR REP., *supra* note 110, at 5–7. The Auditor’s report is discussed in more detail under Recommendation #8. See *infra* notes 299–312 and accompanying text.

²⁷⁷ See MO. STATE AUDITOR REP., *supra* note 110, at 8, 12, 15–16.

²⁷⁸ Interview with Jeremy Spratt, *supra* note 109.

²⁷⁹ *Id.*

²⁸⁰ *State v. Lawhorn*, 762 S.W.2d 820, 823 (Mo. banc 1988).

²⁸¹ *Id.* at 821–23.

²⁸² *Id.* at 823.

²⁸³ *Id.* (internal quotations omitted).

It appears that Missouri trial courts and practicing attorneys have interpreted *Lawhorn* to prohibit expert testimony on eyewitness identifications.²⁸⁴ Moreover, *Lawhorn* has been cited for the principle that such testimony is inadmissible.²⁸⁵ In a 2007 circuit court case in St. Louis City, for instance, a prosecutor filed a motion to exclude expert testimony on the issue of eyewitness identification accuracy, arguing that it “is inadmissible because it invades the province of the jury.”²⁸⁶ The motion cited *Lawhorn* for the proposition that such testimony is inadmissible under Missouri law.²⁸⁷

It appears that, in practice, Missouri is not in compliance with Recommendation #6. The Supreme Court of Missouri has held that it is not an abuse of discretion for Missouri trial courts to refuse to admit expert testimony on factors affecting eyewitness accuracy, and trial courts have relied on *Lawhorn* to exclude the admission of this testimony.

G. Recommendation #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 lineup accuracy. If the court finds a sufficient risk of misidentification based on cross-racial factors, judges should have available model jury instructions that inform juries that the cross-racial nature of the identification may affect the reliability of an eyewitness identification.²⁸⁸

Missouri is not in compliance with Recommendation #7. The Missouri Approved Instructions only provide an all-purpose instruction on witness believability that instructs jurors to consider such factors as the witness’s ability to “observe and remember” and whether “any interest, bias

²⁸⁴ Telephone Interview by Mark Pickett with Greg Mermelstein, Appellate/PCR Div. Dir., Mo. State Pub. Defender Sys. (Apr. 26, 2011) (on file with author). In addition, Missouri appellate courts have repeatedly held that a trial court’s refusal to admit testimony from an eyewitness identification expert was not an abuse of discretion. *State v. Whitmill*, 780 S.W.2d 45, 46 (Mo. banc 1989) (applying an abuse-of-discretion standard but noting that “[g]enerally, expert testimony is inadmissible if it relates to the credibility of witnesses because this constitutes an invasion of the province of the jury” (citing *Lawhorn*, 762 S.W.2d at 823)); *State v. Ware*, 326 S.W.3d 512, 528–29 (Mo. App. 2010) (applying an abuse-of-discretion standard and noting several other cases in which denial of expert testimony on witness accuracy or truthfulness was properly denied); *State v. Cunningham*, 863 S.W.2d 914, 923 (Mo. App. 1993); *State v. Hill*, 854 S.W.2d 486, 487–88 (Mo. App. 1993).

²⁸⁵ Interview with Greg Mermelstein, *supra* note 284.

²⁸⁶ State’s Motion to Exclude Expert Testimony of Dr. Richard M. Berne, *State v. Love*, No. 22061-00095, 2007 WL 7294997, at *1 (St. Louis City Cir. Ct. July 16, 2007).

²⁸⁷ *Id.* at *2.

²⁸⁸ The ABA Criminal Justice Section’s Committee on Rules of Criminal Procedure, Evidence, and Police Practices recommends a model jury instruction on cross-racial identification as follows:

In this case, the identifying witness is of a different race than the defendant. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race that the witness has affected the accuracy of the witness’ original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.

See ABA, RECOMMENDATION 104D, 2008 Ann. Mtg., available at http://www.abanet.org/moratorium/policy/2000s/2008_AM_OneHundredFourD.pdf.

or prejudice” influenced the witness.²⁸⁹ The Missouri Court of Appeals, citing the notes on use to the Missouri Approved Instructions, has held that trial courts may not provide an additional instruction on witness believability.²⁹⁰

Recent social scientific research demonstrates a number of factors that influence eyewitness identification accuracy, ranging from the length of time the eyewitness observed the suspect to the type of identification procedure used by law enforcement.²⁹¹ This research indicates that cross-racial identifications are especially likely to be unreliable.²⁹² Moreover, seven persons in Missouri who were convicted based on eyewitness misidentification have been exonerated following DNA testing.²⁹³ Five of these convictions were based on a cross-racial identification.²⁹⁴ In all of these cases, jurors were unable to accurately assess the reliability of the identification. For instance, in one of the seven innocence cases, a juror agreed during voir dire that “the fear, the emotions, and the stress involved in” a rape would make the rape victim’s identification more reliable.²⁹⁵ Social scientific research, however, demonstrates that a person in a stressful situation is less likely to make a reliable identification.²⁹⁶

As recently recognized by the Supreme Court of New Jersey, “science reveals that memory and eyewitness identification evidence present certain complicated issues,” and it is therefore the “court’s obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial.”²⁹⁷ Because of cases like those described above, Missouri should adopt a model jury instruction specifically related to eyewitness identification, which the trial court can tailor to the needs of an individual case, and which allows the court to instruct on cross-racial identifications when appropriate. Several states have adopted jury instructions on eyewitness identification accuracy that could serve as a guide for the development of a similar instruction in Missouri.²⁹⁸

²⁸⁹ MAI-CR3d 302.01.

²⁹⁰ State v. Johnson, 231 S.W.3d 870, 877 (Mo. App. 2007) (quoting MAI-CR3d 302.01, Note on Use 3).

²⁹¹ See generally Penrod, *supra* note 4, at 37. See also State v. Henderson, 27 A.3d 872 (N.J. 2011).

²⁹² See generally Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984).

²⁹³ *Missouri Cases of Innocent People Convicted Based on Eyewitness Misidentification and Later Exonerated by DNA*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Missouri_Cases_of_Innocent_People_Convicted_Based_on_Eyewitness_Misidentification_and_Later_Exonerated_by_DNA.php (last visited Jan. 12, 2012).

²⁹⁴ *Id.*

²⁹⁵ State v. Woods, 705 S.W.2d 76, 79 (Mo. App. 1985). Woods served eighteen years in prison and was paroled before DNA testing on the victim’s underwear revealed that he was innocent. *Anthony D. Woods*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Anthony_D_Woods.php (last visited Mar. 11, 2011).

²⁹⁶ Memon et al., *supra* note 212, at 350 (“A meta-analysis of the effects of heightened stress indicates that it negatively impacts eyewitness recall of details of a crime, as well as identification of a perpetrator or target person.”).

²⁹⁷ State v. Henderson, 27 A.3d 872, 924 (N.J. 2011).

²⁹⁸ States that use a cautionary instruction as to the unreliability of eyewitness identification testimony include Alabama, see *Brooks v. State*, 380 So. 2d 1012, 1014 (Ala. App. Ct. 1980) (“[a] requested identification instruction which deals realistically with the shortcomings and trouble spots of the identification process should be given where the principle has not been covered by the court’s oral charge”), California, see *People v. Hall*, 616 P.2d 826, 835 (Cal. 1980), *overruled on other grounds* *People v. Newman*, 981 P.2d 98, 104 n.6 (Cal. 1999) (refusal to give a requested instruction “deal[ing] with identification in the context of reasonable doubt” was error), Connecticut, see *State v. Ledbetter*, 881 A.2d 290, 318 (Conn. 2005) (requiring a cautionary jury instruction warning the jury of the risks of misidentification if certain conditions are met), Georgia, see *Brodes v. State*, 614 S.E.2d 766, 769 (Ga. 2005) (“[t]he creation of the pattern jury instruction regarding the assessment of reliability of eyewitness

H. Recommendation #8

Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.

Recommendation #9

Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.

Missouri POST Audit

The Director of the Department of Public Safety has the authority to discipline a Missouri law enforcement officer for such acts as committing a criminal offense.²⁹⁹ S/he also can immediately suspend an officer who commits a felony, who has had his/her law enforcement license revoked or suspended in another jurisdiction, or who “[p]resents a clear and present danger to the public.”³⁰⁰ There are, however, few other guidelines for disciplining officers. Moreover, a 2005 report by the Missouri State Auditor found that the Missouri POST Program had failed to adequately develop and enforce many policies related to the discipline of law enforcement officers and the investigation of officer misconduct.³⁰¹ Among the audit’s findings:

identification testimony reflects the studied conclusion that judicial guidance to the jury on the topic of eyewitness identification is warranted”), Kansas, *see* State v. Warren, 635 P.2d 1236, 1244 (Kan. 1981) (requiring a cautionary jury instruction warning the jury of the risks of misidentification if certain conditions are met), Massachusetts, *see* Commonwealth v. Rodriguez, 391 N.E.2d 889, 302 (Mass. 1979) (“a defendant who fairly raises the issue of mistaken identification might well be entitled to instructions [as to the possibility of mistaken identification]”), Michigan, *see* People v. Storch, 440 N.W.2d 14, 16 n.1 (Mich. App. Ct. 1989) (quoting approvingly a cautionary jury instruction warning the jury of the risks of misidentification), Minnesota, *see* State v. Burch, 170 N.W.2d 543, 553-54 (Minn. 1969) (“where requested by defendant’s counsel, we think the court should instruct on the factors the jury should consider in evaluating an identification and caution against automatic acceptance of such evidence”), Montana, *see* State v. Hart, 625 P.2d 21, 31 (Mont. 1981) (“[a cautionary jury instruction warning the jury of the risks of misidentification] may be proper, if not mandatory, in certain cases”), New Jersey, *see* Henderson, 27 A.3d at 925–26 (requesting the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current charge on eyewitness identifications and submit them to the state supreme court for its review), North Carolina, *see* State v. Kinard, 283 S.E.2d 540, 543 (N.C. App. Ct. 1981) (“[i]f the evidence strongly suggests the likelihood of irreparable misidentification, the identification issue would become a substantial feature of the case, and the trial judge is required, even in the absence of a request, to properly instruct the jury as to the detailed factors that enter into the totality of the circumstances relating to identification”), Pennsylvania, *see* Commonwealth v. Washington, 927 A.2d 586, 603-04 (Pa. 2007) (quoting approvingly a cautionary jury instruction warning the jury of the risks of misidentification), Utah, *see* State v. Long, 721 P.2d 483, 492 (Utah 1986) (“trial courts shall give [a cautionary jury] instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense”). *See also* State v. Smith, No. 48-2009-CF-005719-O (Fl. 9th Jud. Cir. Feb. 24, 2011) (order permitting cautionary jury instruction on gauging eyewitness identification accuracy) (on file with author).

²⁹⁹ Sections 590.080.1, 590.090.1, RSMo 2011.

³⁰⁰ Section 590.090.1, RSMo 2011.

³⁰¹ *See* MO. STATE AUDITOR REP., *supra* note 110.

- (1) POST had failed to enforce a statute that compels local law enforcement agencies to notify POST within thirty days of an officer being subject to discipline. This delayed POST investigations into officer misconduct.³⁰²
- (2) POST was not performing periodic criminal background checks on licensed officers. As a result, POST was not aware of pending criminal charges against several active duty officers.³⁰³
- (3) POST no longer had the statutory authority to discipline officers for off-duty misconduct. As a result, an officer who had been disciplined for “inappropriate contact” with a seventeen-year-old high school student under the prior statute could not be reprimanded under the current law.³⁰⁴
- (4) State law prohibited POST from revealing an officer’s “information regarding previous employment or termination” to prospective law enforcement employers, allowing officers with poor employment records to remain employed in law enforcement by moving to another agency. For instance, one officer worked for nine agencies in a six-year period, despite having been terminated from past positions for dishonesty and poorly written reports.³⁰⁵
- (5) POST had failed to document and track a number of complaints filed against licensed officers, and complaints were “not subject to management oversight to verify [they] were properly handled.”³⁰⁶
- (6) POST investigations into officer misconduct were “not initiated and/or completed in a timely manner.” POST took one year from the date of the complaint, on average, to complete an investigation into officer misconduct. In one case, POST waited six months before beginning its investigation of an officer who had been terminated for theft. Until the investigation is completed, an officer maintains his/her license and can continue working in law enforcement.³⁰⁷
- (7) POST did not have written guidelines regarding officer discipline.³⁰⁸

To the extent that POST agreed with the audit’s findings, it stated that POST lacked the funding necessary to implement the suggested changes.³⁰⁹ Specifically, POST’s budget only allowed for one investigator in charge of reviewing all of the complaints against every officer in the state.³¹⁰ As of February 2011, the POST Program Manager reports that there has not been a substantial increase in POST funding since the State Auditor issued her report, and the program still only has one staff member assigned to investigating officer misconduct.³¹¹

³⁰² *Id.* at 5–6.

³⁰³ *Id.* at 9.

³⁰⁴ *Id.* at 10.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 13–14.

³⁰⁷ MO. STATE AUDITOR REP., *supra* note 110, at 14–15.

³⁰⁸ *Id.* at 15.

³⁰⁹ *See id.* at 8, 12, 15–16.

³¹⁰ *Id.* at 8.

³¹¹ Interview with Jeremy Spratt, *supra* note 109. In total, the POST Commission has five full-time staff members. *Id.*

We also observe that the POST Commission does not appear to have any authority to investigate misconduct by agencies affiliated with law enforcement, such as forensic service providers.³¹² We did not find any other Missouri entity charged with receiving complaints and investigating misconduct by such agencies affiliated with law enforcement.

Local Misconduct Investigations

At the local level, Missouri allows local governments to establish civilian review boards.³¹³ These boards do not have any direct disciplinary power under the statute, but they have “the authority to investigate allegations of misconduct by local law enforcement officers” and “recommend disciplinary action” to the chief law enforcement official in the jurisdiction.³¹⁴

In our review of Missouri municipalities, we found only two cities that had established civilian review boards: Springfield and Columbia. If a citizen appeals a determination made by the Springfield Police Department regarding specific police conduct, the Springfield review board will “review and comment to the City Council through the City Manager and to the Chief of Police . . . about [that] specific police conduct.”³¹⁵ Columbia’s Citizens Police Review Board, founded in 2009, “[r]eviews appeals from the police chief’s decisions on alleged police misconduct,” but the City Manager can override the board’s decision.³¹⁶ In the two cases where Columbia’s Citizens Police Review Board found misconduct by police, the City Manager reversed the decision and found that the officer in question had not engaged in misconduct.³¹⁷

The Office of Community Complaints (OCC) addresses misconduct allegations against the Kansas City Police Department.³¹⁸ Like a civilian review board, civilians staff the OCC.³¹⁹ The OCC, however, is under the direct authority of the Kansas City Board of Police Commissioners, and, in addition to investigating misconduct, “is also entrusted with the duty to protect members of the police department from unjust and unfair accusations.”³²⁰ The St. Louis County and St. Louis Metropolitan police departments investigate misconduct through internal affairs divisions and provide a means for citizens to file complaints against officers.³²¹

³¹² See sections 590.010–.501, RSMo 2011.

³¹³ Section 590.653.1, RSMo 2011.

³¹⁴ Section 590.653, RSMo 2011.

³¹⁵ *Police Civilian Review Board*, CITY OF SPRINGFIELD, MO., <http://www.springfieldmo.gov/boards/detail.jsp?id=40> (last visited Jan. 13, 2012).

³¹⁶ *Citizens Police Review Board*, CITY OF COLUMBIA, MO., <http://www.gocolumbiamo.com/Council/Commissions/description.php?bcid=14> (last visited Jan. 13, 2012); Brennan David, *Watkins Overrules Board Decision*, COLUMBIA DAILY TRIB., Feb. 23, 2011, <http://www.columbiatribune.com/news/2011/feb/23/watkins-overrules-review-board-decision> (last visited Jan. 13, 2012).

³¹⁷ David, *supra* note 316.

³¹⁸ *Office of Community Complaints*, KANSAS CITY POLICE DEP’T, <http://www.kcmo.org/police/OfficeofCommunityComplaints/index.htm> (last visited Jan. 13, 2012).

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Commendations and Complaints*, ST. LOUIS COUNTY GOV’T, <http://www.stlouisco.com/LawandPublicSafety/PoliceDepartment/CommendationsandComplaints> (last visited Jan. 13, 2012); *Internal Affairs – Complaint Form*, ST. LOUIS METRO. POLICE DEP’T, http://www.slmpd.org/internal_affairs/internal_affairs.asp (last visited Jan. 13, 2012).

The Ted White, Jr., Case

The Ted White, Jr., case demonstrates the potential problems that can arise from the failure to recognize, investigate, and punish officer misconduct. In 1999, White was convicted of molesting his adopted daughter in Lee's Summit, Missouri, based largely on the accusation of his wife.³²² After the trial, however, White's new attorneys discovered that, during the molestation investigation, White's wife had been having an affair with Detective Richard McKinley, the lead investigator on the case.³²³ McKinley and White's now former wife married shortly after White was convicted.³²⁴ White's attorneys also alleged that McKinley read the alleged victim's diary but never seized it as evidence.³²⁵ Because the prosecution did not disclose this information, White received a new trial on appeal, and a jury acquitted him in 2005.³²⁶ As late as 2008, however, McKinley was still employed as an officer with the Lee's Summit Police Department.³²⁷

Conclusion

Missouri is not in compliance with Recommendations #8 and #9.

While the Missouri POST Program provides training programs and disciplinary procedures for law enforcement agencies, and some local law enforcement agencies provide means for citizens to report officer misconduct, Missouri has failed to adequately ensure that investigative personnel are held accountable for their performance and that citizens and investigative personnel have an adequate opportunity to report misconduct in investigations.

Misconduct by law enforcement undermines public confidence in the justice system. As evidenced by the 2005 POST audit, there is insufficient oversight of law enforcement in Missouri. Despite the numerous deficiencies identified in the POST audit, POST's budget has remained virtually unchanged since the audit's release in 2005. While local law enforcement efforts to improve effective reporting and investigation of law enforcement conduct are laudable, local-level misconduct reporting procedures cannot fully rectify the current deficiencies at POST, as POST regulates statewide officer licensing.

Accordingly, the Missouri General Assembly should increase funding for POST so that it can obtain the resources and hire the investigative personnel necessary to correct the problems outlined in the State Auditor's report. Specifically, POST should have the resources necessary to document, track, and investigate all credible claims of officer misconduct in a timely manner, to perform full background checks of all officers, and to develop and implement written guidelines regarding officer discipline.

³²² Russ Pulley, *Exonerated Man Asks Why Police Officer Still Has a Job*, KANSAS CITY STAR, Oct. 17, 2008, at B5.

³²³ Sarah Overstreet, *With Years of Struggle Over, Ted White Jr. Can Look to Future*, SPRINGFIELD NEWS-LEADER, Feb. 16, 2005, at B1.

³²⁴ *Id.*

³²⁵ Pulley, *supra* note 322.

³²⁶ Overstreet, *supra* note 323.

³²⁷ Pulley, *supra* note 322.

CHAPTER FOUR

CRIME LABORATORIES AND MEDICAL EXAMINER OFFICES

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

With the increased reliance on forensic evidence—including DNA, ballistics, fingerprinting, handwriting comparisons, and hair samples—it is vital that forensic service providers, such as crime laboratories, coroners, and medical examiner offices, provide expert, accurate results.

Despite the increased reliance on forensic evidence and those who collect and analyze it, the validity and reliability of work done by unaccredited and accredited forensic analysts has recently been called into question.¹ While the majority of forensic service providers strive to do their work accurately and impartially, some laboratory technicians have been accused or convicted of failing to properly analyze blood and hair samples, reporting results for tests that were never conducted, misinterpreting test results in an effort to aid the prosecution, testifying falsely for the prosecution, failing to preserve DNA samples, or destroying DNA or other biological evidence.² This has led to internal investigations into the practices of several prominent crime laboratories and technicians, independent audits of crime laboratories, and the reexamination of cases.³

In addition, the system of medico-legal death investigations throughout the United States is fragmented, sometimes relying on elected officials without any medical training to determine the cause and manner of sudden or unexplained deaths.⁴ Like other forensic service providers, many medical examiner and coroner offices suffer from inadequate funding, making it difficult to recruit and retain qualified death investigation personnel. Despite these concerns, pressure mounts on the forensic science community. Significant backlogs continue to plague publicly-funded crime laboratories attendant with a growing demand for their services.⁵

¹ COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *Strengthening Forensic Science in the United States: A Path Forward* 37–52 (2009), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [hereinafter 2009 NAS REPORT].

² *Id.* at 42–45.

³ See, e.g., Martha Waggoner, *Report Blasts N.C. Crime Lab: Review Found that Agents Misrepresented Evidence, Kept Critical Notes from Attorneys*, CHARLESTON GAZETTE & DAILY MAIL, Aug. 19, 2010, at 5D; *Error-prone Detroit Crime Lab Shut Down*, USA TODAY, Sep. 25, 2008, http://www.usatoday.com/news/nation/2008-09-25-crime-lab_N.htm (reporting that a state audit found a ten percent error rate in 200 cases); Julie Bykowicz & Justin Fenton, *City Crime Lab Director Fired*, BALTIMORE SUN, Aug. 21, 2008 (reporting that several samples were contaminated by analysts own DNA); 2009 NAS Report, *supra* note 1, at 193 (describing the problems in the Houston Police Department Crime Laboratory, including “poor documentation, serious analytical and interpretive errors, the absence of quality assurance programs, inadequately trained personnel, erroneous reporting, the use of inaccurate and misleading statistics, and even . . . the falsification of scientific results”). See also *Wrongful Convictions Involving Unvalidated or Improper Forensic Science that Were Later Overturned through DNA Testing*, INNOCENCE PROJECT, http://www.innocenceproject.org/docs/DNA_Exonerations_Forensic_Science.pdf (last visited Jan. 6, 2012) (“Of the first 225 wrongful convictions overturned by DNA testing, more than 50% (116 cases) involved unvalidated or improper forensic science.”).

⁴ 2009 NAS REPORT, *supra* note 1, at 49–51.

⁵ *Id.* at 37.

The need for accuracy and reliability in forensic science necessitates that jurisdictions allocate adequate resources to forensic service providers. In order to take full advantage of the power of forensic science to aid in the search for truth and to minimize its enormous potential to contribute to wrongful convictions, forensic service providers must be accredited, examiners and lab technicians must be certified, procedures must be standardized and published, and adequate funding must be provided.

I. FACTUAL DISCUSSION: MISSOURI OVERVIEW

A. Forensic Science Laboratories

1. Missouri Law Enforcement Crime Laboratories

The Missouri forensic analysis system includes eight law enforcement crime laboratories and three private crime laboratories.⁶ Additionally, the Missouri State Public Defender will generally use out-of-state laboratories for forensic testing.⁷

The Missouri State Highway Patrol (MSHP) operates the MSHP Forensic Laboratory (MSHP-FL), which provides “forensic science services and technical support to all local, county, state, and federal law enforcement agencies” in Missouri.⁸ MSHP-FL consists of one main laboratory in Jefferson City (generally referred to as the “Central Laboratory”) and seven satellite laboratories throughout the state.⁹ The Central Laboratory is a full-service facility, providing forensic laboratory services in the areas of DNA, drug testing, firearms, latent prints, toxicology, and trace evidence; the seven satellite crime laboratories provide more limited services, but at a minimum provide drug testing and blood alcohol analysis.¹⁰ If the regional laboratory is not equipped to provide adequate services for a specific case, it will serve as a “relay station for evidence bound for the Jefferson City laboratory.”¹¹ In addition to the forensic analysis services, MSHP-FL provides law enforcement agents with telephone support for collection and preservation issues that might arise in the field.¹²

Additionally, Missouri has five local police and sheriff’s department crime laboratories offering localized services: the Kansas City Police Department Crime Laboratory, the St. Charles County Sheriff’s Department Criminalistics Laboratory, the St. Louis County Police Department Crime Laboratory, the St. Louis Metropolitan Police Department Crime Laboratory,¹³ and the Independence Police Department Crime Laboratory.¹⁴

⁶ See *infra* notes 8–14 and accompanying text.

⁷ Telephone Interview by Rachel Bays with Greg Mermelstein, Appellate/PCR Div. Dir., Mo. State Pub. Defender Sys. (Nov. 24, 2010) (on file with author).

⁸ *Mission Statement and Goals*, MO. STATE HIGHWAY PATROL, <http://www.msdp.dps.missouri.gov/MSHPWeb/PatrolDivisions/CLD/GeneralInformation/missionStatement.html> (last visited Jan. 6, 2012); see also section 650.105.5, RSMo 2011 (“All law enforcement agencies, municipal, county and state, shall have access to crime laboratories [that receive state funding].”).

⁹ *Laboratory History*, MO. STATE HIGHWAY PATROL, <http://www.msdp.dps.missouri.gov/MSHPWeb/DevelopersPages/CLD/laboratoriesIndex.html> (last visited Jan. 6, 2012).

¹⁰ See MO. STATE HIGHWAY PATROL FORENSIC LAB., FORENSIC EVIDENCE HANDBOOK iii–iv (2007), available at <http://www.msdp.dps.missouri.gov/MSHPWeb/Publications/Handbooks-Manuals/documents/SHP-145.pdf> [hereinafter MSHP FORENSIC HANDBOOK].

¹¹ *Id.* at iii.

¹² See *id.* at iv.

¹³ *ASCLD/LAB Accredited Laboratories*, AM. SOC’Y OF CRIME LAB. DIRECTORS/LAB. ACCREDITATION BD. (ASCLD/LAB), <http://www.ascl-d-lab.org/accreditedlabs.html#mo> (last visited Jan. 6, 2012).

¹⁴ The Independence Crime Laboratory “serves not only the City of Independence, but 14 other agencies.” INDEPENDENCE POLICE DEP’T, 2009 INDEPENDENCE POLICE DEPARTMENT ANNUAL REPORT 5 (2009). The laboratory performs “crime scene processing, fingerprint analysis, and drug and alcohol testing” in four different sections of the laboratory, which include the Crime Scene Unit, Latent Prints, Controlled Substances, and Toxicology. *Id.*

Private Laboratories

In addition to the state law enforcement laboratories, there are three private forensic laboratories in Missouri: Genetic Technologies, Inc.; Paternity Testing Corp.; and Mid America Laboratories.¹⁵

2. Laboratory Accreditation

While Missouri does not currently require the accreditation of crime laboratories, after December 31, 2012, “any crime laboratory providing reports or testimony to a state court pertaining to a result of the forensic analysis of evidence shall be accredited or provisionally accredited by a laboratory accrediting organization approved by the department of public safety.”¹⁶

As of September 2010, all eight MSHP-FL laboratories and all local law enforcement laboratories have obtained national accreditation through the *Legacy* Accreditation Program (*Legacy* program) of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).¹⁷ The *Legacy* program is “a voluntary program in which any crime laboratory may participate to demonstrate that its management, operations, personnel, procedures, equipment, physical plant, security, and health and safety procedures meet established standards.”¹⁸ The program requires crime laboratories to demonstrate and maintain compliance with a number of established standards.¹⁹

Since April 2004, ASCLD/LAB has provided accreditation under both the *Legacy* program and its *International* Accreditation Program, the latter of which is based on standards developed by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), collectively known as the ISO/IEC 17025:2005 (*International* program).²⁰ Effective April 1, 2009, ASCLD/LAB no longer accepts new applications for accreditation under the *Legacy* program, and is “currently [] in the process of converting the accreditation of its U.S. laboratories to meet the requirements of a recognized international standard, [namely,] ISO/IEC 17025:2005.”²¹

¹⁵ See GENETIC TECHNOLOGIES, <http://www.genetictechnologies.com> (last visited Jan. 25, 2012); PATERNITY TESTING CORP., <http://www.ptclabs.com/> (last visited Jan. 25, 2012); *Introduction of Mid America Lab*, MID AMERICA LAB., <http://www.capitalritz.com/midamerica/indexx.htm> (last visited Jan. 25, 2012).

¹⁶ Section 650.060.1, RSMo 2011.

¹⁷ *ASCLD/LAB Accredited Laboratories*, ASCLD/LAB, <http://www.ascl-d-lab.org/labstatus/accreditedlabs.html#mo> (last visited Sept. 25, 2010).

¹⁸ AM. SOC’Y OF CRIME LAB. DIRS. (ASCLD), LABORATORY ACCREDITATION BOARD 2008 MANUAL 1 (2008) (on file with author) [hereinafter ASCLD/LAB-*LEGACY* 2008 MANUAL].

¹⁹ *Id.* at 13–60. The only other entity that accredits crime laboratories in the United States is Forensic Quality Services (FQS). 2009 NAS REPORT, *supra* note 1, at 75–77.

²⁰ *Programs of Accreditation*, ASCLD/LAB, http://www.ascl-d-lab.org/programs/prgrams_of_accreditation_index.html (last visited Jan. 25, 2012); ISO/IEC 17025, GENERAL REQUIREMENTS FOR THE COMPETENCE OF TESTING AND CALIBRATION LABORATORIES v (2d ed. 2005) (on file with author) [hereinafter ISO/IEC 17025: GENERAL REQUIREMENTS].

²¹ *Programs of Accreditation*, ASCLD/LAB, http://www.ascl-d-lab.org/programs/prgrams_of_accreditation_index.html (last visited Sept. 13, 2010). ASCLD/LAB continues to monitor and fully support *Legacy*-accredited laboratories as well as to “accept applications to add new accredited disciplines under the *Legacy* Program for those laboratories.” *Id.*

The chart below details the disciplines in which each laboratory received *Legacy* program accreditation.

Forensic Laboratory ²²	ASCLD/LAB Legacy Certified Disciplines
Kansas City Police Department, Crime Laboratory (Kansas City, Missouri)	Controlled Substances; Trace Evidence; Biology; Firearms/Toolmarks; Latent Prints; Crime Scene; and Digital & Multimedia Evidence (Video Analysis only) ²³
St. Charles County Sheriff's Department Criminalistics Laboratory (O'Fallon, Missouri) ²⁴	Controlled Substances, Toxicology (Blood Alcohol Only); Biology; Firearms/Toolmarks (Function Testing and Serial Number Restoration only); and Trace Evidence (Fire Debris and Explosives only) ²⁵
St. Louis County Police Department Crime Laboratory (Clayton, Missouri)	Controlled Substances; Toxicology (Blood Alcohol only); Trace Evidence (Fire Debris only); Firearms/Toolmarks; and Biology ²⁶
St. Louis Metropolitan Police Department, Crime Laboratory (St. Louis, Missouri)	Controlled Substances; Trace Evidence (Fire Debris and Impression Evidence only); Biology; Firearms/Toolmarks; and Latent Prints ²⁷
Independence Police Department Crime Laboratory (Independence, Missouri)	Controlled Substances; Latent Prints; Crime Scene; and Firearms/Toolmarks (Firearm Function Testing and Serial Barrel Measurements only) ²⁸

a. ASCLD/LAB-*Legacy* Program Accreditation²⁹

The ASCLD/LAB-*Legacy* Accreditation Program requires crime laboratories to demonstrate and maintain compliance with a number of established standards, which are described in the 2008 ASCLD/LAB Laboratory Accreditation Board *Legacy* Manual (*Legacy* Manual).³⁰ The *Legacy* Manual rates each standard as “Essential,” “Important,” or “Desirable.”³¹ In order to obtain

²² *Crime Lab. Div. Laboratories*, MO. STATE HIGHWAY PATROL, <http://www.msdp.dps.missouri.gov/MSHPWeb/DevelopersPages/CLD/laboratoriesIndex.html> (last visited Jan. 25, 2012) (listing the locations of all MSHP laboratories).

²³ ASCLD/LAB, *Certificate of Accreditation (ASCLD/LAB-Legacy) for the Kansas City Police Crime Laboratory* (Aug. 3, 2009), available at <http://www.ascl-d-lab.org/cert/cert019.pdf>.

²⁴ St. Charles County Sheriff's Department Crime Laboratory plans to apply for ASCLD/LAB-*International* Accreditation; however, the laboratory had not submitted an application as of November 2, 2010. Telephone Interview by Rachel Bays with Brian Hampton, Dir. of Crime Lab., St. Charles County Sheriff's Dep't Crime Lab. (Nov. 2, 2010) (on file with author).

²⁵ ASCLD/LAB, *Certificate of Accreditation (ASCLD/LAB-Legacy) for the St. Charles County Sheriff's Department Criminalistics Laboratory* (May 13, 2008), available at <http://www.ascl-d-lab.org/cert/cert375.pdf>.

²⁶ ASCLD/LAB, *Certificate of Accreditation (ASCLD/LAB-Legacy) for the St. Charles County Sheriff's Department Criminalistics Laboratory* (July 20, 2010), available at <http://www.ascl-d-lab.org/cert/cert332.pdf>.

²⁷ ASCLD/LAB, *Certificate of Accreditation (ASCLD/LAB-Legacy) for the St. Louis Metropolitan Police Department* (Dec. 6, 2007), available at <http://www.ascl-d-lab.org/cert/cert051.pdf>.

²⁸ ASCLD/LAB, *Certificate of Accreditation (ASCLD/LAB-Legacy) for the Independence Missouri Police Department Crime Laboratory* (Jan. 8, 2011), available at <http://www.ascl-d-lab.org/cert/cert416.pdf>.

²⁹ For a description of ASCLD/LAB-*Legacy* accreditation, see *infra* Appendix.

³⁰ ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 18, at 3, 71–84, app. 1–3.

³¹ *Id.* at 2. The *Manual* defines “Essential” as “[s]tandards which directly affect and have fundamental impact on the work product of the laboratory or the integrity of the evidence”; “Important” as “[s]tandards which are considered to be key indicators of the overall quality of the laboratory but may not directly affect the work product

accreditation, the “laboratory must achieve 100% of the Essential, 75% of the Important, and 50% of the Desirable criteria.”³² If the Board grants accreditation to the laboratory, it is effective for five years “provided that [the] laboratory continues to meet ASCLD/LAB standards, including completion of the Annual Accreditation Audit Report and participation in prescribed proficiency testing programs.”³³

b. ISO/IEC 17025 Accreditation

As mentioned above, the ISO and the IEC have established standards for the competence of laboratories to carry out tests and calibrations, which are set out in ISO/IEC 17025:2005.³⁴ As of January 2012, all eight MSHP-FL laboratories are accredited under ASCLD/LAB’s *International* program.³⁵ In addition, two of Missouri’s private forensic laboratories have obtained voluntary ISO/IEC 17025:2005 accreditation: (1) Genetic Technologies, Inc., in Pacific, Missouri, accredited through ASCLD/LAB-*International*;³⁶ and (2) Paternity Testing Corp., in Columbia, Missouri, accredited through Quality Services’ (FQS) international accreditation program.³⁷ The Mid American Crime Laboratory is not accredited.³⁸ The following chart details the disciplines in which each laboratory received *International* program accreditation:

Forensic Laboratory ³⁹	ASCLD/LAB International Certified Disciplines
MSHP Jefferson City Crime Laboratory (Jefferson City, Missouri)	Drug Chemistry; Toxicology; Biology; Trace Evidence; Firearms/Toolmarks; Latent Prints; and Impression Evidence ⁴⁰
MSHP Macon Crime Laboratory (Macon, Missouri)	Drug Chemistry ⁴¹

nor the integrity of the evidence”; and “Desirable” as “[s]tandards which have the least effect on the work product or the integrity of the evidence but which nevertheless enhance the professionalism of the laboratory.” *Id.*

³² *Id.* at 2 (emphasis omitted).

³³ *Id.* at 1. “[L]aboratories seeking renewal . . . are expected to remain in compliance with the requirements of the accreditation program at all times.” *Id.* at 3.

³⁴ ISO/IEC 17025, GENERAL REQUIREMENTS *supra* note 20, at 12–14, 19.

³⁵ ASCLD/LAB Accredited Laboratories, AM. SOC’Y OF CRIME LAB. DIRS. LAB. ACCREDITATION BD. (ASCLD/LAB), <http://www.ascl-d-lab.org/labstatus/accreditedlabs.html#mo> (last visited Jan. 25, 2012).

³⁶ Laboratories Accredited by ASCLD/LAB, ASCLD/LAB, <http://www.ascl-d-lab.org/accreditedlabs.html#mo> (last visited Jan. 25, 2012).

³⁷ Accredited Labs, FORENSIC QUALITY SERVS., http://www.forquality.org/Accredited_Labs.html (last visited Feb. 13, 2012).

³⁸ See *Introduction of Mid America Lab*, MID AMERICA LAB., <http://www.capitalritz.com/midamerica/indexx.htm> (last visited Jan. 25, 2012).

³⁹ Crime Lab. Div. Laboratories, MO. STATE HIGHWAY PATROL, <http://www.msHP.dps.missouri.gov/MSHPWeb/DevelopersPages/CLD/laboratoriesIndex.html> (last visited Jan. 25, 2012) (listing the locations of all MSHP laboratories).

⁴⁰ ASCLD/LAB, *Scope of ASCLD/LAB-International Program Accreditation for the Missouri State Highway Patrol Jefferson City Crime Laboratory*, No. ALI-183-T (Sept. 8, 2011), available at <http://www.ascl-d-lab.org/cert/ALI-183-T.pdf>.

⁴¹ ASCLD/LAB, *Scope of ASCLD/LAB-International Program Accreditation for the Missouri State Highway Patrol Macon Crime Laboratory*, No. ALI-187-T (Sept. 8, 2011), available at <http://www.ascl-d-lab.org/cert/ALI-187-T.pdf>.

Forensic Laboratory (cont'd)	ASCLD/LAB International Certified Disciplines (cont'd)
MSHP Park Hills Crime Laboratory (Park Hills, Missouri)	Drug Chemistry and Toxicology (Blood Alcohol only) ⁴²
MSHP Springfield Crime Laboratory (Springfield, Missouri)	Drug Chemistry; Toxicology; Biology; Trace Evidence; Firearms/Toolmarks; Latent Prints; and Impression Evidence ⁴³
MSHP Cape Girardeau Crime Laboratory (Cape Girardeau, Missouri)	Drug Chemistry; Toxicology; Biology; Firearms/Toolmarks (Function Testing only); Latent Prints; and Serial No. Restoration ⁴⁴
MSHP Willow Springs Crime Laboratory (Willow Springs, Missouri)	Drug Chemistry ⁴⁵
MSHP St. Joseph Crime Laboratory (St. Joseph, Missouri)	Drug Chemistry and Toxicology ⁴⁶
Genetic Technologies, Inc., (Pacific, Missouri)	Biology ⁴⁷

i. ISO/IEC 17025:2005 Accreditation Through ASCLD/LAB-*International*⁴⁸

ASCLD/LAB's *International* program is a voluntary program "of accreditation in which any crime laboratory . . . may participate to demonstrate that its technical operations and overall management system meet ISO/IEC 17025:2005 requirements and applicable ASCLD/LAB-*International* supplemental requirements."⁴⁹ The ISO/IEC 17025:2005 standards, "developed through technical committees to deal with particular fields of technical activity,"⁵⁰ "specif[y] the general requirements for the competence to carry out tests and/or calibrations."⁵¹ The ASCLD/LAB-*International* supplemental requirements contain additional "accreditation requirements for forensic science testing laboratories for the examination or analysis of evidence

⁴² ASCLD/LAB, *Scope of ASCLD/LAB-International Program Accreditation for the Missouri State Highway Patrol Park Hills Crime Laboratory*, No. ALI-188-T (Sept. 8, 2011), available at <http://www.ascl-d-lab.org/cert/ALI-188-T.pdf>.

⁴³ ASCLD/LAB, *Scope of ASCLD/LAB-International Program Accreditation for the Missouri State Highway Patrol Springfield Crime Laboratory*, No. ALI-184-T (Sept. 8, 2011), available at <http://www.ascl-d-lab.org/cert/ALI-184-T.pdf>.

⁴⁴ ASCLD/LAB, *Scope of ASCLD/LAB-International Program Accreditation for the Missouri State Highway Patrol Cape Girardeau Crime Laboratory*, No. ALI-185-T (Sept. 8, 2011), available at <http://www.ascl-d-lab.org/cert/ALI-185-T.pdf>.

⁴⁵ ASCLD/LAB, *Scope of ASCLD/LAB-International Program Accreditation for the Missouri State Highway Willow Springs Crime Laboratory*, No. ALI-189-T (Sept. 8, 2011), available at <http://www.ascl-d-lab.org/cert/ALI-189-T.pdf>.

⁴⁶ ASCLD/LAB, *Scope of ASCLD/LAB-International Program Accreditation for the Missouri State Highway Patrol St. Joseph Crime Laboratory*, No. ALI-186-T (Sept. 8, 2011), available at <http://www.ascl-d-lab.org/cert/ALI-186-T.pdf>.

⁴⁷ ASCLD/LAB, *Scope of ASCLD/LAB-International Program Accreditation for Genetic Technologies, Inc.*, No. ALI-027-T (Feb. 17, 2007), available at <http://www.ascl-d-lab.org/cert/ALI-027-T.pdf>.

⁴⁸ For a full description of ASCLD/LAB-*International* accreditation, see *infra* Appendix.

⁴⁹ ASCLD/LAB, ASCLD/LAB-*INTERNATIONAL* PROGRAM OVERVIEW 3 (Sept. 11, 2010) (effective Oct. 1, 2010), available at <http://www.ascl-d-lab.org/documents/AL-PD-3041.pdf> [hereinafter ASCLD/LAB-*INTERNATIONAL* OVERVIEW].

⁵⁰ 2009 NAS REPORT, *supra* note 1, at 198.

⁵¹ *Id.* at 21; ISO/IEC 17025: GENERAL REQUIREMENTS, *supra* note 20, at vi.

as it relates to legal proceedings.”⁵² The *International* program offers accreditation in forensic science testing (including controlled substances, toxicology, trace evidence, biology, firearms and toolmarks, questioned documents, latent prints, crime scene, and digital and multimedia evidence) and forensic science calibration (toxicology, breath alcohol measuring, and instruments).⁵³ In order to be accredited through the *International* program, the forensic laboratory must meet all of the ISO/IEC 17025:2005 requirements as well as the ASCLD/LAB-*International* supplemental requirements applicable to the work conducted at that particular laboratory.⁵⁴ Accreditation is granted for a period of five years, “provided that the laboratory continues to meet all applicable accreditation standards, submits to scheduled on-site surveillance visits; completes and submits annual reports; and participates in prescribed proficiency testing programs.”⁵⁵

ii. Forensic Quality Services-International Accreditation⁵⁶

FQS-I is a division of the National Forensic Science Technology Center providing accreditation to forensic testing laboratories in which the “results may have legal or regulatory implications.”⁵⁷ In order for a laboratory to obtain FQS-I accreditation, it must demonstrate that it “meets all requirements of ISO/IEC 17025:2005,” that it “can maintain its impartiality and integrity,” and that it continues to adhere to the standards described in the laboratory’s certificate of accreditation “demonstrated by an agreed system of surveillance.”⁵⁸ A laboratory will normally remain accredited for twenty-four months. FQS-I will monitor conformance to accreditation standards approximately one year after accreditation is granted.⁵⁹

3. Missouri Crime Laboratory Review Commission

In 2007, Missouri Governor Matt Blunt signed an Executive Order creating the Governor’s “Crime Laboratory Review Commission” (Review Commission) in order to “provide independent review of any state or local Missouri crime laboratory receiving any amount of state-administered funding.”⁶⁰ The purpose of the Review Commission is to ensure that all Missouri crime laboratories provide the “highest quality forensic science services to the citizens of the State of Missouri in the most efficient manner” because a “successful investigation and prosecution of crimes routinely depends on the accurate scientific analysis of evidence conducted in crime laboratories at the state and local levels.”⁶¹

⁵² ASCLD/LAB-*INTERNATIONAL*, 2006 SUPPLEMENTAL REQUIREMENTS FOR THE ACCREDITATION OF FORENSIC SCIENCE TESTING LABORATORIES 2 (Jan. 24, 2006) (on file with author).

⁵³ ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 49, at 5.

⁵⁴ *Id.* at 4. Additionally, “where applicable, laboratories performing DNA analysis will be assessed in accordance with the requirements of the most current version of the *Quality Assurance Standards for Forensic DNA Testing Laboratories* and the *Quality Assurance Standards for [Convicted Offender] DNA Databasing Laboratories.*” *Id.*

⁵⁵ *Id.* at 19.

⁵⁶ For a description of FQS-I accreditation, see *infra* Appendix.

⁵⁷ FQS-I, GENERAL REQUIREMENTS FOR ACCREDITATION (GRA) 3 (on file with author) [hereinafter FQS-I GRA].

⁵⁸ *Id.*

⁵⁹ *Id.* at 9. It is possible for laboratories to receive accreditation for up to five years; however, if the laboratory is granted accreditation for more than twenty-four months, FQS may require additional on-site audits. *Id.*

⁶⁰ Mo. Exec. Order No. 07-16 (June 18, 2007), available at http://www.sos.mo.gov/library/reference/orders/2007/eo07_016.pdf.

⁶¹ *Id.*

In 2008, the Missouri General Assembly codified the executive order in a statute, with minor revisions, thereby authorizing the Review Commission to oversee all state and local Missouri crime laboratories that receive state funds.⁶² The Review Commission is to be comprised of five members appointed by the Missouri Governor and approved by the Missouri Senate.⁶³ The members must include the Director of the Department of Public Safety, one prosecutor, one defense attorney, one law enforcement agent employed by a county or municipality in a management position, and one senior manager from an approved accredited laboratory.⁶⁴

The Review Commission is tasked with providing an “independent review” of all state crime laboratories, including but not limited to the following (1) assessing the needs and capabilities of the laboratories; (2) authorizing investigations of wrongdoing; (3) issuing reprimands; (4) making recommendations for necessary changes; (5) issuing reports summarizing findings of negligence and misconduct of a crime laboratory or an employee or contractor; and (6) submitting an annual report to the Governor summarizing the Review Commission’s activities and making necessary suggestions “to improve the quality management systems within the crime laboratories in the state.”⁶⁵ Although the Governor established the Review Commission in 2007, it has not yet been fully staffed. As of January 2012, four of the five members have been appointed; the law enforcement agent position is still vacant.⁶⁶ Missouri has never allocated any funding for the Review Commission.⁶⁷

B. Missouri Medico-legal Death Investigations System

Missouri’s system of medico-legal death investigation uses both elected county coroners as well as appointed medical examiners.⁶⁸ Missourians elect coroners by popular vote in 100 of the 114 counties, while the remaining counties and St. Louis City use medical examiners appointed by the county’s governing body.⁶⁹ A county may transition to a medical examiner system from a coroner system by vote of the county’s electorate.⁷⁰ Medical examiners and coroners are responsible for investigating all deaths which occur as a result of unusual or suspicious circumstances.⁷¹

⁶² Section 650.059.1, RSMo 2011.

⁶³ Section 650.059.2, RSMo 2011.

⁶⁴ *Id.*

⁶⁵ Section 650.059.8, RSMo 2011.

⁶⁶ *Crime Laboratory Review Commission*, OFFICE OF MO. GOV., <http://governor.mo.gov/boards/show/CRIMEDPS> (last visited Feb. 15, 2011).

⁶⁷ Interview with Tony Roberts, Section Manager and Analyst, Div. of Budget & Planning, Mo. Office of Admin. (Feb. 16, 2012) (on file with author).

⁶⁸ U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT ON MED. EXAMINERS AND CORONERS’ OFFICES, 2004 1 (June 2007), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/meco04.pdf>.

⁶⁹ Section 58.700.1, RSMo 2011; *see also Membership Roster by County*, MO. CORONERS’ AND MED. EXAM’RS’ ASS’N, <http://www.mcmea.org/membershiproster.html> (last visited Feb. 15, 2010). “By and large, only the metropolitan areas have opted for the expense of hiring full-time medical examiners.” H. Morley Swingle, *Coroner’s Inquests in Missouri: Modern Usage of the Hue and Cry*, 63 J. MO. B. 80 (2007). *See also* section 58.760.5, RSMo 2011.

⁷⁰ Section 58.760, RSMo 2011.

⁷¹ Sections 58.720, 58.451.1, RSMo 2011.

1. Medical Examiner Offices

Missouri has seven medical examiner offices, which serve the fifteen jurisdictions that have transitioned to a medical examiner system.⁷²

Medical Examiner Office	Counties Served
Jackson County Medical Examiner's Office (JCMEO)	Jackson County, Platte County, Clay County, Cass County ⁷³
St. Louis County Medical Examiner's Office	St. Louis County, St. Charles County, Jefferson County, Franklin County ⁷⁴
University of Missouri, Forensic Pathology	Boone County, Callaway County, Greene County ⁷⁵
St. Louis City Medical Examiner	St. Louis City ⁷⁶
Cole County Medical Examiner's Office	Cole County ⁷⁷
Buchanan County Medical Examiner	Buchanan County ⁷⁸
Camden County Medical Examiner	Camden County ⁷⁹

a. Qualifications of Medical Examiners

In counties that have implemented a medical examiner system, the county's "governing body" will appoint a county medical examiner and establish his/her compensation rate or contract with another county's medical examiner for services.⁸⁰ Missouri requires medical examiners to be physicians licensed to practice by the state medical board.⁸¹

⁷² Two or more counties may combine resources to appoint a Medical Examiner who will have jurisdiction over all participating counties. Sections 58.765, RSMo 2011. "The governing body of all the counties shall approve the contract, administer the appointment and allocate the costs among the counties." Section 58.765, RSMo 2011.

⁷³ *Medical Examiner*, JACKSON COUNTY, MO., <http://www.jacksongov.org/content/3310/3350/default.aspx> (last visited Jan. 30, 2012).

⁷⁴ See Curriculum Vitae, Dr. Mary Case (2/27/09), available at <http://path.slu.edu/uploads/uploads/facultycvs/Mary-Case-M-D.pdf>.

⁷⁵ *Department of Pathology and Anatomical Sciences*, SCHOOL OF MEDICINE UNIV. OF MO., <http://pathology-anatomy.missouri.edu/forensicservices/medexaminer.html> (last visited Jan. 30, 2012).

⁷⁶ *Medical Examiner*, CITY OF ST. LOUIS, MO., <http://stlouis-mo.gov/government/departments/medical-examiner/> (last visited Feb. 19, 2012).

⁷⁷ *Cole County Medical Examiner's Office*, COLE COUNTY, MO., <http://www.colecounty.org/Cole%20County%20Medical%20Examiner.pdf> (last visited Jan. 30, 2012).

⁷⁸ ROBIN CARNAHAN, OFFICIAL MANUAL OF THE STATE OF MISSOURI 769–70 (Laura Egerdal, ed. 2009), available at <http://www.sos.mo.gov/bluebook/2009-2010/default.asp>.

⁷⁹ See *Membership Roster Counties: Caldwell–Crawford*, MO. CORONERS' AND MED. EXAM'RS' ASS'N, <http://www.mcmea.org/PageC.html> (last visited Feb. 15, 2012).

⁸⁰ Section 58.700.3, RSMo 2011.

⁸¹ Section 58.705.1, RSMo 2011. See also section 334.031, RSMo 2011; 20 CSR 2150-2.004–.010 (listing the requirements for a licensed physician).

b. Powers and Duties of Medical Examiners

The local office of the medical examiner should be contacted about a death involving sudden, violent, or suspicious circumstances, and should be informed of any “known facts concerning the time, place, manner and circumstances of the death.”⁸² Medical examiners should also be notified of any death that occurs outside a licensed health care facility by the first licensed medical professional or law enforcement officer learning of that death.⁸³ Upon receiving the body, the medical examiner will investigate the cause of death.⁸⁴

Medical examiners are required by statute to fully investigate the surrounding facts and circumstances of any case in which the death of the individual was a result of

- (1) Violence by homicide, suicide, or accident;
- (2) Thermal, chemical, electrical, or radiation injury;
- (3) Criminal abortions, including those self-induced;
- (4) Disease thought to be of a hazardous and contagious nature or which might constitute a threat to public health; or when a person dies:
 - (a) Suddenly when in apparent good health;
 - (b) When unattended by a physician, chiropractor, or an accredited Christian Science practitioner, during the period of thirty-six hours immediately preceding his death;
 - (c) While in the custody of the law, or while an inmate in a public institution;
 - (d) In any unusual or suspicious manner.⁸⁵

If the death involves a child under the age of one and older than one week who was in apparent good health, the medical examiner is required to have a certified child death pathologist conduct an autopsy.⁸⁶ In all other cases, if an autopsy is deemed necessary, the medical examiner can perform the autopsy only if s/he is a licensed pathologist; otherwise, the medical examiner must hire a competent pathologist to perform the autopsy.⁸⁷ The results of all investigations and autopsies are filed at the county medical examiner office.⁸⁸ It is the responsibility of the medical examiner to complete the Missouri certificate of death.⁸⁹

In cases of a “sudden, violent or suspicious death” in which no autopsy or investigation was conducted, the medical examiner may request that the prosecuting attorney apply for a court order to exhume the body.⁹⁰

⁸² Section 58.720, RSMo 2011.

⁸³ Section 58.720.2, RSMo 2011.

⁸⁴ *Id.*

⁸⁵ Section 58.720, RSMo 2011.

⁸⁶ Section 194.117, RSMo 2011. This provision also applies to cases investigated by a county coroner. *Id.*

⁸⁷ Section 58.725, RSMo 2011.

⁸⁸ Sections 58.725, 58.740, RSMo 2011.

⁸⁹ Section 58.720.8, RSMo 2011.

⁹⁰ Section 58.720.3, RSMo 2011. This provision also applies to the county coroner. *Id.*

2. Coroner Offices

a. Election, Qualification, and Training Requirements for Coroners

Missouri coroners are elected by popular vote in each county that has not opted for a medical examiner system.⁹¹ At the time of election, a coroner must be a U.S. citizen, a resident of Missouri for a minimum of one year, a resident of the specific county for a minimum of six months, and above twenty-one years old.⁹² Once elected, all coroners must take “the oath prescribed by the constitution and shall give bond to the state of Missouri, in the penalty of at least one thousand dollars, with sufficient sureties.”⁹³

Coroners are also required to complete, at minimum, twenty hours of continuing education course work every year “relat[ed] to the operations of the coroner’s office” that is “approved by a professional association of the county coroners of Missouri unless exempted . . . by the professional association.”⁹⁴ If a coroner does not complete the required twenty hours of training, his/her annual salary will be decreased by \$1,000.⁹⁵

b. Powers and Duties of Coroners

An elected coroner is considered “a conservator of the peace” and is responsible for conducting “inquests of violent and casual deaths” where a dead body has been discovered within his/her county.⁹⁶ Each county coroner may recommend the appointment of a deputy county coroner, who must be approved by the county commission.⁹⁷ If an elected coroner, or his/her deputy coroner, is unavailable to perform his/her duties, the county sheriff will assume the responsibilities.⁹⁸ The coroner must be notified of any case in which a person dies as a result of

- (1) Violence by homicide, suicide, or accident;
- (2) Criminal abortions, including those self-induced;
- (3) Some unforeseen sudden occurrence and the deceased has not been attended by a physician during the thirty-six-hour period preceding the death;
- (4) In any unusual or suspicious manner;
- (5) Any injury or illness while in the custody of the law or while an inmate in a public institution; the police, sheriff, law enforcement officer or official, or any person having knowledge of such a death shall immediately notify

⁹¹ Section 58.020, RSMo 2011.

⁹² Section 58.030, RSMo 2011.

⁹³ Section 58.050, RSMo 2011.

⁹⁴ Section 58.095.2, RSMo 2011.

⁹⁵ *Id.*; see also section 58.096, RSMo 2011.

⁹⁶ Section 58.180, RSMo 2011. “Every coroner, having been notified of the dead body of any person, supposed to have come to his or her death by violence or casualty, being found within his county, may make out his or her warrant, directed to the sheriff of the county where the dead body is found, requiring him or her forthwith to summon a jury of six good and lawful citizens of the county, to appear before such coroner, at the time and place in his or her warrant expressed, and to inquire how and by whom he or she came to his or her death.” Section 58.260, RSMo 2011.

⁹⁷ Section 58.160, RSMo 2011.

⁹⁸ Section 58.205, RSMo 2011.

the coroner of the known facts concerning the time, place, manner and circumstances of the death.⁹⁹

Any law enforcement agency investigating a death has a duty to notify the coroner.¹⁰⁰ If the coroner determines that further examination of the body is necessary, s/he can order that an autopsy be conducted by a licensed pathologist.¹⁰¹ If after viewing the deceased and conducting an investigation into the death, the coroner concludes that further investigation is necessary, s/he may conduct a coroner's inquest.¹⁰²

To commence the inquest, the coroner will issue a "coroner's warrant" to the county or city sheriff, summoning "six good and lawful citizens of the county to appear" to serve as the jury and to determine "how and by whom the deceased died."¹⁰³ The coroner also has the authority to issue subpoenas and compel the testimony of witnesses.¹⁰⁴ Coroner's inquests are typically structured similar to that of a trial—they are "held in a courtroom, with the coroner sitting on the bench, the coroner's jury occupying the jury box, the prosecutor manning the counsel table, the witnesses testifying from the witness box, and the public and media sitting in the spectator seats."¹⁰⁵

If the inquest jury determines the death was the result of a felony, the coroner must immediately inform the associate circuit judges within the proper county, and file a record of the proceedings with the prosecuting attorney.¹⁰⁶ If a coroner's inquest was not held, the coroner will file a written report concerning the death with the prosecuting attorney, establishing all facts and circumstances of the investigation, all conclusions, and any action that was taken.¹⁰⁷ It is the responsibility of the county coroner to file the Missouri certificate of death.¹⁰⁸

c. Accreditation of Medical Examiner Offices, Coroners, and Certification of Forensic Toxicologists and Medico-legal Death Investigators

Similar to crime laboratories, Missouri does not require medical examiner offices or coroner offices to be accredited. However, the Jackson County Medical Examiner's Office (JCMEO), in Kansas City, Missouri, voluntarily obtained accreditation through the National Association of Medical Examiners (NAME).¹⁰⁹ NAME is the primary accrediting entity for medical examiner

⁹⁹ Section 58.451.1, RSMo 2011.

¹⁰⁰ Section 58.451.1–3, RSMo 2011.

¹⁰¹ Sections 194.115.5, 58.541.7, RSMo 2011.

¹⁰² Section 58.451.8, RSMo 2011.

¹⁰³ *Id.* The statutes do not define how the sheriff should select individuals for the inquest jury. *See Swingle, supra* note 69, at 83 ("In the past, Cape Girardeau County followed a practice whereby the coroner picked the jurors. For more recent coroner's juries, the circuit clerk's office has used its computer to generate names at random from the pool of potential jurors in the same way citizens are selected for regular jury duty.").

¹⁰⁴ Section 58.330, RSMo 2011.

¹⁰⁵ *See Swingle, supra* note 69, at 83.

¹⁰⁶ Sections 58.370, 58.375.1, RSMo 2011.

¹⁰⁷ Section 58.375.2, RSMo 2011.

¹⁰⁸ Section 58.451.10–11, RSMo 2011.

¹⁰⁹ *NAME Accredited Offices*, NAT'L ASS'N OF MED. EXAM'RS, http://thename.org/index.php?option=com_content&task=view&id=67&Itemid=69 (last visited Feb. 1, 2012).

and coroner offices.¹¹⁰ As of January 2012, JCMEO was the only medical examiner office in Missouri to be accredited by NAME.¹¹¹

i. National Association of Medical Examiner Accreditation

NAME accreditation “attests that an office has a functional governing code, adequate staff, equipment, training, and a suitable physical facility and produces a forensically documented accurate, credible death investigation product.”¹¹² The NAME accreditation process for medical examiner offices is similar to the ASCLD/LAB accreditation process associated with forensic laboratories. The applicant must perform a self-inspection using the NAME Accreditation Checklist,¹¹³ file an application, and undergo an external inspection to evaluate whether the facility meets the NAME Standards for Accreditation.¹¹⁴

The external inspection is conducted by a NAME inspector, who “systematically examine[s] in detail each question on the Inspection Checklist with the chief medical examiner . . . or his or her representative.”¹¹⁵ The checklist contains a series of questions designated as “essential” or “non-essential” criteria.¹¹⁶ Essential requirements include whether

- (1) The office has a written and implemented policy or standard operating procedure, signed within the last two years covering facility maintenance, security, and personnel issues;
- (2) The Chief Medical Examiner or the Coroner’s autopsy surgeon is a forensic pathologist certified by the American Board of Pathology and has at least two years of forensic pathology work experience beyond forensic pathology residency/fellowship training;
- (3) There are written and implemented qualifications established for medical investigators.¹¹⁷

The inspector must submit the report to NAME within thirty calendar days of the inspection.¹¹⁸ The report concludes with a recommendation for full accreditation, provisional accreditation, or

¹¹⁰ 2009 NAS REPORT, *supra* note 1, at 258 (“Currently, the standard for quality in death investigation for medical examiner offices is accreditation by NAME”); *see also* NAT’L ASS’N OF MED. EXAM’RS, PRELIMINARY REPORT ON AMERICA’S MEDICOLEGAL OFFICES, NAT’L INST. OF JUSTICE FORENSIC SUMMIT 1 (MAY 18–19, 2004), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/213421.pdf>.

¹¹¹ *NAME Accredited Offices*, NAT’L ASS’N OF MED. EXAM’RS, http://thename.org/index.php?option=com_content&task=view&id=67&Itemid=69 (last visited Feb. 1, 2012).

¹¹² *Id.*

¹¹³ NAT’L ASS’N OF MED. EXAM’RS, NAME INSPECTION AND ACCREDITATION CHECKLIST, SECOND REVISION, 2, 4 (2009), *available at* http://thename.org/index.php?option=com_docman&task=cat_view&gid=45&Itemid=26 [hereinafter NAME ACCREDITATION CHECKLIST].

¹¹⁴ NAT’L ASS’N OF MEDICAL EXAM’RS, INSPECTION & ACCREDITATION POLICIES AND PROCEDURES MANUAL 61–66, July 2009, *available at* http://thename.org/index.php?option=com_docman&task=cat_view&gid=45&Itemid=26 [hereinafter NAME MANUAL].

¹¹⁵ *Id.* at 65.

¹¹⁶ *Id.* at 57.

¹¹⁷ NAME ACCREDITATION CHECKLIST, *supra* note 113, at 2–3, 24, 26.

¹¹⁸ NAME MANUAL, *supra* note 114, at 67.

non-accreditation.¹¹⁹ In order to obtain full accreditation, the applicant may not have more than fifteen “non-essential” criteria deficiencies and may not have any “essential” criteria deficiencies.¹²⁰ Full accreditation is conferred for a period of five years.¹²¹

ii. American Board of Medico-legal Death Investigators

The American Board of Medico-legal Death Investigators (ABMDI) is a voluntary, independent professional certification board.¹²² ABMDI’s certification program ensures that medico-legal death investigators “have proven knowledge and skills necessary to perform medicolegal death investigations as set forth in the National Institutes of Justice 1999 publication *Death Investigation: A Guide for the Scene Investigator*.”¹²³

The ABMDI has two certification levels: “Registry Diplomate” and “Board Certified Fellow.”¹²⁴ In order to obtain ABMDI certification, investigators must pass a multiple choice and a practical examination, as well as complete 640 hours of death investigations for Registry Diplomate Status and 4,000 hours of death investigations to achieve Board Certified Fellow status.¹²⁵ Additionally, certified investigators must complete forty-five hours of approved continuing education each year.¹²⁶

Currently, eighteen Missouri medico-legal death investigators have been certified as ABMDI Registry Diplomates and twelve investigators have obtained ABMDI Board Certified Fellow status. Every Missouri medical examiner office has at least one ABMDI certified investigator.¹²⁷

¹¹⁹ *Id.* at 68.

¹²⁰ *Id.* at 69.

¹²¹ *Id.*

¹²² AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php> (last visited Feb. 1, 2012). In 2005, ABMDI received accreditation from the Forensic Specialties Accreditation Board. FORENSIC SPECIALTIES ACCREDITATION BD., <http://www.thefsab.org/> (last visited Feb. 1, 2012).

¹²³ AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php> (last visited Feb. 1, 2012). The Forensic Specialties Accreditation Board is “a mechanism whereby the forensic community can assess, recognize and monitor organizations or professional boards that certify individual forensic scientists or other forensic specialties.” *Id.*

¹²⁴ *Id.*

¹²⁵ *Registry Certification (Basic)*, AM. BD. OF MED. DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=registry-certification-basic> (last visited Feb. 1, 2012); *Board Certification (Advanced)*, AM. BD. OF MED. DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=board-certification-advanced> (last visited Feb. 1, 2012).

¹²⁶ *Registry Certification (Basic)*, AM. BD. OF MED. DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=registry-certification-basic> (last visited Feb. 1, 2012); *Board Certification (Advanced)*, AM. BD. OF MED. DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=board-certification-advanced> (last visited Feb. 1, 2012).

¹²⁷ AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, MEMBER ROSTER (Mar. 1, 2010), *available at* <http://medschool.slu.edu/abmdi/uploads/files/ABMDI%20Directory%20Edits%200210.pdf>. The following offices employ ABMDI Registered Diplomates: Jackson County Medical Examiner’s Office; Greene County Medical Examiner’s Office; St. Louis City Medical Examiner’s Office; St. Louis County Medical Examiner’s Office; St. Charles, Jefferson & Franklin County Medical Examiner’s Office; Buchanan County Medical Examiner’s Office; Lincoln County Coroner’s Office; St. Louis Metropolitan Police Department Crime Laboratory; City of St. Clair; Southwest Missouri Forensics. *Id.* The following office employ ABMDI Board Certified Fellows: Jackson County Medical Examiner’s Office; St. Louis County Medical Examiner’s Office; St. Louis City Medical Examiner’s

3. Missouri Coroners' and Medical Examiners' Association

The Missouri Coroners' and Medical Examiners' Association (MCMEA) was established in 1985 to "aid in the establishment, improvement and maintenance of a uniform and stable system of laws relating to the regulation of coroners in the state of Missouri."¹²⁸ As of October 2010, every county in Missouri, as well as the St. Louis City, has a coroner or medical examiner that is a member of MCMEA.¹²⁹ Additionally, the MCMEA is responsible for providing continuing education training to coroners and medical examiners and offers two such training opportunities each year.¹³⁰

Office; Greene County Medical Examiner's Office; Livingston County Coroner's Office; and the Coplin Funeral Home in Park Hills, Missouri. *Id.*

¹²⁸ MO. CORONERS' AND MED. EXAM'RS' ASS'N, <http://www.mcmea.org/> (last visited Feb. 1, 2012).

¹²⁹ See *Membership Roster*, MO. CORONERS' AND MED. EXAM'RS' ASS'N, <http://www.mcmea.org/membershiproster.html> (last visited Feb. 1, 2012).

¹³⁰ *Coroner Training*, MO. CORONERS' AND MED. EXAM'RS' ASS'N, <http://www.mcmea.org/training.html> (last visited Feb. 1, 2012); see also section 58.096, RSMo 2011.

II. ANALYSIS

A. Recommendation #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.

Accreditation means “that a laboratory adheres to an established set of standards of quality and relies on acceptable practices within these requirements.”¹³¹ As explained in the 2009 National Academy of Sciences *Report on Forensic Science (NAS Report)*, “[l]aboratory accreditation and individual certification of forensic science professionals should be mandatory” and all forensic laboratories should “establish routine quality assurance and quality control procedures to ensure the accuracy of forensic analyses and the work of forensic practitioners.”¹³²

Crime Laboratories

Missouri does not currently require the accreditation of crime laboratories; however, after December 31, 2012, “any crime laboratory providing reports or testimony to a state court pertaining to a result of the forensic analysis of evidence shall be accredited or provisionally accredited by a laboratory accrediting organization approved by the department of public safety.”¹³³ While the Assessment Team commends Missouri for requiring accreditation of all crime laboratories after December 31, 2012, the state has failed to ensure crime laboratory accreditation since the reinstatement of the death penalty.

As explained in the Factual Discussion, all Missouri law enforcement crime laboratories have voluntarily obtained accreditation by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) under its *Legacy Accreditation Program*.¹³⁴ However, the Independence Missouri Police Department Crime Laboratory first received accreditation only in January 2011.¹³⁵

While ASCLD/LAB accreditation requires formal written policies and procedures to ensure the validity, reliability, and timely analysis of forensic evidence, the Assessment Team was only provided the policies and procedures from the St. Charles County Sheriff’s Department Criminalistics Laboratory (St. Charles County Laboratory) and the Missouri State Highway Patrol Forensic Laboratory (MSHP-FL). Specifically, both of these laboratories have formal written procedures providing for the proper method of collecting and storing various biological

¹³¹ 2009 NAS REPORT, *supra* note 1, at 195 (also recognizing that “accreditation does not mean that accredited laboratories do not make mistakes, nor does it mean that a laboratory utilizes best practices in every case”).

¹³² 2009 NAS REPORT, *supra* note 1, at 215.

¹³³ Section 650.060.1, RSMo 2011.

¹³⁴ See *Accredited Laboratories*, AM. SOC’Y OF CRIME LAB. DIRS./LAB. ACCREDITATION BD. (ASCLD/LAB), <http://www.asclcd-lab.org/accreditedlabs.html#mo> (last visited Feb. 1, 2012).

¹³⁵ ASCLD/LAB, *Certificate of Accreditation (ASCLD/LAB-Legacy) for the Independence Missouri Police Department Crime Laboratory* (Jan. 8, 2011), available at <http://www.asclcd-lab.org/cert/cert416.pdf>.

evidence, as well as for maintaining the chain of custody and handling of such evidence.¹³⁶ MSHP-FL also has written procedures for the proper sterilization and calibration of equipment used during forensic testing, proper forensic testing techniques for biological evidence, and the documentation requirements of all aspects of forensic analysis.¹³⁷

Additionally, the Assessment Team confirmed that both the St. Charles County Laboratory and MSHP-FL have written policies and procedures on the qualifications and training of analysts as well as procedures for addressing conflicts of interest and errors.¹³⁸ MSHP-FL requires all employees to complete an in-house training program and pass a competency test in each forensic category prior to performing any testing in that discipline.¹³⁹ Additionally, every forensic analyst must complete one internal or external proficiency test per year in his/her primary forensic discipline, and one analyst in each discipline must pass an external proficiency test annually.¹⁴⁰ Furthermore, MSHP-FL requires an annual evaluation of all personnel who provide in-court testimony.¹⁴¹ This evaluation includes a review of all testimony, supervisor or peer evaluations, and discussions with court personnel.¹⁴² Analysts at the St. Charles County Laboratory must have a bachelor's degree in a science-related field, complete extensive training in his/her forensic science discipline, pass an initial proficiency test prior to conducting any independent case work, and pass continual competency tests.¹⁴³ Finally, while the St. Charles County Laboratory provided this information upon request, MSHP-FL is the only laboratory to publish these written policies and procedures.¹⁴⁴

The Assessment Team commends all of Missouri's crime laboratories for obtaining ASCLD/LAB-*Legacy* accreditation. However, inadequacies and recent criticism of the ASCLD/LAB-*Legacy* accreditation process underscore the need for crime laboratories to adhere to the more rigorous standards set forth in ISO/IEC 17025:2005, the basis of ASCLD/LAB-*International* accreditation. The ASCLD/LAB-*International* program, unlike the *Legacy* program, has no optional requirements for quality management systems and technical operations of laboratories; instead, each requirement must be met for accreditation.¹⁴⁵ The *International* program has an additional requirement for an annual surveillance visit, during which "any issues that may have come to the attention of ASCLD/LAB and/or requirements selected by ASCLD/LAB are reviewed."¹⁴⁶ Furthermore, the *International* program prohibits ASCLD

¹³⁶ MO. STATE HIGHWAY PATROL FORENSIC LAB., QUALITY MGMT. SYS. MANUAL (2010) (on file with author); MSHP FORENSIC HANDBOOK, *supra* note 10, at iii; Interview with Brian Hampton, *supra* note 24.

¹³⁷ MO. STATE HIGHWAY PATROL FORENSIC LAB., QUALITY MGMT. SYS. MANUAL (2010) (on file with author). See generally DNA SECTION TRAINING MANUAL, MO. STATE HWY. PATROL FORENSIC LAB. iii (June 2007), available at http://www.cstl.nist.gov/strbase/tools/MSHP_DNA_TrainingManual072006.pdf (listing DNA requirements).

¹³⁸ Interview with Brian Hampton, *supra* note 24.

¹³⁹ MO. STATE HIGHWAY PATROL FORENSIC LAB., QUALITY MGMT. SYS. MANUAL 20–21 (2010) (on file with author).

¹⁴⁰ *Id.* at 22.

¹⁴¹ *Id.* at 27.

¹⁴² *Id.*

¹⁴³ *Id.*; Interview with Brian Hampton, *supra* note 24.

¹⁴⁴ See *Handbooks*, MO. STATE HIGHWAY PATROL, <http://www.mshp.dps.missouri.gov/MSHPWeb/DevelopersPages/handbooksAndManuals.html> (last visited Feb. 1, 2012).

¹⁴⁵ ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 49, at 13–14; ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 18, at 84 app. 3.

¹⁴⁶ ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 49, at 49; 2009 NAS REPORT, *supra* note 1, at 199.

Consulting, a for-profit corporation that received criticism for working with applicant laboratories to meet *Legacy* program requirements, from consulting with laboratories on their applications for ASCLD/LAB-*International* accreditation.¹⁴⁷ As of April 1, 2009, all Missouri crime laboratories that seek to be reaccredited will need to do so under the more stringent ISO/IEC 17025:2005 criteria.¹⁴⁸ Finally, both ASCLD/LAB accreditation programs determine whether to confer accreditation on a particular laboratory through a peer review system. The ASCLD/LAB Board of Directors, a group of fellow laboratory directors from other ASCLD/LAB-accredited laboratories, will make final accreditation decisions.¹⁴⁹ While a peer review system is not per se unreliable, an external state-based oversight commission can further ensure the impartiality of the accreditation process.¹⁵⁰ This is a relevant concern in Missouri as the MSHP-FL Director is also a former ASCLD/LAB president.¹⁵¹

Additionally, all crime laboratory systems, especially those housed within law enforcement agencies, should be monitored by an independent external organization dedicated to ensuring the validity, reliability, and timely analysis of forensic evidence. The 2009 *NAS Report* on forensic science recommended that “[s]cientific and medical assessment conducted in forensic

¹⁴⁷ See, e.g., Joseph Neff & Mandy Locke, *Forensic Groups Ties Raise Concerns*, NEWS & OBSERVER, Oct. 13, 2010, <http://www.newsobserver.com/2010/09/26/703376/forensic-groups-ties-raise-concerns.html> (last visited Feb. 1, 2012). The deficiency of the ASCLD/LAB-*Legacy* accreditation program is perhaps best illustrated by the failures of North Carolina’s *Legacy*-accredited State Bureau of Investigations (SBI). After the highly publicized exoneration of Gregory Taylor in 2010, an independent evaluation of SBI’s practices from January 1987 through January 2003, during which time SBI was accredited through the ASCLD/LAB-*Legacy* program, raised “serious issues about laboratory reporting practices . . . and the potential that information that was material and even favorable to the defense of criminal charges was withheld or misrepresented.” N.C. ATTY. GEN. OFFICE, AN INDEPENDENT REVIEW OF THE SBI FORENSIC LABORATORY 4 (2010), available at http://www.ncaj.com/file_depot/0-10000000/0-10000/9208/folder/88864/Independent+Review+of+SBI+Forensic+LAB.pdf. Despite SBI’s *Legacy*-accreditation since 1988, the independent review of SBI’s reporting practices during that time identified 230 cases in which laboratory reports similar to those in Taylor’s case existed—i.e., “cases in which presumptive tests yielded ‘positive indications for the presence of blood’ but where subsequent confirmatory tests reflecting ‘negative’ or ‘inconclusive’ results were omitted from the final report. The final report in such cases, then, would only indicate the positive results of the less sensitive presumptive test for blood.” *Id.* at 3.

¹⁴⁸ *Programs of Accreditation*, ASCLD/LAB, http://www.ascl-d-lab.org/programs/prgrams_of_accreditation_index.html (last visited Feb. 1, 2012). ASCLD/LAB continues to “monitor and fully support” *Legacy*-accredited laboratories as well as to “accept applications to add new accredited disciplines under the *Legacy* Program for those laboratories.” *Id.*

¹⁴⁹ See Janine Arvizu, *Shattering The Myth: Forensic Laboratories*, 21 CHAMPION 18 (2000). Furthermore, while Lead Assessors or Inspectors conducting the requisite site-assessments are usually ASCLD employees, occasionally the Lead Assessor may be a volunteer from the ASCLD/LAB Delegates Assembly, which is also comprised of the ASCLD/LAB-accredited laboratories’ directors. *Id.* (“This peer-to-peer composition of ASCLD Inspectors creates the potential for conflicts in the close-knit forensic community. If an Inspector is perceived as being too rough on a laboratory, it could limit his or her career opportunities at sister laboratories. Or consider the fact that representatives from the laboratory that I audit today may show up on my doorstep next month to audit my laboratory.”); ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 18, at 8–9; ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 49, at 12–14.

¹⁵⁰ Arvizu, *supra* note 149, at 26.

¹⁵¹ *ASCLD Presidential Page*, ASCLD, <http://www.ascl-d.org/content/ascl-d-presidential-page> (last visited Feb. 1, 2012) (listing William E. Marbaker as a past president); *Crime Laboratory Division*, MO. STATE HIGHWAY PATROL, <http://www.msHP.dps.mo.gov/MSHPWeb/PatrolDivisions/CLD/index.html> (last visited Feb. 15, 2012) (listing William E. Marbaker as Director of the Crime Laboratory Division).

investigations should be independent of law enforcement efforts either to prosecute criminal suspects or even to determine whether a criminal act has indeed been committed.”¹⁵²

The Missouri Assessment Team notes that there have been no public allegations of bias against Missouri’s law enforcement crime laboratories, and the Team commends MSHP-FL for attempting to minimize law enforcement involvement in forensic analysis by employing civilian analysts and a civilian crime laboratory director. However, MSHP continues to control MSHP-FL funding and the appointment of the MSHP-FL Director.¹⁵³ In addition, other law enforcement crime laboratories in Missouri remain entirely controlled by local law enforcement and use commissioned law enforcement officers to conduct forensic analysis.¹⁵⁴ Furthermore, indigent defense service providers in Missouri—for example, MSPD and the Midwest Innocence Project—routinely send biological evidence to out-of-state private crime laboratories, thereby expending additional state resources on forensic analysis.

Understanding the logistical and financial obstacles to creating a completely independent crime laboratory system, the Missouri Assessment Team again emphasizes the need for a state-based external oversight commission. By creating a crime laboratory monitoring system, Missouri can better ensure that all forensic laboratories are free from external or internal pressures, while reducing the need for the defense bar to seek costly out-of-state analysis.

Missouri created a Crime Laboratory Review Commission (Review Commission) tasked with conducting an “independent review” of all state crime laboratories. The Review Commission investigates wrongdoing, issues reprimands, recommends necessary changes, and suggests ways “to improve the quality management systems within the crime laboratories in the state.”¹⁵⁵ The state, however, has failed to completely staff and has never funded the Review Commission.¹⁵⁶ While the statutory advent of the Review Commission creates the appearance that Missouri has created independent oversight of crime laboratories, there continues to be no such oversight.

¹⁵² 2009 NAS REPORT, *supra* note 1, at 23 (“Administratively, this means that forensic scientists should function independently of law enforcement administrators. The best science is conducted in a scientific setting as opposed to a law enforcement setting.”). *Id.*

¹⁵³ The *NAS Report* notes the importance of crime laboratory directors having the independence to “set [their] own priorities with respect to cases, expenditures, and other important issues”; and “to set their own budget priorities and not have to compete with the parent law enforcement agencies.” *Id.* at 183–84.

¹⁵⁴ *Criminal Investigations Division*, CITY OF INDEPENDENCE, MO. <http://www.ci.independence.mo.us/ipd/investigations.aspx> (last visited Feb. 8, 2012); *Sections*, KANSAS CITY POLICE DEP’T, <http://www.kcmo.org/police/AboutUs/Departments/Investigations/RegionalCrimeLab/Sections/index.htm> (last visited Feb. 8, 2012); *Division of Criminal Investigations*, ST. LOUIS COUNTY, <http://ww5.stlouisco.com/police/bios/dcibios.html#lab> (last visited Feb. 8, 2012); *Bureau of Criminal Investigation*, ST. CHARLES COUNTY, MO., SHERIFF, http://sheriff.sccmo.org/sheriff/index.php?option=com_content&task=view&id=14&Itemid=26 (last Fe. 8, 2012).

¹⁵⁵ Section 650.059.8, RSMo 2011.

¹⁵⁶ Interview with Tony Roberts, Section Manager and Analyst, Div. of Budget & Planning, Mo. Office of Admin. (Feb. 16, 2012) (on file with author) (confirming that the Division of Budget and Planning has never funded the Review Commission). The Review Commission continues to have one vacancy. *Crime Laboratory Review Commission*, OFFICE OF MO. GOV. JAY NIXON, <http://governor.mo.gov/boards/show/CRIMEDPS> (last visited Feb. 15, 2012).

Medical Examiner and County Coroner Offices

Missouri does not require medical examiner offices or coroner offices to be accredited. The Jackson County Medical Examiner's Office (JCMEO) is the only office to have voluntarily obtained accreditation through the National Association of Medical Examiners (NAME).¹⁵⁷

While NAME accreditation requires all medical examiners to be board-certified pathologists by the American Board of Pathology, JCMEO further requires forensic pathologists to receive specialized training in forensic pathology.¹⁵⁸ Additionally, the Chief Medical Examiner and Deputy Medical Examiner for JCMEO are board-certified forensic pathologists.¹⁵⁹

While not currently accredited, the medical examiner office for Boone, Callaway, and Greene Counties is in the process of obtaining NAME accreditation,¹⁶⁰ and the St. Louis City Medical Examiner's Office has stated that it plans to seek NAME accreditation.¹⁶¹ Both medical examiner offices currently require all pathologists to be board-certified by the American Board of Pathology.¹⁶² The Chief Medical Examiner of the St. Louis County Medical Examiner's Office also is board-certified in Forensic Pathology by the American Board of Pathology.¹⁶³ Furthermore, JCMEO, the St. Louis County Medical Examiner's Office, the St. Louis City Medical Examiner's Office, and the Greene County Office of the Medical Examiner employ pathologists who are Board Certified Fellows by the American Board of Medicolegal Death Investigators (AMBDI).¹⁶⁴

Three unaccredited medical examiner offices in Missouri have instituted various policies and procedures similar to the policies required by NAME to help ensure the validity, reliability, and timely analysis of forensic evidence. For example, the medical examiner office for Boone, Callaway, and Greene Counties conducts weekly quality assurance meetings for every case and maintains all files in both digital and hard copy.¹⁶⁵ It is the policy of the St. Louis City Medical Examiner's Office that the pathologist who conducts the death investigation maintains the case

¹⁵⁷ *NAME Accredited Offices*, NAT'L ASS'N OF MED. EXAM'RS, http://thename.org/index.php?option=com_content&task=view&id=67&Itemid=69 (last visited Feb. 8, 2012).

¹⁵⁸ *Medical Examiner*, JACKSON COUNTY MEDICAL EXAM'R, <http://www.jacksongov.org/content/3310/3350/default.aspx> (last visited Feb. 8, 2012). The Jackson County Medical Examiner's Office usually hires forensic pathologists to "conduct specialized forensic autopsies [and] provide expert testimony in courts of law." *Id.*

¹⁵⁹ *Medical Examiner*, JACKSON COUNTY MED. EXAM'R, <http://www.jacksongov.org/content/3310/3350/default.aspx> (last visited Feb. 8, 2012).

¹⁶⁰ Telephone Interview with Dr. Carl "Chris" Stacey, Chief Medical Examiner, Boone County Med. Exam'r Office, Dep't of Pathology & Anatomical Science, Univ. of Mo. School of Medicine (Nov. 18, 2010) (on file with author). The Boone County Medical Examiner Office has taken steps towards receiving accreditation from NAME, including writing policies and procedures for the office, hiring new staff, building a new morgue, and implementing a process for receiving the death certificates from all counties in which it provides services. *Id.*

¹⁶¹ Telephone Interview with Dr. Michael Graham, Chief Medical Examiner, St. Louis City Medical Examiner's Office (Nov. 18, 2010) (on file with author).

¹⁶² Interview with Dr. Carl Stacey, *supra* note 160; Interview with Dr. Michael Graham *supra* note 161.

¹⁶³ ST. LOUIS COUNTY HEALTH, MEDICAL EXAMINER POLICIES AND PROCEDURES FOR REPORTABLE DEATHS at 4 (Aug. 2003), available at http://ww5.stlouisco.com/doh/medexam/ME504_Booklet.pdf.

¹⁶⁴ *Board Certified Fellows*, ABMDI, <http://medschool.slu.edu/abmdi/index.php?page=board-diplomates> (search by state "Missouri") (last visited Feb. 8, 2012).

¹⁶⁵ Interview with Dr. Carl Stacey, *supra* note 160.

throughout the legal process to ensure consistency.¹⁶⁶ The St. Louis County Medical Examiner's Office has developed written and published policies and procedures for investigations of reportable deaths.¹⁶⁷

JCMEO, despite its NAME accreditation, has had several instances that have call into question the validity and reliability of its death investigations. In 1999, the Circuit Court of Jackson County found that the JCMEO Deputy Medical Examiner provided false information in several autopsy reports.¹⁶⁸ The court determined that Dr. Michael Berkland's actions "constitute[d] misconduct, fraud, misrepresentation, dishonesty, unethical conduct and unprofessional conduct in the practice of medicine."¹⁶⁹ After an internal investigation, Dr. Thomas Young, the JCMEO Acting Chief Medical Examiner at the time, stated that in every one of Dr. Berkland's cases that were reviewed, "there is clear evidence of an intent to make up autopsy findings without performing the necessary examination."¹⁷⁰ Dr. Young further stated that Dr. Berkland acted as an advocate for law enforcement and considered convictions in cases in which he testified a "personal victory."¹⁷¹ In 1999, Missouri revoked Dr. Berkland's medical license.¹⁷²

Since the appointment of the new Chief Medical Examiner, JCMEO has been publicly criticized for several cause-of-death misclassifications.¹⁷³ In two cases discovered in 2007 and 2009, JCMEO had classified a death as natural; however, further investigation revealed one victim had suffered three bullet wounds—two of which were to the head—and the other victim had been sexually assaulted, had suffered a broken jaw, and had a knife wound to her throat.¹⁷⁴ In 2010, a year after a Deputy Medical Examiner had classified a death as natural despite the decedent's gunshot wound to the head, the JCMEO Chief Medical Examiner reclassified the death as a homicide.¹⁷⁵ Additionally, there appear to be several examples of inconsistent classifications both among JCMEO analysts and between JCMEO analysts and police investigators. In 2010, JCMEO ruled the deaths of two gunshot victims as accidental.¹⁷⁶ However, six months later one of the deaths was reclassified as a homicide by the Chief Medical Examiner.¹⁷⁷ In a 2007 case, the Kansas City Police Department identified a suspect in an assumed homicide but later closed the investigation after JCMEO ruled the death accidental due to acute cocaine intoxication, despite a police investigation that revealed bloody clothing and witness accounts of an assault.¹⁷⁸

¹⁶⁶ Interview with Dr. Michael Graham, *supra* note 161.

¹⁶⁷ ST. LOUIS COUNTY HEALTH, MEDICAL EXAMINER POLICIES AND PROCEDURES FOR REPORTABLE DEATHS (Aug. 2003), available at http://ww5.stlouisco.com/doh/medexam/ME504_Booklet.pdf.

¹⁶⁸ Chris George & Denis Wright, "Unwrapped" Part 2: Dr. Michael Berkland in Missouri, ONLINE JOURNAL, Nov. 21, 2001, at 1, available at <http://surftofind.com/medical>.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 3.

¹⁷² *Id.* at 2.

¹⁷³ Christine Vendel, *KC Police Chief Calls Fatality Classification System 'Broken'*, KANSAS CITY STAR (Mar. 3, 2009), at A1; Christine Vendel, *New Policy Sheds Light on Death Investigations*, KANSAS CITY STAR (May 31, 2009), at A1.

¹⁷⁴ Christine Vendel, *KC Police Chief Calls Fatality Classification System 'Broken'*, KANSAS CITY STAR (Mar. 3, 2009), at A1; Christine Vendel, *New Policy Sheds Light on Death Investigations*, KANSAS CITY STAR (May 31, 2009), at A1.

¹⁷⁵ Christine Vendel, *'Natural' Death Goes Back Onto Homicide List*, KANSAS CITY STAR (May 20, 2010).

¹⁷⁶ Christine Vendel, *Once a Homicide Victim Not Always a Homicide Victim*, KANSAS CITY STAR (Sept. 3, 2009).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

These incidents at JCMEO exemplify the need for an independent state oversight body to monitor Missouri's medico-legal death investigation system. JCMEO's NAME accreditation has not ensured the validity and reliability of the office's investigations.

The Missouri Assessment Team is not aware of any similar incidents in Missouri's other medical examiner offices.

Conclusion

Missouri is in partial compliance with Recommendation #1.

Missouri does not currently require its crime laboratories and medico-legal death investigation offices to be accredited. However, the Missouri Assessment Team commends all Missouri crime laboratories for seeking voluntary accreditation and notes that, if section 650.060 is implemented on December 31, 2012, as planned, Missouri statutory law will require all crime laboratories to receive accreditation. Missouri has also failed, however, to establish standardized systems and procedures for crime laboratories and medico-legal death investigations. While the General Assembly has created an independent oversight board for crime laboratories, the Review Commission has yet to be funded or fully staffed. The Review Commission also would not monitor medical examiner and coroner offices, as Section 650.060 does not apply to these entities.

The Assessment Team recommends that Missouri fully fund and staff the Crime Laboratory Review Commission, that the Review Commission have the power to create standardized systems and procedures, and that the Review Commission be given the authority to monitor medical examiner and coroner offices.

B. Recommendation #2

Crime laboratories and medical examiner offices should be adequately funded.

Proper funding is needed to ensure that crime laboratories, medical examiner offices, and county coroner offices maintain the equipment needed to develop accurate and reliable results and to hire and retain a sufficient number of competent forensic scientists and staff to timely analyze forensic evidence.

Sources of Crime Laboratory Funding

Missouri's law enforcement crime laboratories are funded by a variety of state and county sources, as well as by federal grant funding.

MSHP-FL's primary funding is from General Assembly appropriations. In 2010, MSHP-FL received \$9,860,488 from the General Assembly.¹⁷⁹ Since 2008, however, the General Assembly has appropriated fewer funds to MSHP-FL each year, with \$12,032,057 appropriated

¹⁷⁹ OFFICE OF ADMIN., EXECUTIVE BUDGET FISCAL YEAR 2011, at 8-4 (2010), available at <http://oa.mo.gov/bp/budg2011/PublicSafety.pdf>.

in 2008 and \$10,394,660 appropriated in 2009.¹⁸⁰ This may be due to the fact that in both 2008 and 2009, MSHP-FL spent significantly less than was appropriated: \$7,682,327 in 2008 and \$8,617,064 in 2009.¹⁸¹

While MSHP-FL is the only crime laboratory to receive appropriations directly from the General Assembly, other crime laboratories are eligible for competitive funding through the Missouri Crime Laboratory Upgrade Program (MCLUP).¹⁸² MCLUP, which is funded by the General Assembly, provides “equipment, supplies, and manpower to regional crime labs throughout the state to reduce backlogs and increase turnaround in the analysis of evidence.”¹⁸³ All Missouri law enforcement crime laboratories are eligible to apply for funding through MCLUP.¹⁸⁴ In 2010, MCLUP awarded \$620,977 to various crime laboratories; however, the total awards in 2011 decreased to \$610,785, resulting in an approximate \$25,000 decrease of funding to MSHP.¹⁸⁵ The following chart presents the MCLUP awards to the various crime laboratories since 2008.¹⁸⁶

Award Recipient	MCLUP Award 2008	MCLUP Award 2009	MCLUP Award 2010	MCLUP Award 2011
MSHP	\$229,947	\$250,132	\$275,130	\$251,782
Kansas City Police Department	\$72,504	\$75,998	\$77,207	\$79,430
Independence Police Department	\$24,320	\$25,189	\$25,586	\$25,195
St. Louis Metropolitan Police Department	\$79,820	\$89,842	\$93,474	\$93,537
St. Louis County Police Department	\$84,119	\$90,590	\$86,447	\$96,384
St. Charles County Sheriffs Office	\$21,942	\$37,241	\$47,601	\$49,283

The Crime Laboratory Assistance Program (CLAP), created by statute, is designed to “defray part of the operational costs incurred by crime laboratories.”¹⁸⁷ CLAP was funded by General

¹⁸⁰ OFFICE OF ADMIN., EXECUTIVE BUDGET FISCAL YEAR 2010, at 8-3 (2009), available at <http://oa.mo.gov/bp/budg2010/PublicSafety.pdf>; OFFICE OF ADMIN., EXECUTIVE BUDGET FISCAL YEAR 2009, at 8-3 (2008), available at <http://oa.mo.gov/bp/budg2009/PublicSafety.pdf>.

¹⁸¹ *Id.*; OFFICE OF ADMIN., EXECUTIVE BUDGET FISCAL YEAR 2011, at 8-4 (2010), available at <http://oa.mo.gov/bp/budg2011/PublicSafety.pdf>.

¹⁸² *Crime Lab Assistance Program (CLAP), and Missouri Crime Lab Upgrade Program*, MO. DEPT. OF PUBLIC SAFETY, <http://www.dps.mo.gov/dir/programs/cjle/clapmclup.asp> (last visited Feb. 16, 2012). MCLUP is administered by the Department of Public Safety. *Id.*

¹⁸³ MO. DEP’T OF PUB. SAFETY, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT PROGRAM: FY10 ANNUAL REPORT 31 (2010), available at <http://www.mshp.dps.missouri.gov/MSHPWeb/SAC/pdf/2010StateAnnualReport.pdf>.

¹⁸⁴ *Id.*

¹⁸⁵ MO. DEP’T OF PUB. SAFETY, MISSOURI CRIME LAB UPGRADE (MCLUP) AWARDS (2010) (on file with author).

¹⁸⁶ *Id.*

¹⁸⁷ Section 650.105, RSMo 2011. Crime laboratory is defined as “any forensic science laboratory operated or supported financially by the state or any unit of city, county, or other local Missouri government receiving state-administered funding, and employs at least one scientist who examines physical evidence in criminal matters and provides expert or opinion testimony with respect to such physical evidence in a state court of law.” Section 650.059.7, RSMo 2011.

Assembly appropriations and administered by the Department of Public Safety.¹⁸⁸ However, the General Assembly is not currently funding CLAP.¹⁸⁹

In addition to MCLUP and CLAP funding, law enforcement crime laboratories other than MSHP-FL receive funding from city and county appropriations. The Kansas City Police Department Crime Laboratory requested \$4,377,218 from the local government in fiscal year 2011, but it only received \$4,274,101.¹⁹⁰ The St. Charles County Sheriff's Department Criminalistics Laboratory received \$221,050 from St. Charles County appropriations in fiscal year 2010, approximately \$7,000 less than the laboratory received in 2009.¹⁹¹ The St. Louis Metropolitan Police Department Crime Laboratory, the St. Louis County Crime Laboratory, and the Independence Crime Laboratory are funded by city or county appropriations to their respective police departments.¹⁹² The police departments are then responsible for allocating the funds to the crime laboratory. The Assessment Team was unable to determine the funding allocated to these three crime laboratories by their respective law enforcement agencies.

In addition, federal grant programs provide funding to Missouri crime laboratories. Since 2004, Missouri crime laboratories have been awarded National Institute of Justice (NIJ) grants for DNA testing and DNA backlog reductions. Specifically, several laboratories have received funding through the NIJ's *Forensic DNA Backlog Reduction Program* in order "to reduce forensic DNA sample turnaround time, increase the throughput of public DNA laboratories and reduce DNA forensic casework backlogs."¹⁹³ While most of the crime laboratories have received an increase in grant awards over the last several years, MSHP and the Kansas City Police Department received a reduced award in 2010.¹⁹⁴ The following chart lists NIJ grants received by Missouri crime laboratories since 2007:

¹⁸⁸ Section 488.029, RSMo 2011; *see also* section 650.105, RSMo 2011.

¹⁸⁹ *Crime Lab Assistance Program*, MO. DEP'T OF PUB. SAFETY, <http://www.dps.mo.gov/dir/programs/cjle/clapmclup.asp> (last visited Feb. 13, 2012).

¹⁹⁰ KANSAS CITY, MO. POLICE DEP'T, APPROPRIATED BUDGET 2011–2012, at 164 (Apr. 8, 2011), *available at* http://www.kcmo.org/idc/groups/police/documents/police/fy_2011-12_budget_adopted.pdf.

¹⁹¹ ST. CHARLES CNTY., 2010 ANNUAL BUDGET 150 (Dec. 22, 2010), *available at* http://finance.sccmo.org/finance/index.php?option=com_docman&task=doc_download&gid=1696. In 2009, the St. Charles Criminalistics Laboratory received \$228,490. *Id.*

¹⁹² *See* CITY OF ST. LOUIS BUDGET DIV., CITY OF ST. LOUIS, MISSOURI, FISCAL YEAR 2011 ANNUAL OPERATING PLAN, at A-6 (June 25, 2010), *available at* <http://stlouis-mo.gov/government/departments/budget/documents/upload/FY2011-AOP-Complete.pdf>. ST. LOUIS CNTY. DIV. OF BUDGET, 2010 ADOPTED BUDGET 112, 158, 249 (2009), *available at* <http://www.stlouisco.com/YourGovernment/CountyDepartments/Budget>. *Criminal Investigation Division*, CITY OF INDEPENDENCE, <http://www.ci.independence.mo.us/ipd/investigations.aspx> (last visited Feb. 13, 2012).

¹⁹³ *See Backlog Reduction Funding Awards, 2004–2010*, NAT'L INST. OF JUSTICE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/backlog-reduction-funding.htm> (last visited Feb. 16, 2012). *Backlog Reduction Funding Awards — State-by-State Details*, NAT'L INST. OF JUSTICE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/backlog-reduction-detailed-funding.htm#Missouri> (last visited Feb. 16, 2012).

¹⁹⁴ *Backlog Reduction Funding Awards — State-by-State Details*, NAT'L INST. OF JUSTICE, <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/backlog-reduction-detailed-funding.htm#Missouri> (last visited Feb. 16, 2012).

Award Recipient	2007	2008	2009	2010
MSHP	\$337,000	\$472,067	\$434,900	\$433,826
Kansas City Police Department	\$305,045	\$376,718	\$425,877	\$398,376
St. Louis Metropolitan Police Department	\$402,564	\$383,582	\$319,731	\$350,292
St. Louis County police Department	\$145,538	\$128,916	\$143,616	\$170,244
St. Charles County Sheriffs Office	\$24,374	\$31,516	\$31,915	\$36,866

In addition, the Missouri Department of Public Safety, the Kansas City Board of Police Commissioners, the St. Louis Metropolitan Police Department, and the St. Louis County Police Department received additional funding from the NIJ's Paul Coverdell Forensic Sciences Improvement Grant Program (Coverdell Grant Program).¹⁹⁵ The Coverdell Grant Program is a federal program that seeks to improve the quality of and reduce backlogs in forensic evidence analysis.¹⁹⁶

In 2009, the Missouri Department of Public Safety received a base Coverdell award of \$308,133 and the Kansas City Board of Police Commissioners was awarded a competitive award of \$99,000.¹⁹⁷ The Kansas City Board of Police Commissioners also received a competitive award of \$94,624 from Coverdell in 2005.¹⁹⁸ The St. Louis Metropolitan Police Department received a competitive award in 2008 of \$82,800¹⁹⁹ and in 2006 of \$84,385.²⁰⁰ The St. Louis County Police Department received a competitive award in 2004 for \$80,024.²⁰¹

¹⁹⁵ 42 U.S.C. § 3797j; *see also Coverdell Forensic Science Improvement Grants Program*, NAT'L INST. OF JUSTICE, <http://www.nij.gov/topics/forensics/lab-operations/capacity/nfsia/welcome.htm> (last visited Feb. 16, 2012).

¹⁹⁶ *Fiscal Year 2010 Report on the Paul Coverdell Forensic Science Improvement Grants Program*, NAT'L INST. OF JUSTICE, <http://www.nij.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2010-report.htm> (last visited Feb. 16, 2012).

¹⁹⁷ *FY2009 Coverdell Report to Congress – Funding Table*, NAT'L INST. OF JUSTICE, *available at* <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2009-funding-table.xls>. The Board of Police Commissioners will use “[t]he FY 2009 Paul Coverdell Forensic Science Improvement Grants Program [to] fund contract services for certified latent print examiner(s) to complete the technical examination of the items of evidence (latent lifts or photographs) for latent prints of value, the formal documentation of the latent prints of value findings, and the uploading of their results into the Automated Fingerprint Identification System (AFIS). This program will reduce the projected backlog by 23.1% during the grant period.” *Id.*

¹⁹⁸ *FY2005 Coverdell Report to Congress – Funding Table*, NAT'L INST. OF JUSTICE, *available at* <http://www.nij.gov/nij/topics/forensics/lab-operations/capacity/nfsia/fy05-coverdell-funding.xls>. “Funds will be used by the Kansas City Police Crime Laboratory to obtain training in the areas of latent fingerprint comparisons and expert testimony. The crime scene investigation section of the laboratory will achieve competency in advanced chemical latent print processing. Five firearms examiners, one firearms technician and four latent print examiners will utilize overtime to reduce backlogs.” *Id.*

¹⁹⁹ *FY2008 Coverdell Report to Congress – Funding Table*, NAT'L INST. OF JUSTICE, *available at* <http://www.nij.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2008-funding-table.xls>. “The St. Louis Metropolitan Police Department will use grant funding to provide an adequate, organized storage facility to store and process forensic evidence submitted to the laboratory’s latent fingerprint section. This storage system will yield adequate, expanded storage capacity that will meet current evidence storage requirements in the unit. Also, the alarm and entry system of the evidence storage area will be integrated with the main laboratory’s security entry and tracking system using an electronic key card system which is a monitored, recorded system. Secure evidence storage lockers will be installed within the area to store firearms, drug paraphernalia and flammable evidence.” *Id.*

Adequacy of Crime Laboratory Funding

Despite state and federal funding, it appears that Missouri crime laboratories are unable to efficiently manage their workloads. Backlogs persist at some Missouri crime laboratories. The St. Charles Criminalistics Laboratory currently takes sixty to seventy days, on average, to complete non-drug analyses.²⁰² In order to help reduce its backlog, the laboratory is purchasing new equipment and outsourcing cases to MSHP-FL.²⁰³ In 2008, the St. Louis County Crime Laboratory had an average turnaround time of 53.5 days.²⁰⁴ The Kansas City Police Department Crime Laboratory has been plagued with the most significant testing backlogs in the state. In August 2010, the Kansas City Crime Laboratory had a backlog of 332 cases.²⁰⁵ These 332 cases had been awaiting analysis for at least thirty days, with some waiting as long as six months.²⁰⁶ The average turnaround time for testing at the Kansas City Crime Laboratory was seven months.²⁰⁷ The backlogs at the Kansas City Crime Laboratory are attributed to insufficient staff and a lack of adequate space.²⁰⁸

MSHP-FL receives evidence from across the state from local, state, and federal law enforcement agencies and other crime laboratories. In 2009, MSHP-FL had 497 rape kits awaiting DNA testing, with an average turnaround time of six months.²⁰⁹ By contrast, the St. Louis Metropolitan Police Department Crime Laboratory had only sixty-nine rape kits awaiting DNA testing in 2009.²¹⁰ In order to “lower case turnaround time and increase analyst productivity,” MSHP-FL has asked submitting agencies to limit evidence submissions to the most probative

²⁰⁰ *FY06 Coverdell Report to Congress – Funding Table*, NAT’L INST. OF JUSTICE, available at <http://www.nij.gov/nij/topics/forensics/lab-operations/capacity/nfsia/fy06-coverdell-funding.xls>. “The St. Louis Metropolitan Police Department will use grant funds to purchase the necessary computer server, software and camera equipment to immediately implement a conversion to digital crime scene photography. This conversion will improve current operations by decreasing the time required to provide investigative units with high quality crime scene images.” *Id.*

²⁰¹ *FY04 Coverdell Report to Congress – Funding Table*, NAT’L INST. OF JUSTICE, available at http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/fy2004_table.htm. “Funding will be used to: 1) purchase equipment and software; 2) prepare for ASCLD-LAB accreditation; and 3) provide training to non-DNA analysts.” *Id.*

²⁰² Interview with Brian Hampton, *supra* note 24.

²⁰³ *Id.*

²⁰⁴ MO. DEP’T OF PUB. SAFETY, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT PROGRAM: FY08 ANNUAL REPORT 37 (2008), available at <http://www.mshp.dps.missouri.gov/MSHPWeb/SAC/pdf/2008StateAnnualReport.pdf>.

²⁰⁵ *Crime Lab Backlog Hurting Investigations* (ABC television broadcast Aug. 6, 2010), available at <http://www.kmbc.com/video/24544610/detail.html> (interviewing Kansas City Crime Laboratory Director Linda Netzel).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Laura Strickler, *Thousands of Rape Kits Wait to Be Tested*, CBS NEWS (Nov. 10, 2009), http://www.cbsnews.com/stories/2009/11/10/cbsnews_investigates/main5605770.shtml?source=related_story (last visited Feb. 17, 2012).

²¹⁰ *Id.*

samples.²¹¹ MSHP-FL expects that the new Springfield Crime Laboratory will further help to expedite the review and analysis of forensic evidence.²¹²

Despite the attempts by Missouri’s crime laboratories to reduce their backlogs, additional funding is needed to alleviate crime laboratory backlogs and ensure manageable case loads.

Sources of Medical Examiner Funding

Missouri does not have a centralized program for funding medical examiner and coroner offices. These offices are primarily funded by the counties they serve, although some offices have received additional grant funding.

Medical Examiner Budgets

The following tables show the funding sources and amounts for each medical examiner office.²¹³

Jackson County Medical Examiner’s Office

Funding Source	2008	2009	2010
Jackson County ²¹⁴	\$2,393,191	\$2,867,543	\$2,597,853
Clay County ²¹⁵	\$415,000	\$216,976	168,428
Platte County ²¹⁶	\$80,000	\$72,542	\$75,081
Cass County ²¹⁷	_223	_223	_223
Coverdell Grant Program ²¹⁸	\$92,558	\$125,000	
	\$2,980,749	\$3,285,052	\$2,672,934

²¹¹ *Help Control the DNA Backlog*, UNDER THE SCOPE, Sept. 2007, at *1, available at <http://www.msdp.dps.mo.gov/MSHPWeb/Publications/OtherPublications/documents/underTheScope7-1.pdf>.

²¹² Mallory McGowin, *Crime Lab Backlog May Soon Be Reduced*, KRCG 13, May 12, 2008, http://www.connectmidmissouri.com/news/news_story.aspx?id=133304 (last visited Feb. 17, 2012). The Springfield Lab opened in December 2008. Sarah Erst, *No. 27 Missouri State Highway Patrol Crime Lab*, SPRINGFIELD BUS. J. ONLINE, July 26, 2010, <http://sbj.net/main.asp?Search=1&ArticleID=87481&SectionID=48&SubSectionID=108&S=1> (last visited Feb. 17, 2012).

²¹³ The Missouri Assessment Team was unable to locate any funding information for the Camden County Medical Examiner’s Office.

²¹⁴ JACKSON CNTY. MEDICAL EXAMINER’S OFFICE, 2009 MEDICAL EXAMINER DEPARTMENT OVERVIEW, at G-2 (2009), available at http://www.jacksongov.org/filestorage/3277/3316/5935/5939/Medical_Examiner.pdf.

²¹⁵ CLAY CNTY. COMM’N, 2012 APPROVED COUNTY BUDGET 36 (2011), available at http://www.claycountymo.gov/@api/deki/files/1769/=2012_Budget_Details.pdf; CLAY CNTY. COMM’N, 2009 EXPENSE SUMMARY 1 (2009), available at <http://www.claycogov.com/county/budget/budget2009/index.php>.

²¹⁶ SIOBHANN K. WILLIAMS, 2010 PLATTE COUNTY BUDGET 17 (Jan. 8, 2010), available at http://www.co.platte.mo.us/docs/auditor/2010/2010_Commission_Approved_Budget.pdf; SIOBHANN K. WILLIAMS, 2009 PLATTE CNTY. BUDGET 17 (Jan. 29, 2009), available at http://www.co.platte.mo.us/docs/auditor/2009/2009_Commission_Approved_Budget.pdf.

²¹⁷ The Assessment Team was unable to locate the Cass County contribution to the Jackson County Medical Examiner’s Office.

²¹⁸ *FY08 Coverdell Report to Congress – Funding Table*, NAT’L INST. OF JUSTICE, available at <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2008-report.htm>.

St. Louis County Medical Examiner's Office

Funding Source	2008	2009	2010	2011
St. Louis County ²¹⁹	\$1,553,000	\$1,690,000	\$1,733,000	\$1,761,000
Jefferson County ²²⁰	–	–	–	–
St. Charles County ²²¹	\$401,100	\$425,166	\$442,173	\$470,914
Franklin County ²²²	\$186,853	\$205,539	\$213,760	\$225,000
	\$2,140,953	\$2,320,705	\$2,388,933	\$2,456,914

St. Louis City Medical Examiner's Office

Funding Source	2009	2010	2011
St. Louis City ²²³	\$2,393,191	\$2,867,543	\$2,597,853
Grants and other funds ²²⁴	\$983	\$225,000	\$225,000
	\$2,394,174	\$3,092,543	\$2,822,853

Medical Examiner's Office for Boone, Callaway, Greene Counties

Funding Source	2008	2009	2010
Boone County ²²⁵	\$185,352	\$197,380	\$210,309
Callaway County ²²⁶	–	–	–
Greene County ²²⁷	\$256,352	\$348,210	\$366,165
	\$439,732	\$595,590	\$606,474

²¹⁹ CHARLES A. DOOLEY, ADOPTED BUDGET OF ST. LOUIS COUNTY FOR FISCAL YEAR 2010, at 129 (2009), available at http://www.stlouisco.com/budget/Budget2010_Final/2010FinalBudget.pdf; CHARLES A. DOOLEY, ADOPTED BUDGET OF ST. LOUIS COUNTY FOR FISCAL YEAR 2011, at 155 (2010), available at http://www.stlouisco.com/budget/Budget2011_Final/2011FinalBudget.pdf.

²²⁰ The Missouri Assessment Team was unable to locate the Jefferson County contribution to the St. Louis County Medical Examiner's Office.

²²¹ JOHN WHITE, ANNUAL BUDGET FOR ST. CHARLES COUNTY, FISCAL YEAR 2011, at 11 (2010), available at http://finance.sccmo.org/finance/index.php?option=com_content&task=view&id=43&Itemid=72.

²²² TAMBRA L. VEMMER, PROPOSED BUDGET OF FRANKLIN COUNTY FOR FISCAL YEAR 2011, at 55 (2010), available at http://www.franklinmo.net/data/auditor/Budget/2011_Franklin_County_Budget.pdf; RALPH E. SUDHOLT, BUDGET OF FRANKLIN COUNTY FOR FISCAL YEAR 2009, at 28 (2008), available at http://www.franklinmo.net/data/auditor/Budget/2009_Franklin_County_Budget.pdf.

²²³ Bd. OF ESTIMATE AND APPORTIONMENT, ANNUAL OPERATING PLAN OF THE CITY OF ST. LOUIS FOR FISCAL YEAR 2011, at 100 (2010), available at <http://stlouis-mo.gov/government/departments/budget/documents/upload//FY2011-AOP-Complete.pdf>.

²²⁴ *Id.* at S-41.

²²⁵ JUNE E. PITCHFORD, BUDGET OF BOONE COUNTY FOR FISCAL YEAR 2010, at 316 (2009), available at <http://www.showmeboone.com/Budget%202010/Default.htm>.

²²⁶ The Missouri Assessment Team unable to locate the Callaway County contribution to the Medical Examiner's Office.

²²⁷ GREENE CNTY. BUDGET OFFICE, BUDGET OF GREEN COUNTY, FISCAL YEAR 2010, at § 101-416 (2009), available at http://www.greenecountymo.org/budget/file/2010_budget.pdf.

Buchanan County Medical Examiner's Office

Funding Source	2008	2009	2010
Buchanan County ²²⁸	\$72,382	\$52,539	\$70,005
	\$72,382	\$70,000	\$55,000

Cole County Medical Examiner's Office

Funding Source	2008	2009	2010
Cole County ²²⁹	\$44,500	\$46,500	\$44,500
	\$44,500	\$44,500	\$44,500

Medical Examiner Salaries

Salary levels for medical examiners vary considerably by office. In 2008, the Jackson County Medical Examiner earned \$230,006, while one of the Jackson County Deputy Medical Examiners earned \$140,004.²³⁰ In comparison, in 2010, the St. Louis County Medical Examiner earned \$108,709.²³¹ Despite the disparity in salary for the two Chief Medical Examiners, both provide services to four counties.²³² Notably, the four counties serviced by the St. Louis County Medical Examiner's Office have a higher total population.²³³ Without knowing the budget contribution of Cass County and Jefferson County, we are unable to compare the precise budgets of the two medical examiner offices.

Adequacy of Funding for the Medical Examiner System

When a medical examiner office has a significant backlog of cases, it is often because that office is inadequately funded. Currently, the St. Louis City Medical Examiner's Office does not have a backlog and manages the approximately 125 to 200 homicide autopsies it conducts each year.²³⁴

²²⁸ CNTY. COMM'N OF BUCHANAN CNTY., APPROVED BUDGET OF BUCHANAN COUNTY FOR FISCAL YEAR 2010, 28 (2009), available at <http://www.co.buchanan.mo.us/offices/auditor/budget.pdf>.

²²⁹ JAMES T. LEPAGE, RECOMMENDED BUDGET FOR FISCAL YEAR 2011, at 78-79 (2010), available at <http://www.jeffcitymo.org/documents/Proposed%202011%20County%20Budget.pdf>. Although the figures are listed under the heading "County Coroner," Clay County operates a medical examiner office. Cf. *Cole Cnty. Med. Exam'r's Office*, COLE CNTY., <http://www.colecounty.org/Cole%20County%20Medical%20Examiner.pdf> (last visited Feb. 17, 2012).

²³⁰ *Search the Jackson County Salary Database*, KANSASCITY.COM, (April 21, 2008) <http://www.kansascity.com/2008/04/09/568201/search-the-jackson-county-salary.html> (website of the *Kansas City Star*) (search "Department" for "Medical Examiner;" then follow "Search" hyperlink) (last visited Feb. 13, 2012).

²³¹ *St. Louis County Employee Pay*, ST. LOUIS TODAY, (May 24, 2010) http://www.stltoday.com/news/local/govt-and-politics/html_17a628c8-6763-11df-aa1a-0017a4a78c22.html (website of the *St. Louis Post-Dispatch*) (search "Job Title" for "Chief Medical Examiner;" then follow "Search" hyperlink) (last visited Feb. 13, 2012).

²³² *Medical Examiner*, JACKSONGOV.ORG, <http://www.jacksongov.org/content/3310/3350/default.aspx> (last visited Feb. 13, 2012); see Curriculum Vitae, Dr. Mary Case (2/27/09), available at <http://path.slu.edu/uploads/uploads/faculty cvs/Mary-Case-M-D.pdf>.

²³³ The total 2009 population of the counties served by the St. Louis County Medical Examiner was 1,668,044. *State & County QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/maps/missouri_map.html (last visited Feb. 13, 2012). The total 2009 population of the counties served by JCMEO was 1,124,938. *Id.*

²³⁴ Interview with Dr. Michael Graham, *supra* note 161.

The medical examiner office for Boone, Callaway, and Greene Counties also does not have a backlog of cases.²³⁵ While we were unable to determine the exact backlog of cases at JCMEO, the office indicated that its goal for 2010 is to conduct and complete 90% of homicide autopsy reports within two months and 95% of other autopsy reports with three months.²³⁶

Despite being among the better-funded medical examiner office in Missouri, conducting the fewest autopsies, and having the highest paid Medical Examiner in the state, JCMEO is unable to adequately investigate death scenes. As discussed in Recommendation #1, in 2009 JCMEO misclassified two deaths. In both instances, no JCMEO investigator visited the death scene.²³⁷ At the time of the misclassifications, JCMEO policy stated that it would only assume jurisdiction over a body if “invited to the death scene” by law enforcement.²³⁸ JCMEO would discuss the case with law enforcement over the telephone and, based on that discussion, determine whether a visit to the scene was necessary.²³⁹ Despite receiving a budget of over \$3,000,000 in 2009, JCMEO’s Medical Examiner explained that, in order to investigate every death in the county, the medical examiner would need to “triple [] staff and boost [the office’s] budget by millions of dollars.”²⁴⁰ By contrast, the St. Louis County Medical Examiner assumed jurisdiction of all deaths until the office determined otherwise, despite a reduced budget that same year.²⁴¹ In 2009, following the misclassifications, JCMEO instituted a new policy requiring an investigator to travel to all death scenes that do not occur in a hospital, despite the office’s receiving no additional funding.²⁴²

Without further information, the Assessment Team is unable to determine whether Missouri medical examiner offices are adequately funded. However, it is clear that the medical examiner offices rely on the counties they serve for the majority of their funding and that there are vast differences in county funding for these offices. These discrepancies also are found with respect to medical examiners’ salaries. Furthermore, it appears that the problems that plague JCMEO may stem more from the allocation of resources within the office than from the overall funding received by the office.

Sources of Funding for Coroner Offices

Similar to medical examiner offices, coroners are funded by the counties they serve. A county is only required to provide funding for the coroner’s salary and the expenses associated with hiring a physician to conduct a postmortem examination.²⁴³ Counties are not required to provide

²³⁵ Interview with Dr. Carl Stacey, *supra* note 160.

²³⁶ JACKSON CNTY. MEDICAL EXAMINER’S OFFICE, 2009 MEDICAL EXAMINER DEPARTMENT OVERVIEW, at G-1 (2009), available at http://www.jacksongov.org/filestorage/3277/3316/5935/5939/Medical_Examiner.pdf.

²³⁷ Christine Vendel, *New Policy Sheds Light on Death Investigations*, KANSAS CITY STAR, May 31, 2009, at A1.

²³⁸ *Id.*

²³⁹ *Id.*; Christine Vendel, *KC Police Chief Calls Fatality Classification System ‘Broken’*, KANSAS CITY STAR, Mar. 3, 2009, at A1.

²⁴⁰ Christine Vendel, *KC Police Chief Calls Fatality Classification System ‘Broken’*, KANSAS CITY STAR, Mar. 3, 2009, at A1.

²⁴¹ Christine Vendel, *New Policy Sheds Light on Death Investigations*, KANSAS CITY STAR, May 31, 2009, at A1. See also *supra* notes 214–222 and accompanying text.

²⁴² Christine Vendel, *New Policy Sheds Light on Death Investigations*, KANSAS CITY STAR, May 31, 2009, at A1.

²⁴³ Sections 58.095.1, 58.560, RSMo 2011; see also Telephone Interview by Rachel Bays with John Clifton, County Coroner, Cape Girardeau, Mo. (Nov. 24, 2010) (on file with author).

coroners with office space or supplies.²⁴⁴ Consequently, many coroners perform their duties in local funeral homes.²⁴⁵

In 2011, Cape Girardeau County allocated \$134,601 to its coroner, including money for salaries, benefits, equipment, office space, training, and supplies.²⁴⁶ This is a per capita budget of approximately \$1.79.²⁴⁷ Despite being one of the most well-funded coroner offices in Missouri, the Cape Girardeau County Coroner’s budget falls well below the national average of \$2.89 per capita.²⁴⁸ In some counties, the coroners’ budgets are below one dollar per capita. For example, the Taney County Coroner’s 2009 budget was \$45,879, or approximately \$0.89 per capita.²⁴⁹

Coroner Salaries

Coroners receive a base salary, prescribed by statute, based on the assessed value of the county.²⁵⁰ The table below presents the statutorily-established coroner compensation schedule.²⁵¹

Assessed Valuation of County	Salary
\$18,000,000 to \$40,999,999	\$8,000
\$41,000,000 to \$53,999,999	\$8,500
\$54,000,000 to \$65,999,999	\$9,000
\$66,000,000 to \$85,999,999	\$9,500
\$86,000,000 to \$99,999,999	\$10,000
\$100,000,000 to \$130,999,999	\$11,000
\$131,000,000 to \$159,999,999	\$12,000
\$160,000,000 to \$189,999,999	\$13,000
\$190,000,000 to \$249,999,999	\$14,000
\$250,000,000 to \$299,999,999	\$15,000
\$300,000,000 or more	\$16,000

²⁴⁴ Interview with John Clifton, *supra* note 243.

²⁴⁵ *Id.*

²⁴⁶ PETE FRAZIER, BUDGET FOR FISCAL YEAR 2011: CAPE GIRARDEAU COUNTY 20 (2010), available at <http://www.capecounty.us/Files/FinancialDocuments/Budget.pdf>.

²⁴⁷ The population for Cape Girardeau County in 2010 was 75,674. *State & County QuickFacts: Cape Girardeau County, Missouri*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/29/29031.html> (last visited Feb. 16, 2012).

²⁴⁸ 2009 NAS REPORT, *supra* note 1, at 249–50.

²⁴⁹ RICK C. FINDLEY, TANEY COUNTY 2009 BUDGET, at 51 (2010), available at http://www.taney.mo.us/CountyWeb/sources/pdf/6/2010_01_21_budgetfinal.pdf. The 2010 population for Taney County was 51,675. *State & County QuickFacts: Taney County, Missouri*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/29/29213.html> (last visited Feb. 16, 2012).

²⁵⁰ Section 58.095.1, RSMo 2011.

²⁵¹ *Id.*

The base salaries represent the minimum salary a county coroner may receive. Some county coroners receive salaries well above the base amount. The Cape Girardeau coroner received a salary of \$35,000 in 2008.²⁵² The Scott County Coroner received an annual salary of \$17,500 in 2008,²⁵³ approximately \$20,000 less than the 2008 median income for Scott County.²⁵⁴ The Bollinger County Coroner earned less than \$10,000 that same year.²⁵⁵ Because of the meager levels of compensation, many coroners seek additional employment, for example, as funeral home directors.²⁵⁶

Adequacy of Coroner Funding

Because the Assessment Team was unable to determine the role of each county coroner in the medico-legal death investigation process, the Team likewise was unable to determine a baseline for evaluating whether coroner funding is adequate. Absent adequate office space, reasonable salaries, and funding for basic supplies, it would be difficult to conclude that Missouri's coroners are able to carry out their statutory-mandated duties.

Conclusion

Although the persistent backlogs at some crime laboratories and the lack of accreditation by all but one medical examiner office may evidence inadequate funding, the Assessment Team has insufficient information to determine Missouri's compliance with Recommendation #2.

There are enormous variations in funding between Missouri crime laboratories, medical examiner offices, and coroner offices. This patchwork of systems has led to serious backlogs, mistakes, and, in the case of county coroners, a lack of necessary equipment and facilities. Furthermore, there is no oversight or review of allocation decisions made by crime laboratory directors and medical examiners, which may account for JCMEO's adequate yet poorly allocated funds. Finally, some crime laboratories and medical examiner offices appear to lack adequate funding.

The Missouri Assessment Team notes that, similar to the discussion in Recommendation #1, an independent crime laboratory and medical examiner review board could serve as an auditor to help ensure that crime laboratories and medical examiner offices properly use funds. Additionally, the Team cannot justify the continued use of the coroner system if such a system lacks sufficient funding to be effective in death investigations.

²⁵² Bridget DiCosmo, *County Coroners Have Variety of Duties for Little Pay*, S.E. MISSOURIAN, Apr. 29, 2008, <http://www.semissourian.com/story/1398372.html> (last visited Feb. 16, 2012).

²⁵³ *Id.*

²⁵⁴ *State & County QuickFacts: Scott County, Missouri*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/29/29201.html> (last visited Feb. 16, 2012) (the median income for Scott County from 2006 through 2010 was \$37,716).

²⁵⁵ DiCosmo, *supra* note 252.

²⁵⁶ Interview with John Clifton, *supra* note 243.

CHAPTER FIVE

PROSECUTORIAL PROFESSIONALISM

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

The prosecutor plays a critical role in the criminal justice system. Although the prosecutor operates within the adversarial system, the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused, and to enforce the rights of the public.

Because prosecutors are decision-makers on a broad policy level and preside over a wide range of cases, they are sometimes described as "administrators of justice." Each prosecutor has responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused. S/he must also decide whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice. Moreover, in cases in which capital punishment can be sought, prosecutors have enormous discretion in deciding whether or not to seek the death penalty. The character, quality, and efficiency of the whole system are shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers.

While the great majority of prosecutors are ethical, law-abiding individuals who seek justice, the existence of prosecutorial misconduct can affect innocent lives and society at large. Nationwide, between 1970 and 2004, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions, or reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases.¹

Prosecutorial misconduct can encompass various actions, including, but not limited to, failing to disclose exculpatory evidence, abusing discretion in filing notices of intent to seek the death penalty, racially discriminating in making peremptory challenges, covering-up or endorsing perjury by informants and jailhouse snitches, or making inappropriate comments during closing arguments.² The causes of prosecutorial misconduct include an individual's desire to obtain a conviction at any cost, lack of proper training, inadequate supervision, insufficient resources, and excessive workload.

Solutions to the problem of prosecutorial misconduct and wrongful convictions include adequate funding to prosecutor offices, adoption of standards to ensure manageable workloads for prosecutors, and requiring that prosecutors scrutinize cases that rely on eyewitness identifications, confessions, or testimony from witnesses who receive a benefit from the police or prosecution. Perhaps most importantly, there must be meaningful sanctions against prosecutors who engage in misconduct.

¹ STEVE WEINBERG, CENTER FOR PUBLIC INTEGRITY, *BREAKING THE RULES: WHO SUFFERS WHEN A PROSECUTOR IS CITED FOR MISCONDUCT?* (2004), available at <http://www.publicintegrity.org/pm>.

² *Id.*; see also *Police and Prosecutorial Misconduct*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited on Jan. 13, 2012).

I. FACTUAL DISCUSSION: MISSOURI OVERVIEW

A. *Prosecution Offices*

1. Local Prosecuting Attorneys

a. Organization

Missouri is divided into 114 counties, each with its own prosecuting attorney who is elected to a four-year term in the state's general election on even-numbered, non-presidential election years.³ In addition, the independent city of St. Louis has its own prosecutor, known as the circuit attorney, who is elected to serve a four-year term in presidential election years.⁴ Prosecuting attorneys and the St. Louis City circuit attorney may also appoint assistant prosecutors, investigators, and other assistants as necessary.⁵

b. Statutory Responsibilities⁶

Missouri statute dictates that prosecuting attorneys have a duty to “prosecute all civil and criminal actions in the prosecuting attorney’s county in which the county or state is concerned.”⁷ Specifically, prosecutors are responsible for requesting circuit judges to issue subpoenas,⁸ dismissing complaints and indictments,⁹ and trying criminal cases.¹⁰ The prosecuting attorney also represents the State of Missouri in appeals of misdemeanor convictions in his/her jurisdiction,¹¹ and in “all criminal cases where any person . . . [in his/her jurisdiction] [is] brought up on writs of habeas corpus.”¹² The St. Louis City circuit attorney’s statutory responsibilities are nearly identical to those of prosecuting attorneys.¹³ Assistant prosecuting attorneys have the same duties and responsibilities as the elected prosecutor who appoints them.¹⁴

c. Qualifications, Training, and Funding

An elected prosecuting attorney must “be a person learned in the law, [be] duly licensed to practice as an attorney at law in this state . . . , [be] at least twenty-one years of age, and . . .

³ Section 56.010, RSMo 2011; *Missouri Prosecuting Attorneys*, MO. OFF. OF PROSECUTION SERVS., <http://mops.mo.gov/MoProsAttorneys.htm> (last visited Oct. 4, 2011).

⁴ Section 56.430, RSMo 2011.

⁵ Section 56.151, 56.200, 56.240, 56.540 RSMo 2011.

⁶ This section relates specifically to responsibilities of local prosecutors as defined by statute. For a discussion on ethical rules relevant to prosecutors, refer to the section on The Missouri Rules of Professional Conduct, *infra* notes 26–31 and accompanying text.

⁷ Section 56.060.1, RSMo 2011. The statute also enumerates additional responsibilities which are not relevant to the prosecution of criminal cases. *Id.*

⁸ Section 56.085, RSMo 2011.

⁹ Section 56.087.1, RSMo 2011.

¹⁰ Section 56.090, RSMo 2011.

¹¹ Section 56.060.1, RSMo 2011.

¹² Section 56.080, RSMo 2011.

¹³ *See* sections 56.450, 56.460, 56.550, RSMo 2011.

¹⁴ *See* sections 56.180, 56.200, RSMo 2011.

[have] been a bona fide resident of the county in which he seeks election for twelve months” prior to the election.¹⁵ The St. Louis City circuit attorney must meet similar qualifications.¹⁶ In addition, in order to receive \$2,000 of their annual salary, prosecuting attorneys and the circuit attorney must complete “at least twenty hours of classroom instruction each calendar year relating to the operations of the prosecuting attorney’s office.”¹⁷

d. The Missouri Association of Prosecuting Attorneys

The Missouri Association of Prosecuting Attorneys (MAPA) was founded in 1969 “for the purpose of providing uniformity and efficiency in the discharge of duties and functions of Missouri prosecutors and their assistants.”¹⁸ MAPA provides some training programs to prosecutors and promotes “the development of legislation that is important to Missouri prosecutors.”¹⁹ As of 2012, St. Louis County Prosecuting Attorney Robert McCulloch is the President of MAPA.²⁰

2. Missouri Attorney General’s Office

Special prosecutors from the Public Safety Division of the Missouri Attorney General’s Office “assist Missouri’s local prosecuting attorneys in serious or difficult trials and grand jury proceedings.”²¹ These prosecutors become involved in trial-level capital prosecutions in one of two ways. First, the Governor may direct the Attorney General to provide assistance in a case, typically at the request of a local prosecutor.²² Second, a special prosecutor may be appointed by the trial court if the local prosecuting attorney recuses him/herself or is disqualified due to a conflict of interest.²³

The Attorney General may also assist local prosecutors in capital post-conviction proceedings upon request of a local prosecutor or in cases where the local prosecutor is disqualified or recused.²⁴ A different division of the Attorney General’s Office, the Criminal Division, is assigned to handle the direct appeals of all Missouri criminal cases, including capital prosecutions.²⁵

¹⁵ Section 56.010, RSMo 2011.

¹⁶ Section 56.430, RSMo 2011.

¹⁷ Section 56.265.2, RSMo 2011.

¹⁸ *Missouri Association of Prosecuting Attorneys*, MO. OFF. OF PROSECUTION SERVS., <http://mops.mo.gov/mapa.htm> (last visited Oct. 4, 2011).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *AGO Public Safety Division*, MO. ATT’Y GEN., <http://ago.mo.gov/prosecutors.htm> (last visited Oct. 20, 2011).

²² Email Interview by Mark Pickett & Kirstin Ramsay with Mo. Office of the Att’y Gen. (Oct. 24, 2011) (citing Section 27.030, RSMo 2011).

²³ *Id.* (citing Section 56.110, RSMo 2011).

²⁴ *Id.*

²⁵ *See id.*

B. *The Missouri Rules of Professional Conduct*

The Supreme Court of Missouri established the Missouri Rules of Professional Conduct to address the professional and ethical responsibilities of all attorneys, including prosecutors.²⁶ The Comments to Rule 4-3.8 state that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”²⁷ As such, the Rules provide that a prosecutor in a criminal case shall

- (1) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (2) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (3) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (4) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (5) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes [that the information is not protected by privilege, necessary to complete a prosecution, and not feasibly available from another source];
- (6) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused, and exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under [the Rules of Professional Conduct].²⁸

The Rules further require “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”²⁹ The Rules also state that lawyers may not falsify evidence or counsel their clients or witnesses to do so, may not make frivolous discovery requests, should make

²⁶ See generally Rule 4.

²⁷ Rule 4-3.8 cmt.

²⁸ Rule 4-3.8(a)–(f).

²⁹ Rule 4-8.3(a).

reasonable efforts to comply with discovery requests, and should refrain from making personal statements about the credibility of witnesses or the guilt or innocence of the accused.³⁰ Prosecutors, like all lawyers, are forbidden from making “extrajudicial statement[s they] know[] or reasonably should know will be disseminated by means of public communication and will have the substantial likelihood of materially prejudicing an adjudicative proceeding.”³¹

C. Other Rules and Laws Governing Prosecutors’ Responsibilities and Conduct

1. Capital Charging Decisions

First-degree murder is the only offense eligible for the death penalty under Missouri law.³² If a Missouri prosecutor intends to seek the death penalty against a first-degree murder defendant, s/he must serve defense counsel with a list of all statutory aggravating circumstances s/he intends to prove “[a]t a reasonable time before the commencement of the first stage” of the defendant’s trial.³³ The Supreme Court of Missouri has held that it is reasonable for the prosecutor to serve notice of aggravating circumstances as late as twenty-five days before the trial begins.³⁴

2. Discovery Obligations

a. Constitutional Discovery Obligations

Prosecutors have a constitutional duty to disclose to the defendant all exculpatory evidence in the state’s possession “where the evidence is material either to guilt or to [level of] punishment, irrespective of the good faith or bad faith of the prosecution.”³⁵ This includes all material exculpatory, mitigating, and impeachment evidence, as well as “favorable evidence known to others acting on the government’s behalf in the case,” such as law enforcement officers.³⁶ Evidence is considered material if there is a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”³⁷

b. Discovery Rules Under Missouri Law

Missouri Supreme Court Rules impose additional discovery obligations on prosecutors. Upon written request, the prosecution must provide defense counsel with several materials that are within the prosecution’s possession or control:

- (1) The names and last known addresses of persons whom the state intends to call as witnesses at any hearing or at the trial, together with their written or

³⁰ Rule 4-3.4.

³¹ Rule 4-3.6.

³² See section 565.020, RSMo 2011. First-degree murder is defined as “knowingly caus[ing] the death of another person after deliberation upon the matter.” Section 565.020.1, RSMo 2011.

³³ Section 565.005.1(1), RSMo 2011.

³⁴ *State v. McMillin*, 783 S.W.2d 82, 102 (Mo. banc 1990), *abrogated on other grounds by Morgan v. Illinois*, 504 U.S. 719, 725 n.4 (1992).

³⁵ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

³⁶ *Kyles v. Whitley*, 514 U.S. 419, 421 (1995); *Giglio v. United States*, 405 U.S. 150, 154–55 (1972).

³⁷ *United States v. Bagley*, 473 U.S. 667, 682 (1985).

- recorded statements, and existing memoranda, reporting or summarizing part or all of their oral statements;
- (2) Any written or recorded statements and the substance of any oral statements made by the defendant or by a co-defendant, a list of all witnesses to the making, and a list of all witnesses to the acknowledgment, of such statements, and the last known addresses of such witnesses;
 - (3) Those portions of any existing transcript of grand jury proceedings which relate to the offense with which defendant is charged, containing testimony of the defendant and testimony of persons whom the state intends to call as witnesses at a hearing or trial;
 - (4) Any existing transcript of the preliminary hearing and of any prior trial held in the defendant's case if the state has such in its possession or if such is available to the state;
 - (5) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;
 - (6) Any books, papers, documents, photographs, or objects, which the state intends to introduce into evidence at the hearing or trial or which were obtained from or belong to the defendant;
 - (7) Any record of prior criminal convictions of persons the state intends to call as witnesses at a hearing or the trial;
 - (8) If there has been any photographic or electronic surveillance (including wiretapping), relating to the offense with which the defendant is charged, of the defendant or of conversations to which the defendant was a party or of his premises; this disclosure shall be in the form of a written statement by counsel for the state briefly setting forth the facts pertaining to the time, place, and persons making the same; [and]
 - (9) Any material or information, within the possession or control of the state, which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment.³⁸

Upon defendant's motion, the trial court must also order the disclosure of any other "relevant and material" information in the prosecution's control, provided that the trial court finds the request to be "reasonable."³⁹ If discoverable information and items are in the "possession or control of other governmental personnel," the prosecution must "make good faith efforts" to obtain the material.⁴⁰ Disclosure of all discoverable material must be made in the manner agreed to by the parties, or by the disclosing party in a place where it "may be inspected, obtained, tested, copied, or photographed" as needed.⁴¹ Both the defense and prosecution may also obtain depositions of "any persons" as ordered by the court⁴² and may "discover by deposition the facts and opinions to which an expert is expected to testify."⁴³

³⁸ Rule 25.03(A).

³⁹ Rule 25.04(A).

⁴⁰ Rules 25.03(C); 25.04(C). If the prosecution cannot obtain the material, the trial court must issue a subpoena directing the material to be disclosed. Rules 25.03(C), 25.04(C).

⁴¹ Rule 25.07.

⁴² Rules 25.12; 25.15.

⁴³ Rules 25.12(d), 25.15(d).

Attorney work product is not discoverable “to the extent that [it] contain the opinions, theories, or conclusions of” the members of the prosecution.⁴⁴ The identity of a non-testifying informant and certain materials that “involves a substantial risk of prejudice to national security” are also not discoverable.⁴⁵ Finally, the trial court may enter a protective order preventing or limiting the discovery of an item or document “on motion and for good cause shown.”⁴⁶

3. Limitations on Argument

Under Missouri law, the prosecutor and defense counsel are entitled to make closing arguments to the jury.⁴⁷ Generally, prosecutors have broad discretion in closing arguments, as long as their statements are based on the evidence and reasonable inferences from the evidence.⁴⁸ Prosecutors may use pictures, diagrams, and other illustrative aids in their arguments.⁴⁹

There are, however, several limitations on what prosecutors are permitted to argue. The prosecutor may not use insulting words or epithets to describe the defendant, unless the insulting language is supported by the evidence.⁵⁰ For instance, the Supreme Court of Missouri held that a prosecutor improperly referred to a defendant as a “mass murderer” and “serial killer,” because his two prior homicide convictions did not meet the “common sense” definition of those words.⁵¹ Prosecutors are also forbidden from commenting on the defendant’s decision not to testify in his/her own defense, as the U.S. Constitution protects criminal defendants from self-incrimination.⁵² Furthermore, the prosecutor may not state his personal opinion about the defendant’s guilt unless that opinion is based on the evidence, nor may s/he claim that s/he has special knowledge that the defendant is guilty.⁵³ The prosecutor is also forbidden from personalizing the alleged crime by asking the jurors to “place themselves in the shoes of a party or victim.”⁵⁴

In capital penalty phase closing arguments, the U.S. Supreme Court has held that a prosecutor may not diminish the role of the jury in determining a death sentence.⁵⁵ Thus, the prosecutor may not argue that the jury’s decision is simply a recommendation that can be overruled by the

⁴⁴ Rule 25.10(A).

⁴⁵ Rule 25.10(C).

⁴⁶ Rule 25.11.

⁴⁷ Rule 27.02(n). The prosecutor speaks first, followed by defense counsel. The prosecutor may then argue in rebuttal. *Id.*

⁴⁸ *State v. Shurn*, 866 S.W.2d 447, 460 (Mo. banc 1993).

⁴⁹ *State v. Jones*, 749 S.W.2d 356, 363–64 (Mo. banc 1988).

⁵⁰ *State v. Whitfield*, 837 S.W.2d 503, 513 (Mo. banc 1992).

⁵¹ *Id.*

⁵² *State v. Kempker*, 824 S.W.2d 909, 911 (Mo. banc 1992). The Court in *Kempker*, however, upheld the conviction because the defendant did not object to the argument at trial. *Id.* In addition, the prosecutor may note that the evidence is undisputed or uncontested. *State v. Barnum*, 14 S.W.3d 587, 592 (Mo. banc 2000).

⁵³ *State v. Roberts*, 838 S.W. 2d 126, 130 (Mo. App. 1992).

⁵⁴ *State v. Rhodes*, 988 S.W.2d 521, 528 (Mo. banc 1999).

⁵⁵ *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985).

trial judge.⁵⁶ Nor can the prosecutor minimize the jury's responsibilities by arguing that a death sentence is more humane than life in prison.⁵⁷

To properly preserve improper-argument claims for appeal, defense counsel must object at trial when the alleged error is made.⁵⁸ The trial court, however, "has wide discretion in controlling closing argument"; thus, the "prosecuting attorney's statements must be plainly unwarranted and clearly injurious to the accused" to warrant reversal on appeal.⁵⁹

4. Plea Agreements

While a defendant does not have a constitutional right to a plea agreement or to plea negotiation,⁶⁰ the Missouri Supreme Court rules dictate that the prosecutor and defense counsel "may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty" the prosecutor will

- (A) Dismiss other charges; or
- (B) Make a recommendation, or agree not to oppose the defendant's request, for a particular disposition, with the understanding that such recommendation or request shall not be binding on the court; or
- (C) Agree that a specific sentence is the appropriate disposition of the case; or
- (D) Make a recommendation for, or agree on, another appropriate disposition of the case.⁶¹

When a plea agreement is reached, it must be disclosed to the trial court.⁶² The trial court may, in its discretion, "accept or reject the agreement or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report."⁶³ As with any guilty plea, the court cannot accept a plea agreement unless it determines that the plea is voluntarily made by inquiring directly with the defendant.⁶⁴ In addition, it must find a factual basis to support the plea.⁶⁵ The court must also inform the defendant that, by pleading guilty, s/he is waiving the right to a trial and other associated rights, such as the right to cross-examine witnesses.⁶⁶

⁵⁶ Driscoll v. Delo, 71 F.3d 701, 711–12 (8th Cir. 1995).

⁵⁷ Antwine v. Delo, 54 F.3d 1357, 1362–63 (8th Cir. 1995).

⁵⁸ State v. Rogers, 970 S.W.2d 402, 405 (Mo. App. 1998).

⁵⁹ State v. Mahurin, 799 S.W.2d 840, 844 (Mo. banc 1990).

⁶⁰ See Weatherford v. Bursey, 429 U.S. 545, 561 (1977) ("But there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.").

⁶¹ Rule 24.02(d)(1).

⁶² Rule 24.02(d)(2).

⁶³ *Id.*

⁶⁴ Rule 24.02(c).

⁶⁵ Rule 24.02(e).

⁶⁶ Rule 24.02(b).

*D. Investigation and Disciplining of Prosecutorial Misconduct*⁶⁷

The procedures for investigating allegations of misconduct and for disciplining attorneys who are found to have engaged in misconduct are controlled by the Missouri Supreme Court Rules.⁶⁸ The Supreme Court of Missouri established the Office of Chief Disciplinary Counsel (OCDC) to investigate alleged ethical violations of attorneys.⁶⁹ When a complaint is received, it will be investigated by OCDC or by a Regional Disciplinary Committee (RDC).⁷⁰ At the close of the investigation, the OCDC or RDC may (1) determine that no misconduct has occurred and close the file; (2) determine that a minor violation has occurred and formally admonish the attorney; or (3) determine that a serious ethical violation has occurred and refer the case to a Disciplinary Hearing Panel (DHP) for further proceedings.⁷¹

The DHP is a panel of two lawyers and one non-lawyer, chosen from a large pool of persons appointed by the Supreme Court of Missouri.⁷² The DHP hearing functions like a trial, with both the OCDC and the attorney charged with misconduct having an opportunity to present evidence and testimony to the panel.⁷³ If, at the close of the hearing, the DHP determines by a preponderance of the evidence that the alleged misconduct has occurred, it may discipline the attorney through a written admonition, public reprimand, suspension of the attorney's law license, or disbarment.⁷⁴ Either the OCDC or the disciplined attorney may appeal the DHP's decision to the Supreme Court of Missouri, which has the ultimate authority to review any discipline recommendation.⁷⁵

⁶⁷ The Missouri Bar also provides a helpful explanation of Missouri's attorney discipline procedure. See MO. BAR, MISSOURI'S LAWYER DISCIPLINE SYSTEM (rev. June 2011), available at http://www.mobar.org/uploadedFiles/Home/Publications/Legal_Resources/Brochures_and_Booklets/Client_Resource_Guide/discipline.pdf.

⁶⁸ See Rule 5.

⁶⁹ Rule 5.06; see also MISSOURI'S LAWYER DISCIPLINE SYSTEM, *supra* note 67.

⁷⁰ Rules 5.02, 5.08; see also MISSOURI'S LAWYER DISCIPLINE SYSTEM, *supra* note 67.

⁷¹ Rule 5.11; see also MISSOURI'S LAWYER DISCIPLINE SYSTEM, *supra* note 67.

⁷² Rules 5.04, 5.16, 5.17; see also MISSOURI'S LAWYER DISCIPLINE SYSTEM, *supra* note 67.

⁷³ *Id.*

⁷⁴ Rule 5.16; see also MISSOURI'S LAWYER DISCIPLINE SYSTEM, *supra* note 67.

⁷⁵ Rule 5.19; see also MISSOURI'S LAWYER DISCIPLINE SYSTEM, *supra* note 67.

II. ANALYSIS

The Missouri Assessment Team was unable to determine whether Missouri is in compliance with several of the Recommendations in this Chapter. The Team has relied on publicly available data on training, budgets, and discipline of Missouri prosecutors, as well as Missouri statutory and case law describing prosecutors' charging and discovery practices. The Team also spoke with St. Louis County Prosecuting Attorney Robert McCulloch,⁷⁶ and a survey was completed by the Office of the Missouri Attorney General, which assists in the prosecution of capital cases when the local prosecutor lacks the resources to handle the case or is disqualified due to a conflict of interest.⁷⁷ The Missouri Assessment Team also submitted a survey to several Missouri prosecuting attorneys requesting general data regarding the death penalty in each prosecutor's jurisdiction, as well as information on qualification and training requirements of prosecutors who handle capital cases, funding and budget limitations, and capital charging and discovery practices.⁷⁸ In reply, however, the Missouri Association of Prosecuting Attorneys (MAPA) sent a "formal response of Missouri's prosecutors" declining to complete the survey.⁷⁹ MAPA stated that "[b]ecause Missouri statutes and court rules have set forth specific rules by which Missouri prosecutors and courts are to adhere, many of the questions posed in the ABA Questionnaire are not applicable, unable to be answered in the format requested."⁸⁰ After receiving this response, the Missouri Assessment Team sent an additional letter to MAPA asking it to reconsider answering the portions of the survey related to training, funding, and other areas that do not implicate the capital charging process; however, MAPA did not respond.⁸¹ The correspondence with MAPA and the Missouri prosecutors is reproduced in the Appendix to the Report.

A. Recommendation #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.

⁷⁶ Interview with Robert McCulloch, Prosecuting Att'y, St. Louis Cnty., Mo., in Clayton, Mo. (Apr. 5, 2011) (audio recording on file with author), *infra* Appendix.

⁷⁷ Interview with Mo. Office of the Att'y Gen., *supra* note 22.

⁷⁸ See Letter from Mark Pickett, Project Att'y, ABA Death Penalty Moratorium Implementation Project, to Mo. Prosecuting Att'ys (Apr. 18, 2011), *infra* Appendix.

⁷⁹ Letter from Jeffrey M. Merrell, Chair, Special Committee on the Death Penalty, Mo. Ass'n of Prosecuting Att'ys, to Mark Pickett, Project Att'y, ABA Death Penalty Moratorium Implementation Project (June 10, 2011), *infra* Appendix.

⁸⁰ *Id.* In addition, the Assessment Team received individual responses from two prosecutors declining to complete the survey. See Letter from Daniel White, Prosecuting Att'y, Clay Cnty., Mo., to Mark Pickett, Project Att'y, ABA Death Penalty Moratorium Implementation Project (June 10, 2011), *infra* Appendix; Letter from Jennifer Joyce, Circuit Att'y, St. Louis City, Mo., to Mark Pickett, Project Att'y, ABA Death Penalty Moratorium Implementation Project (June 15, 2011), *infra* Appendix.

⁸¹ See Letter from Mark Pickett, Project Att'y, ABA Death Penalty Moratorium Implementation Project, to Jeffrey M. Merrell, Chair, Special Committee on the Death Penalty, Mo. Ass'n of Prosecuting Att'ys (July 11, 2011), *infra* Appendix.

Missouri's Expansive Aggravating Circumstances⁸²

Missouri law does not require prosecuting attorney offices to have written policies governing the exercise of prosecutorial discretion.⁸³ Instead, the prosecutor's decision to seek the death penalty is governed by Missouri's capital sentencing statutes.⁸⁴ To charge a case capitally, the prosecutor must have probable cause to believe that the defendant is guilty of first-degree murder and that one or more of Missouri's seventeen statutory aggravating circumstances are present in the case.⁸⁵

These statutes, however, do little to provide necessary guidance in the capital charging decision, as the expansive nature of Missouri's statutory aggravating circumstances grants prosecutors the discretion to pursue the death penalty in virtually any first-degree murder case. The Missouri General Assembly has expanded the list of statutory aggravating circumstances several times, from ten in the original 1977 statute to seventeen as of 2012.⁸⁶ Most other capital jurisdictions, including most death penalty jurisdictions that border Missouri, have fewer than seventeen aggravating circumstances.⁸⁷ Moreover, many of Missouri's aggravating circumstances are so broadly written that they are applicable to an overwhelming proportion of first-degree murder cases.⁸⁸ A recent study of 247 Missouri cases in which the defendant could have been charged with intentional homicide found, for instance, the "murder for the purpose of receiving money" aggravating circumstance would apply to 45% of the sampled cases; the "wantonly vile" aggravating circumstance would apply to more than 90% of the cases; and the "engaged in a felony" aggravating circumstance would apply to more than 50% of the cases.⁸⁹ Many other aggravating circumstances were found to be equally expansive.⁹⁰

⁸² For a discussion of Missouri's expansive aggravating circumstances as they relate to the Supreme Court of Missouri's proportionality review, see Chapter Seven on the Direct Appeal Process.

⁸³ See Letter from Jeffrey M. Merrell to Mark Pickett, *supra* note 79 (citing Missouri's capital sentencing laws and noting that "Missouri statutes and court rules have set forth specific rules by which Missouri prosecutors and courts are to adhere" regarding death penalty charging decisions).

⁸⁴ See sections 565.001, 565.005, RSMo 2011.

⁸⁵ See sections 565.005.1(1), 565.032.2, RSMo 2011; Rule 4–3.8(a). Missouri statutory law defines first-degree murder as "knowingly caus[ing] the death of another person after deliberation upon the matter." Section 565.020.1, RSMo 2011.

⁸⁶ Compare section 565.012.2, RSMo 1977, with Section 565.032.2, RSMo 2011.

⁸⁷ See, e.g., ARK. CODE ANN. § 5-10-101 (West 2011) (listing Arkansas's ten aggravating circumstances); KAN. STAT. ANN. § 21-6624 (West 2011) (listing Kansas's eight aggravating circumstances); KY. REV. STAT. ANN. § 532.025(2)(a) (West 2011) (listing Kentucky's eight aggravating circumstances); NEB. REV. STAT. § 29-2523(1) (2011) (listing Nebraska's nine aggravating circumstances); OKLA. STAT. tit. 21, § 701.12 (2011) (listing Oklahoma's eight aggravating circumstances); TENN. CODE ANN. § 39-13-204(i) (West 2011) (listing Tennessee's seventeen aggravating circumstances). Furthermore, the Model Penal Code death penalty statute, by comparison, limits the statutory aggravating circumstances to eight. MODEL PENAL CODE § 210.6(3) (withdrawn 2009). The American Law Institute, which drafts the Model Penal Code, withdrew its support for its Model Death Penalty statute in 2009, citing the inability to create a fair and constitutional death penalty statute. Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. TIMES, Jan. 4, 2010.

⁸⁸ Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-making in Death-eligible Cases*, 51 ARIZ. L. REV. 305, 321–25 (2009).

⁸⁹ *Id.* at 323. Missouri's mandatory model jury instructions provide that a capital jury must be instructed that it can find the presence of the "wantonly vile" aggravating circumstance only if the victim was tortured or if one of the following conditions is met:

[1] That the defendant inflicted physical pain or emotional suffering on [name of victim] and that defendant did so for the purpose of making [name of victim] suffer before dying.

Additionally, two other statutory aggravating circumstances—murder “committed for the purpose of avoiding, interfering with, or preventing a lawful arrest” and murder of a victim who “was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as . . . a witness”—have been broadly interpreted to encompass any case in which the victim could have identified his/her assailant.⁹¹ Since only one of the seventeen aggravating circumstances must be present for a case to be charged capitally,⁹² a Missouri prosecutor is able to pursue the death penalty in virtually any case where there is probable cause to believe the defendant committed intentional homicide.

The U.S. Supreme Court has held that the death penalty is reserved for a “narrow category” of the most culpable murderers.⁹³ In this scheme, aggravating circumstances are designed to serve a gatekeeping function, thus preventing juries from “wantonly and freakishly impos[ing]” death

[2] That the defendant committed repeated and excessive acts of physical abuse upon [name of victim] and the killing was therefore unreasonably brutal.

[3] That the defendant killed [name of victim] after he was bound or otherwise rendered helpless by (defendant) (or) ([name or describe person acting with defendant]) and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

[4] That the defendant killed [name of victim] knowing that [name of victim] was physically disabled and helpless and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

[5] That the defendant, while killing [name of victim] or immediately thereafter, purposely mutilated or grossly disfigured the body of [name of victim] by (an act) (acts) beyond that necessary to cause his death.

[6] That the defendant, while killing [name of victim] or immediately thereafter, (had sexual intercourse with her) (sexually violated her (by inserting a [Describe object.] into the (anus) (vagina) of [name of victim]) (by inserting his penis into the (mouth) (anus) of [name of victim])).

[7] That the defendant killed [name of victim] as a part of defendant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life.

[8] That the defendant's selection of the person he killed was random and without regard to the victim's identity and that defendant's killing of [name of victim] thereby exhibited a callous disregard for the sanctity of all human life.

[9] That the defendant killed [name of victim] for the purpose of causing suffering to another person and thereby exhibited a callous disregard for the sanctity of all human life.

[10] That the defendant killed [name of victim] for the sole purpose of deriving pleasure from the act of killing and thereby exhibited a callous disregard for the sanctity of all human life.

MAI-CR3d 314.40, Note on Use 6. While this instruction reduces the vagueness of the “wantonly vile” aggravating circumstance, it does little to reduce the circumstance's breadth. The instruction, in effect, creates eleven new aggravating circumstances, many of which are quite broad. To illustrate, the study found the “wantonly vile” aggravating circumstance to apply to 90% of sampled cases by comparing the sampled cases to death penalty cases upheld by the Supreme Court of Missouri. Barnes et al., *supra* note 88, at 323–24. In those cases, the Court upheld the application of the “wantonly vile” aggravating circumstance based on the jury instructions. *See, e.g.*, State v. Strong, 142 S.W.3d 702, 721–22 (Mo. banc 2004).

⁹⁰ Barnes et al., *supra* note 88, at 323.

⁹¹ *See id.* at 325; State v. Grubbs, 724 S.W.2d 494, 495–96, 500 (Mo. banc 1987); State v. Brown, 902 S.W.2d 278, 283 (Mo. banc 1995).

⁹² *See* sections 565.005.1(1), 565.032.2, RSMo 2011.

⁹³ Atkins v. Virginia, 536 U.S. 304, 319 (2002).

sentences.⁹⁴ Missouri’s broad aggravating circumstances, however, do not serve this purpose. Instead, the statute’s many aggravating circumstances grant nearly unfettered charging discretion to Missouri prosecutors. Without the guidance of narrowly-defined aggravating circumstances, it is extremely difficult to ensure consistent charging decisions among all Missouri prosecutors.

Policies and Practices of Individual Prosecutor Offices

There are 115 elected prosecuting attorneys in Missouri, each with the power to decide whether to seek the death penalty against a defendant charged with homicide in his/her jurisdiction.⁹⁵ Because the Missouri Assessment Team was unable to obtain information on charging practices from several jurisdictions, the Team was unable to fully analyze the policies governing the exercise of prosecutorial discretion for every prosecutor office in Missouri.⁹⁶ The Team was, however, able to obtain some information regarding the exercise of prosecutorial discretion in capital cases in some Missouri prosecutor offices.

Missouri Association of Prosecuting Attorneys

Taney County Prosecuting Attorney and Chairman of the MAPA Special Committee on the Death Penalty Jeffrey Merrell, signatory of MAPA’s “formal response of Missouri’s prosecutors” to the Assessment Team’s survey, stated that many questions regarding the exercise of prosecutorial discretion in capital cases are inapplicable to Missouri “[b]ecause Missouri statutes and court rules have set forth specific rules by which Missouri prosecutors and courts are to adhere.”⁹⁷ Mr. Merrell further stated that section 565.032 of the Revised Statutes of Missouri “sets forth how first-degree murder and death penalty cases are to be reviewed by prosecutors.”⁹⁸ Section 565.032, however, relates to the type of evidence the trier of fact is permitted to consider in the sentencing phase of capital murder trial and does not discuss the role of prosecutor.⁹⁹

Clay County

In response to the Missouri Assessment Team’s survey, Clay County Prosecuting Attorney Daniel White stated that he has sought the death penalty twice in his nearly-twenty year career as

⁹⁴ *Gregg v. Georgia*, 428 U.S. 153, 207–08 (1976). While juror and prosecutor discretion also limits the application of the death penalty, *Gregg* holds that only “legislative guidelines” can ensure consistency and prevent “freakishly” imposed death sentences. *Id.*

⁹⁵ *Missouri Prosecuting Attorneys*, MO. OFF. OF PROSECUTION SERVS., <http://mops.mo.gov/MoProsAttorneys.htm> (last visited Jan. 15, 2012). Missouri’s 114 counties and the independent City of St. Louis each have their own elected prosecutor. *Id.* In smaller counties, prosecutors from the Missouri Attorney General’s Office are often called upon to prosecute a capital case. Interview with Robert McCulloch, *supra* note 76. In the vast majority of these cases, however, the decision to seek the death penalty is made by the local Prosecuting Attorney. Telephone Interview by Mark Pickett with Ron Holliger, Gen. Counsel, Mo. Office of the Att’y Gen. (Sept. 20, 2011).

⁹⁶ *See supra* notes 76–81 and accompanying text.

⁹⁷ Letter from Jeffrey M. Merrell to Mark Pickett, *supra* note 79.

⁹⁸ *Id.*

⁹⁹ Section 565.032, RSMo 2011. The only reference to prosecutors in this section relates to murder of a prosecuting attorney as a statutory aggravating circumstance. Section 565.032.2(5), RSMo 2011. Other provisions of Missouri statutory law provide little additional guidance to prosecutors regarding capital charging practices, only stating that prosecutors who wish to pursue the death penalty must file a notice of aggravating circumstances within a “reasonable time.” Section 565.005.1(1), RSMo 2011.

a prosecutor.¹⁰⁰ While Mr. White did not state whether his office has any written policies governing prosecutorial discretion in capital cases, he noted that he could not “quantify the soul-searching, legal research, fact-finding, and energy expended in first, arriving at the decision to seek the death penalty and second, actually going forward.”¹⁰¹

St. Charles County

St. Charles County Assistant Prosecuting Attorney Philip Groenweghe, who discussed his office’s capital charging policies in a 2007 panel discussion of prosecutors, said that his office’s capital charging procedures are “less formal” than in St. Louis City, perhaps because his county is much smaller and has fewer murders.¹⁰² He stated, however, that the elected prosecutor and the senior assistant prosecutors will “talk about [a case] informally to decide whether or not [they] think it is a potential death penalty case.”¹⁰³ He further described his office’s decision-making process as follows:

What do we think the chances are that the jury is going to assess the death penalty? I don’t like to take that option away from them arbitrarily. If we believe that there are sufficient aggravators that a jury could return a death verdict, there’s a very strong possibility we are going to do that. But ultimately the decision is going to be made by the elected prosecutor, not by the assistant, nor is it going to be done by a committee vote. Ultimately it is going to be his decision looking at all these factors and many factors we couldn’t even begin to imagine. Each case is unique and each case has to be considered on a case-by-case basis.¹⁰⁴

Mr. Groenweghe also stated that he is always willing to meet with the defense attorney to discuss potential mitigating circumstances.¹⁰⁵ After his office files notice of aggravating circumstances, the decision to accept a plea agreement is made on a case-by-case basis.¹⁰⁶

St. Louis City

St. Louis City Circuit Attorney Jennifer Joyce discussed her capital charging policies extensively at the same 2007 panel discussion attended by Mr. Groenweghe.¹⁰⁷ Her office has established a special committee comprised of senior prosecutors who “meet once a week . . . [to] review all the cases that are charged by [the] office and assign what [their] recommendation upon a guilty plea

¹⁰⁰ Letter from Daniel White to Mark Pickett, *supra* note 80.

¹⁰¹ *Id.*

¹⁰² Philip Groenweghe, Assistant Prosecution Att’y, St. Charles Cnty., Mo., Panel Discussion at the St. Louis Univ. School of Law Conference: Life and Death Decisions—Prosecutorial Discretion and Capital Punishment in Missouri (Mar. 2, 2007). A summary and partial transcript of this panel discussion, which was prepared for the Missouri Assessment Team by a student at St. Louis University School of Law who viewed a video-recording of the panel, is on file with the author.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Jennifer Joyce, Circuit Att’y, St. Louis City, Mo., Panel Discussion at the St. Louis Univ. School of Law Conference: Life and Death Decisions—Prosecutorial Discretion and Capital Punishment in Missouri (Mar. 2, 2007). Ms. Joyce’s office declined to complete the Missouri Assessment Team’s survey.

would be.”¹⁰⁸ With respect to capital-eligible first-degree murder cases, the trial attorney assigned to the case drafts a “summary of the case and [its] strengths and weaknesses” for review by the committee.¹⁰⁹ The committee identifies specific cases that might warrant capital punishment and then “research[es] and gather[s] as much information as [it] possibly can on any aggravators and also on any mitigating circumstances.”¹¹⁰ Before the committee presents the case to Ms. Joyce, there must be “clear evidence of probably more than one aggravator.”¹¹¹ Ms. Joyce then decides whether or not to seek the death penalty “based on extensive review and research and lots of witness interviews and physical evidence and whatever is available [W]e can wait months and even up to a year before we make that decision until I feel like we have enough to make that decision.”¹¹² She also stated that she regularly consults with defense attorneys regarding any additional mitigating evidence in the case.¹¹³ Once notice of aggravating circumstances have been filed, her office has an “across the board policy” that, if “the defendant wants to accept responsibility and plead guilty [to first-degree murder],” notice of intent to seek the death penalty will be withdrawn.¹¹⁴

St. Louis County

St. Louis County Prosecuting Attorney Robert McCulloch, whose office has filed notice of aggravating circumstances in approximately forty-two murder cases since his election in 1991, stated that he “ultimately make[s] the decision” regarding whether to seek the death penalty “in every case,” but that his office has no written policies governing how this decision is made.¹¹⁵ He stated that since each case is unique, he would not be able to “formulate a policy that would be workable to cover the various permutations” of potentially capital murder cases.¹¹⁶ He further said that since he is solely responsible for all capital charging decisions in St. Louis County, there is no need for “a policy to direct [himself] to make the decision [he is] going to make.”¹¹⁷

Mr. McCulloch did, however, discuss the typical process involved in his decision whether or not to seek the death penalty. After a defendant is arrested and charged with first-degree-murder in St. Louis County, his office gathers “as much information as available” about the case, including police and crime laboratory reports, witness statements, and information about the defendant and victim.¹¹⁸ Mr. McCulloch also stated that, in making his decision, his office “gather[s] everything [it] can on mitigation.”¹¹⁹ If he is considering pursuing the death penalty, he will inform the public defender representing the defendant and tell him/her that “if you have anything

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Jennifer Joyce, Circuit Att’y, St. Louis City, Mo., Panel Discussion at the St. Louis Univ. School of Law Conference: Life and Death Decisions—Prosecutorial Discretion and Capital Punishment in Missouri (Mar. 2, 2007).

¹¹⁴ *Id.*

¹¹⁵ Interview with Robert McCulloch, *supra* note 76.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

you want us to consider, let us know.”¹²⁰ In most cases, he does not receive a response.¹²¹ Mr. McCulloch acknowledged, however, prior to filing notice of aggravating circumstances, most defendants are represented by a county public defender, who likely lacks the capital training and experience necessary to recognize potentially mitigating evidence.¹²² In response to this problem, Mr. McCulloch stated that it would “make[] sense” to appoint capital-qualified defense counsel earlier in the process.¹²³

Mr. McCulloch estimated that it typically takes six months to decide whether or not to seek the death penalty in any given case.¹²⁴ In some cases, however, such as a case that involves the rape and murder of a small child, there is a “good chance” he will seek the death penalty earlier in the process.¹²⁵ In most cases, he will not withdraw notice of aggravating circumstances or accept a plea agreement after notice of aggravating circumstances has been filed unless there is evidence of “something major we didn’t know about.”¹²⁶

Missouri Attorney General

The Office of the Missouri Attorney General assists local prosecutors with capital prosecutions when the local prosecutor lacks the resources to handle a case or is disqualified due to a conflict of interest.¹²⁷ Since Missouri Governor Jay Nixon took office in January 2009, the Attorney General has brought three capital murder cases to trial.¹²⁸ As of October 2011, the Attorney General is also assisting local prosecutors in nine pending murder cases in which notice of aggravating circumstances has been filed.¹²⁹ In most cases, however, the decision to seek the death penalty in these cases remains with the local prosecutor.¹³⁰

Disparity in Missouri’s Capital Charging Practices

Perhaps due to the lack of uniform policies governing the capital decision-making process and the expansive aggravating circumstances, which grant prosecutors broad discretion regarding the decision to seek the death penalty, there is a significant geographic disparity in Missouri with respect to capital charging practices. A recent study analyzed the charging decisions in 1,046

¹²⁰ *Id.*

¹²¹ Interview with Robert McCulloch, *supra* note 76.

¹²² *See id.*

¹²³ *Id.*

¹²⁴ *Id.* It was unclear from Mr. McCulloch’s statements whether this is six months from the date of arrest, date of indictment, or some other date. *See id.*

¹²⁵ *Id.*

¹²⁶ *Id.* In one case, for instance, the defendant had suffered a bullet wound to the head prior to committing the alleged capital offense. *Id.* Mr. McCulloch’s office was aware of the injury prior to filing notice of aggravating circumstances, but they were not aware of the “mental problems” the defendant suffered as a result. *Id.* After notice of aggravating circumstances was filed, capital-qualified defense counsel were appointed, and they brought their client’s mental impairments to Mr. McCulloch’s attention. *Id.* Based on this information, Mr. McCulloch determined that the death penalty was an inappropriate punishment. *Id.*

¹²⁷ Interview with Mo. Office of the Att’y Gen., *supra* note 22.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

intentional homicide cases arising in Missouri from 1997 through 2001.¹³¹ Intentional homicide defendants in the St. Louis City and Jackson County (which encompasses Kansas City) were charged with capital murder in 6.5% and 1.3% of cases, respectively. In the rest of Missouri, by contrast, an intentional homicide defendant was charged with capital murder in approximately 20% of the reviewed cases.¹³² These disparate charging practices resulted in disparate sentences, as well. In St. Louis City, less than one-half of 1% of the reviewed cases resulted in a death sentence, and no defendants from Jackson County were sentenced to death.¹³³ In the rest of Missouri, however, 4.5% of intentional homicide cases resulted in a death sentence.¹³⁴ Thus, as a result of geographic disparity in charging practices, a homicide defendant in Missouri who is charged in a rural or suburban county may be more than ten times likely to receive a death sentence than a similar defendant charged in Kansas City or St. Louis City.¹³⁵

Conclusion

While none of the information we obtained revealed written policies on capital charging practices, the Assessment Team was unable to survey all jurisdictions to determine if any prosecutor office in Missouri had enacted written guidelines. Thus, the Team is unable to determine if Missouri is in compliance with Recommendation #1.

The Assessment Team notes, however, that many Missouri prosecutors appear to rely on the Missouri statutes governing the death penalty in lieu of instituting policies on the exercise of prosecutorial discretion in capital cases.¹³⁶ Yet Missouri's statutory aggravating circumstances do little to limit the exercise of prosecutorial discretion, as one or more aggravating circumstances are applicable to virtually any first-degree murder case. This has led to dramatically disparate charging practices throughout Missouri.

Accordingly, Missouri should substantially amend its statutory aggravating circumstances such that the death penalty is only applicable to a narrow category of first-degree murders. As the U.S. Supreme Court has held, statutory aggravating circumstances must serve to prevent "wanton[] and freakish[]" death sentences by limiting the death penalty to the worst and most culpable murder defendants.¹³⁷ Without narrowly-defined aggravating circumstances, it is nearly impossible for individual prosecutors in Missouri to consistently and fairly exercise their capital charging discretion in all cases, even when applicable written policies are in place. Thus, amending the statutory aggravating circumstances would help to ensure the fair, efficient, and

¹³¹ Barnes et al., *supra* note 88, at 311.

¹³² *Id.* at 344.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ Letter from Jeffrey M. Merrell to Mark Pickett, *supra* note 79 ("Because Missouri statutes and court rules have set forth specific rules by which Missouri prosecutors and courts are to adhere, many of the questions posed in the ABA Questionnaire [on the practices of Missouri prosecutors] are not applicable, unable to be answered in the format requested.").

¹³⁷ *See* Gregg v. Georgia, 428 U.S. 153, 207–08 (1976).

effective exercise of capital charging discretion. In addition, individual Missouri prosecutors should adopt written procedures governing how the capital charging decision is made.¹³⁸

B. Recommendation #2

Each prosecutor’s office should establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.

When a person is wrongfully convicted, the injustice is twofold: an innocent person is incarcerated, while a guilty criminal remains free. According to the Innocence Project, eyewitness identification has played “a role in more than 75% of convictions overturned through DNA testing.”¹³⁹ In addition, “[i]n about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty.”¹⁴⁰ Finally, “statements from people with incentives to testify—particularly incentives that are not disclosed to the jury—are [often] the central evidence in convicting an innocent person.”¹⁴¹

Missouri Law Governing Eyewitness Identifications, Confessions, and Informant Testimony

Because of the risk of wrongful conviction in cases that rely on eyewitness identifications, confessions, and jailhouse snitches, it is important for prosecutors to develop policies for evaluating the accuracy of such evidence before offering it in court. This is especially true in potentially capital cases, where there is often public pressure on officials to apprehend and convict a suspect due to the brutal nature of the crime. Missouri law, however, does not require prosecuting attorneys to establish procedures or policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.¹⁴² Nevertheless, Missouri has adopted laws relevant to the admissibility and gathering of some of these types of evidence. Based on MAPA’s response to the Missouri Assessment Team’s survey of Missouri prosecutors, it appears that, in some instances, prosecutors may rely on these laws in lieu of developing policies specific to their respective offices.¹⁴³

¹³⁸ Although the Assessment Team was unable to receive any information directly from the St. Louis City Circuit Attorney’s office regarding capital charging practices, aspects of that office’s capital charging policy might serve as a model for the rest of Missouri.

¹³⁹ *Understanding the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Jan. 19, 2012). For a discussion of issues related to eyewitness misidentification, see Chapter Three on Law Enforcement.

¹⁴⁰ *False Confessions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Jan. 18, 2012).

¹⁴¹ *Understanding the Causes: Informants*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Snitches-Informants.php> (last visited Jan. 18, 2012) (stating that “[i]n more than 15% of wrongful conviction cases overturned through DNA testing, an informant testified against the defendant at the original trial”).

¹⁴² For a discussion of Missouri law enforcement practices regarding eyewitness identification and custodial interrogation procedures, see Chapter Three on Law Enforcement.

¹⁴³ See Letter from Jeffrey M. Merrell to Mark Pickett, *supra* note 79 (stating that “[b]ecause Missouri statutes and court rules have set forth specific rules by which Missouri prosecutors and courts are to adhere, many of the questions posed in the ABA Questionnaire are not applicable”).

Missouri law requires law enforcement officers to video or audio-record custodial interrogations of defendants charged with murder and other serious felonies.¹⁴⁴ The statute, however, has broad exceptions which allow officers to circumvent the recording requirement entirely by failing to purchase or maintain recording equipment.¹⁴⁵ Moreover, there is no remedy for a defendant who is interrogated in violation of the statute.¹⁴⁶ Defendants are entitled to a pattern jury instruction regarding the believability and voluntariness of a confession, if so requested,¹⁴⁷ but Missouri law does not generally permit expert testimony on the reliability of confessions.¹⁴⁸

In general, Missouri law does not require any specific eyewitness identification procedures beyond what is demanded by the U.S. Constitution. In addition, trial courts are not permitted to give jury instructions that are specific to eyewitness identification procedures. Instead, Missouri's pattern jury instructions, the Missouri Approved Instructions, provide a general instruction on witness believability.¹⁴⁹ Missouri law also prohibits expert testimony on the issue of eyewitness accuracy.¹⁵⁰

There are no Missouri laws governing the admissibility of snitch or informant testimony. It does not appear that law enforcement officers or prosecutors are required to follow any particular procedures for recording or assessing the reliability of such evidence. Moreover, Missouri courts have held that a defendant is not entitled to a pretrial hearing to determine if snitch testimony is unreliable and therefore inadmissible.¹⁵¹ Instead, as with eyewitness testimony, all credibility determinations are left to the jury, which receives a general instruction on witness credibility.¹⁵² The trial court may not provide the jury with an instruction specific to the believability of snitch or informant testimony.¹⁵³

¹⁴⁴ Section 590.700, RSMo 2011. For a discussion of Missouri's custodial interrogation recording statute, see Chapter Three on Law Enforcement, Recommendation #4.

¹⁴⁵ Section 590.700.3, RSMo 2011.

¹⁴⁶ Section 590.700.6, RSMo 2011.

¹⁴⁷ *State v. Harris*, 781 S.W.2d 137, 141 (Mo. App. 1989) (citing MAI-CR3d 310.06, Notes on Use 2). The pertinent part of MAI-CR 310.06 provides as follows:

Evidence has been introduced that the defendant made certain statements relating to the offense for which he is on trial. If you find that a statement was made by the defendant, and that at that time he understood what he was saying and doing, and that the statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement, then you may give it such weight as you believe it deserves in arriving at your verdict. However, if you do not find and believe that the defendant made the statement, or if you do not find and believe that he understood what he was saying and doing, or if you do not find and believe that the statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement, then you must disregard it and give it no weight in your deliberations.

MAI-CR3d 310.06.

¹⁴⁸ *State v. Davis*, 32 S.W.3d 603, 608–09 (Mo. App. 2000).

¹⁴⁹ MAI-CR3d 302.01.

¹⁵⁰ *State v. Hill*, 854 S.W.2d 486, 487–88 (Mo. App. 1993). Some Missouri appellate cases appear to indicate that eyewitness expert testimony may be admissible with the trial court's discretion. In practice, however, it appears that such testimony is inadmissible. For a discussion of this issue, see Chapter Three on Law Enforcement, Recommendation #7.

¹⁵¹ *Byrd v. State*, 329 S.W.3d 718, 725 (Mo. App. 2010).

¹⁵² *Id.* at 725.

¹⁵³ *State v. Mayes*, 63 S.W.3d 615, 630 (Mo. banc 2001).

Policies and Practices of Prosecuting Attorney Offices

As mentioned, we were unable to obtain information necessary to determine whether most Missouri prosecutors have voluntarily established policies and procedures related to the evaluation of evidence based on eyewitness identifications, confessions, and informant testimony.¹⁵⁴ We were, however, able to obtain limited information from a small number of jurisdictions.

For example, St. Louis County Prosecuting Robert McCulloch stated that his office has no specific procedures or policies for evaluating the reliability of evidence.¹⁵⁵ In the case of jailhouse snitch testimony, Mr. McCulloch indicated that his office reviews the credibility of each informant on a case-by-case basis.¹⁵⁶ Generally, propositions from snitches are ignored, unless there is something about the snitch's statement that indicates it may be reliable.¹⁵⁷ Mr. McCulloch added that he did not believe any of the capital cases that he has prosecuted have "turn[ed] on the reliability" of jailhouse snitch testimony.¹⁵⁸ He further stated that, in the death penalty cases he has prosecuted, "it's important . . . that we don't have any doubt about [the defendant's] responsibility," so "[g]uilt is generally not . . . the main issue."¹⁵⁹ Mr. McCulloch made similar statements regarding his office's evaluation of confessions and eyewitness identifications.¹⁶⁰ He further noted that most issues regarding the admissibility of confessions are addressed in pretrial hearings.¹⁶¹

While the Missouri Assessment Team was unable to obtain any information regarding the policies of the St. Louis City Circuit Attorney's Office, we note that Circuit Attorney Jennifer Joyce has established the DNA Justice Project in an effort to "identif[y] cases in which DNA testing was not available at the time of conviction" but for which testing is now available.¹⁶² Post-conviction DNA testing may allow some persons who were wrongly convicted of an offense due to eyewitness misidentification, false confession, or unreliable snitch testimony to

¹⁵⁴ See *supra* notes 76–81 and accompanying text.

¹⁵⁵ Interview with Robert McCulloch, *supra* note 76.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* It was unclear from Mr. McCulloch's statement which factors he considers in assessing a snitch's reliability. See *id.*

¹⁵⁸ *Id.* Ellen Reasonover was prosecuted capitally and wrongfully convicted in St. Louis County based on the false testimony of jailhouse snitches, but her prosecution occurred several years before Mr. McCulloch took office. See *infra* notes 173–181 and accompanying text. Although Mr. McCulloch was an assistant prosecutor in St. Louis County at the time Reasonover was convicted, it does not appear that he had any involvement in her case. See *Reasonover v. Washington*, 60 F. Supp. 2d 937 (E.D. Mo. 1999). When Reasonover was released from prison in 1999, however, Mr. McCulloch was serving as the elected prosecutor in St. Louis County. See Interview with Robert McCulloch, *supra* note 76. Mr. McCulloch chose to dismiss the charges against Reasonover rather than retry her for murder, noting that the case had been "gutted of all incriminating evidence" as a result of the court decision that led to her release. Joe Lambe, *Savoring Her Newfound Freedom Despite 16 Years in Prison, Woman Says She Isn't Bitter*, KANSAS CITY STAR, Aug. 5, 1999, at B1.

¹⁵⁹ Interview with Robert McCulloch, *supra* note 76.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Biography of Jennifer M. Joyce*, CITY OF ST. LOUIS CIRCUIT ATTORNEY'S OFF., <http://www.circuitattorney.org/bio.aspx> (last visited Jan. 18, 2012).

prove their innocence. According to Ms. Joyce's office, "[t]he DNA Justice Project has exonerated some people and has also confirmed guilt in several cases."¹⁶³

Use of Eyewitness Identifications, Confessions, and Informants in Missouri Cases

There are several examples of cases in Missouri that illustrate the problem of cases that rely heavily on eyewitness identifications, confessions, and snitch testimony. These cases highlight the need for policies on evaluating these kinds of evidence. In addition, because the errors in these cases were not uncovered until several years after the defendant was convicted, it is possible that there are other Missouri defendants who have been wrongly convicted or sentenced to death.

In Missouri, there have been at least seven individuals convicted based on an eyewitness identification who were later exonerated through DNA testing.¹⁶⁴ Although none of these cases were capital murder prosecutions, all were for serious felonies such as rape.¹⁶⁵ In addition, at least two persons in Missouri, Johnny Lee Wilson and Melvin Lee Reynolds, were wrongly convicted of non-capital murder based largely on false confessions made after lengthy interrogations by law enforcement officers, during which the suspects were repeatedly threatened.¹⁶⁶ In Reynolds's case, his wrongful conviction gave the actual murderer an opportunity to kill again.¹⁶⁷

In Missouri, the problem of jailhouse snitch testimony has affected capital murder prosecutions. Joseph Amrine, for instance, was convicted of first-degree murder and sentenced to death for the stabbing death of a fellow inmate in the Jefferson City Correctional Center.¹⁶⁸ The evidence against Amrine was based entirely on the testimony of three inmates.¹⁶⁹ Six other inmates, however, testified that Amrine was playing poker with them when the murder occurred, and there was evidence that one of the witnesses who testified against Amrine was the actual killer.¹⁷⁰ Following his conviction, all three prosecution witnesses recanted their trial testimony, stating that they testified against Amrine in exchange for favorable treatment or some other

¹⁶³ *Id.* The Assessment Team had hoped to obtain more specific information from Ms. Joyce about the DNA Justice Project. As with most of the prosecutors we contacted, however, Ms. Joyce's office declined to complete the survey or furnish the Team with any additional information. Letter from Jennifer Joyce to Mark Pickett, *supra* note 80.

¹⁶⁴ *Missouri Cases of Innocent People Convicted Based on Eyewitness Misidentification and Later Exonerated by DNA*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Missouri_Cases_of_Innocent_People_Convicted_Based_on_Eyewitness_Misidentification_and_Later_Exonerated_by_DNA.php (last visited Mar. 9, 2011).

¹⁶⁵ *See id.*

¹⁶⁶ *Wilson v. Lawrence County*, 260 F.3d 946, 949, 952–53 (8th Cir. 2001); Richard E. Meyer, *A Tragic Conviction: How Justice System Can Go Wrong*, L.A. TIMES, Mar. 17, 1985, at 1. For a discussion of the Wilson and Reynolds cases, see Chapter Three on Law Enforcement, Recommendation #4.

¹⁶⁷ Meyer, *supra* note 166.

¹⁶⁸ *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 544 (Mo. banc 2003).

¹⁶⁹ *Id.* Two inmates claimed to be eyewitnesses. The third claimed that Amrine had confessed to the murder in his presence. *Id.*

¹⁷⁰ *Id.*

benefit.¹⁷¹ In 2003, eighteen years after the murder, the Supreme Court of Missouri overturned Amrine's conviction, finding clear and convincing evidence of his actual innocence.¹⁷²

In another case resting largely on false jailhouse snitch testimony, Ellen Reasonover was convicted of capital murder in the 1983 shooting death of a gas station attendant in St. Louis County.¹⁷³ Reasonover had originally contacted police as an eyewitness to the highly-publicized crime, but when she was unable to correctly identify the men that she claimed to have seen, police began to suspect that she was involved in the murder.¹⁷⁴ Reasonover repeatedly denied any involvement in the offense during police interrogations.¹⁷⁵ While she was being held in the jail, however, two fellow inmates, Rosie Jolliff and Mary Ellen Lyner, claimed that Reasonover had confessed in their presence to committing the murder.¹⁷⁶

Reasonover was subsequently tried capitally for the murder, where both of the alleged witnesses testified.¹⁷⁷ Jolliff testified that Reasonover had admitted to committing the murder with two other men and that she had received no benefit in exchange for testimony.¹⁷⁸ Lyner also testified that Reasonover had confessed to a robbery and murder at a gas station, but admitted that the prosecutor had promised to recommend a lenient sentence on her pending charges in exchange for her testimony.¹⁷⁹ Based on this testimony, Reasonover was convicted of capital murder and sentenced to life in prison, having been spared the death penalty by a lone juror who did not vote for a death sentence.¹⁸⁰ In 1999, sixteen years after her arrest, the Federal District Court for the Eastern District of Missouri examined newly-discovered evidence that exonerated Reasonover and, thereafter, granted a writ of habeas corpus, ordering her release from prison.¹⁸¹

Another Missouri capital case, in which the defendant was later executed, relied heavily on jailhouse snitch testimony and a custodial interrogation. Walter Blair, an African-American, was convicted and sentenced to death by an all-white jury for the 1979 murder of Katherine Jo Allen in Jackson County.¹⁸² The prosecution's theory was that Larry Jackson, who had been charged with raping Allen, hired Blair to murder Allen so she could not testify against Jackson at his rape trial.¹⁸³ Days later, Blair allegedly entered Allen's apartment in the early morning, kidnapped Allen at gunpoint in the presence of her boyfriend, and shot and killed her in a vacant lot four blocks from Blair's mother's home.¹⁸⁴ A few days after the murder, Blair was arrested,

¹⁷¹ *Amrine*, 102 S.W.3d at 544–45; Brief for Petitioner at 2, *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003) (No. SC84656).

¹⁷² *Amrine*, 102 S.W.3d at 548–49.

¹⁷³ *Reasonover v. Washington*, 60 F. Supp. 2d 937, 941–42 (E.D. Mo. 1999).

¹⁷⁴ *Id.* at 942–43.

¹⁷⁵ *Id.* at 943.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 941.

¹⁷⁸ *Reasonover*, 60 F. Supp. 2d at 944.

¹⁷⁹ *Id.*

¹⁸⁰ *Reasonover*, 60 F. Supp. 2d at 941; *Ellen Reasonover*, MIDWESTERN INNOCENCE PROJECT, <http://www.themip.org/index.php/ellen-reasonover> (last visited Sept. 22, 2011).

¹⁸¹ *Reasonover*, 60 F. Supp. 2d at 941, 981. The exact nature of this exonerating evidence, which involved several *Brady* violations, is discussed in Recommendations #3 and #4. See *infra* notes 218–223 and 242–253 and accompanying text.

¹⁸² *Blair v. Armontrout*, 916 F.2d 1310, 1313, 1333 (8th Cir. 1990).

¹⁸³ *Id.* at 1313–14. Blair was in jail on other charges when he allegedly met Jackson but was released prior to Allen's murder. *Id.*

¹⁸⁴ *Id.* at 1314.

interrogated, and confessed in a videotaped interrogation.¹⁸⁵ At trial, Blair's girlfriend and his friend, Ernest Jones, both testified that Blair had discussed his plan to kill Allen before the murder and that Blair had shown them items stolen from Allen's apartment after the murder.¹⁸⁶

Before Blair became a suspect, however, police arrested Ernest Jones's brother, who had pawned a ring that was stolen during the murder.¹⁸⁷ Jones's brother, in turn, implicated Jones, who was arrested.¹⁸⁸ In a police-administered line-up, Allen's boyfriend identified Jones as the person who kidnapped Allen.¹⁸⁹ In addition, another eyewitness told police that he saw a man resembling Jones fleeing the scene of the murder.¹⁹⁰ It was only after Jones was implicated in the lineup that he told police that Blair was the killer.¹⁹¹ In exchange for his testimony against Blair, Jones was granted immunity from prosecution in the Allen murder and awarded \$2,500.¹⁹² The prosecutor also recommended a favorable sentence for Jones on unrelated drug and assault charges, but this agreement was not revealed to defense counsel before trial.¹⁹³

Regarding his confession, Blair claimed that police officers pointed a gun at his head, denied his requests for counsel, falsely told him that several witnesses had implicated him, and threatened to charge his girlfriend with murder if he did not confess.¹⁹⁴ While Blair's claims cannot be verified, at the time of his interrogation the police were under public pressure to solve the case "because the victim [Allen] had previously asked for their protection [when she agreed to testify in the rape trial] and they had refused."¹⁹⁵

Several years after his conviction, Blair presented several affidavits in federal habeas proceedings which further implicated Ernest Jones.¹⁹⁶ Five of the affiants stated that "Ernest Jones admitted in their presence that he had killed Kathy Jo Allen and framed Blair."¹⁹⁷ The only affiant who testified against Blair at trial, Jones's girlfriend Tina Jackson, stated that "her trial testimony was false, that Ernest Jones told her what to say, and that she did so out of fear of him."¹⁹⁸ As a result of this new evidence, the U.S. Court of Appeals for the Eighth Circuit granted Blair a temporary stay of execution and scheduled oral arguments in the case,¹⁹⁹ with one Circuit Judge finding that Blair "did not receive a fair trial and . . . that the newly discovered evidence persuasively demonstrates that Blair is actually innocent of capital murder and that Katherine Jo Allen was murdered by [Ernest Jones]."²⁰⁰ The next day, however, the U.S.

¹⁸⁵ *Id.* at 1315.

¹⁸⁶ *Id.* at 1314–15, 1334.

¹⁸⁷ *Id.* at 1314.

¹⁸⁸ *Blair v. Armontrout*, 916 F.2d 1310, 1314, 1334 (8th Cir. 1990).

¹⁸⁹ *Id.* at 1334 (Heaney, J., concurring and dissenting).

¹⁹⁰ *Id.* (Heaney, J., concurring and dissenting).

¹⁹¹ *Id.* (Heaney, J., concurring and dissenting).

¹⁹² *Id.* at 1317.

¹⁹³ *See id.*

¹⁹⁴ *Blair*, 916 F.2d at 1334 (Heaney, J., concurring and dissenting).

¹⁹⁵ *Id.* (Heaney, J., concurring and dissenting).

¹⁹⁶ *Blair v. Delo*, 999 F.2d 1219, 1220 (8th Cir. 1993) (Heaney, J., concurring).

¹⁹⁷ *Id.* at 1221 (Heaney, J., concurring).

¹⁹⁸ *Id.* (Heaney, J., concurring).

¹⁹⁹ *Id.* at 1220.

²⁰⁰ *Id.* (Heaney, J., concurring).

Supreme Court vacated the stay,²⁰¹ and Blair was executed.²⁰² While Blair did not establish his innocence prior to his execution, his case underscores the importance of evaluating snitch testimony and confessions prior to pursuing a capital prosecution.

Conclusion

Because we were unable to obtain information regarding most Missouri prosecutors' procedures and policies for evaluating cases that rely upon eyewitness identifications, confessions, or the testimony of jailhouse snitches, we were unable to determine if Missouri is in compliance with Recommendation #2.²⁰³

Given the documented instances of wrongful convictions and possible wrongful executions, however, the Missouri Assessment Team recommends that Missouri adopt a law requiring all prosecutors to develop written policies for evaluating cases that rely on these types of evidence. Some of these policies could be based on those adopted by the New Jersey Attorney General's Office, which promulgated guidelines for prosecutors in 2001 describing the manner in which eyewitness identifications should be conducted.²⁰⁴

Moreover, Missouri should consider establishing a procedure for determining the admissibility of uncorroborated eyewitness identifications, confessions, and jailhouse snitch testimony in a pretrial hearing.²⁰⁵ Missouri trial courts should also be permitted to instruct jurors on factors to consider in evaluating jailhouse informant and cooperating witness testimony.²⁰⁶ Finally, all prosecutors should be required to receive training on how to evaluate the accuracy of eyewitness identifications, confessions, and jailhouse snitch testimony.

²⁰¹ *Delo v. Blair*, 509 U.S. 823, 823 (1993).

²⁰² *State of Missouri v. Walter Junior Blair*, MO. DEATH ROW, http://missourideathrow.com/2008/12/walter_blair/ (last visited Jan. 18, 2012).

²⁰³ For a discussion of ABA policies on custodial interrogation and eyewitness identification as they relate to law enforcement, see Chapter Three on Law Enforcement Identifications and Interrogations.

²⁰⁴ Memorandum from John J. Farmer, Jr., Att'y Gen. of N.J. to N.J. Prosecutors & Law Enforcement (Apr. 18, 2001), *available at* <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>. To aid prosecutors in determining whether informants have received a benefit for their testimony in other jurisdictions, Missouri should establish a statewide informant registry system.

²⁰⁵ Illinois, for example, required the trial court to hold a pretrial hearing to determine the admissibility of informant testimony in capital cases prior to abolishing the death penalty in 2011. 725 ILL. COMP. STAT. 5/115-21 (2011).

²⁰⁶ Oklahoma, for instance, requires trial courts to instruct jurors on several factors to be considered when evaluating jailhouse informant testimony:

The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider: (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the informant has ever changed his or her testimony; (4) the criminal history of the informant; and (5) any other evidence relevant to the informer's credibility.

Dodd v. State, 993 P.2d 778, 784 (Okla. Crim. App. 2000).

C. Recommendation #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.

Federal and State Law Governing Discovery Practices

In *Brady v. Maryland*, the U.S. Supreme Court held that prosecutors have an affirmative duty to disclose exculpatory evidence to the defendant “where the evidence is material either to guilt or to [level of] punishment, irrespective of the good faith or bad faith of the prosecution.”²⁰⁷ This includes all material exculpatory, mitigating, and impeachment evidence, as well as “favorable evidence known to the others acting on the government’s behalf in the case,” such as law enforcement officers.²⁰⁸ “[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”²⁰⁹ In accordance with *Brady*, the Missouri Rules of Professional Conduct provide that prosecutors have a special duty to disclose all exculpatory and mitigating evidence to the defendant.²¹⁰ Other discovery obligations are controlled by the Missouri Supreme Court Rules and require the prosecution to provide defense counsel with materials such as witness statements and reports prepared by experts.²¹¹

Discovery Policies and Practices of Individual Prosecutor Offices

As discussed at the beginning of the Analysis section of this Chapter, the Assessment Team was unable to obtain information from most Missouri prosecuting attorneys, including information related to discovery procedures.²¹² While the Office of the Missouri Attorney General completed most of our survey, with regard to discovery practices it stated only that the office complies with state and federal law relating to discovery.²¹³ St. Louis County Prosecuting Attorney Robert McCulloch, however, described his office’s policy as “open file discovery.”²¹⁴ After defense counsel files a discovery request, his office responds with a letter stating that all evidence in his office’s possession will be made available.²¹⁵ Mr. McCulloch stated that, with the exception of work product, he provides defense counsel with “anything you can think of,” including every police report, witness statement, and photograph.²¹⁶ Physical evidence in state custody is made available for inspection “whenever [defense counsel] want[s] to see it.”²¹⁷

²⁰⁷ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

²⁰⁸ *Kyles v. Whitley*, 514 U.S. 419, 421 (1995); *Giglio v. United States*, 405 U.S. 150, 154–55 (1972).

²⁰⁹ *United States v. Bagley*, 473 U.S. 667, 682 (1985).

²¹⁰ Rule 4-3.8(d).

²¹¹ Rules 25.03–25.11. A discussion of Missouri’s discovery rules appears in the Factual Discussion section of this Chapter. See *supra* notes 38–46 and accompanying text.

²¹² See *supra* notes 76–81 and accompanying text.

²¹³ Interview with Mo. Office of the Att’y Gen., *supra* note 22.

²¹⁴ Interview with Robert McCulloch, *supra* note 76.

²¹⁵ *Id.* Mr. McCulloch described the letter as stating “what we got, you got.” *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

Discovery and *Brady* Violations in Missouri Cases

In the Ellen Reasonover case, discussed in Recommendation #2,²¹⁸ the St. Louis County Prosecuting Attorney's Office committed several *Brady* violations, having failed to divulge multiple pieces of exculpatory evidence that would have established Reasonover's innocence.²¹⁹ Perhaps most troubling, the prosecutor failed to divulge his promise to recommend an "unusually favorable" sentence to a jailhouse informant.²²⁰ According to the public defender who had represented the informant prior to Reasonover's trial, it was "common practice" at the time for St. Louis County prosecutors to make intentionally vague agreements with jailhouse snitches who testify for the prosecution in exchange for lenient sentencing in order to circumvent *Brady*'s requirement that this impeachment evidence be disclosed.²²¹ In addition, the prosecution failed to divulge an audio-taped conversation between Reasonover and another suspect, secretly recorded by police at the jail, during which Reasonover repeatedly stated she was not involved in the murder.²²² A recorded telephone conversation between Reasonover and one of the informants who later testified against her, in which Reasonover repeatedly professed her innocence, was also never disclosed.²²³

Brady violations have occurred in capital prosecutions outside of St. Louis County, as well. In St. Charles County, for instance, Michael Taylor was convicted of first-degree murder and sentenced to death in 2003.²²⁴ In state post-conviction proceedings it was revealed that the prosecution had failed to turn over impeachment evidence prior to Taylor's trial, including evidence that one of the witnesses against Taylor, a prison inmate, had "a documented history of lying to the state in an effort to obtain favorable treatment."²²⁵

²¹⁸ See *supra* notes 173–181 and accompanying text.

²¹⁹ Reasonover v. Washington, 60 F. Supp. 2d 937, 950–63 (E.D. Mo. 1999).

²²⁰ *Id.* at 957–60.

²²¹ *Id.* at 959, 974 (citing Giglio v. United States, 405 U.S. 150, 154–55 (1972)).

²²² *Id.* at 950.

²²³ *Id.* at 956.

²²⁴ Taylor v. State, 262 S.W.3d 231, 236–38 (Mo. banc 2008).

²²⁵ *Id.* at 245.

Conclusion

The Missouri laws and rules governing discovery provide the necessary framework for prosecutors to fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects. The Missouri Assessment Team, however, lacks information necessary to determine whether systemic discovery violations have occurred, and thus cannot determine whether Missouri is in compliance with Recommendation #3. The Assessment Team notes that, in order to ensure that all evidence is fully disclosed, it is the best practice to allow open file discovery in all capital prosecutions.

D. Recommendation #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.

Overview of Attorney Discipline

The Center for Public Integrity's study of Missouri criminal appeals, which included both capital and non-capital cases from 1970 to June 2003, revealed 376 cases in which a defendant alleged prosecutorial error or misconduct.²²⁶ In seventy-seven cases, the appellate court reversed or remanded the defendant's conviction, sentence, or indictment due to prosecutorial misconduct that prejudiced the defendant.²²⁷ Moreover, three defendants who alleged prosecutorial misconduct were later found to be innocent.²²⁸ Of the seventy-seven cases in which prosecutorial misconduct or error was found, fifty-eight "involved courtroom behavior such as improper arguments or use of improper evidence."²²⁹

The Missouri Supreme Court Rules govern the manner by which attorneys practicing in Missouri, including prosecutors, are investigated and disciplined for alleged professional misconduct.²³⁰ Any person may initiate the complaint process by filing a complaint with the Office of Chief Disciplinary Counsel (OCDC), an agency established by the Supreme Court of Missouri to investigate alleged ethical violations of attorneys.²³¹ Complaints are investigated by

²²⁶ *Nationwide Numbers: State-by-state Data for The Harmful Error*, CTR. FOR PUB. INTEGRITY, <http://www.iwatchnews.org/2003/06/26/5927/nationwide-numbers> (last visited Jan. 19, 2012); *Nationwide Numbers*, CTR. FOR PUB. INTEGRITY IWATCH NEWS, <http://www.iwatchnews.org/2003/06/26/5927/nationwide-numbers> (last visited Jan. 23, 2012).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See Rule 5. The Missouri Bar website also includes a guide to the process by which Missouri attorneys are disciplined. See also MO. BAR, MISSOURI'S LAWYER DISCIPLINE SYSTEM (rev. June 2011), available at http://www.mobar.org/uploadedFiles/Home/Publications/Legal_Resources/Brochures_and_Booklets/Client_Resource_Guide/discipline.pdf.

²³¹ Rule 5.06; see also MISSOURI'S LAWYER DISCIPLINE SYSTEM, *supra* note 230.

the OCDC or a Regional Disciplinary Committee (RDC).²³² If OCDC or an RDC finds a serious violation has occurred, the case will be referred to a Disciplinary Hearing Panel (DHP).²³³ A DHP is authorized to discipline the attorney if it finds a violation has occurred, but a DHP's decision may be appealed to the Supreme Court of Missouri.²³⁴ OCDC's annual report, however, states that, of the 870 cases it investigated in 2010, only one was for a complaint related to prosecutorial responsibility.²³⁵ It appears that most investigations relate to alleged ethical violations in civil cases.²³⁶

Instances of Prosecutorial Misconduct and Error in Missouri Cases

Improper argument appears to be the most prevalent type of prosecutorial error in Missouri capital cases. The Supreme Court of Missouri and the U.S. Court of Appeals for the Eighth Circuit have granted relief to at least nine death-sentenced defendants on the grounds that the prosecutor engaged in improper argument to the jury.²³⁷ In *Weaver v. Bowersox*, for instance, a St. Louis County prosecutor urged the jury to impose the death penalty because it would “give a message” to other drug dealers.²³⁸ The prosecutor also referred to the defendant as “drug scum,” and urged the jurors to think of themselves as soldiers with a duty to kill.²³⁹ In another capital case, also in St. Louis County, the prosecutor argued that the jurors should apply the “eye for an eye” rule of the “Old Testament,” compared the defendant to Charles Manson, and told the jurors that he knew the death penalty was appropriate in this case because of his position as “top law enforcement officer in this county.”²⁴⁰ The Eighth Circuit held that this argument was “filled with improper statements” and “obviously improper and prejudicial.”²⁴¹ While this type of improper argument might not rise to the level of misconduct requiring investigation by OCDC, it demonstrates the need for prosecution offices to have an internal discipline procedure to ensure that such misconduct or error is remedied and not repeated.

²³² Rules 5.02, 5.08; *see also* MISSOURI'S LAWYER DISCIPLINE SYSTEM, *supra* note 230.

²³³ Rule 5.11; *see also* MISSOURI'S LAWYER DISCIPLINE SYSTEM, *supra* note 230.

²³⁴ Rules 5.04, 5.16, 5.17, 5.19; *see also* MISSOURI'S LAWYER DISCIPLINE SYSTEM, *supra* note 230.

²³⁵ MO. OFF. OF CHIEF DISCIPLINARY COUNSEL, REPORT OF THE OFFICE OF CHIEF DISCIPLINARY COUNSEL FOR THE YEAR 2010 TOGETHER WITH THE FINANCIAL REPORT OF THE TREASURE OF THE ADVISORY COMMITTEE FUND FOR 2010 26 (2011), *available at* <http://www.mochiefcounsel.org/reports/AnnualReport2010.pdf>.

²³⁶ *See id.*

²³⁷ *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006); *Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999); *Driscoll v. Delo*, 71 F.3d 701 (8th Cir. 1995); *Antwine v. Delo*, 54 F.3d 1357 (8th Cir. 1995); *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989); *State v. Rhodes*, 988 S.W.2d 521 (Mo. banc 1999); *State v. Taylor*, 944 S.W.2d 925 (Mo. banc 1997); *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995); *State v. Whitfield*, 837 S.W.2d 503 (Mo. banc 1992).

²³⁸ *Weaver*, 438 F.3d at 836.

²³⁹ *Id.* The prosecutor's full statement comparing the jurors to soldiers involved a discussion of the 1970 film *Patton*:

I know there's a movie, *Patton*, and in the movie, [United States General] George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in the pile of goo that a moment before was your best friend's face, you'll know what to do.

Id.

²⁴⁰ *Shurn*, 177 F.3d at 665–66.

²⁴¹ *Id.* at 667.

In the Ellen Reasonover case, first discussed in Recommendation #2,²⁴² a St. Louis County assistant prosecutor withheld several pieces of exculpatory evidence from defense counsel prior to Reasonover's trial in 1983, including audio recordings of Reasonover's conversations in the jail,²⁴³ as well as the prosecutor's agreement to recommend a lenient sentence for a witness, a jailhouse snitch, in exchange for her trial testimony against Reasonover.²⁴⁴ Reasonover was released from prison in 1999 when the federal district court granted a writ of habeas corpus after it found several *Brady* violations in her case.²⁴⁵ Following her exoneration, she sued St. Louis County, the individual prosecutor, and others who were involved in her wrongful conviction.²⁴⁶ The suit against the prosecutor was later dismissed on the grounds that he was immune from claims related to the performance of his official duties.²⁴⁷

While it is possible that the prosecutor who handled Reasonover's case was never aware of the existence or nature of the recorded statements, his failure to divulge his agreement with the informant appears to have been deliberate. In federal court proceedings that led to Reasonover's exoneration, the prosecutor testified that he did not disclose the agreement because no such agreement existed.²⁴⁸ A note in the case file of the informant's defense attorney regarding a conversation with this prosecutor, however, indicated that the prosecutor had agreed to recommend a favorable sentence for the informant but intentionally kept the details of the agreement vague to prevent discovery by Reasonover's defense counsel.²⁴⁹ The note read as follows:

[Informant] Rose Jolliff is going to be a witness in a Capital Murder case that [the prosecutor in the Reasonover case] is trying After she testifies [against Reasonover] she is going to plead guilty to this case and be given probation. The details of the plea can be worked after she testifies. The state does not want to allow [Reasonover's] Defense Attorney to bring up any kind of deal that might have been made in Rose's case. *I have been assured by [the prosecutor] that the state isn't going to burn her, that she will receive probation.*²⁵⁰

Plainly, this note evinces the prosecutor's intent to circumvent his constitutional obligation to disclose a plea agreement with a witness.²⁵¹ As the federal district court noted in its writ of habeas corpus granting relief to Reasonover, a prosecutor has a constitutional duty to divulge all

²⁴² See *supra* notes 173–181 and accompanying text.

²⁴³ Reasonover v. Washington, 60 F. Supp. 2d 937, 950–63 (E.D. Mo. 1999).

²⁴⁴ *Id.* at 957–60.

²⁴⁵ See Reasonover v. Washington, 60 F. Supp. 2d 937 (E.D. Mo. 1999); *Ellen Reasonover*, MIDWESTERN INNOCENCE PROJECT, <http://www.themip.org/index.php/ellen-reasonover> (last visited Sept. 22, 2011).

²⁴⁶ Peter Shinkle, *Judge Clears Prosecutor in Reasonover Lawsuit*, ST. LOUIS POST-DISPATCH, Nov. 20, 2003, at D2.

²⁴⁷ *Id.*

²⁴⁸ Reasonover, 60 F. Supp. 2d at 974.

²⁴⁹ *Id.* at 957–59.

²⁵⁰ *Id.* at 957–58 (emphasis added).

²⁵¹ *Id.* at 959.

plea agreements with witnesses, even those that do not involve an express promise, as “[i]t is a constitution we deal with, not semantics.”²⁵²

Despite his involvement in Reasonover’s wrongful conviction, it appears that the prosecutor was never investigated or sanctioned by OCDC, the St. Louis County prosecutor office, or any other entity charged with disciplining attorney misconduct.²⁵³ Such disciplinary proceedings are often the only means by which a prosecutor can be sanctioned for his/her misconduct because, as this case demonstrates, prosecutors are typically immune from civil lawsuits. Moreover, Reasonover languished in prison for sixteen years before the nature of the informant agreement was revealed. Thus, while prosecutorial misconduct was eventually disclosed and the error rectified, this occurred only through federal court proceedings and after several years of incarceration.

Other instances of prosecutorial misconduct have also received little or no scrutiny by OCDC or any other disciplinary authority. For instance, one former Assistant Attorney General’s conduct as a prosecutor at trial has been criticized in several cases, including two non-capital murder cases in which the convictions were later overturned. In one case, a Missouri circuit judge overturned the murder conviction of Dale Helmig in state habeas proceedings in 2010, having found clear and convincing evidence of Helmig’s innocence.²⁵⁴ Helmig had been prosecuted for the murder of his mother in 1993.²⁵⁵ The circuit court found that the Assistant Attorney General had “elicited testimony before the jury that [he] knew or should have known was false.”²⁵⁶ For example, during direct examination, a law enforcement officer falsely testified that Helmig had never denied committing the murder, and the Assistant Attorney General made no attempt to correct the error.²⁵⁷ He also repeated to the jury a false allegation that Helmig had thrown coffee on his mother during an argument days before the murder.²⁵⁸ Furthermore, he characterized as “consciousness of guilt” Helmig’s failure to come to his mother’s house on the day officers searched it; in fact, Helmig had been instructed by law enforcement not to visit the house.²⁵⁹

The same Assistant Attorney General was also found to have engaged in misconduct in the case of Joshua Kezer, who was prosecuted for second-degree murder in the early 1990s.²⁶⁰ At Kezer’s trial, the Assistant Attorney General told the jury in his closing arguments that “[w]e [the prosecution] put [Kezer] at the scene, we put a gun in his hand, we put the victim with him, we have got blood on his clothes.”²⁶¹ In 2009, however, a Missouri circuit judge found that Kezer was innocent of the murder, and noted that

²⁵² *Reasonover*, 60 F. Supp. 2d at 974 (quoting *Brown v. Wainwright*, 785 F.2d 1457, 1464–65 (11th Cir.1986)); see also *Giglio v. United States* 405 U.S. 150, 154–55 (1972) (requiring disclosure of “evidence of *any understanding* or agreement as to future prosecution”) (emphasis added)).

²⁵³ *Search Result for Steven Goldman*, MO. BAR, <http://members.mobar.org/members/LawyerSearch/GSResults.aspx?fname=Steven%25&lname=Goldman%25&city=%25&zip=%25&county=> (last visited Sept. 29, 2011) (listing Mr. Goldman as a member in good standing).

²⁵⁴ Kelly Wiese, *Missouri Courts Rebuke Hulshof’s Conduct in Two Cases*, MO. LAW. MEDIA, Nov. 7, 2010.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Christine Byers, *Murder Conviction Is Ruled Wrongful*, ST. LOUIS POST-DISPATCH, Nov. 4, 2010, at A1.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Bob Watson, *Kezer Asks State to Block Hulshof Law License*, JEFFERSON CITY NEWS-TRIB., Jan. 5, 2011, at 7.

²⁶¹ *Id.*

none of what [the Assistant Attorney General] said in [his] final summary was true. [The witness's] testimony putting [Kezer] at the scene is totally discredited. No gun was ever found, and there is no credible evidence that he ever had a gun There is now uncontroverted evidence that [Kezer] was not at the Halloween party, which was the only evidence presented that he was ever in the presence of the victim. New testing indicates there was no blood on his jacket.

Kezer was subsequently released from prison, having served sixteen years of a sixty-year sentence.²⁶² The Supreme Court of Missouri has also appointed a special master to review the same Assistant Attorney General's conduct in the murder trial of Mark Woodworth.²⁶³ That case, however, is still pending.

Despite repeated rebukes from Missouri judges, the Assistant Attorney General who prosecuted these cases is currently a member in good standing with the Missouri Bar and has not been sanctioned for his misconduct.²⁶⁴ Joshua Kezer filed a complaint with OCDC against this Assistant Attorney General in January 2011 requesting that he be disbarred.²⁶⁵ Because OCDC does not comment on pending investigations, the status of that complaint is unknown.²⁶⁶ Notwithstanding the prospect of discipline, however, both Kezer and Helmig spent more than fifteen years in prison before they were exonerated. Delays such as these cast doubt on whether Missouri is willing to fully remedy the prejudicial impact of prosecutorial misconduct or error.

Another former assistant prosecutor has had at least seven convictions overturned on appeal due to his misconduct and errors at trial in St. Louis City.²⁶⁷ This prosecutor also prosecuted Reggie Clemons, who is currently on death row for a 1991 double murder.²⁶⁸ At trial, he had been held in contempt for comparing Clemons to serial killers Charles Manson and John Wayne Gacy during penalty phase closing arguments, despite having been previously warned not to do so by the trial judge.²⁶⁹ In 2010, during Clemons's state habeas proceedings, it was revealed that a rape kit from one of the victims, which included possible DNA evidence, was collected by law enforcement, but never tested or revealed to defense counsel.²⁷⁰ The prosecutor has claimed that he was unaware that the material existed at the time, but St. Louis Police Chief Dan Isom stated that the evidence was presented to the prosecutor before trial.²⁷¹ The Supreme Court of Missouri

²⁶² *Id.*

²⁶³ Kelly Wiese, *Courts Rebuked Prosecutors' Conduct This Year*, MO. LAW. MEDIA, Dec. 28, 2010.

²⁶⁴ *Search Result for Kenny Hulshof*, MO. BAR, <http://members.mobar.org/members/LawyerSearch/GSResults.aspx?fname=kenny%25&lname=hulshof%25&city=%25&zip=%25&county=> (last visited Sept. 29, 2011) (listing Mr. Hulshof as a member in good standing); see also Kelly Wiese, *A Look at Some Prosecutions in Missouri that Went Awry*, MO. LAW. MEDIA, Oct. 8, 2010.

²⁶⁵ Watson, *supra* note 260.

²⁶⁶ *Id.*

²⁶⁷ Wiese, *supra* note 264.

²⁶⁸ Kelly Wiese, *Rape Kit, Lab Reports Surface in St. Louis Murder Case*, MO. LAW. MEDIA, Mar. 15, 2010.

²⁶⁹ Rickeena J. Richards, *Trio Hope Film Brings Sharp Focus to Death Penalty*, BELLEVILLE NEWS-DEMOCRAT, Nov. 5, 2007, at B1.

²⁷⁰ Wiese, *supra* note 268.

²⁷¹ Christine Byers, *Clemons Data There in 1991, Isom Says: Police Provided Rape Kit to Attorneys in Murder of Kerry Sisters on Bridge, Police Chief Asserts*, ST. LOUIS POST-DISPATCH, Mar. 10, 2010, at A4.

has appointed a special master to review the case.²⁷² The prosecutor is currently a member in good standing with the Missouri Bar.²⁷³

Conclusion

Missouri is in partial compliance with Recommendation #4.

Although Missouri has established a procedure by which attorney misconduct can be investigated and sanctioned, it appears that this system is not functioning adequately with respect to prosecutors. Only one instance of alleged prosecutorial misconduct was investigated in 2010, and some prosecutors have not been investigated for conduct that could constitute a violation of the Missouri Rules of Professional Conduct. Furthermore, many of the defendants who were prejudiced by prosecutorial misconduct or error did not obtain relief until several years after they were convicted. Missouri and federal courts should be commended for correcting errors in many of these cases. However, Ellen Reasonover, Dale Helmig, and Joshua Kezer each spent more than fifteen years in prison before they were released. Delays such as this make it difficult to ensure that the prejudicial impact of prosecutorial misconduct is fully and adequately remedied, as the defendants have already spent years in prison by the time the misconduct is revealed. The Missouri lawyer discipline process is especially ill-suited for death penalty cases, where prosecutorial misconduct and error might not be discovered until after the defendant is executed.

Accordingly, to ensure adequate statewide enforcement of ethical rules with respect to prosecutors, Missouri should establish a separate entity charged with investigating and sanctioning misconduct by prosecutors and criminal defense counsel.²⁷⁴ Alternately, OCDC could task particular officials—those trained to recognize misconduct in criminal cases—with investigating prosecutors and criminal defense attorneys. In addition, as prosecutors are held to a higher ethical standard than other attorneys, individual prosecutor offices should establish disciplinary practices and procedures to reduce prosecutorial misconduct and error and to ensure that prosecutors who knowingly engage in misconduct are appropriately sanctioned. In furtherance of this goal, prosecutors in larger jurisdictions should consider establishing Conviction Integrity Units staffed by prosecutors and charged with investigating claims of misconduct and error.²⁷⁵ Finally, judges and members of the Missouri Bar should be encouraged to fulfill their obligation to report misconduct and ineffective lawyering to the appropriate disciplinary entity.²⁷⁶

²⁷² Wiese, *supra* note 268.

²⁷³ *Search Result for Nels Moss*, MO. BAR, <http://members.mobar.org/members/LawyerSearch/GSResults.aspx?fname=nels%25&lname=moss%25&city=%25&zip=%25&county=> (last visited Sept. 29, 2011) (listing Mr. Moss as a member in good standing).

²⁷⁴ This entity could be housed within OCDC. As with other attorney disciplinary decisions in Missouri, this entity's decision could be appealed to the Supreme Court of Missouri.

²⁷⁵ A similar unit was established by the Dallas County, Texas, District Attorney in 2007. Terri Moore, *Prosecutors Reinvestigate Questionable Evidence: Dallas Establishes "Conviction Integrity Unity"*, CRIM. JUST., Fall 2011, at 4.

²⁷⁶ For a discussion on the duty of trial judges to report attorney misconduct in capital cases, see Chapter Eleven on Judicial Independence and Vigilance, Recommendations #4 and #5.

E. Recommendation #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.

The U.S. Supreme Court has held that a prosecutor's constitutional duty to disclose material exculpatory evidence under *Brady* includes a duty to disclose "favorable evidence known to the others acting on the government's behalf in the case," such as law enforcement officers and crime laboratory technicians, even if the evidence is "known only to police investigators and not to the prosecutor."²⁷⁷ Missouri Supreme Court Rules further require the prosecutor to "use diligence and make good faith efforts" to find and disclose any "material or information which would be discoverable [under Missouri law] . . . if in the possession or control of the [prosecution], but which is, in fact, in the possession or control of other governmental personnel."²⁷⁸

Given these obligations, it is imperative for Missouri prosecutors to develop procedures to ensure that law enforcement agencies, laboratories, and other experts under their direction are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence. As discussed at the beginning of the Analysis section of this Chapter, the Assessment Team was unable to obtain information regarding the policies of most Missouri prosecuting attorneys.²⁷⁹ St. Louis County Prosecuting Attorney Robert McCulloch stated, however, that his office tells law enforcement agencies and crime laboratories that "[e]verything you got [regarding the case], we want."²⁸⁰ Mr. McCulloch did not indicate whether he has implemented any policies or procedures to ensure that all such materials are disclosed.²⁸¹

While we were not able to obtain relevant policies from other Missouri prosecutors, we are aware of some cases in which law enforcement officers or crime laboratory personnel may have failed to disclose evidence to prosecutors. In the previously discussed cases of Dale Helmig and Joshua Kezer,²⁸² the former Assistant Attorney General who prosecuted the cases asserted that law enforcement officers did not turn over all of the evidence to him, leading him to make several false statements at trial.²⁸³ The former St. Louis City prosecutor who handled the Reggie Clemons case also stated that he did not disclose the rape kit to defense counsel because law enforcement never told him it existed.²⁸⁴ The St. Louis Police Department, however, claims that it informed the prosecutor about the rape kit before trial.²⁸⁵ In a 2009 non-capital murder case in Jackson County, inmate Yntell Duley was granted post-conviction relief on the grounds that the prosecution had failed to disclose an officer's report containing exculpatory information.²⁸⁶ The

²⁷⁷ *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995).

²⁷⁸ Rule 25.03(C).

²⁷⁹ *See supra* notes 76–81 and accompanying text.

²⁸⁰ Interview with Robert McCulloch, *supra* note 76.

²⁸¹ *See id.*

²⁸² *See supra* notes 254–266 and accompanying text.

²⁸³ Wiese, *supra* note 264.

²⁸⁴ Byers, *supra* note 271.

²⁸⁵ *Id.*

²⁸⁶ *Duley v. State*, 304 S.W.3d 158, 165 (Mo. App. 2009).

prosecutor who handled the case later claimed that he was never aware of the report, which was part of another case file.²⁸⁷

Conclusion

The Missouri Assessment Team is unable to determine whether Missouri is in compliance with Recommendation #5. Although we are aware of some cases in which law enforcement officers and state agencies have failed to comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence, this information is insufficient to determine Missouri's compliance with this Recommendation.

Given that prosecutors are responsible for disclosing discoverable evidence that may be in the control of other state agencies, however, the Assessment Team recommends that all prosecuting attorneys develop procedures to ensure that law enforcement agencies, crime laboratories, experts, and other state actors are fully aware of and comply with this duty. In addition, all law enforcement officers should be required to receive training on the importance of divulging all evidence to the prosecutor in all criminal cases, including anything that might constitute *Brady* material.

F. Recommendation #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.

Missouri statutory law provides that every prosecutor must complete “twenty hours of classroom instruction each calendar year relating to the operations of the prosecuting attorney’s office” in order to receive \$2,000 of his/her annual salary.²⁸⁸ The instruction must be sponsored by the Missouri Office of Prosecution Services (MOPS), the Missouri Association of Prosecuting Attorneys, the National District Attorneys Association, the National College of District Attorneys, the Missouri Organization of Defense Lawyers, or the Missouri Bar Association.²⁸⁹ MOPS was established by the Missouri General Assembly “as an autonomous entity within the Missouri Attorney General’s Office to assist prosecuting attorneys in their efforts against criminal activity within the state.”²⁹⁰ In 2010 and 2011, however, MOPS did not offer any training courses relevant to capital prosecutions in the legal education programs it provided.²⁹¹ Nevertheless, it is possible that capital training has been available through other approved sources.

²⁸⁷ Wiese, *supra* note 264.

²⁸⁸ Section 56.265.2, RSMo 2011.

²⁸⁹ MO. OFF. OF PROSECUTION SERVS., SECTION 56.265 TRAINING RULE (amended Apr. 4, 2007), *available at* <http://mops.mo.gov/pdf/Training%20Rule.pdf>.

²⁹⁰ MO. OFF. OF PROSECUTION SERVS., <http://mops.mo.gov/index.htm> (last visited Jan. 19, 2012); *see also* section 56.760, RSMo 2011.

²⁹¹ *Trainings/Conferences*, MO. OFF. OF PROSECUTION SERVS., <http://mops.mo.gov/TrainingConf.htm> (last visited Sept. 30, 2011).

As discussed at the beginning of the Analysis section of this Chapter, we were unable to obtain information on training and professional development of Missouri prosecutors in death penalty cases.²⁹² While the Office of the Missouri Attorney General completed portions of our survey, it asserted that responding to questions on training and qualifications “would divulge personal and confidential information about assistant attorneys general, work product, strategy, resources and the level of our resolve to proceed in capital murder cases.”²⁹³

St. Louis County Prosecuting Attorney Robert McCulloch stated that the attorneys assigned to capital cases in his office receive training through the National District Attorneys Association, MOPS, and other organizations.²⁹⁴ He noted, however, that the availability of capital training programs has decreased in recent years, as funding has “dried up” in the wake of budget constraints.²⁹⁵ Mr. McCulloch also described his internal training procedures for death penalty cases. He always assigns two attorneys to prosecute a capital case.²⁹⁶ To serve as a lead attorney, a prosecutor must have served as a second chair in at least one or two prior death penalty cases.²⁹⁷

Conclusion

The Assessment Team was unable to determine whether Missouri in compliance with Recommendation #6. It appears that Missouri has reduced funding to support the training, professional development, and continuing education of prosecutors. Because we could not obtain information regarding training programs from the vast majority of Missouri’s prosecuting attorneys, however, we cannot accurately assess Missouri’s compliance with this Recommendation. The Assessment Team strongly encourages Missouri to provide adequate funding for prosecutorial training as needed to ensure that all prosecutors receive adequate training and professional development, especially with respect to capital prosecutions. In addition, all members of the Missouri Bar should be trained on recognizing attorney misconduct and their professional duty to report it. Missouri should also adopt procedures to ensure that these training requirements are enforced.

²⁹² See *supra* notes 76–81 and accompanying text.

²⁹³ Interview with Mo. Office of the Att’y Gen., *supra* note 22.

²⁹⁴ Interview with Robert McCulloch, *supra* note 76.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.* Mr. McCulloch may also assign a newly-hired prosecutor as a third attorney to the case, “who is just there to stay out of the way” and learn from the more experienced prosecutors. *Id.*

CHAPTER SIX

DEFENSE SERVICES

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Defense counsel competency is perhaps the most critical factor determining whether an individual will receive the death penalty. Although anecdotes about inadequate defenses long have been part of trial court lore, a comprehensive 2000 study¹ shows definitively that poor representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants.

Effective capital case representation requires substantial specialized training and some experience in the complex laws and procedures that govern a capital case in a given jurisdiction, as well as the resources to conduct a complete and independent investigation in a timely way. Full and fair compensation to the lawyers who undertake such cases also is essential, as is proper funding for experts.

Under current case law, a constitutional violation of the Sixth Amendment right to effective assistance of counsel is established by a showing that the representation was not only deficient but also prejudicial to the defendant—i.e., there must be a reasonable probability that, but for defense counsel's errors, the result of the proceeding would have been different.² The 2000 study found that between 1973 and 1995, state and federal courts undertaking reviews of capital cases identified sufficiently serious errors to require retrials or re-sentencing in 68 percent of the cases reviewed.³ In many of those cases, more effective trial counsel might have helped avert the constitutional errors at trial that ultimately led to relief.

In the majority of capital cases, however, defendants lack the means to hire lawyers with the knowledge and resources to develop effective defenses. The lives of these defendants often rest with new or incompetent court-appointed lawyers or overburdened public defender services provided by the state.

Although lawyers and the organized bar have provided, and will continue to provide, *pro bono* representation in capital cases, most *pro bono* representation is limited to post-conviction proceedings. Only the jurisdictions themselves can address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases. Jurisdictions that authorize capital punishment therefore have the primary—and constitutionally mandated—responsibility for ensuring adequate representation of capital defendants through appropriate appointment procedures, training programs, and compensation measures.

¹ JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995 (2000), available at <http://www2.law.columbia.edu/instructionalservices/liebman>.

² Strickland v. Washington, 466 U.S. 668 (1984).

³ Liebman, *supra* note 1, at 5–6.

I. FACTUAL DISCUSSION: MISSOURI OVERVIEW

A. Missouri's Indigent Legal Representation System

The Missouri State Public Defender System (MSPD) is a statewide system of public defenders providing representation to over 98% of the indigent defendants across the State of Missouri.⁴ MSPD is divided into three separate legal divisions: Trial Division; Capital Division; and Appellate/Post-Conviction (Appellate/PCR) Division.⁵ Primary funding for MSPD is provided through annual appropriations by the Missouri General Assembly and is subject to the approval of the Missouri Governor.⁶

1. History of Missouri Indigent Defense Resources

Until 1971, Missouri trial courts appointed counsel to represent indigent defendants without providing compensation for the attorney's time or expenses.⁷ In 1972, the Missouri General Assembly passed Chapter 600 of the Missouri Revised Statutes (RSMo), which created a system of full-time public defenders.⁸ The public defenders were assigned to twenty of Missouri's forty-three⁹ judicial circuits.¹⁰ The Missouri General Assembly also provided compensation for court appointed counsel representing indigent defendants in judicial circuits where public defender offices had not yet been established.¹¹ In 1976, the Public Defender Commission (MSPD Commission) was created to over see the public defender system.¹²

In 1982, the Missouri General Assembly substantially revised the public defender statute and created the Office of State Public Defender (OSPD).¹³ OSPD was established as an "independent department of the judicial branch of state government."¹⁴ Additionally, the

⁴ Sections 600.011–.101, RSMo 2011 ("The 'Office of State Public Defender' is hereby created and established as an independent department of the judicial branch of state government."); *see also* STATE OF MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2010 ANNUAL REP. 10 (Oct. 1, 2010), *available at* <http://www.publicdefender.mo.gov/about/FY2010AnnualReport.pdf> [hereinafter 2010 MO. PUB. DEFENDER ANNUAL REPORT].

⁵ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 10.

⁶ Section 600.040.2, RSMo 2011.

⁷ *State v. Green*, 470 S.W.2d 571, 572–73 (Mo. banc 1971).

⁸ Sections 600.001–600.150, RSMo 1972; *see also State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 65 (Mo. banc 1981).

⁹ In 1976 Missouri only had forty-three judicial circuits. *See Missouri Circuit Courts Statutory History* (on file with author). The 44th Judicial Circuit was established in 1982, and the 45th Judicial Circuit was created in 1991. Section 478.185, RSMo 1982; section 478.186, RSMo 1991.

¹⁰ CLAIRE MCCASKILL, OFFICE OF MO. STATE AUDITOR, PUBLIC DEFENDER COMMISSION STATE AUDIT REPORT, REP. NO. 2004-94, at 12 (Dec. 2004), *available at* <http://www.auditor.mo.gov/press/2004-94.pdf> [hereinafter 2004 MO. PUB. DEFENDER AUDIT REPORT]. At the time, public defenders were serving in circuits with a "population of not less than 75,000, nor more than 150,000, or have a population of more than 200,000." Section 600.010, RSMo 1972.

¹¹ 2004 MO. PUB. DEFENDER AUDIT REPORT, *supra* note 10, at 12. MSPD now provides public defenders to indigent defendants in every county of Missouri. 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 3.

¹² 2004 MO. PUB DEFENDER AUDIT REPORT, *supra* note 10, at 12 (noting that prior to the Commission's creation, the appointment of full-time public defenders was made by the Appellate Judicial Commission).

¹³ *See* H.B. 1169, 81st Gen. Assemb., 2d Reg. Sess. (Mo. 1982); *see also* section 600.019.1, RSMo 2011; 18 CSR 10-1.010(2).

¹⁴ Section 600.019, RSMo 1982; *see also* 2004 MO. PUB. DEFENDER AUDIT REPORT, *supra* note 10, at 12.

statutory revisions gave the MSPD Commission the authority to issue guidelines for indigency determinations.¹⁵ The creation of OSPD substantially reduced the role of the courts in the appointment process.¹⁶ Instead, the MSPD Commission was given the authority to contract with private bar attorneys to represent criminal defendants when the full-time public defenders were unavailable.¹⁷

MSPD underwent an additional reorganization in 1989.¹⁸ This restructuring provided public defenders to indigent defendants in every judicial circuit across Missouri¹⁹ and divided MSPD into three specialized departments: Trial Division; Capital Division; and Appellate/PCR Division.²⁰ This is the current system in the State of Missouri.²¹

2. Missouri State Public Defender System

a. Trial Division

The MSPD Trial Division provides representation to indigent defendants who are charged with offenses that carry a sentence of imprisonment.²² First-degree murder cases are initially assigned to the MSPD Trial Division unless the prosecution provides notice of aggravating factors or otherwise indicates its intent to seek the death penalty in a particular case.²³ As of 2010, MSPD employed 315 Trial Division attorneys within thirty-four district offices throughout Missouri.²⁴

b. Capital Division

Once the prosecution files aggravating factors or otherwise indicates its intent to seek the death penalty, the capital case will be transferred to the MSPD Capital Division from the local MSPD Trial Division.²⁵ The Capital Division has a total of three offices located in St. Louis, Kansas

¹⁵ See section 600.086, RSMo 1982; 2004 MO. PUB. DEFENDER AUDIT REPORT, *supra* note 10, at 12.

¹⁶ See 2004 MO. PUB. DEFENDER AUDIT REPORT, *supra* note 10, at 12.

¹⁷ *Id.*

¹⁸ *Id.* at 13; see also State *ex rel.* Mo. Pub. Defender Comm'n v. Pratte, 298 S.W.3d 870, 876 (Mo. banc 2009) (quoting MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2009 ANNUAL REPORT (Oct. 1, 2009), available at <http://www.publicdefender.mo.gov/about/FY2009AnnualReport.pdf> [hereinafter 2009 MO. PUB. DEFENDER ANNUAL REPORT]). This system gave the director "the authority to hire assistant public defenders, as well as contract with private attorneys, in order to provide defense services 'by means of a centrally administered organization.'" State *ex rel.* Pub. Defender Comm'n v. Williamson, 971 S.W.2d 835, 838 (Mo. App. 1988) (quoting sections 600.011(7), 600.021, 600.042.1(10), RSMo 1994).

¹⁹ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 3; 2009 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 18, at 2. Currently, MSPD will contract with the private bar to handle cases when MSPD experiences a conflict of interest or excessive caseload. 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 77.

²⁰ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 10.

²¹ See *id.*

²² *Id.* at 21.

²³ *Id.*; see also Email Interview by Rachel Bays with Karen Kraft, Capital Div. Dir., Mo. State Pub. Defender Sys. (June 7, 2010) (on file with author).

²⁴ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 14.

²⁵ *Id.* at 74; see also Interview with Karen Kraft, *supra* note 23.

City, and Columbia.²⁶ As of September 2010, the MSPD Capital Division employed fourteen capital trial attorneys and three capital direct appeal attorneys.²⁷

c. Appellate/Post-Conviction Relief Division

The MSPD Appellate/PCR Division represents indigent inmates during capital and non-capital state post-conviction proceedings, and non-capital direct appeals.²⁸ There are a total of six Appellate/PCR Division offices located in St. Louis, Kansas City, and Columbia.²⁹ As of August 2010, the MSPD Appellate/PCR Division employed seven attorneys that were statutorily qualified—in accordance with section 547.370 of the RSMo—to represent death row inmates during state post-conviction proceedings.³⁰

d. Missouri Public Defender Commission

The MSPD Commission governs MSPD.³¹ The MSPD Commission is responsible for promulgating logistical and administrative rules necessary for the administration of MSPD, including the following: establishing indigency guidelines, determining the qualification criteria for public defenders, reviewing client complaints, approving the annual internal operating budget, approving a fee schedule for private counsel contracted by MSPD, and approving legislative budget requests.³²

The MSPD Commission is comprised of seven voting members, four of whom must be lawyers.³³ The Governor appoints each member of the MSPD Commission to serve a six year term.³⁴ Of the seven MSPD Commission members, no more than four members can represent the same political affiliation.³⁵ The MSPD Commission appoints the MSPD Director who is responsible for supervising MSPD personnel, preparing the MSPD annual report, maintaining

²⁶ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 74.

²⁷ *Id.* at 14; *see also* Interview with Karen Kraft, *supra* note 23.

²⁸ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 74.

²⁹ *Id.* at 69.

³⁰ Email Interview by Rachel Bays with Greg Mermelstein, Director, Appellate/PCR Div., Mo. State Pub. Defender Sys. (Aug. 20, 2010) (on file with author); *see also* section 547.370, RSMo 2011 (delineating the qualifications for and requiring certification of attorneys who represent death row inmates in state post-conviction proceedings).

³¹ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 10.

³² *See id.*; *see also* section 600.017, RSMo 2011.

³³ Section 600.015, RSMo 2011; *see also* *The Commission*, MO. STATE PUB. DEFENDER, <http://publicdefender.mo.gov/about/commission.htm> (last visited Jan. 10, 2011) (noting that the current commission only has six members, with one vacancy; the current members are Eric Barnhart, a Republican Attorney located in Florissant; Muriel Brison, a Democrat located in Hermann; Douglas Copeland, a Republican Attorney located in St. Louis, serving as Chair of the Commission; Willie Ellis, a Democrat located in Florissant; Miller Leonard, a Republican Attorney located in Denver, Colorado; and Nancy Watkins, a Democratic Attorney located in Clayton).

³⁴ Section 600.015.1, RSMo 2011. If an individual leaves before his/her six year term is complete, the Governor appoints a new member to fill that position for the remainder of the unexpired term. Section 600.015.2, RSMo 2011. Members of the Commission are not paid salaries but receive necessary compensation for expenses incurred during the performance of their duties. Section 600.015.5, RSMo 2011.

³⁵ Section 600.015.1, RSMo 2011.

financial records, promulgating rules and regulations, and coordinating the operations of MSPD.³⁶ The Director serves as a non-voting member of the MSPD Commission.³⁷

3. Funding for the Missouri State Public Defender System

The Missouri General Assembly provides primary funding for MSPD.³⁸ In Fiscal Year 1999, the annual appropriations from the General Assembly for MSPD totaled \$26.92 million,³⁹ and by Fiscal Year 2010 the appropriated amount from the General Assembly increased to \$34.21 million.⁴⁰

The chart below lists the total appropriations provided to MSPD by the Missouri General Assembly during fiscal years 2000 through 2010.⁴¹

Fiscal Year	Funding Allocated to MSPD by Missouri General Assembly (in millions)	MSPD Opened Cases	MSPD Closed Cases	Allocation Per Opened Case	Allocation Per Closed Case
2000	\$28.47	75,738	69,591	\$375.90	\$409.10
2001	\$29.71	76,786	73,438	\$386.92	\$404.56
2002	\$29.81	82,206	77,165	\$362.63	\$386.32
2003	\$29.81	85,908	81,059	\$347.00	\$367.76
2004	\$28.11	88,916	86,356	\$316.14	\$325.51
2005	\$28.46	88,131	87,180	\$322.93	\$326.45
2006	\$28.46	88,532	83,260	\$ 321.47	\$341.82
2007	\$30.49	87,497	85,133	\$348.47	\$358.15
2008	\$32.68	85,405	85,116	\$382.65	\$383.95
2009	\$34.07	83,082	81,704	\$410.08	\$416.99
2010	\$34.21	84,616	81,346	\$404.30	\$420.55

The average cost per case disposition for the entirety of MSPD in fiscal year 2010 was \$376.⁴² Over the same period of time, the MSPD Trial Division expended \$23,876,800 on direct case

³⁶ Section 600.042.1, RSMo 2011.

³⁷ Section 600.015.3, RSMo 2011.

³⁸ Section 600.040.2, RSMo 2011. MSPD is eligible for federal stimulus funds, grant funds, the Legal Defense and Defender Fund, and Debt Offset Escrow Funds. 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 18. Additionally, the Trial Division office space and utilities are the responsibility of each circuit or regional public defender. Section 600.040.1, RSMo 2011. If more than one county is represented by an office, the amount due will be based on a pro-rata share of the costs based upon county population. *Id.* All other costs for the MSPD Trial Division that are not associated with office space and utilities are covered within the general revenue budget. *Id.* The Capital and Appellate/PCR Divisions do not fall under section 600.040.1 and the office space, utilities, and operational expenses are provided by the general revenue budget. *See* 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 98.

³⁹ SPANGENBERG GROUP ET AL., ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM: FINAL REPORT 14 (2009), available at <http://members.mobar.org/pdfs/public-defender/2009-report.pdf> [hereinafter SPANGENBERG REPORT].

⁴⁰ *Id.*; *see also* 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 18.

⁴¹ *See* SPANGENBERG REPORT, *supra* note 39, at 14.

⁴² 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 19. This amount includes all cases disposed of by MSPD, including capital cases. *Id.*

spending with an average of \$295 per case disposition.⁴³ Jefferson City had the lowest cost per case disposition at \$228, and St. Louis City had the highest cost per case disposition at \$412.⁴⁴

During fiscal year 2010, the MSPD Capital Division expended \$3,029,608 on direct case spending.⁴⁵ The Kansas City office expended \$80,667 per case disposition; the Columbia office expended \$154,394 per case disposition; and the St. Louis office expended \$260,703 per case disposition.⁴⁶ The average expenditure per case disposition in the Capital Division was \$151,480.⁴⁷

The below table illustrates the fiscal year 2010 expenditures within the three Capital Division offices.⁴⁸

Fiscal Year 2010	Salaries (excluding fringe benefits)	Office Expenditures	Case-Related Expenditures	Defenderplex	Total Office Costs
Kansas City Capital Office	\$417,433.79	\$37,539.65	\$37,451.11	\$46,389.47	\$538,814.02
Columbia Capital Office	\$529,234.15	\$64,999.79	\$87,947.26	\$50,923.32	\$733,104.52
St. Louis Capital Office	\$771,146.00	\$65,725.46	\$158,484.31	\$89,365.34	\$1,084,721.11
Total	\$1,717,813.94	\$168,264.90	\$283,882.68	\$186,678.13	\$2,356,639.65

During fiscal year 2010, the Appellate/PCR Division expended \$3,102,866 on direct case spending.⁴⁹ The Appellate/PCR Eastern B office had the lowest per disposition expenditures at \$1,186, and the Appellate/PCR Central A office had the highest per disposition expenditures at \$2,062.⁵⁰ The average expenditure per disposition within the Appellate/PCR Division during fiscal year 2010 was \$1,691.⁵¹

B. Attorneys Handling Death Penalty Trials and Appeals: Appointment, Qualifications, Workload Limitations, Training, Compensation, and Resources

1. Appointment of Counsel

Missouri guarantees counsel to indigent defendants charged with a capital crime at trial and on direct appeal.⁵²

⁴³ *Id.* Direct spending includes only the money spent on the individual cases. It does not include operating expenses, such as information technology services, human resources, and other units that provide support to MSPD. Telephone Interview by Kirstin Ramsay with Kathleen Lear, Mo. State Pub. Def. Comptroller (Dec. 29, 2010) (on file with author).

⁴⁴ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 19.

⁴⁵ *Id.* at 20.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Chart provided by Kathleen Lear, MSPD Comptroller. Interview with Kathleen Lear, *supra* note 43.

⁴⁹ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 20.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 10.

The MSPD Capital Division ultimately represents, at trial and on direct appeal, the majority of indigent defendants charged with a capital crime.⁵³ However, prior to a prosecutor's filing notice of intent to seek the death penalty, the MSPD Trial Division will be appointed to represent an indigent defendant not yet facing capital charges.⁵⁴ If MSPD is unable to provide representation to a capital defendant, MSPD will contract with private counsel to handle the case.⁵⁵

a. MSPD

At arraignment or the first court appearance, the trial court will inform the defendant of his/her right to counsel.⁵⁶ If the defendant cannot afford an attorney, the trial court will refer the defendant to the local public defender Trial Division office for the county where the charges originated.⁵⁷ The local public defender office will make an initial indigency determination.⁵⁸ Indigency determinations are based on a totality of the defendant's circumstances, taking into consideration his/her ability to post bond, income, and number of dependents, as well as any other means available to the defendant to hire counsel.⁵⁹

Once MSPD certifies that the defendant is indigent, MSPD representation of the defendant will continue at every stage of the case or proceeding, up to and including the direct appeal, unless the MSPD Director relieves the public defender of his/her obligations or the court grants permission to withdraw.⁶⁰ The representation by the Capital Division includes all pretrial proceedings, trial, the motion for new trial, direct appeal briefs, and direct appeal oral argument.⁶¹

If the local MSPD office does not find the defendant indigent, s/he will be ineligible for public defender representation; however, the defendant has the right to appeal this decision to the circuit court.⁶² If the court does not find the defendant indigent, the public defender has no duty to represent the defendant.⁶³

⁵³ See Mo. Const. art. I, sec. 18(a); see also sections 545.820, 600.042.4, RSMo 2011; Rule 31.02.

⁵⁴ Interview with Karen Kraft, *supra* note 23.

⁵⁵ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 77.

⁵⁶ Sections 545.820, RSMo 2011; Rule 31.02.

⁵⁷ Sections 600.086, RSMo 2011.

⁵⁸ Section 600.042.4, RSMo 2011; see also 18 CSR 10-3.010.

⁵⁹ 18 CSR 10-3.010(1).

⁶⁰ Section 600.044, RSMo 2011. The MSPD *Guidelines for Representation* states that MSPD attorneys should "make every effort to arrange for prompt and timely consultation with the client in an appropriate and private setting" and that "consultation should occur within one week after representation of the client is undertaken, and must occur prior to the conduct of any preliminary hearing in the case." MO. STATE PUB. DEFENDER, POLICIES AND PROCEDURES, *Guidelines for Representation: General Duties of Public Defenders* (effective Nov. 1, 1992) (on file with author). In addition to the initial contact, MSPD attorneys should continue having contact with the client at least "once per month during the pendency of the representation." *Id.*

⁶¹ Section 600.044, RSMo 2011.

⁶² See section 600.086.3, RSMo 2011.

⁶³ See *id.*

b. Private Bar Attorneys

If the MSPD Capital Division is unable to represent the accused due to a conflict of interest or excessive caseload, MSPD may contract with private bar attorneys to undertake the representation.⁶⁴ MSPD does not maintain a roster of qualified capital counsel.⁶⁵ The MSPD General Counsel or Deputy Director is responsible for securing contract counsel for a capital defendant.⁶⁶ However, MSPD has not contracted with a private attorney to represent a capital defendant at trial since 2007.⁶⁷ Instead, MSPD handles conflicts of interest internally, by distributing the affected case to a conflict-free MSPD Capital Division office.⁶⁸

Additionally, the court may appoint private counsel to represent indigent defendants if the MSPD office in the jurisdiction has stopped accepting new cases due to an excessive caseload.⁶⁹ If a defendant is charged with murder and the prosecution has noted its intent to seek the death penalty, the case will be assigned directly to the MSPD Capital Division.⁷⁰ However, if a defendant is charged with murder and the prosecution has not yet given notice of its intent to seek the death penalty, the court will appoint a private bar attorney if the local MSPD Trial Division office is on unavailable status due to an excessive caseload.⁷¹

c. Appellate/PCR Division

Once the defendant has been found guilty of first-degree murder and sentenced to death, the court will question the defendant regarding the effectiveness of the defendant's trial counsel.⁷² If the court finds probable cause that the defendant did not receive effective assistance of counsel, the court will appoint new counsel to represent the defendant during his/her appeals.⁷³ If the

⁶⁴ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 77; *see also* section 600.042.1(10), RSMo 2011.

⁶⁵ Telephone Interview by Kirstin Ramsay with Peter Sterling, Mo. State Pub. Def. General Counsel (Mar. 15, 2011) (on file with author).

⁶⁶ *Id.*

⁶⁷ *Id.*; *but cf.* STATE OF MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2004 ANNUAL REP. 21 (Oct. 1, 2004), *available at* <http://www.publicdefender.mo.gov/about/FY2004AnnualReport.pdf> [hereinafter 2004 MO. PUB. DEFENDER ANNUAL REPORT]; STATE OF MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2005 ANNUAL REP. 17 (Oct. 1, 2005), *available at* <http://www.publicdefender.mo.gov/about/FY2005%20Annual%20Report.pdf> [hereinafter 2005 MO. PUB. DEFENDER ANNUAL REPORT]; STATE OF MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2006 ANNUAL REP. 27 (Oct. 1, 2006), *available at* <http://www.publicdefender.mo.gov/about/FY2006AnnualReport.pdf> [hereinafter 2006 MO. PUB. DEFENDER ANNUAL REPORT]; STATE OF MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2007 ANNUAL REP. 57 (Oct. 1, 2007), *available at* <http://www.publicdefender.mo.gov/about/FY2007AnnualReport.pdf> [hereinafter 2007 MO. PUB. DEFENDER ANNUAL REPORT] (showing that contract counsel was assigned to four capital cases in 2004, four capital cases in 2005, one capital case in 2006, and six capital cases in 2007).

⁶⁸ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 77; *see also* Moore v. State, 934 S.W.2d 289, 292 (Mo. banc 1996) (“ [T]he . . . [MSPD] Commission has general authority to erect so-called ‘Chinese walls’ within its office, assuring that an attorney whose responsibilities are in conflict with another member of the staff will not be influenced by that association.”).

⁶⁹ State *ex rel.* Mo. Pub. Defender Comm'n v. Pratte, 298 S.W.3d 870 (Mo. banc 2009).

⁷⁰ Interview with Karen Kraft, *supra* note 23.

⁷¹ Kathryn Wall, *Hankins Charges Upgraded to Murder*, SPRINGFIELD NEWS-LEADER, Aug. 25, 2010, at A1. *See also* State *ex rel.* Mo. Pub. Defender Comm'n v. Pratte, 298 S.W.3d 870 (Mo. banc 2009).

⁷² Rule 29.07(b).

⁷³ *Id.*

defendant is represented by MSPD, s/he will automatically be appointed new counsel at both the direct appeal and post-conviction proceedings.⁷⁴

Once the direct appeal becomes final, a death row inmate in Missouri is responsible for filing a pro se motion for post-conviction relief.⁷⁵ After the pro se motion is filed and the court finds that the death row inmate is indigent, the court will officially appoint the MSPD Appellate/PCR Division to represent the defendant.⁷⁶ If the death row inmate was represented by MSPD at trial and on direct appeal, the MSPD Appellate/PCR Division will informally assist the inmate in filing the initial pro se motion for post-conviction relief.⁷⁷ If a hearing is granted an indigent inmate will be represented by the MSPD Appellate/PCR Division. The MSPD Appellate/PCR Division will continue representation during the appeal of a post-conviction relief motion.⁷⁸

If a death row inmate cannot be represented by the MSPD Appellate/PCR Division due to a conflict of interest, MSPD will contract with a private bar attorney to represent the defendant in state post-conviction proceedings.⁷⁹ Due to the rarity in which the MSPD Appellate/PCR Division contracts with private counsel, MSPD does not maintain a roster of available attorneys qualified to represent a death row inmate during state post-conviction proceedings.⁸⁰

2. Attorney Qualifications

Any person representing a criminal defendant in the State of Missouri must be licensed to practice law in Missouri or be admitted pro hac vice.⁸¹ In order to maintain a law license in Missouri, “[e]ach lawyer . . . must complete 15 hours of continuing legal education, including two hours of ethics, professionalism, or malpractice prevention.”⁸²

a. MSPD

Missouri has not established statutory guidelines or rules governing the qualifications of attorneys handling capital cases at trial or on direct appeal. However, MSPD has adopted its *Guidelines for Representation (Guidelines)*, which is applicable to all public defenders.⁸³ The *Guidelines* does not include any specific requirements for attorneys handling capital cases, but it does require that “[p]rior to undertaking the defense of one accused of a crime, a Public Defender should have sufficient experience to provide competent representation of that case” and “should handle the more serious and complex criminal cases only after having had experience and/or training in less complex criminal matters.”⁸⁴

⁷⁴ Interview with Kathleen Lear *supra* note 43; Interview with Karen Kraft *supra* note 23.

⁷⁵ Rule 29.15(b).

⁷⁶ Rules 24.036(a), 29.16(a).

⁷⁷ Interview with Greg Mermelstein, *supra* note 30.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See section 600.021.2, RSMo 2011; Rules 4–5.5, 9.01–9.04.

⁸² Rule 15.05.

⁸³ MO. STATE PUB. DEFENDER, POLICIES AND PROCEDURES, *Guidelines for Representation: Education, Training and Experience of Public Defenders* (effective Nov. 1, 1992).

⁸⁴ *Id.*

b. Private Bar Attorneys

Neither the State of Missouri nor MSPD have written policies defining the minimum qualifications for contract counsel, appointed counsel, or privately retained counsel representing a capital defendant at trial or on direct appeal.⁸⁵

c. Appellate/PCR Division

Missouri has statutorily defined minimum qualifications for all defense counsel representing a death row inmate during state post-conviction proceedings.⁸⁶ Attorneys representing a death row inmate must meet the Missouri minimum requirements of all criminal attorneys: the attorney must be a member of the Missouri Bar or admitted pro hac vice.⁸⁷ Additionally, at least one of the two attorneys appointed must have (1) attended at least twelve hours of training or educational programs on the post-conviction phase of a criminal case; (2) a minimum of three years of criminal law litigation experience; (3) participated as either counsel or co-counsel in at least five post-conviction motions or class A felony trials;⁸⁸ and (4) participated as counsel or co-counsel in a minimum of three felony jury trials or five direct criminal appeals in felony cases that went to final judgment.⁸⁹

3. Caseload Limitations

Missouri has not established caseload maximums for attorneys representing capital defendants at trial, on direct appeal, or during state post-conviction proceedings.⁹⁰

However, in 2008 the MSPD Commission enacted an administrative rule for determining caseload maximums for MSPD Trial Division offices by comparing the number of hours required to handle incoming cases against the attorney hours available to handle those cases, and it “authorized the director to place an office on limited availability once it had exceeded that maximum for three consecutive months.”⁹¹ Once the caseload maximum has been reached for three consecutive months, MSPD may file a notice of “limited availability” and exclude MSPD appointment from certain categories of cases.⁹² In 2009 the Supreme Court of Missouri held that while MSPD could not categorically reject certain cases for appointment, it may reject all case

⁸⁵ See section 600.021, RSMo 2011; Rule 9.03 (stating that all persons that represent criminal defendants in the State of Missouri must be licensed to practice law or be admitted pro hac vice).

⁸⁶ See section 547.370, RSMo 2011. See also Interview with Greg Mermelstein, *supra* note 30.

⁸⁷ See sections 547.370.2, 600.021.2, RSMo 2011; see also Rules 4–5.5, 9.01–9.04, 15.05.

⁸⁸ Section 547.370.2(2)–(3), RSMo 2011.

⁸⁹ Section 547.370.2(4), RSMo 2011.

⁹⁰ See 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 5.

⁹¹ *Id.*

⁹² *Id.*; see also State *ex rel.* Mo. Pub. Defender Comm’n v. Pratte, 298 S.W.3d 870, 879 (Mo. banc 2009) (explaining that after a notice of limited availability was filed, “the district defender and other members of the public defender management personnel [would] consult with the court and prosecutors to determine which categories of cases are to be excluded”). The cases that are subject to the *Pratte* decision involve those cases where the accused is charged with a probation violation and if the accused had previously retained private counsel. *Id.* at 874.

appointments when the caseload maximums have been reached.⁹³ As such, when an MSPD office reaches its caseload maximum it will refuse all case appointments.⁹⁴

The MSPD Capital Division “limits each of its capital attorneys to no more than six open capital cases.”⁹⁵ Although the MSPD Capital Division was originally established to focus solely on cases in which the death penalty was sought, it has started handling non-death eligible first-degree murder cases and sexual assault cases, in an effort to ease the caseload burdens within the Trial Division.⁹⁶ The six case maximum only applies to open capital cases.⁹⁷ The MSPD Capital Division employed seventeen attorneys and opened thirty-two new cases in fiscal year 2010.⁹⁸

The Appellate/PCR Division does not have a maximum capital caseload limit.⁹⁹ In 2010, the MSPD Appellate/PCR Division employed thirty-six attorneys and opened 1,921 new cases.¹⁰⁰

4. Resources Available to Defense Counsel

a. MSPD

Funding for experts or other ancillary capital defense services is provided to MSPD by the Missouri General Assembly.¹⁰¹ MSPD attorneys who require expert services must submit a request for expenses to the District Defender.¹⁰² If the District Defender agrees that the expenditure is warranted, the request must be approved by one of the three Division Directors, the Deputy Director, or General Counsel.¹⁰³

⁹³ *Pratte*, 298 S.W.3d at 887–89.

⁹⁴ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 82. *See also* Eva Dou, *Public Defenders Prepare to Turn Away Cases, Citing Work Overload*, MISSOURIAN, Oct. 1, 2010, <http://www.columbiamissourian.com/stories/2010/10/01/more-public-defenders-prepare-turn-away-cases-citing-work-overload/> (last visited Sept. 29, 2011).

⁹⁵ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 84 (referencing 18 CSR 10-4.010). Caseload maximums for the Capital Division are “based upon a Florida study in which attorneys defending death penalty cases in the manner set forth by the ABA death penalty standards tracked their hours per case and determined that an attorney could effectively handle no more than 3 capital cases per year per attorney. Since each of MSPD’s capital cases is assigned to two attorneys who divide the work on the case between them, MSPD has raised that caseload standard to 6 open capital cases per attorney.” *Id.*

⁹⁶ Interview with Karen Kraft, *supra* note 23; *see* 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 74.

⁹⁷ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 74.

⁹⁸ *Id.* at 14, 74.

⁹⁹ *See* Interview with Greg Mermelstein, *supra* note 30 (“There is no formal policy or protocol for maximum caseloads for capital appellate/post conviction attorneys or support staff . . . [the] Appellate/Postconviction Division tries to limit the number of capital case assignments to appellate postconviction attorneys at no more than 5 or 6 capital cases at any given time.”).

¹⁰⁰ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 14, 70.

¹⁰¹ Section 600.040, RSMo 2011; *see also* 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 18.

¹⁰² Interview with Karen Kraft, *supra* note 23.

¹⁰³ *Id.*

MSPD also employs both mitigation specialists and investigators.¹⁰⁴ In fiscal year 2010, the MSPD Trial Division employed fifty-one investigators and no mitigation specialists.¹⁰⁵ The MSPD Capital Division employs four investigators and four mitigation specialists.¹⁰⁶ The MSPD Appellate/PCR Division employs six investigators and three mitigation specialists.¹⁰⁷ MSPD was allocated up to fifteen additional support staff members, which can include investigators, effective July 1, 2010.¹⁰⁸ However, at the end of fiscal year 2010, MSPD had only received half of the funding allotment.¹⁰⁹

Investigators in the Capital Division must have a degree, from a four year college or university, with a “specialization in law, criminal justice, criminology, or a closely related field.”¹¹⁰ Mitigation specialists in the Capital Division must have a “[m]aster’s degree from an accredited college or university with specialization in psychology, social work, sociology, or closely related field.”¹¹¹

b. Private Counsel

“MSPD contracts out two kinds of cases; (1) those which are a conflict for the local public defender office to handle; and (2) caseload relief contracts Conflict cases are those in which the lawyers or staff of the local public defender office have a conflict of interest in representing the defendant.”¹¹² Caseload relief contracts occur when an office is either in danger of reaching its caseload maximum or has exceeded its caseload maximum.¹¹³

Contract counsel are entitled to litigation expenses, including expert services and ancillary services, in addition to a modified flat-fee.¹¹⁴ Contract counsel must submit a request for expenditures to the MSPD General Counsel or Deputy Director.¹¹⁵ Expert and ancillary services requested by contract counsel are included in the MSPD budget under the Homicide Conflict appropriation.¹¹⁶

Under Missouri State Regulations, when an attorney is appointed by the court because MSPD has refused to accept new appointments due to an excessive workload, the attorney is entitled to “reasonable and necessary litigation costs including expert witness fees, deposition fees, and

¹⁰⁴ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 14 (averaging approximately one investigator for every six attorneys).

¹⁰⁵ 2009 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 18, at 61. *See also* Interview with Kathleen Lear *supra* note 43.

¹⁰⁶ 2009 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 18, at 61.

¹⁰⁷ *Id.*

¹⁰⁸ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 14.

¹⁰⁹ *Id.*

¹¹⁰ MO. PUB. DEFENDER SYS., *Job Description: Investigator I* (June 7, 2010) (on file with author).

¹¹¹ MO. PUB. DEFENDER SYS., *Job Description: Mitigation Specialist I* (June 7, 2010) (on file with author).

¹¹² 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 77.

¹¹³ *Id.* at 77.

¹¹⁴ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 78. The 2010 flat-fee for contract counsel representing capital defendants was a maximum of \$24,000. Interview with Peter Sterling, *supra* note 65.

¹¹⁵ Interview with Peter Sterling, *supra* note 65.

¹¹⁶ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 18, 81–82. *See also* Interview with Peter Sterling, *supra* note 65.

transcript costs to the extent funds are available to do so.”¹¹⁷ These expenses are the responsibility of MSPD and all requests for expenses are to be made directly to the MSPD Director.¹¹⁸

In rare instances, a private bar attorney may be appointed by the court to represent an indigent defendant when MSPD is accepting new appointments.¹¹⁹ An attorney appointed by the court may also be entitled to reasonable expenses, even if the attorney is not otherwise being compensated.¹²⁰ However, these requests for expert and ancillary services must be submitted to the court for approval.¹²¹ If the court approves the expenses, the court may order the Governor to seek funds from the General Assembly to be deposited into the circuit court’s depository.¹²² If the General Assembly fails to produce the necessary funds, the circuit court may dismiss the case.¹²³

A private bar attorney who is retained by a defendant may also request funding for expert and ancillary services from MSPD, if the defendant is found to be indigent by MSPD.¹²⁴ The privately retained attorney must submit a request for funding to the MSPD Director.¹²⁵ MSPD will only provide private counsel funding for expert and ancillary services if the private attorney’s retainer is commensurate with the MSPD contract attorney fees.¹²⁶

The Supreme Court of Missouri recently indicated that a pro se defendant is not necessarily entitled to state funds to employ expert services.¹²⁷ The Court suggested that while the state is required to provide funds to counsel to secure expert services, they are not necessarily required to provide those funds to a pro se litigant.¹²⁸

5. Compensation Available to Defense Counsel in Capital Cases

a. MSPD

¹¹⁷ 18 CSR 10-4.010.

¹¹⁸ *Id.*

¹¹⁹ *See, e.g.*, State v. Brown, 722 S.W.2d 613 (Mo. App. 1986) (allowing for the court appointment of private counsel in a securities fraud case when the public defender moved to withdraw due to a lack of “expertise in the area here involved”).

¹²⁰ Williamson v. Vardeman, 674 F.2d 1211, 1216 (8th Cir. 1982) (holding that it is an unconstitutional “taking” to require attorneys to advance payment for expenses incurred in representation of indigent defendants).

¹²¹ State *ex rel.* Pub. Defender Comm’n v. Williamson, 971 S.W.2d 835 (Mo. App. 1998) (citing State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64, 67 (Mo. banc 1981)).

¹²² Brown, 722 S.W.2d at 620–21 (citing State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64, 67 (Mo. banc 1981)).

¹²³ *Id.*

¹²⁴ Williams v. State, 254 S.W.3d 70, 75 (Mo. App. 2008) (citing State v. Huchting, 927 S.W.2d 411, 419 (Mo. App. 1996)).

¹²⁵ *Id.*

¹²⁶ *See* Interview with Kathleen Lear *supra* note 43.

¹²⁷ State v. Davis, 318 S.W.3d 618, 631–32 (Mo. banc 2010).

¹²⁸ *Id.*

Public defender salaries are determined by the MSPD Commission.¹²⁹ There are four different salary classifications within MSPD, ranging from Assistant Public Defender I, with a salary of \$37,296 to Assistant Public Defender IV, with a salary of \$60,324.¹³⁰

The base salary for an attorney in the MSPD Capital Division is \$55,104.¹³¹ This includes the \$49,104 base salary for an Assistant Public Defender III plus an Associate Capital Attorney Differential of \$6,000 per year.¹³² All lead capital counsel receive a base salary plus a \$12,000 Lead Capital Attorney Differential.¹³³ Salaries for attorneys in the MSPD Capital Division currently range from \$66,324 for a six-year tenured public defender to \$81,948 for a twenty-five-year tenured public defender.¹³⁴ Salaries for the attorneys serving as District Defenders of the Capital Divisions range from \$80,520 for the Kansas City District Defender who has been employed by MSPD for thirteen years to \$95,196 for the St. Louis District Defender who has been with MSPD for twenty-eight years.¹³⁵

Salaries for the attorneys in the MSPD Appellate/PCR Division who are qualified to handle capital post-conviction proceedings range from \$72,324 to \$81,948.¹³⁶ Attorneys who are statutorily qualified to handle capital post-conviction proceedings earn a base salary commensurate with their pay scale plus a \$12,000 Capital Post-conviction Differential.¹³⁷ An MSPD Appellate/PCR attorney with approximately ten years of experience with MSPD is paid an annual salary of \$72,324 while an Appellate/PCR attorney with approximately twenty-four years of experience with MSPD is paid an annual salary of \$81,948.¹³⁸

The starting salary for an MSPD investigator is \$28,596.¹³⁹ The starting salary for a Capital Division Investigator is \$37,296.¹⁴⁰ Currently, the highest paid Capital Division investigator earns \$40,968.¹⁴¹ The starting salary for an MSPD mitigation specialist is \$34,644.¹⁴² The highest paid MSPD mitigation specialist earns \$40,968.¹⁴³

b. Private Counsel

¹²⁹ Section 600.021.3, RSMo 2011.

¹³⁰ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16.

¹³¹ *Id.*; Interview with Karen Kraft, *supra* note 23.

¹³² *See* 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16. All attorneys in the Capital Division must be at least an Assistant Public Defender III. Interview with Karen Kraft, *supra* note 23.

¹³³ *See* 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16.

¹³⁴ *See id.*; *see also* Interview with Karen Kraft, *supra* note 23.

¹³⁵ Interview with Karen Kraft, *supra* note 23.

¹³⁶ Interview with Greg Mermelstein, *supra* note 30.

¹³⁷ *See* 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16.

¹³⁸ Interview with Greg Mermelstein, *supra* note 30.

¹³⁹ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16.

¹⁴⁰ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16; *see also* Interview with Karen Kraft, *supra* note 23 (noting that Capital Division investigators start as Investigator III).

¹⁴¹ Interview with Karen Kraft, *supra* note 23.

¹⁴² *Id.*

¹⁴³ Interview with Kathleen Lear *supra* note 43; *see also* Interview with Karen Kraft, *supra* note 23.

MSPD uses a “modified flat-fee rate” for the compensation of contract counsel.¹⁴⁴ The contract counsel fee is negotiated by MSPD prior to representation.¹⁴⁵ The current contract fee for a capital case is \$15,000 per attorney.¹⁴⁶ The fee may be negotiated if there are “special circumstances” requiring an additional modification.¹⁴⁷ Additionally, MSPD provides all contract counsel with a per diem fee for trial representation.¹⁴⁸

In cases in which private attorneys are appointed by the court, the Supreme Court of Missouri has held that it is the duty of the Missouri Bar to represent indigent defendants even if no compensation is available.¹⁴⁹ However, the Court warned that “there are many criminal cases that are sufficiently difficult or complex that an appointment to provide representation without compensation may be oppressive or confiscatory, especially if the burden of providing such representation falls on the relatively few lawyers who appear fully qualified to defend difficult criminal cases.”¹⁵⁰

6. Training Requirements and Training Opportunities

Apart from the continuing legal education requirements for all attorneys,¹⁵¹ Missouri has not enacted rules, regulations, or requirements for the training of attorneys who represent capital defendants at trial and on direct appeal.

In 2009, the Office of State Court Administrators received federal grant funding to support a capital litigation seminar made available to all Missouri prosecutors, defense attorneys, and judges handling death penalty cases.¹⁵² Additionally, attorneys in Missouri have the opportunity to attend general criminal defense seminars offered by the Missouri Association of Criminal Defense Lawyers on topics such as eyewitness identification and DNA analysis.¹⁵³

a. MSPD

The MSPD Training Division is tasked with the training all MSPD staff.¹⁵⁴ MSPD training is funded through the Legal Defense and Defender Fund.¹⁵⁵ While MSPD does not require specific

¹⁴⁴ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 78. MSPD has not contracted with a private attorney to represent a capital defendant at trial since 2007. Interview with Karen Kraft, *supra* note 23.

¹⁴⁵ Interview with Peter Sterling, *supra* note 65.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; *see also* 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 78.

¹⁴⁸ Interview with Peter Sterling, *supra* note 65.

¹⁴⁹ *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 65-67 (Mo. banc 1981). *But cf.* *State ex rel. Mo. Pub. Defender Comm’n v. Pratte*, 298 S.W.3d 870, 889 (Mo. banc 2009).

¹⁵⁰ *Pratte*, 298 S.W.3d at 889.

¹⁵¹ Rule 15.05(a) (requiring all attorneys to complete fifteen hours of continuing legal education each year, two of which must be related to professionalism, ethics or malpractice prevention).

¹⁵² Capital Litigation Initiative: Bringing the Players Together (Dec. 9-11, 2009) (Federal Grant No. 2008-CP-BX-0003 received by the Missouri Office of State Courts Administrator).

¹⁵³ MO. ASS’N OF CRIMINAL DEFENSE LAWYERS, http://www.macdl.net/missouri_cle_hours.aspx (last visited Oct. 29, 2010). One capital specific workshop was offered prior to 2003; however, there are no records available of this workshop. Telephone Interview by Rachel Bays with Mo. Ass’n of Criminal Defense Lawyers (Aug. 27, 2010) (on file with author).

¹⁵⁴ *See Working for MSPD: Training Division*, MO. STATE PUB. DEFENDER, <http://www.publicdefender.mo.gov/employment/training.htm> (last visited Oct. 29, 2010).

training for attorneys who represent capital defendants at trial and direct appeal, MSPD has made both in-house and external trainings available to its Capital Division attorneys.¹⁵⁶

b. Private Bar Attorneys

There are no training capital requirements for private bar attorneys who are contracted by MSPD, appointed by the court, or retained by the defendant. In the past, MSPD has provided training to contract counsel, however this training is no longer offered.¹⁵⁷

c. Appellate/PCR Attorneys

Missouri statutory law requires that at least one attorney representing a death row inmate during state post-conviction proceedings has “attended and successfully completed within two years immediately preceding the appointment” a minimum of twelve hours of training or educational programs on criminal post-conviction and death penalty litigation.¹⁵⁸ In order for the MSPD Appellate/PCR attorneys to meet these requirements, MSPD will either provide training seminars or funding for attorneys to attend national and regional seminars.¹⁵⁹

C. Attorneys Handling Federal Habeas Petitions: Appointment, Qualifications, Training, and Resources Available

Pursuant to federal statutory law, a death-sentenced inmate petitioning for federal habeas relief in one of Missouri’s two federal judicial districts is entitled to the appointment of counsel and other services if s/he “is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.”¹⁶⁰ Missouri’s two federal judicial districts have an Office of the Federal Public Defender, with multiple office locations throughout the district.¹⁶¹

Death-sentenced inmates entitled to a court-appointed attorney must be provided “one or more” qualified attorneys prior to the filing of a formal, legally sufficient federal habeas petition.¹⁶² To be qualified for appointment in federal habeas proceedings, at least one of the appointed attorneys must have been admitted to practice within the U.S. Court of Appeals for the Eighth Circuit for a minimum of five years, in addition to having a minimum of three years experience

¹⁵⁵ Section 600.090.5, RSMo 2011 (referencing section 600.042.1(7), RSMo 2011); 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 17.

¹⁵⁶ Interview with Karen Kraft, *supra* note 23.

¹⁵⁷ *Id.*; Interview with Peter Sterling, *supra* note 65.

¹⁵⁸ Section 547.370.2(1), RSMo 2011.

¹⁵⁹ Interview with Greg Mermelstein, *supra* note 30.

¹⁶⁰ 18 U.S.C. § 3599(a)(1)–(2) (2011) (stating that a death-sentenced inmate is entitled to the appointment of one or more attorneys before judgment; after the entry of a judgment imposing a sentence of death but before the execution of that judgment; and in any post-conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence); *see also* *McFarland v. Scott*, 512 U.S. 849, 856–57 (1994).

¹⁶¹ The Office of the Federal Public Defender in the Eastern District of Missouri has two locations: St. Louis and Cape Girardeau. The Office of the Federal Public Defender in the Western District of Missouri has three locations: Kansas City, Jefferson City, and Springfield. *See Federal Public & Community Defender Directory*, FD.ORG, 9 (Jan. 4, 2011), available at http://www.fd.org/pdf_lib/defenderdir.pdf.

¹⁶² 18 U.S.C. § 3599(a)(2) (2011).

handling felony appeals in the Eighth Circuit.¹⁶³ For good cause, the court has the authority to appoint counsel “whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.”¹⁶⁴

Under federal statutory law attorneys appointed to represent a death-sentenced inmate are entitled to compensation at a rate of not more than \$178 per hour for both in-court and out-of-court work.¹⁶⁵

The court may authorize “fees and expenses paid for investigative, expert, and other reasonably necessary services . . . not [to] exceed \$7,500.”¹⁶⁶ However, the court also has the authority to certify payments in excess of the \$7,500 limit in order to “provide fair compensation for services of an unusual character or duration, and the amount of the excess is approved by the chief judge of the circuit or his representative.”¹⁶⁷ In order for the inmate to receive an ex parte hearing for the request of investigative, expert, or other services, s/he is required to make a “proper showing . . . concerning the need for confidentiality.”¹⁶⁸ The Eastern District of Missouri has held that a “proper showing” means illustrating a sufficient case-specific showing of the need for confidentiality and not merely a generic showing of confidentiality “of the sort which arises in most capital cases.”¹⁶⁹

D. Appointment of Attorneys Handling Clemency Petitions

Death row inmates who receive counsel pursuant to federal statutory law are eligible for representation through clemency proceedings.¹⁷⁰ The U.S. Supreme Court held in 2009 that “section 3599 [of Title 18 of the United States Code] authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation.”¹⁷¹

¹⁶³ 18 U.S.C. § 3599(b)–(c) (2011).

¹⁶⁴ 18 U.S.C. § 3599(d) (2011).

¹⁶⁵ 18 U.S.C. § 3599(g)(1) (2011); U.S. COURTS, *Federal Death Penalty and Capital Habeas Representations, in* GUIDE TO JUDICIARY POLICY (2011), available at <http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol07A-Ch06.pdf>. The hourly rate was raised from \$125 on January 1, 2010. 18 U.S.C. § 3599(g)(1) (2011). The Judicial Conference can further adjust this rate “up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule.” GUIDE TO JUDICIARY POLICY, *supra*.

¹⁶⁶ 18 U.S.C. § 3599(g)(2) (2011).

¹⁶⁷ *Lyons v. Luebbers*, No. 4:01-CV-422-CAS, 2007 WL 1796212, at *2 (E.D. Mo. June 19, 2007).

¹⁶⁸ *Barnett v. Roper*, No. 4:03CV00614 ERW, slip op. at *1 (E.D. Mo. Apr. 1, 2010).

¹⁶⁹ *Id.* (quoting *Graves v. Johnson*, 101 F. Supp. 2d 496, 499 (S.D. Tex. 2000) (citation omitted)).

¹⁷⁰ 18 U.S.C. § 3599(e) (2011); *see also Harbison v. Bell*, 129 S. Ct. 1481, 1491 (2009).

¹⁷¹ *Harbison*, 129 S. Ct. at 1491.

II. ANALYSIS

A. Recommendation #1

In order to ensure high-quality legal representation for all individuals facing the death penalty, each death penalty jurisdiction should guarantee qualified and properly compensated counsel at every stage of the legal proceedings—pretrial (including arraignment and plea bargaining), trial, direct appeal, all certiorari petitions, state post-conviction and federal habeas corpus, and clemency proceedings. Counsel should be appointed as quickly as possible prior to any proceedings.

Under state and federal law, an indigent defendant charged with or convicted of a capital offense in the State of Missouri is guaranteed counsel at pre-trial proceedings, at trial, and on direct appeal.¹⁷² During state post-conviction proceedings, counsel is only provided to an indigent death row inmate once the inmate has filed his/her facially-sufficient pro se state post-conviction relief motion.¹⁷³ Additionally, under federal law an indigent death row inmate is entitled to counsel through federal habeas proceedings, and that counsel is authorized to continue his/her representation through clemency proceedings.¹⁷⁴

Generally, indigent defendants who are entitled to appointed counsel during pre-trial proceedings, at trial, and on direct appeal are appointed counsel from the Missouri State Public Defender (MSPD) system, at arraignment or initial court appearance.¹⁷⁵ Typically, the MSPD Trial Division is assigned all first-degree murder cases.¹⁷⁶ However, once the prosecution has indicated its intent to seek the death penalty, the case will be transferred to the MSPD Capital Division.¹⁷⁷ Similarly, indigent death row inmates are appointed counsel from the MSPD Appellate/Post-Conviction Relief (Appellate/PCR) Division, for representation during state post-conviction proceedings.¹⁷⁸ If new counsel is appointed to represent the death row inmate during federal habeas proceedings, s/he must be appointed prior to the filing of a formal, legally-sufficient habeas petition.¹⁷⁹

The adequacy of compensation provided to defense counsel in capital cases will be discussed in Recommendation #4.

¹⁷² Rule 31.02(a), (c).

¹⁷³ Section 547.360.5, RSMo 2011. Once the indigent inmate has filed his/her state post-conviction motion pro se, the court will appoint two attorneys to represent the defendant. Section 547.370.1, RSMo 2011. Counsel will have the opportunity to amend the inmate's pro se motion upon appointment. Section 547.360.5, RSMo 2011.

¹⁷⁴ 18 U.S.C. § 3599(a)(2) (2011); *see also* *McFarland v. Scott*, 512 U.S. 849, 856–57 (1994); *Harbison v. Bell*, 129 S. Ct. 1481, 1486 (2009).

¹⁷⁵ Sections 600.042, 545.820, RSMo 2011; Rule 24.02. *See also* Interview with Karen Kraft, *supra* note 23.

¹⁷⁶ Interview with Karen Kraft, *supra* note 23.

¹⁷⁷ *Id.*

¹⁷⁸ Section 547.370.1, RSMo 2011. *See also* Interview with Greg Mermelstein, *supra* note 30.

¹⁷⁹ *McFarland v. Scott*, 512 U.S. 849, 856–57 (1994). “Requiring an indigent capital petitioner to proceed without counsel in order to obtain counsel thus would expose him to the substantial risk that his habeas claims never would be heard on the merits.” *Id.* at 856.

1. **At minimum, satisfying this standard requires the following (as articulated in Guideline 4.1 of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*): At least two attorneys at every stage of the proceedings qualified in accordance with *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 5.1 (reproduced below as Recommendation #2), an investigator, and a mitigation specialist.**

State and federal law does not guarantee the appointment of two attorneys at all stages of the capital legal proceedings. No Missouri statute or rule guarantees access to investigators and mitigation specialists. The qualification requirements for attorneys appointed in all legal proceedings will be discussed in Recommendation #2.

Appointment of Counsel

There are no Missouri statutes or rules requiring the appointment of two attorneys to represent capital defendants at trial or on direct appeal. However, the MSPD Capital Division routinely assigns two attorneys to represent a capital defendant during pretrial proceedings and at trial.¹⁸⁰ MSPD only provides one attorney to represent the capital defendant on direct appeal.¹⁸¹ Missouri law does require two attorneys be appointed to represent death row inmates during state post-conviction relief proceedings.¹⁸²

When the MSPD Capital Division is unable to accept a capital defendant's case due to either a conflict of interest or excessive caseload,¹⁸³ MSPD will contract with private bar attorneys to represent the capital defendant.¹⁸⁴ MSPD typically will—but is not required to—contract with two attorneys to handle a capital case.¹⁸⁵

Upon the filing of a pro se state post-conviction motion and a finding of indigency by the court, a death row inmate is statutorily required to have two counsel appointed to represent him/her during these proceedings.¹⁸⁶ If the court appoints MSPD, two attorneys from the Appellate/PCR Division will represent the inmate.¹⁸⁷ However, MSPD only appoints one post-conviction appellate attorney to represent an inmate on appeal from a denial of a post-conviction relief motion.¹⁸⁸

¹⁸⁰ Interview with Karen Kraft, *supra* note 23. “There are at least two attorneys assigned to every case” in the Capital Division. *Id.*

¹⁸¹ *Id.* The MSPD attorneys that are responsible for handling a capital defendant's direct appeal are located within the Capital Division offices. *Id.*

¹⁸² Section 547.370, RSMo 2011.

¹⁸³ Interview with Karen Kraft, *supra* note 23.

¹⁸⁴ *Id.*; Interview with Peter Sterling, *supra* note 65.

¹⁸⁵ Interview with Karen Kraft, *supra* note 23. “Those who do not have prior capital experience must be experienced criminal defense practitioners with previous murder experience and every effort is made to pair them with an experienced capital litigator in any capital case assignment.” *Id.*

¹⁸⁶ Section 547.370, RSMo 2011.

¹⁸⁷ Interview with Greg Mermelstein, *supra* note 30.

¹⁸⁸ *Id.*

Generally, if MSPD represented the inmate during his/her capital trial proceedings and on direct appeal, upon the denial of the direct appeal, the inmate's case will be transferred to the Appellate/PCR Division to ensure the inmate meets the filing deadline for the pro se post-conviction relief motion.¹⁸⁹ However, an indigent inmate that was not represented by MSPD during his/her capital trial is not guaranteed any assistance in filing his/her pro se post-conviction relief motion.¹⁹⁰

Federal law provides that indigent death row inmates seeking federal habeas relief will receive the appointment of "one or more attorneys."¹⁹¹ Federal habeas counsel is also authorized to continue representing his/her indigent client through state clemency proceedings.¹⁹² However, two attorneys are not required under federal law for federal habeas relief, nor during the death-row inmate's clemency proceedings.¹⁹³

Access to Investigators and Mitigation Specialists

Attorneys appointed to represent an indigent capital defendant or a death row inmate may have—but are not guaranteed—access to investigators and mitigation specialists at trial, on direct appeal, during state post-conviction proceedings, during federal habeas proceedings, and in clemency proceedings. Access to, and procedures for, obtaining such experts will be discussed under Subsection b.

- 2. At least one member of the defense should be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. Investigators and experts should not be chosen on the basis of cost of services, prior work for the prosecution, or professional status with the state.**

The State of Missouri does not require any member of the capital defense team to be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.¹⁹⁴ However, Missouri law does require that at least one member of the state post-conviction defense team have "attended and successfully completed within two years immediately preceding appointment at least twelve hours of training or educational programs on the post-conviction phase of a criminal case and federal and state aspects of cases in which the death penalty is sought."¹⁹⁵ In fulfilling this requirement, the attorney could—but is not mandated to—receive training on screening an individual for the presence of mental or psychological disorders or impairments.

¹⁸⁹ *Id.* The informal transfer of the inmate's post-conviction case from direct appeal counsel to Appellate/PCR counsel has occurred both during the pendency of the direct appeal, as well as after a direct appeal was denied. *Id.* This is not a formal appointment by the court, but rather an informal safeguard established by the Appellate/PCR Division to aid the inmate in meeting the filing deadline for state post-conviction proceedings. *Id.*

¹⁹⁰ See section 547.360, RSMo 2011. "When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant." *Id.*

¹⁹¹ 18 U.S.C. § 3599(a)(2) (2011); see also *McFarland v. Scott*, 512 U.S. 849, 856–57 (1994).

¹⁹² 18 U.S.C. § 3599(a)(2) (2011); see also *Harbison v. Bell*, 129 S. Ct. 1481, 1486 (2009).

¹⁹³ 18 U.S.C. § 3599(a)(2) (2011).

¹⁹⁴ See Interview with Karen Kraft, *supra* note 23.

¹⁹⁵ Section 547.370.2, RSMo 2011.

Additionally, Missouri requires that all attorneys complete at least fifteen hours of continuing legal education credits every year, which includes a requirement of two ethics credits.¹⁹⁶ It is conceivable that in fulfilling these requirements, an attorney could receive training on screening individuals for the presence of mental or psychological disorders or impairments. Specifically, the MSPD Capital Division attorneys had the opportunity to attend the National Consortium on Capital Defense Training’s Capital Mental Health Training II in 2009.¹⁹⁷ However, there was no requirement that the capital attorneys attend the training.¹⁹⁸

- 3. A plan for defense counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high-quality legal representation at every stage of the proceedings. The plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.**
 - a. Counsel should have the right to seek such services through ex parte proceedings, thereby protecting confidential client information.**
 - b. Counsel should have the right to have such services provided by persons independent of the government.**
 - c. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.**

The State of Missouri requires that attorneys representing defendants charged with or convicted of a capital offense have access to expert services in preparing and presenting a defense.¹⁹⁹ Generally, only indigent defendants receiving representation through MSPD will have access to the MSPD investigators and mitigation specialists.²⁰⁰ Court appointed attorneys or attorneys contracted by MSPD to represent capital defendants must request funding for experts, including investigators and mitigations specialists.²⁰¹ However, the MSPD mitigation specialists have assisted contract counsel in a “number of cases.”²⁰²

MSPD Access to Experts

As of June 2010, the MSPD Capital Division employed four mitigation specialists and four investigators.²⁰³ In order to obtain any other expert or ancillary services, public defenders must

¹⁹⁶ Rule 15.05(a).

¹⁹⁷ Interview with Karen Kraft, *supra* note 23.

¹⁹⁸ *Id.*

¹⁹⁹ *Hutchison v. State*, 150 S.W.3d 292, 307 (Mo. banc 2004) (“Due process mandates that a defendant facing the death penalty have access to a competent expert who will conduct an appropriate examination and assist in the evaluation, preparation and presentation of evidence”) (citing *Ake v. Oklahoma*, 470 U.S. 68, 84 (1985)).

²⁰⁰ Interview with Karen Kraft, *supra* note 23.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* The investigators within MSPD are generally responsible for the investigation of “guilt phase” evidence for a capital case, while the mitigation specialists are typically responsible for investigating “penalty phase” issues. *Id.* However, there are cases in which mitigation specialists and investigators will cross roles and aid the other in the investigation of the other phase. *Id.* The Capital Division investigators have used Trial Division investigators “to help with some tasks” when the investigator’s cases are spread throughout the state. *Id.*

make all requests to the Capital Division District Defender.²⁰⁴ Requests for expert services are determined on a case-by-case basis through an internal MSPD process, which begins with receiving approval from the attorney's District Defender.²⁰⁵ If the funding request is determined to be warranted, the District Defender will submit the request for funds for a second level of review, which is conducted by one of the following: the Trial Division Director, the Capital Division Director, the Appellate/PCR Director, the MSPD Deputy Director, or the MSPD General Counsel.²⁰⁶ Review of the funding requests rotates weekly between these five individuals who determine whether the request should be approved, denied, or amended with supplemental information.²⁰⁷ If the request is approved, the attorney may then hire a private expert to perform the needed services.²⁰⁸ Funds for expert and mental health services are included in MSPD's allocated budget.²⁰⁹

MSPD Contracted Attorneys' Access to Experts

Attorneys that are contracted by MSPD to handle a capital case must submit requests for funds to the MSPD General Counsel or Deputy Director.²¹⁰ Funding requests are usually approved within three to five business days.²¹¹ Once approved, the expert will invoice MSPD directly.²¹² While contract attorneys may use MSPD investigators and mitigation specialists, MSPD prefers for contract attorneys to secure their own experts.²¹³

Court Appointed and Retained Attorneys' Access to Experts

Private bar attorneys that are not contracted through MSPD but are, instead, appointed by the court to handle a capital case are eligible for reasonable and necessary litigation costs.²¹⁴

While counsel is entitled to these costs, the genesis of the funds differs depending on the reason for counsel's appointment. If counsel is appointed by the court because MSPD has reached its maximum case load, and has thus refused any further appointments, MSPD is responsible for funding "reasonable and necessary litigation costs including expert witness fees, deposition fees,

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Interview with Karen Kraft, *supra* note 23. If questions arise concerning the funding for a capital case, the issue will be directed to the Capital Division Director for his/her input and review. *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* MSPD internal policies and procedures on mental health evaluations require the MSPD attorney to advise the mental health expert of the approved fees and, if additional fees are required, the expert is not to continue working on the case until additional funds are approved. MO. STATE PUB. DEFENDER, POLICIES AND PROCEDURES, *Mental Health Evaluations for Public Defender Clients* (effective Dec. 10, 2005) (on file with author).

²⁰⁹ Interview with Karen Kraft, *supra* note 23. *See also* State *ex rel.* Jordon v. Mehan, 597 S.W.2d 724 (Mo. App. 1980).

²¹⁰ Interview with Peter Sterling, *supra* note 65.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*; Interview with Karen Kraft, *supra* note 23.

²¹⁴ 18 CSR 10-4.010(5). This rule is applicable when private bar attorneys are appointed by the court during a period where MSPD has closed its doors to accepting any new cases due to excessive caseloads. *Id.*; *see also* State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64, 67 (1981) (requiring the payment of "reasonable and necessary costs ordered advanced by the court").

and transcript costs to the extent funds are available to do so.”²¹⁵ As such, the court-appointed attorney must apply to the MSPD Director, or the Director’s designee, for payment of litigation costs.²¹⁶

In rare instances, a private bar attorney may be appointed by the court to represent an indigent defendant when MSPD is accepting new appointments.²¹⁷ An attorney appointed by the court may also be entitled to reasonable expenses, even if the attorney is not otherwise being compensated.²¹⁸ However, these requests for expert and ancillary services must be submitted to the court for approval.²¹⁹ If the court approves the expenses, the court may order the Governor to seek funds from the General Assembly to be deposited into the circuit court’s depository.²²⁰ If the General Assembly fails to produce the necessary funds, the circuit court may dismiss the case.²²¹

If a capital defendant retains his/her own private counsel, but is unable to provide the requisite funding to hire experts, s/he is eligible for funding through MSPD if the defendant is determined to be indigent, and the private attorney’s retainer is commensurate with the MSPD contract counsel fee.²²²

Attorneys Representing Death-sentenced Inmates During State Post-conviction Proceedings

Once a death row inmate has filed his/her facially-sufficient pro se post-conviction relief motion, the court must appoint two attorneys to represent the inmate during the post conviction relief proceedings.²²³ Missouri does not mandate that a death row inmate receive access to a mitigation specialist or investigator during his/her capital state post-conviction proceedings.

However, as of August 2010, the MSPD Appellate/PCR Division employed three mitigation specialists and two investigators.²²⁴ The investigators and mitigation specialists within the Appellate/PCR Division are assigned to both capital and non-capital cases.²²⁵

²¹⁵ 18 CSR 10-4.010(5).

²¹⁶ *Id.*

²¹⁷ *See, e.g.,* State v. Brown, 722 S.W.2d 613, 614 (Mo. App. 1986) (allowing for the court appointment of private counsel in a securities fraud case when the public defender moved to withdraw due to a lack of “expertise in the area here involved”).

²¹⁸ Williamson v. Vardeman, 674 F.2d 1211, 1216 (8th Cir. 1982) (holding that it is an unconstitutional “taking” to require attorneys to advance payment for expenses incurred in representation of indigent defendants).

²¹⁹ State *ex rel.* Pub. Defender Comm’n v. Williamson, 971 S.W.2d 835 (Mo. App. 1998) (citing State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64, 67 (Mo. banc 1981)).

²²⁰ Brown, 722 S.W.2d at 620–21 (citing State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64, 67 (Mo. banc 1981)).

²²¹ *Id.*

²²² *See* section 600.086.3, RSMo 2011; 18 CSR 10-3.010; *see also* Williams v. State, 254 S.W.3d 70 (Mo. App. 2008) (finding that even though a capital defendant’s parents retained a private attorney to handle the capital defense, the capital defendant was entitled to receive funds to hire a psychiatrist for consultation or to perform necessary evaluations because the defendant was found to be indigent). *See also* Interview with Kathleen Lear, *supra* note 43.

²²³ Section 547.370.1, RSMo 2011.

²²⁴ Interview with Greg Mermelstein, *supra* note 30. There are currently no existing formal MSPD policies or procedures for assigning investigators or mitigation specialists to a particular capital case. *Id.*

²²⁵ *Id.*

Appellate/PCR attorneys within MSPD who desire funding for additional expert assistance or other ancillary services must file a request using the same internal request process as the MSPD Capital Division.²²⁶

Attorneys Representing Death Row Inmates in Federal Habeas and Clemency Proceedings

Indigent death row inmates petitioning for federal habeas relief may request, and the federal court may authorize, an inmate's attorneys to obtain investigative, expert, or other necessary services on behalf of the inmate.²²⁷ The fees for these services may not exceed the amount of \$7,500 in any case, unless payment in excess of the limit has been certified by the court.²²⁸ Similarly, in cases in which federal habeas counsel has continued his/her representation of the inmate through clemency proceedings, the attorney will also have access to experts and investigators to prepare for those proceedings.²²⁹

Conclusion

The State of Missouri is in partial compliance with Recommendation #1.

Under state and federal law, individuals charged with a capital felony or sentenced to death are not guaranteed two attorneys during the capital trial or on the direct appeal. Although MSPD attempts to assign two attorneys to defendants represented by the MSPD Capital Division, or attorneys contracted through MSPD, Missouri provides no guarantee that a capital defendant will be represented by two attorneys at the capital trial or on direct appeal.

While Missouri has implemented guidelines for the appointment of state post-conviction counsel, these guidelines only apply after the inmate has filed his/her facially-sufficient pro se state post-conviction relief motion, thereby requiring the inmate to file the post-conviction relief motion within the prescribed deadline without the assistance of counsel. Upon an appeal of a post-conviction motion, MSPD will provide the death-sentenced inmate with the assistance of only one appellate attorney. Additionally, federal law guarantees that a death row inmate receives at least one attorney during federal habeas proceedings, and that counsel is authorized to continue his/her representation through state clemency proceedings.

While Missouri law does provide that a capital defendant or death row inmate is entitled to expert services, there is no guarantee that defendants not represented by MSPD will have the benefit of both an investigator and mitigation specialist.

The Missouri Assessment Team applauds MSPD's effort to staff each capital case with two attorneys, a mitigation specialist, and an investigator. However, because Missouri prosecutors

²²⁶ *Id.*

²²⁷ *Harbison v. Bell*, 129 S. Ct. 1481, 1486 (2009) (citing 18 U.S.C. § 3599(f) (2009)) (“Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant’s attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor . . .”).

²²⁸ 18 U.S.C. § 3599(g)(2) (2011).

²²⁹ *See Harbison*, 129 S. Ct. at 1485–86.

are not required to file a notice of aggravators at the time of indictment, it may be several months before a capital case is transferred from the local Trial Division office to the Capital Division. As such, a capital defendant may wait several months before receiving capital counsel, mitigation specialists, or investigators. It is impossible for the Capital Division to represent every first-degree murder case in anticipation that the case may eventually become a capital case. Furthermore, because the decision to seek the death penalty is left to the discretion of each Prosecuting Attorney, MSPD is unable to predict which cases will eventually become capital. Finally, no member of the defense team is required to be qualified by experience or training to screen the defendant for mental or psychological disorders or conditions.

Accordingly, the Missouri Death Penalty Assessment Team recommends that Missouri adopt a statute or rule requiring that all capital defendants receive two qualified defense counsel, a mitigation specialist, and an investigator at a minimum during pretrial proceedings, at trial, and during state post-conviction proceedings, consistent with the *ABA Guidelines*.

The State of Missouri should adopt a statute or rule requiring that at least one member of the capital defense team—either an attorney, the mitigation specialist, or the investigator—receive the requisite amount of training and continuing education, thereby qualifying the individual to screen for mental and psychological disorders or conditions.

In order to ensure that all capital defendants receive qualified capital counsel at all stages of the legal proceedings, the Assessment Team recommends that MSPD create a division that is responsible for representing all defendants charged with first-degree murder, regardless of whether the prosecutor has filed a notice of intent to seek the death penalty. This division should be staffed with capital attorneys, mitigation specialists, and investigators. The Team acknowledges that additional funding will be needed to adequately staff a first-degree murder division and urges the legislature to provide such funding in order to ensure that capital defendants are adequately represented throughout the legal proceedings.

Finally, the Assessment Team recommends that the Supreme Court of Missouri adopt a court rule requiring trial judges to allow a reasonable time for defense counsel to prepare after the prosecutor has noted his/her intent to seek the death penalty. The Team emphasizes that the preparation for a capital murder trial requires significantly more time than a non-capital trial. In addition to the severity of the punishment, the sentencing phase of the trial requires extensive mitigation investigation and preparation. As such, defense counsel should be given adequate time to prepare after s/he is alerted that the prosecution will seek the death penalty.

B. Recommendation #2

Qualified Counsel (Guideline 5.1 of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*):

- 1. The jurisdiction should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high-quality legal representation.**
- 2. In formulating qualification standards, the jurisdiction should ensure:**

- a. **That every attorney representing a capital defendant has:**
 - i. **Obtained a license or permission to practice in the jurisdiction;**
 - ii. **Demonstrated a commitment to providing zealous advocacy and high-quality legal representation in the defense of capital cases; and**
 - iii. **Satisfied the training requirements set forth in Guideline 8.1.**

- b. **That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high-quality legal representation. Accordingly, the qualification standards should ensure that the pool includes sufficient numbers of attorneys who have demonstrated:**
 - i. **Substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;**
 - ii. **Skill in the management and conduct of complex negotiations and litigation;**
 - iii. **Skill in legal research, analysis, and the drafting of litigation documents;**
 - iv. **Skill in oral advocacy;**
 - v. **Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;**
 - vi. **Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;**
 - vii. **Skill in the investigation, preparation, and presentation of mitigating evidence; and**
 - viii. **Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.**

The State of Missouri has not developed a specific set of qualifications for attorneys representing defendants charged with a capital offense at trial or on direct appeal. However, section 537.370 of the Missouri Revised Statutes provides minimum qualification standards for attorneys handling death penalty cases during state post-conviction proceedings.²³⁰

Qualifications for Attorneys Handling Death Penalty Cases at Trial and on Direct Appeal

Missouri requires capital defense counsel to be licensed by the State of Missouri to practice law or admitted to practice pro hac vice.²³¹ This is the only requirement that the State has placed on attorneys representing capital defendants at trial and on direct appeal.

Specifically, there are no requirements that attorneys representing capital defendants at trial or on direct appeal demonstrate a specific commitment to providing zealous advocacy and high-quality legal representation in the defense of capital cases.²³² Furthermore, there are no qualifications or

²³⁰ Section 537.370, RSMo 2011.

²³¹ Section 600.021.2, RSMo 2011.

²³² *But cf. Mission and Principles*, MO. STATE PUB. DEFENDER, <http://www.publicdefender.mo.gov/about/mission.htm> (last visited Oct. 14, 2011) (explaining that the mission of the MSPD is “to provide high quality, zealous advocacy for indigent people who are accused of crime in the State of Missouri”).

rules regarding the necessary training for counsel representing a capital defendant at trial or on direct appeal.

The MSPD Capital Division employs attorneys who are tasked with representing defendants charged with a capital offense; however, MSPD has not promulgated qualification standards, specific to capital attorneys, to ensure that the attorneys employed within the MSPD Capital Division are providing the highest quality legal representation.²³³

There are also no qualification standards for private bar attorneys representing capital defendants who are retained by a defendant, appointed by the court, or contracted by MSPD. Four of the forty-eight current death row inmates did not receive the benefit of representation by the MSPD Capital Division.²³⁴ In selecting contract counsel, MSPD “strive[s] to ensure that at least one of the two attorneys hired on the case has experience handling capital cases, but this is not always possible.”²³⁵ Additionally, there are no requirements or qualification standards for attorneys appointed by the court or retained by the defendant.

The only standards for measuring defense counsel’s performance at trial and on direct appeal are those applied by the appellate courts in making an ineffective assistance of counsel determination.²³⁶ The lack of qualification standards for private bar attorneys has resulted in unqualified counsel representing defendants at trial and on direct appeal. Unqualified counsel combined with a failure to supervise can have a significant impact in capital cases. For example, in one case in which MSPD contracted with two private bar attorneys to represent a capital defendant, one of the attorneys had never before tried a murder case.²³⁷ This attorney represented the defendant during the sentencing phase of the trial but failed to uncover and present any mitigation evidence related to the physical, sexual and emotional abuse suffered by the defendant during his childhood; his diagnosis of post-traumatic stress disorder; and his abuse of drugs and alcohol.²³⁸

Qualifications for Attorneys Handling Capital Cases During State Post-conviction Proceedings

In 1997, the State of Missouri enacted legislation providing minimum qualification standards for attorneys handling a capital case during state post-conviction proceedings.²³⁹ Under section

²³³ Cf. MO. STATE PUB. DEFENDER, POLICIES AND PROCEDURES (effective Nov. 1, 1992) (on file with author) (policies and procedures applicable to all MSPD attorneys).

²³⁴ See *Current Inmates*, Mo. State Pub. Defender, <http://missourideathrow.com/current-inmates> (last visited Jan. 13, 2011). The four defendants were William Boliek, Charles Mathenia, Roosevelt Pollard, and Elroy Preston. *Id.*

²³⁵ Interview with Karen Kraft, *supra* note 23. The MSPD General Counsel and the MSPD Deputy Director will contract with private bar attorneys whom they believe have the qualifications to handle a capital case. Interview with Peter Sterling, *supra* note 65.

²³⁶ *Strickland v. Washington*, 466 U.S. 668 (1984).

²³⁷ *Link v. Luebbers*, 469 F.3d 1197, 1200 (8th Cir. 2006).

²³⁸ *Id.* at 1201.

²³⁹ Section 547.370, RSMo 2011. See also Rules 24.036, 29.16 (effective July 1997). Rule 24.036 provides for the appointment of counsel for an inmate sentenced to death following a guilty plea. Rule 29.16 provides for the appointment of counsel for an inmate sentenced to death following a trial. Missouri post-conviction rules do not meet the Antiterrorism and Effective Death Penalty Act (AEDPA) opt-in requirements for expedited review because Missouri’s rules on the appointment, payment, and compensation of competent post-conviction counsel “only offers the appointment of counsel to indigent prisoners under a capital sentence who file a petition for post-conviction

547.370 of the Missouri Revised Statutes, at least two attorneys must be appointed to represent a death row inmate during his/her state post-conviction proceedings.²⁴⁰ Additionally, both attorneys are required to be licensed to practice law in Missouri or admitted pro hac vice.²⁴¹ Before being appointed, at least one attorney must satisfy the following requirements:

- (1) Have at least three years litigation experience in the field of criminal law;
- (2) Have participated as counsel or co-counsel to final judgment in at least five post-conviction motions involving class A felonies in either state or federal trial courts; and
- (3) Have participated in either state or federal court as counsel or co-counsel to final judgment in at least: (a) three felony jury trials; or (b) five direct criminal appeals in felony cases.²⁴²

In addition to the required trial experience listed above, Missouri also mandates that at least one attorney handling the capital post-conviction proceedings have completed twelve hours of training and education on state and federal death penalty issues within the previous two years.²⁴³ MSPD is responsible for certifying that the attorney has met these requirements prior to the attorney filing his/her entry of appearance in the state post-conviction proceeding.²⁴⁴

The post-conviction representation requirements, in accord with ABA Guideline 5.1, mandate that counsel in state post-conviction proceedings be a member of the Missouri Bar or be admitted pro hac vice, but they do not mandate that attorneys handling death penalty cases demonstrate a specific commitment to providing zealous advocacy and high-quality legal representation. Additionally, while the state mandates twelve hours of training on state and federal death penalty issues within two years prior to the representation, the qualification standards do not contain all of the requisite training requirements as delineated in ABA Guideline 8.1. Specifically, there is no requirement that counsel complete training on international death penalty issues, the ethical obligations of attorneys representing capital defendants, or the effective use of investigators and mitigation specialists. The main criterion for the qualification of counsel in state post-conviction proceedings is experience. Experience, however, does not automatically translate into high-quality legal representation.

Conclusion

The State of Missouri is in partial compliance with Recommendation #2.

The Assessment Team applauds Missouri for enacting guidelines for the qualification of defense counsel representing death row inmates during state post-conviction proceedings. However, these standards fall below those required by the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)*.

relief, not all prisoners under a capital sentence, as required by AEDPA.” Hall v. Luebbers, 341 F.3d 706, 712 (8th Cir. 2003).

²⁴⁰ Section 547.370, RSMo 2011.

²⁴¹ Section 547.370.2, RSMo 2011.

²⁴² Section 547.370.2(2)–(4), RSMo 2011.

²⁴³ Section 547.370.2(1), RSMo 2011.

²⁴⁴ Section 547.370.2, RSMo 2011.

Furthermore, Missouri has not established any qualification standards for attorneys representing a capital defendant at trial and on direct appeal. Without a required demonstration of the skills outlined in Recommendation #2, Missouri cannot guarantee that each capital defendant is afforded the highest quality legal representation.

The Assessment Team acknowledges that, in practice, the MSPD Capital Division attempts to comply with the *ABA Guidelines*; however, to ensure that all MSPD capital attorneys and contract attorneys satisfy the requirements of the *ABA Guidelines*, the MSPD Commission should adopt qualification standards, consistent with the *ABA Guidelines*, for all MSPD attorneys and contract defense counsel handling capital cases at any stage of the proceedings.

Similar to the certification that is required of all attorneys representing death row inmates in post-conviction proceedings, a certifying body created by the MSPD Commission, the Missouri Bar Association, or the Supreme Court of Missouri should certify that at least one attorney representing a capital defendant in Missouri at trial and on direct appeal is qualified consistent with the *ABA Guidelines*. Furthermore, the certifying body should allow private retained counsel who are representing capital defendants to obtain certification under the *ABA Guidelines*, or equivalent standards, as an added protection to capital defendants who seek to retain private counsel. The MSPD Commission, the Missouri Bar Association, or the Supreme Court of Missouri should maintain a roster of those private attorneys who are certified to represent capital defendants. This list should be accessible to all capital defendants who seek to retain private counsel.

Such a certification system would only apply to attorneys representing capital defendants. In order to satisfy the certification requirements, attorneys would be required to demonstrate their compliance with the *ABA Guidelines* or equivalent standards through submission of an application and supporting documentation.

C. Recommendation #3

The selection and evaluation process should include:

- 1. A statewide independent appointing authority, not comprised of judges or elected officials, consistent with the types of statewide appointing authority proposed by the ABA (see *ABA Policy Recommendations on Death Penalty Habeas Corpus*, paragraphs 2 and 3, and Appendix B thereto, proposed section 2254(h)(1), (2)(I), reprinted in 40 Am. U. L. Rev. 1, 9, 12, 254 (1990), or *ABA Death Penalty Guidelines*, Guideline 3.1 Designation of a Responsible Agency), such as:**
 - a. A defender organization that is either:**
 - i. A jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**
 - ii. A jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**

b. An “Independent Authority,” that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.

MSPD is the statewide independent appointing authority, with the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of capital murder.²⁴⁵

MSPD Commission

MSPD is overseen by the MSPD Commission.²⁴⁶ The MSPD Commission is responsible for selecting the MSPD Director, Deputy Director, and public defenders.²⁴⁷ Additionally, the MSPD Commission is tasked with promulgating logistical and administrative rules for MSPD, determining the qualification criteria for public defenders, reviewing client complaints, and approving a fee schedule for private counsel contracted by MSPD.²⁴⁸ The MSPD Commission consists of seven members, appointed by the Governor, four of whom must be lawyers.²⁴⁹

MSPD Director

The MSPD Director is appointed by the Commission to serve as head of the Public Defender office and is responsible for the overall supervision of public defender staff.²⁵⁰ The MSPD Director is responsible for creating the policies and regulations that govern the individual public defender offices, maintaining accurate financial records, allocating funds to the several divisions, and supervising the training of all public defenders.²⁵¹

MSPD Capital Division

MSPD has created a statewide capital trial office which employs full time public defenders to handle the majority of capital trials in the state.²⁵² As of June 2010, the MSPD Capital Division employed seventeen attorneys.²⁵³ While the MSPD Capital Division is primarily a capital trial

²⁴⁵ See sections 600.011–.101, RSMo 2011.

²⁴⁶ Section 600.015.1, RSMo 2011.

²⁴⁷ Section 600.017(1), RSMo 2011.

²⁴⁸ Section 600.017(2), (3), & (7), RSMo 2011.

²⁴⁹ Section 600.015.1, RSMo 2011. The current commission only has six members, with one vacancy. See *The Commission*, MO. STATE PUB. DEFENDER, <http://publicdefender.mo.gov/about/commission.htm> (last visited Oct. 4, 2010). The current members are Eric Barnhart, a Republican Attorney from Florissant; Muriel Brison, a Democrat from Hermann; Douglas Copeland, a Republican Attorney from St. Louis, serving as the Chair of the Commission; Willie Ellis, a Democrat from Florissant; Miller Leonard, a Republican Attorney from Platte City (now in Denver, Colorado); and Nancy Watkins, a Democratic Attorney from Clayton. *Id.*

²⁵⁰ Sections 600.019.2, 600.042.1(1), RSMo 2011. The MSPD Director must be “an attorney with substantial experience in the representation of persons accused of crime” and must also have “experience in the administration of personnel and shall be dedicated to the goals of providing quality legal representation for eligible persons and of improving the quality of defense services generally.” Section 600.019.2, RSMo 2011.

²⁵¹ Section 600.042.1, RSMo 2011.

²⁵² *Capital Litigation*, MO. STATE PUB. DEFENDER, http://www.publicdefender.mo.gov/legal/capital_division.htm (last visited Oct. 14, 2011).

²⁵³ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 14; see also Interview with Karen Kraft, *supra* note 23.

office, recently it has been required to accept non-capital homicide and sexual assault cases, in order to ease the burden of the MSPD Trial Division.²⁵⁴

Additionally, housed within the MSPD Capital Division are three capital direct appeal attorneys who handle all MSPD capital direct appeals.²⁵⁵ The capital direct appeal attorneys may also be assigned non-capital direct appeals if the MSPD Appellate/PCR Division has an excessive caseload.²⁵⁶

MSPD Appellate/PCR Division

MSPD also provides a separate legal division responsible for non-capital direct appeals and all capital and non-capital post-conviction relief motions and appeals.²⁵⁷ As of August 2010, the MSPD Appellate/PCR Division employed seven attorneys who were statutorily qualified to handle capital post-conviction proceedings.²⁵⁸

2. Development and maintenance, by the statewide independent appointing authority, of a roster of eligible lawyers for each phase of representation.

MSPD does not maintain a roster of eligible capital attorneys.²⁵⁹ If the MSPD Capital Division is unable to represent a capital defendant due to a conflict of interest or excessive case load, MSPD will contract with private bar attorneys to handle the capital trial representation.²⁶⁰ MSPD does not require any specific standards or minimum qualifications for counsel who handle capital cases.²⁶¹ Instead, the MSPD General Counsel or the MSPD Deputy Director will contract with private bar attorneys who they know to have previous experience handling capital cases.²⁶² MSPD has not contracted a capital case to a private bar attorney since 2007.²⁶³ However, in 2007 contract counsel were assigned to six capital cases.²⁶⁴

²⁵⁴ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 11, 74; *see also* Interview with Karen Kraft, *supra* note 23.

²⁵⁵ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 74; *see also* Interview with Karen Kraft, *supra* note 23.

²⁵⁶ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 11, 74.

²⁵⁷ *Appellate/Post-conviction Relief Division*, MO. STATE PUB. DEFENDER, http://www.publicdefender.mo.gov/legal/appellate_PCR.htm (last visited Oct. 14, 2011); 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 68.

²⁵⁸ Interview with Greg Mermelstein, *supra* note 30. *See also* section 547.370, RSMo 2011 (enumerating the post-conviction relief qualifications for attorneys). For a discussion of qualification standards for post-conviction relief attorneys, *see supra* notes 242–246 and accompanying text.

²⁵⁹ Interview with Peter Sterling, *supra* note 65.

²⁶⁰ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 77.

²⁶¹ Interview with Peter Sterling, *supra* note 65.

²⁶² *Id.*

²⁶³ *See* MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2008 ANNUAL REPORT, at 57 (Oct. 1, 2008), *available at* <http://www.publicdefender.mo.gov/about/FY2008AnnualReport.pdf> [hereinafter 2008 MO. PUB. DEFENDER ANNUAL REPORT]; 2009 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 18, at 51; 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 80.

²⁶⁴ 2007 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 67, at 57.

Missouri has promulgated specific qualifications for attorneys who represent death row inmates during state post-conviction proceedings.²⁶⁵ While MSPD may contract with private bar attorneys to represent a death row inmate during capital post-conviction proceedings, the contracted attorney must satisfy the statutory requirements for post-conviction counsel.²⁶⁶ It is the responsibility of MSPD to ensure that any attorney contracted to handle capital post-conviction proceedings meets the requirements for appointment enumerated in the statute.²⁶⁷ MSPD does not maintain a roster of qualified capital post conviction attorneys due to the infrequency in which MSPD contracts with private bar attorneys to handle capital post-conviction relief proceedings.²⁶⁸ Additionally, if a private bar attorney is retained by a death row inmate to represent him/her during post-conviction relief proceedings, it remains the responsibility of MSPD to certify that the retained attorney is qualified under the statute.²⁶⁹

- 3. The statewide independent appointing authority should perform the following duties:**
 - a. Recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;**
 - b. Establish minimum standards for performance of all counsel in death penalty cases;**
 - c. Draft and periodically publish rosters of certified attorneys;**
 - d. Draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;**

MSPD is the independent appointing authority responsible for the selecting, training, and monitoring of attorneys who represent indigent defendants charged with or convicted of a capital offense. However, in the rare occasion that an indigent capital defendant is appointed counsel by the court, MSPD is not responsible for supervising the representation. Additionally, MSPD is not responsible for overseeing the representation of defendants who retain private counsel.²⁷⁰

Typically, the MSPD Capital Division will be assigned to represent an indigent defendant charged with a capital offense.²⁷¹ While MSPD has not promulgated specific certification standards for the performance of defense counsel in capital cases, MSPD provides guidelines for representation that are applicable to all trial attorneys within MSPD. The *Guidelines for Representation (Guidelines)* states that “[p]rior to undertaking the defense of one accused of a

²⁶⁵ See section 547.370, RSMo 2011.

²⁶⁶ See section 547.370.2, RSMo 2011.

²⁶⁷ See section 547.370.2, RSMo 2011.

²⁶⁸ Interview with Greg Mermelstein, *supra* note 30. Since 2006, MSPD has only contracted with private bar attorneys for one state post-conviction motion and one direct appeal. *Id.* Both cases were contracted due to a conflict of interest. *Id.*

²⁶⁹ See section 547.370.2, RSMo 2011. During the time when MSPD contracted with private bar attorneys to handle death row inmates’ state post-conviction proceedings, the attorney was required to fill out a form certifying that s/he was qualified according to Missouri statutory law. See Interview with Karen Kraft, *supra* note 23.

²⁷⁰ Section 600.086, RSMo 2011.

²⁷¹ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 74.

crime, a Public Defender should have sufficient experience to provide competent representation for that case.”²⁷²

Similarly, MSPD has no specific qualification standards for private bar attorneys contracted to represent indigent defendants charged with a capital offense.²⁷³ However, the *Guidelines* is incorporated into all contracts with private counsel.²⁷⁴ Additionally, there are no mechanisms in place to monitor the performance of attorneys once they are contracted by MSPD to handle a capital case.²⁷⁵ If a defendant or third party files a complaint with MSPD regarding a contract attorney, the complaint will be addressed by the MSPD General Counsel or Deputy Director.²⁷⁶

All attorneys in Missouri who represent an inmate during state post-conviction relief proceedings must meet the minimum qualification standards described within the Missouri statute.²⁷⁷

e. Assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;

MSPD is responsible for assigning attorneys to represent indigent defendants charged with or convicted of a capital offense at every stage of the proceedings.²⁷⁸ At the initial court appearance a defendant charged with a capital offense will be assigned a public defender from the local MSPD Trial Division.²⁷⁹ The Trial Division will continue representing the defendant until a notice of aggravating circumstances is provided by the prosecution or the prosecution has announced its intent to seek the death penalty.²⁸⁰ At this time, the MSPD Capital Division will be assigned to represent the defendant.²⁸¹

Missouri does not require the prosecution to file a notice of aggravating circumstances within a specified time period.²⁸² As such, a defendant charged with a capital eligible offense may be represented by the MSPD Trial Division for several months before the case is transferred to the MSPD Capital Division.²⁸³ The MSPD Trial Division attorneys are burdened with a

²⁷² MO. STATE PUB. DEFENDER, POLICIES AND PROCEDURES, *Guidelines for Representation: Education, Training and Experience of Public Defenders* (effective Nov. 1, 1992) (on file with author); see also Interview with Karen Kraft, *supra* note 23.

²⁷³ Interview with Peter Sterling, *supra* note 65; Interview with Greg Mermelstein, *supra* note 30. However, the MSPD has stated that it attempts to place at least one experienced capital defender on every contracted capital case. Interview with Karen Kraft, *supra* note 23; Interview with Peter Sterling, *supra* note 65.

²⁷⁴ Interview with Peter Sterling, *supra* note 65.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Section 547.370.2, RSMo 2011.

²⁷⁸ Sections 600.042.4, 600.044, RSMo 2011.

²⁷⁹ Interview with Karen Kraft, *supra* note 23.

²⁸⁰ *Id.*

²⁸¹ *Id.* See also 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 74.

²⁸² Section 565.005, RSMo 2011. While the notice must be filed within “a reasonable time” before trial, the term “reasonable time” is not defined in the Missouri Revised Statutes and has not been defined by the Supreme Court of Missouri. *Id.* However, the Supreme Court of Missouri has held “the statutory presumption is that where first-degree murder is charged, the death penalty is an option until that punishment is affirmatively waived by the state.” *State v. Nicklasson*, 967 S.W.2d 596, 604–05 (Mo. banc 1998).

²⁸³ Interview with Karen Kraft, *supra* note 23.

significantly higher caseload than the MSPD Capital Division attorneys.²⁸⁴ Additionally, the MSPD Trial Division employs no mitigation specialists and only one investigator per every seven attorneys.²⁸⁵ Consequently, a defendant charged with a capital eligible offense in Missouri may not receive access to an experienced capital trial team until several months after his/her initial appearance.²⁸⁶

Once a case is transferred to the MSPD Capital Division, the Capital Division Director will assign the case to one of the three MSPD Capital Division offices.²⁸⁷ While there are no published guidelines for assigning capital cases within the MSPD Capital Division, the Director will consider the current caseload of the Capital Division attorneys, geographic proximity to the defendant, and any special expertise that would be beneficial in a particular case.²⁸⁸ The Director is also responsible for assigning a capital direct appeal to one of the three capital direct appeal attorneys within the MSPD Capital Division.²⁸⁹ Similarly, there are no published guidelines for assigning capital direct appeal attorneys; in making this decision, however, the Director will consider the current caseload of the attorney and his/her geographic proximity to the defendant.²⁹⁰

The MSPD Appellate/PCR Division Director is the individual responsible for assigning attorneys to handle a death row inmate's state post-conviction proceedings.²⁹¹ Similarly, there are no mandated guidelines by which an attorney is assigned to handle an indigent inmate's state capital post-conviction proceedings.²⁹²

The MSPD General Counsel or Deputy Director is responsible for the assignment of contract counsel at all levels of the capital proceedings.²⁹³ If the Capital Division Director requests contract counsel, the MSPD General Counsel or Deputy Director will contact a private bar attorney known to have experience with capital cases.²⁹⁴ Generally, MSPD will contract with two attorneys in capital cases.²⁹⁵

f. Implement mechanisms to ensure that the workload of defense attorneys in death penalty cases enables counsel to provide each client with high-quality legal representation consistent with the ABA Guidelines;

The State of Missouri has not established any mechanism for ensuring that the workload of capital attorneys is consistent with providing each client with high-quality legal representation.

²⁸⁴ See 2009 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 18, at 9, 55.

²⁸⁵ *Id.* at 60.

²⁸⁶ Interview with Karen Kraft, *supra* note 23. "Because of lack of training and the overload of cases in the trial offices, mistakes are sometimes made in the handling of these cases early on in court or with clients. Unfortunately, the clients face getting a new attorney sometimes months after they have been charged." *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ Interview with Greg Mermelstein, *supra* note 30.

²⁹² Interview with Peter Sterling, *supra* note 65.

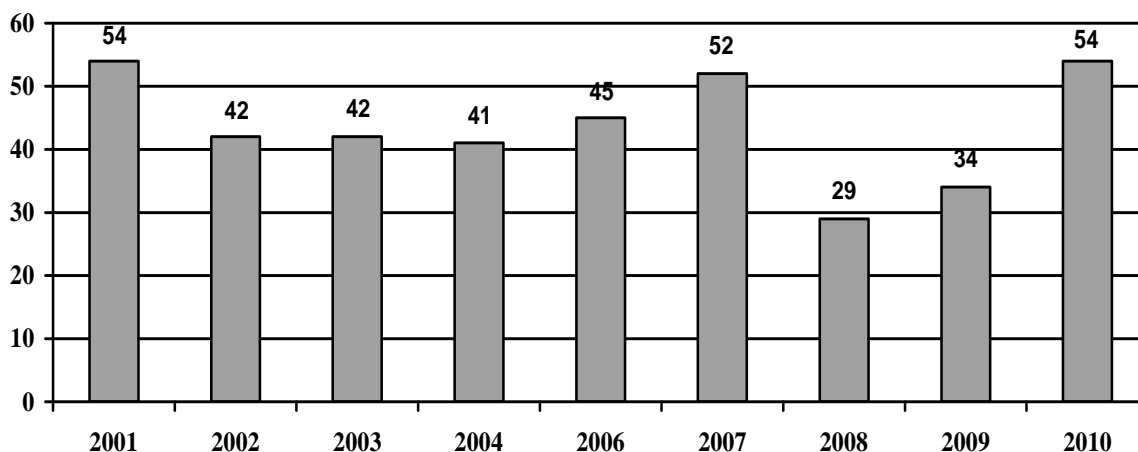
²⁹³ Interview with Karen Kraft, *supra* note 23.

²⁹⁴ Interview with Peter Sterling, *supra* note 65.

²⁹⁵ *Id.*

However, MSPD limits the number of capital cases assigned to each capital attorney to six open capital cases at one time.²⁹⁶ The six case maximum does not include any non-capital cases the attorneys may be assigned.²⁹⁷ Additionally, in 2010 the MSPD Capital Division experienced a 58% increase in open cases from 2009.²⁹⁸ This is the MSPD Capital Division’s highest open caseload since 2001.

*Capital Division Open Cases*²⁹⁹



Typically, a defendant charged with a capital offense in Missouri will initially be represented by the MSPD Trial Division.³⁰⁰ Excessive caseloads have been a continuing problem for the MSPD Trial Division. In 2009, the Missouri Bar commissioned a report on MSPD which was conducted by the Spangenberg Group (*Spangenberg Report*). The *Spangenberg Report*, found that one of “the most significant” shortcomings of MSPD are the excessive workloads.³⁰¹ The *Spangenberg Report* further indicated that, since 2005, the problem of excessive caseloads “ha[d] become more severe.”³⁰² The Missouri General Assembly recognized that MSPD’s excessive caseloads may force attorneys to violate the professional and ethical requirements to practice law in Missouri.³⁰³ The General Assembly passed a bill allowing MSPD to refuse

²⁹⁶ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 74.

²⁹⁷ *Id.* at 74, 84.

²⁹⁸ Compare 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 74 (fifty-four open cases), with 2009 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 18, at 55 (thirty-four open cases).

²⁹⁹ See 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 74; 2009 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 18, at 55; 2008 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 263, at 61; 2007 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 67, at 61; 2006 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 67, at 31; 2005 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 67, at 21; 2004 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 67, at 25; MO. PUB. DEFENDER COMM’N, FISCAL YEAR 2003 ANNUAL REPORT 23 (2003); MO. PUB. DEFENDER COMM’N, FISCAL YEAR 2002 ANNUAL REPORT 24 (2002); MO. PUB. DEFENDER COMM’N, FISCAL YEAR 2001 ANNUAL REPORT 19 (2001).

³⁰⁰ Interview with Karen Kraft, *supra* note 23.

³⁰¹ SPANGENBERG REPORT, *supra* note 39, at 16.

³⁰² SPANGENBERG REPORT, *supra* note 39, at 16.

³⁰³ SPANGENBERG REPORT, *supra* note 39, at 36–37.

appointments upon reaching a maximum caseload threshold.³⁰⁴ This bill was vetoed by the Governor on July 13, 2009.³⁰⁵

However, in 2008 the MSPD Commission promulgated internal regulations establishing caseload guidelines for the Trial Division.³⁰⁶ Each office was given a maximum allowable caseload based on the type of case and number of attorneys employed by that district.³⁰⁷ If an office exceeds the caseload threshold for three consecutive months, MSPD will attempt to negotiate with the prosecution and circuit court.³⁰⁸ If the parties are unable to determine a feasible solution, the office will be unavailable for new appointments until the caseloads fall back below the maximum caseload established for that office.³⁰⁹

In June 2010, the MSPD Director gave notice to twenty-two judicial districts that the public defender offices servicing their courts are at risk of exceeding their maximum caseloads.³¹⁰ Subsequently, in July 2010 two public defender offices temporarily refused appointments due to exceeding the caseload threshold, and an additional forty counties warned that their offices would be at the maximum threshold at some point in the future.³¹¹ The effects of the closures on the Capital Division are unclear, but it appears that if an indigent defendant were to be charged with first-degree murder during the closure of the local MSPD office, s/he would either not receive MSPD counsel or would experience delays in the appointment process.³¹²

The MSPD Appellate/PCR Division also does not have any formal guidelines limiting the workload of post-conviction attorneys.³¹³ Currently, the attorneys in the MSPD Appellate/PCR Division average four capital post-conviction cases per attorney.³¹⁴ However, attorneys within the Appellate/PCR Division are also assigned non-capital direct appeal cases and non-capital

³⁰⁴ S.B. 37, 2009 Reg. Sess.

³⁰⁵ SPANGENBERG REPORT, *supra* note 39, at 37.

³⁰⁶ See 18 CSR 10-4.010. The guidelines originally allowed MSPD to refuse categories of cases, however the Missouri Supreme Court ruled that MSPD may not limit availability by category of cases. *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870 (Mo. banc 2009).

³⁰⁷ 18 CSR 10-4.010(1).

³⁰⁸ *Id.* See also Interview with Peter Sterling, *supra* note 65.

³⁰⁹ 18 CSR 10-4.010. See also Interview with Peter Sterling, *supra* note 65. Prior to refusing appointments, the MSPD Director must give notice of pending unavailability to the local circuit court at least one month prior to MSPD closing. 18 CSR 10-4.010(2)(B).

³¹⁰ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 7.

³¹¹ *Id.*; Associated Press, *Public Defenders May Cut St. Louis Co. Cases*, MISSOURIAN, July 29, 2010, <http://www.columbiamissourian.com/stories/2010/07/29/public-defenders-may-cut-st-louis-co-cases/> (last visited Oct. 14, 2011).

³¹² Allison Retka, *Judge Orders Defender's Appointment: Appeal of Order Pondered As Second Office in Springfield Closes*, MO. LAW. MEDIA, Aug. 2, 2010, (last visited Oct. 14, 2011) (quoting MSPD District Defender Rod Hackathorn, "if someone is charged with murder, they should have counsel right away," but the suspect would be denied public defender services because "if we're refusing misdemeanors, we have to refuse murders too").

³¹³ Interview with Greg Mermelstein, *supra* note 30. "There is no formal policy or protocol for maximum caseloads for capital appellate/postconviction attorneys or support staff. As an office practice, the Appellate/Postconviction Division tries to limit the number of capital case assignments to appellate/postconviction attorneys at no more than 5 or 6 capital cases at any given time." *Id.*

³¹⁴ See *id.*

post-conviction relief cases.³¹⁵ In 2010 alone, the Appellate/PCR Division opened 1,921 new cases.³¹⁶

g. Monitor the performance of all attorneys providing representation in capital proceedings;

MSPD is responsible for monitoring the performance of capital defense attorneys working within the MSPD Capital Division and Appellate/PCR Division during yearly reviews; however, it does not appear that these reviews are actually being completed.³¹⁷ The *Spangenberg Report* found that most supervisors are carrying full caseloads which resulted in “inadequate mentoring, training and supervision of personnel.”³¹⁸ In addition, attorneys handling capital post-conviction proceedings within the Appellate/PCR Division of MSPD are evaluated by attorneys who have little or no death penalty experience and no understanding of what would constitute quality representation on a capital appeal.³¹⁹ While the MSPD Appellate/PCR Division Director does have capital experience, s/he is not the individual responsible for conducting the evaluations of the capital appellate attorneys.³²⁰

MSPD has no formal procedures for reviewing the quality of work performed by private bar attorneys contracted to handle capital cases.³²¹ If a complaint is filed against contract counsel it is investigated by the MSPD General Counsel or the MSPD Deputy Director.³²²

The following example illustrates the problem with a failure to monitor attorneys who represent capital defendants. In 1997, a Missouri capital defendant was represented by an attorney who had previously been disbarred for “taking fees from clients who he subsequently performed little or no services.”³²³ This attorney also was convicted for conspiracy to assist a prisoner’s escape from jail.³²⁴ After being released and reinstated to the Bar, the attorney represented a defendant charged with first-degree murder and forcible rape.³²⁵ At the time of this representation, the attorney had not handled a death penalty case in over fifteen years.³²⁶ After being convicted and sentenced to death, the Supreme Court of Missouri overturned the defendant’s death sentence on the basis of ineffective assistance of counsel.³²⁷ Subsequently, the Office of Chief Disciplinary Council (OCDC) determined, based on a joint stipulation with the attorney, that the attorney’s failure to provide effective assistance constituted a violation of the Missouri Rules of Professional Conduct and that the attorney should receive a public reprimand.³²⁸ OCDC explained that the attorney had “violated duties owed to a client, the most important of a

³¹⁵ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 68.

³¹⁶ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 71.

³¹⁷ Interview with Karen Kraft, *supra* note 23; Interview with Greg Mermelstein, *supra* note 30.

³¹⁸ SPANGENBERG REPORT, *supra* note 39, at 29.

³¹⁹ Interview with Greg Mermelstein, *supra* note 30.

³²⁰ *Id.*

³²¹ *Id.*; Interview with Peter Sterling, *supra* note 65.

³²² Interview with Peter Sterling, *supra* note 65.

³²³ Brief for Informant at 6, *In Re* Robert H. Wendt, No. SC86642 (Mo. 2005) (on file with author).

³²⁴ *Id.*

³²⁵ *Id.* at 7–8. *See also* Knese v. State, 85 S.W.3d 628, 630 (Mo. banc 2002).

³²⁶ Brief for Informant at 9, *In Re* Robert H. Wendt, No. SC86642 (Mo. 2005) (on file with author).

³²⁷ *Knese*, 85 S.W.3d at 633.

³²⁸ Brief for Informant at 17–20, *In Re* Robert H. Wendt, No. SC86642 (Mo. 2005) (on file with author).

lawyer's obligations."³²⁹ The Supreme Court of Missouri later dismissed the complaint without explanation.³³⁰ The Assessment Team is unaware of whether this attorney continues to represent capital defendants.

h. Periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high-quality legal representation consistent with these Guidelines;

MSPD is responsible for reviewing the performance of both attorneys in the MSPD Capital Division and attorneys contracted by MSPD.³³¹ In theory, attorneys employed by MSPD are held accountable for their performance in yearly performance evaluations; however, as explained in subsection vii, these evaluations are not conducted consistently.³³² Furthermore, the State of Missouri has no required guidelines for certifying attorneys representing defendants charged with a capital offense. Consequently, there are no guidelines for certification or policies established for reviewing the performance of counsel contracted by MSPD, appointed by the court, or retained by the defendant.

The lack of clear criteria for the selection of contract counsel and MSPD's failure to review and certify contract counsel has led to the ineffective representation of capital defendants. As an example, an MSPD contract attorney—who handled a capital case in which the defendant was sentenced to death—was disciplined by the Advisory Committee of the Missouri Bar Administration for “neglect of clients and failure to appear at court proceedings.”³³³ The attorney subsequently was disbarred.³³⁴

Missouri statutory law requires MSPD to certify whether attorneys are qualified to represent death row inmates during post-conviction proceedings.³³⁵ The MSPD Appellate/PCR Division assures that all attorneys within the division and any attorneys contracted by the division are properly certified as capital post-conviction counsel.³³⁶

i. Conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and

The MSPD Director is responsible for supervising the training of all public defenders and other personnel, as well as establishing such training courses as s/he deems appropriate.³³⁷ MSPD has

³²⁹ *Id.* at 18.

³³⁰ See Maridee F. Edwards, REPORT OF THE OFFICE OF THE CHIEF DISCIPLINARY COUNSEL FOR THE YEAR 14 (2005), available at www.mochiefcounsel.org/reports/AnnualReport2005.pdf (last visited Oct. 14, 2011).

³³¹ See Section 600.042.1(1), RSMo 2011; see also Interview with Karen Kraft, *supra* note 23.

³³² See *supra* note 320–333 and accompanying text. MO. STATE PUB. DEFENDER, POLICIES AND PROCEDURES, *Guidelines for Representation: Using the Guidelines* (effective Nov. 1, 1992) (on file with author) (“These guidelines set forth specifically what is expected of the attorney at each stage of the proceedings. They should be used by attorneys in evaluating staff performance.”); see also Interview with Karen Kraft, *supra* note 23.

³³³ See *Boliek v. Delo*, 912 F. Supp. 1199, 1203 n.2 (W.D. Mo. 1995).

³³⁴ *Id.*

³³⁵ Section 547.370.2, RSMo 2011.

³³⁶ Interview with Greg Mermelstein, *supra* note 30.

³³⁷ Section 600.042.1(7), RSMo 2011.

established a Training Division devoted to training all MSPD employees.³³⁸ MSPD is not responsible for providing training to contract counsel, court-appointed counsel, or retained counsel. Although the MSPD Training Division did offer training to contract attorneys in death penalty cases at one time, that practice no longer exists.³³⁹

The MSPD Training Division has offered capital training seminars; however, the last capital training seminar occurred in 2006.³⁴⁰ In 2009, the Missouri Office of State Courts Administrator received federal grant funding to support a joint capital litigation seminar for Missouri judges, prosecutors, and public defenders.³⁴¹ There were no MSPD training sessions planned in fiscal year 2011.³⁴² MSPD has, however, provided funding for MSPD employees to attend national training seminars and workshops on capital defense issues.³⁴³

Missouri statutory law requires capital post-conviction counsel to receive specialized training in order to receive appointment in a capital state post-conviction case.³⁴⁴ According to the statute, at least one attorney appointed to handle the state post-conviction proceedings for a death row inmate in Missouri must “have attended and successfully completed within two years immediately preceding the appointment at least twelve hours of training or educational programs on the post conviction phase of a criminal case and federal and state aspects of cases in which the death penalty is sought.”³⁴⁵ MSPD ensures that all MSPD capital post-conviction counsel are provided courses in order to satisfy the statutory requirements.³⁴⁶ However, MSPD is not mandated by statute or Missouri law to provide such courses, nor is MSPD required to provide contract, court-appointed, or retained counsel with such training opportunities.³⁴⁷

j. Investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.

³³⁸ *Training Division*, MO. STATE PUB. DEFENDER, <http://www.publicdefender.mo.gov/employment/training.htm> (last visited Oct. 14, 2011).

³³⁹ Interview with Peter Sterling, *supra* note 65. “When money was not as tight as it is today, the MSPD paid for capital contract counsel to attend one national capital program as part of their contract, as well as inviting them to attend the in-house capital training we conducted at no charge.” Interview with Karen Kraft, *supra* note 23.

³⁴⁰ Interview with Karen Kraft, *supra* note 23.

³⁴¹ CAPITAL LITIGATION INITIATIVE, <http://www.cvent.com/events/capital-litigation-initiative/event-summary-3d61376af9eb4c50b4e163ff7c59a15b.aspx> (last visited Oct. 14, 2011) (Federal Grant No. 2008-CP-BX-0003 received by the Missouri Office of State Courts Administrator).

³⁴² Interview with Karen Kraft, *supra* note 23.

³⁴³ *Id.* Capital Division attorneys have attended such programs as the National Legal Aid and Defender Association’s “Life in the Balance”; the California Attorneys for Criminal Justice and California Public Defenders Association, Capital Case Seminar in Monterey, California; the NAACP Legal Defense and Education Fund’s Capital Punishment Training Conference in Airlie, Virginia; DePaul University Death Penalty Symposium; and the National Consortium for Capital Defense Training’s Capital Mental Health Training II. *Id.*

³⁴⁴ Section 547.370.2(1), RSMo 2011.

³⁴⁵ *Id.*

³⁴⁶ Interview with Greg Mermelstein, *supra* note 30.

³⁴⁷ For a discussion of training opportunities available to capital counsel in Missouri, see *infra* Recommendation #4.

The State of Missouri has entrusted OCDC with investigating grievances and disciplining practicing attorneys, including attorneys defending a capital defendant.³⁴⁸ OCDC is responsible for maintaining current disciplinary records on all attorneys licensed to practice law in Missouri.³⁴⁹ Any admonition against an attorney by OCDC will be available to the public for three years, after which it will become a closed record.³⁵⁰ However, if the disciplinary action is referred to the Supreme Court of Missouri and the Court takes action against the attorney, the opinion will be a public record.³⁵¹ OCDC publishes an annual report including the names and disciplinary action taken against each attorney.³⁵²

Additionally, the MSPD Commission is responsible for reviewing all client complaints against MSPD attorneys—including attorneys in the MSPD Capital Division and attorneys in the MSPD Appellate/PCR Division—that are not resolved internally.³⁵³ However, we were unable to determine the internal MSPD procedures for handling client complaints or how often client complaints are reviewed by the MSPD Commission.

Conclusion

The State of Missouri is in partial compliance with Recommendation #3.

The Missouri Assessment Team applauds the State of Missouri for creating a statewide independent appointing authority tasked with representing defendants charged with or convicted of a capital offense. Missouri has successfully removed the judiciary from the attorney selection process with the creation of a statewide public defender system. Moreover, MSPD should be applauded for creating the MSPD Capital Division and the MSPD PCR/Appellate Division to provide representation to capital defendants and death row inmates.

However, MSPD has failed to promulgate certification standards and procedures by which attorneys are certified and assigned to cases, except in capital post-conviction proceedings.

Additionally, because defendants charged with a capital offense are initially assigned to the MSPD Trial Division, the excessive caseloads plaguing that division could prohibit a capital defendant from receiving the highest quality representation. If the MSPD Trial Division is under an appointment freeze, a defendant charged with a capital crime may not receive any representation through MSPD.

³⁴⁸ *About*, OFFICE OF CHIEF DISCIPLINARY COUNSEL, <http://www.mochiefcounsel.org/ocdc.htm?id=1&cat=1> (last visited Oct. 6, 2011). Annual Reports are published on OCDC's website from 2003 to present, listing the attorney name, bar license number, and violation, as well as the geographical location of the attorney. *Annual Reports*, OFFICE OF CHIEF DISCIPLINARY COUNSEL, <http://www.mochiefcounsel.org/ocdc.htm?id=5&cat=1> (last visited Oct. 6, 2011).

³⁴⁹ *About*, OFFICE OF CHIEF DISCIPLINARY COUNSEL, <http://www.mochiefcounsel.org/ocdc.htm?id=1&cat=1> (last visited Oct. 6, 2011).

³⁵⁰ Rule 5.31(d).

³⁵¹ *Id.*

³⁵² Telephone Interview by Rachel Bays with Office of Chief Disciplinary Counsel staff (Sept. 17, 2010). Annual reports are also available for public view for 2003 through 2008. *See Annual Reports*, OFFICE OF CHIEF DISCIPLINARY COUNSEL <http://www.mochiefcounsel.org/ocdc.htm?id=5&cat=1> (last viewed Oct. 14, 2011).

³⁵³ Section 600.017(3), RSMo 2011.

The Missouri Assessment Team encourages MSPD to create a first-degree murder unit to ensure all potentially capital cases receive adequate representation throughout the entire proceedings. Furthermore, the Team recommends that MSPD or the Supreme Court of Missouri create guidelines for the appointment and performance of capital attorneys as described in Recommendation #2.

The Team acknowledges that no capital cases have been contracted to private bar attorneys since 2007. However, the Capital Division caseloads are at their highest level since 2001 and further budget cuts and restructuring may require capital cases to be contracted to private bar attorneys in the near future. By enacting guidelines for representation, MSPD will be able to ensure that all defendants charged with capital crimes are receiving the highest quality representation.

Finally, the Missouri Assessment Team encourages the General Assembly to adequately fund MSPD to ensure that capital defendants receive the highest quality legal representation throughout the entire proceedings.

D. Recommendation #4

Compensation for Defense Team (Guideline 9.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):

- 1. The jurisdiction should ensure funding for the full cost of high-quality legal representation, as defined by ABA Guideline 9.1, by the defense team and outside experts selected by counsel.³⁵⁴**

The State of Missouri provides primary funding for MSPD.³⁵⁵ In fiscal year 2010, Missouri allocated MSPD \$34,207,100.³⁵⁶

The funding provided by Missouri, however, has proven woefully inadequate. Missouri has the forty-ninth lowest per capita spending on indigent defendants in the nation and has the lowest spending per attorney of all statewide public defender systems.³⁵⁷ In the 2009 State of the Judiciary Address, the Chief Justice of the Supreme Court of Missouri stated that Missouri

³⁵⁴ In order for a state to ensure funding for the “full cost of high quality legal representation,” it must be responsible for “paying not just the direct compensation of members of the defense team, but also the costs involved with the requirements of the [] Guidelines for high quality representation (e.g., Guideline 4.1 [Recommendation #1], Guideline 8.1 [Recommendation #5]).” See ABA, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 984–85 (2003).

³⁵⁵ Section 600.040.1–.2, RSMo 2011. Additional funding is provided by the federal government, the Legal Defense and Defender Fund, and the various counties that are responsible for funding office space for the MSPD Trial Division. 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 18.

³⁵⁶ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 18. MSPD was also eligible for funding through the Legal Defense and Defender Fund, Debt Offset Escrow Fund, and federal grants and contributions. *Id.*; see also sections 600.090, 143.786, RSMo 2011.

³⁵⁷ NAT’L LEGAL AID & DEFENDER ASS’N, A RACE TO THE BOTTOM: TRIAL LEVEL INDIGENT DEFENDER SYSTEM IN MICHIGAN: SPEED AND SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS iii (June 2008); see also SPANGENBERG REPORT, *supra* note 39, at 11, 35, 66 (“Missouri’s public defender system is at the bottom of its sister states in terms of resources, and the results are alarming”). The cost per attorney is “the total cost of supporting a single FTE [full time employee] attorney, including salary, benefits, support staff, administration and other overhead.” *Id.* at 11 n.11.

continues to face “a critical challenge . . . to deliver equal and affordable access to justice in criminal cases.”³⁵⁸ Additionally, in the 2010 State of the Judiciary Address, the Chief Justice warned that, because of inadequate funding of prosecutors and defense attorneys, the system was “stressed to the point of breaking.”³⁵⁹

MSPD Trial Division

The majority of capital cases are initially assigned to the MSPD Trial Division before ultimately being transferred to the MSPD Capital Division for representation.³⁶⁰ Missouri provides primary funding for the operational costs of all MSPD Trial Division districts.³⁶¹ During fiscal year 2010, the MSPD Trial Division had total direct case expenditures of approximately \$24 million.³⁶² In 2010, the average expenditure per case was \$295, a decrease of approximately \$100 from the average per case expenditure in 1981, when counsel was predominantly appointed by the courts.³⁶³ According to the 2009 *Spangenberg Report*, Missouri’s public defender system is “so underfunded . . . that MSPD will require substantially more resources before most of its lawyers can fully comprehend all the requirements that an adequate system necessarily entails.”³⁶⁴ In 2008, it was estimated that Missouri would require an additional \$25,000,000 in order to reach the “average per capita expenditure for all southern states.”³⁶⁵

The MSPD Trial Division receives the majority of its operating budget from the Missouri General Assembly; however, counties served by each local MSPD Trial Division office are responsible for funding the Trial Division office space.³⁶⁶ In some counties, the lack of adequate funding for office space has resulted in dilapidated conditions. According to the 2010 MSPD Annual Report, several MSPD Trial Division offices are located in buildings with collapsing ceiling tiles, asbestos, and insect infestations.³⁶⁷ Inadequate office space has also forced multiple attorneys to share a single office space, or to seek an alternative work space within break rooms, conference rooms, libraries, and computer server closets.³⁶⁸ Some counties have refused to pay for MSPD office space altogether, resulting in unpaid rents and eviction notices.³⁶⁹

³⁵⁸ Chief Justice Laura Stith, State of the Judiciary Address at the Joint Session of the General Assembly (Jan. 28, 2009), available at <http://www.courts.mo.gov/page.jsp?id=28987>).

³⁵⁹ Chief Justice William Price, State of the Judiciary Address at the Joint Session of the General Assembly (Feb. 3, 2010), available at <http://www.courts.mo.gov/page.jsp?id=36875>).

³⁶⁰ Interview with Karen Kraft, *supra* note 23.

³⁶¹ Section 600.040.2, RSMo 2011.

³⁶² 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 19. Direct case expenditures do not include operation costs, such as information technology services, human resources, and other units that provide support to MSPD. Interview with Kathleen Lear, *supra* note 43.

³⁶³ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 19. The 1981 average expenditure per case in the Missouri was \$390. 2009 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 18, at 58.

³⁶⁴ SPANGENBERG REPORT, *supra* note 39, at 46.

³⁶⁵ *See id.* at 11 n.12.

³⁶⁶ Section 600.040.1, RSMo 2011. The MSPD Capital Division and Appellate/PCR Division offices are provided appropriations from the General Assembly for these offices. 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 98.

³⁶⁷ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 94–96.

³⁶⁸ *Id.*

³⁶⁹ *Id.*

In 2006, the Missouri Senate established the Senate Interim Committee on the Missouri State Public Defender System and found the lack of adequate office space to be one of the four largest issues facing MSPD, along with caseloads, attorney retention, and the management crisis.³⁷⁰

MSPD Capital and Appellate/PCR Divisions

During fiscal year 2010, the MSPD Capital Division's direct case expenditures were \$2,356,640, which included the salaries of attorneys, investigators, mitigation specialists, litigation expenses (depositions and experts), travel, as well as office space, but did not include human resource support, information technology support, and other units that provide support to the Capital Division.³⁷¹ The MSPD Capital Division's average expenditure per assignment for fiscal year 2010 was \$94,675.³⁷²

The MSPD Appellate/PCR Division handles both capital and non-capital appeals.³⁷³ Direct case expenditures within the Appellate/PCR Divisions for fiscal year 2010 totaled \$3,102,866.³⁷⁴ The average expenditure per assignment in the Appellate/PCR Division was \$1,615.³⁷⁵

MSPD is also responsible for funding capital cases handled by private bar attorneys who are contracted by MSPD.³⁷⁶ The funding for contract counsel is appropriated by the Missouri General Assembly for the specific purpose of contracting criminal representation.³⁷⁷ In fiscal year 2010, MSPD received \$2,558,059 for the "defense of violent crimes and/or the contracting of criminal representation with entities outside of the Missouri Public Defender System."³⁷⁸ Additionally, MSPD was awarded \$2,000,000 in federal stimulus money to support the funding of additional contract counsel; however, only \$500,000 of the \$2,000,000 was actually released to MSPD.³⁷⁹ In recent years, MSPD has been forced to use homicide contract counsel funding for other expenses.³⁸⁰

- 2. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high-quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.**
 - a. Flat-fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.**

³⁷⁰ S. INTERIM COMM. ON THE MO. STATE PUB. DEFENDER SYS., CORRECTED REPORT 4 (2007), *available at* <http://www.senate.mo.gov/06info/comm/interim/publicdefenderReport.pdf>.

³⁷¹ See Interview with Karen Kraft, *supra* note 23; Interview with Kathleen Lear *supra* note 43.

³⁷² 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 20.

³⁷³ *Id.* at 90.

³⁷⁴ *Id.* at 20.

³⁷⁵ *Id.*

³⁷⁶ Section 600.017.7, RSMo 2011. The MSPD Commission is responsible for establishing the fee schedule for assigned counsel. *Id.*

³⁷⁷ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 18. Fees for contract counsel in capital cases are funded through the Homicide Conflict Appropriations. Interview with Peter Sterling, *supra* note 65.

³⁷⁸ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 18.

³⁷⁹ *Id.*

³⁸⁰ Interview with Peter Sterling, *supra* note 65.

- b. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.**
- c. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

The amount of compensation provided for the representation of a capital defendant or a death row inmate depends upon whether that attorney is employed by MSPD, is a private bar attorney contracted through MSPD, or is a private bar attorney appointed by the trial court.

MSPD

As of October 2010, the starting salary for an entry-level MSPD Trial Division assistant public defender was \$37,296.³⁸¹ MSPD attorneys received no salary increases in either fiscal year 2002 or 2003, and only staff earning less than \$40,000 received a \$600 increase during fiscal year 2004.³⁸² In 2006, Missouri’s Personnel Advisory Board found Missouri public defender salaries “lagging 35 percent behind public defender salaries in other states.”³⁸³ Between 2008 and 2010, assistant public defender starting salaries increased from \$36,204 to \$37,296.³⁸⁴

The starting salaries for the MSPD Capital Division attorneys range from \$55,104 for associate capital counsel to \$72,324 for lead capital counsel.³⁸⁵ Salaries are “determined through a range and step pay scale model” and depend on years of service; however, “there has been no money for step increases for the last several years.”³⁸⁶ Capital Division attorneys receive a base salary commensurate with the MSPD range and salary chart, plus an additional capital differential of \$6,000 per year for associate capital counsel and \$12,000 per year for lead capital counsel.³⁸⁷ Currently, the newest capital attorney, who has been with the MSPD Capital Division for six

³⁸¹ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16.

³⁸² SPANGENBERG REPORT, *supra* note 39, at 7. In 2005, the salaries for experienced trial attorneys within MSPD were capped at \$52,452. *Id.* This was the lowest salary for an experienced trial attorney that the Spangenberg Group had encountered in the country. *Id.*

³⁸³ PERS. ADVISORY BD., MO. OFFICE OF ADMIN., REVIEW OF MO. STATE PUB. DEFENDER ASSISTANT PUB. DEFENDER SALARIES: EXECUTIVE SUMMARY (2006) (on file with author). The Personnel Advisory Board compared the following states’ public defender salaries to those in Missouri: Iowa, Kentucky, North Dakota, Kansas, Wyoming, Nebraska, Idaho, and Georgia. *Id.* at 4; *see also* 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 15; Cat Kelly, *Commentary: Fact-Checking the State’s Case Against the Public Defender System*, MO. LAW. WEEKLY, Aug. 15, 2010, available at http://findarticles.com/p/articles/mi_7992/is_20100815/ai_n55294719/?tag=content;coll.

³⁸⁴ 2007 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 67, at 74; 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16.

³⁸⁵ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16.

³⁸⁶ Interview with Karen Kraft, *supra* note 23.

³⁸⁷ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16.

years, earns \$66,324 per year.³⁸⁸ The longest tenured capital attorney, who has been with the MSPD Capital Division for twenty-five years, earns \$81,948 per year.³⁸⁹

The MSPD Capital Division District Defenders receive an additional managerial differential for serving in a supervisory position.³⁹⁰ The current salaries for the Directors range between \$80,520 for the Director of the Kansas City Capital Division, who has been with MSPD for thirteen years, and \$95,196 for the supervisor of the St. Louis Capital Division, who has been with MSPD for twenty-eight years.³⁹¹

Attorneys within the MSPD Appellate/PCR Division, as of 2010, had salaries that ranged between \$72,324 in the Kansas City Appellate/PCR office, to \$81,948 for an attorney within the Columbia Appellate/PCR office.³⁹² Attorneys in the Appellate/PCR Division who are qualified to handle capital post-conviction cases receive a base salary plus a \$12,000 per year differential.³⁹³

By comparison, in the St. Louis County Prosecutor's office, which has prosecuted 40% of the current death sentenced inmates,³⁹⁴ attorney salaries in 2011 ranged from \$28,056 to \$117,320, with the First Assistant Prosecuting attorney earning \$137,974.³⁹⁵ Additionally, in 2011, the St. Louis County Prosecutor's office employed an executive assistant who earned \$98,126,³⁹⁶ almost \$3,000 more than the head of the St. Louis Capital Division, who has been with MSPD for twenty-eight years.³⁹⁷ In 2010, the MSPD Director made only \$3,000 more than the 2011 salary of one St. Louis County prosecuting attorney,³⁹⁸ \$15,000 less than the First Assistant Prosecuting Attorney,³⁹⁹ and \$30,000 less than the elected St. Louis County Prosecutor.⁴⁰⁰

³⁸⁸ Interview with Karen Kraft, *supra* note 23.

³⁸⁹ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16; *see also* Interview with Karen Kraft, *supra* note 23.

³⁹⁰ Interview with Karen Kraft, *supra* note 23.

³⁹¹ *Id.*

³⁹² Interview with Greg Mermelstein, *supra* note 30.

³⁹³ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16.

³⁹⁴ *Current Inmates*, MO. DEATH ROW, <http://missourideathrow.com/current-inmates/> (last visited Jan. 13, 2010).

³⁹⁵ *St. Louis County Employee Pay*, ST. LOUIS TODAY, http://www.stltoday.com/news/local/govt-and-politics/html_17a628c8-6763-11df-aa1a-0017a4a78c22.html (website of the St. Louis Post-Dispatch) (last visited Oct. 20, 2011) (select "Prosecuting Attorney" from the "Department" drop-down menu, then follow the "search" hyperlink).

³⁹⁶ *Id.*

³⁹⁷ Interview with Karen Kraft, *supra* note 23 (noting that the head of the St. Louis Capital Division earns \$95,196).

³⁹⁸ The 2009 to 2010 salary of the MSPD Director was \$120,480. ROBIN CARNAHAN, OFFICIAL MANUAL OF THE STATE OF MISSOURI 973 (Laura Egerdal, ed. 2009), *available at* <http://www.sos.mo.gov/bluebook/2009-2010/default.asp> [hereinafter MO. OFFICIAL MANUAL]. The highest paid St. Louis County prosecuting attorney, other than the elected prosecutor or the first assistant, earned \$117,320 in 2011. *St. Louis County Employee Pay*, ST. LOUIS TODAY, http://www.stltoday.com/news/local/govt-and-politics/html_17a628c8-6763-11df-aa1a-0017a4a78c22.html (last visited Oct. 20, 2011) (select "Prosecuting Attorney" from the "Department" drop-down menu, then follow the "search" hyperlink).

³⁹⁹ In 2011, the First Assistant Prosecuting Attorney in St. Louis County earned \$137,974. *St. Louis County Employee Pay*, ST. LOUIS TODAY, http://www.stltoday.com/news/local/govt-and-politics/html_17a628c8-6763-11df-aa1a-0017a4a78c22.html (last visited Oct. 20, 2011) (select "Prosecuting Attorney" from the "Department" drop-down menu, then follow the "search" hyperlink).

Discrepancies also exist when comparing MSPD attorney salaries with the salaries of prosecutors in other offices. The salary range for an attorney at the Jackson County Prosecutor's office in 2008 was \$39,228 to \$101,004, with the Chief Trial Assistant earning \$100,921.⁴⁰¹ The starting salary for an attorney at the Missouri Attorney General's office is \$42,500,⁴⁰² \$7,000 more than the starting salary at MSPD.⁴⁰³ The 2009 to 2010 salary range for attorneys at the Missouri Attorney General's office was \$42,500 to \$94,760.⁴⁰⁴ Division Directors at the Attorney General's office in 2009 to 2010 were earning between \$94,000 and \$100,000, significantly higher salaries than the MSPD Division Directors. The Deputy Attorney General earned \$125,000, almost \$5,000 more than the MSPD Director.⁴⁰⁵

Contracted Capital Counsel

MSPD has the authority to contract with private bar attorneys in "such areas of the state and on such terms as it deems necessary."⁴⁰⁶ In Missouri, contracted counsel handling death penalty trials are paid a modified flat-fee rate.⁴⁰⁷ From 1999 to 2003, private bar attorneys that were contracted by MSPD to handle capital cases were compensated at a rate of \$10,000 to \$13,000 for lead counsel and \$5,000 to \$8,000 for co-counsel.⁴⁰⁸ Currently, the base contract fee for capital cases is generally \$15,000 per attorney.⁴⁰⁹ In 2007, the last time an attorney was contracted for a capital case, the base fee was \$12,000 per attorney.⁴¹⁰ The base fee can be negotiated in each individual case.⁴¹¹ Additionally, contract counsel can receive per diem compensation if a case goes to trial.⁴¹² Litigation expenses such as "expert witness fees and travel costs, depositions, transcripts, [and] case investigation" are not included in the modified flat-fee and must be approved separately.⁴¹³ There is no cap on litigation expenses for contract counsel in capital cases.⁴¹⁴ Contract counsel is required to make all funding requests to MSPD through an internal request process prior to the expense being incurred.⁴¹⁵

⁴⁰⁰ The elected St. Louis County Prosecutor earned \$150,000 in 2011. *St. Louis County Employee Pay*, ST. LOUIS TODAY, <http://www.stltoday.com> (last visited Oct. 20, 2011) (select "Prosecuting Attorney" from the "Department" drop-down menu, then follow the "search" hyperlink).

⁴⁰¹ *Search the Jackson County Salary Database*, KANSASCITY.COM, <http://www.kansascity.com/2008/04/09/568201/search-the-jackson-county-salary.html> (last visited Oct. 20, 2011) (select "Prosecuting Attorney" from the "Department" drop-down menu, then follow the "search" hyperlink).

⁴⁰² MO. OFFICIAL MANUAL, *supra* note 398, at 947-49.

⁴⁰³ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16.

⁴⁰⁴ MO. OFFICIAL MANUAL, *supra* note 398, at 947-49.

⁴⁰⁵ *Id.* Incidentally, the Attorney General of Missouri earns only \$116,000. *Id.*

⁴⁰⁶ Section 600.021.6, RSMO 2011.

⁴⁰⁷ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 78.

⁴⁰⁸ MAREA L. BEEMAN & JAMES DOWNING, RATES OF COMPENSATION FOR COURT-APPOINTED COUNSEL IN CAPITAL CASES AT TRIAL: A STATE-BY-STATE OVERVIEW 13 (2003), *available at* <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/compensatio nratescapital2003.authcheckdam.pdf>.

⁴⁰⁹ Interview with Peter Sterling, *supra* note 65.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 78.

⁴¹⁴ Interview with Peter Sterling, *supra* note 65.

⁴¹⁵ *Id.*

Court-appointed Counsel

Until 1971, Missouri was not required to compensate attorneys appointed by the court to defend indigent clients, nor were they required to reimburse the attorney for expenses incurred during that representation.⁴¹⁶ In *State v. Green*, the Supreme Court of Missouri held that the profession alone should not bear a responsibility that constitutionally belonged to the State.⁴¹⁷

The General Assembly responded to *Green* by establishing a system of full-time public defenders within twenty judicial circuits and also provided payment to appointed counsel in the remaining judicial circuits.⁴¹⁸ Public defenders appointed by the Appellate Judicial Commission were responsible for providing assistance to any defendant charged with a felony who could not afford a private attorney.⁴¹⁹

By 1981, the amount appropriated by the General Assembly to compensate private court-appointed attorneys was depleted before the end of each fiscal year.⁴²⁰ Due to the depletion of the available funds, the Supreme Court of Missouri again held that counsel could be appointed without compensation or reimbursement of expenses.⁴²¹ While the Court recognized the burden of representation without compensation, it concluded that representation of indigent defendants was an obligation that counsel undertook when taking his/her oath to become an attorney.⁴²²

Within a year, the U.S. Court of Appeals for the Eighth Circuit held that “[r]equiring lawyers to pay the necessary expenses of criminal defense work without reimbursement is . . . constitutionally distinct from merely compelling lawyers to provide their services.”⁴²³ Thus, while court-appointed attorneys did not need to be compensated for their time, Missouri was required to fund the expenses associated with representation.⁴²⁴ Consequently, court-appointed counsel must request funds from the trial court, which in turn must request funds from the General Assembly; if the expenses remain unpaid after the prescribed time, the court must discharge the accused.⁴²⁵

In 2009, the Supreme Court of Missouri stated in dicta that some criminal cases may be “sufficiently difficult or complex that an appointment to provide representation without compensation may be oppressive or confiscatory, especially if the burden of providing such representation falls on the relatively few lawyers who appear fully qualified to defend criminal cases.”⁴²⁶ It does not appear that under the current system attorneys are appointed by the court to represent capital defendants, but the possibility of such an appointment remains.

⁴¹⁶ *State v. Green*, 470 S.W.2d 571, 572–73 (Mo. 1971).

⁴¹⁷ *Id.*

⁴¹⁸ Sections 600.011–600.101, RSMo 2011; *see also* 2004 MO. PUB. DEFENDER AUDIT REPORT, *supra* note 10, at 12.

⁴¹⁹ 2004 MO. PUB. DEFENDER AUDIT REPORT, *supra* note 10, at 12.

⁴²⁰ *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 65 (Mo. banc 1981).

⁴²¹ *Id.* at 66.

⁴²² *Id.*

⁴²³ *Williamson v. Vardeman*, 674 F.2d 1211, 1215 (8th Cir. 1982).

⁴²⁴ *Id.* at 1216.

⁴²⁵ *Id.*

⁴²⁶ *State ex rel. Mo. Pub. Defender Comm’n v. Pratte*, 298 S.W.3d 870, 889 (Mo. banc 2009) (“The troubling question of paying lawyers is not presented directly in these writ proceedings, but the issue lurks behind the

Federal Habeas Counsel and Clemency Counsel

Attorneys appointed for federal habeas proceedings are entitled to compensation at a rate of no more than \$178 per hour for both in-court and out-of-court work.⁴²⁷ The U.S. Supreme Court has found that an attorney wishing to represent his/her client through clemency proceedings may continue to be compensated at the same rate as during federal habeas proceedings.⁴²⁸

3. **Non-attorney members of the defense team should be fully-compensated at a rate that is commensurate with the provision of high-quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.**
 - a. **Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.**
 - b. **Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.**
 - c. **Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

MSPD

The MSPD Capital Division and Appellate/PCR Division employ investigators and mitigation specialists and have access to funds to hire experts and obtain ancillary services.⁴²⁹ The current starting salary for an MSPD Capital Division investigator is \$37,296.⁴³⁰ Investigators within MSPD have received limited salary increases and “only those who have been in the system for some time have moved beyond the starting salary for their job classification.”⁴³¹ Salaries for mitigation specialists currently range from \$35,952 for a specialist who has been with MSPD for two years to \$40,968 for a specialist who has been with MSPD for over fifteen years.⁴³²

There is a stark contrast in pay between investigators employed by prosecutor offices throughout the state and those employed by MSPD. For example, the 2008 salary range for a full-time investigator at the St. Louis County Prosecutor’s office was \$36,000 to \$62,559, with the Chief

application of the only coercive remedy the trial judges of this state currently possess—the appointment of counsel who would be required to work without pay.”)

⁴²⁷ GUIDE TO JUDICIARY POLICY, *supra* note 165.

⁴²⁸ 18 U.S.C. § 3599(e) (2011); *see also* Harbison v. Bell, 129 S. Ct. 1481, 1486 (2009).

⁴²⁹ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 92; *see also* Interview with Karen Kraft, *supra* note 23.

⁴³⁰ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16. *See also* Interview with Karen Kraft, *supra* note 23 (“Investigator III is a classification reserved for those doing capital investigation or those in trial offices who supervise other investigators.”)

⁴³¹ Interview with Karen Kraft, *supra* note 23.

⁴³² *Id.*; Interview with Kathleen Lear, *supra* note 43.

Investigator earning \$76,265.⁴³³ The current salary range for MSPD full-time investigators, by contrast, is \$28,596 to \$37,296.⁴³⁴ In fact, the lowest paid investigator at the St. Louis County Prosecutor's office in 2011 earned \$13,000 more than a Capital Division investigator who has been with MSPD for fifteen years.⁴³⁵ The highest paid Capital Division Investigator, who has been with MSPD for twenty-eight years, earns \$40,968,⁴³⁶ \$20,000 less than the highest paid investigator at the St. Louis County Prosecutor's Office.⁴³⁷ The Jackson County Prosecutor's Office investigator salary range in 2008 was \$32,905 to \$61,276.⁴³⁸ The Missouri Attorney General's office investigators currently earn \$24,205 to \$47,839.⁴³⁹

Contract Counsel

Attorneys who are contracted to handle a capital case by MSPD may—but are not guaranteed to—receive the assistance of MSPD mitigation specialists.⁴⁴⁰ Additionally, contract counsel can request funding for any expense related to the representation of the capital defendant by emailing his/her request to the MSPD General Counsel or Deputy Director.⁴⁴¹ Once a request is approved the investigator or mitigation specialist will directly invoice MSPD.⁴⁴²

If counsel is appointed by the court to handle a capital case during a time when the MSPD office has closed due to case overload, the attorney must submit a request for funding through the MSPD internal request system, and s/he will receive funding for all “reasonable and necessary litigation costs including expert witness fees, deposition fees, and transcript costs to the extent funds are available to do so.”⁴⁴³ Requests must be approved by the MSPD Director or his/her designee.⁴⁴⁴

⁴³³ *St. Louis County Employee Pay*, ST. LOUIS TODAY, http://www.stltoday.com/news/local/govt-and-politics/html_17a628c8-6763-11df-aa1a-0017a4a78c22.html (website of the St. Louis Post-Dispatch) (May 24, 2010) (select “Prosecuting Attorney” from the “Department” drop-down menu, then follow the “search” hyperlink).

⁴³⁴ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 16.

⁴³⁵ The lowest salary for an investigator in the St. Louis Prosecutor's office in 2011 was \$52,000. *St. Louis County Employee Pay*, ST. LOUIS TODAY, http://www.stltoday.com/news/local/govt-and-politics/html_17a628c8-6763-11df-aa1a-0017a4a78c22.html (last visited Oct. 20, 2011) (select “Prosecuting Attorney” from the “Department” drop-down menu, then follow the “search” hyperlink). The Capital Division Investigator who has been with the MSPD for fifteen years earns \$38,700. Interview with Karen Kraft, *supra* note 23.

⁴³⁶ Interview with Karen Kraft, *supra* note 23.

⁴³⁷ The highest paid investigator at the St. Louis County Prosecutor's Office earned \$62,559 in 2008. *St. Louis County Employee Pay*, ST. LOUIS TODAY, http://www.stltoday.com/news/local/govt-and-politics/html_17a628c8-6763-11df-aa1a-0017a4a78c22.html (last visited May 24, 2010) (select “Prosecuting Attorney” from the “Department” drop-down menu, then follow the “search” hyperlink).

⁴³⁸ *Search the Jackson County Salary Database*, KANSASCITY.COM, <http://www.kansascity.com/2008/04/09/568201/search-the-jackson-county-salary.html> (last visited Apr. 21, 2008) (select “Prosecuting Attorney” from the “Department” drop-down menu, then follow the “search” hyperlink).

⁴³⁹ MO. OFFICIAL MANUAL, *supra* note 398, at 947–49.

⁴⁴⁰ Interview with Karen Kraft, *supra* note 23.

⁴⁴¹ Interview with Peter Sterling, *supra* note 65.

⁴⁴² *Id.*

⁴⁴³ 18 CSR 10-4.010(5).

⁴⁴⁴ *Id.*

Federal Habeas Counsel and Clemency Counsel

In federal habeas proceedings, the court may authorize appointed attorneys to obtain investigative, expert, or other services as are reasonably necessary for representation.⁴⁴⁵ Defense counsel should submit vouchers for payment every two months to the clerk of the court.⁴⁴⁶ Compensation related to the investigation, experts, and other services should be submitted to the court directly by the service provider.⁴⁴⁷ If the court determines that the investigative, expert, or other services are necessary for the representation of the defendant, the court will authorize counsel to obtain those services requested.⁴⁴⁸ The fees and expenses paid for these services are not to exceed \$7,500, unless the court authorizes payment in excess of the limit.⁴⁴⁹ These requests are not conducted ex parte unless defense counsel is able to make a “proper showing concerning the need for confidentiality.”⁴⁵⁰

4. Additional compensation should be provided in unusually protracted or extraordinary cases.

Additional compensation for attorneys is not provided for handling capital trials and capital appeals in which MSPD provided representation, as these attorneys are salaried employees. In cases where private attorneys are contracted by MSPD to handle a capital case, attorneys are compensated according to a base fee for each attorney, which is negotiated at the time of the contract.⁴⁵¹ However, contract attorneys can receive additional compensation when the representation is “particularly complex,” or “has special circumstances that may require work above and beyond the norm for its case type,” or if MSPD is “unable to locate a qualified attorney who will take the case at the rate on the schedule.”⁴⁵² Contract counsel will also receive a per diem if the case goes to trial.⁴⁵³

5. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

Compensation for reasonable incidental expenses is not an issue in cases where MSPD is providing representation, as these attorneys are salaried employees and their offices are provided by the state with resources for funding the costs associated with defending capital cases.

⁴⁴⁵ 18 U.S.C. § 3599(f) (2011).

⁴⁴⁶ *Lyons v. Luebbers*, No. 4:01-CV-422-CAS, 2007 WL 1796212, at *1 (E.D. Mo. June 19, 2007).

⁴⁴⁷ *Id.* at *2.

⁴⁴⁸ *Id.*

⁴⁴⁹ 18 U.S.C. § 3599(g) (2011). *See* 18 U.S.C. § 3006A (2011); *Lyons*, at *2. However, the court has the authority to certify payments in excess of the \$7,500 limit in order to “provide fair compensation for services of an unusual character or duration, and the amount of the excess is approved by the chief justice of the circuit or his representative.” *Id.*

⁴⁵⁰ *Lyons*, 2007 WL 1796212, at *2.

⁴⁵¹ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 78. “This is a base fee corresponding to the type of case, with provisions for additional payment if the case should go to trial.” *Id.* *See also* Interview with Peter Sterling, *supra* note 65.

⁴⁵² 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 78.

⁴⁵³ Interview with Peter Sterling, *supra* note 65.

In cases where a private attorney is contracted by MSPD, the attorney is eligible for litigation expenses, including expert witness fees, travel costs, depositions, transcripts, and case investigation.⁴⁵⁴ Counsel appointed by the court to represent a defendant charged with a capital offense, during a time when MSPD is not accepting any new cases, is entitled to compensation by MSPD for the same services listed above for private contract attorneys, “to the extent funds are available to do so.”⁴⁵⁵

In cases where a private attorney is contracted by MSPD or appointed by the court to represent a death row inmate during state post-conviction proceedings, the attorney is entitled to compensation for “reasonable and necessary litigation” expenses.⁴⁵⁶

Conclusion

Missouri is in partial compliance with Recommendation #4.

It appears that Missouri provides at least some funding of the costs associated with providing legal representation for capital defendants and death row inmates at trial, on direct appeal, and during capital post-conviction and clemency proceedings. However, the funding provided to MSPD by Missouri and the funding provided to the MSPD Trial Division—where most capital cases originate—by the various counties has proven to be woefully inadequate to ensure high-quality legal representation to all defendants charged with or convicted of a capital offense. Furthermore, it appears that capital counsel is not being fully compensated at a rate commensurate with the provision of high-quality legal representation or commensurate with the salary scales at Missouri prosecutor offices. Finally, under current Missouri case law, it is possible that counsel could be appointed by the court, rather than MSPD, to handle a capital case without compensation.

Contrary to the *ABA Guidelines*, which call for appointed counsel to be fully compensated for actual time, it is MSPD policy to negotiate with contract counsel to determine a modified flat-fee rate. The rate generally starts at \$15,000. However, there is no formal requirement that capital contract counsel receive this amount of compensation. The exact amount of compensation is determined by the MSPD General Counsel or Deputy Director. With the financial constraints plaguing MSPD, it is possible that MSPD will compensate contract attorneys at a lower flat-fee.

Missouri should ensure that all members of the capital defense team are adequately compensated at a rate commensurate with high-quality legal representation. Moreover, Missouri should ensure all members of the capital defense team are compensated commensurate with their prosecutor counterparts.

E. Recommendation #5

Training (Guideline 8.1 of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*):

⁴⁵⁴ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 78.

⁴⁵⁵ 18 CSR 10-4.010(5).

⁴⁵⁶ Section 547.370.4, RSMo 2011.

The Missouri Supreme Court Rules require all attorneys admitted to the Missouri Bar to complete fifteen hours of continuing legal education every year, which must include two hours of ethics, professionalism, or malpractice prevention training.⁴⁵⁷ Missouri does not require specialized training for attorneys representing a capital defendant at trial or on direct appeal. However, at least one of the two attorneys appointed to represent a death row inmate during state post-conviction proceedings must, by statute, satisfy minimum training requirements.⁴⁵⁸

1. The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the defense team.

Missouri provides funding for the training, professional development, and continuing education of some, but not all, members of the defense team in capital cases. The Missouri Legal Defense and Defender Fund (LDDF) is the primary source of funding for MSPD's training of attorneys, investigators, and mitigation specialists.⁴⁵⁹ LDDF is comprised of money collected in accordance with Missouri law,⁴⁶⁰ requiring public defenders to effectuate liens against clients "[i]f at any time, either during or after the disposition of his case, such defendant becomes financially able to meet all or some part of the cost of services rendered to him."⁴⁶¹ In addition to funding MSPD training, LDDF may be used "to pay for experts witness fees, the costs of depositions, travel expenses incurred by witnesses in case preparation and trial, expenses incurred for changes of venue and other lawful expenses as authorized by the public defender commission."⁴⁶² In fiscal year 2010, MSPD collected \$1,660,502 through lien repayments; however, it spent only \$1,413,988 of those funds.⁴⁶³

The MSPD Training Division, funded by LDDF, provides training to MSPD attorneys, investigators, and mitigation specialists, and supports MSPD staff attendance at national defender training conferences.⁴⁶⁴ For example, MSPD attempts to send all new capital attorneys, investigators, and mitigation specialists to at least one national capital training within their first year of employment.⁴⁶⁵ These trainings have included the National Legal Aid and Defender Association's "Life in the Balance"; the California Attorneys for Criminal Justice and California Public Defenders Association Capital Case Seminar in Monterey, California; the NAACP Legal

⁴⁵⁷ Rule 15.05. Prior to 2009, each lawyer was required to complete at least three hours of ethics, professionalism or malpractice prevention continuing legal education. Rule 15.05(f).

⁴⁵⁸ See section 547.370.2(1), RSMo 2011.

⁴⁵⁹ Section 600.090.5, RSMo 2011 (referencing section 600.042.1(7), RSMo 2011); 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 17.

⁴⁶⁰ Section 600.090, RSMo 2011.

⁴⁶¹ Section 600.090.1(2), RSMo 2011. During fiscal year 2010, MSPD collected \$1,600,000 through lien repayments. 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 17.

⁴⁶² Section 600.090.5, RSMo 2011. In fiscal year 2009, MSPD spent \$199,618 on these expenditures. 2009 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 18, at 75.

⁴⁶³ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 4, at 18. During fiscal year 2010, MSPD was authorized to collect and spend up to \$2,980,263; however, the MSPD collected only \$1,660,502. *Id.* LDDF also authorizes MSPD to pay the salaries of the MSPD Director of Training and the MSPD Training Assistant out of LDDF, rather than through MSPD general revenue appropriations. *Id.* at 17.

⁴⁶⁴ See *Training Division*, MO. STATE PUB. DEFENDER, <http://www.publicdefender.mo.gov/employment/training.htm> (last visited Oct. 20, 2011).

⁴⁶⁵ Interview with Karen Kraft, *supra* note 23.

Defense and Education Fund's Capital Punishment Training Conference in Airlie, Virginia; DePaul University Death Penalty Symposium; and the National Consortium for Capital Defense Training's Capital Mental Health Training II.⁴⁶⁶ In 2009, the Missouri Office of State Courts Administrator received federal grant funding to support a joint capital litigation seminar for Missouri judges, prosecutors, and public defenders.⁴⁶⁷

However, according to the 2009 *Spangenberg Report*, MSPD has eliminated "'specialty' training, such as juvenile, capital and appellate training."⁴⁶⁸ The Training Division has not offered a death penalty-specific training seminar to MSPD attorneys, since 2006 and no such trainings were planned for the 2011 fiscal year.⁴⁶⁹ MSPD has also limited the number of capital attorneys permitted to attend national training seminars, "rely[ing] more on sending one or two representatives to such programs to bring the information back."⁴⁷⁰ Furthermore, contract attorneys handling death penalty cases were once provided funding to attend one national death penalty conference, as well as to attend MSPD-sponsored capital training at no cost; however, as of June 2010, MSPD no longer provides funding for training, professional development, or continuing education to its contract attorneys.⁴⁷¹

- 2. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the independent appointing authority, in the defense of capital cases. Such 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 guilt/innocence and penalty;**
 - 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/her family;**
 - i. Post-conviction litigation in state and federal courts; and**
 - j. The presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.**

⁴⁶⁶ *Capital Division*, MO. STATE PUB. DEFENDER, http://www.publicdefender.mo.gov/legal/capital_division.htm (last visited Oct. 20, 2011); Interview with Karen Kraft, *supra* note 23. Capital Division attorneys have attended the following non-capital national trainings: National Criminal Defense College's Trial Practice Institute, Advanced Cross Examination, and Theories and Themes Seminar. Interview with Karen Kraft, *supra* note 23.

⁴⁶⁷ CAPITAL LITIGATION INITIATIVE, <http://www.cvent.com/events/capital-litigation-initiative/event-summary-3d61376af9eb4c50b4e163ff7c59a15b.aspx> (last visited Oct. 14, 2011) (Federal Grant No. 2008-CP-BX-0003, received by the Missouri Office of State Courts Administrator).

⁴⁶⁸ SPANGENBERG REPORT, *supra* note 39, at 62.

⁴⁶⁹ Interview with Karen Kraft, *supra* note 23. Capital attorneys are, however, able to attend any non-death penalty trainings that are offered within the Training Division that nevertheless apply to their practice, such as forensic evidence seminars, and advanced trial skills. *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

- 3. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the independent appointing authority that focuses on the defense of death penalty cases.**

Apart from the general continuing legal education requirements mandated for all attorneys, there is no additional required training for attorneys seeking to qualify for appointment to a capital case at trial or on direct appeal. The MSPD *Guidelines for Representation (Guidelines)*, applicable to all MSPD trial attorneys, requires a public defender to participate in “skills training and education programs.”⁴⁷² The *Guidelines* provides that “a Public Defender must develop and follow a program of self study, no less than one hour per month, devoted to keeping abreast of changes in Missouri case and statutory law.”⁴⁷³ Neither Missouri nor MSPD have promulgated any rules or policies describing the necessary substantive components, or frequency of training of capital counsel at trial and on direct appeal, to comport with the requirements delineated in Recommendation #5.

However, “within two years immediately preceding the appointment,” one of the two counsel appointed to represent a death row inmate during state post-conviction proceedings must complete twelve hours of training on post-conviction proceedings, and on federal and state laws affecting capital cases.⁴⁷⁴ Furthermore, MSPD requires that “[c]ounsel shall continue to improve their substantive and procedural knowledge of criminal law, as well as their knowledge . . . related to post-conviction litigation, by participating in 15 hours of formal CLE training yearly, as well as reading all available caselaw summaries, slip opinions, BNA Criminal Law Reporter, and other periodicals circulated among the offices.”⁴⁷⁵ Despite these requirements, Missouri has not adopted a training program encompassing all components of Recommendation #5.

- 4. The jurisdiction should ensure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.**

MSPD capital investigators and mitigation specialists can attend general training sessions available to all MSPD staff through the MSPD Training Division; however, these MSPD-sponsored trainings are not specifically tailored for capital case investigation and mitigation.⁴⁷⁶ Although MSPD once provided capital mitigation specialists and investigators funds to attend national death penalty training seminars, it appears the availability of such programs has been

⁴⁷² MO. STATE PUB. DEFENDER, POLICIES AND PROCEDURES, *Guidelines for Representation: Education, Training and Experience of Public Defenders* (effective Nov. 1, 1992) (on file with author).

⁴⁷³ *Id.*

⁴⁷⁴ Section 547.370.2(1), RSMo 2011.

⁴⁷⁵ MO. STATE PUB. DEFENDER, POLICIES AND PROCEDURES, *Guidelines for Representation, Appellate/PCR: Continuing Legal Education* (effective Jan. 1, 1991) (on file with author).

⁴⁷⁶ For example, MSPD investigators and mitigation specialists have also received funding to attend national programs, such as the Mitigation Program of the National Alliance of Sentencing Advocates and Mitigation Specialists, the Death Penalty Seminar of the California Attorneys for Criminal Justice–California Public Defenders Association, and the national and regional conferences of the National Defender Investigation Association. Funding was also provided to attend in-state non-MSPD programs, such as the Eyewitness Evidence and Death Investigation Seminar in Kansas City, Missouri. Interview with Karen Kraft, *supra* note 23.

eliminated.⁴⁷⁷ Missouri and MSPD do not provide continuing professional education to non-MSPD mitigation specialists and investigators wishing to participate on capital defense teams.

Conclusion

Missouri is in partial compliance with Recommendation #5.

While Missouri has established training requirements for attorneys representing death row inmates during state post-conviction proceedings, training is not required of attorneys representing capital defendants at trial or on direct appeal. In addition, training does not cover all of the areas included in Recommendation #5, nor is it required of all members of the defense team, such as investigators and mitigation specialists.

Accordingly, the Missouri Death Penalty Assessment Team recommends that Missouri adopt mandatory training requirements for all attorneys and members of the defense team who seek to handle a capital case. A program designed to satisfy these requirements should include, at minimum, presentations and trainings consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.

⁴⁷⁷ SPANGENBERG REPORT, *supra* note 39, at 22.

CHAPTER SEVEN

THE DIRECT APPEAL PROCESS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Every defendant who receives a death sentence is, by statute, entitled to one level of appellate review, known as the direct appeal. As the Supreme Court of the United States stated in *Barefoot v. Estelle*, “direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception.”¹ The direct appeal process in capital cases is designed to correct any errors in the trial court’s findings of fact and law and to determine whether the trial court’s actions during the guilt and sentencing phases of the trial were unlawful, excessively severe, or an abuse of discretion.

One of the best ways to ensure a meaningful direct appeal process is comparative proportionality review.² Comparative proportionality review is the process through which a death sentence is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate.³ Meaningful comparative proportionality review helps to ensure that the death penalty is being administered in a rational and non-arbitrary manner; to provide a check on broad prosecutorial discretion; and to prevent discrimination from playing a role in the capital decision-making process.

In most capital cases, juries determine the sentence, yet they do not have the information necessary to evaluate the propriety of that sentence in light of sentences in similar cases.⁴ In the relatively small number of cases in which the trial judge determines the sentence, proportionality review is still important, as the judge may be unaware of statewide sentencing practices or be affected by public or political pressure. Regardless of who determines the sentence, dissimilar results are virtually ensured without the equalizing force of proportionality review.

Beyond simply stating that a particular death sentence is proportional, or citing previous decisions, a court conducting proportionality review ought to analyze the similarities and differences between those past decisions and the case before it. By weighing the appropriateness of a death sentence from a statewide perspective, a reviewing court achieves the important ends of proportionality review while properly leaving to local prosecutors and juries the decisions, in the first instance, of whether the death penalty ought to be sought and whether it ought to be imposed.

Moreover, for proportionality review to be truly effective in ensuring the rational, non-arbitrary application of the death penalty, it must include not only cases in which a death sentence was

¹ *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

² *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (opinion of White, J.) (Burger, C.J., & Rehnquist, J., concurring) (finding that proportionality review “serves as a check against the random or arbitrary imposition of the death penalty”); *see also* *Pulley v. Harris*, 465 U.S. 37, 71 (1984) (Brennan, J., dissenting) (noting that, in 1984, over thirty states required, either by statute or case law, some form of comparative proportionality review).

³ *Gregg*, 428 U.S. at 206 (opinion of White, J.) (Burger, C.J., & Rehnquist, J., concurring).

⁴ *Id.*

imposed but also cases in which the death penalty was sought but not imposed and cases in which the death penalty could have been but was not sought.⁵

Because of the role that meaningful comparative proportionality review can play in reducing arbitrary and excessive death sentences, states that do not engage in the review, or that do so only superficially, may increase the risk that their capital punishment systems will function in an arbitrary and discriminatory manner.

⁵ See, e.g., *Walker v. Georgia*, 129 S. Ct. 453, 454–55 (2008) (Stevens, J., on the denial of certiorari) (noting that Georgia’s approach to proportionality review, in which Georgia asserted that the state supreme court compared “‘not only similar cases in which death was imposed, but similar cases in which death was not imposed’ . . . seemed judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court”) (citing *Zant v. Stephens*, 462 U.S. 862, 880 n.19 (1983)).

I. FACTUAL DISCUSSION: MISSOURI OVERVIEW

Missouri statutory law provides that when a defendant is sentenced to death, s/he is entitled to (1) a review of the death sentence and (2) a direct appeal of the conviction to the Supreme Court of Missouri.⁶ If an appeal is taken, the mandatory review and the direct appeal are consolidated into a single procedure.⁷ The right of direct appeal, however, may be waived by the defendant, whereas review of the death sentence is mandatory and cannot be waived.⁸

A. *Mandatory Review of the Death Sentence*

The Supreme Court of Missouri must conduct the statutorily mandated review of the defendant's death sentence in all cases, regardless of whether the defendant pleaded guilty or wishes to relinquish his/her rights to appeal and post-conviction review.⁹ In addition, “[b]oth the defendant and the state shall have the right to submit briefs . . . and to present oral argument to the supreme court” in support of their respective positions.¹⁰ If the defendant fails to submit a brief because, for instance, s/he has elected to abandon his/her appeal, the Court will conduct its review based on the trial transcript and record alone.¹¹

The Supreme Court of Missouri has explained that the “ultimate purpose of [a death sentence] review is to prevent freakish and wanton applications of the death penalty.”¹² The Missouri statute requires the Court to consider three issues in mandatory review:

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
- (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance . . . and any other circumstance found; [and]
- (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both [sic] the crime, the strength of the evidence and the defendant.¹³

If the Court finds that the death sentence was in error based on one or more of the three statutory considerations, it may either “[s]et the sentence aside and resentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the

⁶ Section 565.035, RSMo 2011. The Missouri Court of Appeals does not review death penalty cases, as the Constitution of Missouri provides the Supreme Court of Missouri has “exclusive appellate jurisdiction” over “all cases where the punishment imposed is death.” Mo. Const. art. V, sec. 3.

⁷ Section 565.035.7, RSMo 2011.

⁸ Section 565.035.7, RSMo 2011.

⁹ Section 565.035.1, RSMo 2011; *State v. Worthington* 8 S.W.3d 83, 86 (Mo. banc 1999); *State v. Franklin*, 969 S.W.2d 743, 744–45. (Mo. banc 1998).

¹⁰ Section 565.035.4, RSMo 2011. The procedure for properly filing an appellate brief is discussed in the Direct Appeal section, below.

¹¹ Section 565.035.1, RSMo 2011; *see also Franklin*, 969 S.W.2d at 745.

¹² *State v. Edwards*, 116 S.W.3d 511, 548 (Mo. banc 2003). The Court has further held that mandatory review is not required by the Missouri or United States constitutions. *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993). The U.S. Supreme Court has similarly held that proportionality review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 47–48 (1984).

¹³ Section 565.035.3, RSMo 2011.

governor[.]” or “[s]et the sentence aside and remand the case for retrial of the punishment hearing” with a new jury.¹⁴

1. Influence of Passion, Prejudice, or Other Arbitrary Factor

In the first part of its mandatory review, the Supreme Court of Missouri must consider “[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.”¹⁵ The Court has not outlined an exact procedure for conducting this arbitrariness review. The Court has considered various claims under this arbitrariness review, such as allegations that the jury imposed the death sentence due to excessive trial publicity, the race of the defendant, improper argument by the prosecutor, and admission of improper character evidence.¹⁶

2. Evidence of an Aggravating Circumstance

The Missouri mandatory review statute also requires the Supreme Court of Missouri to consider “[w]hether the evidence supports the jury’s or judge’s finding of a statutory aggravating circumstance.”¹⁷ Irrespective of the number of aggravating circumstances found by the jury, the Court “need only determine whether, as a matter of law and fact, *one* of the aggravating circumstances is applicable.”¹⁸ Accordingly, if multiple aggravating circumstances are found by the jury, and the Court finds that the evidence did not support one or more of them, the death sentence will be upheld so long as the evidence supports one of the aggravating circumstances.¹⁹ In addition, when determining whether the evidence supports an aggravating circumstance, the Court will not reweigh the aggravating and mitigating circumstances to determine if a death sentence was appropriate.²⁰

3. Proportionality Review

The final analysis conducted under Missouri’s mandatory review of a death sentence, proportionality review, requires the Supreme Court of Missouri to consider whether the defendant’s death sentence was “excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.”²¹ “If the case, taken as a whole, is plainly lacking circumstances consistent with those in similar cases in which the death penalty has been imposed, then a resentencing will be ordered.”²² The methodology of

¹⁴ Section 565.035.5, RSMo 2011. If the Court elects to remand for a new sentencing trial, “evidence of the guilty verdict [in the original trial] shall be admissible in the new [sentencing] trial together with the official transcript of any testimony and evidence properly admitted in each stage of the original trial where relevant to determine punishment.” Section 565.035.5(3), RSMo 2011.

¹⁵ Section 565.035.3(1), RSMo 2011.

¹⁶ See, e.g., *State v. Johns*, 679 S.W.2d 253, 267 (Mo. banc 1984), *overruled on other grounds by State v. O’Brien*, 857 S.W.2d 212 (Mo. banc 1993).

¹⁷ Section 565.035.3(2), RSMo 2011.

¹⁸ *Johns*, 679 S.W.2d at 267 (emphasis added).

¹⁹ See *Franklin*, 969 S.W.2d at 745 (finding that the evidence did not support one of the three aggravating circumstances found by the jury, but upholding the death sentence).

²⁰ See, e.g., *State v. Anderson*, 306 S.W.3d 529, 544 (Mo. banc 2010).

²¹ Section 565.035.3(3), RSMo 2011.

²² *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993).

the Court’s proportionality review, however, has changed since the Missouri General Assembly reinstated the death penalty in 1977.

a. Scope of Review of “Similar Cases”

When Missouri reintroduced the death penalty in 1977, the death penalty review statute directed the Court to maintain records of “all capital cases in which [a death] sentence was imposed after May 26, 1977.”²³ In 1983, the statute was amended and now requires the Court to “accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed.”²⁴ The statute does not expressly require, however, that the scope of the Court’s proportionality review must include the types of cases for which the Court is required to maintain records. As such, the Supreme Court of Missouri determines the cases it will consider in proportionality review.

In 1981, the Supreme Court of Missouri conducted its first proportionality review of a death sentence imposed pursuant to Missouri’s then newly-adopted death penalty statute in *State v. Mercer*.²⁵ The *Mercer* court considered “cases in which both death and life imprisonment were submitted to the jury, and which have been affirmed on appeal” in its proportionality review.²⁶ After the General Assembly amended the mandatory review statute in 1983, the Court continued to apply the *Mercer* standard in its proportionality review.²⁷

In 1993, however, the Supreme Court of Missouri’s decision in *State v. Ramsey* narrowed the types of “similar cases” that must be considered in proportionality review, holding that the Court must only consider “similar cases in which the death penalty” was actually imposed.²⁸ The Court reasoned that a more exhaustive review of other murder cases is not necessary, as “[p]roportionality review is not constitutionally required[,]” and only serves “as an additional [legislative] safeguard against arbitrary and capricious sentencing and to promote the evenhanded, rational and consistent imposition of death sentences.”²⁹

In 2010, the Supreme Court of Missouri reconsidered its proportionality analysis in *State v. Deck*.³⁰ *Deck*, however, did not produce a majority opinion, as one of the seven Supreme Court judges did not file or join an opinion, and the remaining six judges were evenly divided.³¹ In the principal opinion, three of the judges asserted that the Court should uphold the *Ramsey* standard, by which the Court only reviews cases in which a death sentence had been imposed.³² The concurring opinion, by contrast, reasoned that Missouri’s mandatory review statute “requires consideration of all ‘other similar cases,’” in which a sentence of death or life imprisonment was

²³ Section 565.014.6, RSMo (1977).

²⁴ Section 565.035.6, RSMo (2011).

²⁵ 618 S.W.2d 1, 10–11 (Mo. banc 1981).

²⁶ *Id.* at 11.

²⁷ *See, e.g.*, *State v. Six*, 805 S.W.2d 159, 169 (Mo. banc 1991).

²⁸ 864 S.W.2d 320, 328 (Mo. banc 1993).

²⁹ *Id.* at 328.

³⁰ *See* 303 S.W.3d 527 (Mo. banc 2010).

³¹ *Id.* at 553.

³² *Id.* at 550–52. The principal opinion explained that if the Missouri General Assembly disagreed with the *Ramsey* standard, it would have amended the statute. *Id.* at 551–52.

imposed.³³ This concurrence asserted that, because the statute directs the Court to “accumulate the records of all cases in which the sentence of death *or life imprisonment* without probation or parole was imposed[.]” it follows that the Court must consider both types of cases in its proportionality review.³⁴

Shortly after *Deck*, the Supreme Court of Missouri produced a clear majority on the issue of proportionality review in *State v. Anderson*.³⁵ Applying the rationale of the concurring opinion in *Deck*, the majority held that proportionality review “requires consideration of all factually similar cases in which the death penalty was submitted to the jury, including those resulting in a sentence of life imprisonment without the possibility of probation or parole.”³⁶ In a subsequent opinion, the Court held that this standard does not apply retroactively to cases originally decided under the *Ramsey* standard.³⁷

b. Method of Comparing Similar Cases

The Supreme Court of Missouri has applied varying methodologies for selecting “similar cases” and comparing them to the case on appeal. For example, in the 1980s, the Court’s opinion would often state directly that the sentence was not disproportionate, accompanied by case citations in support of that proposition.³⁸ In more recent cases, however, the Supreme Court of Missouri has generally selected cases for proportionality review based on common statutory aggravating circumstances.³⁹ Using this methodology, the Court will typically uphold a death sentence if it is able to locate prior cases in which the trier of fact found one or more of the same aggravating circumstances as in the reviewed case.⁴⁰ The Court will generally not compare the specific facts of the case on appeal with the facts of the cited cases.⁴¹ In some cases, however, the Court has deviated from this approach and reviewed the specific facts of a case in its proportionality analysis.⁴²

³³ *Id.* at 555 (Stith, J., concurring); *see also id.* at 553–54 (Breckenridge, J., concurring).

³⁴ *Id.* at 559 (Stith, J., concurring) (quoting section 565.035.6, RSMo 2011); *see also id.* at 553–54 (Breckenridge, J., concurring).

³⁵ 306 S.W.3d 529 (Mo. banc 2010).

³⁶ *Id.* at 545 (Breckenridge, J., concurring). Although the quoted language appears in a concurring opinion, it represents the opinion of the majority of the Court on this particular point of law. *See id.* The Court has applied the *Anderson* proportionality review standard in subsequent cases. *E.g.*, *State v. Davis*, 318 S.W.3d 618, 643 (Mo. banc 2010).

³⁷ *State v. Nunley*, 341 S.W.3d 611, 614 (Mo. banc 2011).

³⁸ *See, e.g.*, *Schneider*, 736 S.W.2d at 404; *Driscoll*, 711 S.W.2d at 517–18; *see also* Donald H. Wallace & Jonathan R. Sorensen, *A State Supreme Court’s Review of Comparative Proportionality; Explanations for Three Disproportionate & Executed Death Sentences*, 20 T. JEFFERSON L. REV. 207, 229–33 (1998) (reviewing the Supreme Court of Missouri’s proportionality review methodology in all capital cases through 1997).

³⁹ *See, e.g.*, *State v. Johnson*, 284 S.W.3d 561, 577 (Mo. banc 2009); *State v. Zink*, 181 S.W.3d 66, 75 (Mo. banc 2005); *see also* Wallace & Sorensen, *supra* note 38, at 229–37.

⁴⁰ *See, e.g.*, *Johnson*, 284 S.W.3d at 577; *Zink*, 181 S.W.3d at 75.

⁴¹ *See, e.g.*, *Johnson*, 284 S.W.3d at 577; *Zink*, 181 S.W.3d at 75.

⁴² *See, e.g.*, *State v. McIlvoy*, 629 S.W.2d 333, 341–42. (Mo. banc 1982) (considering the defendant’s low IQ and minimal criminal record, as well as the co-defendant’s role in the offense, and determining that the death sentence was disproportionate); *State v. Chaney*, 967 S.W.2d 47, 59–60. (Mo. banc 1998) (reviewing the relative strength of the evidence of guilt as compared to other capital cases and finding the death penalty to be disproportionate).

c. Consideration of the “Strength of the Evidence”

In 1983, the Missouri General Assembly amended the death penalty review statute to require the Supreme Court of Missouri to consider “the strength of the evidence” in its proportionality review.⁴³ In reviewing the strength of the evidence, the Court has compared the nature of the evidence supporting the defendant’s guilt to the evidence of guilt offered in other cases.⁴⁴ If the strength of the evidence in the case “falls within a narrow band where the evidence is sufficient to support a conviction, but not of the compelling nature usually found in cases where the sentence is death[,]” the Court will reverse the death sentence.⁴⁵

B. Direct Appeal

In addition to mandatory review, a death-sentenced defendant is entitled to a direct appeal to the Supreme Court of Missouri, alleging other errors at the trial court level.⁴⁶ The defendant may, however, waive direct appeal by affirmatively informing the Supreme Court of Missouri that s/he does not wish to pursue direct appeal, or by neglecting to file for appeal in a timely manner.⁴⁷ Missouri Supreme Court Rules require a defendant’s death sentence to be stayed during the direct appeal process.⁴⁸

1. Direct Appeal Procedure

The defendant must file a notice of appeal with the clerk of the trial court within ten days after the death sentence becomes final.⁴⁹ However, the Supreme Court of Missouri may, in its discretion upon a showing of good cause, grant the defendant leave to file a notice of appeal with the trial court after ten days have elapsed, provided the motion for leave is filed with the Supreme Court within twelve months after the death sentence becomes final.⁵⁰ After the notice of appeal is filed, the defendant has thirty days to order the trial transcript and court file from the trial court reporter.⁵¹ The transcript and court file will constitute the record on appeal, which the defendant must file in the Supreme Court within ninety days after the notice of appeal is filed.⁵² The defendant must file his/her brief with the Supreme Court within sixty days after the notice of appeal is filed.⁵³ The state has thirty days to respond.⁵⁴ The Missouri Supreme Court Rules dictate that the defendant’s brief cannot be longer than 31,000 words.⁵⁵ The state’s response cannot exceed ninety-percent of the length of the defendant’s brief.⁵⁶ Death-sentenced

⁴³ Section 565.035.3(3), RSMo 1983.

⁴⁴ *State v. Chaney*, 967 S.W.2d 47, 60 (Mo. banc 1998).

⁴⁵ *Id.*

⁴⁶ Section 565.035.7, RSMo 2011.

⁴⁷ Section 565.035.7, RSMo 2011; Rule 30.01(d); *State v. Franklin*, 969 S.W.2d 743, 744 (Mo. banc 1998).

⁴⁸ Rule 30.15(a).

⁴⁹ Rule 30.01(d).

⁵⁰ Rule 30.03.

⁵¹ Rule 30.04(c).

⁵² Rules 30.04(f), 81.19.

⁵³ Rule 84.05(a).

⁵⁴ *Id.*

⁵⁵ Rule 84.06(b).

⁵⁶ *Id.*

defendants also have a statutory right to present their claims in an oral argument before the Supreme Court of Missouri.⁵⁷

2. Standard of Review on Direct Appeal

a. Review of a Court's Findings of Fact

The Supreme Court of Missouri “extend[s] substantial deference to trial court decisions” on factual issues.⁵⁸ As such, the Court will generally not review alleged factual errors on direct appeal.⁵⁹

b. Errors of Law Properly Preserved

In order to properly preserve a legal error for appeal, the defendant typically must make a contemporaneous objection to the alleged error at the earliest opportunity and raise the error again after s/he is convicted in his/her motion for a new trial.⁶⁰ The Supreme Court of Missouri typically reviews properly preserved constitutional errors de novo, without deference to the trial court's ruling.⁶¹ However, a decision that involved the trial court's discretion, such as the decision to admit evidence at trial, is reviewed for abuse of discretion.⁶² Under the abuse of discretion standard, the Supreme Court will only reverse the trial court's decision “if this discretion was clearly abused.”⁶³

The reviewing court will not, however, grant relief for errors of law which are found to be harmless.⁶⁴ Missouri Supreme Court Rules define harmless error as “[a]ny error, defect, irregularity, or variance which does not affect substantial rights.”⁶⁵ Under this standard, the Supreme Court of Missouri “will reverse the trial court's decision only when the error was so prejudicial that the defendant was deprived of a fair trial.”⁶⁶ The Court defines prejudice as a “reasonable probability that the trial court's error affected the outcome of the trial.”⁶⁷ In the case of errors involving federal constitutional rights, however, the Supreme Court of Missouri “must be able to declare a belief that [the error] was harmless beyond a reasonable doubt.”⁶⁸

c. Errors of Law Not Properly Preserved

⁵⁷ Section 565.035.4, RSMo 2011.

⁵⁸ *State v. Taylor*, 298 S.W.3d 482, 492 n.4 (Mo. banc 2009) (“For instance, appellate review of the trial court's legal determination of whether a statement is hearsay is given no deference and is reviewed de novo. Once a statement is classified as hearsay, the court must determine whether a hearsay exception applies. The trial court's findings as to the factual underpinnings of a hearsay exception are subject to deferential review”) (internal citations omitted).

⁵⁹ *See id.*

⁶⁰ *State v. Gant*, 490 S.W.2d 46, 49 (Mo. banc 1973).

⁶¹ *State v. Werner*, 9 S.W.3d 590, 595 (Mo. banc 2000).

⁶² *State v. Morrow*, 968 S.W.2d 100, 106 (Mo. banc 1998).

⁶³ *Id.*

⁶⁴ *State v. Johnson*, 284 S.W.3d 561, 568 (Mo. banc 2009).

⁶⁵ Rule 29.12(a).

⁶⁶ *Johnson*, 284 S.W.3d at 568.

⁶⁷ *State v. Zink*, 181 S.W.3d 66, 73 (Mo. banc 2005).

⁶⁸ *Chapman v. California*, 386 U.S. 18, 24 (1967).

If defense counsel neglected to preserve an alleged error at trial by failing to properly object or raise the issue in a motion for new trial, the Supreme Court of Missouri may, in its discretion, review the alleged error under the plain error standard.⁶⁹ For the defendant to prevail on this standard, s/he “must make a demonstration that manifest injustice or a miscarriage of justice will occur if the error is not corrected.”⁷⁰ Plain error review “is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review.”⁷¹ Moreover, alleged trial errors that were the result of trial strategy, such as a strategic decision not to object, are considered a waiver of plain error review and will not be reviewed on direct appeal under any standard.⁷²

⁶⁹ Rule 30.20; *State v. Knese*, 985 S.W.2d 759, 770 (Mo. banc 1999).

⁷⁰ *State v. Tokar*, 918 S.W.2d 753, 769–70 (Mo. banc 1996).

⁷¹ *Id.* at 769.

⁷² *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009).

II. ANALYSIS

A. Recommendation #1

In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, direct appeal courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought.

Scope of Review

According to the Supreme Court of Missouri, proportionality review must include “cases in which the death penalty was submitted to the jury, including those resulting in a sentence of life imprisonment without the possibility of probation or parole.”⁷³ While the Missouri statute calls for the Court to consider whether the death sentence “is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant,”⁷⁴ the Supreme Court of Missouri does not include in its review similar cases in which the death penalty could have been sought but was not.⁷⁵

An expansive proportionality review statute, which requires the reviewing court to examine cases in which the death penalty could have been sought, is necessary to provide a check on the prosecution’s broad discretion in deciding to seek the death penalty. This is especially true in Missouri, where numerous and expansive statutory aggravating circumstances permit most murders to be charged capitally.⁷⁶

Since reinstating the death penalty in 1977, the Missouri General Assembly has repeatedly expanded the list of statutory aggravating circumstances, from ten in the original statute to seventeen as of January 2012.⁷⁷ Most other capital jurisdictions, including most death penalty states that border Missouri, have fewer than seventeen aggravating circumstances.⁷⁸ Moreover,

⁷³ State v. Anderson, 306 S.W.3d 529, 545 (Mo. banc 2010) (Breckenridge, J., concurring). Although the quoted language appears in a concurring opinion, it represents the opinion of the majority of the Court on this particular point of law. See *id.* In a subsequent opinion, however, the Court held that this standard does not apply retroactively to cases decided on direct appeal prior to the Court’s decision in *Anderson*. State v. Nunley, 341 S.W.3d 611, 614 (Mo. banc).

⁷⁴ Section 565.035.3, RSMo 2011.

⁷⁵ See section 565.035, RSMo 2011; see also State v. Shafer, 969 S.W.2d 719, 742 (Mo. banc 1998).

⁷⁶ See section 565.032, RSMo 2011; see also Katherine Barnes, David Sloss, & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-making in Death-eligible Cases*, 51 ARIZ. L. REV. 305, 321–25 (2009). For a discussion of prosecutorial discretion and capital charging practices, see Chapter Five on Prosecutorial Professionalism.

⁷⁷ Section 565.032.2, RSMo 2011.

⁷⁸ See, e.g., ARK. CODE ANN. § 5–10–101 (West 2011) (listing Arkansas’s ten aggravating circumstances); KAN. STAT. ANN. § 21–6624 (West 2011) (listing Kansas’s eight aggravating circumstances); KY. REV. STAT. ANN. § 532.025(2)(a) (West 2011) (listing Kentucky’s eight aggravating circumstances); NEB. REV. STAT. § 29–2523(1) (2010) (listing Nebraska’s nine aggravating circumstances); OKLA. STAT. tit. 21, § 701.12 (2011) (listing Oklahoma’s eight aggravating circumstances); TENN. CODE ANN. § 39-13-204(i) (West 2011) (listing Tennessee’s

many of Missouri’s aggravating circumstances would likely apply to a large number of murders. A study of 247 Missouri cases in which the defendant could have been charged with first-degree murder found that the “murder for the purpose of receiving money” aggravating circumstance would apply to 45% of the sampled cases; the “wantonly vile” aggravating circumstance would apply to more than 90% of the cases; and the “engaged in a felony” aggravating circumstance would apply to more than 50% of the cases.⁷⁹

Because these expansive aggravating circumstances allow almost any first-degree murder case to be prosecuted capitally, it is essential that the Missouri General Assembly require that proportionality review include an equally expansive number of cases, including all cases in which the death penalty could have been sought. When a prosecuting attorney in one of Missouri’s 114 counties is free to pursue the death penalty in virtually any murder case, the General Assembly’s prescribed aggravating circumstances do not serve to limit capital punishment to the “narrow category” of the most culpable murderers for whom the death penalty is reserved.⁸⁰ Furthermore, because the vast majority of murders are death penalty-eligible, it is more difficult to ensure a thorough proportionality review that considers the range of cases that may provide the most relevant evidence of arbitrariness. In particular, the “wantonly vile” aggravator potentially serves as a catchall provision to encompass most murders.⁸¹

Expanding the scope of proportionality review to include all cases in which the death penalty could have been sought would provide an essential check on prosecutorial discretion, juror decision-making, and generally help to ensure that the death penalty is not arbitrarily applied.

Additionally, in most cases, the Supreme Court of Missouri selects cases for proportionality review based on common statutory aggravating circumstances.⁸² The Court will typically

seventeen aggravating circumstances). Furthermore, the now-withdrawn Model Penal Code death penalty statute, by comparison, limits the statutory aggravating circumstances to eight. MODEL PENAL CODE § 210.6(3) (2009) (withdrawn 2009). The American Law Institute, which drafts the Model Penal Code, withdrew its support for its Model Death Penalty statute in 2009, citing the inability to create a fair and constitutional death penalty statute. Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. TIMES, Jan. 4, 2010, available at http://www.nytimes.com/2010/01/05/us/05bar.html?_r=1&hp.

⁷⁹ Barnes et al., *supra* note 76, at 323. Additionally, two other statutory aggravating circumstances, murder “committed for the purpose of avoiding, interfering with, or preventing a lawful arrest” and murder of a victim who “was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as . . . a witness[.]” have been broadly interpreted to encompass any homicide in which the victim could have identified his/her assailant. *See State v. Grubbs*, 724 S.W.2d 494, 495–96 (Mo. banc 1987); *State v. Brown*, 902 S.W.2d 278, 283 (Mo. banc 1995).

⁸⁰ *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

⁸¹ Missouri’s mandatory model jury instructions instruct jurors that they can find the presence of the “wantonly vile” aggravating circumstance only if the victim was tortured or if one of ten other conditions is met. MAI-CR3d 314.40, Note on Use 6. While this instruction reduces the vagueness of the “wantonly vile” aggravating circumstance, it does little to reduce the breadth of the circumstance. The instruction, in effect, creates eleven new aggravating circumstances, many of which are quite broad. *See id.* To illustrate, the Barnes study found the “wantonly vile” aggravating circumstance applied to 90% of sampled cases when the researchers compared the sampled cases to death penalty cases upheld by the Supreme Court of Missouri. Barnes et al., *supra* note 76, at 323–24. In those cases, the Court upheld the application of the “wantonly vile” aggravating circumstance based on the jury instructions. *See, e.g., State v. Strong*, 142 S.W.3d 702, 721–22 (Mo. banc 2004).

⁸² *See, e.g., State v. Johnson*, 284 S.W.3d 561, 577 (Mo. banc 2009); *State v. Zink*, 181 S.W.3d 66, 75 (Mo. banc 2005); *see also Wallace & Sorensen, supra* note 69, at 229–37.

compare the case on appeal with prior cases that had similar aggravating circumstances and determine whether to uphold the death sentence based solely on this information.⁸³ The existing nature of mandatory death sentence review, however, does not include cases with similar aggravating circumstances, but for which death penalty was not sought. Given the expansive nature of Missouri's aggravating circumstances, it is possible that a review of all death-eligible cases could reveal that the death penalty is rarely pursued in certain types of cases that share common aggravating circumstances. However, as explained above, expanding review to include all death-eligible cases may be difficult given the expansive nature of Missouri's aggravating circumstances, which encompass the vast majority of murders.

Conclusion

Missouri is in partial compliance with Recommendation #1.

While Missouri's proportionality review now encompasses cases in which the death penalty was submitted to the jury, this review does not include all death penalty-eligible cases, including cases in which the death penalty could have been sought. Moreover, given that Missouri law renders the vast majority of first-degree murder cases capital-eligible, it is essential for the state's proportionality review to require an examination of potential capital cases to ensure that the death penalty is administered in a rational, non-arbitrary manner; to provide a check on broad prosecutorial discretion; and to prevent discrimination from playing a role in the capital decision-making process.

In order to ensure the state's compliance with this Recommendation, it is necessary for Missouri to implement a uniform, statewide system for the collection of data on the charging, prosecution, and conviction of all capital-eligible offenses. However, to make this feasible, aggravating circumstances in Missouri's death penalty law have to be sufficiently limited such that the Court can reasonably conduct a meaningful proportionality review. Narrowing the applicability of Missouri's aggravating circumstances would reduce the number of capital-eligible offenses, thereby limiting the number of cases that must be considered in comparative proportionality review.

⁸³ See, e.g., *Johnson*, 284 S.W.3d at 577; *Zink*, 181 S.W.3d at 75.

CHAPTER EIGHT

STATE POST-CONVICTION PROCEEDINGS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

The availability of state post-conviction and federal habeas corpus relief through collateral review of state court judgments is an integral part of the capital punishment review process. Significant percentages of capital convictions and death sentences have been set aside in such proceedings as a result of ineffective assistance of counsel claims, claims made possible by the discovery of crucial new evidence, claims based upon prosecutorial misconduct, claims based on unconstitutional racial discrimination in jury selection, and other meritorious constitutional bases.

Collateral review is critically important to the fair administration of justice in capital cases. Because some capital defendants receive inadequate counsel at trial and on direct appeal, and because it is often impossible to uncover prosecutorial misconduct or other crucial evidence until after direct appeal, state post-conviction proceedings often provide the first opportunity to establish meritorious constitutional claims. Moreover, exhaustion and procedural default rules require the inmate to present such claims in state court before they may be considered in federal habeas corpus proceedings.

Securing relief on meritorious federal constitutional claims in state post-conviction proceedings or federal habeas corpus proceedings has become increasingly difficult in recent years because of more restrictive state procedural rules and practices and more stringent federal standards and time limits for review of state court judgments. Some federal restrictions include a one-year statute of limitations on federal habeas claims and, in some circumstances, a requirement that federal courts defer to state court rulings that the Constitution has not been violated, even if the federal court concludes that the state court's ruling was erroneous. Federal law also places, absent a convincing claim of innocence, tight restrictions on evidentiary hearings with respect to facts not presented in state court—no matter the justification for the omission.¹

In addition, decisions by the Supreme Court of the United States and passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) have greatly limited the ability of a death row inmate to return to federal court a second time. The frequent invocation of the harmless error doctrine also has limited grants of federal habeas corpus relief.

These limitations on post-conviction relief, as well as the federal government's defunding of resource centers for federal habeas proceedings in capital cases, have been justified as necessary to discourage frivolous claims in federal courts. These changes, however, also have resulted in an inability of death row inmates to have valid claims heard or reviewed on the merits in federal court.

State courts and legislatures could alleviate some of the unfairness these developments have created by making it easier for state courts to review valid claims of constitutional error on the

¹ See 28 U.S.C. §§ 2244, 2254 (2011).

merits. Under current collateral review procedures, a “full and fair judicial review” often does not include reviewing the merits of the inmate’s constitutional claims.

I. FACTUAL DISCUSSION: MISSOURI OVERVIEW

A. Rule 24.035 and Rule 29.15 State Post-conviction Proceedings

Rules 24.035 and 29.15 of the Supreme Court of Missouri provide the primary means by which a Missouri inmate can challenge his/her conviction or sentence in state post-conviction proceedings.² Rule 24.035 and Rule 29.15 proceedings are identical in most respects;³ however, Rule 24.035 applies to cases in which the inmate was convicted after pleading guilty,⁴ whereas Rule 29.15 applies to cases in which the inmate was found guilty following a trial.⁵

1. Overview of Rule 24.035 and Rule 29.15 Post-conviction Procedures

a. Trial-level Procedure

A Missouri inmate must initiate post-conviction proceedings him/herself by filing a pro se Rule 24.035 or Rule 29.15 motion with the trial court in which s/he was convicted.⁶ The inmate must file this motion ninety days from the date the Supreme Court of Missouri affirms his/her death sentence on direct appeal.⁷ In cases where the inmate waived his/her right to direct appeal s/he must file the pro se motion within 180 days of being “delivered to the custody of the department of corrections.”⁸ In order to file for relief, the inmate must complete a form, provided by the court, wherein the inmate lists his/her post-conviction claims, the factual bases for those claims, and other facts about his/her case.⁹ If the inmate fails to file the pro se motion in a timely manner, s/he automatically waives his/her right to Rule 24.035 and Rule 29.15 post-conviction review.¹⁰

In preparing the initial pro se motion, indigent inmates are not entitled to the assistance of counsel.¹¹ In capital cases, however, the Missouri State Public Defender (MSPD) often informally assists death row inmates to ensure timely and proper filing.¹² After an indigent inmate timely files his/her pro se motion, the trial court will appoint counsel to represent the inmate.¹³ Following the appointment of counsel, the inmate may file an amended Rule 24.035 or Rule 29.15 motion with the full assistance of his/her attorney.¹⁴ The amended motion is an entirely new filing that may raise new claims but cannot incorporate by reference materials from

² See generally Rules 24.035, 29.15.

³ See Rules 24.035, 29.15.

⁴ Rule 24.035(a).

⁵ Rule 29.15(a).

⁶ See Rules 24.035(b), 29.15(b). See also Email Interview by Rachel Bays with Greg Mermelstein, Appellate/PCR Div. Dir., Mo. State Pub. Defender Sys. (Aug. 20, 2010) (on file with author).

⁷ Rules 24.035(b), 29.15(b).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Accord Rules 24.035(e), 29.15(e).

¹² Interview with Greg Mermelstein, *supra* note 6.

¹³ Rules 24.035(e), 29.15(e).

¹⁴ Rules 24.035(g), 29.15(g).

the pro se motion.¹⁵ If the inmate waived his/her right to direct appeal, the amended motion must be filed

within sixty days of the earlier of: (1) the date both a complete transcript has been filed in the trial court and counsel is appointed or (2) the date both a complete transcript has been filed in the trial court and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant.¹⁶

If the inmate did not waive direct appeal, s/he must file the amended motion

within sixty days of the earlier of: (1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant.¹⁷

The trial court may, in its discretion, grant the inmate an additional thirty days to file the amended motion.¹⁸ As a general rule, if post-conviction counsel does not file the amended motion in a timely manner, any additional claims raised in that motion will not be considered, and the Rule 24.035 or Rule 29.15 proceedings will be limited to claims raised in the inmate's pro se motion.¹⁹ The prosecutor must file his/her response to the amended motion "within thirty days after the date an amended motion is required to be filed."²⁰

After the pleadings are filed, the trial court will hold an evidentiary hearing unless it determines that "the motion and the files and records of the case conclusively show that the movant is entitled to no relief."²¹ If a hearing is held, it "shall be on the record and shall be confined to the claims contained in the last timely filed motion."²² Irrespective of whether the court holds a hearing, it must "issue findings of fact and conclusions of law on all issues presented."²³ In order to be granted relief, the inmate has the burden of proving his/her claims by a preponderance of the evidence.²⁴ If the trial court finds that the inmate is entitled to relief, it must "vacate and set aside the judgment and [] discharge the [inmate] or resentence the [inmate] or order a new trial or correct the judgment and sentence as appropriate."²⁵

¹⁵ See Rules 24.035(g), 29.15(g).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *Day v. State*, 770 S.W.2d 692, 696 (Mo. banc 1989).

²⁰ Rules 24.035(g), 29.15(g).

²¹ Rules 24.035(h), 29.15(h).

²² Rules 24.035(i), 29.15(i).

²³ Rules 24.035(j), 29.15(j).

²⁴ Rules 24.035(i), 29.15(i).

²⁵ Rules 24.035(j), 29.15(j).

b. Appellate Review of Post-conviction Orders

In capital cases, appeals of Rule 24.035 and Rule 29.15 post-conviction orders are made directly to the Supreme Court of Missouri.²⁶ The Missouri Supreme Court Rules dictate that “[a]ppellate review of the trial court’s action on the [Rule 24.035 or Rule 29.15 post-conviction motion] shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous.”²⁷

2. Types of Claims Reviewable in Rule 24.035 and Rule 29.15 Proceedings

a. Ineffective Assistance of Counsel

Missouri Supreme Court Rules state that Rule 24.035 and Rule 29.15 post-conviction proceedings are the proper forum for an inmate to raise claims of ineffective assistance of trial and appellate counsel.²⁸ An inmate may not, however, couch a claim of trial error “in terms of a claim of ineffective assistance of counsel . . . in an attempt to circumvent the well-established law” that a claim of trial error can only be raised on direct appeal.²⁹

Missouri courts have adopted the standard for evaluating ineffective assistance of counsel claims established by the U.S. Supreme Court in *Strickland v. Washington*.³⁰ For an inmate to prevail on an ineffective assistance of counsel claim, s/he “must show by a preponderance of the evidence: (1) that trial counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances and (2) that counsel’s deficient performance prejudiced the defense.”³¹ The inmate “must overcome a strong presumption that counsel provided competent assistance”³² by demonstrating “that counsel’s representation fell below an objective standard of reasonableness.”³³ Moreover, to prove s/he was prejudiced by the deficient performance, the inmate must show that “there is a *reasonable probability* that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”³⁴

b. Claims Related to Guilty Pleas

An inmate may obtain relief in Rule 24.035 proceedings on the grounds that his/her guilty plea was not valid.³⁵ Missouri inmates have been granted post-conviction relief on the grounds that there was no factual basis established at the plea hearing to support all of the elements of the

²⁶ See Mo. Const. art. V, sec. 3.

²⁷ Rules 24.035(k), 29.15(k).

²⁸ Rules 24.035(a), 29.15(a).

²⁹ See *Morrow v. State*, 21 S.W.3d 819, 829 (Mo. banc 2000).

³⁰ See *Deck v. State*, 68 S.W.3d 418, 425–26 (Mo. banc 2002).

³¹ *Id.* at 425 (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)).

³² *Id.* at 425–26 (citing Rule 29.15(i); *Leisure v. State*, 828 S.W.2d 872, 874 (Mo. banc 1992)).

³³ *Id.* at 426 (quoting *Strickland*, 466 U.S. at 688).

³⁴ *Id.* (quoting *Strickland*, 466 U.S. at 694).

³⁵ See, e.g., *State v. Taylor*, 929 S.W.2d 209, 217–18 (Mo. banc 1996).

crime to which the inmate pleaded guilty.³⁶ In addition, an inmate may obtain post-conviction relief if s/he can prove that her guilty plea was not knowingly and voluntarily made.³⁷

3. Restrictions on Rule 24.035 and Rule 29.15 Motions

The Supreme Court of Missouri has held that “[c]laims of trial error will only be considered in a Rule 29.15 motion where fundamental fairness requires, and then, only in rare and exceptional circumstances.”³⁸ The post-conviction court is also prohibited from considering claims of newly discovered evidence and claims of actual innocence in Rule 24.035 and Rule 29.15 proceedings;³⁹ instead, these claims may be presented in Rule 91 habeas corpus proceedings.⁴⁰

Missouri Supreme Court Rules also prohibit inmates from filing second and successive Rule 24.035 and Rule 29.15 motions.⁴¹

4. Appointment of Counsel in Rule 24.035 and Rule 29.15 Proceedings⁴²

The trial court will appoint post-conviction counsel to represent an inmate after s/he files a pro se Rule 24.035 or Rule 29.15 post-conviction motion.⁴³ The MSPD Appellate/Post-Conviction Review (Appellate/PCR) Division represents most indigent death row inmates in these proceedings.⁴⁴ There are six Appellate/PCR Division offices located in St. Louis, Kansas City, and Columbia.⁴⁵ As of August 2010, the MSPD Appellate/PCR Division employed seven attorneys who are qualified by Missouri statute to represent death row inmates during state post-conviction proceedings.⁴⁶ In the small number of cases where the MSPD Appellate/PCR Division cannot represent the inmate due to a conflict of interest, MSPD will contract with a private bar attorney to represent the inmate in state post-conviction proceedings.⁴⁷ Private attorneys who are appointed to represent capital inmates must also meet the statutory qualification standards.⁴⁸

³⁶ See, e.g., *Jones v. State*, 758 S.W.2d 153, 154 (Mo. App. 1988).

³⁷ See *Taylor*, 929 S.W.2d at 217–18.

³⁸ *State v. Carter*, 955 S.W.2d 548, 555 (Mo. banc 1997) (citing *Schneider v. State*, 787 S.W.2d 718, 721 (Mo. banc 1990)).

³⁹ *Wilson v. State*, 813 S.W.2d 833, 834–35 (Mo. banc 1991).

⁴⁰ See *infra* notes 54–74 and accompanying text.

⁴¹ Rules 24.035(l), 29.15(l).

⁴² For a discussion on the appointment and qualifications of capital defense counsel in Missouri, see Chapter Six on Defense Services.

⁴³ Rules 24.035(e), 29.15(e). The U.S. Supreme Court has held that there is no constitutional obligation for states to appoint counsel to indigent death row inmates who wish to pursue state post-conviction relief. *Murray v. Giarratano*, 492 U.S. 1, 3–4 (1989).

⁴⁴ STATE OF MO. PUB. DEFENDER COMM’N, FISCAL YEAR 2010 ANNUAL REPORT 71, 74 (2010), available at <http://www.publicdefender.mo.gov/about/FY2010AnnualReport.pdf> [hereinafter 2010 MO. PUB. DEFENDER ANNUAL REPORT].

⁴⁵ *Id.* at 69.

⁴⁶ Interview with Greg Mermelstein, *supra* note 6; see also section 547.370, RSMo 2011 (delineating the qualifications for and requiring certification of attorneys who represent death row inmates in state post-conviction relief proceedings).

⁴⁷ Interview with Greg Mermelstein, *supra* note 6.

⁴⁸ Section 547.370, RSMo 2011.

Pursuant to Missouri law, the trial court must appoint two attorneys to represent the inmate in Rule 24.035 or 29.15 post-conviction proceedings.⁴⁹ At least one of these two attorneys must meet training and experience requirements as delineated by Missouri statute.⁵⁰

The MSPD Appellate/PCR Division also employs three mitigation specialists and two investigators.⁵¹ These investigators and mitigation specialists are assigned both capital and non-capital appellate case work.⁵² Appellate/PCR attorneys who desire funding for additional expert assistance or other ancillary service must file a request and obtain approval from MSPD.⁵³

B. Other Missouri Post-conviction Proceedings

1. Rule 91 Habeas Corpus

a. Rule 91 Generally

Missouri Supreme Court Rule 91 allows “[a]ny person restrained of liberty” to seek review of his/her sentence or conviction by “petition[ing] for a writ of habeas corpus to inquire into the cause of such restraint.”⁵⁴ Death row inmates must file their habeas corpus petitions directly to the Supreme Court of Missouri.⁵⁵ An inmate may file a Rule 91 petition at any time during his/her incarceration.⁵⁶

Missouri’s Rule 91 habeas corpus procedure was established before the inception of Rule 24.035 and Rule 29.15 post-conviction proceedings.⁵⁷ It is unclear the extent to which Rules 24.035 and 29.15 supplant traditional Rule 91 proceedings. The Supreme Court of Missouri has held that “[t]he relief available under a writ of habeas corpus has traditionally been very limited, and courts are not required to issue this extraordinary writ where other remedies are adequate and available.”⁵⁸ Moreover, the Court “has taken a narrow view of what a criminal defendant must show to obtain a [Rule 91] writ of habeas corpus in order to overcome a previous procedural default” in Rule 24.035 or Rule 29.15 proceedings.⁵⁹ Thus, a petitioner generally cannot obtain relief in Rule 91 proceedings if s/he failed to present the claim in his/her prior Rule 24.035 or Rule 29.15 motion.⁶⁰ There are, however, some exceptions that permit an inmate to obtain Rule 91 relief on procedurally defaulted claims.

b. Exceptions to Rule 91 Procedural Default

⁴⁹ Section 547.370.1, RSMo 2011.

⁵⁰ Section 547.370.2(2)–(4), RSMo 2011.

⁵¹ Interview with Greg Mermelstein, *supra* note 6.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Rule 91.01(b).

⁵⁵ Rule 91.02(b).

⁵⁶ *See* Rule 91.01. The Rule 91 habeas corpus provisions contain no filing deadlines.

⁵⁷ *See* State ex rel. Nixon v. Jaynes, 63 S.W.3d 210, 214 (Mo. banc 2001).

⁵⁸ Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. banc 2000) (citing State ex rel. Simmons v. White, 866 S.W.2d 443, 445–46 (Mo. banc 1993)).

⁵⁹ *Nixon*, 63 S.W.3d at 214 (emphasis omitted).

⁶⁰ *See id.* (“[I]t is unusual for a court to consider a prisoner’s petition for a writ of habeas corpus for claims that should have been raised in post-conviction proceedings.”).

i. Cause and Prejudice

The Supreme Court of Missouri has held that an inmate may obtain relief on a procedurally defaulted claim in Rule 91 proceedings if s/he can demonstrate “cause and prejudice” with respect to the defaulted claim.⁶¹ To demonstrate “cause,” the inmate must prove that the defaulted claim “was not raised timely because of some objective factor external to the defense,” such as the prosecution’s failure to disclose evidence.⁶² “Prejudice” requires the inmate to demonstrate that “that the newly discovered evidence resulted in a verdict not worthy of confidence.”⁶³

ii. Manifest Injustice

An inmate may obtain relief in Rule 91 proceedings on a procedurally defaulted claim if the error is “rare and exceptional,” such that “a manifest injustice results if habeas corpus relief is not granted.”⁶⁴ The inmate must demonstrate that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.”⁶⁵ To prove actual innocence, the inmate “must show that it is more likely than not that no reasonable juror would have convicted him in the light [of new evidence of innocence].”⁶⁶ While the manifest injustice exception is typically limited to claims of actual innocence, a death row inmate may obtain relief under this exception if the inmate can prove that s/he is “innocent of the death penalty.”⁶⁷ The death row inmate must show that, as a result of a constitutional violation, “there was no aggravating circumstance or that some other condition of eligibility [for the death penalty] had not been met.”⁶⁸

iii. Freestanding Claims of Actual Innocence

More recently, the Supreme Court of Missouri has held that a death-sentenced inmate is entitled to Rule 91 relief if s/he can show that s/he is actually innocent of the offense for which s/he was convicted, irrespective of any alleged constitutional violation.⁶⁹ The burden is on the inmate to “make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment.”⁷⁰ In contrast with the manifest injustice exception, however, it appears that this exception only applies to cases in which the inmate can prove that s/he is actually innocent of the crime itself, rather than cases in which the inmate is guilty but ineligible for the death penalty.⁷¹

⁶¹ *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 77 (Mo. banc 2011) (citing *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. banc 2010)).

⁶² *Id.*

⁶³ *Id.* (internal quotations omitted) (citing *Engel*, 304 S.W.3d at 129).

⁶⁴ *Clay*, 37 S.W.3d at 217 (internal quotations omitted) (citing *Simmons*, 866 S.W.2d at 446).

⁶⁵ *Id.* (internal quotations omitted) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). The Supreme Court of Missouri has held that the manifest injustice standard is synonymous with the fundamental miscarriage of justice standard that applies to procedurally defaulted claims in federal habeas corpus proceedings. *Id.*

⁶⁶ *Id.* (quoting *Schlup*, 513 U.S. at 327).

⁶⁷ *Id.* at 218 n.1 (internal quotations omitted) (citing *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992)).

⁶⁸ *Id.*

⁶⁹ *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543 (Mo. banc 2003).

⁷⁰ *Id.* at 548.

⁷¹ *See id.*

iv. Counsel Abandonment

An inmate may be entitled to Rule 91 relief by demonstrating that his/her claims were not presented in prior proceedings because the inmate was abandoned by his/her Rule 24.035 or Rule 29.15 post-conviction counsel.⁷² The Supreme Court of Missouri only has discussed this exception in dicta.⁷³ In other contexts, however, the Court has recognized three types of attorney misconduct that rise to the level of abandonment:

- (1) “[W]hen post-conviction counsel fails to file an amended [Rule 24.035 or Rule 29.15] motion and the record shows the movant was deprived of meaningful review of the claims”;
- (2) “when post-conviction counsel files an untimely amended [Rule 24.035 or Rule 29.15] motion”; and
- (3) “when post-conviction counsel’s overt actions prevent the movant from filing the original [pro se Rule 24.035 or Rule 29.15] motion timely.”⁷⁴

2. Writ of Mandamus

A writ of mandamus, also referred to as a recall of a mandate, is a special order issued by a court to correct a prior action.⁷⁵ Although the precise applicability of the writ is unclear, the Supreme Court of Missouri has issued a writ of mandamus in certain instances when an intervening court decision rendered an inmate’s death sentence unconstitutional after his/her Rule 24.035 or Rule 29.15 proceedings had concluded.⁷⁶ For instance, in 2010 the Court recalled its mandate and resentenced a death row inmate to life in prison following the U.S. Supreme Court’s decision in *Atkins v. Virginia*⁷⁷ that mentally retarded persons are constitutionally ineligible for the death penalty.⁷⁸ The inmate had not presented this claim in prior proceedings because he had been convicted several years before the execution of the mentally retarded was deemed unconstitutional.⁷⁹

⁷² Kilgore v. State, 791 S.W.2d 393, 396 (Mo. banc 1990) (citing Wiglesworth v. Wyrick, 531 S.W.2d 713, 717 (Mo. banc 1976)).

⁷³ *Id.*

⁷⁴ Moore v. State, 328 S.W.3d 700, 702 (Mo. banc 2010) (citing Gehrke v. State, 280 S.W.3d 54, 57 (Mo. banc 2009); McFadden v. State, 256 S.W.3d 103, 109 (Mo. banc 2008)).

⁷⁵ BLACK’S LAW DICTIONARY 980 (8th ed. 2004) (defining *mandamus*).

⁷⁶ See, e.g., State ex rel. Lyons v. Lombardi, 303 S.W.3d 523, 525 (Mo. banc 2010) (per curiam).

⁷⁷ Atkins v. Virginia, 536 U.S. 304 (2002).

⁷⁸ Lyons, 303 S.W.3d at 525.

⁷⁹ See *id.*

II. ANALYSIS

The Recommendations contained in this Chapter seek to make the post-conviction process in death penalty cases an efficient and effective mechanism for correcting serious errors that occurred during a capital trial or for permitting consideration of new evidence bearing on the defendant's conviction or sentence. In some cases, the Recommendations espouse a possible remedy to remove procedural barriers to courts' review of death row inmates' claims of serious error or even innocence.

A. Recommendation #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 the applicable law.

Missouri Supreme Court Rules 24.035 and 29.15 provide a mechanism for post-conviction review of a capital inmate's conviction and death sentence.⁸⁰ Several aspects of Rules 24.035 and 29.15 proceedings, however, limit the ability of death row inmates to adequately develop their claims or limit the trial courts' ability to consider the claims of a death row inmate.

Insufficient Time to Adequately Develop and Prepare Post-conviction Claims

Missouri Supreme Court Rules place strict filing deadlines on Rule 24.035 and Rule 29.15 post-conviction motions. Before an indigent death-sentenced inmate is appointed post-conviction counsel, the inmate must initiate post-conviction proceedings him/herself by filing a pro se motion with the circuit court in which s/he was convicted.⁸¹ The inmate must file this motion ninety days from the date the Supreme Court of Missouri affirms his/her death sentence on direct appeal.⁸² An inmate's failure to file the pro se motion constitutes a "complete waiver" of the right to post-conviction review.⁸³ The Supreme Court of Missouri has held that this deadline is mandatory in all cases and cannot be tolled, extended, or excused for any reason.⁸⁴ There is no good cause exception.⁸⁵

⁸⁰ See Rules 24.035, 29.15. Rule 24.035 and Rule 29.15 post-conviction motions are nearly identical, except that Rule 24.035 applies to cases in which the inmate was convicted after pleading guilty, while Rule 29.15 applies to cases in which the inmate was convicted after a trial.

⁸¹ See Rules 24.035(b), 29.15(b). See also Interview with Greg Mermelstein, *supra* note 6.

⁸² Rules 24.035(b), 29.15(b). If the inmate waived his/her direct appeal, s/he must file the pro se motion within 180 days of being "delivered to the custody of the department of corrections." Rules 24.035(b), 29.15(b).

⁸³ Rules 24.035(b), 29.15(b).

⁸⁴ Day v. State, 770 S.W.2d 692, 695-96 (Mo. banc 1989).

⁸⁵ *Id.* For instance, in *State v. Ivy*, a non-capital case, an inmate challenged the Rule 29.15 pro se motion filing deadline, alleging he was unable to file the motion in a timely manner because prison officials had placed him in administrative detention and confiscated his "legal papers" during the filing period. *State v. Ivy*, 851 S.W.2d 71, 73 (Mo. App. 1993). The Missouri Court of Appeals held that the inmate's claim was not reviewable, as there are no exceptions to the pro se motion filing deadline. *Id.* at 74.

Although inmates are not formally appointed post-conviction counsel until after they file the initial pro se motion, the Missouri State Public Defender (MSPD) often informally assists death-sentenced inmates to ensure that the motion is timely filed.⁸⁶ The ultimate responsibility for ensuring that the motion is filed, however, is with the inmate. In *Smith v. State*, for instance, a death row inmate argued that the pro se filing deadline should be excused in his case, claiming that MSPD had advised him incorrectly regarding the deadline.⁸⁷ The Supreme Court of Missouri denied his claim, holding that “this Court’s rules for post-conviction relief make no allowance for excuse.”⁸⁸ In a later case, the inmate contended that he did not file the pro se motion in a timely manner because he “suffered from a mental illness that interfered with his right to seek post-conviction relief.”⁸⁹ In response, the Supreme Court of Missouri reiterated that there is no exception to the pro se filing deadline.⁹⁰

After an inmate properly files his/her pro se post-conviction motion, s/he will be appointed post-conviction counsel and may file an amended motion with the full assistance of his/her attorney.⁹¹ The inmate must file the amended motion within sixty days of the date counsel was appointed.⁹² The trial court also has the authority to grant a single thirty day extension at the inmate’s request.⁹³ Generally, if the inmate’s post-conviction counsel fails to file the amended motion in a timely manner, any new claims raised in that motion will be barred, and the Rule 24.035 or Rule 29.15 proceedings will be limited to the claims raised in the pro se motion.⁹⁴ However, if the trial court determines that the failure to file the amended motion was the result of attorney abandonment, rather than the negligence or the intentional conduct of the inmate, the court will consider the inmate’s Rule 24.035 or Rule 29.15 motion on the merits.⁹⁵ Post-conviction counsel is deemed to have abandoned the inmate if the inmate can prove that the failure to timely file the amended post-conviction motion was entirely due to counsel’s inaction.⁹⁶

Thus, absent complete counsel abandonment, a Missouri death row inmate is given no more than 180 days from the date his/her direct appeal is denied in which to prepare and file a final motion for post-conviction relief, even if the trial court grants a one-time thirty-day extension.⁹⁷

⁸⁶ Interview with Greg Mermelstein, *supra* note 6.

⁸⁷ *Smith v. State*, 798 S.W.2d 152, 153 (Mo. banc 1990).

⁸⁸ *Id.*

⁸⁹ *Smith v. State*, 21 S.W.3d 830, 831 (Mo. banc 2000).

⁹⁰ *Id.* *Smith’s* claim also was barred because this was his third Rule 29.15 motion, and Missouri Supreme Court Rules do not permit successive post-conviction motions. *Id.* Successive motions are discussed under Recommendation #10 of this Chapter. See *infra* notes 201–226 and accompanying text.

⁹¹ Rules 24.035(g), 29.15(g).

⁹² Rules 24.035(e), 29.15(e). If the inmate waived his/her direct appeal, s/he must file the amended motion within sixty days of the date both a transcript is filed in the trial court and counsel is appointed. *Id.* If the inmate hires his/her own attorney, the amended motion must be filed within sixty days of “the date both a complete transcript has been filed in the trial court and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant.” *Id.*

⁹³ Rules 24.035(g), 29.15(g).

⁹⁴ *Day v. State*, 770 S.W.2d 692, 696 (Mo. banc 1989).

⁹⁵ *Sanders v. State*, 807 S.W.2d 493, 495 (Mo. banc 1991). In addition to providing grounds for the trial court to consider an amended Rule 24.035 or Rule 29.15 motion that is filed out of time, the Supreme Court of Missouri has held that counsel abandonment may be grounds for Rule 91 habeas corpus relief for claims that should have been brought in Rule 24.035 or Rule 29.15 proceedings. *Kilgore v. State*, 791 S.W.2d 393, 396 (Mo. banc 1990).

⁹⁶ *Sanders*, 807 S.W.2d at 495.

⁹⁷ See Rules 24.035, 29.15.

Moreover, the first ninety days of this process are reserved for the mere filing of the pro se motion, during which time MSPD post-conviction counsel are not yet appointed and only voluntarily assist with ensuring the pro se motion is timely filed.⁹⁸ These first ninety days are, in effect, dead time. It is not until the period following the appointment of counsel when the inmate, through his/her attorney, can effectively research, develop, and draft the claims for his/her post-conviction motion.

Post-conviction motions, especially in capital cases, often include factual and research-intensive issues, such as claims of ineffective assistance counsel, which are not readily apparent from a review of the trial record. Thus, Missouri's limited post-conviction timeframe may not afford post-conviction counsel adequate time to prepare a complete, fully-developed post-conviction motion. Most other capital jurisdictions, including all jurisdictions previously assessed by the ABA Death Penalty Moratorium Implementation Project, provide death row inmates with a significantly longer period, or do not impose a specific deadline at all, in which to file for post-conviction relief in a death penalty case.⁹⁹

Denial of Evidentiary Hearings

Missouri Supreme Court Rules provide that the trial court shall not hold an evidentiary hearing if it determines that “the motion and the files and records of the case conclusively show that the movant is entitled to no [post-conviction] relief.”¹⁰⁰ The Supreme Court of Missouri has further held

[t]o be entitled to an evidentiary hearing, a movant must: (1) allege [in the amended motion for post-conviction relief] facts, not conclusions, that, if true, would warrant relief; (2) these facts must raise matters not refuted by the record and files in the case; and (3) the matters complained of must have resulted in prejudice to the movant.¹⁰¹

⁹⁸ Interview with Greg Mermelstein, *supra* note 6.

⁹⁹ ALA. R. CRIM. P. 32.2(c) (providing that an Alabama death row inmate must file his/her post-conviction petition within one year after the Court of Criminal Appeals issues the certificate of judgment affirming his/her conviction); ARIZ. R. CRIM. P. 32.4(c)(1) (providing that an Arizona death row inmate must file a post-conviction petition within 120 days after the Arizona Supreme Court files notice of post-conviction relief in the trial court following the denial of direct appeal); FLA. R. CRIM. P. 3.851(d)(1) (stating that a death row inmate must file for post-conviction relief within one year of the disposition of his/her petition for writ of certiorari to the U.S. Supreme Court); O.C.G.A. § 9-14-42(c) (2011) (providing no set time limit for Georgia death row inmates to file for post-conviction relief); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(a) (stating that Indiana inmates may file for post-conviction relief “at any time.”); KY. R. CRIM. P. 11.42(10) (providing Kentucky death row inmates three years from the date the judgment becomes final to file for post-conviction relief); OHIO REV. CODE § 2953.21(A)(2) (2011) (dictating that Ohio death row inmates have 180 days to file for post-conviction relief from the date on which the trial transcript is filed in the Ohio Supreme Court in the direct appeal of the judgment of conviction and sentence); 42 PA. CONS. STAT. § 9545(b)(1) (2011); PA. R. CRIM. P. 901(A) (stating that Pennsylvania death row inmates must file their post-conviction motions within one year of final judgment on direct appeal); TENN. CODE ANN. § 40-30-102(a) (2011) (providing a death row inmate with one year following the disposition of his/her direct appeal to file for post-conviction relief).

¹⁰⁰ Rules 24.035(h), 29.15(h).

¹⁰¹ *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. banc 2003) (citing *State v. Brooks*, 960 S.W.2d 479, 497 (Mo. banc 1997)).

It appears that Missouri trial judges routinely grant evidentiary hearings on all major issues in capital post-conviction cases.¹⁰² But there are exceptions. Missouri trial courts have denied evidentiary hearings on all or some of the inmate's claims in at least fifteen capital post-conviction cases since 1997.¹⁰³ In *Williams v. State*, for instance, Williams, a death row inmate, alleged several ineffective assistance of counsel claims that were denied without an evidentiary hearing. For instance, Williams alleged that trial counsel had failed to investigate and present mitigating evidence of his social history during the penalty phase of his trial.¹⁰⁴ According to Williams's post-conviction motion, six witnesses could have testified to the "horrible" abuse inflicted upon Williams during his childhood.¹⁰⁵ Trial counsel had also failed to call an expert witness to discuss the impact of this abuse.¹⁰⁶ The trial judge, however, denied the claim without an evidentiary hearing, finding that "an abusive childhood defense would have been inconsistent with [defense counsel's] penalty phase strategy and would not have changed the jury's sentence."¹⁰⁷

¹⁰² Email Interview by Mark Pickett with Greg Mermelstein, Appellate/PCR Div. Dir., Mo. State Pub. Defender Sys. (July 15, 2011) (on file with author).

¹⁰³ See *White v. State*, 939 S.W.2d 887, 892 (Mo. banc 1997) (Jackson Cnty.) (denying an evidentiary hearing on all claims, including several ineffective assistance of counsel claims); *State v. Smith*, 944 S.W.2d 901, 909 (Mo. banc 1997) (Jackson Cnty.) (denying an evidentiary hearing on all claims); *State v. Carter*, 955 S.W.2d at 548, 553 (Jackson Cnty.) (Mo. banc 1997) (denying an evidentiary hearing on all claims, including several claims of ineffective assistance of counsel); *State v. Brooks*, 960 S.W.2d 479, 497–99 (Mo. banc 1997) (St. Louis Cnty.) (denying evidentiary hearing on several ineffective assistance of counsel claims, including a claim related to trial counsel's failure to investigate the inmate's mental health); *State v. Jones*, 979 S.W.2d 171, 179–81 (Mo. banc 1998) (St. Louis City) (denying evidentiary hearing on most claims, including claim that trial counsel was ineffective for failing to investigate and present evidence of the inmate's mental illness); *State v. Ferguson*, 20 S.W.3d 485, 510 (Mo. banc 2000) (St. Louis Cnty.) (denying evidentiary hearing on all of the inmate's post-conviction claims and adopting the state's proposed findings of fact and conclusions of law verbatim); *Morrow v. State*, 21 S.W.3d 819, 822–29 (Mo. banc 2000) (St. Louis Cnty.) (denying an evidentiary hearing on all claims, including ineffective assistance of counsel claims related to a failure to investigate mitigating evidence); *Hutchison v. State*, 59 S.W.3d 494, 495–96 (Mo. banc 2001) (Lawrence Cnty.) (denying evidentiary hearing on claim that prosecutor had failed to disclose a plea agreement made with a cooperating witness; on appeal, the Supreme Court of Missouri reversed and remanded for a hearing on this issue); *Smulls v. State*, 71 S.W.3d 138, 146, 155–57 (Mo. banc 2002) (St. Louis Cnty.) (denying an evidentiary hearing on twenty-one of inmate's twenty-six post-conviction claims); *Knese v. State*, 85 S.W.3d 628, 631 (Mo. banc 2002) (St. Charles Cnty.) (denying evidentiary hearing on claim of ineffective assistance based on trial counsel's failure to read the questionnaire responses of two jurors stating that they would automatically impose the death penalty; inmate was granted new sentencing hearing on this claim on appeal); *Barnett v. State*, 103 S.W.3d 765, 768 (Mo. banc 2003) (St. Louis Cnty.) (denying all of inmate's post-conviction claims without a hearing); *Johnson v. State*, 102 S.W.3d 535, 537 (Mo. banc 2003) (Boone Cnty.) (denying evidentiary hearing on claim that inmate is mentally retarded, and thus constitutionally ineligible for the death penalty; inmate was granted new sentencing hearing on this claim on appeal); *Williams v. State*, 168 S.W.3d 433, 439–446 (Mo. banc 2005) (St. Louis Cnty.) (denying an evidentiary hearing on several issues, including prosecutorial misconduct and ineffective assistance of counsel); *Goodwin v. State*, 191 S.W.3d 20, 26–27 (Mo. banc 2006) (St. Louis Cnty.) (denying evidentiary hearing on multiple issues, including issue of whether inmate was mentally retarded and thus ineligible for the death penalty); *Edwards v. State*, 200 S.W.3d 500, 513 (Mo. banc 2006) (St. Louis Cnty.) (denying evidentiary hearing on claim that a co-defendant had recanted a confession that implicated the defendant).

¹⁰⁴ *Williams*, 168 S.W.3d at 443.

¹⁰⁵ Appellant's Reply Brief at 36–37, *Williams*, 168 S.W.3d 433 (No. SC86095), 2005 WL 955052.

¹⁰⁶ *Id.*

¹⁰⁷ *Williams*, 168 S.W.3d at 443. The Supreme Court of Missouri upheld the trial court's ruling, finding that the denial of the evidentiary hearing was not clearly erroneous. *Id.*

The U.S. Supreme Court has held that trial counsel in a capital case have an affirmative duty to fully investigate mitigating evidence related to their client's social history, including evidence of childhood abuse.¹⁰⁸ For this reason, it is especially important for trial courts in post-conviction hearings to carefully consider allegations of inadequate mitigation investigation. While it is possible that the trial judge's finding was accurate in *Williams*, the claim would have been better considered following an evidentiary hearing, in which the mitigation witnesses could have testified about the exact nature of the abuse that Williams suffered. This would have allowed the trial judge to more accurately assess the extent of the abuse and the credibility of the witnesses.

Many other claims that are commonly presented in post-conviction proceedings involve complex factual considerations as well, such as other types of ineffective assistance counsel claims and claims of prosecutorial misconduct. By making findings of fact and conclusions of law without first holding an evidentiary hearing, a trial judge may be preventing adequate development of post-conviction claims.

Limitations on Reviewable Claims in Post-conviction Proceedings

Missouri also places strict limits on the types of claims that the trial court may consider in Rule 24.035 and Rule 29.15 post-conviction proceedings. Missouri law dictates that “[t]he sole purpose of [these] proceeding[s] is to determine whether the proceedings that led to [the inmate’s] conviction were violative of any constitutional requirements or if the judgment of conviction is otherwise void.”¹⁰⁹ The trial court, therefore, cannot consider claims of newly discovered evidence, claims of actual innocence, or other claims related to the inmate’s guilt or innocence.¹¹⁰

In addition, a claim that the prosecution failed to disclose exculpatory evidence in violation of *Brady v. Maryland*¹¹¹ has been considered a simple discovery violation and, thus, a “trial error” that cannot be raised in Rule 24.035 and Rule 29.15 post-conviction proceedings absent “rare and exceptional circumstances.”¹¹² For instance, in *State v. Carter*, a death row inmate claimed that the prosecution had failed to disclose evidence that the medical examiner who performed the victims’ autopsies had incompetently performed autopsies in the past.¹¹³ If such evidence existed, disclosure might well be required under *Brady*.¹¹⁴ The Supreme Court of Missouri held that the claim was not cognizable in post-conviction proceedings, noting that “[c]laims of trial error will only be considered in a Rule 29.15 motion where fundamental fairness requires, and then, only in rare and exceptional circumstances.”¹¹⁵ Other Missouri cases, however, have found

¹⁰⁸ *Wiggins v. Smith*, 539 U.S. 510, 535–36 (2003) (“[C]ounsel were not in a position to make a reasonable strategic choice as to whether to focus on [inmate’s] direct responsibility, the sordid details of his life history, or both, because the investigation supporting their choice was unreasonable.”).

¹⁰⁹ *Wilson v. State*, 813 S.W.2d 833, 834 (Mo. banc 1991).

¹¹⁰ *Id.* at 834–35.

¹¹¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

¹¹² *Williams*, 168 S.W.3d at 439–40; *State v. Carter*, 955 S.W.2d 548, 555 (Mo. banc 1997).

¹¹³ *Carter*, 955 S.W.2d at 555.

¹¹⁴ *Giglio v. United States*, 405 U.S. 150, 154–55 (1972) (holding that exculpatory material requiring disclosure under *Brady* includes impeachment evidence).

¹¹⁵ *Id.* (citing *Schneider v. State*, 787 S.W.2d 718, 721 (Mo. banc 1990)).

that *Brady* claims are cognizable in post-conviction proceedings.¹¹⁶ The reason for this inconsistent treatment of *Brady* claims is unclear.¹¹⁷

Limiting consideration of *Brady* claims during post-conviction proceedings may unfairly restrict trial court consideration of errors that were unknown to the inmate at trial or on direct appeal due to prosecutorial misconduct or negligence. For example, it may not be clear from the trial record if evidence was inadvertently or purposefully concealed from the defense. Moreover, by considering some *Brady* claims on the merits but not others, death row inmates cannot be certain that these claims will be considered in a manner that is consistent with prior cases. A death row inmate may be able to present claims such as these directly to the Supreme Court of Missouri in a later Rule 91 habeas corpus proceeding.¹¹⁸ In capital cases, however, Rule 91 petitions are made directly to the Supreme Court of Missouri.¹¹⁹ Thus, unless the Court appoints a special master to consider the Rule 91 claims, there is no opportunity for an evidentiary hearing before the court in Rule 91 proceedings, which thereby impedes full judicial consideration of the inmate's claims of error.

Stays of Execution

It appears that Missouri does not schedule executions while litigation is pending in either the state or federal courts; therefore, Missouri is in compliance with this portion of the Recommendation.

Potential Waiver of Post-conviction Rights at a Defendant's Sentencing Hearing

As claims of ineffective assistance of counsel are among the most frequent claims brought by death row inmates in post-conviction hearings, it is important that Missouri trial courts fully consider these claims on the merits. Missouri Supreme Court Rule 29.07(b)(4), however, states that during a defendant's sentencing hearing following his/her conviction

the [trial] court . . . shall examine the defendant as to the assistance of counsel received by the defendant. The examination shall be on the record and may be conducted outside the presence of the defendant's counsel. At the conclusion of the examination the court shall determine whether probable cause exists to believe the defendant has received ineffective assistance of counsel.¹²⁰

In most cases, this portion of the sentencing hearing takes the form of yes-or-no questions asked by the trial court to the defendant regarding defense counsel's performance.¹²¹ The court may

¹¹⁶ See, e.g., *Middleton v. State*, 103 S.W.3d 726, 733–34 (Mo. banc 2003) (reviewing, on the merits, a death row inmate's claim that the prosecution had failed to disclose a promise of a favorable sentence made to a prosecution witness).

¹¹⁷ See *Williams*, 168 S.W.3d at 439–40 (noting that some, but not all, *Brady* claims have been considered on the merits in post-conviction proceedings without explaining why).

¹¹⁸ See *id.* Rule 91 habeas corpus is discussed in Recommendation #10. See *infra* notes 202–217 and accompanying text.

¹¹⁹ Rule 91.02(b).

¹²⁰ Rule 29.07(b)(4).

¹²¹ See, e.g., *State v. Driver*, 912 S.W.2d 52, 54 (Mo. banc 1995).

ask the defendant questions such as, “[D]id [your defense attorney] do everything you asked him to do?”¹²² The Missouri Court of Appeals has held that when a defendant states that s/he approves of his/her counsel’s performance at this hearing, s/he is completely precluded from raising an ineffective assistance of counsel claim in post-conviction proceedings.¹²³ In *State v. Driver*, however, the Supreme Court of Missouri held that a defendant’s “factual representations” regarding counsel during a sentencing hearing do not necessarily preclude an ineffective assistance claim.¹²⁴ In most cases, the Court held, the defendant’s statements are to be “considered,” but are not dispositive, in evaluating the claim.¹²⁵ To completely preclude the claim, the trial court’s inquiry into counsel’s performance “must be specific enough to . . . refute[] conclusively the allegation of ineffectiveness.”¹²⁶

Despite the *Driver* decision, the Missouri Court of Appeals has continued to use a defendant’s statements at the sentencing hearing to completely prohibit an ineffective assistance of counsel claim, even when the trial court’s inquiry was limited to general questions.¹²⁷ Thus, while the precise effect of this inquiry on post-conviction proceedings appears to be unsettled, it is clear that a defendant’s statements regarding his/her counsel’s performance at the sentencing hearing will have at least some impact on his/her ability to obtain post-conviction relief on an ineffective assistance of counsel claim.

A defendant’s evaluation of his attorneys’ abilities is sometimes of negligible value in assessing an ineffective assistance of counsel claim, as the client may have little idea what the duties of counsel are in order to render effective assistance. This is especially true in a capital case, where the defendant’s personal wishes regarding defense strategy often conflict with defense counsels’ duty to fully investigate their client’s background. The U.S. Supreme Court held in *Rompilla v. Beard* that, “even when a capital . . . defendant himself [has] suggested that no mitigating evidence is available,” defense counsel is bound to conduct a mitigation investigation.¹²⁸ A defendant may, for instance, be hostile to a mitigation investigation that could uncover evidence of childhood abuse or mental illness, or s/he may not understand the complexities of the litigation that s/he is being asked to evaluate. In some cases, a defendant may even be pleased, at least in the short term, that his/her attorneys failed to investigate the defendant’s traumatic life history.¹²⁹ In practice, current MSPD policy dictates that attorneys must advise their clients not

¹²² *State v. Hurtt*, 836 S.W.2d 56, 61 (Mo. App. 1992).

¹²³ *See, e.g., Jackson v. State*, 90 S.W.3d 238, 241 (Mo. App. 2002) (“A movant is precluded from seeking post-conviction relief based upon a claim of ineffective assistance of counsel when the movant repeatedly assures the court at a Rule 29.07(b)(4) hearing that he is satisfied with counsel’s performance and believes counsel has done everything that he requested.” (citing *Driver*, 912 S.W.2d at 55)); *May v. State*, 921 S.W.2d 85, 88 (Mo. App. 1996) (holding that motion court’s denial of defendant’s ineffective assistance claim without a hearing was not in error because defendant’s statements at the Rule 29.07 sentencing hearing colloquy “conclusively refuted” the ineffective assistance claim (citing *Driver*, 912 S.W.2d at 55)).

¹²⁴ *Driver*, 912 S.W.2d at 55.

¹²⁵ *Id.* at 55–56.

¹²⁶ *Id.*

¹²⁷ *See, e.g., May*, 921 S.W.2d at 88.

¹²⁸ *Rompilla v. Beard*, 545 U.S. 374, 377 (2005).

¹²⁹ For example, in *Rompilla* the defendant told his trial attorneys that his childhood was “normal” when, in fact, he had been severely tortured by his father throughout his youth. *Id.* at 381, 392 (quoting *Rompilla v. Horn*, 355 F.3d 233, 279 (3rd Cir. 2004) (Sloviter, J., dissenting)).

to respond to questions regarding attorney performance during a sentencing hearing.¹³⁰ However, a defendant who is not represented by MSPD or who ignores such advice may still be at risk of inadvertently undermining his/her ability to have an ineffective assistance of counsel claim fully considered on the merits.

Conclusion

Missouri is in partial compliance with Recommendation #1.

Missouri provides death row inmates with a right to post-conviction review at the trial court level. Many aspects of this post-conviction review system, however, limit adequate development and judicial consideration of a death row inmate's claims. Missouri's strict filing deadlines for post-conviction motions, which afford inmates very little time to prepare their claims and allow for no exceptions, may prevent a death row inmate from having adequate time to fully research and prepare all meritorious post-conviction claims. This is especially worrisome because an inmate who does not raise a post-conviction claim at the state trial court level is likely to be foreclosed from presenting that claim in later post-conviction or federal habeas corpus proceedings, and thus the merits of his/her claim may never be reviewed.¹³¹ In federal habeas corpus proceedings, federal courts generally are precluded from considering claims that were not properly raised in state court proceedings.¹³² In cases where the inmate was unable to present all or some of his/her claims to the trial court, there would be no record for these courts to review.

Limitations on the scope of post-conviction claims may also restrict full consideration of claims by the trial court, particularly *Brady* claims of prosecutorial misconduct, which may not be discovered by the inmate until long after s/he is convicted. Moreover, an inmate may inadvertently waive or undermine a claim of ineffective assistance of counsel simply by stating that s/he was satisfied with counsel's performance at the Rule 29.07 sentencing hearing inquiry, further limiting the ability of the trial court to fully consider the inmate's post-conviction claims on their merits. Finally, while we commend those Missouri trial courts that grant evidentiary hearings in capital post-conviction hearings, we note that there have been fifteen cases since 1997 in which Missouri trial courts have denied hearings, even with respect to fact-intensive, potentially-credible issues.

The Assessment Team recommends that Missouri amend its trial level post-conviction procedures in capital cases such that counsel are appointed on the date that the death row inmate's direct appeal is denied. The required initial pro se post-conviction motion should be eliminated entirely, thereby allowing post-conviction counsel to begin working on the case immediately. In addition, to ensure adequate time for research and development of claims, Missouri should increase the amount of time provided to death row inmates petitioning for post-

¹³⁰ Email Interview by Mark Pickett with Greg Mermelstein, Appellate/PCR Div. Dir., Mo. State Pub. Defender Sys. (Sept. 9, 2011) (on file with author).

¹³¹ See, e.g., *Clemons v. Luebbers*, 381 F.3d 744, 751–52 (8th Cir. 2004) (“[T]he failure of counsel to later preserve these claims prompted the state courts to dispose of the voir dire arguments on procedural grounds, an independent and adequate state basis. Absent any reason to lift the procedural bar (cause and prejudice or actual innocence), our review is precluded.”).

¹³² *Wainwright v. Sykes*, 433 U.S. 72, 90–91(1977); see also 28 U.S.C. § 2254(b)(1) (2011).

conviction relief,¹³³ with an allowance for an extension upon a showing of good cause. These revisions will help ensure that inmates' post-conviction claims are reviewed on the merits as early as possible in the post-conviction process, while reducing the need to waste judicial resources on the litigation of procedural issues.

The limitations on the claims that may be presented in post-conviction relief proceedings should also be relaxed, especially with regard to *Brady* claims. In addition, when considering ineffective assistance of counsel claims, Missouri courts should not give weight to the inmate's statements related to defense counsel performance made at his/her sentencing hearing inquiry. Issues of ineffective assistance of counsel are best reserved for post-conviction proceedings, where the claim can be fully investigated and presented by a qualified post-conviction attorney. Finally, Missouri should adopt a rule or law requiring Missouri trial courts to hold an evidentiary hearing with respect to all claims in capital post-conviction proceedings, absent clear evidence that the claim is frivolous or unsupported by existing law.

B. Recommendation #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.

The Missouri Rules of Civil Procedure govern discovery in Rule 24.035 and Rule 29.15 post-conviction proceedings and in Rule 91 habeas corpus proceedings.¹³⁴ A party may request and obtain discovery in the following ways: depositions, written interrogatories, production of documents or things or permission to enter upon land or other property, physical and mental examinations, and requests for admission.¹³⁵ Generally, discovery by either party is permitted “regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action.”¹³⁶ The discovery rules, however, protect attorney work product, stating that

a party may obtain discovery of [otherwise discoverable] documents and tangible things . . . prepared in anticipation of litigation or for trial . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the adverse party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.¹³⁷

Moreover, when work product is discoverable, the trial court must “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”¹³⁸ Upon a showing of good cause, the trial court also has discretion to grant a protective order limiting or preventing discovery over certain

¹³³ See *supra* note 99 on capital jurisdictions that afford more time for filing post-conviction relief petitions than is permitted in Missouri.

¹³⁴ See Rules 24.035(a), 29.15(a), 91.01(a).

¹³⁵ Rule 56.01(a).

¹³⁶ Rule 56.01(b)(1).

¹³⁷ Rule 56.01(b)(3).

¹³⁸ *Id.*

matters “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”¹³⁹

The Supreme Court of Missouri has held that “[t]rial courts have broad discretion in administering rules of discovery” in post-conviction proceedings, including the power to deny or delay discovery in the claim development stage.¹⁴⁰ In one case, for example, a death row inmate sought post-conviction discovery of an allegedly exculpatory surveillance videotape, arguing that the state’s failure to disclose the tape before trial violated *Brady v. Maryland*.¹⁴¹ The trial court denied the discovery request because the inmate failed to properly plead the *Brady* claim in his motion for post-conviction relief.¹⁴² The Supreme Court of Missouri upheld the trial court’s ruling, noting that

[t]here is no authority in law for the proposition that a defendant may simply make a general allegation of a *Brady* violation so as to require the motion court to grant an evidentiary hearing and to order that the state discloses its entire file so that a criminal defendant may cast about, attempting to discover whether or not a *Brady* violation may have occurred.¹⁴³

Conclusion

Because we are unable to determine whether discovery has been meaningful in cases where only limited discovery has been permitted, we are unable to determine whether Missouri is in compliance with Recommendation #2.

However, in order to reduce excessive litigation on discovery issues and to ensure that all potential claims can be fully explored in post-conviction proceedings, the Assessment Team believes that it is the best practice to allow open file discovery in all Rule 24.035 and Rule 29.15 capital post-conviction cases. This would provide inmates with access to the complete files of all law enforcement and prosecutorial agencies involved in the investigation or prosecution of the inmate, while still allowing prosecutors to obtain protective orders upon a showing of good cause. Although open file discovery does not eliminate the risk of discovery violations, it substantially reduces the chance that a document or item will be withheld due to inadvertent error.¹⁴⁴ Absent open file discovery, it is often impossible for defense counsel to determine whether all exculpatory material has been disclosed.

¹³⁹ Rule 56.01(c).

¹⁴⁰ See *Smulls v. State*, 71 S.W.3d 138, 150–51 (Mo. banc 2002) (quoting *State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 343 (Mo. banc 1998)).

¹⁴¹ *State v. Ferguson*, 20 S.W.3d 485, 504 (Mo. banc 2000). The *Brady* Court held that prosecutors have an affirmative duty to disclose exculpatory evidence before trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹⁴² *Ferguson*, 20 S.W.3d at 504.

¹⁴³ *Id.* at 503 (quoting *Brooks*, 960 S.W.2d at 500).

¹⁴⁴ Daniel S. Medwed, *Brady’s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1557–63 (2010) (noting that while open file discovery does not eliminate error, it is the “best way to guarantee that defendants obtain the exculpatory evidence owed to them”).

C. Recommendation #3

Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.

The Missouri Rules of Civil Procedure, which dictate discovery rules in post-conviction cases, do not set forth a specific time period for discovery.¹⁴⁵ As discussed in Recommendation #1, however, the post-conviction process itself is governed by strict filing deadlines, permitting counsel, once appointed, no more than ninety days to investigate, develop, and present all claims. This process may leave counsel with limited time to review discovery in a manner sufficient to draft a post-conviction motion that adequately raises all viable claims and to prepare for an evidentiary hearing.¹⁴⁶ Although the trial court is not required to set an evidentiary hearing date within a specified time limit, counsel may have limited time to prepare, depending on the hearing date.¹⁴⁷

Conclusion

Missouri is in partial compliance with Recommendation #3.

Missouri does not place any time limits on the discovery process in post-conviction proceedings. However, counsel may have limited time to review discovery because of Missouri's strict post-conviction filing deadlines. While different cases will require varying amounts of preparation, the amount of time afforded Missouri post-conviction counsel is likely inadequate to fully prepare for a post-conviction claim in a death penalty case.

D. Recommendation #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 bases for dispositions of claims.

The Supreme Court of Missouri has exclusive appellate jurisdiction in death penalty cases, including a death row inmate's appeal of the denial of his/her Rule 29.15 or Rule 24.035 post-conviction motion.¹⁴⁸ Missouri Supreme Court Rules dictate that "[a]ppellate review of the trial court's action on the [Rule 24.035 or Rule 29.15 post-conviction motion] shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous."¹⁴⁹ In all cases, the Court's opinion must be in writing.¹⁵⁰ Missouri Supreme Court Rule 84.16(b) states that the Court may issue its opinion in the form of a written order without explaining the bases for its disposition provided "all [Supreme Court] judges agree to affirm and further believe that an opinion would have no precedential value" because the "judgment of the trial court in

¹⁴⁵ See Rule 56.01. Although the Rules place limits on the time allowed to respond to certain discovery requests, the discovery process itself is not limited to any particular time period.

¹⁴⁶ See *supra* notes 81–99 and accompanying text.

¹⁴⁷ See Rules 24.035(g)–(i), 29.15(g)–(i).

¹⁴⁸ See Mo. Const. art. V, sec. 3.

¹⁴⁹ Rules 24.035(k), 29.15(k).

¹⁵⁰ Rule 84.16(a).

[the post-conviction proceeding was] based on findings of fact that are not clearly erroneous.”¹⁵¹ The Assessment Team is not aware of any capital post-conviction cases in which the Supreme Court of Missouri has invoked Rule 84.16(b) to entirely dispose of a case without examining the issues presented and explaining the bases for its opinion.¹⁵²

For the reasons stated above, Missouri is in compliance with Recommendation #4.

E. Recommendation #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.

Application of a knowing, understanding, and voluntary standard to waivers of constitutional error is discussed in Recommendation #6, below. Therefore, Recommendation #5 is not applicable to Missouri.

F. Recommendation #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 capital cases.

Generally, a Missouri inmate who fails to raise claims, constitutional or otherwise, that were available at trial or on direct appeal is procedurally barred from raising those claims in a Rule 24.035 or Rule 29.15 post-conviction motion—that is, s/he is considered to have waived those claims.¹⁵³ An inmate may raise a procedurally defaulted claim in post-conviction proceedings only “where fundamental fairness requires . . . , and, then, only in rare and exceptional circumstances.”¹⁵⁴ While the Court has not expressly stated what constitutes “exceptional circumstances” in this context, it previously has denied post-conviction claims based on issues such as improper death-qualification of jurors,¹⁵⁵ admissibility of improperly seized evidence,¹⁵⁶ improper jury instructions,¹⁵⁷ and double jeopardy¹⁵⁸ because the inmate failed to raise the claim at trial or on direct appeal. There is no law or rule permitting Missouri trial courts to apply a

¹⁵¹ Rule 84.16(b).

¹⁵² The Court has used Rule 84.16(b) in some capital post-conviction cases to dispose of issues that the Court considered frivolous, repetitive, or unsupported by precedent. For instance, in *State v. Simmons* the Court cited Rule 84.16(b) to dismiss some of the inmate’s ineffective assistance of counsel claims because the claims offered “no grounds upon which a reasonable probability of prejudice to [the inmate] from counsels’ acts or failures to act could be founded.” *State v. Simmons*, 944 S.W.2d 165, 181 (Mo. banc 1997). The Court did, however, address the inmate’s other claims, including several other ineffective assistance of counsel claims. *Id.* at 181–90.

¹⁵³ *See* *Rodden v. State*, 795 S.W.2d 393, 395 (Mo. banc 1990).

¹⁵⁴ *Sidebottom v. State*, 781 S.W.2d 791, 800 (Mo. banc 1989) (citing *Roberts v. State*, 775 S.W.2d 92, 95 (Mo. banc 1989)).

¹⁵⁵ *See, e.g., Rodden*, 795 S.W.2d at 395.

¹⁵⁶ *Id.*

¹⁵⁷ *Roberts*, 775 S.W.2d at 96.

¹⁵⁸ *State v. Tolliver*, 839 S.W.2d 296, 298 (Mo. banc 1992).

“knowing, understanding, and voluntary” standard for waivers of claims of constitutional error not properly preserved at trial or on appeal.

Furthermore, Missouri’s strict post-conviction procedural default rules apply to all alleged errors, whether based on constitutional or state law issues.¹⁵⁹ Thus, Missouri appellate courts will not apply the plain error rule with respect to errors of state law not raised properly at trial or on direct appeal. Instead, the court will consider the inmate’s claim to be procedurally barred unless “fundamental fairness requires otherwise, and, then, only in rare and exceptional circumstances.”¹⁶⁰ Thus, while it is unclear whether Missouri’s fundamental fairness standard is identical to the plain error standard, it is clear that the exception is not liberally applied.¹⁶¹

For the reasons stated above, Missouri is not in compliance with Recommendation #6.

G. Recommendation #7

The states should establish post-conviction defense organizations, similar in nature to the capital resources centers defunded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.

State Post-conviction Proceedings

The Missouri State Public Defender (MSPD) Appellate/Post-Conviction Review (Appellate/PCR) Division represents most indigent inmates during capital Rule 24.035 and Rule 29.15 post-conviction proceedings.¹⁶² Missouri law does not permit the appointment of post-conviction counsel until the inmate files a pro se motion for post-conviction relief and the court finds that the inmate is indigent.¹⁶³ In practice, however, the MSPD Appellate/PCR Division will informally assist the death row inmate in filing the initial pro se motion if s/he was represented by MSPD at trial and on direct appeal.¹⁶⁴ The MSPD Appellate/PCR Division will continue to represent the inmate throughout the state post-conviction proceedings, including the appeal of the post-conviction motion to the Supreme Court of Missouri.¹⁶⁵

If a death row inmate cannot be represented by the MSPD Appellate/PCR Division due to a conflict of interest, MSPD will contract with a private bar attorney to represent the inmate in state post-conviction proceedings.¹⁶⁶ MSPD, however, represents the overwhelming majority of

¹⁵⁹ See *Rodden*, 795 S.W.2d at 395.

¹⁶⁰ *Sidebottom*, 781 S.W.2d at 800 (citing *Roberts*, 775 S.W.2d at 95).

¹⁶¹ See *id.*

¹⁶² See 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 44, at 71, 74. For a discussion on the history and policies of MSPD, see Chapter Six on Defense Services. The U.S. Supreme Court has held that there is no constitutional obligation for states to appoint counsel to indigent death row inmates who wish to pursue state post-conviction relief. *Murray v. Giarratano*, 492 U.S. 1, 3–4 (1989).

¹⁶³ Rules 24.036(a); 29.16(a).

¹⁶⁴ Interview with Greg Mermelstein, *supra* note 6.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

death row inmates in these proceedings and, therefore, rarely contracts with private counsel in post-conviction cases.¹⁶⁷

Federal Habeas Corpus and State Clemency Proceedings

MSPD does not represent death row inmates in federal habeas corpus or clemency proceedings, nor has Missouri established any other organizations to represent death row inmates during these proceedings. Instead, Missouri relies upon the federal government to appoint and compensate defense counsel after state post-conviction proceedings have concluded. Federal law provides that indigent death row inmates seeking federal habeas corpus relief will receive the appointment of “one or more attorneys.”¹⁶⁸ Federal habeas counsel may continue representing an indigent client through state clemency proceedings;¹⁶⁹ however, federal law does not mandate the appointment of two attorneys during federal habeas proceedings, and federally-appointed counsel are not required to continue representing the inmate through state clemency proceedings.¹⁷⁰

Conclusion

Missouri is in partial compliance with Recommendation #7.

The Missouri Assessment Team commends Missouri for establishing a statewide public defender system that provides post-conviction counsel to indigent death row inmates. However, Missouri law does not permit the appointment of state post-conviction counsel until after the inmate files a pro se motion for post-conviction relief, thereby permitting at most ninety days for counsel to develop claims for post-conviction review. In addition, Missouri does not guarantee counsel for death row inmates in federal habeas corpus or clemency proceedings. Missouri relies on federal courts to appoint and compensate such counsel, who may not have expertise in capital defense. Furthermore, because federally-appointed attorneys are not required to represent inmates past the conclusion of federal habeas proceedings, Missouri capital inmates may remain on death row for years without the assistance of counsel. As such, viable claims that may arise during this period, such as claims based on newly-discovered evidence and new developments in the law, may go unnoticed and unlitigated.

Accordingly, the Assessment Team recommends that Missouri allow for the automatic appointment of capital post-conviction counsel when the Supreme Court of Missouri affirms the inmate’s death sentence on direct appeal.¹⁷¹ Moreover, Missouri should reorganize the MSPD Appellate/PCR Division so that it can receive federal funds to represent Missouri death row inmates through federal habeas corpus and state clemency proceedings.¹⁷² This would ensure

¹⁶⁷ *Id.*

¹⁶⁸ 18 U.S.C. § 3599(a)(2) (2009); *see also* McFarland v. Scott, 512 U.S. 849, 856–57 (1994).

¹⁶⁹ 18 U.S.C. § 3599(a)(2); *see also* Harbison v. Bell, 129 S. Ct. 1481, 1486 (2009).

¹⁷⁰ 18 U.S.C. § 3599(a)(2).

¹⁷¹ If the inmate waived direct appeal, the appointment should occur when s/he is delivered to the custody of the Missouri Department of Corrections.

¹⁷² Kentucky’s public defenders, for instance, routinely are appointed to represent Kentucky death row inmates during federal habeas proceedings and continue to represent the inmates in state clemency proceedings. Interview by Sarah Turberville & Paula Shapiro with the Ky. Dep’t of Pub. Advocacy (June 14, 2010) (on file with author);

that Missouri's death row inmates are guaranteed continuity of representation for as long they are on death row. Consistent representation would conserve resources, since a new set of federally-appointed lawyers would no longer be required to replicate work already done by MSPD. In addition, by ensuring that all death row inmates are represented during their time on death row, Missouri will reduce the risk that viable legal claims that might arise during the inmate's incarceration will go unlitigated.

H. Recommendation #8

For state post-conviction proceedings, the State should appoint counsel whose qualifications are consistent with the recommendations in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.

Qualifications of Post-conviction Counsel¹⁷³

While Missouri has established some qualifications for capital post-conviction counsel, these qualifications are not consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)*. In most cases, attorneys appointed to represent a death row inmate during post-conviction proceedings are employed by the MSPD Appellate/PCR Division.¹⁷⁴ By statute, at least one of the two attorneys must have (1) attended at least twelve hours of training or educational programs on the post-conviction phase of a criminal case; (2) three years of criminal litigation experience; (3) participated as either counsel or co-counsel in at least five post-conviction motions or class A felony trials; and (4) participated as counsel or co-counsel in at least three felony jury trials or five direct criminal appeals in felony cases that went to final judgment.¹⁷⁵

While the qualifications for capital post-conviction counsel go beyond the minimum requirements to practice law in Missouri, they are not fully consistent with the *ABA Guidelines*.¹⁷⁶ Specifically, post-conviction attorneys are not required to demonstrate specific skills that are critical to providing high-quality capital representation, such as knowledge and understanding of the relevant law governing capital cases, skill in the investigation and presentation of mitigating evidence and evidence relevant to the inmate's mental status, and familiarity with common areas of forensic investigation. Moreover, while Missouri post-conviction counsel are required to attend some training specific to post-conviction proceedings, the required training is not sufficient to comport with the *ABA Guidelines*.¹⁷⁷ Instead, Missouri's statutory qualifications focus on attorney experience. As the *ABA Guidelines* recognize,

Interview by Sarah Turberville & Paula Shapiro with Louisville Metro Pub. Defender's Office (June 14, 2010) (on file with author); KY. DEP'T OF PUB. ADVOCACY, POLICIES AND PROCEDURES, *Qualification and Compensation of Counsel in Contract Capital Cases* §§ 18.01(E)(5)–(7), 18.09 (revised Jan. 1, 2008).

¹⁷³ For a discussion on the qualifications of capital defense counsel, see Chapter Six on Defense Services.

¹⁷⁴ Interview with Greg Mermelstein, *supra* note 6.

¹⁷⁵ Section 547.370.2(1)–(4), RSMo 2011.

¹⁷⁶ For the text of Guideline 5.1, which concerns the qualifications of counsel in death penalty cases, see Chapter Six on Defense Services, Recommendation #2.

¹⁷⁷ For an analysis of Missouri's compliance with the training requirements of the *ABA Guidelines*, see Chapter Six on Defense Services, Recommendation #5.

however, an experienced attorney may not necessarily possess the skills necessary to adequately represent a capital defendant in post-conviction proceedings.

Compensation for Post-conviction Counsel¹⁷⁸

Salaries for attorneys in the MSPD Appellate/PCR Division who are qualified to handle capital post-conviction proceedings range from \$72,324 to \$81,948.¹⁷⁹ An MSPD Appellate/PCR attorney with approximately ten years of experience with MSPD is paid a salary of \$72,324, while an Appellate/PCR attorney with approximately twenty-four years of experience with MSPD is paid a salary of \$81,948.¹⁸⁰

MSPD also has the authority to contract with private counsel to represent a death row inmate in post-conviction proceedings when a conflict of interest exists.¹⁸¹ In Missouri, contracted counsel handling death penalty cases are paid a modified flat-fee rate.¹⁸² As of March 2011, the base contract fee for capital cases is generally \$15,000 per attorney.¹⁸³ MSPD also reimburses private contract counsel for incidental expenses such as expert witness fees, travel costs, depositions, and transcripts.¹⁸⁴ It does not appear, however, that MSPD has contracted with private counsel on any capital post-conviction cases in recent years.

Funding for Post-conviction Investigators and Experts¹⁸⁵

Missouri law does not require that a death row inmate receive access to a mitigation specialist or investigator during his/her state post-conviction proceedings. As of August 2010, however, the MSPD Appellate/PCR Division employed three mitigation specialists and two investigators.¹⁸⁶ These mitigation specialists and investigators are assigned both capital and non-capital appellate case work.¹⁸⁷ Appellate/PCR attorneys who desire funding for additional expert assistance or other ancillary services must file a request and obtain approval from MSPD.¹⁸⁸ Attorneys that are contracted by MSPD to handle a capital post-conviction case must submit funding requests for mitigation specialists, investigators, and experts to the MSPD General Counsel or the Deputy Director.¹⁸⁹

¹⁷⁸ For a discussion on funding and resources for capital defense counsel, see Chapter Six on Defense Services.

¹⁷⁹ Interview with Greg Mermelstein, *supra* note 6.

¹⁸⁰ *Id.*

¹⁸¹ See Section 600.021.6, RSMo 2011.

¹⁸² 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 44, at 78. A modified flat-fee schedule is a base fee that allows for additional payment if the case goes to trial or is particularly complex. *Id.*

Id.

¹⁸³ Telephone Interview by Kirstin Ramsay with Peter Sterling, General Counsel, Mo. State Pub. Defender Sys. (Mar. 15, 2011) (on file with author).

¹⁸⁴ 2010 MO. PUB. DEFENDER ANNUAL REPORT, *supra* note 44, at 78.

¹⁸⁵ For a discussion of funding for investigators and experts, see Chapter Six on Defense Services.

¹⁸⁶ Interview with Greg Mermelstein, *supra* note 6. There are currently no existing formal MSPD policies or procedures for assigning investigators or mitigation specialists to a particular capital case. *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Interview with Peter Sterling, *supra* note 183.

Conclusion

Missouri is in partial compliance with Recommendation #8.

The Missouri Assessment Team commends Missouri for establishing some qualifications for capital post-conviction counsel. The current statutory requirements, however, are not consistent with the *ABA Guidelines*. Specifically, the Missouri requirements overemphasize attorney experience at the expense of demonstrated skills that are relevant to capital litigation. Missouri should adopt qualification standards consistent with the *ABA Guidelines* for all MSPD Appellate/PCR Division attorneys and contract defense counsel handling capital cases. Missouri also appears to provide adequate funding for post-conviction counsel, investigators, and experts. However, should the MSPD Appellate/PCR Division contract with private counsel to handle capital post-conviction cases, we caution against the policy of negotiating flat-fees with these private attorneys. Such attorneys should instead be fully compensated for actual time and services performed at an hourly rate commensurate with prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should also be available.

I. Recommendation #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.

While a state cannot change the retroactivity doctrine applied by federal courts in federal habeas proceedings, it can change its own state post-conviction rules and procedures to give full retroactive effect to U.S. Supreme Court decisions. This more generous approach to retroactivity better ensures that valid constitutional claims will be equally cognizable and, therefore, that similarly-situated inmates will not receive disparate treatment on post-conviction review.

U.S. Supreme Court Decisions

Missouri post-conviction courts give retroactive effect to U.S. Supreme Court decisions in limited circumstances.¹⁹⁰ The Supreme Court of Missouri, adopting an analysis developed by the U.S. Supreme Court in *Linkletter v. Walker*¹⁹¹ and *Stovall v. Denno*,¹⁹² requires the post-conviction court to consider three factors in determining whether a U.S. Supreme Court decision should apply retroactively: “(a) the purpose to be served by the new [constitutional] standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the

¹⁹⁰ See *State v. Whitfield*, 107 S.W.3d 253, 266 (Mo. banc 2003). Missouri does not permit second or successive Rule 24.035 or Rule 29.15 post-conviction motions under any circumstances. Rules 24.035(l), 29.015(l). Thus, cases involving retroactive application of decisions typically will involve a different form of collateral attack recognized under Missouri law, such as Rule 91 state habeas or a motion to recall the mandate. See *infra* notes 201–226 and accompanying text.

¹⁹¹ *Linkletter v. Walker*, 381 U.S. 618 (1965).

¹⁹² *Stovall v. Denno*, 388 U.S. 293 (1967).

effect on the administration of justice of a retroactive application of the new standards.”¹⁹³ In applying the *Linkletter-Stovall* test for retroactive application of U.S. Supreme Court decisions, the Supreme Court of Missouri rejected the narrower retroactivity test later adopted by the U.S. Supreme Court in *Teague v. Lane*.¹⁹⁴

When considering the purpose served by the new constitutional standard—the first *Linkletter-Stovall* factor—the Supreme Court of Missouri appears to view decisions involving the application of the death penalty as a factor favoring retroactive application.¹⁹⁵ The second and third factors focus on the number of inmates to which the new rule would apply and the administrative difficulty of applying the new rule to their cases.¹⁹⁶ The Supreme Court of Missouri has retroactively applied the U.S. Supreme Court’s holding in *Ring v. Arizona*,¹⁹⁷ which held that aggravating circumstances used to sentence a defendant to death must be determined by a jury.¹⁹⁸ In a later case, *State ex rel. Taylor v. Steele*, the Supreme Court of Missouri determined that *Ring* retroactivity does not apply to cases in which the defendant pleaded guilty, thereby waiving a jury determination of sentencing under Missouri law.¹⁹⁹ The Assessment Team is not aware of any other capital cases since Missouri reintroduced the death penalty in which the Supreme Court of Missouri considered the retroactivity of a U.S. Supreme Court decision.

Federal Appellate and District Court Decisions

As the Supreme Court of Missouri has ruled on the issue of retroactivity in a small number of cases, no trend in the Court’s willingness to consider federal appellate and district court decisions has emerged. In *Taylor*, however, the Supreme Court of Missouri considered a similar ruling by the U.S. Court of Appeals for the Eighth Circuit to determine that *Ring* does not apply retroactively to cases in which the defendant pleaded guilty and waived jury sentencing.²⁰⁰

Conclusion

Missouri is in partial compliance with Recommendation #9.

¹⁹³ *Whitfield*, 107 S.W.3d at 268.

¹⁹⁴ *Id.* at 266–67 (citing *Teague v. Lane*, 489 U.S. 288, 311 (1989)). The test outlined in *Teague* must be applied by federal courts in federal habeas proceedings, but the Supreme Court of Missouri has held that the decision is not binding on state courts. *Id.* at 267. Under the *Teague* standard, a U.S. Supreme Court decision regarding constitutional criminal procedure will only apply retroactively if (a) the decision places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,” or (b) the decision involves “those procedures that . . . are implicit in the concept of ordered liberty.” *Teague*, 489 U.S. at 311 (internal quotations omitted).

¹⁹⁵ See *Whitfield*, 107 S.W.3d at 268 (contrasting its holding that the rule requiring a jury determination of aggravating circumstances in a capital case should be applied retroactively with a rule, pertaining to jury trials in non-capital cases, whose purpose was deemed “not a sufficient basis in itself to require retroactive application” (citing *DeStefano v. Woods*, 392 U.S. 631, 633–34 (1968))).

¹⁹⁶ See *id.* at 268–69.

¹⁹⁷ *Ring v. Arizona*, 536 U.S. 584 (2002).

¹⁹⁸ *Whitfield*, 107 S.W.3d at 268–69.

¹⁹⁹ *State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 649 (2011). The Court also held that *Ring*, as a general matter, is inapplicable to cases in which the defendant pleads guilty. *Id.* But the Court noted that, even if *Ring* did apply to such cases, it would not apply retroactively. *Id.*

²⁰⁰ *Id.* at 650 (citing *United States v. Stoltz*, 149 F. App’x 567, 568–69 (8th Cir. 2005)).

The Assessment Team commends the Supreme Court of Missouri for adopting the less restrictive *Linkletter-Stovall* test to determine whether a U.S. Supreme Court decision applies retroactively. However, because the Court does not give full retroactive effect to U.S. Supreme Court decisions in every capital case, Missouri is not in full compliance with this Recommendation.

J. Recommendation #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.

Missouri Supreme Court Rules 24.035 and 29.15, the primary means by which a Missouri death row inmate may seek collateral review of his/her conviction and sentence, do not permit second or successive post-conviction motions under any circumstances.²⁰¹ Missouri courts, however, allow two additional forms of post-conviction review: Rule 91 habeas corpus and the writ of mandamus. Under certain circumstances, these proceedings may allow courts to review possibly meritorious claims that were not pursued under Rule 24.035 or Rule 29.15 post-conviction proceedings because of counsels' omissions or intervening court decisions.

Rule 91 Habeas Corpus

Rule 91 habeas corpus allows “[a]ny person restrained of liberty” to seek collateral review of his/her sentence or conviction by “petition[ing] for a writ of habeas corpus to inquire into the cause of such restraint.”²⁰² In capital cases, habeas corpus petitions are made directly to the Supreme Court of Missouri.²⁰³ Contrary to the strict filing deadlines of Rules 24.035 and 29.15, Rule 91 does not require the inmate to file his/her petition at any particular time, allowing Rule 91 to function similar to a successive post-conviction proceeding.²⁰⁴ In practice, death row inmates typically file Rule 91 petitions after all federal habeas corpus claims are exhausted.²⁰⁵ There are no provisions for the appointment of counsel to represent indigent inmates in Rule 91 proceedings.²⁰⁶ As such, Missouri inmates with viable Rule 91 claims must represent themselves or rely on pro bono counsel.²⁰⁷ In addition, because Rule 91 claims in capital cases are made directly to the Supreme Court of Missouri, no evidentiary hearing will be held in the court that reviews the petition. In some instances, however, the Court will appoint a special master to review the claims and hold a hearing if factual issues are in dispute.²⁰⁸

²⁰¹ Rules 24.035(l), 29.15(l). See also *Sanders*, 807 S.W.2d at 495.

²⁰² Rule 91.01(b).

²⁰³ Rule 91.02(b).

²⁰⁴ Compare Rule 24.035(b), and Rule 29.15(b), with Rule 91.01.

²⁰⁵ Telephone Interview by Mark Pickett with Sean O'Brien, Assoc. Professor of Law, Univ. of Mo. Kansas City Sch. of Law (Sept. 7, 2011) (on file with author).

²⁰⁶ Telephone Interview by Mark Pickett with Greg Mermelstein, Appellate/PCR Div. Dir., Mo. State Pub. Defender Sys. (Sept. 6, 2011) (on file with author).

²⁰⁷ *Id.*

²⁰⁸ See *In re Competency of Parkus*, 219 S.W.3d 250, 254 (Mo. banc 2007).

Since the introduction of Rule 24.035 and Rule 29.15 post-conviction proceedings, the proper use of Rule 91 has not always been clear.²⁰⁹ In *In re Competency of Parkus*, for instance, the Supreme Court of Missouri held that Rule 91 is not the proper procedure for a death-sentenced inmate who committed his/her offense before the U.S. Supreme Court banned the execution of the mentally retarded to raise his/her claim of mental retardation as a bar on execution.²¹⁰ The Court noted, however, that the issue “was unduly complicated by the lack of a clear procedure.”²¹¹

Generally, Missouri courts impose a procedural default rule with respect to Rule 91 proceedings; thus, an inmate is not entitled to relief under Rule 91 with respect to claims that could have been but were not raised in the inmate’s Rule 24.035 or Rule 29.15 post-conviction proceeding.²¹² In recent years, however, the Supreme Court of Missouri has become more willing to grant relief in Rule 91 proceedings for claims that could have been raised in Rule 24.035 or Rule 29.15 proceedings but were not. With respect to claims that may not have been presented due to counsel’s omissions, an inmate may be able to raise a defaulted claim under Rule 91 if the movant can demonstrate that s/he was abandoned by his/her prior post-conviction counsel during Rule 24.035 or Rule 29.15 proceedings.²¹³ However, it appears that this exception has only been discussed in dicta.²¹⁴ In other cases, the Supreme Court of Missouri has identified three types of attorney misconduct that rise to the level of abandonment:

- (1) “[W]hen post-conviction counsel fails to file an amended [Rule 24.035 or Rule 29.15] motion and the record shows the movant was deprived of meaningful review of the claims”;
- (2) “when post-conviction counsel files an untimely amended [Rule 24.035 or Rule 29.15] motion”; and
- (3) “when post-conviction counsel’s overt actions prevent the movant from filing the original [pro se Rule 24.035 or Rule 29.15] motion timely.”²¹⁵

The abandonment exception may allow some death row inmates to pursue, through Rule 91, claims that were not presented in Rule 24.035 or Rule 29.15 proceedings due to counsels’ omissions. The exception, however, appears to be limited to cases in which the inmate received no Rule 24.035 or Rule 29.15 post-conviction review whatsoever on account of his/her attorney either failing to file the motion in a timely manner or failing to file the motion at all.²¹⁶ Thus, an inmate whose prior attorney filed a timely Rule 24.035 or Rule 29.15 motion, but who omitted

²⁰⁹ *See id.*

²¹⁰ *Id.*

²¹¹ *Id.* Instead, the Court held that the inmate must pursue relief through a motion to recall the mandate. *Id.* The motion to recall the mandate is discussed in the next section of this Recommendation.

²¹² *See White v. State*, 779 S.W.2d 571, 572 (Mo. banc 1989).

²¹³ *Kilgore v. State*, 791 S.W.2d 393, 396 (Mo. banc 1990).

²¹⁴ *See id.*

²¹⁵ *Id.*

²¹⁶ *See id.*

certain viable claims in that motion, would not be entitled relief in a Rule 91 proceeding with respect to the omitted claims.²¹⁷

Writ of Mandamus

The writ of mandamus, also referred to as a motion to recall a mandate, made directly to the Supreme Court of Missouri, appears to be the method by which a Missouri death row inmate can obtain relief when an intervening court decision resulted in a possibly meritorious claim not previously being raised in Rule 24.035 or Rule 29.15 proceedings.²¹⁸ As with Rule 91 habeas corpus proceedings, the exact limitations of the writ of mandamus are unclear. The Supreme Court of Missouri has stated that “this Court has never fully delineated the scope of an appellate court’s power to recall its mandate.”²¹⁹ However, the Court has held that an inmate is entitled to relief through a writ of mandamus “when the decision of a lower appellate court directly conflicts with a decision of the United States Supreme Court upholding the [federal constitutional] rights of the accused.”²²⁰ Accordingly, death row inmates obtained relief using this procedure when the Supreme Court of Missouri retroactively applied the U.S. Supreme Court’s holding in *Ring v. Arizona*,²²¹ requiring that aggravating circumstances used to sentence a defendant to death be determined by a jury.²²² In another case, the Court held that a motion to recall the mandate was the proper procedure for a death row inmate, sentenced to death before the U.S. Supreme Court banned the execution of the mentally retarded, to prove that he was mentally retarded and thus ineligible for the death penalty.²²³

The writ of mandamus does not allow an inmate to obtain relief in all cases where an intervening court decision resulted in a possibly meritorious claim not previously being raised in Rule 24.035 or Rule 29.15 proceedings. First, as discussed in Recommendation #9, the Court will not recall its mandate if it determines that the intervening decision does not apply retroactively.²²⁴ Second, this procedure only applies to intervening cases related to federal constitutional rights.²²⁵ Thus, a Missouri death row inmate with a meritorious claim that his/her death sentence is invalid based on an intervening case decided on state law grounds would not be able to obtain relief under Missouri law.²²⁶

Conclusion

Missouri is in partial compliance with Recommendation #10.

²¹⁷ Other narrow exceptions exist which allow an inmate to present a procedurally defaulted claim in Rule 91 proceedings. Because those exceptions are not relevant to this Recommendation, however, they are only addressed in the factual discussion of this Chapter. See *supra* notes 61–74 and accompanying text.

²¹⁸ See, e.g., *State v. Whitfield*, 107 S.W.3d 253, 264–65 (Mo. banc 2003) (internal quotations omitted).

²¹⁹ *Id.*

²²⁰ *Id.* at 265.

²²¹ *Ring v. Arizona*, 536 U.S. 584 (2002).

²²² *Whitfield*, 107 S.W.3d at 268–69.

²²³ *In re Competency of Parkus*, 219 S.W.3d 250, 254 (Mo. banc 2007) (citing *Atkins v. Virginia*, 536 U.S. 304 (2002)).

²²⁴ See *supra* notes 190–200 and accompanying text.

²²⁵ *Whitfield*, 107 S.W.3d at 265 (applying *Ring*, 536 U.S. 584, retroactively).

²²⁶ See *id.*

Missouri does not permit second or successive Rule 24.035 or Rule 29.15 post-conviction motions, thereby prohibiting consideration of any issues not raised in the initial motion for relief. While Missouri does have additional post-conviction remedies that allow the Supreme Court of Missouri to review possibly meritorious claims not pursued under prior proceedings because of counsels' omissions or intervening court decisions, these proceedings are too limited to ensure that all inmates with meritorious claims will obtain relief.

Furthermore, the rules governing these remedies are unclear and often confusing, as the Supreme Court of Missouri has acknowledged. Unclear procedures may increase the risk that a death row inmate's meritorious claim will go unheard due to a misunderstanding of the applicable law. Moreover, because these claims are typically not brought until shortly before the inmate's scheduled execution, inmates with possible meritorious claims may needlessly remain on death row for years.

In addition, because there is no right to counsel during Rule 91 proceedings, those death row inmates who are not represented by pro bono counsel may have claims that go overlooked. Indeed, Missouri death row inmates have no right to counsel during the several-year period between the close of federal habeas proceedings and the date of execution, meaning that no attorney may be available to investigate and present potential Rule 91 claims that arise during this period. Finally, because Rule 91 petitions are made directly to the Supreme Court of Missouri in capital cases, inmates are not afforded the same two-tier level of review that exists in Rule 24.035 and Rule 29.15 post-conviction proceedings, where the inmate's claim is first reviewed by the trial court, then appealed to the Supreme Court.

Accordingly, Missouri should enact a rule or law permitting second and successive post-conviction proceedings in 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. While Rule 91 habeas corpus has provided an effective avenue of relief in some circumstances, it is not the best mechanism for review of claims. The desire to limit successive post-conviction claims is understandable, but individuals facing execution should not have to rely on confusing Rule 91 habeas corpus and writ of mandamus procedures in cases where a post-conviction claim was overlooked because of attorney omissions or intervening court decisions.

K. Recommendation #11

In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.

In *Chapman v. California*, the U.S. Supreme Court held that "before a federal constitutional error can be held harmless, the [appellate] court must be able to declare a belief that it was harmless

beyond a reasonable doubt.”²²⁷ Under this standard, the prosecution must “prove that there was no injury” to the inmate as a result of the error.²²⁸

Missouri courts have applied the *Chapman* harmless error standard to constitutional trial errors.²²⁹ Generally, however, Missouri courts are not permitted to consider trial errors in post-conviction proceedings, as the defendant is presumed to have had an opportunity to raise trial-related claims on the direct appeal of his/her conviction.²³⁰ The Court will only consider claims of trial error in post-conviction proceedings “where fundamental fairness requires . . . , and then, only in rare and exceptional circumstances.”²³¹

As a result of the strict rules governing the scope of post-conviction proceedings, claims based on ineffective assistance of counsel—a constitutional error—form the majority of alleged errors considered by Missouri post-conviction courts.²³² Missouri courts do not apply the *Chapman* harmless error standard to these claims.²³³ Instead, the inmate must prove that his/her trial or appellate “counsel’s deficient performance prejudiced the defense.”²³⁴ To demonstrate prejudice, the inmate must prove that, but for counsel’s deficient performance, there is a “reasonable probability that the result [of the proceeding] would have been different.”²³⁵ In contrast with the *Chapman* harmless error standard, this standard places the burden on the inmate to prove that s/he was harmed by the error.

Conclusion

Missouri is in partial compliance with Recommendation #11. It appears that Missouri courts will apply the *Chapman* harmless error standard in the rare instances in which constitutional trial errors are considered in post-conviction proceedings. Missouri courts do not apply the *Chapman* standard to ineffective assistance of counsel claims, however, which constitute the majority of post-conviction claims in Missouri capital cases.

²²⁷ *Chapman v. California*, 386 U.S. 18, 24 (1972).

²²⁸ *Id.*

²²⁹ *See, e.g., State v. Edwards*, 116 S.W.3d 511, 541–42 (Mo. banc 2003) (applying the “harmless beyond a reasonable doubt” standard when considering the trial court’s failure to instruct the jury that no adverse inference should be drawn from the defendant’s failure to testify on his/her own behalf).

²³⁰ *Zink v. State*, 278 S.W.3d 170, 176 (Mo. banc 2009).

²³¹ *Schneider v. State*, 787 S.W.2d 718, 721 (Mo. banc 1990) (citing *Walls v. State*, 779 S.W.2d 560, 563 (Mo. banc 1989)).

²³² *See* Rules 24.035(a) (expressly reserving claims of ineffective assistance of counsel for post-conviction proceedings), 29.15(a) (same). *See also Zink*, 278 S.W.3d at 176 (considering several ineffective assistance of counsel claims in an appeal of a denial of a Rule 29.15 post-conviction motion but refusing to consider all other claims as those claims related to alleged trial errors).

²³³ *See Deck v. State*, 68 S.W.3d 418, 425–26 (Mo. banc 2002).

²³⁴ *Id.* at 425 (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)). While this standard was endorsed by the U.S. Supreme Court in *Strickland*, the Supreme Court of Missouri is not required to adopt this standard. *See id.* at 426 (noting that Missouri courts have “recognized” the *Strickland* standard).

²³⁵ *Id.* at 426–27.

L. Recommendation #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.

Because Recommendation #12 is predicated on the implementation of a moratorium, it is not applicable to Missouri at this time.

CHAPTER NINE

CLEMENCY

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Under a state's constitution or clemency statute, the Governor or entity established to handle clemency matters is empowered to pardon an individual's criminal offense or commute an individual's death sentence. In death penalty cases, the clemency process traditionally was intended to function as a final safeguard to evaluate (1) the fairness and judiciousness of the penalty in the context of the circumstances of the crime and the individual, and (2) whether a person should be put to death. The clemency process can only fulfill this critical function when the exercise of the clemency power is governed by fundamental principles of justice, fairness, and mercy.

The clemency process should provide a safeguard for claims that have not been considered on the merits, including claims of innocence and claims of constitutional deficiency. Clemency also can be a way to review important sentencing issues that were barred in state and federal courts. Because clemency is the final avenue of review available to a death row inmate, the state's use of its clemency power is an important measure of the fairness of the state's justice system as a whole.

While elements of the clemency process, including criteria for filing and considering petitions and inmates' access to counsel, vary significantly among states, some minimal procedural safeguards are constitutionally required. "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."¹

Since 1972, when the Supreme Court of the United States temporarily halted executions, clemency has been granted in substantially fewer death penalty cases. From 1976, when the Court authorized states to reinstate capital punishment, through January 2012, clemency has been granted on humanitarian grounds 270 times in twenty-one capital jurisdictions in the United States.² One-hundred sixty-seven of these were granted by former Illinois Governor George Ryan in 2003 out of concern that the justice system in Illinois could not ensure that an innocent person would not be executed.³ Another fifteen of these clemency grants occurred in Illinois when Governor Pat Quinn commuted the death sentences of the remaining men on death row to life without parole upon that state's repeal of its death penalty statute in 2011.⁴

¹ Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

² See Clemency, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Feb. 10, 2012). This figure includes states that authorized capital punishment at any time during this period.

³ *Id.* There have been five additional broad grants of clemency.

⁴ 725 ILL. COMP. STAT. 5/119-1 (2011) (amending the Illinois Code of Criminal Procedure to abolish the death penalty); Christopher Wills, *Illinois Abolishes Death Penalty*, WASH. POST, Mar. 10, 2011, at A9.

Due to restrictions on the judicial review of meritorious claims, the need for a meaningful clemency power is more important than ever. As a result of these restrictions, clemency can be the state's final opportunity to address miscarriages of justice, even in cases involving actual innocence. A clemency decision-maker may be the only person or body that has the opportunity to evaluate all of the factors bearing on the appropriateness of the conviction and/or death sentence without regard to constraints that may limit a court's or jury's decision-making. Yet as the capital punishment process currently functions in many jurisdictions, meaningful review frequently is not obtained, and clemency too often has not proven to be the critical final check against injustice in the criminal justice system.

I. FACTUAL DISCUSSION: MISSOURI OVERVIEW

Due to the opaque nature of the Missouri clemency process, Missouri laws and practices during clemency proceedings described herein have been obtained through information contained in clemency petitions, news articles, and the 2002 book *Justice Denied: Clemency Appeals in Death Penalty Cases*, in which the author examined fifty clemency petitions presented to the Governors of Missouri between 1977 and 2000.⁵

A. Clemency Decision-makers

1. The Governor of Missouri

The State of Missouri provides the Governor with the sole constitutional and statutory power to grant or deny reprieves, commutations, and pardons under “such conditions and with such restrictions and limitations as he may deem proper.”⁶ The Board of Probation and Parole (Board) will investigate all applications for clemency, commutations, and pardons and submit a report to the Governor, along with all materials gathered in the course of the investigation.⁷ The Board may, but is not required to, make a recommendation to the Governor on whether to grant or deny the clemency petition.⁸ Any recommendation made by the Board is non-binding on the Governor.⁹

Additionally, at his/her discretion, the Governor may appoint a Board of Inquiry to investigate a death row inmate’s application for clemency.¹⁰ After an investigation, the Board of Inquiry will provide the Governor with a report and recommendation regarding the clemency application.¹¹ Any recommendation by the Board of Inquiry is non-binding on the Governor.¹²

2. The Board of Probation and Parole

The Board is composed of seven members, all of whom are appointed by the Governor and confirmed by the Missouri Senate.¹³ When appointing members to the Board, the Governor shall appoint “persons of recognized integrity and honor, known to possess education and ability in decision making through career experience and other qualifications for the successful performance of their official duties.”¹⁴ No more than four members may be of the same political party.¹⁵ Once appointed, the seven Board members serve six-year terms and are eligible for

⁵ See CATHLEEN BURNETT, *JUSTICE DENIED: CLEMENCY APPEALS IN DEATH PENALTY CASES* (2002). The Missouri Assessment Team also submitted a questionnaire to the Missouri Governor regarding the issues addressed throughout this Chapter; however, as of February 2012, the Team has not received a response. See Clemency Questionnaire, *infra* Appendix.

⁶ Mo. Const. art. IV, sec. 7; section 217.800.1, RSMo 2011.

⁷ Section 217.800.2, RSMo 2011.

⁸ See section 217.800.2, RSMo 2011.

⁹ See section 217.800.1, RSMo 2011.

¹⁰ Section 552.070, RSMo 2011.

¹¹ *Id.*

¹² *Id.*

¹³ Section 217.665.1, RSMo 2011.

¹⁴ Section 217.665.2, RSMo 2011.

¹⁵ *Id.*

reappointment.¹⁶ The Governor will appoint one of the seven Board members to serve as Chairman of the Board and one member to serve as Vice-Chairman of the Board.¹⁷ Board members are full-time employees and are compensated between \$65,676 and \$95,040 per year.¹⁸ The Chairman of the Board earns between \$71,544 and \$103,860 per year.¹⁹

B. Clemency Applications and Investigations

1. Avenues for Applying for and Obtaining Clemency

To apply for clemency, an inmate or his/her attorney must submit a petition for clemency to the Missouri Governor, who will then refer the application to the Board for investigation.²⁰ The Governor may also appoint a separate Board of Inquiry to review the petition.²¹ Alternatively, citizens of Missouri may submit a petition for clemency to the Governor on behalf of any inmate.²² If the Director of the Department of Corrections (Director) has reasonable cause to believe that an inmate has “a mental disease or defect excluding fitness for execution,” the Director must petition the Governor for a stay of execution.²³

2. Applications for Clemency

Missouri does not have any statutory or regulatory guidelines governing the form or substance of clemency petitions. Similarly, Missouri does not have specific deadlines for filing clemency petitions. Generally, petitions for clemency are filed after judicial remedies have been exhausted and an execution date has been set by the Supreme Court of Missouri.²⁴

3. Investigations and Recommendations

a. The Missouri Probation and Parole Board’s Investigation and Recommendation

Upon receipt of a clemency petition, the Board will review the petition and conduct an investigation into the case.²⁵ The governing statute is silent on what the Board’s investigation should include.²⁶ In previous clemency proceedings, the Board’s investigation has generally

¹⁶ Section 217.665.3, RSMo 2011.

¹⁷ Section 217.665.5, RSMo 2011.

¹⁸ Sections 217.665.6–7, 105.950, RSMo 2011; app. E–F, RSMo 2011.

¹⁹ Sections 217.665.7, 105.950, RSMo 2011; app. E–F, RSMo 2011.

²⁰ BURNETT, *supra* note 5, at 13; section 217.800.2, RSMo 2011.

²¹ Section 552.070, RSMo 2011.

²² BURNETT, *supra* note 5, at 163 (“Precedent was established in 1984 for the right of citizens of the state to apply for commutation in behalf of the public welfare when then-governor Bond accepted the application for Reprieve of Commutation for Gerald Smith submitted by religious leaders and others and then referred it to the Board of Probation and parole for review.”).

²³ Section 552.060.2, RSMo 2011.

²⁴ *See generally* BURNETT, *supra* note 5, at 163.

²⁵ Section 217.800.2, RSMo 2011.

²⁶ *Id.* The Board’s investigation in past cases has generally consisted of reviewing the clemency petition, trial transcript, and judicial rulings on the case. BURNETT, *supra* note 5, at 163.

consisted of reviewing the clemency petition, trial transcript, and judicial rulings on the case.²⁷ In past cases, a local member of the Department of Probation and Parole also has met with the inmate several days before the scheduled execution to request a statement.²⁸ A report of this meeting will be submitted to the Board.²⁹ The Board is not required to hold a hearing, speak with the inmate's attorneys or family, or interview the victims.³⁰

After review of the investigation materials, the Board will meet to discuss the petition on the Monday before the scheduled execution.³¹ The Board can, but is not required to, make a recommendation as to whether to grant or deny the petition.³² All investigation materials, reports, and any recommendations will be submitted to the Governor and must remain confidential.³³

b. The Board of Inquiry's Investigation and Recommendation

At his/her discretion, the Governor may appoint a Board of Inquiry to investigate all clemency petitions of inmates sentenced to death.³⁴ The Governor may appoint any individual to the Board of Inquiry and no member of the Board of Inquiry will receive compensation.³⁵ The Board of Inquiry may collect any information bearing upon whether the inmate should be executed, reprieved, pardoned, or his/her sentence commuted.³⁶ The Board of Inquiry will provide the Governor with all reports and documents collected during the investigation and issue a recommendation to the Governor.³⁷ All reports and recommendations furnished by the Board of Inquiry are confidential and may not be released to the public.³⁸

c. The Governor's Investigation

In previous clemency cases, the Governor's legal counsel has also conducted an independent investigation of clemency petitions.³⁹ This investigation will generally consist of reviewing all court decisions in the case, obtaining the full legal file from the Attorney General's Office, reviewing all telephone calls and letters from the public; if requested, the Governor's legal adviser will meet with the inmate's attorney.⁴⁰ The Governor's legal advisers then meet with the Governor to talk about the case before the Governor makes the final clemency determination.⁴¹

²⁷ BURNETT, *supra* note 5, at 163. See also Executive Clemency, MO. DEP'T OF CORR., <http://doc.mo.gov/division/prob/ExecClem.php> (last visited Jan. 13, 2012).

²⁸ BURNETT, *supra* note 5, at 163.

²⁹ *Id.*

³⁰ See generally Section 217.800, RSMo 2011.

³¹ BURNETT, *supra* note 5, at 163. According to Burnett, executions in Missouri are scheduled on Wednesdays at 12:01 a.m. *Id.*

³² Section 217.800.2, RSMo 2011.

³³ *Id.*; section 549.500, RSMo 2011.

³⁴ Section 552.070, RSMo 2011.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ BURNETT, *supra* note 5, at 164.

⁴⁰ *Id.*

⁴¹ *Id.*

C. Clemency Decision-making Process

After all investigations and reports are submitted to the Governor, the Governor is solely responsible for granting or denying a petition for clemency.⁴² There are no statutes or regulations governing the timing of the Governor's clemency decision. In previous cases, the Governor has waited to announce his/her decision until all court litigation was complete, which may be as late as one or two hours before the scheduled execution.⁴³

Upon making a clemency decision, the Governor will notify the Department of Corrections, the inmate's attorney, and the Associated Press.⁴⁴ If the Governor denies the petition for clemency and the inmate is executed, the Governor's statement denying clemency will be read to the media.⁴⁵

⁴² Mo. Const. art. IV, sec. 7; section 217.800, RSMo 2011.

⁴³ BURNETT, *supra* note 5, at 166.

⁴⁴ *Id.* at 166–67.

⁴⁵ *Id.*

II. ANALYSIS

Due to the opaque nature of the Missouri clemency process, the Missouri Assessment Team was unable to obtain necessary information to determine compliance with each of the ABA Protocols contained in this Chapter. Missouri laws and practices during clemency proceedings described herein have been obtained through information contained in clemency petitions, news articles, and the 2002 book *Justice Denied: Clemency Appeals in Death Penalty Cases*, in which the author examined fifty clemency petitions presented to the Governors of Missouri between 1977 and 2000.⁴⁶

A. Recommendation #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.

The State of Missouri does not require the Governor, who possesses the sole constitutional and statutory power to grant or deny clemency, to conduct any specific type of review or consider any specific facts, evidence, or circumstances when making his/her clemency decision.⁴⁷ It appears that the Governor's legal counsel reviews the clemency petition, collects all legal decisions pertaining to the inmate's case, obtains the inmate's case file from the Attorney General's Office, meets with the inmate's attorney, and catalogs correspondence from the public.⁴⁸ However, the Governor is free to examine any information s/he deems appropriate. If the Governor wishes to conduct a further investigation into the petition, s/he may appoint a Board of Inquiry to investigate the clemency petition.⁴⁹

Additionally, the Board of Probation and Parole (Board) is tasked with investigating clemency petitions and submitting a report of the investigation to the Governor.⁵⁰ There are no requirements regarding the information the Board must collect or review; however, the Board generally reviews the clemency petition, trial transcript, and judicial rulings on the case.⁵¹ Additionally, an employee of the Department of Probation and Parole will visit the inmate and provide a written report of the visit to the Board.⁵² Once the Board concludes its investigation, it must transmit all materials collected during the investigation to the Governor.⁵³ The Board may, but is not required to, make a non-binding recommendation to the Governor as to whether to

⁴⁶ See BURNETT, *supra* note 5, at xii. The Missouri Assessment Team also submitted a questionnaire to the Missouri Governor regarding the issues addressed throughout this Chapter; however, as of February 2012, the Team has not received a response. See Clemency Questionnaire, *infra* Appendix.

⁴⁷ Mo. Const. art. IV sec. 7; section 217.800, RSMo 2011.

⁴⁸ BURNETT, *supra* note 5, at 163–64.

⁴⁹ Section 552.070, RSMo 2011.

⁵⁰ Section 217.800, RSMo 2011.

⁵¹ BURNETT, *supra* note 5, at 163. See also *Executive Clemency*, MO. DEP'T OF CORR., <http://doc.mo.gov/division/prob/ExecClem.php> (last visited Jan. 6, 2012) (listing the types of information the investigation may include).

⁵² BURNETT, *supra* note 5, at 163 (“[A] local member of the Department of Probation and Parole [] merely asks the condemned if there is anything else he would like to say on his behalf . . .”).

⁵³ Section 217.800.2, RSMo 2011.

grant or deny the clemency petition.⁵⁴ Missouri law does not require the Governor to consider any of the Board's information as part of his/her clemency decision-making process.⁵⁵

The Missouri Governor "is not restricted as to the nature of the considerations he may entertain or the evidence he may receive,"⁵⁶ and Missouri law does not require the Governor or the Board to conduct any specific type of review or consider any specific factors. Therefore, the review conducted by the Governor and the Board and the factors considered are largely unknown.⁵⁷ The Governor is not required to make a statement concerning his/her clemency decision. In practice, after the Governor notifies the Director of the Department of Corrections of his/her decision, the Governor's spokesperson will release a statement to the media.⁵⁸ This statement generally does not include any specific information relating to the review of the petition or the reasons for the decision.⁵⁹ Furthermore, all information collected by the Board, along with its report and recommendation, are completely confidential and may not be released to the public.⁶⁰

Several Missouri Governors, however, have made public statements concerning the scope of their clemency review as it relates to the judicial process. For example, former Governor John Ashcroft stated that "[i]t would have been arrogant and irresponsible for me to second-guess the people and the court system by arbitrarily reversing the decision of unmistakable juries and judges."⁶¹ Governor Ashcroft presided over seven executions, granted one stay of execution, and granted no clemency petitions.⁶² Former Governor Mel Carnahan stated that his clemency decisions focused on whether the petitioner was actually innocent: "The essential fact reviewed by my staff is whether or not the individual is in fact guilty of first degree murder."⁶³ Governor Carnahan oversaw thirty-four executions and granted two clemency applications.⁶⁴ He asserted

⁵⁴ *Id.*

⁵⁵ Section 217.800.1–2, RSMo 2011.

⁵⁶ *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000).

⁵⁷ BURNETT, *supra* note 5, at 162 ("Because of the relative silence of the executive office on this subject, it is not known what style of clemency decision making describes that of Missouri governors.").

⁵⁸ *Id.* at 166.

⁵⁹ *Id.* at 166–67.

⁶⁰ Sections 217.670.5, 549.500, 552.070, RSMo 2011. See also David A. Lieb, *Missouri Parole Board Works Under Shroud of Secrecy: Exemption from Sunshine Law Means Records, Proceedings Are Often Closed*, ST. LOUIS POST-DISPATCH, Mar. 13, 2011, at A3.

⁶¹ John Ashcroft, Editorial, *It's the People's Collective Self Defense*, ST. LOUIS POST-DISPATCH, May 18, 2000, at B7.

⁶² See *Executions: 1989–2011*, MO. DEATH ROW, <http://missourideathrow.com/executions-1989-2009/> (last visited Jan. 6, 2012); *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Jan. 6, 2012). John Ashcroft was governor from 1985 to 1993. *Missouri History: Governors*, MO SEC'Y OF STATE ROBIN CARNAHAN, <http://www.sos.mo.gov/archives/history/historicallistings/governors.asp> (last visited Jan. 6, 2012). Governor Ashcroft granted a stay to Bobby Shaw who was later granted clemency by Governor Carnahan. Donald E. Franklin & Tim Poor, *Ashcroft Orders Execution Stayed, Inmate's Competency Questioned*, ST. LOUIS POST-DISPATCH, Nov. 26, 1992, at 01D.

⁶³ Mel Carnahan, Editorial, *Complete Confidence in the Guilt of Those Executed*, ST. LOUIS POST-DISPATCH, May 12, 2000, at C19.

⁶⁴ See *Executions: 1989–2011*, MO. DEATH ROW, <http://missourideathrow.com/executions-1989-2009/> (last visited Jan. 6, 2012); *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Jan. 6, 2012). Mel Carnahan was governor from 1993–2000. *Missouri History: Governors*, MO. SEC'Y OF STATE ROBIN CARNAHAN, <http://www.sos.mo.gov/archives/history/historicallistings/governors.asp> (last visited Jan. 6, 2012). Governor Carnahan granted clemency to Bobby Shaw in 1993 and Darrell Mease in 1999. *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Jan. 6, 2012).

that the reason for granting Bobbie Shaw's petition for clemency was Shaw's mental impairment.⁶⁵ The reasoning Governor Carnahan later asserted for granting clemency in the case of Darrell Mease was a request from Pope John Paul II.⁶⁶ It appears Governor Carnahan was not influenced by previous court decisions in either case.

Governor Bob Holden presided over fifteen executions, granted one stay of execution for further appellate review, and granted no clemency petitions.⁶⁷ Governor Holden stated that he would review each case individually and consider all factors brought to his attention, specifically stating that he would "not be bashful about making decisions either way about the merits on the case."⁶⁸ Governor Matt Blunt, who oversaw five executions and granted no clemency petitions,⁶⁹ claimed in one case that he "found no reason to set aside the result of previous judicial decisions in the case."⁷⁰ In a separate case, after denying clemency, Governor Blunt stated, "Missouri's highest courts and a jury of Marlin Gray's peers determined unequivocally that he should be held accountable for Julie and Robin Kerry's deaths I support the sentence issued and affirmed by both Missouri and U.S. Courts and believe justice has been served."⁷¹

Finally, Missouri Governor Jay Nixon stated after his election that "[i]f a jury of Missourians decides that the ultimate penalty is appropriate, then the families of victims deserve closure and justice without never-ending delays."⁷² However, Governor Nixon later granted clemency to Richard Clay with little explanation, releasing only the following statement upon the grant of clemency:

After an exhaustive review, I am convinced of Richard Clay's involvement in the senseless murder of Randy Martindale and find that the evidence clearly supports the jury's verdict of murder in the first degree.

Having looked at this matter in its entirety and after significant thought and counsel, I have concluded, however, to exercise my constitutional authority and commute Richard Clay's sentence to life without the possibility of parole.

⁶⁵ Scott Charton, *Missouri Governor Commutes Death Row Inmate's Sentence*, ASSOCIATED PRESS, Jun. 6, 1993, at AP Online.

⁶⁶ Terry Ganey, *Carnahan Spares Murderer's Life, Brief Meeting with Pope Led Governor to Cancel Execution, 'It's a Miracle!' Lawyer Says*, ST. LOUIS POST-DISPATCH, Jan. 29, 1999, at A1.

⁶⁷ See *Executions: 1989–2011*, MO. DEATH ROW, <http://missourideathrow.com/executions-1989-2009/> (last visited Jan. 6, 2012); *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Jan. 6, 2012). Bob Holden was governor from 2001–2005. *Missouri History: Governors*, MO. SEC'Y OF STATE ROBIN CARNAHAN, <http://www.sos.mo.gov/archives/history/historicallistings/governors.asp> (last visited Jan. 6, 2012). Governor Holden issued a stay of execution to Daniel Basile in 2002 to allow for additional investigation. *Holden Halts Execution for Last Minute Alleged Alibi Witness*, JEFFERSON CITY NEWS-TRIBUNE, Aug. 14, 2002.

⁶⁸ *Holden Acknowledges Qualms About Execution, but No Regrets*, JEFFERSON CITY NEWS-TRIBUNE, Feb. 9, 2001.

⁶⁹ See *Executions: 1989–2011*, MO. DEATH ROW, <http://missourideathrow.com/executions-1989-2009/> (last visited Jan. 6, 2012); *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Jan. 6, 2012). Matt Blunt was governor from 2005–2009. *Missouri History: Governors*, MO. SEC'Y OF STATE ROBIN CARNAHAN, <http://www.sos.mo.gov/archives/history/historicallistings/governors.asp> (last visited Jan. 6, 2012).

⁷⁰ Jim Salter, *Supreme Court Denies Stay of Execution in Hall Case*, ASSOCIATED PRESS, Mar. 15, 2005.

⁷¹ Robert Patrick, *Gray Is Executed for Kerry Murders*, ST. LOUIS POST-DISPATCH, Oct. 26, 2005, at B1.

⁷² Tony Messenger, *Nixon's Clemency Puzzles Onlookers*, ST. LOUIS POST-DISPATCH, Jan. 12, 2011, at A1.

Richard Clay's involvement in this crime is clear, and he must, and will, serve the remainder of his life behind bars for his role in this heinous act.⁷³

Since he took office in 2009, Governor Nixon has presided over two executions and granted no other clemency petitions.⁷⁴

Based on this information, the degree to which Missouri Governors base their clemency decisions on an independent analysis of issues which may not have been previously considered on the merits by the courts varies depending on the Governor and may even vary depending on the case.

If clemency decision-makers issued a written statement of reasons for every clemency decision, making specific reference to the various factors and claims that were considered, Missouri would be able to better ensure the fair application of the death penalty, as well as improve transparency in what is currently an opaque decision-making process by Missouri officials. However, due to the lack of laws, rules, procedures, standards, and guidelines requiring the Governor or Board to conduct any specific type of review or consider any specific factors, and because of the current lack of information on the rationale supporting the decision to grant or deny clemency in Missouri death penalty cases, we are unable to assess whether Missouri is in compliance with Recommendation #1.

B. Recommendation #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.

Recommendation #2 requires clemency decision-makers to consider "all factors" that might lead the decision-maker to conclude that death is not the appropriate punishment. According to the ABA, these factors include, but are not limited to

- (1) constitutional claims that were not considered on the merits because of procedural default, statutes of limitations, limits on retroactivity, or the abuse-of-the-writ doctrine, or because the federal courts showed deference to possibly erroneous, but not "unreasonable," state court rulings;
- (2) constitutional claims that were found to have merit but did not involve errors that were deemed sufficiently prejudicial to warrant judicial relief;
- (3) lingering doubts of guilt (as discussed in Recommendation #4);
- (4) facts that no fact-finder ever considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims;

⁷³ Scott Lauck, *Missouri Governor Commutes Clay's Sentence to Life in Prison*, MO. LAW. MEDIA, Jan. 10, 2011.

⁷⁴ See *Executions: 1989–2011*, MO. DEATH ROW, <http://missourideathrow.com/executions-1989-2009/> (last visited May 20, 2011); *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited May 20, 2011). *Missouri History: Governors*, MO. SEC'Y OF STATE ROBIN CARNAHAN, <http://www.sos.mo.gov/archives/history/historicallistings/governors.asp> (last visited May 20, 2011).

- (5) patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction (as discussed in Recommendation #3);
- (6) the inmate’s mental retardation, mental illness, and mental competency (as discussed in Recommendation #4); and
- (7) the inmate’s age at the time of the offense (as discussed in Recommendation #4).⁷⁵

As discussed under Recommendation #1, the Governor of Missouri—who possesses the sole constitutional and statutory power to grant or deny clemency applications—is not required to consider any specific factors when making his/her clemency decision, although several Missouri Governors have described parts of their clemency decision-making process. Governor Matt Blunt indicated that two of his legal counsel would review the details of each case and present arguments for and against the execution.⁷⁶ Governor Blunt’s discussions with counsel would involve the details of the crime, the trial, and any mitigating evidence discovered since the conviction and sentence.⁷⁷ Governor Mel Carnahan also tasked his legal counsel with investigating clemency petitions.⁷⁸ Prior to denying one clemency petition, Governor Carnahan’s legal counsel reviewed trial transcripts, subsequent appeals, and interviewed witnesses to the murder.⁷⁹ Governor Roger Wilson agreed to an in-person meeting with the wife of a petitioner before denying an inmate’s clemency request.⁸⁰ Governor Jay Nixon has not publicly spoken about his administration’s procedures for making clemency determinations.⁸¹ Based upon these anecdotal accounts, it appears that the information sought and reviewed and the process used to make clemency determinations varies depending on the Governor.

Similarly, the Board of Probation and Parole is not required to consider any specific factors when reviewing a clemency petition.⁸² Moreover, details regarding the Board’s clemency process are not released to the public.⁸³ Therefore, it is impossible to determine which factors the Board considers when determining whether a death sentence should be carried out, such as any of the seven factors listed above. Even on the rare occasion when a recommendation by the Board has been released to the public, the reasoning for the Board’s recommendation was not included in the release. Furthermore, there is no requirement that the Governor abide by the Board’s recommendation. On at least two occasions, the Governor denied a clemency petition despite the Board’s recommendation to grant clemency.⁸⁴

⁷⁵ AM. BAR ASS’N, *DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES* (2002).

⁷⁶ Tony Messenger, *Nixon’s Clemency Puzzles Onlookers*, ST. LOUIS POST-DISPATCH, Jan. 12, 2011, at A1.

⁷⁷ *Id.*

⁷⁸ Kim Bell, *Inquiry Fails to Shake Guilt; Killer Is Executed*, ST. LOUIS POST-DISPATCH, Mar. 11, 1999, at A9.

⁷⁹ *Id.*

⁸⁰ Tim O’Neil, *Condemned Man Loses Appeal in ’82 Killing Outside Arnold Tavern*, ST. LOUIS POST-DISPATCH, Nov. 15, 2000, at B4.

⁸¹ On May 9, 2011, a letter and questionnaire was sent to the Missouri Governor’s Office requesting information on Governor Nixon’s clemency decision-making process. As of January 2012, the Assessment Team received no response from the Governor’s Office. See Clemency Questionnaire, *infra* Appendix.

⁸² Section 217.800, RSMo 2011.

⁸³ Sections 217.670.5, 549.500, 552.070, RSMo 2011. See also Lieb, *supra* note 60, at A3.

⁸⁴ *Missouri Executes Man Who Killed His Grandmother*, REUTERS LTD., Apr. 27, 2005 (“It was the second time this year Blunt disagreed with recommendations to grant clemency from the state’s Board of Probations and Parole.”).

A review of Missouri's past clemency decisions does not further illuminate the clemency decision-making process. It is difficult to ascertain the reasons why inmates have been granted or denied clemency, because neither the Governor nor the Board are required to publicly explain the clemency decision or recommendation.⁸⁵ Since Missouri reinstated the death penalty, three death row inmates have been granted clemency.⁸⁶ In two of the three granted clemency petitions, the Governor has explained the reasons for his decision: Darrell Mease was granted a reprieve at the request of Pope John Paul II⁸⁷ and Bobby Shaw was granted a reprieve due to severe mental impairments.⁸⁸ The Governor gave no reason for granting Richard Clay's petition.⁸⁹

It is unclear whether all of the ABA-endorsed factors are considered by Missouri Governors. For example, one factor that the ABA suggests should be considered in clemency review is "constitutional claims that were not considered on the merits because of procedural default, statute of limitations, limits on retroactivity, or the abuse-of-the-writ doctrine, or because the federal courts showed deference to possibly erroneous, but not "unreasonable," state court rulings."⁹⁰ Of the fifty clemency petitions that were filed between 1977 and 2000, 42% asserted that substantive claims had not been reviewed by any appellate court due to procedural bars.⁹¹ In one clemency petition, the petitioner alleged that several substantive issues, including an error in jury instructions on mitigating circumstances, were never reviewed by the court because his lawyer had filed a brief thirty-three pages over the maximum page limit; consequently, the final thirty-three pages of the brief were not considered either on direct appeal or during post-conviction review.⁹² While it is possible that the Governor might have considered these factors in making his clemency determination, the inmate's petition was denied without explanation.⁹³

It also is unclear whether Missouri clemency decision-makers consider facts "that no fact-finder ever considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims."⁹⁴ Of the fifty clemency petitions decided between 1977 and 2000, thirty-nine (78%) have alleged that new evidence discovered since the trial would have changed the fact-finder's verdict in either the guilt or sentencing phases.⁹⁵ No petitions have been granted on this ground. However, in 2002 Governor Bob Holden issued a stay of execution for Daniel Basile to give defense attorneys an opportunity to investigate and present a new alibi witness to the appellate courts.⁹⁶

⁸⁵ See Mo. Const. art. IV, sec. 7; Sections 217.670, 217.800, RSMo 2011.

⁸⁶ *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited May 20, 2011).

⁸⁷ Ganey, *supra* note 66.

⁸⁸ Charton, *supra* note 65.

⁸⁹ Messenger, *supra* note 76.

⁹⁰ See *supra* note 75 and accompanying text.

⁹¹ BURNETT, *supra* note 5, at 122.

⁹² *Id.* at 141–42.

⁹³ *Id.*

⁹⁴ See *supra* note 75 and accompanying text.

⁹⁵ BURNETT, *supra* note 5, at 168.

⁹⁶ *Holden Halts Execution for Last Minute Alleged Alibi Witness*, JEFFERSON CITY NEWS, Aug. 14, 2002. Basile was executed twenty-two hours after the Supreme Court of Missouri and the U.S. Court of Appeals for the Eighth Circuit refused to grant review. William C. Lhotka & Peter Shinkle, *Basile Is Put to Death After Delay; Woman's Alibi Claim Held Up Execution*, ST. LOUIS POST-DISPATCH, Aug. 15, 2002, at A1.

In conclusion, it appears that some Governors have considered at least some of the factors delineated by Recommendation #2. However, because of the secrecy surrounding both the Governor's and the Board's decision-making processes, and the lack of laws, rules, standards, or guidelines governing clemency determinations, we were unable to ascertain whether Missouri is in compliance with Recommendation #2.

C. Recommendation #3

Clemency decision-makers should consider as factors in their deliberations any patterns 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.

As discussed under Recommendation #2, neither the Governor nor the Board are required to consider any specific factors when determining whether to grant a death row inmate's clemency petition. However, at least five clemency petitions have alleged racial bias in jury selection, none of which were granted.⁹⁷ Winford Stokes, Maurice Byrd, and Walter Blair were all African-American defendants convicted of murdering white victims and sentenced to death by all white juries.⁹⁸ All three men were tried and convicted before the 1986 U.S. Supreme Court decision in *Batson v. Kentucky*, which prohibited the use of peremptory strikes based solely on a juror's race; however, each was executed subsequent to the *Batson* decision.⁹⁹ Additionally, Mose Young and Jerome Mallett were African-American men convicted of murdering white victims.¹⁰⁰ Both men argued issues of racial bias in their clemency petitions.¹⁰¹ The prosecutor in Young's trial used each of his peremptory strikes against African-American jurors.¹⁰² Nevertheless, based on procedural grounds Young was unable to present this information in his subsequent appeals.¹⁰³ Mallett was initially granted relief by the post-conviction circuit court based on allegations of racial bias in jury selection, but his case was reversed by a split decision from the Supreme Court of Missouri.¹⁰⁴ Both clemency petitions were denied without explanation.

Due to the lack of transparency in the clemency decision-making process, however, we are unable to determine the extent to which racial disparity may be considered during clemency

⁹⁷ BURNETT, *supra* note 5, at app. 2; *infra* note 100–104 and accompanying text.

⁹⁸ *Id.*

⁹⁹ *Id.* See also *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹⁰⁰ See NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), DEATH ROW U.S.A. 23 (Winter 2011), available at http://naacpldf.org/files/publications/DRUSA_Winter_2011.pdf.

¹⁰¹ Application for Executive Clemency to Governor Holden: Mose Young, Jr. (2001), available at <http://www.ccadp.org/moseyoung-appeal.htm>; Jerome Mallett Clemency Letter from the American Civil Liberties Union to the Missouri Pardon and Parole Board (June 22, 2001), available at <http://www.aclu.org/capital-punishment/jerome-mallett-clemency-letter>.

¹⁰² Application for Executive Clemency to Governor Holden: Mose Young, Jr. (2001), available at <http://www.ccadp.org/moseyoung-appeal.htm>.

¹⁰³ *Id.*

¹⁰⁴ *Mallett v. Bowersox*, 160 F.3d 456, 459 (8th Cir. 1998) (citing *Mallett v. State*, 769 S.W.2d 77 (Mo. banc 1989)).

proceedings and, therefore, are unable to ascertain whether Missouri is in compliance with Recommendation #3.

D. Recommendation #4

Clemency decision-makers should consider as factors in their deliberations 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 relating to a lingering doubt about the inmate’s guilt.

Missouri requires the Governor to issue a stay of execution pending a psychological examination if the Director of the Department of Corrections has reasonable cause to believe a death sentenced inmate “lacks [the] capacity to understand the nature and purpose of the punishment” as a result of mental disease or defect.¹⁰⁵ However, neither the Governor nor the Board is required to consider mental retardation, mental illness, or mental competency in their clemency decision-making processes.

Based on an examination of past clemency petitions, it appears that in some cases the Governor and the Board consider mental health factors in the clemency decision-making process. In 1993, Bobby Shaw became the first Missouri inmate to be granted clemency since the reinstatement of the death penalty.¹⁰⁶ Prior to Governor Carnahan granting the clemency petition, Governor Ashcroft issued a stay of execution because of doubts regarding Shaw’s competency.¹⁰⁷ Subsequently, Governor Carnahan accepted the recommendation of the Board and granted Shaw’s clemency petition.¹⁰⁸ As an explanation of his clemency decision Governor Carnahan stated:

In its recommendation, the board said: “Based on the information provided to the Board in a variety of psychiatric and psychological reports, there appears to be little doubt that Mr. Shaw is mentally retarded and suffers from varying degrees of mental illness.”

Further, the Board’s letter indicates that lingering questions remain about Shaw’s mental impairments and the fact that information about those impairments was not provided to the jury during the sentencing phase of Shaw’s trial.¹⁰⁹

Governor Carnahan also appears to have considered mental illness issues when he issued a stay of execution for Roosevelt Pollard in 1997.¹¹⁰ Pollard was later declared incompetent by a Missouri circuit court and subsequently removed from death row.¹¹¹ Additionally, the Governor issued a stay of execution for Theodore Boliek in order to review Boliek’s psychological records;

¹⁰⁵ Section 552.060.1, RSMo 2011.

¹⁰⁶ *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited May 20, 2011).

¹⁰⁷ Franklin & Poor, *supra* note 62.

¹⁰⁸ BURNETT, *supra* note 5, at 171–72.

¹⁰⁹ *Id.* at 172.

¹¹⁰ Kim Bell, *Man on Death Row Is Ruled Mentally Incompetent, Escapes Execution*, ST. LOUIS POST-DISPATCH, Feb. 2, 1999, at B1.

¹¹¹ *Id.*

Governor Carnahan also convened a Board of Inquiry to further investigate the allegations of mental illness and ineffective assistance of counsel presented in Boliek's clemency petition.¹¹² However, Governor Carnahan died before he made a determination on Boliek's clemency petition and the Board of Inquiry report issued to Governor Carnahan remains confidential.¹¹³ The two subsequent Governors and the Supreme Court of Missouri have interpreted Governor Carnahan's stay of execution order to only allow Governor Carnahan himself to lift the stay.¹¹⁴ As such, Boliek cannot be executed.¹¹⁵

While Governors Carnahan and Ashcroft have considered factors such as mental retardation, mental illness, and mental competency when making clemency decisions in some cases, at least five other clemency petitions that alleged competency issues have been denied for reasons not made public.¹¹⁶

Missouri is in partial compliance with Recommendation #4. While at least two of Missouri's former Governors considered mental retardation and mental illness in making their clemency determinations, and although the state does require a stay of execution pending a competency evaluation, Missouri law does not require clemency decision-makers to consider mental retardation or mental illness in the clemency decision-making process. Thus, we are unable to determine whether Missouri is in full compliance with this recommendation.

E. Recommendation #5

Clemency decision-makers should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.

As discussed in the previous recommendations, because the Governor and the Board are not required to consider any specific factors when determining whether to grant a clemency petition, and because the factors considered by the Governor or Board in making clemency decisions are largely undisclosed, it is unclear whether clemency decision-makers consider an inmate's rehabilitation or positive acts while on death row. From 1977 to 2000, seventeen death row inmates have requested clemency based on the inmate's rehabilitation or religious transition.¹¹⁷ None of these petitions were granted.¹¹⁸ Of the three clemency petitions granted in Missouri, it is unknown whether the Governor considered rehabilitation or the inmate's positive acts when reviewing the clemency petition. As such, we are unable to determine whether Missouri is compliance with Recommendation #5.

¹¹² Tony Rizzo, *Death Row Inmate for Nearly 25 Years Spared by Improbable Events*, KANSAS CITY STAR, June 6, 2009, at A1. Additionally, three death row inmates were granted stays of execution after the Director of the Department of Corrections alerted the Governor to their incompetence: Charles Mathenia, Elroy Preston, and Marvin Jones. BURNETT, *supra* note 5, at 221.

¹¹³ Rizzo, *supra* note 112; section 552.070, RSMo 2011.

¹¹⁴ Rizzo, *supra* note 112.

¹¹⁵ *Id.*

¹¹⁶ BURNETT, *supra* note 5, at 176.

¹¹⁷ BURNETT, *supra* note note 5, at 175–76.

¹¹⁸ *Id.* at 175–76.

F. Recommendation #6

In clemency proceedings, the 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 Defense Counsel in Death Penalty Cases.

Recommendation #7

Prior to clemency hearings, death row inmates' counsel should be entitled to compensation and access to investigative and expert resources. Counsel should also be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.

Missouri does not have any laws, rules, procedures, or guidelines requiring the appointment of counsel to death row inmates pursuing clemency. Death row inmates who receive counsel in federal court pursuant to section 3599 of Title 18 are eligible for representation through clemency.¹¹⁹ The U.S. Supreme Court held in 2009 that “section 3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation.”¹²⁰ As such, if an inmate is represented during federal habeas proceedings and the attorney wishes to continue the representation through clemency proceedings, s/he may continue to be compensated at the same rate as s/he was during federal habeas proceedings.¹²¹ The current compensation rate for attorneys appointed for federal habeas proceedings is \$178 per hour.¹²² Similarly, in cases in which federal habeas counsel has continued his/her representation of the inmate through clemency proceedings, the attorney will also have access to experts and investigators to prepare for those proceedings.¹²³

However, the authorization of federal counsel to continue representation does not guarantee the inmate representation during clemency proceedings. If the inmate is not being represented by federal counsel prior to the filing of the inmate's clemency petition, or if federal counsel does not wish to continue his/her appointment through state clemency proceedings, then Missouri does not guarantee representation for the inmate. Generally, the Missouri State Public Defender (MSPD) will not provide representation or funding for inmates in clemency proceedings.¹²⁴ Consequently, inmates are not guaranteed counsel or experts during clemency proceedings. Missouri's failure to provide representation in clemency proceedings has spurred public interest groups in Missouri to accept clemency representations; however, the funding for this representation is not guaranteed and funding, when provided, is through the individual organizations' budget or the federal court system.¹²⁵

¹¹⁹ 18 U.S.C. § 3599(e) (2011); *see also* Harbison v. Bell, 129 S. Ct. 1481, 1491 (2009).

¹²⁰ Harbison, 129 S. Ct. at 1491.

¹²¹ 18 U.S.C. § 3599(e); *see also* Harbison, 129 S. Ct. at 1486.

¹²² 18 U.S.C. § 3599(g)(1). However, this rate can be adjusted by the Judicial Conference “up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule.” 18 U.S.C. § 3599(g)(1) (citing 5 U.S.C. § 5305).

¹²³ *See* Harbison, 129 S. Ct. at 1485–86.

¹²⁴ Email Interview by Rachel Bays with Greg Mermelstein, Appellate/PCR Div. Dir., Mo. State Pub. Defender Sys. (Aug. 20, 2010).

¹²⁵ *Id.*; Harbison v. Bell, 129 S. Ct. 1481, 1491 (2009); BURNETT, *supra* note 5, at 164.

There are no restrictions on the information that may be presented to the Governor or the Board in clemency petitions, and Missouri officials cannot interfere with the efforts of a clemency petitioner to present evidence to the Governor.¹²⁶ Nevertheless, because the Board may deny an inmate or his/her counsel access to any materials that may have been submitted in opposition to clemency, the inmate may not be able to respond to or rebut that opposing evidence.¹²⁷ Missouri also does not impose any deadlines for filing clemency petitions, and a clemency petition may be filed at any time after judicial remedies have been exhausted.¹²⁸ In practice, however, counsel does not usually begin drafting the actual clemency petition until an execution date has been set and the Supreme Court of Missouri has issued a death warrant.¹²⁹ This typically occurs thirty days in advance of the execution date.¹³⁰

The State of Missouri is not in compliance with Recommendations #6 and #7.

The Missouri Assessment Team urges Missouri to provide funding for attorneys to represent inmates who are not represented by federal counsel in clemency proceedings. This funding should be provided either to MSPD to represent inmates in clemency proceedings or to public interest groups who are currently representing such inmates. The state should ensure that the funding is sufficient to compensate counsel and provide for investigative and expert resources. Furthermore, the Missouri Assessment Team recommends that Missouri require the Board and the Governor to release any materials submitted in opposition to the clemency petition to the inmate's attorney. This requirement would provide the inmate with a better opportunity to rebut the evidence.

G. Recommendation #8

Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.

Missouri does not require the Governor or the Board to conduct any formal proceedings or hearings before making their clemency decision.¹³¹ Similarly, the Governor is not required to conduct any specific investigation or to preside over any proceedings.¹³² After the Board has completed its investigation it need only send the Governor its investigative materials and, if reached, its recommendation.¹³³ There are no laws, rules, procedures, or guidelines governing the manner in which the Governor makes a clemency determination.

Furthermore, all investigations and recommendations made by the Board are kept confidential.¹³⁴ The Board's investigation and recommendation are not subject to Missouri's open records law

¹²⁶ Hayes v. Young, 218 F.3d 850, 853 (8th Cir. 2000).

¹²⁷ Section 549.500, RSMo 2011.

¹²⁸ BURNETT, *supra* note 5, at 163–64.

¹²⁹ *Id.*; *supra* note 24 and accompanying text.

¹³⁰ *Id.*

¹³¹ Mo. Const. art. IV, sec. 7; Sections 217.800, 552.070, RSMo 2011.

¹³² Mo. Const. art. IV, sec. 7; Section 217.800, RSMo 2011.

¹³³ Sections 217.800.2, 217.665, 217.670, RSMo 2011

¹³⁴ Section 552.070, RSMo 2011. *See also* sections 549.500, 217.670.5, 217.075, RSMo 2011.

and is only available to persons having “proper interest” at the discretion of the Missouri Department of Corrections.¹³⁵ Similarly, the Governor is not required to publicize what investigation s/he conducted or his/her reasons for a clemency decision.¹³⁶ The Missouri Assessment Team urges that the Board’s findings and recommendations to grant or deny clemency be made available to the public in all cases. Due to Missouri’s secrecy in decision-making in clemency cases, the public knows little of the process. The State of Missouri, therefore, is not in compliance with Recommendation #8.

H. Recommendation #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 clemency petitioners.

Missouri does not require the Governor or the Board to meet with the inmate or his/her legal counsel.¹³⁷ In practice, an employee of the Department of Probation and Parole will visit the inmate to obtain a statement, which will then be submitted to the Board.¹³⁸ Additionally, the Governor’s legal counsel will generally meet with the attorney for the petitioner.¹³⁹ In rare instances, the Governor himself will meet with the attorney or family members of the inmate. For example, Governor Carnahan conducted an in-person meeting with Bobby Shaw’s attorney before granting the clemency petition, and Governor Wilson met with James Chambers’ wife before denying Chambers’ clemency petition.¹⁴⁰ However, clemency decision-makers themselves do not meet with the petitioners. The State of Missouri is not in compliance with Recommendation #9.

I. Recommendation #10

Clemency decision-makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system’s ability to grant relief under circumstances that might warrant grants of clemency.

While some Missouri Governors have taken into account a wide variety of circumstances, particularly mental illness, in making a decision to grant clemency, and although Missouri Governors and legal counsel may be well-versed on the broad-based nature of clemency powers, Missouri does not require that all clemency decision-makers be fully educated about the broad-based nature of clemency powers and the limitations on the judicial system’s ability to grant relief under circumstances that might warrant grants of clemency. When appointing members to the Board, the Governor is required to appoint persons “of recognized integrity and honor, known to possess education and ability in decision making through career experience and other

¹³⁵ Sections 549.500, 217.670.5, 217.075, RSMo 2011; *see also* Lieb, *supra* note 60, at A3.

¹³⁶ BURNETT, *supra* note 5, at 166–67.

¹³⁷ Section 217.800, RSMo 2011; BURNETT, *supra* note 5, at 162–65.

¹³⁸ BURNETT, *supra* note 5, at 163.

¹³⁹ *Id.* at 164.

¹⁴⁰ *Id.* at 176; O’Neil, *supra* note 80.

qualifications for the successful performance of their official duties.”¹⁴¹ There are no further education or experience requirements for Board members. Once Board members are appointed, however, they are not required to undergo any formal training. Furthermore, if the Governor appoints a Board of Inquiry, its members need not satisfy any qualification or training requirements.

Finally, as discussed in other recommendations, the public has little information regarding the bases for clemency decisions. Due to the opaque nature of the process, it appears that the public is not educated on the broad-based nature of clemency powers and on the limitations of the courts to grant relief under circumstances that might warrant relief through clemency.

Because the Assessment Team is unable to determine whether all clemency decision-makers are fully educated on the broad-based nature of clemency powers and whether clemency decision-makers encourage the public’s understanding of this issue, the Team is unable to determine whether Missouri is in full compliance with Recommendation #10.

J. Recommendation #11

To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.

In Missouri, the Governor possesses the sole constitutional and statutory authority to grant or deny clemency petitions.¹⁴² However, the Board may make non-binding clemency recommendations.¹⁴³ Members of the Board are appointed by the Governor and are confirmed by the Senate.¹⁴⁴ Furthermore, the Missouri statute requires that no more than four members of the Board be from the same political party.¹⁴⁵

Although all petitioners will receive written notification of the Governor’s determination regarding clemency, s/he need not formally notify the public of this decision.¹⁴⁶ In practice, the Governor will generally provide the public a short, boilerplate statement following each grant or denial of clemency.¹⁴⁷ Moreover, Board meetings are conducted in private and the reports of the Board are not subject to the Missouri open records laws.¹⁴⁸

The confidentiality surrounding the clemency decision-making process tends to insulate the Board member from direct criticism; it also tends to insulate Board members from being held individually accountable. Because the Governor and the Board do not have to explain their decisions or produce their reports and investigations, it is not possible to determine whether political considerations have influenced their decisions.

¹⁴¹ Section 217.665.2, RSMo 2011.

¹⁴² Mo. Const. art. IV, sec. 7; section 217.800, RSMo 2011.

¹⁴³ Section 217.800, RSMo 2011.

¹⁴⁴ Section 217.665.1, RSMo 2011.

¹⁴⁵ Section 217.665.2, RSMo 2011.

¹⁴⁶ Mo. Const. art. IV, sec. 7; Section 217.800, RSMo 2011; BURNETT, *supra* note 5, at 166–67.

¹⁴⁷ BURNETT, *supra* note 5, at 166–67.

¹⁴⁸ Section 549.500, RSMo 2011; *see also* O’Neil, *supra* note 80.

In the two instances where the Governor did issue an explanation for the grant of clemency, the decision garnered significant media attention and public response. For example, Governor Carnahan's explanation that he granted clemency to Darrell Mease at the request of Pope John Paul II received much negative media attention and condemnation from the public.¹⁴⁹ Similarly, after Governor Carnahan commuted Bobby Shaw's death sentence to life in prison due to concerns regarding Shaw's mental competence, several protests were held at the Governor's office.¹⁵⁰ Governor Nixon's failure to explain his reasons for granting clemency to Richard Clay also received significant media and public scrutiny.¹⁵¹

As further illustration of the involvement of politics in Missouri clemency decision-making, the death penalty and clemency became a specific campaign issue during the 2000 U.S. Senate race between former Governor John Ashcroft and Governor Mel Carnahan.¹⁵² During the campaign, Governor Ashcroft cited Governor Carnahan's grant of clemency to Darrell Mease in his criticism of Governor Carnahan's position on the death penalty.¹⁵³ Governor Carnahan responded with an editorial in the *St. Louis Post-Dispatch*,¹⁵⁴ to which Governor Ashcroft responded by writing an editorial in the same paper in which he expressed his views on the death penalty and the clemency decision-making process.¹⁵⁵

However, because we are unable to determine the rationale for decisions in the vast majority of clemency grants or denials in Missouri, we ultimately are unable to assess whether Missouri is in full compliance with this Recommendation.

* * *

The Missouri Assessment Team was unable to determine the state's compliance with the majority of the Recommendations contained in this Chapter due to the opaque nature of the clemency decision-making process in Missouri. The Missouri Board of Probation and Parole does not conduct its activities publicly, nor is it required to release the basis for its clemency recommendation or to even state publicly whether there has been a recommendation for clemency. Indeed, the Board has been described as one of the most secretive state agencies in the state.¹⁵⁶ The Governor also is not required to state the basis for a grant or denial of clemency.

¹⁴⁹ BURNETT, *supra* note 5, at 173–74; Cathleen Burnett, *Petitions for Life: Executive Clemency in Missouri Death Penalty Cases*, 6 RICH. J.L. & PUB. INT. 1, 16 (2001); *see also* Evelyn Nieves, *Granting Clemency Is Costly for Politicians*, SEATTLE TIMES, May 9, 1999, at A9.

¹⁵⁰ Burnett, *supra* note 149, at 16.

¹⁵¹ Phillip O'Connor, *No Softening of His Support for Executions, Nixon Asserts: 'Number of Factors' Contributed to His Decision to Spare Life of Convict*, ST. LOUIS POST-DISPATCH, Jan. 14, 2011, at A5; Tony Messenger, *Nixon's Clemency Puzzles Onlookers*, ST. LOUIS POST-DISPATCH, Jan. 12, 2011, at A1.

¹⁵² BURNETT, *supra* note 5, at 160–61.

¹⁵³ *Id.*; *see also* Nieves, *supra* note 149.

¹⁵⁴ Mel Carnahan, Editorial, *Complete Confidence in the Guilt of Those Executed*, ST. LOUIS POST-DISPATCH, May 12, 2000, at C19.

¹⁵⁵ John Ashcroft, Editorial, *It's the People's Collective Self Defense*, ST. LOUIS POST-DISPATCH, May 18, 2000, at B7.

¹⁵⁶ *See, e.g.*, Lieb, *supra* note 60, at A3.

The Assessment Team recognizes that greater transparency in Missouri's clemency processes arguably could make clemency decision-making more—rather than less—susceptible to unnecessary political influence. However, steps can be taken that would better ensure the fair application of the death penalty, in addition to providing the public and interested parties more information about the factors influencing clemency decisions in Missouri.

Accordingly, the Missouri Assessment Team recommends that the state require the Board of Probation and Parole to make a recommendation to the Governor on any death row inmate's request for a pardon, reprieve, or commutation. Moreover, the Board should have the power to conduct investigations, hold hearings, and test evidence in order to review claims of factual innocence in capital cases. In all cases, the investigation, report, and recommendation of the Board should be made available to the public. As the Governor remains the final arbiter of clemency decisions in capital cases, these modifications may serve to increase transparency while also minimizing the risk of increased politicization in clemency decision-making.

CHAPTER TEN

CAPITAL JURY INSTRUCTIONS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

In virtually all jurisdictions that authorize capital punishment, jurors in capital cases have the “awesome responsibility” of deciding whether another person will live or die.¹ Jurors, prosecutors, defendants, and the general public rely upon state trial judges to present fully and accurately, through jury instructions, the applicable law to be followed in jurors’ decision-making. Sometimes, however, jury instructions are poorly written and conveyed. As a result, instructions may tend to confuse jurors, rather than communicate.²

It is important that trial judges impress upon jurors the full extent of their responsibility to decide whether the defendant will live or die or to make their advisory recommendation on sentencing. Some trial court instructions may lead jurors to misunderstand their responsibility or to believe that reviewing courts independently will determine the appropriate sentence. In some cases, jurors may conclude that their decisions are not vitally important in determining whether a defendant will live or die.

Furthermore, courts must ensure that jurors do not act based on serious misimpressions, such as a belief that a sentence of “life without parole” does not ensure that the offender will remain in prison for the rest of his/her life. Jurors holding this or other mistaken beliefs may vote to impose a death sentence because they erroneously assume any lesser sentence eventually will result in the release of the offender within some number of years.

Jurors also must understand the meaning of mitigation as well as their ability to bring mitigating factors to bear when considering capital punishment. Unfortunately, jurors can confuse mitigation with aggravation, or they may believe that they cannot consider evidence as mitigating unless it is proved beyond a reasonable doubt to the satisfaction of every member of the jury.³

¹ *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) (quotations omitted).

² See William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51 (2003); see also James Luginbuhl, *Comprehension of Judges’ Instructions in the Penalty Phase of a Capital Trial*, 16 LAW & HUM. BEHAV. 203, 204 (1992) (listing “[p]ast research . . . demonstrat[ing] jurors’ inadequate comprehension of judges’ instructions”).

³ See Bowers & Foglia, *supra* note 2, at 68.

I. FACTUAL DISCUSSION: MISSOURI OVERVIEW

A. *Development and Application of Missouri's Jury Instructions*

1. General Statutory and Constitutional Provisions

Missouri statutory law provides that in a criminal trial, prior to the closing arguments, the court must “instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving the verdict, which instructions shall include a definition of the term reasonable doubt.”⁴ The Supreme Court of Missouri has also held that, in a criminal case, a “verdict-directing instruction must contain each element of the offense charged and must require the jury to find every fact necessary to constitute essential elements of offense charged.”⁵

2. The Missouri Approved Instructions

Missouri Supreme Court Rule 28 states that Supreme Court of Missouri must “approve and publish pattern instructions and verdict forms, including accompanying Notes on Use, for use in criminal jury trials.”⁶ Missouri’s criminal pattern jury instructions, known as the Missouri Approved Instructions – Criminal (MAI-CR), have been in effect since in 1973.⁷

The MAI-CR are mandatory instructions.⁸ The Missouri Supreme Court Rules dictate that when there is an applicable MAI-CR instruction, that instruction “shall be given or used to the exclusion of any other instruction or verdict form.”⁹ If an MAI-CR instruction is not available or is no longer applicable under current law, the trial court may alter the instruction or provide a new instruction, provided that it is “simple, brief, impartial, and free from argument.”¹⁰

B. *Selection and Submission of Instructions to Missouri Jurors*

1. Selection of Instructions

Prior to instructing the jury, the trial court “shall call a conference of counsel for the purpose of considering instructions and verdict forms.”¹¹ Both parties have the opportunity to “submit to the court instructions and verdict forms that the party requests be given.”¹² Based on these recommendations, the court selects the instructions it will present to the jury.¹³ The Notes on Use to the MAI-CR will indicate which instructions must be given in particular circumstances.¹⁴

⁴ Section 546.070(4), RSMo 2011.

⁵ State v. Ward, 745 S.W.2d 666, 670 (Mo. banc 1988).

⁶ Rule 28.01.

⁷ MAI-CR3d, Preface.

⁸ Rule 28.02(c).

⁹ *Id.*

¹⁰ Rule 28.02(d).

¹¹ Rule 28.02(e).

¹² Rule 28.02(b).

¹³ Rule 28.02(e).

¹⁴ See MAI-CR3d, How to Use this Book.

Those proposed instructions which the court rejects must be “filed, and shall be kept as a part of the record of the case.”¹⁵

To properly preserve errors in jury instructions for appeal, counsel must “make specific objections” to the court’s decision to give or not to give an instruction.¹⁶ In addition, counsel must raise the issue again in a motion for a new trial.¹⁷

2. Charging and Instructing the Jury Generally

The trial court must read the instructions to the jury, and “all numbered instructions and all verdict forms shall be handed to the jury for its use during its deliberation.”¹⁸

The MAI-CR also permits a special instruction “when the [trial] [c]ourt deems it appropriate and when the length of deliberation or communication from the jury causes the [c]ourt to believe that the jury may be deadlocked.”¹⁹ The instruction reads as follows:

You should make every reasonable effort to reach a verdict, as it is desirable that there be a verdict in every case. Each of you should respect the opinions of your fellow jurors as you would have them respect yours, and in a spirit of tolerance and understanding endeavor to bring the deliberations of the whole jury to an agreement upon a verdict. Do not be afraid to change your opinion if the discussion persuades you that you should. But a juror should not agree to a verdict that violates the instructions of the Court, nor should a juror agree to a verdict of guilty unless he is convinced of the defendant’s guilt beyond a reasonable doubt.²⁰

Missouri courts have held that this instruction may not be used to “coerce” a verdict from the jury.²¹ Both parties may object to the use of the instruction outside the presence of the jury.²²

C. Applicable Guilt Phase Jury Instructions

1. Instruction on First-Degree Murder

Under Missouri law, first-degree murder, defined by statute as “knowingly caus[ing] the death of another person after deliberation upon the matter,” is the only offense eligible for the death penalty.²³ The instruction for first-degree murder is found at MAI-CR3d 314.02.

¹⁵ Rule 28.03(e).

¹⁶ Rule 28.03.

¹⁷ *Id.*

¹⁸ Rule 28.02(e). Some jury instructions which may have been given earlier in the trial, such as instructions read prior to jury selection or before an expert witness testifies, are not submitted to the jury in writing. *See* MAI-CR3d 300.02–.20.

¹⁹ MAI-CR3d 312.10, Note on Use 2.

²⁰ MAI-CR3d 312.10.

²¹ *State v. Rojano*, 519 S.W.2d 42, 44 (Mo. App. 1975). It is unclear, however, what constitutes coercion in this context. *See id.*

²² MAI-CR3d 312.10, Note on Use 3.

2. Instruction on Lesser-Included Offenses

The U.S. Supreme Court has held that in a capital case, the trial court must instruct the jury on any lesser-included homicide offense that is supported by the evidence.²⁴ According to the Supreme Court of Missouri, in most first-degree murder prosecutions, the defendant is entitled to an instruction on the lesser-included offense of second-degree murder.²⁵ The defendant may also receive an instruction on felony murder when there is evidence that a requisite felony has been committed in the course of the homicide.²⁶ Furthermore, a capital murder defendant will be entitled to an instruction on voluntary manslaughter if second-degree murder is submitted to the jury and “evidence of sudden passion arising from adequate cause” was introduced at trial.²⁷

D. Applicable Penalty Phase Jury Instructions

Missouri law provides that if the defendant is convicted of capital murder when the prosecution is seeking the death penalty, “a second stage of the trial shall proceed at which the only issue shall be the punishment.”²⁸ During this stage, the prosecution and defense may submit aggravating and mitigating evidence, respectively, “including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed” by statute.²⁹

1. Preliminary Instructions

At the opening of the penalty phase, the trial court will instruct the jury regarding the basic purpose of this phase of the trial, and inform them that “in order to consider the death penalty, [they] must first find one or more statutory aggravating circumstances beyond a reasonable doubt.”³⁰

2. Mental Retardation³¹

In accordance with the U.S. Supreme Court decision prohibiting the execution of the mentally retarded,³² a Missouri trial court must instruct the jury to sentence the capital defendant to life in prison if it “unanimously find[s] by a preponderance of the evidence that the defendant is

²³ See section 565.020, RSMo 2011.

²⁴ *Schad v. Arizona*, 501 U.S. 624, 648 (1991).

²⁵ See *State v. Santillan*, 948 S.W.2d 574, 576 (Mo. banc 1997). See also Section 565.025.2, RSMo 2011 (listing two types of second-degree murder as lesser-included offenses of first-degree murder). The Court in *Santillan* noted that the sole difference between first and second-degree murder is that first-degree murder requires the prosecution to prove deliberation by the defendant. 948 S.W.2d at 576. Thus, an instruction on second-degree murder is only unwarranted if the evidence is such that “no rational fact finder could conclude that the defendant acted without deliberation.” *Id.* The instruction for second-degree murder is found at MAI-CR3d 314.04.

²⁶ See MAI-CR3d 314.06.

²⁷ MAI-CR3d 314.08, Note on Use 3.

²⁸ Section 565.030.4, RSMo 2011.

²⁹ *Id.*

³⁰ MAI-CR3d 314.30.

³¹ For a discussion of mental retardation issues as they relate to capital punishment, see Chapter Thirteen on Mental Retardation and Mental Illness.

³² *Atkins v. Virginia*, 536 U.S. 304 (2002).

mentally retarded.”³³ The court must instruct the jury on the mental retardation issue “if there is evidence, whether submitted in the guilt or the punishment phase, that the defendant is mentally retarded,” but the defendant may waive the instruction upon approval of the court.³⁴

3. Aggravating Circumstances

The trial court will instruct the jury that it must decide whether one or more statutory aggravating circumstances is present in the case before it can consider the death penalty.³⁵ There are seventeen aggravating circumstances enumerated in Missouri’s death penalty statute, including such circumstances as the defendant committed the murder “for the purpose of receiving money or any other thing of monetary value,” or the murder was “outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind.”³⁶

The trial court will instruct the jury on the individual statutory aggravating circumstances that are “supported by the evidence and requested by the state.”³⁷ The jurors also will be instructed that the burden is on the prosecution to prove each aggravating circumstance beyond a reasonable doubt, and that “if [they] do not unanimously find from the evidence beyond a reasonable doubt that . . . at least one of the . . . foregoing statutory aggravating circumstances exists, [they] must return a verdict of” life in prison without eligibility for probation or parole.³⁸

Missouri law also permits the prosecution to introduce other evidence in support of aggravation, including “evidence concerning the murder victim and the impact of the crime upon the family of the victim and others.”³⁹ There are, however, no jury instructions specifically related to these types of evidence.⁴⁰

4. Mitigating Circumstances

The court will next instruct the jury that if it unanimously finds beyond a reasonable doubt the existence of one or more aggravating circumstances, it “must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.”⁴¹ In reaching this decision, the jury “may consider all of the evidence presented in both the guilt and the punishment stages of trial.”⁴²

³³ MAI-CR3d 314.38; section 565.030.4(1), RSMo 2011.

³⁴ MAI-CR3d 314.38, Note on Use 2.

Section 565.030.6, RSMo 2011; *see also* MAI-CR3d 313.38.

³⁵ Section 565.032.1(1), RSMo 2011; MAI-CR3d 314.40.

³⁶ Section 565.032.2, RSMo 2011. For a full list of Missouri’s statutory aggravating circumstances, see Chapter One.

³⁷ MAI-CR3d 314.40.

³⁸ MAI-CR3d 314.40 (internal parentheses omitted).

³⁹ Section 565.030.4, RSMo 2011.

⁴⁰ *See generally* MAI-CR3d.

⁴¹ MAI-CR3d 314.44; *see also* section 565.030.4(3), RSMo 2011.

⁴² MAI-CR3d 314.44.

The court will instruct the jury to consider any of Missouri’s seven statutory mitigating circumstances which are “supported by the evidence and requested by the defendant.”⁴³ Jurors are further instructed that they may consider “any other facts or circumstances which [they] find from the evidence in mitigation of punishment.”⁴⁴ The trial court may not, however, instruct the jurors on specific mitigating circumstances that are not listed in the statute.⁴⁵ The court will end its instruction on mitigating circumstances as follows:

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the facts or circumstances in aggravation of punishment, then you must return a verdict fixing defendant’s punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.⁴⁶

5. Final Decision on Punishment

Missouri law permits the jury to sentence the defendant to life in prison even if it does not unanimously find that the mitigating evidence outweighs the aggravating evidence.⁴⁷ The trial court will instruct the jury as follows:

You are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.⁴⁸

After the instructions on aggravating and mitigating circumstances, the court instructs the jury on how to complete the verdict forms, during which many of the previous penalty phase instructions are reiterated.⁴⁹ At the close of this instruction, the jurors also are informed that “if [they] return a verdict indicating that [they] are unable to decide or agree upon the punishment, the Court will fix the defendant’s punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole.”⁵⁰ The court will remind the jury, however, “that under the law, it is the primary duty and responsibility of the jury to fix the punishment.”⁵¹

⁴³ *Id.*; see also section 565.032.3, RSMo 2011. For a full list of Missouri’s statutory mitigating circumstances, see Chapter One.

⁴⁴ MAI-CR3d 314.44 (internal parentheses omitted).

⁴⁵ State v. Johnson, 22 S.W.3d 183, 191 (Mo. banc 2000).

⁴⁶ MAI-CR3d 314.44.

⁴⁷ See section 565.030.4(4), RSMo 2011.

⁴⁸ MAI-CR3d 314.46 (internal parentheses omitted).

⁴⁹ See MAI-CR3d 314.48.

⁵⁰ *Id.*

⁵¹ *Id.*

II. ANALYSIS

A. Recommendation #1

Each capital punishment jurisdiction should work with attorneys, judges, linguists, social scientists, psychologists, and jurors themselves to evaluate the extent to which jurors understand capital jury instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand the revised instructions to permit further revision as necessary.

As in many states, capital sentencing procedure in Missouri is a complex, multi-step process.⁵² Jurors must make unanimous findings of one or more aggravating circumstances, compare mitigating and aggravating evidence in a subjective weighing process, and then decide whether to impose a sentence of life in prison without parole or death.⁵³ Perhaps due to this complexity, capital jurors can misunderstand and misapply the law during sentencing deliberations.⁵⁴

Missouri's pattern jury instructions, the Missouri Approved Instructions – Criminal (MAI-CR), are mandatory instructions which must be used to the exclusion of any other instruction.⁵⁵ The most recent version of the MAI-CR, the third edition, was adopted by the Supreme Court of Missouri for use beginning in 1987.⁵⁶ Revisions, additions, and withdrawals to the MAI-CR are published in supplements approximately once per year.⁵⁷ The MAI-CR were drafted following “years of study and work of a committee appointed by the Missouri Bar.”⁵⁸ The committee for the third edition was comprised of Missouri judges, law professors, prosecutors, and defense lawyers.⁵⁹ To our knowledge, the committee does not directly consult with linguists, social scientists, psychologists, jurors themselves, or any other persons who might assist in drafting instructions that laypersons who serve on juries can readily understand.⁶⁰ The committee's capital jury instructions are largely based on Missouri's death penalty sentencing statutes, which in some instances require jurors to be instructed on specific issues in a particular manner.⁶¹

⁵² See section 565.032.1, RSMo 2011

⁵³ *Id.*

⁵⁴ See, e.g., William J. Bowers et al., *Jurors' Failure to Understand or Comport with Constitutional Standards in Capital Sentencing: Strength of the Evidence*, 46 CRIM. L. BULL. 1147, 1151–52 (2010) (summarizing certain findings of the Capital Jury Project, viz., that jurors “[f]ail[] to understand sentencing requirements” and “[m]istakenly believ[e] the death penalty is required by law”); Luginbuhl, *supra* note 2, at 204 (listing “[p]ast research . . . demonstrat[ing] jurors' inadequate comprehension of judges' instructions”).

⁵⁵ Rule 28.02(c). The trial court may not deviate from the MAI-CR unless there is not an applicable instruction on the relevant point of law. *Id.* The Supreme Court of Missouri has held that the instructions contained in the MAI-CR are “presumptively correct” unless they conflict with a statute. *State v. Taylor*, 238 S.W.3d 145, 148 (Mo. banc 2007).

⁵⁶ MAI-CR3d, Order Approving the MAI-CR3d Instructions and Verdict Forms.

⁵⁷ See *Missouri Approved Instructions: Civil and Criminal*, YOUR MO. COURTS, <http://www.courts.mo.gov/page.jsp?id=589> (last visited Jan. 16, 2012).

⁵⁸ MAI-CR3d, Preface.

⁵⁹ MAI-CR3d, Supreme Court's Committee on Procedure in Criminal Cases.

⁶⁰ See *id.* All of the committee members are either listed as judges or are listed as licensed attorneys on the Missouri Bar website. *The Official Directory of Missouri Lawyers*, THE MO. BAR, <http://members.mobar.org/members/LawyerSearch/GSSearch.aspx> (enter the committee member's first and last name in the corresponding fields, then click “search”) (last visited Jan. 16, 2012).

⁶¹ Sections 565.030, 565.032, RSMo 2011; MAI-CR3d 314.30–314.48. For instance, Missouri statute provides that “[i]f the trier [in a capital sentencing hearing] is a jury it shall be instructed before the case is submitted that if it

Missouri jurors have expressed confusion or a misunderstanding regarding the capital sentencing procedure described in Missouri’s capital sentencing instructions. In one case, the jury sent a note to the trial court during penalty phase deliberation which read, “What is the legal definition of mitigating (as in mitigation circumstances)?”⁶² Because the MAI-CR do not define “mitigating,” the trial court replied, “Any legal terms in the instructions that have a ‘legal’ meaning would have been defined for you. Therefore, any terms that you have not had defined for you should be given their ordinary meaning.”⁶³ In another case, the jury sent a note to the judge asking “whether it was required to impose death if it found at least one statutory aggravator,” indicating a misunderstanding of the MAI-CR instruction.⁶⁴ Because the MAI-CR instruction is mandatory and exclusive, however, the trial court could not provide further clarification.⁶⁵ In both cases, the jury returned a sentence of death.⁶⁶

The Capital Jury Project conducts three to four-hour interviews with capital jurors who have served in capital trials.⁶⁷ Since 1991, it has interviewed 1,198 jurors who have served in 353 capital trials in fourteen states, including Missouri, revealing several misconceptions about capital sentencing procedures.⁶⁸ For instance, 65.5% of surveyed Missouri jurors erroneously believed that the jury had to be unanimous on a finding of mitigating evidence, and 36.8% did not realize they could consider any evidence as mitigating evidence.⁶⁹ In addition, 48.3% of Missouri jurors believed that the death penalty was required by law if the murder was heinous, vile, or depraved,⁷⁰ when such a finding is merely an aggravating circumstance that is required for the jury to *consider* the death penalty.⁷¹ The U.S. Supreme Court has held that the existence of an aggravating circumstance can never suffice to require the death penalty.⁷² In order to avoid juror confusion such as this in the future, it is imperative for jury instructions to be clearly written in a manner that ensures jurors understand and correctly apply the applicable law.

Conclusion

Missouri is in partial compliance with Recommendation #1.

Missouri consults a diverse group of legal professionals when drafting and revising the MAI-CR. However, it does not appear that the drafting committee directly consults with non-lawyers such

is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death.” Section 565.030.4(4), RSMo 2011.

⁶² State v. Deck, 994 S.W.2d 527, 541 (Mo. banc 1999).

⁶³ *Id.*

⁶⁴ State v. Clay, 975 S.W.2d 121, 134 (Mo. banc 1998).

⁶⁵ *Id.*

⁶⁶ *Deck*, 994 S.W.2d at 531; *Clay*, 975 S.W.2d at 134.

⁶⁷ *What is the Capital Jury Project?*, UNIV. AT ALBANY, <http://www.albany.edu/scj/13189.php> (last visited Jan. 12, 2012).

⁶⁸ See Bowers & Foglia, *supra* note 2, at 55; *What is the Capital Jury Project?*, *supra* note 67.

⁶⁹ See Bowers & Foglia, *supra* note 2, at 68.

⁷⁰ *Id.* at 72.

⁷¹ Section 565.032.2(7), RSMo 2011.

⁷² See *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976).

as linguists, social scientists, psychologists, and jurors themselves who might be able to better ensure that capital sentencing instructions are understood by laypersons who serve on juries.

The Missouri Assessment Team recognizes the complexities inherent in designing capital jury instructions that are both comprehensible to laypersons and accurate statements of the law. Moreover, the Assessment Team acknowledges that the MAI-CR drafting committee strives to improve its instructions through regular revisions. However, some jurors still appear to find certain aspects of Missouri's capital sentencing instructions to be confusing. As such, the drafting committee should consider consulting with non-lawyers when it next reviews the MAI-CR's capital sentencing instructions.

B. Recommendation #2

Jurors should receive written copies of “court instructions” (referring to the judge’s entire oral charge) to consult while the court is instructing them and while conducting deliberations.

Jurors are often better able to understand the court's instructions and correctly apply the law when provided with written copies of the court's instructions.⁷³ This is especially true in death penalty cases, where jurors are often confused by complex capital sentencing procedures.⁷⁴

Missouri Supreme Court Rule 28.02 provides that “all numbered instructions and all verdict forms shall be handed to the jury for its use during its deliberation.”⁷⁵ As such, Missouri is in compliance with Recommendation #2.

C. Recommendation #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.

National studies have shown that capital jurors commonly have difficulty understanding jury instructions.⁷⁶ This confusion can be attributed to a number of factors, such as the use of complex legal concepts and unfamiliar words without proper explanation and insufficient

⁷³ The Honorable B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 IND. L. J. 1229, 1259 (1993); Judge Roger M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 S.C. L. REV. 135, 177–78 (2000) (noting that 69% of the judges polled thought that juror comprehension would be aided by giving written instructions after the judge charged the jury and most believed that it would aid juror comprehension to have the instructions with them during deliberations).

⁷⁴ See Recommendation #1, *supra* notes 52–72 and accompanying text.

⁷⁵ Rule 28.02(e).

⁷⁶ 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).

definitions.⁷⁷ When trial courts respond to jurors' questions about capital jury instructions with substantive answers that clarify the applicable law, juror comprehension of those instructions often improves. In one study, for instance, 154 persons in Virginia were selected to participate in mock death penalty deliberations.⁷⁸ The mock jurors were presented with a factual outline of a capital murder cases and instructed on the law.⁷⁹ The study found that a follow-up clarifying instruction corrected the misunderstanding of 40% of the mock jurors who erroneously believed that they were required to impose the death penalty if an aggravating circumstance was found.⁸⁰ By contrast, "simply directing the jurors to reread the pattern instruction did nothing to improve their comprehension."⁸¹

According to Missouri law, the MAI-CR are mandatory instructions which "shall be given or used to the exclusion of any other instruction."⁸² As such, the Supreme Court of Missouri has held that "[w]here jury instructions are correct, clear, and unambiguous, a trial court may respond to a jury's question by instructing them to look to the instructions for guidance."⁸³ The Missouri Court of Appeals has also held that a trial court's response to juror questions could be construed as an instruction, and as such "comments by the trial court to the jury touching on matters governed by applicable MAI's [sic] and their Notes on Use should be avoided."⁸⁴ Furthermore, the MAI-CR prohibits trial courts from defining legal terms and concepts unless a definition is expressly permitted by the applicable instruction.⁸⁵ As such, it appears that Missouri trial courts do not generally respond to jurors' requests for clarifications of instructions, other than by reiterating or referring generally to the instructions already provided.⁸⁶

As discussed in Recommendation #1, there have been at least two capital cases in which trial courts have not provided answers to jurors' inquiries regarding capital sentencing instructions.⁸⁷ In addition, during guilt phase deliberations in one capital case, the jury sent a note to the judge that asked, "Is the jury required by law to be unanimous on each element [of the offense] contained in the count in order to be unanimous on that count?"⁸⁸ After conferring with counsel, the trial court responded with a note that stated, "The jury is to be guided by the instructions as

⁷⁷ James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L. J. 1161, 1169–1170 (1995); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 7 (discussing jurors' understanding of the concept of mitigating evidence, including the scope, applicable burden of proof, and the requisite number of jurors necessary to find the existence of a mitigating circumstance).

⁷⁸ Stephen P. Garvey, Sheri Lynn Johnson & Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 633–35 (2000).

⁷⁹ *Id.*

⁸⁰ *Id.* at 639. The clarifying instruction stated, "Even if you find that the State has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison." *Id.* at 635.

⁸¹ *Id.* at 638.

⁸² Rule 28.02(c).

⁸³ *State v. Clay*, 975 S.W.2d 121, 134 (Mo. banc 1998).

⁸⁴ *State v. Richardson*, 951 S.W.2d 718, 721–22 (Mo. App. 1997).

⁸⁵ MAI-CR3d 333.00, Note on Use 2.

⁸⁶ The U.S. Supreme Court approved of this approach to capital juror requests for clarification in *Weeks v. Angelone*, 528 U.S. 225 (2000).

⁸⁷ See *supra* notes 62–66 and accompanying text.

⁸⁸ *State v. Johnston*, 957 S.W.2d 734, 752 (Mo. banc 1997).

given.”⁸⁹ Trial courts have given similar responses to juror inquiries in several non-capital cases as well.⁹⁰

Conclusion

For the foregoing reasons, Missouri is not in compliance with Recommendation #3.

The Missouri Assessment Team acknowledges that juror inquiries present a difficult task for a trial judge: while most judges strive to ensure jurors understand the applicable law, a judge who deviates from the MAI-CR risks creating reversible error by inadvertently misinforming the jury. Yet, as discussed in this Recommendation and in Recommendation #1, national studies indicate that Missouri capital jurors are often confused about the meanings of words such as “mitigating” and that Missouri capital jurors may not apply the correct standard when evaluating evidence during the penalty phase of a death penalty case. Furthermore, as one study indicated, potential jurors who have relevant terms defined for them are better able to correctly apply the law. Thus, trial courts should make every effort to direct the jurors to the specific instruction that is relevant to their question, rather than referring to the instructions in general. In addition, in order to improve the clarity of jury instructions and obviate the need for judges to respond to individual juror questions, the Assessment Team recommends that Missouri revise its capital jury instructions to provide comprehensible definitions of the terms “mitigating” and “aggravating,” as well as any other words that jurors frequently misunderstand.

D. Recommendation #4

Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant’s request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors’ understanding of alternative sentences.

Instructions on Alternative Punishments

Missouri law dictates that capital murder is punishable by “either death or imprisonment for life without eligibility for probation or parole or release except by act of the governor.”⁹¹ In jurisdictions where life in prison without parole is the only alternative sentence to capital murder, it is critically important for trial courts to clearly instruct jurors that such a sentence means that the defendant will, in fact, spent his/her entire life in prison. Even when the instructions describe the sentence as “life in prison without parole,” capital jurors are often concerned during sentencing deliberations that a sentence of life in prison without parole does not actually

⁸⁹ *Id.*

⁹⁰ *See, e.g.,* Roberts v. State, 232 S.W.3d 581, 584 (Mo. App. 2007) (instructing jurors to be “guided by the instructions as the Court has given them to you” in response to an inquiry about sodomy); State v. Guinn, 58 S.W.3d 538, 547 (Mo. App. 2001) (responding to a jury’s inquiry about the defendant’s alibi defense by stating, “I cannot provide additional evidence. The case must be decided on the evidence presented and the instructions given to you”); State v. Dunagan, 772 S.W.2d 844, 860 (referring jurors to the court’s previous instruction in response to a note asking whether the jurors could recommend leniency in sentencing).

⁹¹ Section 565.020.2, RSMo 2011.

guarantee that the defendant will not eventually be released.⁹² Of the Missouri jurors surveyed by the Capital Jury Project, the median estimate was that a defendant sentenced to life in prison without parole would be released after serving a twenty-year sentence.⁹³ Capital jurors who are confused about the meaning of life without parole often seek clarification from the trial court.⁹⁴

Missouri trial courts instruct jurors that the sentencing alternative to the death penalty is “imprisonment for life by the Department of Corrections without eligibility for probation or parole.”⁹⁵ Commendably, this instruction states that the defendant will not be eligible for probation or parole without including a reference to the caveat, noted in the Missouri statute, that the defendant could be released “by act of the governor.”⁹⁶ However, a Missouri trial court is likely prohibited from further explaining the meaning of “imprisonment for life,” even if jurors express confusion or request clarification, as the MAI-CR prohibit courts from defining terms unless a definition is expressly permitted by the applicable instruction.⁹⁷ As noted, jurors are often uncertain that a defendant will spend his entire life in prison, even when the sentencing option is referred to as “life in prison without parole.”⁹⁸ Thus, while the MAI-CR instruction might appear to clearly define a life sentence as prohibiting parole, further explanation may be necessary to ensure that jurors’ sentencing decisions are not based on a mistaken fear that the defendant might be released.

Testimony of Parole Officials and Other Witnesses

Because life in prison without parole is the only sentencing alternative to the death penalty for a defendant convicted of capital murder in Missouri, this portion of the Recommendation is not applicable.

Conclusion

Missouri is in partial compliance with Recommendation #4.

While Missouri capital jurors are instructed that the alternative to the death penalty is “imprisonment for life by the Department of Corrections without eligibility for probation or parole,” trial courts are not permitted to provide jurors with a definition or an explanation of what this sentence entails, even if jurors request clarification.

⁹² Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103, 117 (2010).

⁹³ See Bowers & Foglia, *supra* note 2, at 82.

⁹⁴ Sundby, *supra* note 92, at 118.

⁹⁵ MAI-CR3d 314.31.

⁹⁶ Section 565.020.2, RSMo 2011.

⁹⁷ MAI-CR3d 333.00, Note on Use 2.

⁹⁸ William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 648 (1999).

As capital jurors may be confused on the meaning of a sentence of life without parole, Missouri should revise its instruction to simply explain that life without parole in fact means that the defendant will die in prison.⁹⁹

E. Recommendation #5

Trial courts should not place limits on a juror's ability to give full consideration to any evidence that might serve as a basis for a sentence less than death.

The U.S. Supreme Court has held that, in capital sentencing, a mitigating circumstance is defined as “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”¹⁰⁰ As such, it is critically important that trial courts not place limits on capital jurors’ ability to give full consideration to mitigating evidence.

The MAI-CR include some instructions which encourage jurors to give full consideration to evidence that might serve as a basis for a sentence less than death. In assessing mitigating evidence, the trial court instructs jurors that they “may consider all of the evidence presented in both the guilt and the punishment stages of trial, including . . . evidence presented in support of [statutory] mitigating circumstances submitted in this instruction.”¹⁰¹ Jurors are also told that “[i]t is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment.”¹⁰² Jurors are further instructed that they “are not compelled to fix death as a punishment even if [they] do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment.”¹⁰³

Trial courts are not, however, permitted to instruct jurors on individual non-statutory mitigating circumstances that are requested by defense counsel and supported by the evidence.¹⁰⁴ In *State v. Copeland*, for instance, the defendant sought and was denied an instruction on four additional non-statutory mitigating circumstances, such as that the defendant “has never before [] been arrested or charged with a criminal offense.”¹⁰⁵ In addition, instructions to Missouri capital jurors do not provide a definition of the term “mitigating evidence,”¹⁰⁶ which may limit jurors’ ability to give full consideration to evidence constituting mitigation. Jurors are also not instructed that they need not find mitigating circumstances beyond a reasonable doubt.¹⁰⁷

⁹⁹ Although the Governor of Missouri has the power to pardon a person sentenced to life in prison, this power should not be mentioned in the instruction, given the extreme unlikelihood that any Governor would pardon a convicted murderer without clear evidence of innocence.

¹⁰⁰ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

¹⁰¹ MAI-CR3d 314.44.

¹⁰² *Id.*

¹⁰³ MAI-CR3d 314.46.

¹⁰⁴ Section 565.032.1(2), RSMo 2011 (“If the trier is a jury, it shall not be instructed upon any specific evidence which may be in aggravation or mitigation of punishment”); *State v. Johnson*, 22 S.W.3d 183, 191 (Mo. banc 2000).

¹⁰⁵ *State v. Copeland*, 928 S.W.2d 828, 853 (Mo. banc 1996), *overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo. banc 2008).

¹⁰⁶ *State v. Deck*, 994 S.W.2d 527, 542 (Mo. banc 1999); *see also* MAI-CR3d 314.44.

¹⁰⁷ *See* MAI-CR3d 314.44.

As the results of the Capital Jury Project have demonstrated, capital jurors in Missouri frequently misunderstand the manner in which they are permitted to consider mitigating evidence. For instance, 36.8% of Missouri capital jurors failed to understand that they could consider any evidence as mitigating evidence in reaching their decision.¹⁰⁸ In addition, 34.5% did not understand that they did not have to find mitigating evidence beyond a reasonable doubt.¹⁰⁹ Such misconceptions may be due, in part, to jury instructions that do not fully apprise jurors of their ability to consider any evidence that might serve as a basis for a sentence less than death.

Conclusion

Missouri is in partial compliance with Recommendation #5.

Missouri should be commended for adopting jury instructions which require the trial court to instruct jurors that they may consider all evidence in reaching a decision on sentencing, and that they need not all agree on the particular facts which support a sentence less than death. However, Missouri trial courts are not permitted to instruct jurors on individual non-statutory mitigating circumstances, which may cause jurors to underemphasize those non-statutory mitigating circumstances upon which they are not individually instructed. Compounding the potential confusion, jurors are also not told that, unlike aggravating circumstances, mitigating circumstances need not be found beyond a reasonable doubt. Jurors are also not instructed on the meaning of the word “mitigating,” which has caused juror confusion in at least one prior case.

In order to ensure that capital jurors understand that they may consider any evidence that might serve as a basis for a sentence less than death, the Missouri Assessment Team recommends that the MAI-CR be amended to require the trial court to instruct the jury on individual non-statutory mitigating circumstances when such circumstances are supported by the evidence and requested by the defendant. In addition, the MAI-CR should include definitions of “mitigating” and “aggravating,” and should require the trial court to instruct jurors that they need not find mitigating circumstances beyond a reasonable doubt.

F. Recommendation #6

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.

Missouri’s death penalty statute provides that the jury must return a life sentence if it “decides under all of the circumstances not to assess and declare the punishment at death,” even if it finds that the mitigating evidence does not outweigh the aggravating evidence.¹¹⁰ As such, the MAI-CR require the trial court to instruct capital jurors as follows:

¹⁰⁸ Bowers & Foglia, *supra* note 2, at 68.

¹⁰⁹ *Id.*

¹¹⁰ Section 565.030.4(4), RSMo 2011.

You are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.¹¹¹

Thus, Missouri is in compliance with Recommendation #6.

G. Recommendation #7

In states where it is applicable, trial courts should make clear in juror 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.

Missouri capital jurors are required to determine that the mitigating evidence does not “*outweigh* the evidence in aggravation of punishment” before it can impose a death sentence.¹¹² The Supreme Court of Missouri has described the weighing process as a “wholly subjective and discretionary analysis.”¹¹³

Missouri trial courts, however, are not permitted to instruct jurors that the weighing process should not be conducted by determining whether there are a greater number of aggravating circumstances than mitigating circumstances. Instead, the MAI-CR requires the court to instruct that each juror “must [] determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.”¹¹⁴ Jurors are then informed that they “may consider all of the evidence presented in both the guilt and the punishment stages of trial” in making this determination.¹¹⁵

For the above reasons, Missouri is not in compliance with Recommendation #7. The Missouri Assessment Team recommends that MAI-CR3d 314.44 be amended to require the trial court to instruct jurors that, during the weighing process, they should not simply compare the number of aggravating circumstances and mitigating circumstances in reaching a sentencing decision.

¹¹¹ MAI-CR3d 314.46 (internal parentheses omitted). Jurors are also instructed, in any earlier instruction, that the burden is on the prosecution to prove each aggravating circumstance beyond a reasonable doubt.

¹¹² Section 565.030.4(3), RSMo 2011.

¹¹³ State v. Whitfield, 107 S.W.3d 253, 277 (Mo. banc 2003).

¹¹⁴ MAI-CR3d 314.44.

¹¹⁵ *Id.*

CHAPTER ELEVEN

JUDICIAL INDEPENDENCE AND VIGILANCE

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Our criminal justice system relies on the independence of the judicial branch to ensure that judges decide cases to the best of their abilities without bias—political or otherwise—and notwithstanding official and public pressure. However, judicial independence is increasingly being undermined by judicial elections, appointments, and confirmation proceedings that are affected by nominees' or candidates' purported views on controversial issues, including the death penalty, or by their decisions in capital cases.

During judicial election campaigns, voters often expect candidates to assure them that they will be “tough on crime,” that they will impose the death penalty whenever possible, and, if they are seeking an appellate judgeship, that they will uphold death sentences. In retention campaigns, judges are asked to defend decisions in capital cases and sometimes are defeated because of their unpopular decisions, regardless of whether these decisions are reasonable or binding applications of the law, or reflect the predominant view of the Constitution. Prospective and actual nominees for judicial appointments often are subjected to scrutiny on these same bases. Generally, when this scrutiny occurs, the discourse is not about the constitutional doctrine in a case but rather about the specifics of the crime.

All of this increases the possibility—or, at least, the perception—that judges will decide cases not on the basis of their best understanding of the law, but on the basis of how their decisions might affect their careers. These circumstances also may make it less likely that judges will be viewed by the public as sufficiently vigilant against prosecutorial misconduct and incompetent representation by defense counsel. Ultimately, judges must remain cognizant of their obligation to take corrective measures both to remedy the harms of prosecutorial misconduct and defense counsel incompetence, and to prevent such harms from occurring in the future.

I. FACTUAL DISCUSSION: MISSOURI OVERVIEW

Missouri's judiciary consists of three levels of authority. The lowest level is the circuit court system, organized into forty-five circuits; the intermediate level is the court of appeals system, organized into three districts; and the highest level is the Supreme Court of Missouri.¹ The circuit courts are courts of original civil and criminal jurisdiction, and all homicide cases originate in the circuit court system.²

The Missouri court of appeals exercises general appellate jurisdiction "in all cases except those within the exclusive jurisdiction of the [S]upreme [C]ourt [of Missouri]."³ Those cases within the exclusive appellate jurisdiction of the Supreme Court include "all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, . . . [and] all cases where the punishment imposed is death."⁴ Otherwise, the Supreme Court of Missouri exercises appellate review over those cases decided by the Court of Appeals.⁵ Missouri's court of appeals system is organized into the western, eastern, and southern districts, with eleven, fourteen, and seven judges serving in those districts, respectively.⁶ The number of judges on the Supreme Court of Missouri is fixed by the Missouri Constitution at seven.⁷

Capital trials take place in Missouri's circuit courts.⁸ The number of circuit judges and associate circuit judges serving on a circuit court is determined by the Missouri General Assembly,

¹ Mo. Const. art. V, sec. 1; ROBIN CARNAHAN, OFFICIAL MANUAL OF THE STATE OF MISSOURI 226–28, 240, 255 (Laura Egerdal, ed. 2009), available at <http://www.sos.mo.gov/bluebook/2009-2010/default.asp> [hereinafter MO. OFFICIAL MANUAL]. The intermediate appellate jurisdiction of a circuit may be divided between two court of appeals districts. For example, one of the three counties contained within the First Circuit (i.e., Schuyler County) falls within the Western District whereas the remaining two counties (i.e., Clark and Scotland Counties) fall within the Eastern District. See MO. OFFICIAL MANUAL, *supra* note 1, at 241. It always must be the case, however, that an entire county will fall within a single circuit and a single court of appeals district. Mo. Const. art. V, sec. 15 (requiring that "[t]he state [] be divided into convenient circuits of contiguous counties").

² Mo. Const. art. V, sec. 14(a). See also Section 478.070, RSMo 2011 ("The circuit courts shall have original jurisdiction over all cases and matters, civil and criminal.").

³ Mo. Const. art. V, sec. 3.

⁴ *Id.*

⁵ Mo. Const. art. V, sec. 10 (empowering the Supreme Court of Missouri to "determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal"). This provision of the Missouri Constitution, as indicated, also provides for the "[t]ransfer of cases from court of appeals to [the] supreme court" in certain circumstances, perhaps before a decision has been rendered by the court of appeals. This pre-decision transfer may be initiated "by order of the supreme court . . . because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule." *Id.*

⁶ Section 477.040, RSMo 2011 (establishing the court of appeals districts); MO. OFFICIAL MANUAL, *supra* note 1, at 341–43. See also Section 477.160 to 477.191, RSMo 2011 (establishing the number of judges in each court of appeals district). The Missouri Constitution requires that there be "not less than three" judges serving on any court of appeals. Mo. Const. art. V, sec. 13. Missouri law allows for the automatic creation of new court of appeals judgeships "[w]henver a vacancy occurs . . . in the office of commissioner of the supreme court." Section 477.152, RSMo 2011. This statute has been applied four times to create two additional judgeships in the eastern district and one additional judgeship in both the western and southern districts.

⁷ Mo. Const. art. V, sec. 2.

⁸ MO. OFFICIAL MANUAL, *supra* note 1, at 255. See also Mo. Const. art. V, sec. 17. Both circuit and associate circuit judges' constitutional authority encompasses capital cases.

although the Missouri Constitution requires that there be at least one circuit judge in each of Missouri's forty-five judicial circuits and "at least one resident associate circuit judge in each county."⁹ One-hundred forty-one circuit judges and 193 associate circuit judges presently serve across Missouri's forty-five judicial circuits.¹⁰

Judicial terms of service vary depending on which court the judge sits. Both Supreme Court and Court of Appeals judges serve twelve-year terms.¹¹ In the circuit court system, circuit court judges serve six-year terms while associate circuit judges serve four-year terms.¹²

A. *Appointment and Election of Judges*

1. Appointment of Judges Pursuant to the Nonpartisan Court Plan

The Nonpartisan Court Plan (the Plan), found in section 25 of Article V of the Missouri Constitution, governs the appointment of judges to fill vacancies on the Supreme Court of Missouri and in the Missouri Court of Appeals.¹³ In addition, judges serving on six of the forty-five circuit courts also must be appointed pursuant to the Plan.¹⁴ Those six circuits encompass the counties of Clay, Greene, Jackson, Platte, and St. Louis as well as the City of St. Louis.¹⁵ In all, 52% of Missouri's circuit judges and 20% of Missouri's associate circuit judges receive appointments to the bench pursuant to the Plan.¹⁶

When a vacancy arises on the Supreme Court or on an intermediate appellate court, the seven-person Appellate Judicial Commission recommends to the governor three individuals who are qualified to fill that vacancy.¹⁷ The seven persons serving on the Appellate Judicial Commission are: (1) A judge of the Supreme Court of Missouri who has been selected by his/her peers; (2) a lawyer residing in each of Missouri's three court of appeals districts who has been elected to the position by a vote of his/her professional peers within the relevant district; and (3) a non-lawyer residing in each of Missouri's three Court of Appeals districts who has been appointed to the

⁹ Mo. Const. art. V, secs. 15(1), 16.

¹⁰ MO. OFFICIAL MANUAL, *supra* note 1, at 341–43; *Meet Your Missouri Judges*, YOUR MO. COURTS, <http://www.courts.mo.gov/page.jsp?id=630> (last visited Dec. 30, 2011).

¹¹ Mo. Const. art. V, sec. 19.

¹² *Id.*

¹³ Mo. Const. art. V, sec. 25(a).

¹⁴ *See* Mo. Const. art. V, sec. 25(a) (applying the Plan to the Sixteenth Circuit, i.e., Jackson County, and the Twenty-Second Circuit, i.e., St. Louis City) and 25(b) (providing for the adoption of the Plan by any circuit not covered by section 25(a) upon majority vote of that circuit's electorate).

¹⁵ Specifically, the six circuits are the Sixth, Seventh, Sixteenth, Twenty-First, Twenty-Second, and Thirty-First Circuits. *Missouri Nonpartisan Court Plan*, YOUR MO. COURTS, <http://www.courts.mo.gov/page.jsp?id=297> (last visited Dec. 30, 2011).

¹⁶ Two circuit judges and three associate circuit judges serve in the Sixth Circuit (Platte County); four circuit judges and three associate circuit judges serve in the Seventh Circuit (Clay County); nineteen circuit judges and nine associate circuit judges serve in the Sixteenth Circuit (Jackson County); twenty circuit judges and thirteen associate circuit judges serve in the Twenty-First Circuit (St. Louis County); twenty-four circuit judges and seven associate circuit judges serve in the Twenty-Second Circuit (City of St. Louis); and five circuit judges and four associate circuit judges serve in the Thirty-First Circuit (Greene County). *See Circuit Courts of Missouri*, YOUR MO. COURTS, <http://www.courts.mo.gov/page.jsp?id=321> (last visited Dec. 30, 2011).

¹⁷ Mo. Const. art. V, sec. 25(a).

position by the governor.¹⁸ The governor may select one name from the submitted list of three names. If s/he takes no action to fill the vacancy within sixty days, then the Commission must choose a name from the list.¹⁹ Following twelve months of service, the appointed judge stands for retention at “the next general election.”²⁰ If a majority of those voting within the judge’s geographic jurisdiction vote to retain the judge, s/he secures a full, twelve-year judicial term, which commences on January 1st of the following year.²¹ If a majority votes against retaining the judge, his/her term expires on January 1st in the following year and a vacancy arises.²²

The process for filling vacancies on the circuit courts within the Plan’s ambit are identical to that described above, except that a five-person circuit judicial commission is responsible for recommending to the governor three individuals who are qualified to fill a vacancy within the commission’s circuit.²³ The five persons serving on each circuit judicial commission are: (1) the Chief Judge of the Court of Appeals district in which the circuit is located; (2) two lawyers residing in the circuit who have been elected to the positions by a vote of their peers within the relevant circuit; and (3) two non-lawyers residing in the circuit who have been appointed to the positions by the governor.²⁴ If a majority of those voting within the judge’s circuit vote to retain the judge, the judge secures a full judicial term to commence on January 1st of the following year.²⁵ Retained circuit court judges secure a full six-year term while retained associate circuit judges secure a full four-year term.²⁶

Finally, any appointed judge who secures a full judicial term must, if s/he wishes to remain in office for an additional term, stand for retention in “the general election [immediately] preceding the expiration of his[/her] term.”²⁷

2. Election of Judges

If not within the ambit of the Nonpartisan Court Plan,²⁸ judges are elected and reelected pursuant to Missouri statutory law.²⁹ Thus, the judges of thirty-nine circuit courts must stand for election in partisan contests.³⁰

¹⁸ MO. CONST. art. V, sec. 25(d).

¹⁹ *Id.*

²⁰ Mo. Const. art V, sec. 25(c)(1). An appointed judge may decide against standing for retention, of course, which results in a vacancy once his/her term expires on January 1st of the following year. *Id.*

²¹ Mo. Const. art. V, secs. 19, 25(c)(1).

²² *Id.*

²³ Mo. Const. art. V, secs. 19, 25(c)(1). In the event that the governor takes no action to fill that vacancy within sixty days, the commission is responsible for choosing a name from the submitted list. *Id.* If a majority of those voting within the judge’s circuit vote to retain the judge, s/he secures a full judicial term in accordance with section 19 of article V of the Missouri Constitution—that is, retained circuit court judges secure a full six-year term while retained associate circuit judges secure a full four-year term. Mo. Const. art. V, sec. 19. These terms also commence on January 1st of the following year. Mo. Const. art. V, sec. 25(c)(1).

²⁴ Mo. Const. art. V, secs. 19, 25(d).

²⁵ Mo. Const. art. V, sec. 25(c)(1).

²⁶ Mo. Const. art. V, sec. 19.

²⁷ Mo. Const. art. V, sec. 25(c)(1).

²⁸ *See* Mo. Const. art. V, sec. 25(a)–(g).

²⁹ Section 478.010, RSMo 2011 (“Except as provided in section 25 of article V of the Constitution of Missouri, the circuit judges of the various judicial circuits shall be elected . . .”).

Judicial elections are governed by the same statutes that cover elections generally.³¹ Under section 115.307, “[p]olitical parties and groups of voters may nominate candidates” pursuant to Missouri law.³² Furthermore, under section 115.339, “all candidates for elective office shall be nominated at a primary election”³³ unless they “desire to be an independent candidate for [] office.”³⁴ Prospective circuit judges file their declarations of candidacy in the office of the Missouri secretary of state, while prospective associate circuit judges file their declarations in the office of the county election authority.³⁵

A candidate who receives the highest number of legally cast votes wins the election.³⁶

B. Conduct Requirements for Judicial Candidates and Sitting Judges

1. General Provisions

Both judges appointed and retained under the Nonpartisan Court Plan (selected judges) and those elected pursuant to Missouri statutory law (elected judges) must adhere to Supreme Court Rule 2, which sets out the rules governing judicial conduct.³⁷ The rules address issues such as (1) upholding the integrity and independence of the judiciary and avoiding impropriety and the appearance of impropriety; (2) performing the duties of judicial office impartially, competently, and diligently; (3) conducting extrajudicial activities in a manner that minimizes the risk of conflict with judicial obligations; and (4) refraining from inappropriate political activity.³⁸

2. Impartiality and Political Activity of Judicial Candidates and Sitting Judges

Rule 2-1.2 provides that “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”³⁹ Rule 2-4.1(D) states that judges may not “engage in any other political activity [separate from those activities sanctioned by Rule 2] except on behalf of measures to improve the law, the legal system, or the administration of justice.”⁴⁰ For example, the Rules forbid elected and selected judges from serving as a party

³⁰ MO. BAR, VOTING FOR MISSOURI’S JUDGES (2011), available at http://www.mobar.org/uploadedFiles/Home/Publications/Legal_Resources/Brochures_and_Booklets/voting%20judges.pdf.

³¹ Section 115.005, RSMo 2011 (describing the scope of the Comprehensive Election Act of 1977). Those statutes are sections 115.001 through 115.641 of the Missouri Revised Statutes. *Id.*

³² Section 115.307, RSMo 2011. *See generally* sections 115.305 to 115.405, RSMo 2011 (addressing “political parties and [the] nomination of candidates”).

³³ Section 115.339, RSMo 2011.

³⁴ Section 115.321, RSMo 2011.

³⁵ Section 115.353(1)–(2), RSMo 2011. This statute explicitly does not apply to circuit judges and associate circuit judges “subject to the provisions of article V, section 25 of the Missouri Constitution,” i.e., the Nonpartisan Court Plan. *Id.*

³⁶ *Cf.* Section 115.517, RSMo 2011 (describing special election procedures in the event of a general-election tie vote).

³⁷ *See* Rule 2-1.1 (“A judge shall comply with the law, including the Code of Judicial Conduct.”).

³⁸ *See generally* Rule 2.

³⁹ Rules 2-1.2.

⁴⁰ Rule 2-4.1(D).

leader or on any party committee, and neither may “solicit contributions to party funds.”⁴¹ But in the event that an incumbent judge or candidate for election to judicial office seeks a judgeship “as a candidate of a political party”—that is, s/he seeks a circuit and associate circuit judgeship outside the ambit of the Plan—the “incumbent judge or candidate for election to judicial office may attend or speak on [his/her] own behalf at political gatherings and may make contributions to the campaign funds of the party of choice.”⁴² Furthermore, any member of the Missouri judiciary must resign judicial office in the event that s/he “becomes a candidate either in a party primary or in a general election for a nonjudicial office.”⁴³

As for campaign conduct, Rule 2-4.2 binds selected and elected judges alike, and it states:

A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of the non-partisan court plan:

- (1) shall maintain the dignity appropriate to judicial office . . . ;
- (2) shall comply with all applicable election, election campaign, and election campaign fund-raising laws and regulations;
- (3) shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
- (4) shall review and approve the content of all campaign statements and materials produced by the candidate before their dissemination;
- (5) shall not knowingly or with reckless disregard for the truth make any false or misleading statement or misrepresent [his/her] identity, qualifications, present position, or other fact; and
- (6) shall prohibit public officials or employees subject to the candidate’s direction or control from doing for the candidate what [s/he] is prohibited from doing under [Rules 2-4.1 and 2-4.2];⁴⁴

Furthermore, elected judges may not, as candidates, “solicit or accept campaign funds in a courthouse or on courthouse grounds,” and they also may not “solicit *in person* campaign funds from persons likely to appear before the judge.”⁴⁵ Rule 2-4.2 does, however, permit a candidate to “make a written solicitation for campaign funds of any person or group, including any person or group likely to appear before the judge.”⁴⁶ If facing a challenger, the Rule also permits an elected judge or candidate to establish committees for the purposes of securing and managing the expenditure of campaign funds.⁴⁷

⁴¹ Rule 2-4.1(A)–(B) (imposing narrow political conduct limitations on selected and elected judges).

⁴² Rule 2.4.1(B).

⁴³ Rule 2-4.1(C). If permitted by law, a judge may remain in office if s/he endeavors to serve as a delegate in a state constitutional convention. *Id.*

⁴⁴ Rule 2-4.2(A).

⁴⁵ Rule 2-4.2(B) (emphasis added).

⁴⁶ *Id.*

⁴⁷ *Id.*

An unopposed candidate for elected judicial office and judges seeking retention pursuant to the Plan who have “drawn active opposition” may also campaign in the manner prescribed by Rule 2-2.4.⁴⁸

3. Rules for Recusal

Rule 2-2.11 requires judges to recuse themselves “in any proceeding in which [their] impartiality might reasonably be questioned,” and it delineates five circumstances that give rise to such doubt.⁴⁹ Generally, these circumstances are (1) “personal bias or prejudice . . . or [personal] knowledge of facts that are in dispute in the proceeding that would preclude the judge from being fair and impartial”; (2) an economic interest in the proceeding, whether the interest is that of the judge or of certain members of the judge’s family; (3) the appearance of impartiality due to public statements made by the judge, whether as a judge or as a judicial candidate, provided those statements were not made “in a court a proceeding, judicial decision, or opinion”; (4) a professional conflict of interest with respect to the particular matter in controversy; and

- (5) the judge knows that he or she, individually or as a fiduciary, or [his/her] spouse, parent, [] child, or any other member of the judge’s family residing in the judge’s household is:
 - (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
 - (b) acting as a lawyer in the proceeding;
 - (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
 - (d) likely to be a material witness in the proceeding.⁵⁰

To determine whether a judge ought to recuse him/herself, “[t]he test . . . is whether a reasonable person would have a factual basis to doubt the judge’s impartiality.”⁵¹ Ultimately, “a particular judge is in the best position to determine if recusal is necessary,”⁵² and appellate courts generally do not upset these determinations unless the judge’s refusal to recuse him/herself constituted an abuse of discretion.⁵³ Nevertheless, a judge subject to recusal for a reason other than bias or prejudice, “may disclose on the record the basis of the judge’s recusal and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive recusal.”⁵⁴

⁴⁸ See Rule 2-2.4(C).

⁴⁹ Rule 2-2.11(A). The list of circumstances delineated in the rule explicitly is not intended to be exhaustive. *Id.*

⁵⁰ Rule 2-2.11(A)(1)–(5).

⁵¹ *State v. Taylor*, 929 S.W.2d 209, 220 (Mo. banc 1996) (citing *State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692, 698 (Mo. App. Ct. 1990)).

⁵² *State v. Nunley*, 923 S.W.2d 911, 917 (Mo. banc 1996) (in a capital case, recusal was not warranted absent “any special relationship between [the judge presiding over appellee’s sentencing] and the original [trial] judge, other than [that] both judges [were] from the same judicial circuit”).

⁵³ *Williams v. Reed*, 6 S.W.3d 916, 920 (Mo. App. 1999).

⁵⁴ Rule 2-2.11(C). The parties are permitted to decide whether the judge may nevertheless participate in the proceeding. *Id.*

Finally, the Supreme Court of Missouri has clarified that “a disqualifying bias or prejudice is one that has an *extrajudicial source* and results in an opinion on the merits on some basis other than what the judge learned from the judge’s participation in a case.”⁵⁵

C. *Complaints and Disciplinary Actions Against Judicial Candidates and Sitting Judges*

1. Non-incumbent Judicial Candidates

a. Office of the Chief Disciplinary Counsel

The Missouri Rules governing the disciplining of lawyers also generally govern the disciplining of non-incumbent candidates seeking election to judgeships in Missouri.⁵⁶ The authority to investigate and prosecute claims of misconduct by these candidates principally falls to the Office of Chief Disciplinary Counsel (OCDC), which “prosecutes misconduct by lawyers,” including violations of Rule 4-8.2(b) which states that “[a] lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.”⁵⁷

Rule 5.06 establishes OCDC, and Rule 5.08 describes his/her jurisdiction and investigatory powers: “[OCDC] has the power, with or without complaint, to investigate any matter of professional misconduct [and] may investigate any such matter alleged to have been committed in [Missouri] or alleged to have been committed in another state by a member of The Missouri Bar.”⁵⁸ Furthermore, OCDC “serve[s] as counsel for the [Missouri] bar in all disciplinary proceedings.”⁵⁹

OCDC also possesses the sole discretion to refer complaints either to the Missouri Bar Complaint Resolution Program or to The Missouri Bar Lawyer-to-Lawyer Dispute Resolution Program.⁶⁰ If OCDC opts not to refer the complaint, it must conduct the investigation in accordance with Rule 5.09 and, in doing so, is empowered to issue subpoenas “for documents

⁵⁵ *Smulls v. State*, 10 S.W.3d 497, 499 (Mo. banc 2000) (citing *State v. Hunter*, 840 S.W.2d 850, 866 (Mo. banc 1992)) (emphasis added).

⁵⁶ Investigating and prosecuting allegations of misconduct by non-incumbent judicial candidates does not fall within the jurisdiction of the Commission on Retirement, Removal, and Discipline, the organ of state government responsible for “receiv[ing] and investigat[ing] . . . all complaints concerning misconduct of all judges.” Mo. Const. art. V, sec. 24(1). That commission is discussed at *infra* note 71 and accompanying text. As the Supreme Court of Missouri has held, “the Commission has no authority to prosecute claims against [a] [r]espondent who [is] a lawyer, but not a judge, at the time of the alleged misconduct.” *In re Burrell*, 6 S.W.3d 869, 869 (Mo. 1999).

⁵⁷ *Id.* Rule 4-8.2(b).

⁵⁸ Rules 5.06; 5.08.

⁵⁹ Rule 5.06.

⁶⁰ See Rule 5.10. See also *The Missouri Bar Complaint Resolution Program Guidelines*, YOUR MO. COURTS, <http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/0/fbe703b8922fd3ea86256ca6005211a8?OpenDocument> (last visited Jan. 12, 2012) (“[OCDC]’s office will refer to the complaint resolution program those complaints it believes may be resolved through an alternative resolution process; *The Missouri Bar Lawyer-to-Lawyer Dispute Resolution Program Guidelines*, THE MO. BAR, http://www.mobar.org/uploadedFiles/Home/For_Lawyers/rule%205.10%20Lawyer%20to%20Lawyer%20Dispute%20Resolution%20Program%20Rule.pdf (last visited Jan. 12, 2012) (“[Certain complaints or disputes] may be . . . referred . . . by [OCDC] [to the lawyer-to-lawyer dispute resolution program] where it believes the complaint or dispute may be resolved through alterative resolution”). Both of these programs operate under their own detailed procedures and are less adversarial than the formal disciplinary proceedings established by Rules 5.11 through 5.34.

and witnesses to testify under oath.”⁶¹ Persons under investigation are not entitled to be present throughout this process.⁶² If there is “probable cause to believe that the individual under investigation is guilty of professional misconduct,” OCDC may move forward in preparing an admonition or an information against the judicial candidate.⁶³

b. Disciplinary Hearing Panel Proceedings

If OCDC opts to file an information against the judicial candidate (respondent), the respondent must answer the information within thirty days of receiving a copy of the information.⁶⁴ The information is then assigned by the chair of the Advisory Committee to a disciplinary hearing panel, or with the consent of the Supreme Court of Missouri, to a special master pursuant to Rule 68.03.⁶⁵ If the disciplinary hearing option is pursued, the chair of the Advisory Committee selects three disciplinary hearing officers to serve on the panel from among those appointed as disciplinary hearing officers by the Supreme Court of Missouri.⁶⁶

Disciplinary hearing panel procedures are governed by the rules of the Supreme Court of Missouri.⁶⁷ The ultimate decision of a disciplinary hearing panel may range from dismissing the information altogether to making a recommendation for discipline such as public reprimand, suspension, or disbarment.⁶⁸

c. Further Proceedings in the Supreme Court of Missouri

If OCDC, the respondent, or the Supreme Court of Missouri does not accept the disciplinary hearing panel’s decision, then OCDC must “file in [the Supreme Court of Missouri] the complete record made before the disciplinary hearing panel.”⁶⁹ The matter is then briefed and argued in that Court “as though a petition for an original remedial writ ha[d] been sustained,” and the Court may dismiss the information or, upon a finding of professional misconduct, “impose appropriate discipline.”⁷⁰

⁶¹ Rule 5.09.

⁶² *Id.*

⁶³ Rule 5.11. If OCDC concludes that no probable cause exists to support the complaint, the complainant can “fil[e] a request for review [of this conclusion] with the advisory committee.” Rule 5.12(b).

⁶⁴ Rule 5.13. Failure to answer the information empowers the Supreme Court of Missouri “to enter an order disbar[ing] respondent without further hearing or proceeding.” *Id.*

⁶⁵ Rule 5.14(a), (e). Rule 68.03 addresses the use of “Masters in Appellate Courts,” including the circumstances of those masters’ appointments, their compensation, qualifications and powers, and the nature of any proceedings involving an appointed master.

⁶⁶ Rule 5.04. The pool of disciplinary hearing officers from which this selection is made must include at least “twenty-four lawyers and twelve nonlawyers.” *Id.* Members of the Advisory Committee also may serve as disciplinary hearing officers. *Id.*

⁶⁷ Rule 5.15(c). However, in disciplinary proceedings, “discovery [is] limited to requests for production of documents, requests for admissions, and depositions”; “[t]he rules of evidence for trials in the circuit courts [] apply”; and “[t]he burden of proof [is] on the informant to establish a violation of Rule 4 by a preponderance of the evidence.” *Id.*

⁶⁸ Rule 5.16(a)–(d). The chair of the Advisory Committee has the added responsibility of reviewing the decision of a disciplinary hearing panel “for the limited purpose of determining that the recommendation for discipline, if any, conforms to [] Rule 5 and the sanctions established by [the Supreme Court of Missouri.]” Rule 5.16(e).

⁶⁹ Rule 5.19(d)(1)–(3).

⁷⁰ Rules 5.19(d)(3), (e).

2. Sitting Judges

a. Authority of the Commission on Retirement, Removal, and Discipline

Article V of the Missouri Constitution requires that a six-member “commission on retirement, removal, and discipline” (Commission) be empanelled to “receive and investigate . . . all complaints concerning misconduct of all judges”⁷¹ The six persons serving on the Commission are: one judge of the court of appeals selected by a majority of the judges of the court of appeals, one judge of the circuit courts selected by a majority of the judges of the circuit courts, two lawyers appointed by the board of governors of The Missouri Bar, and two non-lawyers appointed by the governor.⁷²

The Commission must investigate any complaint alleging that a judge “has committed a crime or is guilty of misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency, or any offense involving moral turpitude, or oppression in office.”⁷³ Members of the Commission may, on their own initiative, file such complaints, however, the complaining Commission member must then recuse him/herself from the proceedings.⁷⁴ If an initial investigation by the Commission “shows probable cause for believing that there has been ‘misconduct,’ or any other offense proscribed by the Constitution,”⁷⁵ then a formal hearing commences “to determine whether discipline should be recommended.”⁷⁶

b. Formal Hearing

A formal hearing before the Commission must be conducted in accordance with both the rules governing the Missouri bar and the judiciary and the rules of evidence.⁷⁷ Furthermore, Rule 12 specifically governs the Commission’s formal proceedings and includes the powers of subpoena and deposition.⁷⁸

The judge, as respondent, is entitled to receive “a transcript of any oral evidence taken and any documentary evidence . . . acquired by [the Commission] during the course of [its] investigation,” so long as the identities of all informants are withheld.⁷⁹ Upon completion of

⁷¹ Mo. Const. art. V, sec. 24(1).

⁷² *Id.*

⁷³ Rule 12.07(a). The Commission need not investigate any complaint that is “obviously unfounded or frivolous.”

Id.

⁷⁴ See Rule 12.03 (“Any member of the Commission shall be disqualified to participate in any matter in which [s/]he has a personal interest. The appropriate authority shall appoint or select a substitute member to sit during such disqualification.”); see also *In re Elliston*, 789 S.W.2d 469 (Mo. banc 1990).

⁷⁵ *Elliston*, 789 S.W.2d at 472.

⁷⁶ *Id.* See also Rule 12.07(a)–(b).

⁷⁷ Rule 12.18.

⁷⁸ Rule 12.10; see also Rule 12.11. Rules 12.09 through 12.21, in particular, set forth various aspects to these hearings, including pleading requirements, the determination of venue, the taking of depositions or witness testimony, and recordkeeping and confidentiality requirements. See Rules 12.09–12.21. Separately, “[i]f no formal proceeding is instituted or if no recommendation is made by the Commission after a formal proceeding,” the record is sealed and available for inspection “only by order of [the Supreme Court of Missouri].” Rule 12.13.

⁷⁹ Rule 12.12. The identity of an informant may be disclosed “upon the order of [the Supreme Court of Missouri].” *Id.*

formal proceedings, the members of the Commission vote to determine whether the respondent is “guilty” and, if so, whether “such person should be removed from office, suspended from the performance of his[/her] duties for a period of time, or otherwise disciplined.”⁸⁰ If at least four members of the Commission find the respondent guilty and agree to the means by which the respondent ought to be reprimanded, then the matter is forwarded to the Supreme Court of Missouri for final resolution.⁸¹

c. Proceedings in the Supreme Court of Missouri

The Supreme Court of Missouri receives from the Commission “a transcript of the record of all evidence and of all proceedings . . . includ[ing] [the Commission’s] findings of fact and conclusions of law and recommendations.”⁸² The respondent may, within thirty days of receiving his/her copy of the transcript, “file a brief setting forth any objections [s/]he may have to the findings and recommendations of the Commission and argument in support thereof.”⁸³ The Commission may file an answer to the respondent’s brief within twenty days of the respondent’s filing, after which the respondent then has an additional ten days to file a reply.⁸⁴ If requested by the respondent, the Supreme Court of Missouri “set[s] the matter of the recommendations of the Commission for oral argument.”⁸⁵

After the respondent has had an opportunity to present his/her arguments to the Supreme Court of Missouri, the Court reviews the record, considers the recommendation of the Commission, and “make[s] such order as to respondent as it deems just.”⁸⁶

⁸⁰ Rule 12.07(c).

⁸¹ *Id.* See also Mo. Const. art. V, sec. 24(3).

⁸² *Id.*

⁸³ Rule 12.08.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Rule 12.07(c). Notably, Rule 12.07(c) empowers the Supreme Court of Missouri to discipline the respondent in a manner not recommended by the Commission, but the text of article V, section 24(3), of the Missouri Constitution is not explicit in granting the court such latitude: “Upon recommendation by an affirmative vote of at least four members of the commission, the supreme court en banc, upon concurring with such recommendation, shall remove, suspend, discipline or reprimand any judge of any court . . .” Mo. Const. art. V, sec. 24(3).

II. ANALYSIS

A. Recommendation #1

States should examine the fairness of their processes for the appointment and election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.

Examining the Fairness of the Appointment and Election Processes

The adoption of Missouri’s Nonpartisan Court Plan (the Plan) in November 1940 resulted from “a public backlash against the widespread abuses of the judicial system”⁸⁷ The expanded application of the Plan in the intervening decades suggests that Missourians have recognized the Plan’s usefulness in “reduc[ing] the role of politics in the election of judges” and its “help[fulness] [in] ensur[ing] the independence and integrity of the judiciary by shielding candidates from undue pressure.”⁸⁸

Furthermore, in 2005 The Missouri Bar accepted the report of its “Subcommittee to Evaluate the Effectiveness of the Missouri [Nonpartisan Court] Plan,” which concluded, generally, that the Plan “has been an effective method of selecting appellate judges in the state and the trial court judges in major population centers.”⁸⁹ The subcommittee cited several advantages of the Plan—as compared to judicial elections—in reducing the likelihood of actual impropriety as well as the appearance of impropriety.⁹⁰ In particular, the Plan reduces the influence of “money and special interest[] [pressures] [in] the selection process,” spares judicial candidates “the potentially compromising process of party-slating, raising money, and campaigning[,]” and largely eliminates the phenomenon of a judge presiding over cases “brought by attorneys who gave them campaign contributions.”⁹¹ Indeed, evidence of the Plan’s enduring appeal for Missourians may be taken from the fact that no circuit that has joined the Plan pursuant to section 25(b) of article V of the Missouri Constitution has since discontinued its participation, as well as from the fact that the most recent expansion of the Plan occurred only a few years ago when the voters of Greene County opted to “extend the [Plan] to its judges.”⁹²

⁸⁷ *Missouri Nonpartisan Court Plan*, YOUR MO. COURTS, <http://www.courts.mo.gov/page.jsp?id=297> (last visited Jan. 12, 2012).

⁸⁸ MO. BAR, VOTING FOR MISSOURI’S JUDGES (2011), available at http://www.mobar.org/uploadedFiles/Home/Publications/Legal_Resources/Brochures_and_Booklets/voting%20judges.pdf. For contrary views on the Plan’s usefulness in removing politics from judicial selection, see Brian Fitzpatrick, *The Politics of Merit Selection*, 74 Mo. L. Rev. 675 (2009); see also JACK W. PELTASON, *The Merits and Demerits of the Missouri Court Plan*, in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 95, 96 (Glenn R. Winters ed., 1973) (arguing that “[t]he effect of the Missouri Court Plan is not to take the courts out of politics, but to drive what politics exists underground.”).

⁸⁹ MO. BAR COMM’N ON THE IMPARTIALITY OF THE JUDICIARY, REPORT OF MISSOURI BAR COMMISSION ON THE IMPARTIALITY OF THE JUDICIARY 13 (2005) (on file with the author) [hereinafter MO. BAR REPORT].

⁹⁰ See *id.* at 13–15.

⁹¹ *Id.* at 14.

⁹² *Missouri Nonpartisan Court Plan*, YOUR MO. COURTS, <http://www.courts.mo.gov/page.jsp?id=297> (last visited Jan. 12, 2012).

Support for the Plan is not unanimous. The not-for-profit corporation Better Courts for Missouri, for example, disputes many of the advantages cited by proponents of the Plan—e.g., “[t]he [selection] process is non-partisan,” “selections are based on merit,” “[r]etention elections are a proper check”⁹³—and state legislators recently have introduced bills that propose reform or elimination altogether of the Plan.⁹⁴ In the end, however, the fact that legislators, associations, interest groups, and others are examining the Plan and reaching their own conclusions as to its effectiveness is encouraging. Furthermore, recent changes to the Plan’s operation—e.g., the 2010 announcement by the Chief Justice of the Supreme Court of Missouri “that applicants for judicial positions would no longer be confidential and that interviews would be held in public”—suggests additional scrutiny of the process by which judges receive their appointments.⁹⁵

As these contemporary developments indicate, government officials and other interested parties have been actively engaged, in recent years, in evaluating, discussing, and debating the fairness of Missouri’s systems for appointing and retaining and electing individuals to the state judiciary.

Educating the Public about the Importance of Judicial Independence

The bar associations of Missouri, St. Louis, and Kansas City have, since 1992, authored and disseminated a brochure that seeks to explain to the public the “two systems for electing judges” in Missouri as well as the merits of the Nonpartisan Court Plan, specifically.⁹⁶ According to that brochure, “[t]he Non-Partisan Court Plan is designed to reduce the role of politics in the election of judges. It helps ensure the independence and integrity of the judiciary by shielding candidates from undue pressure.”⁹⁷ Although the brochure concedes that Missourians unhappy with a judge’s record have the “right to vote against [a] judge when [s/he] is on the ballot for retention [or reelection],” it also stresses that “[j]udges are not elected to represent the opinions of voters” and that “[t]heir role is impartial.”⁹⁸ Judges “must decide who is right and who is wrong in each individual case by applying the facts and the law without favor to either side.”⁹⁹

Apart from this brochure, The Missouri Bar also accepted in 2005 the report of its “Subcommittee to Identify Ways to Further Educate the Bar and the Public About the Missouri [Nonpartisan Court] Plan,” which lists seventeen targets for an educational campaign designed to

⁹³ *Fact & Fiction*, BETTER CTS. FOR MO., <http://www.newmoplan.com/factfiction.aspx> (last visited Dec. 30, 2011). To be fair, proponents of the Plan do not necessarily make these exact claims. *See, e.g.*, MO. BAR REPORT, *supra* note 89, at 15 (finding that the Plan “supports and encourages merit selection, *but does not completely eliminate political influences*” (emphasis added)).

⁹⁴ *See, e.g.*, S. Res. 17, 96th Gen. Assem., 1st Reg. Sess. (Mo. 2011), *available at* http://www.senate.mo.gov/11info/BTS_Web/Bill.aspx?SessionType=R&BillID=4145298 (proposing Plan reforms that include, *inter alia*, changing the composition of selection commissions such that a majority of commissioners would be governor-appointed “citizens, not members of the bar”).

⁹⁵ Scott Lauck, *Under New Nomination Process, Fewer Candidates Seek Seat on Missouri Supreme Court*, MO. LAWYERS MEDIA, July 25, 2011. Chief Justice Price later explained that his decision partly was in response to “polls showing public support for a more open nomination process.” David A. Lieb, *Funding, Politics Trouble Missouri Courts, Price Says*, ST. LOUIS POST-DISPATCH, July 1, 2011, at A2.

⁹⁶ MO. BAR, VOTING FOR MISSOURI’S JUDGES (2011), *available at* http://www.mobar.org/uploadedFiles/Home/Publications/Legal_Resources/Brochures_and_Booklets/voting%20judges.pdf.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

maintain or improve statewide support for the Plan.¹⁰⁰ The report also describes several avenues for reaching this target audience, among them print, radio, television, and online media.¹⁰¹

To its credit, The Missouri Bar has acted on this report's recommendations across several fronts. In the past two years, for example, The Missouri Bar Speaker's Bureau arranged for its members to deliver over 160 public speeches in defense of the Missouri Nonpartisan Court Plan; likewise, presidents of The Missouri Bar have spoken on the same subject to Rotary, Kiwanis, and other service clubs.¹⁰² A wider audience also has been reached through radio and television spots, distributed to the Missouri Broadcasters Association and aired as part of that Association's public education program, as well as through both print and online resources.¹⁰³

Furthermore, evaluations of the appellate judicial evaluation committee, as well as the six circuit judicial evaluation committees, indirectly inform the public of the importance of an independent judiciary.¹⁰⁴ These evaluations are based on "performance standards" delineated in Rule 10.55, including "whether the judge is [d]eciding cases based on established facts and applicable law; [e]xplaining decisions clearly; [e]xhibiting proper courtroom demeanor; and [d]eciding cases promptly."¹⁰⁵

Ultimately, each committee must "[r]ecommend whether or not a judge should be retained and provide reasons for the retention recommendation," and its summary evaluations and recommendations must be released "to the public . . . on or before September 1 of an election year . . . in a manner designed to maximize the use of the information by the public."¹⁰⁶ By basing their recommendations on criteria that emphasize impartiality and professionalism, the seven judicial evaluation committees communicate to the public what ought to matter in

¹⁰⁰ MO. BAR REPORT, *supra* note 89, at 6. The seventeen targets include: (1) The general public; (2) the media and media groups; (3) Missouri attorneys; (4) local bar associations; (5) other lawyer groups (e.g., Association of Corporate Counsel); (6) judges (7) Missouri legislators; (8) political organizations at the state, county and local levels; (9) civic organizations and business groups at the state, county, and local levels; (10) issue-oriented groups; (11) churches and church organizations; (12) students in Missouri's four law schools; (13) faculty at Missouri's four law schools; (14) students in the other universities and colleges in Missouri; (15) faculty at the other universities and colleges in Missouri; (16) elementary and secondary school students; (17) elementary and secondary school faculty.

Id.

¹⁰¹ *Id.* at 7.

¹⁰² Telephone Interview by Ryan Kent with Jack Wax, Media Relations Dir., The Mo. Bar (Oct. 4, 2011) (on file with author).

¹⁰³ *Id.*

¹⁰⁴ *See* Rule 10.50. The appellate judicial performance committee consists of twelve members: "[T]wo members of The Missouri Bar from each district of the court of appeals and two citizens, not members of the Bar, from each district of the court of appeals." Rule 10.51(a). Each of the six circuit judicial evaluation committees consist of twelve members: "[S]ix members of The Missouri Bar who reside in the circuit and six citizens, not members of the Bar, who reside in the circuit." Rule 10.51(b). Finally, "[n]o member of any [judicial performance evaluation] committee [may] hold any public office or hold any official position in a political party." Rule 10.51(c).

¹⁰⁵ Rule 10.55(a)(2)(A)–(D). A more comprehensive list of the current standards used to evaluate selected judges may be found at the website of The Missouri Bar. *See Judicial Performance Standards*, MO. BAR, <http://www.mobar.org/data/judges10/standards.htm> (last visited Dec. 30, 2011).

¹⁰⁶ Rule 10.55(a)(5), (7). The Missouri Bar "and its affiliates" specifically are tasked with the publishing and disseminating the committees recommendations. Rule 10.55(a)(7).

measuring a judge's performance. Consequently, these committees play an important role in underscoring the importance of an independent—yet still accountable—state judiciary.¹⁰⁷

Conclusion

Missouri's state legislature, its organized bar, and other interested parties have, in recent years, actively and thoughtfully evaluated, discussed, and debated the merits of Missouri's judicial selection process. In addition, The Missouri Bar has made a commitment to continually educate the public regarding the importance of an independent judiciary, and it has fulfilled this commitment through public speeches, multimedia ad campaigns, and both print and online resources. The State of Missouri, therefore, is in compliance with Recommendation #1.

B. Recommendation #2

A judge who has made any promise—public or private—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.

The Missouri Code of Judicial Conduct explicitly prohibits “candidate[s], including [] incumbent judge[s]” from “mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.”¹⁰⁸ Once elected, members of the judiciary are bound, more generally, by Rule 2-2.3, which provides that “[a] judge shall perform judicial duties without bias or prejudice.”¹⁰⁹ The Code of Judicial Conduct prohibits judges from “mak[ing] any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make a nonpublic statement that might substantially interfere with a fair trial or hearing.”¹¹⁰ Furthermore, Rule 2-2.11 requires a judge to recuse him/herself if, “while a judge or a judicial candidate, [s/he] made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.”¹¹¹

A sitting judge who makes promises regarding his/her prospective decisions in capital cases contravenes the plain meaning of the Code and would be subject to a misconduct investigation.¹¹² Similarly, a non-incumbent judicial candidate who offers such promises would be subject to a misconduct investigation pursuant to Missouri Rules of Professional Conduct.¹¹³

¹⁰⁷ See also Mo. Lawyers Media Staff, *Missouri Bar Revamps Judicial Evaluation Process*, MO. LAWYERS MEDIA, Nov. 2, 2010; Brian Hamburg, *Judicial Panel Recommends, But You Decide*, SPRINGFIELD NEWS-LEADER, Oct. 29, 2010, at B5 (discussing the value of the Thirty-First Circuit Judicial Evaluation Committee).

¹⁰⁸ Rule 2-4.2(A)(3).

¹⁰⁹ Rule 2-2.3(A).

¹¹⁰ See Rule 2-2.10(A). The Code also prohibits judges from making, “in connection with cases, controversies, or issues that are likely to come before the court, [] pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” Rule 2-2.10(B).

¹¹¹ Rule 2-2.11(A)(4).

¹¹² *Id.*; see also Rule 12.07(a); Mo. Const. art. V, sec. 24(1).

¹¹³ Rule 5.08; Rule 4-8.2(b) (“A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.”).

Encouragingly, we have uncovered no instance in which a judicial candidate or judge has, publicly or privately, made promises regarding his/her prospective decision in a capital case. The Missouri Bar also should be commended for explaining to the public—through the same brochure it distributes regarding the state’s systems for electing judges—that “[j]udges must comply with a very strict code of professional conduct” and, therefore, that “[judges] are not allowed to make promises to voters, except for a promise to perform their duties impartially and faithfully.”¹¹⁴

Based on the above, the State of Missouri complies with Recommendation #2.

C. Recommendation #3

Bar associations and community leaders should speak out in defense of sitting judges who are criticized for decisions in capital cases, particularly when the judges are unable, pursuant to standards of judicial conduct, to speak for themselves.

- 1. Bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, particularly concerning the importance of understanding that violations of substantive constitutional rights are not “technicalities” and that judges and lawyers are bound to protect those rights of all defendants.**
- 2. Bar associations and community leaders publicly should oppose any questions of candidates for judicial appointment or re-appointment concerning the percentages of capital cases in which they upheld the death penalty.**
- 3. Purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.**

Missouri judges have received significant criticism for their handling of and decisions in capital cases.¹¹⁵ In 2004, for example, the Attorney General of Missouri complained that the Supreme Court of Missouri had “refuse[d]” to set execution dates at a pace preferred by the Attorney General.¹¹⁶ He was joined in this public criticism by the elected prosecutor of St. Louis County who stated that “in not setting execution dates . . . justice is not being carried out.”¹¹⁷ Additionally, judges on the Court have been disparaged for their decisions in death penalty cases.¹¹⁸

¹¹⁴ MO. BAR, VOTING FOR MISSOURI’S JUDGES (2011), available at http://www.mobar.org/uploadedFiles/Home/Publications/Legal_Resources/Brochures_and_Booklets/voting%20judges.pdf.

¹¹⁵ See, e.g., William C. Lhotka & Bob Adams, *Justices Rebuff Westfall*, ST. LOUIS POST-DISPATCH, Dec. 10, 1991, at 1A (recounting then-St. Louis County prosecutor George R. Westfall’s criticism of a Missouri Court of Appeals judge for finding that double jeopardy prevented additional charges against a one-time capital defendant, Dennis Bulloch, who was convicted of the lesser charge of involuntary manslaughter).

¹¹⁶ Tim O’Neil, *Pace of Executions Slows in State*, ST. LOUIS POST-DISPATCH, Oct. 10, 2004, at C01.

¹¹⁷ *Id.* In January 2005, Chief Judge Ronnie White of the Supreme Court of Missouri responded to this criticism by clarifying that the Court was taking “a more deliberative approach” to death penalty cases. Tim O’Neil, *Movement on Executions Heartens Prosecutors*, ST. LOUIS POST-DISPATCH, Apr. 25, 2005, at B1.

¹¹⁸ See, e.g., Bruce Fein, *Death Penalty Usurpations*, WASH. TIMES, Feb. 10, 2004, at A16 (criticizing Missouri Supreme Court Judge Laura Denvir Stith for her majority opinion in *State ex rel. Simmons v. Roper*, which held that the execution of individuals who were minors at the time of their capital offense was unconstitutional).

Two particularly high-profile instances in which judicial decision-making in death penalty cases led to robust, public criticism involve Missouri Supreme Court Judges Richard Teitelman and Ronnie White. In 2004, conservative groups and public officials, including Greene County prosecutor Darrell Moore, sought to oust Judge Teitelman from the Court in that year's retention election.¹¹⁹ Moore, in particular, declared publicly that he had urged voters to oust Teitelman "because part of the Supreme Court has taken it upon itself to impose an unofficial moratorium on the death penalty."¹²⁰ The campaign against Judge Teitelman also included recorded phone calls to Missouri households "urg[ing] [them] to vote against judges [up for retention or election] who . . . 'reduce the sentences of brutal murderers.'"¹²¹

Amid this effort to oust Judge Teitelman, Bar leaders spoke in favor of the judge's retention. The president of the Bar Association of Metropolitan St. Louis also observed that a voter's decision whether to retain "should not be based on a single case or a single issue. It should be based on his or her service to our legal system and whether, based on his total record, the judge has exhibited the necessary characteristics to serve on the bench."¹²² In addition, The Missouri Bar issued a press release before the election to highlight the threat posed to the independence of the judiciary by the campaign to oust Judge Teitelman.¹²³ Its president criticized interest groups for "impos[ing] their political issues and labels such as liberal or conservative on judges up for retention and [for] encourag[ing] their followers to vote against judges who do not fit their preferred profile."¹²⁴ Judge Teitelman's predecessor, Judge John Holstein, also publicly lauded his successor's qualifications for continued service on the Supreme Court of Missouri, adding: "I believe it is inappropriate to pick out one or two cases and judge anyone. You have to look at their whole career."¹²⁵

In the case of Judge White, his nomination to the federal bench met with significant opposition from United States Senator John Ashcroft, who stated on the floor of the United States Senate that Judge White had "a serious bias against . . . the death penalty," was "pro-criminal and activist, [and would] push [the] law in a pro-criminal direction," and had "a tremendous bent toward criminal activity."¹²⁶ Senator Ashcroft specifically cited Judge White's lone dissents in the death-penalty cases of *State v. Johnson* and *State v. Kinder*. In both dissents, Judge White urged that appellants be retried on their capital offenses.¹²⁷ Notably, at the time of the statements by Senator Ashcroft, Judge White's rate of affirmance in Missouri death penalty cases was almost 70%, which was "only marginally lower than the 75 percent to 81 percent averages" of

¹¹⁹ See Donna Walter, *Supporters Rally to Defense of Missouri Supreme Court Judge Richard B. Teitelman*, DAILY RECORD (Kansas City, Mo.), Nov. 1, 2004.

¹²⁰ William C. Lhotka, *High Court Judge Faces Ouster Effort*, ST. LOUIS POST-DISPATCH, Oct. 27, 2004, at D1.

¹²¹ Tim Hoover, *Conservative Groups Take Aim at Missouri Judge*, KANSAS CITY STAR, Oct. 28, 2004, at B3.

¹²² Walter, *supra* note 119 (internal quotations omitted).

¹²³ Donna Walter, *All Nonpartisan Court Plan Judges Retained in Missouri Election*, DAILY RECORD (Kansas City, Mo.), Nov. 5, 2004.

¹²⁴ Walter, *supra* note 119 (internal quotations omitted).

¹²⁵ Hoover, *supra* note 121.

¹²⁶ 145 CONG. REC. S11872 (daily ed. Oct. 4, 1999) (statement of Sen. Ashcroft); 145 CONG. REC. S11933 (daily ed. Oct. 5, 1999) (statement of Sen. Ashcroft).

¹²⁷ *Id.* See *State v. Johnson*, 968 S.W.2d 123, 136–38 (Mo. banc 1998) (White, J., dissenting); *State v. Kinder*, 942 S.W.2d 313, 340–42 (Mo. banc 1996) (White, J., dissenting).

other judges on the Supreme Court of Missouri “whom Ashcroft himself appointed when he was governor.”¹²⁸

It does not appear that bar associations and community leaders within Missouri spoke out in defense of Judge White for his decisions in capital cases. This passivity, however, may not be surprising in light of the reported sudden nature of the criticism of Judge White, which may not have provided—unlike the sustained campaign against Judge Teitelman’s retention in 2004—much of an opportunity to correct the record.¹²⁹

Following these criticisms of Judge Teitelman and Judge White, The Missouri Bar adopted in 2005 a plan for responding to certain disparagement of Missouri’s judges and courts.¹³⁰ The plan addresses both when action in response to criticism should be taken as well as the content and form of that response.¹³¹ Specifically, the Bar has made a commitment to answer “inaccurate or unjust criticism . . . through an organized public information program” in the following cases:

When the criticism is serious and will most likely have more than a passing or *de minimis* negative effect in the community; and

- (a) the criticism displays a lack of understanding of the legal system or the role of the judge and is based at least partially on such misunderstanding; or
- (b) the criticism is materially inaccurate and the inaccuracy is a substantial part of the criticism so that any response does not appear to deal with inconsequential issues.¹³²

Furthermore, the plan’s authors make explicit that, “[t]o be effective, the response must be prompt and accurate,” and that the content of a typical response may include mention of “[t]he need for impartial judges.”¹³³ Should this “Plan for Response to Criticism of Judges and Courts” be implemented in the future when the situations warrant, The Missouri Bar would deserve commendation for its efforts to maintain an independent and, consequently, effective state judiciary.

¹²⁸ Stuart Taylor, Jr., *A Character Assassin Should Not Be Attorney General*, NAT’L J., Jan. 13, 2001. See also Michelle Mittelstadt, *Judge Criticizes Ashcroft: He Says Nominee Distorted Record*, DALLAS MORNING NEWS, Jan. 19, 2001, at 1A.

¹²⁹ Recounting the confirmation process of Judge White, U.S. Senator Patrick Leahy noted that Judge White was twice nominated by President Clinton to fill a seat on the U.S. District Court. The Judiciary Committee held two hearings on his nomination [H]owever, his nomination was delayed for months and then years. When the time finally came for a vote on the Senate floor, Judge White was ambushed, and he was rejected in a party-line vote during which Republicans who had supported his nomination previously reversed position to scuttle it before the Senate.

150 CONG. REC. S7404–05 (daily ed. June 24, 2004) (statement of Sen. Leahy).

¹³⁰ See MO. BAR REPORT, *supra* note 89, at 3–5.

¹³¹ *Id.*

¹³² *Id.* at 3. The first requirement might be thought of as the *effect* prong—that is, for a response to be warranted, it must be probable that the criticism will negatively and substantially affect the community’s regard for the judiciary. The second requirement might be thought of as the *substance* prong—that is, for a response to be warranted, the criticism must suffer from a substantive defect, i.e., it is rooted in misunderstanding or inaccuracy.

¹³³ *Id.* at 4–5.

In light of The Missouri Bar's recent adoption of a plan to defend sitting judges who are criticized for their decisions in capital and non-capital cases, and recalling the bar's efforts to rebuff the partisan attacks against Judge Teitelman in 2004, the State of Missouri is in compliance with Recommendation #3.

D. Recommendation #4

A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure that the defendant receives a proper defense.

Recommendation #5

A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during a capital case should take immediate action authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.

Generally, Rule 2-2.15 of the Missouri Code of Judicial Conduct requires that a "judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action."¹³⁴ If a lawyer's violation of the Missouri Rules of Professional Conduct "raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects," then a judge having knowledge of that violation "shall inform the appropriate disciplinary authority" of the violation.¹³⁵

Broadly, the Missouri Rules of Professional Conduct impose upon lawyers a duty of competence: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."¹³⁶ Furthermore, judges also must consider the special responsibilities that determine what is proper conduct for prosecutors in criminal cases. Rule 4-3.8 delineates these responsibilities:

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

¹³⁴ Rule 2-2.15(D).

¹³⁵ Rule 2-2.15(B).

¹³⁶ Rule 4-1.1. The commentary to this Rule identifies as "relevant factors" for determining competence "the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, [and] the preparation and study the lawyer is able to give the matter" Rule 4-1.1 cmt. Regarding death penalty cases, this commentary also cautions that "[t]he required attention and preparation are determined in part by what is at stake; major litigation . . . ordinarily require[s] more extensive treatment than matters of lesser complexity and consequence." *Id.*

- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing [and absent an exception],¹³⁷ disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor . . . ;
- ...
- (f) . . . refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused, and exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making

State judges become familiar with their obligations under the Missouri Code of Judicial Conduct, as well as with the responsibilities of defense counsel and prosecutors, through a variety of required and elective judicial education programs. For example, in new judge orientation, a mandatory week-long program that “covers core information essential to new trial judges,”¹³⁸ almost an entire day is devoted to courtroom management issues—for example, setting lawyers’ expectations with respect to professionalism and decorum.¹³⁹

In addition, continuing education programs offered through Judge College—a biannual, week-long program regularly attended by large numbers of the state judiciary—and trial skills seminars—annual, two-day “intensive seminar[s]” that “explore issues that [have an] impact [on] trial judges”—have focused, with varying degrees of specificity, on issues related to judicial ethics, professionalism, and capital cases.¹⁴⁰ Issues specific to capital cases, however, typically are not a major focus of Judge College programs; indeed, the last program to have focused on capital cases occurred in 1996.¹⁴¹

Despite these rules and trial court judges’ advantageous position for enforcing them, defendants in Missouri death penalty trials have been subject to prosecutorial misconduct as well as

¹³⁷ The exception to Rule 4-3.8(d) “recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.” Rule 4-3.8 cmt. 4.

¹³⁸ *Trial Judge Education*, YOUR MO. COURTS, <http://www.courts.mo.gov/page.jsp?id=2481> (last visited Jan. 12, 2012). See generally Mo. Const., art. V, sec. 5 (“The [S]upreme [C]ourt [of Missouri] may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals”); Mo. Const., art. V, sec. 8 (“The chief justice of the [S]upreme [C]ourt [of Missouri] shall be the chief administrative officer of the judicial system and, subject to the supervisory authority of the supreme court, shall supervise the administration of the courts of [Missouri].”). See also section 477.010, RSMo 2011 (granting “[t]he [S]upreme [C]ourt [of Missouri] . . . the power . . . to promulgate general rules for all courts of the state”).

¹³⁹ Telephone Interview by Ryan Kent with Pat Hubbs, Educ. Programs Specialist, Office of State Courts Adm’r (Aug. 18, 2011) (on file with author).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

ineffective assistance of defense counsel.¹⁴² Since reinstating the death penalty in 1977, at least twenty-eight of 145 death sentences have been reversed on direct appeal or during post-conviction proceedings; nine of these reversals were based in whole or in part on prosecutorial misconduct or ineffective assistance of counsel.¹⁴³ The rate of death sentence reversals in the state suggests that trial courts have, at times, failed to take effective and proactive steps to ensure the fairness of capital proceedings, in which the stakes are, for the accused, especially high.

Not every instance of reversible error is owed to a presiding judge's inattention and the Missouri Assessment Team is mindful that one judge's error ought not to be ascribed to the judiciary as a whole. In *Taylor v. State*, for instance, the prosecution failed to disclose evidence in a capital case that "plainly was within the scope of the disclosure required by the [discovery] rules" and manifestly ignored the trial judge's disclosure order.¹⁴⁴ This conduct came to light only at an evidentiary hearing during post-conviction proceedings.¹⁴⁵ Other cases have seen judges criticize prosecutors for questionable conduct. For example, in 2006 a circuit court judge admonished prosecutors for "telling the defense they would not seek execution and later announcing they would."¹⁴⁶

Trial courts have not, however, always taken corrective action upon observing prosecutorial misconduct in capital cases. For example, in *State v. Rhodes*, the court overruled repeated objections by defense counsel against the prosecutor's "[a]sking the jurors to put themselves in [the victim's] place, then graphically detailing the crime as if the jurors were the victims."¹⁴⁷ This, the Supreme Court of Missouri found, "could only arouse fear in the jury" and was "grossly improper."¹⁴⁸ Likewise, in *State v. Taylor*, the Court reversed the trial judge's overruling of defense counsel's objection during penalty phase closing arguments, an objection that arose when the prosecutor exhorted the jurors to "put [their] emotion into [the sentencing decision]," adding: "Now it is time that you can show your outrage. Now it is time to get mad. You can get mad at [defendant]."¹⁴⁹ Moreover, "because the [trial] court overruled the objection to the criticized language," the Supreme Court of Missouri cautioned that "the appeal to emotion had the stamp of approval of the trial court."¹⁵⁰

The U.S. Court of Appeals for the Eighth Circuit also has had to intervene to remedy the effects of improper argument in Missouri capital cases. For instance, in *Shurn v. Delo*, the Court of Appeals reversed a Missouri death sentence due to an improper closing argument by the

¹⁴² For a discussion of issues related to prosecutors and defense counsel, see Chapter Five on Prosecutorial Professionalism and Chapter Six on Defense Services.

¹⁴³ See *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989); *State v. Whitfield*, 837 S.W.2d 503 (Mo. banc 1992); *Antwine v. Delo*, 54 F.3d 1357 (8th Cir. 1995); *Driscoll v. Delo*, 71 F.3d 701 (8th Cir. 1995); *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995); *State v. Taylor*, 944 S.W.2d 925 (Mo. banc 1997); *State v. Rhodes*, 988 S.W.2d 521 (Mo. banc 1999); *Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999); *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006).

¹⁴⁴ *Taylor v. State*, 262 S.W.3d 231, 240–41 (Mo. banc 2008).

¹⁴⁵ *Id.*

¹⁴⁶ Joe Lambe, *Execution Can Be Pursued in 'Doe' Case: Judge's Ruling Comes with Rebuke for Prosecutors*, KANSAS CITY STAR, Feb. 11, 2006, at B2.

¹⁴⁷ *Rhodes*, 988 S.W.2d at 529 (internal quotations omitted).

¹⁴⁸ *Id.*

¹⁴⁹ *Taylor*, 944 S.W.2d at 937–38.

¹⁵⁰ *Id.* at 938.

prosecutor, an argument in which he “emphasized [his] position of authority and expressed his personal opinion on the propriety of the death sentence,” “attempted to link [the defendant] with Charles Manson, a well-known mass murder,” and “appealed to the jurors’ fears and emotions.”¹⁵¹

Other cases raise concerns regarding trial courts’ attentiveness with respect to defense counsel assistance. In *State v. Storey*, for example, the Supreme Court of Missouri reversed appellant’s death sentence upon finding trial counsel ineffective for failing to object to the “egregious errors” in the prosecutor’s argument, which included “arguing facts outside the record, personalizing the argument, and misstating the law.”¹⁵²

Furthermore, in *Knese v. State*, defense counsel failed to review the questionnaires completed by some of the prospective jurors, including two prospective jurors who eventually were selected to the jury. Both of these prospective jurors expressed, in those questionnaires, strident opinions on crime and the death penalty. Specifically, one prospective juror—later the jury’s foreperson—expressed his belief that laws are “way too soft” on criminals and that executions should be made public; the other expressed his disfavor toward “endless appeals,” “parole boards,” “good time,” and “clergy to pamper a killer,” adding: “[I]f he is found guilty, do it.”¹⁵³ Although it is not common practice in Missouri for trial court judges to review these questionnaires,¹⁵⁴ judges should not exclusively rely on defense counsel, particularly in cases where the gravity of the charged offense makes a death sentence possible, to ensure that prospective jurors are fit to serve on the jury. The added effort to review these questionnaires by the presiding judge in *Knese v. State* would thereby have led to Randall Knese receiving a better defense and, moreover, obviated the later reversal in his case.

Missouri trial courts may take special measures to ensure that capital defendants receive an effective defense and a fair trial, and the occurrence of ineffective lawyering and unfair prosecutorial conduct in capital cases raises questions as to whether judges always are taking enough precautions to ensure the fairness of the proceedings.¹⁵⁵ Nevertheless, given the inherent difficulty in assessing judicial vigilance in every courtroom and across all cases, the Missouri Assessment Team has insufficient information to determine Missouri’s compliance with Recommendations #4 and #5.

¹⁵¹ *Shurn v. Delo*, 177 F.3d 662, 666 (8th Cir. 1999) (referring to *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989)). To its credit, the trial court did sustain defense counsel’s objection during the prosecutor’s guilt-phase closing argument in which he improperly stated, “I do have the strongest evidence.” *State v. Shurn*, 866 S.W.2d 447, 461 (Mo. banc 1993). See also *Weaver v. Bowersox*, 438 F.3d 832, 842 (8th Cir. 2006) (“[T]here can be no interpretation of the inflammatory remarks by the prosecutor that is reasonable under the various applicable United States Supreme Court precedents.”).

¹⁵² *State v. Storey*, 901 S.W.2d 886, 902 (Mo. banc 1995).

¹⁵³ *Knese v. State*, 85 S.W.3d 628, 631–32 (Mo. banc 2002).

¹⁵⁴ Email Interview by Ryan Kent with Karen Kraft, Div. Dir., Mo. State Pub. Defender (Aug. 18, 2011) (on file with author).

¹⁵⁵ In addition to the cases discussed, the Supreme Court of Missouri also has found prosecutorial misconduct or ineffective assistance of defense counsel in specific capital cases, but it determined that the errors were neither prejudicial nor manifestly unjust. For example, in *State v. Taylor*, the Court held that the prosecutor should not have expressed his personal reasons for selecting the state’s witnesses, but this impropriety did not amount to “manifest injustice” and, thus, did not warrant reversing appellant’s conviction or death sentence. *State v. Taylor*, 944 S.W.2d. 925, 936 (Mo. banc 1997).

Ultimately, judges must remain aware of the greater complexity and higher stakes that come with any capital case. As Recommendations #4 and #5 suggest, special vigilance on the part of the trial court often is necessary to ensure that a capital defendant receives a fair trial and that a just outcome is obtained. The Missouri Assessment Team therefore recommends that routine, adequate training be made available to trial judges as to the particular issues relevant to capital litigation. Facilitated by the Office of State Courts Administrator, this training also should emphasize to judges the corrective action a trial court ought to take whenever it observes ineffective lawyering or unfair prosecutorial conduct. The Team also recommends that Missouri adhere to Recommendation #6 below, which provides trial courts with an effective mechanism to help ensure the fairness of death penalty trials and outcomes.

E. Recommendation #6

Judges should do all within their power to ensure that defendants are provided with full discovery in all capital cases. Trial courts should conduct, at a reasonable time prior to a criminal trial, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under the applicable discovery rules, statutes, ethical standards, and the federal and state constitutions and to offer the court’s assistance in resolving disputes over disclosure obligations.

The State of Missouri does not explicitly require its judges to ensure that defendants in death penalty cases are provided with full discovery.¹⁵⁶ The prosecution and the defendant, however, have disclosure obligations under Rule 25 of the Missouri Rules of Criminal Procedure.¹⁵⁷ Specifically, Rules 25.03 and 25.05 require disclosure by the prosecution and the defendant, respectively, of specified materials and information without resort to court orders.¹⁵⁸ Rules 25.04 and 25.06, by contrast, require the prosecution and the defendant to disclose all other requested materials and information “[i]f the court finds the request to be reasonable.”¹⁵⁹ Furthermore, judges have a responsibility, under Rule 2-2.2 of the Missouri Code of Judicial Conduct, to “perform all duties of judicial office promptly, efficiently, fairly and impartially.”¹⁶⁰ The comment to this rule elaborates on the requirement: “In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay.”¹⁶¹ Thus, a judge must ensure that defendants, whether in capital cases or otherwise, are provided with discovery consistent with their rights under Missouri and federal law.¹⁶²

While Missouri is commended for promulgating these rules and for tasking its judges with enforcing the rules’ disclosure requirements, failure to comply fully with these rules does not in every instance compel sanctions. In *State v. Royal*, for example, the prosecution failed to

¹⁵⁶ *State v. Jaco*, 156 S.W.3d 775, 781 (Mo. banc 2005).

¹⁵⁷ *See* Rules 25.03–25.06.

¹⁵⁸ Rules 25.03(a), 25.05(a).

¹⁵⁹ Rules 25.04(a), 25.06(a). Rule 25.06 qualifies the disclosure obligations of the defendant as “[s]ubject to constitutional limitations.” *Id.* *See also* Rule 25.08 (imposing on all parties a continuing duty to disclose).

¹⁶⁰ Rule 2-2.2.

¹⁶¹ Rule 2-2.2 cmt. 1.

¹⁶² *See also* Rule 25.18 (empowering a trial court to issue sanctions—e.g., “order disclosure of material and information not previously disclosed, grant a continuance, exclude [] evidence”—should “a party ha[ve] failed to comply with an applicable discovery rule or an order issued pursuant thereto”).

disclose to the defense the prosecution’s knowledge of statements made by a capital defendant to a law enforcement official; the first defense counsel learned of these statements was during the prosecutor’s opening argument when the prosecutor described the law enforcement official’s anticipated testimony.¹⁶³ Finding that the defendant was not prejudiced by the prosecution’s failure to disclose, the trial court declined to take remedial measures.¹⁶⁴

As to pretrial conferences, Missouri courts are not required under state law to conduct such conferences. However, “[a]t any time after the filing of the indictment or information the court[,] upon motion of any party or upon its own motion[,] may order one or more conferences to consider such matters as will promote a fair and expeditious trial,” and these matters arguably can include establishing the parties’ awareness of their respective disclosure obligations.¹⁶⁵ We were unable to determine, however, if and to what extent pretrial conferences to ensure full compliance with discovery obligations occur in Missouri capital cases.

Given that no rule exists to compel Missouri’s judges to conduct a pretrial conference in capital cases to ensure that counsel is aware of their disclosure obligations, and in light of past failures by counsel to uphold their disclosure obligations without the later imposition of remedial measures, the State of Missouri only partially meets the requirements of Recommendation #6.

Ultimately, the Missouri Assessment Team recommends that Missouri adopt a procedure whereby a criminal trial court shall conduct, at a reasonable time prior to a capital trial, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under applicable discovery rules, statutes, ethical standards, and the federal and state constitutions. A further purpose for this conference would be to offer the court’s assistance in resolving disputes over disclosure obligations; it also will permit the court to monitor the status of discovery in a capital case to ensure proper and timely disclosure.¹⁶⁶ It also may ease the burden on post-conviction courts seeking to determine whether the prosecution had knowledge of the existence of discoverable or *Brady*¹⁶⁷ material, yet failed to disclose it.¹⁶⁸

¹⁶³ *State v. Royal*, 610 S.W.2d 946, 951 (Mo. banc 1981). A trial court’s decision not to impose sanctions for failure to disclose constitutes an abuse of discretion “only where the admittance of the evidence results in a fundamental unfairness to the defendant. The notion of fundamental unfairness in turn is to be measured by whether the evidence or the discovery thereof would have affected the result of the trial.” *Id.* (internal citations omitted).

¹⁶⁴ *Id.* at 952–53.

¹⁶⁵ Rule 24.12. Counsel might be reminded, for example, of their obligations under Rule 4-3.4(a): “[A lawyer shall not] unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act” Rule 4-3.4(a).

¹⁶⁶ See ABA, RECOMMENDATION 102D, 2010 Midyear Mtg. (adopted Feb. 8–9, 2010), available at <http://www.abanow.org/wordpress/wp-content/themes/ABANow/wp-content/uploads/resolution-pdfs/MY2010/102D.pdf>.

¹⁶⁷ *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁶⁸ See, e.g., *Taylor v. State*, 262 S.W.3d 231, 243–45 (Mo. banc 2008) (finding a *Brady* violation due to the prosecution’s failure to comply with a trial court order mandating disclosure of all correspondences from a potential state’s witness who sought leniency in exchange for his testimony against the defendant); see also *Missouri Releases Inmate after Conviction in 1992 Murder Is Overturned*, KANSAS CITY STAR, Feb. 19, 2009, at B5 (reporting the release of Joshua Kezer, convicted of second-degree murder, and the sharp criticism of Special Prosecutor Hulshof for “improperly with[holding] several key pieces of evidence from Kezer’s defense attorneys”). See also *id.* (detailing questionable prosecutorial practices by current Jackson County Prosecutor Kevin Harrell and former prosecutors Dan Miller and Nels Moss).

CHAPTER TWELVE

RACIAL AND ETHNIC MINORITIES

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

In the past twenty-five years, numerous studies evaluating decisions to seek and to impose the death penalty have found that race is too often a major explanatory factor. Nationwide, most of the studies have found that, after controlling for other factors, the death penalty is sought and imposed significantly more often when the murder victim is white than when the victim is black. Studies also have found that, in some jurisdictions, the death penalty has been sought and imposed more frequently in cases involving black defendants than in cases involving white defendants. In some U.S. jurisdictions, the death penalty appears to be most likely in cases in which the victim is white and the perpetrator is black.

In 1987, the Supreme Court of the United States held in *McCleskey v. Kemp*¹ that even if statistical evidence revealed systemic racial disparity in capital cases, this showing would not amount to a federal constitutional violation in and of itself. At the same time, the Court invited legislative bodies to adopt legislation to deal with situations in which there is systematic racial disparity in the death penalty's implementation.

The pattern of racial disparity reflected in *McCleskey* persists today in many jurisdictions, in part because courts may tolerate actions by prosecutors, defense lawyers, trial judges, and juries that may improperly inject race into capital trials. These include intentional or unintentional prosecutorial bias when selecting cases in which to seek the death penalty, ineffective defense counsel who fail to object to systemic discrimination or to pursue discrimination claims, and discriminatory use of peremptory challenges to obtain all-white or largely-white juries.

There is no dispute about the need to eliminate race as a factor in the administration of the death penalty. To accomplish this goal, however, society must identify the various ways in which race affects the administration of the death penalty and devise solutions to eliminate discriminatory practices.

¹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

I. FACTUAL DISCUSSION: A MISSOURI OVERVIEW

The issue of racial and ethnic discrimination in the administration of capital punishment was brought to the forefront of the death penalty debate by the U.S. Supreme Court's decision in *McCleskey v. Kemp*.² Relying on a study conducted by David Baldus, Charles Pulaski, and George Woodworth, McCleskey challenged the constitutionality of Georgia's capital sentencing process by arguing that it was applied in a racially discriminatory manner.³ Specifically, after controlling for 230 variables, the Baldus study showed that blacks convicted of killing whites faced the greatest likelihood of receiving the death penalty, while whites convicted of killing blacks were rarely sentenced to death.⁴ The Court rejected McCleskey's claims, finding that the data showing racial discrepancies in the administration of the death penalty did not prove the existence of intentional racial discrimination in McCleskey's case.⁵

The *McCleskey* decision invited legislatures to develop remedies for eliminating race from the capital sentencing process.⁶ In 1994, the Missouri Sentencing Advisory Commission (MOSAC) was created in order to "study and examine sentencing disparity among economic and social classes in relation to the sentence of death . . . [and] compile statistics, examine cases, draw conclusions, and perform other duties relevant to the research and investigation of disparities in death penalty sentencing among economic and social classes."⁷ In 2005, MOSAC released the first of three biennial reports to include statistical information on capital sentencing within the state, the third of which was released in 2009.⁸ Missouri has also examined racial disparities within its juvenile justice system and gender inequities in the Missouri court system, generally.

MOSAC also releases annual *Profiles of the Institutional and Supervised Offender Population (Profiles)*, which include figures on Missouri death penalty administration as well as the criminal justice system generally.⁹ The *Profiles* includes information on sentences for first-degree

² *Id.*

³ *Id.* at 286.

⁴ *Id.* at 287, 291–92. In its 1990 review of twenty-eight studies conducted at the national, state, and local levels as to whether race was a factor influencing death penalty sentencing, the U.S. General Accounting Office relied on studies conducted, at least in part, in Missouri. See U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES app. I (1990) (citing William Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); William Bowers & Glenn Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, CRIME & DELINQUENCY, Oct. 1980, at 563).

⁵ *McCleskey*, 481 U.S. at 297.

⁶ *Id.* at 319 ("McCleskey's arguments are best presented to the legislative bodies. . . . Legislatures [] are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts,'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976))).

⁷ Section 558.019.8(2), RSMo 1993 (establishing the commission and delineating its responsibilities).

⁸ See MO. SENTENCING ADVISORY COMM'N, 2005 BIENNIAL REPORT 66–69 (2005), available at <http://www.mosac.mo.gov/file.jsp?id=45399> [hereinafter 2005 BIENNIAL REPORT]; MO. SENTENCING ADVISORY COMM'N, 2009 BIENNIAL REPORT 36–40 (2009), available at <http://www.mosac.mo.gov/file.jsp?id=45433> [hereinafter 2009 BIENNIAL REPORT].

⁹ MO. DEP'T OF CORR., A PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION ON JUNE 30, 2008, at 55–56 (Apr. 22, 2009), available at <http://www.mosac.mo.gov/file.jsp?id=45341> [hereinafter 2009 OFFENDER POPULATION PROFILE]. See also MO. DEP'T OF CORR., A PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION ON JUNE 30, 2007 (Jan. 14, 2008), available at <http://www.mosac.mo.gov/>

murder, statistical estimates on incarceration rates, demographics on inmate populations by race and other categories, and changes in the racial composition of the population.¹⁰ MOSAC's statistical updates provide similar information including, but not limited to, Missouri incarceration rates and sentencing dispositions by race and by type of offense.¹¹

In 1990, the Supreme Court of Missouri also established a Gender and Justice Task Force (Task Force), with members appointed by the Supreme Court of Missouri and The Missouri Bar, to conduct an assessment of gender bias in Missouri courts.¹² The Task Force held hearings and conducted an extensive survey of lawyers, court officials, and judges throughout the state over three years.¹³ The 348-page report included a number of recommendations on a range of issues.¹⁴

Finally, in order to combat the effects of racial discrimination within the state's juvenile justice system, the General Assembly adopted legislation setting standards for judges who preside over cases involving juvenile defendants and who must decide whether to transfer those cases to adult court.¹⁵ Specifically, the Juvenile Crime and Crime Prevention Bill of 1995 sought to compel "judges to think about the issue [of racial disparity when] making the decision [to transfer juvenile cases to adult court]."¹⁶ Pursuant to this legislation, the Missouri Office of State Courts Administrator (OSCA) must biennially review a sampling of juvenile cases to identify whether ethnic and gender inequity exists in Missouri juvenile court decisions.¹⁷ OSCA contracted with the National Council on Crime and Delinquency to conduct the review and released a report with recommendations to further the statute's goals.¹⁸ OSCA released its preliminary findings in

file.jsp?id=45419; MO. DEP'T OF CORR., A PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION ON JUNE 30, 2006 (rev. Apr. 3, 2007), *available at* <http://www.mosac.mo.gov/file.jsp?id=45418>; MO. DEP'T OF CORR., A PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION ON JUNE 30, 2005 (Jan. 3, 2006), *available at* <http://www.mosac.mo.gov/file.jsp?id=45417>.

¹⁰ 2009 OFFENDER POPULATION PROFILE, *supra* note 9, at 10, 21, 45, 55–57 (providing information—for example, "Sentences for Murder 1st Degree and the Death Penalty, FY1991–FY2008 By Race"—indicating that 7.6% of blacks that were sentenced for first-degree murder received the death penalty and 13.1% of whites sentenced for first-degree murder received the death penalty).

¹¹ *See, e.g.*, MO. SENTENCING ADVISORY COMM'N, FISCAL YEAR 2005 STATISTICAL UPDATE TO THE JUNE 2005 RECOMMENDED SENTENCE REPORT 7–8 (Oct. 14, 2005), *available at* <http://www.mosac.mo.gov/file.jsp?id=45361>; MO. SENTENCING ADVISORY COMM'N, FISCAL YEAR 2006 STATISTICAL UPDATE TO THE JUNE 2005 RECOMMENDED SENTENCE REPORT 10–11 (Apr. 12, 2007), *available at* <http://www.mosac.mo.gov/file.jsp?id=45362>.

¹² MO. TASK FORCE ON GENDER & JUSTICE, REPORT OF THE MISSOURI TASK FORCE ON GENDER AND JUSTICE (1993) [hereinafter GENDER AND JUSTICE REPORT]. Virginia Young, *Courts Treat Women Unfairly, Study Says But Situation Is Improving, Panel Finds*, ST. LOUIS POST-DISPATCH, June 23, 1993, at A1.

¹³ Young, *supra* note 12, at A1.

¹⁴ *Id.*

¹⁵ Section 211.141.5, RSMo 1995; section 211.326.6, RSMo 1995 ("Standards, training and assessment forms . . . shall be developed considering racial disparities in the juvenile justice system."); MO. OFFICE OF STATE CT. ADM'R, ETHNIC AND GENDER EQUITY IN MISSOURI JUVENILE COURT DECISIONS: PRELIMINARY FINDINGS (2004), *available at* <http://www.courts.mo.gov/file.jsp?id=1740> [hereinafter ETHNIC AND GENDER EQUITY PRELIMINARY FINDINGS].

¹⁶ ETHNIC AND GENDER EQUITY PRELIMINARY FINDINGS, *supra* note 15, at 1; Kenneth J. Cooper, *Despite Law on Racial Disparities, Black Teens Are Overly Tried as Adults*, ST. LOUIS BEACON, May 10, 2011, <http://www.stlbeacon.org/region/110017-black-teens-disproportionately-tried-as-adults> (last visited Jan. 30, 2012).

¹⁷ Section 211.141.5, RSMo Supp. 1995 ("[J]uvenile officers and juvenile courts, shall at least biennially review a random sample of assessments of children and the disposition of each child's case to recommend assessment and disposition equity throughout the state . . .").

¹⁸ ETHNIC AND GENDER EQUITY PRELIMINARY FINDINGS, *supra* note 15.

2004 and again released data in 2011.¹⁹ Ultimately, the 2011 data illustrated “an increasingly disproportionate number of African-American juveniles in adult courts,” a result that occurs despite the requirement that judges consider racial disparity when deciding whether to transfer a juvenile case to adult court.²⁰

¹⁹ See *id.*; Cooper, *supra* note 16.

²⁰ Cooper, *supra* note 16 (describing that, in 2009, 64% of Missouri juveniles tried as adults were black, nearly twice the 2001 level of 36%; for context, black youth make up 15% of the state’s population under juvenile court jurisdiction).

II. ANALYSIS

A. Recommendation #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.

Missouri compiles data on the race of capital defendants in the state. In addition, investigations into Missouri's criminal justice system have included biennial research on the impact of racial discrimination on the juvenile justice system, as well as an examination by the Supreme Court of Missouri's Gender and Justice Task Force on gender bias in the court system. The state has also enacted some initiatives to combat racial discrimination in the criminal justice system. Finally, independent studies by social science researchers have more fully examined the effect of the race of the defendant and victim on capital charging and sentencing in Missouri.

State-based Investigations on Racial Discrimination in the Criminal Justice System

Pursuant to Missouri law, the Missouri Sentencing Advisory Commission (MOSAC) compiled statistical information on the race of capital defendants in 2005, 2007, and 2009.²¹ MOSAC's biennial reports include a section titled "Death Penalty Sentencing," which analyzes "recent trends in prison admissions for murder, including sentences that require the death penalty, and provides measures that identify racial and geographic disparity in the application of capital punishment."²² For example, the 2009 biennial report found that black Missouri capital defendants "are eleven times more likely to be convicted of murder than Other Races," while "Other Races are more likely to be convicted of [first-degree] Murder [] and to receive the death penalty than Blacks."²³ The 2005 biennial report drew similar conclusions, specifically, that while "African-Americans have a much higher commitment rate for murder, . . . the evidence suggests that African-Americans are less likely to be sentenced either to the death penalty or to [first-degree] Murder."²⁴

Notably, MOSAC's 2005 biennial report stated that "[b]ecause statistical analysis did not include any severity of offense, prior criminal history or demographic factors, the conclusions should be considered as subject to more detailed investigations."²⁵ For example, while the biennial reports analyze racial disparities by race of the defendant, neither MOSAC nor any other state-based entity has examined the effect of race of the victim in capital charging and sentencing decisions in Missouri.

²¹ See Factual Discussion, *supra* notes 7–8 and accompanying text; section 558.019.6, RSMo 2011.

²² 2009 BIENNIAL REPORT, *supra* note 8, at 36–40.

²³ 2009 BIENNIAL REPORT, *supra* note 8, at 39 ("From FY85 to FY97 11.6% of Blacks convicted of Murder 1st degree received the death sentence compared to 20.4% of Other Races. In the period FY98-FY09 4.4% of Blacks convicted of Murder 1st degree received the death sentence compared to 9.5% of Other Races. Although the percent of offenders receiving the death sentence has declined the difference between Other Races and Blacks has increased as a ratio from 1.75 to 2.15. Since FY98 Other Races convicted of Murder 1st degree are more than twice as likely to receive the death sentence than Blacks.").

²⁴ 2005 BIENNIAL REPORT, *supra* note 8, at 68–69.

²⁵ *Id.* at 69 (emphasis in original).

Missouri has undertaken a more comprehensive review of the impact of racial discrimination in other segments of the criminal justice system. For example, the Missouri Office of the State Court's Administrator (OSCA) reviewed literature published on racial disparities within its juvenile justice system, including juvenile court dispositions in seventeen of Missouri's forty-five judicial circuits, and it issued a report on its findings in 2004.²⁶ Its assessment included 5,561 youths referred to OSCA for delinquent or status offenses, which is every youth referred between August 15 and September 30, 2003, within the participating counties, designated by race, ethnicity, gender, case disposition, seriousness of the offense, number of prior offenses, and other characteristics.²⁷ After isolating "the influence of each independent characteristic . . . by controlling for all of the other [case] attributes," researchers then drew conclusions on when decisions differed for youths by gender and ethnicity.²⁸ The study recommended institutional changes to the juvenile justice system and encouraged additional research into ethnicity- and gender-based biases within the system.²⁹

In 1990, the Supreme Court of Missouri established the Gender and Justice Task Force (Task Force), with members appointed by the Supreme Court of Missouri and The Missouri Bar, to conduct a major assessment of gender bias in the Missouri criminal justice system.³⁰ The Task Force held hearings and conducted extensive surveys of lawyers, court officials, and judges throughout the state over three years.³¹ The 348-page report included a number of recommendations on a range of issues, and the Task Force notably recommended that a similar study group on race and justice should be established.³² To date, however, no such task force has been created.

Independent Studies of Racial Discrimination in Missouri's Death Penalty System

There have been a number of independent studies on the impact of racial discrimination in Missouri's system of capital punishment. Although the questions at-issue and methodologies used in these studies differ, their various findings support the conclusion that Missouri's capital punishment system is not free from the influence of race and that racial considerations may play a role in determining outcomes in capital cases. Specifically, the studies' findings tend to show that racial factors influence (1) the prosecutor's initial charging decision; (2) the prosecutor's decision to move forward with a capital trial; and (3) the jury's decision to sentence the defendant to death.³³

²⁶ *Id.*; ETHNIC AND GENDER EQUITY PRELIMINARY FINDINGS, *supra* note 15, at 2, 5.

²⁷ *Id.* at 4–6 ("Since the purpose of the study was to assess juvenile dispositions, referrals where the disposition was unknown because of transfer or missing data had to be excluded from the analysis.").

²⁸ *Id.* at 37.

²⁹ *Id.* at 38–39.

³⁰ GENDER AND JUSTICE REPORT, *supra* note 12. Young, *supra* note 12, at A1.

³¹ Young, *supra* note 12, at A1 (over 150 people testified at six hearings and sent surveys, which had a response rate of 17% for lawyers, 20% for court personnel, and 42% for judges).

³² GENDER AND JUSTICE REPORT, *supra* note 12, at 347.

³³ An examination by Jonathan Sorensen and Donald Wallace of all identified homicide cases from 1977 through 1991 also examined whether the prosecutor's decision to move forward to the capital penalty phase upon obtaining a conviction is affected by racial considerations. Jonathan R. Sorensen & Donald H. Wallace, *Capital Punishment in Missouri: Examining the Issue of Racial Disparity*, 13 BEHAV. SCI. & L. 61, 72 (1995).

Although this research, discussed below, indicates that racial considerations have played a role in Missouri’s administration of the death penalty, the Assessment Team notes that the studies are dated or incomplete, indicating that a contemporary investigation should be undertaken to determine whether racial discrimination currently affects Missouri’s criminal justice system and—if it does—how that effect might be countered.

The Prosecutor’s Initial Charging Decision and Decision to Move Forward with a Capital Trial

The prosecutor is a key decision-maker at several points throughout a capital case. With respect to the prosecutor’s initial charging decision and subsequent decision to move forward with a capital trial, two independent studies have suggested that, whether inadvertent or otherwise, race-based considerations influence outcomes in Missouri death penalty cases.

In 2009, for example, Katherine Barnes, David Sloss, and Stephen Thaman³⁴ uncovered geographic and racial disparities in statewide capital-charging decisions upon examining a 247-case sample of the 1,046 intentional homicide cases prosecuted in Missouri from 1997 through 2001.³⁵ One-hundred and twenty-seven cases in the sample were capital-charged cases—including those initially charged as capital but for which a plea of a lesser sentence was accepted—while the remaining 120 were randomly selected non-capital cases.³⁶

Based on their analysis of these cases, Barnes and her colleagues determined that the disparity in charging decisions based on a victim’s race was statistically significant. Specifically, among white defendants in the sample, those facing a capital charge for killing a white victim were more likely to be capitally charged than those accused of killing a black victim.³⁷ Likewise, among black defendants in the sample, “the risk of a capital charge is almost 50% higher” for black defendants accused of killing white victims than for black defendants accused of killing black victims.³⁸ Ultimately, prosecutors were more than twice as likely to file a capital charge

³⁴ Stephen Thaman is a member of the Missouri Death Penalty Assessment Team.

³⁵ Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, App. II, 375–76 (2009) (relying upon “(1) the court records that had been collected for creation of [a] comprehensive database; (2) a web-based database called ‘Case.net,’ which provides access to the Missouri State Courts Automated Case Management System; (3) published appellate opinions; (4) newspaper articles; (5) criminal-history information obtained from the FBI; and (6) police reports obtained from state and local law-enforcement agencies that investigated the homicides.”). Intentional homicide cases are those cases that were initially charged as either first- or second-degree murder or manslaughter and that resulted in a homicide conviction. *Id.* at 309.

³⁶ *Id.* at 311.

³⁷ *Id.* at 351 tbl. 4.3(C) (in the “Prosecutor Filed Capital Charge” column, listing 21.6% for “White Defendant, White Victim” cases and listing 12.4% for “White Defendant, Black Victim” cases). To measure statistical significance, researchers may rely on p-values, which measure “how likely it is that one would obtain results at least as skewed as those shown even if the differences were, in fact, simply random variation.” *Id.* at 330 n.98. In other words, low p-values indicate that “simpl[e] random variation” would not explain skewed results; generally, “[a] p-value of 0.05 or less is [] considered to be statistically significant and evidence of a relationship between the two variables at issue.” *Id.* Notably, the p-value of the results presented in the “Prosecutor Filed Capital Charge” column of Table 4.3(C) is 0.001 or less. *Id.* at 351 tbl. 4.3(C).

³⁸ *Id.* at 350; *see also id.* at 351 tbl. 4.3(C) (in the “Prosecutor Filed Capital Charge” column, listing 10.4% for “Black Defendant, White Victim” cases and listing 6.9% for “Black Defendant, Black Victim” cases).

when the victim was white than when the victim was black.³⁹ Barnes and her colleagues did not, however, find any statistically significant variation in the rate at which prosecutors decided to move forward with a capital trial.⁴⁰ Notably, the Barnes study did not introduce control variables into its analysis, unlike some of the studies described below.⁴¹

Researchers Michael Lenza, David Keys, and Teresa Guess reached a similar conclusion to Barnes and her colleagues in a study published in 2005.⁴² Their study encompassed all the reported homicides in Missouri from 1978 through 1996, a dataset comprised of 9,857 cases; of these cases, “only 574 . . . were selected for prosecution as capital murder offenses.”⁴³ As explained by its authors, “the study design sought to expose general tendencies of decision-makers (e.g., prosecutors and juries) at each stage of the process (charging, plea bargaining, and sentencing).”⁴⁴ Based on the charging patterns found in the dataset, Lenza and his colleagues concluded that, during the period examined, blacks accused of killing whites were “five times more likely” to be charged with capital murder than were blacks accused of killing other blacks, while whites accused of killing blacks were “half as likely” to be charged with capital murder than were whites accused of killing other whites.⁴⁵

Furthermore, Lenza and his colleagues did find a statistically significant relationship between racial characteristics and prosecutors’ decisions to move forward with a capital trial after their initial decision to charge a defendant with a capital offense.⁴⁶ In contrast to whites accused of killing whites, blacks accused of killing whites were “56% more likely” than their white counterparts to face a capital trial, whereas blacks accused of killing blacks were “59% less likely” to face a capital trial.⁴⁷ The study derived these results after controlling for several

³⁹ *Id.* at 349, 350 tbl. 4.3(B) (in the “Prosecutor Filed Capital Charge” column, listing 18.5% for “White Victim(s)” cases and listing 7.0% for “Black Victim(s)” cases). Notably, the p-value of the results presented in the “Prosecutor Filed Capital Charge” column of Table 4.3(B) is 0.001 or less. *Id.* at 350 tbl. 4.3(B). Notwithstanding these statistically significant findings, the Barnes study ultimately concluded that “large racial disparities . . . are a product in significant measure of [] geographic disparities.” *Id.* at 354. In other words, after controlling for race-of-defendant and race-of-victim characteristics, “geographic disparities endure . . . while race effects are no longer present, meaning that geography is a more robust explanation of the capital decision-making process than race.” *Id.*

⁴⁰ Barnes et al., *supra* note 35, at 350 tbl. 4.3(B). Under Missouri law, prosecutors may voluntarily withdraw a first-degree murder charge, whether by accepting a guilty plea or by filing an amended information before trial. *Id.* at 317 n.53. Of the 295 cases in the Barnes study wherein the prosecutor opted not to move forward with a capital trial, 284 cases “were resolved by guilty pleas.” *Id.*

⁴¹ See, e.g., *infra* note 48 and accompanying text.

⁴² See Lenza et al., *The Prevailing Injustices in the Application of the Missouri Death Penalty (1978 to 1996)*, 32 SOC. JUST. 151 (2005).

⁴³ *Id.* at 153.

⁴⁴ *Id.* at 153.

⁴⁵ *Id.* at 155 tbl. 1.

⁴⁶ *Id.* at 160.

⁴⁷ *Id.* at 160 (emphasis added) (for the “blacks accused of killing whites” finding, listing a modestly significant p-value of 0.1121; for the “blacks accused of killing blacks” finding, listing a highly significant p-value of 0.0001). The Lenza study also found that, “[i]n the 12 cases in which whites victimized blacks [] and were charged with capital murder, such cases were 115% more likely to be taken to trial than was true for whites taking the lives of other whites.” *Id.* In light of the small sample size, however, the statistical significance of this finding remains much more questionable. See *id.* at 160 tbl. 6 (for the “whites accused of killing blacks” finding, listing a statistically insignificant p-value of 0.2861).

factors, including the race, age, and gender of the defendants and victims, the type of weapon used in the homicide, and whether the offender and the victim were strangers.⁴⁸

The Jury's Sentencing Decision

While several researchers have attempted to determine whether jurors allow racial factors—subconsciously or otherwise—to influence their decision-making in capital cases, researchers' results have produced mixed results on this issue.

For example, in the Lenza study, “defendant/victim racial characteristics” were found to have “little effect” and to be of “questionable significance in jury decisions in terms of imposing the death penalty.”⁴⁹ Barnes and her colleagues likewise concluded that “geography is a more robust explanation of the capital decision-making process than race,”⁵⁰ albeit “significant racial disparities” were detected with respect to jury decisions to impose a death sentence.⁵¹

Researchers Jonathan Sorensen and Donald Wallace's 1995 analysis of racial disparities in Missouri's capital punishment system encompassed all identified homicide cases from 1977 through 1991, a “universe of 3,873 non-negligent homicide arrestees,” of whom 353 were convicted of capital murder.⁵² An initial analysis of their complete dataset found “[n]o overall statistically significant racial effects . . . in the final stage of the capital punishment process, that is[,] during the sentencing of defendants.”⁵³ However, a different result was revealed once Sorensen and Wallace analyzed cases with similar levels of aggravation.⁵⁴

After analyzing cases grouped by similar levels of aggravation, the researchers again found a race effect:

⁴⁸ See Lenza et al., *supra* note 42, at 156, 158 tbl. 3. Lenza and his colleagues derived these results using logistic regression analysis, which—as explained by Barnes and her colleagues—“at once demonstrates which variables have larger disparities and which disparities are more likely to be a by-product of another disparity.” Barnes, *supra* note 35, at 339.

⁴⁹ Lenza et al., *supra* note 42, at 160. Lenza and his colleagues acknowledged, however, that their study lacked “similar controls” to those introduced in Sorensen and Wallace's 1995 study. *Id.* See also Sorensen & Wallace, *supra* note 33, at 75–78.

⁵⁰ Barnes et al., *supra* note 35, at 344, 352. Geographic disparities in charging practices makes a capital defendant in rural or suburban Missouri more than ten times as likely to receive a death sentence than a similar defendant charged in Kansas City or the City of St. Louis. *Id.* at 344.

⁵¹ *Id.* at 350. “[B]lack defendants who kill white victims are treated the most harshly, with a 75% chance of a death sentence after capital trial. This is more than twice as large as the 33% chance of a death sentence for black defendants with black victims. White defendants face a 60.9% chance of a death sentence after a capital trial if the victim is white.” *Id.* at 350.

⁵² Sorensen & Wallace, *supra* note 33, at 69.

⁵³ *Id.*

⁵⁴ As the researchers noted, “[i]t has been suggested [] that the effects of racial disparity are not constant across levels of seriousness [of the offense].” *Id.* at 73 (citing HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966)). This theory, known as the “liberation hypothesis,” holds that, “in more serious cases, legally relevant factors tend to determine the outcome of a case,” whereas, “in less serious cases[,] jurors are ‘liberated’ from the legally relevant facts.” *Id.* at 73–74. If the theory is valid, then one would “expect to find greater levels of disparity in less serious cases and lower levels [of disparity], or no disparity, in the most aggravated cases.” *Id.* at 74. By refining their focus so as to analyze cases grouped by similar levels of aggravation, Sorensen and Wallace sought, through statistical analysis, to more readily detect any racial disparity that may exist among the cases at each level.

Cases involving white victims are nearly two times more likely to result in death sentences at the lowest level of aggravation. When the race of the offender is limited to blacks, the rate of death sentencing among those who kill whites is 2 ½ times greater than the rate for killers of blacks.⁵⁵

Finally, a 1994 study by Professors John Galliher and David Keys of the University of Missouri examined the proportionality of sentencing in Missouri death-eligible cases from 1977 through May 14, 1994.⁵⁶ The study relied on data contained in the Missouri Trial Judge Reports, comprised of “a narrative statement [prepared by the trial court] of the judgment, the offense, and the punishment prescribed,” as well as demographic information about the defendant and victim.⁵⁷ By comparing the percentage of cases, grouped by offender and victim racial characteristics, in which the offense was capital-eligible, Galliher and Keys concluded that “in Missouri the race of the victim makes little difference for the legal outcome of white offenders, but for black offenders killing a white victim severely reduces the chances of having the death penalty waived.”⁵⁸ The researchers also found that, in death penalty cases from 1977 through 1994, “[a]lmost half of death sentenced black defendants had no member of their race on the jury” and, as compared with white defendants, “black defendants are 20 times more likely to be sentenced to death [in Missouri] without at least one person of their race on the jury.”⁵⁹

Other Findings

Additional findings also shed light on the influence of racial considerations in the administration of Missouri’s death penalty. First, in the same Sorensen and Wallace study previously discussed, a “definite racial effect” was present with respect to charging/conviction outcomes even after the researchers controlled for other, legally relevant predictor variables (e.g., multiple victims, contemporaneous felony).⁶⁰ Furthermore, Sorensen and Wallace’s research demonstrated—using various logistical regression models—that, overall, a pattern persisted by which blacks accused of killing whites faced an “expected likelihood of being sentenced to death” greater than all other racial combinations.⁶¹

A recent article from 2010 similarly concluded—based on an examination of sixteen years’ worth of Missouri death penalty cases reaching the clemency stage—that (1) “there were lower levels of aggravation in cases of executed black defendants who killed white victims,” (2) “there were higher levels of average missed mitigation claims in cases involving white victims,” (3) “there were more strategic omissions of mitigation for black defendants who were granted

⁵⁵ *Id.* at 77.

⁵⁶ See JOHN F. GALLIHER & DAVID KEYS, REPORT TO THE OFFICE OF THE MISSOURI PUBLIC DEFENDER ON PROPORTIONALITY IN SENTENCING IN DEATH ELIGIBLE CASES 130–55 (1994).

⁵⁷ Section 565.035.1, RSMo 2011; Sorensen & Wallace, *supra* note 33, at 66–67 (describing the contents of Missouri Trial Judge Reports).

⁵⁸ *Id.* at 142 (emphasis omitted). It is important to emphasize, however, that the Galliher and Keys study did not use logistic regression or otherwise introduce control variables into its analysis.

⁵⁹ *Id.* at 147, 145.

⁶⁰ Sorensen & Wallace, *supra* note 33, at 70. This finding is distinct from the previous discussion in that Sorensen and Wallace here used logistical regression analysis to uncover any racial effect in *conviction* outcomes.

⁶¹ See *id.* at 70–72.

reprieves,” and (4) “there was more court misunderstanding in omitting mitigation in cases of executed black defendants.”⁶²

Strategies to Eliminate Racial Discrimination in the Criminal Justice System

Missouri has adopted some remedial and preventative strategies to combat racial discrimination during the investigation of crime and at jury selection.

For example, Missouri law enforcement officers must complete at least 470 hours of basic training, which includes mandatory instruction on the “[i]dentification and investigation of, responding to, and reporting [of] bias-related crime, victimization, or intimidation that is a result of or reasonably related to race, color, religion, sex, or national origin,” and at least thirty hours of mandatory education on domestic and family violence as well as “the effects of cultural, racial and gender bias in law enforcement.”⁶³ State law enforcement officers must also complete forty-eight hours of continuing education every three years, including an annual pre-approved hour-long training on the state’s prohibition on racial profiling.⁶⁴ This training “promote[s] understanding and respect for racial and cultural differences and the use of effective, noncombative methods for carrying out law enforcement duties in a racially and culturally diverse environment.”⁶⁵ Missouri also requires all law enforcement agencies to adopt policy on race-based traffic stops that “prohibits the practice of routinely stopping members of minority groups for violations . . . as a pretext for investigating other violations of criminal law.”⁶⁶

In 1989, Missouri also adopted legislation forbidding the exclusion of jurors on account of race, color, religion, sex, national origin, or economic status.⁶⁷

⁶² Leona D. Jochnowitz, *Missed or Foregone Mitigation: Analyzing Claimed Error in Missouri Capital Clemency Cases*, 46 No. 3 CRIM. L. BULL. 347 (2010). Jochnowitz systematically examined Missouri capital appellate decisions and clemency petitions in order to “capture[] the prevalence of the types and reasons for claims of missed mitigation in 36 of 80 un-reversed Missouri death penalty cases reaching the clemency stage of review from convictions between 1980 [through] 1995.” *Id.* Missed or forgone mitigation claims were defined as “one of the potential errors which can increase the risk that death penalty sentencing is unreliable, because the sentencing process failed to be an individualized ‘reasoned moral response’ to the defendant’s background, character and crime.” *Id.* at (citing *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)).

⁶³ Section 15.334, RSMo 2011 (basic training), section 590.040.3, RSMo 2011 (domestic and family violence education); 11 CSR 75-130.010.1, 75-14.030.1. For a discussion of training provided to Missouri’s law enforcement officers, see Chapter Three on Law Enforcement Identifications and Interrogations.

⁶⁴ MO. DEP’T OF PUB. SAFETY, CONTINUING EDUCATION REQUIREMENTS, PEACE OFFICER STANDARDS AND TRAINING PROGRAM (2006) (on file with author); section 590.050(1), RSMo 2011 (requiring all law enforcement officers who make traffic stops . . . to receive three hours of training [every three years]”); 11 CSR 75-15.010.1–2.

⁶⁵ Section 590.050.1, RSMo 2011. Fourteen percent of law enforcement training is on “interpersonal perspectives,” which includes ethics and professionalism and human behavior training on cultural diversity. MO. DEP’T OF PUB. SAFETY, *supra* note 64.

⁶⁶ Section 590.650.5, RSMo 2011.

⁶⁷ Section 494.400, RSMo 2011 (adopted in 1989, amended in 2004). In the event that counsel substantially fails to comply with section 494.400 and related provisions, a “party may move to stay the proceedings or for other appropriate relief including, in a criminal case, to quash the indictment.” Section 494.465, RSMo 2011. *See also* section 494.470.2, RSMo 2011 (“Persons whose opinions or beliefs preclude them from following the law as declared by the court in its instructions are ineligible to serve as jurors on that case.”)

Conclusion

Because Missouri has examined the extent of racial discrimination in some aspects of the administration of criminal justice in the state, and has adopted some preventative strategies to combat discrimination in the investigation of crime and during voir dire, Missouri is in partial compliance with Recommendation #1. In recent years, Missouri has kept regular record of the race of capital defendants subject to the death penalty in the state, investigated the impact of racial discrimination on the juvenile justice system, and examined gender bias in the court system.

Missouri has not, however, fully investigated the impact of racial discrimination in the criminal justice system, and the existing research on this subject remains dated or incomplete. Thus, a contemporary investigation should be undertaken to determine whether racial discrimination currently affects Missouri's criminal justice system and—if it does—how that effect might be countered.

B. Recommendation #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.

To the best of the Assessment Team's knowledge, Missouri collects some, but not all, of the data listed in this Recommendation. While some state agencies possess data relevant to the Recommendation's requirements, it appears that no single entity within Missouri currently collects and maintains all of the specified information—whether systematically or on an ad hoc basis—with respect to every stage of the capital process.

Missouri statutory law provides that the Supreme Court of Missouri must “accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed.” The Office of State Courts Administrator (OSCA) is responsible for accumulating these records in addition to “whatever extracted information the court desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.”⁶⁸

In cases where the death penalty is imposed, Missouri requires the circuit court clerk to collect and transmit to the Supreme Court of Missouri the entire trial record and transcript, a notice prepared by the clerk, and a report prepared by the trial judge.⁶⁹ The “trial judge report” is in the form of a standard questionnaire containing questions relating to (1) offender information, including education level, criminal record, age, and ethnicity; (2) circumstances of the crime,

⁶⁸ Section 565.035.6, RSMo 2011. See also *Office of State Courts Administrator, YOUR MO. COURTS*, <http://www.courts.mo.gov/page.jsp?id=233> (last visited Sept. 21, 2011) (describing each division's responsibilities).

⁶⁹ Section 565.035.1, RSMo 2011 (requiring the transmittal to occur within ten days after receiving the transcript).

including a description of events, method of offense, weapon used, and statement of the accused; (3) aggravating factors presented to and found by the jury; (4) mitigating factors presented; (5) victim information, including age, ethnicity, possible relation to the offender, and reputation in community; and (6) character of the trial, such as its length and the type of legal representation received by the defendant.⁷⁰

This information does not, however, represent a complete profile of all potential capital cases in Missouri.⁷¹ There is no requirement that OSCA collect or maintain trial judge reports for cases in which the death penalty was sought but not imposed, or cases in which the death penalty could have been but was not sought. Furthermore, despite the requirement that OSCA collect and maintain a trial judge report for every case in which the death penalty was imposed, the Missouri Assessment Team's review of the trial judge reports found that these reports have not been consistently collected and maintained. In fact, for cases occurring between 1977 and 2010, trial judge reports in fifty-three of the 185 cases in which the death penalty was imposed were missing. Social science researchers who have undertaken a review of the effect of race on Missouri's capital punishment system over the years also have remarked on the unavailability of trial judge reports in all cases in which a death sentence was imposed.⁷²

Ultimately, Missouri is in partial compliance with this Recommendation. Missouri law requires the Supreme Court of Missouri to maintain some of the data listed in Recommendation #2. In particular, Missouri law requires the collection of information on cases in which the death penalty was sought if it resulted in a sentence of life without parole or a death sentence. Yet trial judges do not always complete trial judge reports in all death penalty cases. Furthermore, there is no requirement that the information mentioned in this Recommendation be collected and maintained as to cases in which the death penalty could have been but was not sought.

Without collecting data on all potential capital cases, Missouri cannot guarantee that its system ensures proportionality in charging and sentencing, nor can it determine the extent of racial or geographic bias in its capital system. The need for accurate information on the use of the death

⁷⁰ Section 565.035.1, RSMo 2011; *see also* Lenza et al., *supra* note 42, at 152.

⁷¹ Section 565.035.6, RSMo 2011.

⁷² *See, e.g.*, Sorensen & Wallace, *supra* note 33, at 66–67. Sorensen and Wallace noted that the trial judge reports used for their study “contain[ed] a wealth of information on the offender, victim, offense, trial, and outcome of those sentenced to life or death,” but they also noted

[t]he disadvantage of using the trial judge reports are two-fold. First, although mandated by law, there is no guarantee of compliance. If a judge does not fill out a report, the data for the case are missing. Although the procedure has been quite systematic in recent years, a perusal of state prison files turned up number of inmates incarcerated for capital murder that were not included in the trial judge reports.

Id. at 66–67. For example, they “found that 219 (62.8%) of the 349 inmates serving life sentences in the Missouri [DOC] for first-degree murder or capital murder as of December 18, 1992 were included in the trial judge reports.” *Id.* at 67 n.4. *See also* GALLIHER & KEYS, *supra* note 56, 148 (noting that a “serious problem with the data used in [] proportionality review is that the trial judge report data located in the Missouri Supreme Court are incomplete . . . numerous missing records represent approximately 29 percent of all cases, making the legally required proportionality review by the Missouri Supreme Court impossible”).

penalty in Missouri is underscored by the fact that many intentional homicides in the state are death-eligible.⁷³

Therefore, the Assessment Team recommends that Missouri implement a uniform, statewide system for collecting data on charging, prosecution, and conviction in all capital-eligible cases. This collected information should include, at minimum, information on the race of defendants and victims, the circumstances of the crime, and all aggravating and mitigating circumstances. In turn, these data should be made available to the Supreme Court of Missouri for use in conducting meaningful proportionality review⁷⁴ as well as to prosecutors for use in making charging decisions and in establishing charging guidelines.

C. Recommendation #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.

Missouri has investigated the effect of race and ethnicity on the fair administration of its juvenile justice system, as well as the effect of gender bias within its court system. In addition, there have been a number of independent studies conducted on the effect of race on capital decision-making in Missouri.⁷⁵ To the best of the Assessment Team's knowledge, Missouri has not collected and reviewed the studies previously undertaken to fully determine the impact of racial discrimination on the death penalty, nor has the state commissioned an investigation into the impact of racial discrimination on the administration of the death penalty.⁷⁶ Missouri, therefore, is not in compliance with Recommendation #3.

The Missouri Assessment Team notes that legislation, introduced annually in the General Assembly since 2000, would create a death penalty commission to review and analyze "all aspects of the death penalty as administered in the state," including all available data concerning the race of the defendant and victim.⁷⁷ The commission would make recommendations for

⁷³ See Chapter Five on Prosecutorial Professionalism. See also Barnes, *supra* note 35, at 323 (finding that the "wantonly vile" aggravating circumstance would apply to more than 90% of intentional homicide cases sampled).

⁷⁴ Section 565.035.3, RSMo 2011. The Supreme Court of Missouri will review every death sentence to determine whether (1) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's or judge's finding of statutory aggravating circumstances and any other circumstance; and (3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering the crime, the strength of the evidence, and the defendant. Section 565.035.3(1)–(3), RSMo 2011. For further discussion of proportionality review, see Chapter Seven on Direct Appeal.

⁷⁵ See Recommendation #1, *supra* notes 35–62 and accompanying text.

⁷⁶ For example, in Kentucky, the Kentucky General Assembly passed Senate Bill 8 in 1992 requiring the Kentucky Justice Cabinet and the Kentucky Department of Public Advocacy to conduct a study to determine if racial bias played a role in death sentencing in Kentucky capital cases and commissioned two social science researchers to conduct the study. See S.B. 8, 1992 Gen. Assemb., Reg. Sess. (Ky. 1992).

⁷⁷ See H.B. 484, 2009 Gen. Assemb., Reg. Sess. (Mo. 2009); S.B. 321, 2009 Gen. Assemb., Reg. Sess. (Mo. 2009). See also H.B. 1683, 2010 Gen. Assemb., Reg. Sess. (Mo. 2010); S.B. 930, 2010 Gen. Assemb., Reg. Sess.

changes to Missouri law and court rules regarding death penalty cases to ensure, among other things, that (1) “race does not play an impermissible role in determining which defendants are sentenced to death,” (2) appellate and post-conviction procedures are adequate to correct errors and injustices occurring at the trial level, and (3) prosecutors throughout the state seek the death penalty using similar criteria.⁷⁸

Because studies undertaken to date indicate that race of the defendant and/or race of the victim affects capital charging and sentencing in death penalty cases,⁷⁹ Missouri should undertake a comprehensive review to determine whether race is a factor in any aspect of Missouri’s administration of the death penalty.⁸⁰

D. Recommendation #4

Where patterns of racial discrimination are found in any phase of the death penalty’s administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.

Missouri has not collaborated with legal scholars, experts, and practitioners to develop remedial and preventative strategies to address racial discrimination previously found in the administration of the death penalty. Nevertheless, Missouri has sought to address racial disparities or racial discrimination within the general criminal justice system.

For example, in response to studies illustrating racial disparities in cases involving juvenile defendants, Missouri passed legislation requiring judges to consider racial disparities when making decisions on whether to transfer juvenile criminal cases to adult court.⁸¹ The law also requires OSCA to “biennially review a random sample of assessments of children and the disposition of each child’s case to recommend assessment and disposition equity throughout the state”⁸² and to develop “[s]tandards, training and assessment forms . . . considering racial disparities in the juvenile justice system.”⁸³

In addition, in 1993 the Gender and Justice Task Force (Task Force) concluded a three-year examination on gender bias in Missouri’s courts and made a number of recommendations to the state on gender disparities.⁸⁴ Notably, the Task Force concluded that “the effects of gender and race on the administration of justice are sometimes entwined and difficult to separate,” and recorded reports of racial and ethnic bias, although it did not actively seek out testimony on

(Mo. 2010); S.B. 930, 2011 Gen. Assemb., 1st Sess. (Mo. 2011); H.B. 700, 2011 Gen. Assemb., 1st Sess. (Mo. 2011).

⁷⁸ See, e.g., H.B. 700, 2011 Gen. Assemb., 1st Sess. (Mo. 2011).

⁷⁹ See Recommendation #1, *supra* notes 35–62.

⁸⁰ This analysis should include, at minimum, an examination of the race of the defendant, the race of the victim, and the racial composition of the jury pool in death penalty cases.

⁸¹ See section 211.326.2, RSMo 2011. Cooper, *supra* note 16.

⁸² Section 211.141.5, RSMo Supp. 1995.

⁸³ Section 211.326.6, RSMo. Supp. 1995.

⁸⁴ GENDER AND JUSTICE REPORT, *supra* note 12 at 333.

racial issues.⁸⁵ The Task Force provided a brief summary of data “that suggest[s] there may be instances and practices in the Missouri court system that constitute disparate treatment based upon race.”⁸⁶ Specifically, with respect to the “disparate treatment of minorities in the criminal justice system,” the Task Force noted that “some judges, attorneys, and court personnel reported that minorities receive differential treatment . . . paying higher bonds, receiving harsher sentences, and being confronted with tougher plea bargains than similarly situated whites.”⁸⁷

In light of these findings, the Task Force recommended “that the Missouri Supreme Court establish a Task Force on Race and Justice to conduct a study of whether racial bias exists in the administration of justice in Missouri, and, if so, what steps should be taken to remedy it [T]he evidence presented to this body, limited as it was, suggests to the Task Force that serious study of racial issues is warranted.”⁸⁸ To date, however, no such task force has been established.

Because Missouri has not developed remedial and preventative strategies to address the identified racial disparities in the administration of the death penalty, Missouri is not in compliance with Recommendation #4.

The Missouri Assessment Team applauds the state for the efforts undertaken to remedy racial bias in the juvenile justice system and gender bias within the court system. It also is laudatory that Missouri enacted a law forbidding the exclusion of jurors on account of race, color, religion, sex, national origin, and economic status.⁸⁹ Nevertheless, the Team recommends that Missouri heed the suggestion of the Supreme Court of Missouri’s Task Force on Gender and Justice to investigate whether race affects the administration of the death penalty in Missouri. Where patterns of racial discrimination are found in the death penalty, the state should develop and implement remedial and preventative strategies similar to its efforts to ameliorate racial disparity in juvenile cases and gender bias in all cases.

E. Recommendation #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 such a law, jurisdictions should permit defendants and inmates to establish prima facie cases of discrimination based upon proof that their cases are part of established racially discriminatory

⁸⁵ *Id.* The Task Force ultimately devoted fourteen pages of its Report to an “Addendum on How Race Affects the Administration of Justice.” *Id.* at 335–47.

⁸⁶ *Id.* at 333. The Task Force estimated, at the time it published its report, 2–3% of the Missouri legal profession was black and 1% of the Missouri legal profession was Hispanic. *Id.* at 334. The Task Force also estimated that 12% of court personnel were minorities. *Id.*

⁸⁷ *Id.* at 341–42 (including five anecdotes detailing racially discriminatory conduct reported to the Task Force via survey comments). According to the report, “[a] majority of all attorneys and judges responding to the surveys observed some racial bias in Missouri courts,” where 63% of female attorneys “perceived that bias against racial minorities is either system wide but subtle and hard to detect, or widespread and readily apparent.” *Id.* at 335–36 (“In contrast, 42% of judges, 37% of male attorneys, and 63% of court employees reported they never observed racial bias in the Missouri courts.”).

⁸⁸ *Id.* at 347, 353 (noting that the Task Force is “aware that a request to convene such a task force has already been made by several local bar associations and [that the Task Force] supports that request”).

⁸⁹ See section 494.400, RSMo 2011 (adopted in 1989, amended in 2004).

patterns. If such a prima facie case is established, the State should have the burden of rebutting it by substantial evidence.

Missouri has not adopted legislation in accordance with Recommendation #5. The Assessment Team notes that legislation, introduced in the General Assembly in 2010 and 2011, would not have allowed any state agent to “seek, impose, affirm, or inflict a sentence of death on the basis of race, or seek, defend, impose, affirm, or inflict a sentence of death that any agent of the state of Missouri at any point sought or imposed on the basis of race.”⁹⁰ The legislation would have permitted a defendant to raise a claim of racial discrimination by presenting evidence, including statistical evidence, that race was a significant factor in the decision to seek or impose a death sentence.⁹¹

F. Recommendation #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 the death penalty’s 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.

Some Missouri entities have developed educational programs on preventing racial and ethnic discrimination in the criminal justice system.

Law Enforcement

As discussed in Recommendation #1, Missouri law enforcement basic training includes mandatory instruction on the identification and investigation of “bias-related crime . . . that is a result of or reasonably related to race, color, religion, sex, or national origin,” and at least thirty hours of mandatory education on domestic and family violence as well as “the effects of cultural, racial and gender bias in law enforcement.”⁹² Missouri law enforcement must also complete continuing education on the state’s prohibition on racial profiling.⁹³

Missouri law enforcement officers who conduct racial profiling are subject to “appropriate counseling and training.”⁹⁴ In addition, the Commission on Accreditation for Law Enforcement

⁹⁰ See, e.g., H.B. 516, 97th Gen. Assemb., Reg. Sess. (Mo. 2011); H.B. 1815, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010); H.B. 1550, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010). See also Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519 (1995).

⁹¹ See H.B. 516, 97th Gen. Assemb., Reg. Sess. (Mo. 2011); H.B. 1815, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010); H.B. 1550, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010).

⁹² Section 15.334, RSMo 2011 (basic training), section 590.040.3, RSMo 2011 (domestic and family violence education); 11 CSR 75-130.010.1, 75-14.030.1.

⁹³ MO. DEP’T OF PUB. SAFETY, *supra* note 64; section 590.050(1), RSMo 2011 (requiring all law enforcement officers who make traffic stops . . . to receive three hours of training [every three years]); 11 CSR 75-15.010.1–2.

⁹⁴ Section 590.650.5, RSMo 2011. Section 590.080.1, RSMo 2011 (discipline of peace officers, including when s/he “[h]as committed any act while on active duty or under color of law that involves moral turpitude or a reckless disregard for [] safety”). In addition, the Director of the Department of Public Safety has the authority to discipline a Missouri law enforcement officer for such acts as committing a criminal offense or who “[p]resent a clear and present danger to the public” at large. Sections 590.080–.090.1(1), RSMo 2011.

Agencies, Inc. (CALEA) requires certified law enforcement agencies to establish a written directive that, at minimum, prohibits bias-based profiling and requires training on how to avoid biased-based profiling.⁹⁵ This requirement, however, is only imposed on certified law enforcement agencies, and only sixteen law enforcement agencies in Missouri have been accredited by CALEA.⁹⁶ Furthermore, a 2005 report by the Missouri State Auditor, found that Missouri failed to adequately develop and enforce many policies related to the discipline of law enforcement officers and the investigation of officer misconduct.⁹⁷ For more information on Missouri law enforcement training and discipline, see Chapter Three on Law Enforcement Practices.

Attorneys

All Missouri attorneys are required to successfully complete at least fifteen hours of continuing legal education credits every year, which must include at least two hours of ethics, professionalism, or malpractice prevention training.⁹⁸ In addition, during capital post-conviction proceedings, at least one attorney is required to have “successfully completed within two years immediately preceding appointment at least twelve hours of training or educational programs on the post-conviction phase of a criminal case and federal and state aspects of cases in which the death penalty is sought.”⁹⁹ However, Missouri does not impose any specialized training requirements for capital defense attorneys related to identifying claims of racial discrimination in capital cases, nor are prosecutors in death penalty cases required to participate in educational

⁹⁵ COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM, at 1.2.9 (5th ed. 2006). Another seven Missouri law enforcement agencies are in the process of obtaining accreditation.

⁹⁶ CALEA Client Database, COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, <http://www.calea.org/content/calea-client-database> (last visited Jan. 13, 2012) (using second search function and designating “US” and “MO” as search criteria to determine the number of agencies that have earned or are in the process of earning accreditation from CALEA’s Law Enforcement Accreditation Program). The following law enforcement agencies have been awarded certification by CALEA: Chesterfield Police Department, Clayton Police Department, Florissant Police Department, Gladstone Department of Public Safety, Jackson Police Department, Jefferson County Sheriff’s Office, Joplin Police Department, the Kansas City Police Department at the University of Missouri, Lee’s Summit Police Department, Missouri State Highway Patrol, Richmond Heights Police Department, Shrewsbury Police Department, Springfield Police Department, St. Louis County Police Department, St. Louis Metropolitan Police Department, the St. Louis Police Department at the University of Missouri, the University of Missouri Police Department in Columbia, and Webster Groves Police Department. *Id.* Seven additional Missouri law enforcement agencies are in the process of being accredited by CALEA: Blue Springs Police Department, Creve Coeur Police Department, Maplewood Police Department, and Poplar Bluff Police Department. *Id.*

⁹⁷ See CLAIRE MCCASKILL, OFFICE OF THE MO. STATE AUDITOR, REP. NO. 2005-10, PEACE OFFICER STANDARDS & TRAINING PROGRAM (LICENSING, TRAINING, & COMPLAINT INVESTIGATION ASPECTS) (2005).

⁹⁸ Rule 15.05(a). However, no continuing legal education or training provided by The Missouri Bar or the Bar Association of Metropolitan St. Louis has included or focused on issues described in this Recommendation. Telephone Interview by Paula Shapiro with Jack Wax, Media Relations Dir., Missouri Bar (Oct. 14, 2011) (on file with author); Telephone Interview by Paula Shapiro with Alexander Braitberg, Dir. of CLE & Member Services, Bar Ass’n of Metro. St. Louis (Oct. 17, 2011) (on file with author) (noting that training related to the impact of race or ethnic bias on cases may not qualify for ethics credit).

⁹⁹ Section 547.370.2, RSMo 2011. For more information about the training provided to Missouri’s capital defense attorneys, see Chapter Six on Defense Services.

programming that emphasizes that race should not be a factor in any aspect of the death penalty.¹⁰⁰

Missouri prosecutors and defense counsel may be sanctioned by the Office of Chief Disciplinary Counsel (OCDC), which investigates and prosecutes grievances and misconduct, such as violations of the Missouri Rules of Professional Conduct (Rules), made by practicing attorneys within the state.¹⁰¹ OCDC possesses sole discretion to refer complaints either to The Missouri Bar Complaint Resolution Program, The Missouri Bar Lawyer-to-Lawyer Dispute Resolution Program,¹⁰² or the Supreme Court of Missouri, which may take action against an attorney.¹⁰³ The Rules specifically state that “it is unprofessional conduct to . . . manifest by words or conduct . . . bias or prejudice based upon race, sex, religion, national origin, disability, age or sexual orientation.”¹⁰⁴ Attorneys whose conduct manifests racial bias or discrimination may, therefore, be disciplined.

Judges

Finally, in addition to the Code of Professional Responsibility, Missouri judges are required to comply with the Code of Judicial Conduct, which addresses the integrity, impartiality, diligence, and independence of the judiciary.¹⁰⁵ Judges are required to “perform judicial duties without bias or prejudice” and to refrain, “in the performance of judicial duties, [] by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, [or] religion.”¹⁰⁶ Judges also must recuse themselves “in a proceeding in which [their] impartiality might reasonably be questioned,” specifically in cases in which judges display “personal bias or prejudice.”¹⁰⁷ The Missouri Commission on Retirement, Removal, and Discipline investigates complaints concerning misconduct of sitting judges and recommends appropriate discipline, while the Supreme Court of Missouri has the sole authority to determine the appropriate discipline for the state’s judges.¹⁰⁸ Additionally, new judges go through a week-long orientation school, which includes one “ethics hour where one of the things mentioned is

¹⁰⁰ For more information on the education and training of Missouri Prosecutors, see Chapter Five on Prosecutor Professionalism.

¹⁰¹ *About the OCDC*, OFFICE OF CHIEF DISCIPLINARY COUNSEL, <http://www.mochiefcounsel.org/ocdc.htm?id=1&cat=1> (last visited Feb. 17, 2012). Annual reports are published and available on the OCDC website from 2003 to the present, listing the attorney name, bar license number, and violation, as well as the geographical location of the attorney. *About, Annual Reports*, OFFICE OF CHIEF DISCIPLINARY COUNSEL, <http://www.mochiefcounsel.org/ocdc.htm?id=5&cat=1> (last visited Feb. 17, 2012).

¹⁰² See Rule 5.10.

¹⁰³ *Annual Reports*, OFFICE OF CHIEF DISCIPLINARY COUNSEL, <http://www.mochiefcounsel.org/ocdc.htm?id=5&cat=1> (last visited Feb. 17, 2012).

¹⁰⁴ Rule 4-8.4(g) (“[T]his does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or other similar factors, are issues.”).

¹⁰⁵ Rules 2.03, 2.04 (“All judges, except part-time judges, shall comply with this Rule 2.”); Michael A. Wolff, *Law Matters: Ensuring Judges’ Ethics and Accountability*, Mar. 2007, <http://www.courts.mo.gov/page.jsp?id=5322> (“These rules are intended to ensure that judges will act fairly, impartially and promptly in deciding cases. They govern the conduct of judges on the bench as well as restrict off-the-bench activities that might call the judge’s fairness into question.”).

¹⁰⁶ Rule 2-2.3(B). Furthermore, the Rule requires judges to ensure that staff, court officials and others, including attorneys, subject to the judge’s direction and control do not manifest bias or prejudice. *Id.*

¹⁰⁷ Rule 2-2.11(A). The list of circumstances delineated in the Rule explicitly is not intended to be exhaustive. *Id.*

¹⁰⁸ Mo. Const. art. V, sec. 24(1).

being aware of gender, race, socio-economic and other similar issues.”¹⁰⁹ Missouri judges also may attend specialized judicial training colleges.¹¹⁰

Missouri is in partial compliance with Recommendation #6. Sanctions are available for conduct that manifests bias or prejudice. The state has not, however, developed and implemented educational programs, applicable to any actor in the criminal justice system, to stress that race should not be a factor in any aspect of death penalty administration.

G. Recommendation #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.

While Missouri has adopted standards for post-conviction counsel representing death row inmates, these standards are not specific with regard to identifying and developing racial discrimination claims, nor are the standards applicable to counsel providing representation in other contexts, such as at trial.¹¹¹

The Missouri State Public Defender (MSPD) *Guidelines for Representation*, which are applicable to all trial attorneys within MSPD, requires each public defender to participate in “skills training and education programs.”¹¹² It is conceivable that, in fulfilling these requirements, an attorney could receive training on identifying and developing claims of racial discrimination in capital cases, as well as training on identifying biased jurors during voir dire. According to the MSPD Training Director, “most of [the MSPD] capital attorneys have had some minimal exposure to this type of training” through, for example, the NAACP Legal Defense Fund’s annual death penalty training program.¹¹³ The Assessment Team notes, however, that, according to the 2009 *Spangenberg Report*, MSPD eliminated “‘specialty’ training,” which includes capital training.¹¹⁴ Furthermore, the MSPD Training Division has not offered a death penalty-specific training seminar since 2006.¹¹⁵

¹⁰⁹ Telephone Interview by Paula Shapiro with James Smith, Adm’r & Counsel, Mo. Comm’n on Retirement, Removal & Discipline (Oct. 13, 2011) (on file with author). See *Judicial Education*, YOUR MO. COURTS, <http://www.courts.mo.gov/page.jsp?id=1805> (last visited Feb. 15, 2012).

¹¹⁰ *Judge Education*, YOUR MO. COURTS, <http://www.courts.mo.gov/page.jsp?id=2278> (last visited Dec. 2, 2011).

¹¹¹ Rule 15.05(a).

¹¹² MO. STATE PUB. DEFENDER, POLICIES AND PROCEDURES, *Guidelines for Representation: Education, Training and Experience of Public Defenders* (effective Nov. 1, 1992) (on file with author).

¹¹³ Email from Melinda K. Pendergraph, Training Dir., Office of the Mo. State Pub. Defender, to Paula Shapiro (Dec. 2, 2011) (on file with author) (noting that “[o]ver the past four years, our capital training in general has lagged behind what we’ve received before that”). Capital defender trainings on litigating race issues are available nationwide. See, e.g., Santa Clara Law Death Penalty College, Schedule for 2012, *Lecture: “Identifying and Litigating Poverty, Race and Cultural Issues,”* available at <http://law.scu.edu/dpc/schedule.cfm> (last visited Feb. 2, 2012).

¹¹⁴ SPANGENBERG GROUP ET AL., ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM: FINAL REPORT 62 (2009), available at <http://members.mobar.org/pdfs/public-defender/2009-report.pdf>.

¹¹⁵ Email Interview by Rachel Bays with Karen Kraft, Capital Div. Dir., Mo. State Pub. Defender Sys. (June 7, 2010) (on file with author). Capital attorneys are, however, able to attend any non-death penalty training that is offered within the Training Division that nevertheless apply to their practice, such as forensic evidence seminars and advanced trial skills. *Id.*

In addition, attorneys seeking to comply with Missouri’s standards for post-conviction counsel in death penalty cases could, but are not required to, receive training on how to identify and develop claims of racial discrimination in capital cases, including discrimination in the jury selection process.”¹¹⁶ There are no training requirements for private bar attorneys who are contracted by MSPD, appointed by the court, or retained by the defendant who undertake capital representation.¹¹⁷

While capital defense counsel may have received training on identifying and developing claims of racial discrimination, as well as training on identifying biased jurors during voir dire, current budget constraints limit MSPD’s ability to provide training to its staff. As the precise effect of these budget constraints on capital defense counsel training remains unclear, the Assessment Team is unable to determine whether Missouri presently complies with this Recommendation.

H. Recommendation #8

Jurisdictions should require jury instructions that it is improper for jurors to consider any racial factors in their decision-making and that jurors should report any evidence of racial discrimination in jury deliberations.

Missouri jury instructions do not require judges to explicitly inform jurors that it is improper to permit racial factors to affect their decision-making and that they should report any evidence of racial discrimination in jury deliberations. Missouri, therefore, is not in compliance with this Recommendation.

I. Recommendation #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.

The Missouri Code of Judicial Conduct (Code) requires judges to perform their judicial duties “without bias or prejudice” and without the appearance of bias or prejudice.¹¹⁸ The Code also requires a judge to recuse him/herself in a proceeding in which s/he “has a personal bias or prejudice concerning a party” or in instances in which his/her “impartiality might reasonably be questioned.”¹¹⁹ In addition, the Code mandates that a “judge shall not hold membership in any organization that practices invidious discrimination against any person who is protected by law

¹¹⁶ Section 547.370.2, RSMo 2011.

¹¹⁷ In the past, MSPD has provided training to contract counsel; however, this training is no longer offered. See Chapter Six on Defense Services, Recommendation #5.

¹¹⁸ Rules 2-2.3(A) (“A judge shall perform the duties of judicial office without bias or prejudice.”), 2-2.3(B) (“A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment . . . based on race . . .”). In addition, a “judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment . . . based on race.” Rule 2-2.3(C).

¹¹⁹ Rule 2-2.7(A); see also Terminology (where impartiality is defined to mean the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge”).

from discrimination” and notes that a “judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.”¹²⁰

When reviewing a judge’s decisions whether to recuse him/herself, Missouri courts presume “that a judge acts with honesty and integrity and will not undertake to preside in a trial in which the judge cannot be impartial.”¹²¹ The standard applied to recusal decisions is whether “a reasonable person would have a factual basis to doubt the judge’s impartiality,” which, the Supreme Court of Missouri has explained, “does not require proof of actual bias, but is an objective standard that recognizes ‘justice must satisfy the appearance of justice.’”¹²²

The Missouri Assessment Team is mindful that requiring judges to recuse themselves whenever it is reasonable to question their impartiality may be interpreted by some as proof that those judges harbor actual bias. However, “[c]onduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary” and, therefore, may require the recusal of judges who may not actually be racially biased or prejudiced.¹²³ The U.S. Supreme Court has long recognized, for example, that “our system of law has always endeavored to prevent even the probability of unfairness,” and that “[s]uch a stringent rule may sometimes bar trial by judges *who have no actual bias* and would do their very best to weigh the scales of justice equally between contending parties.”¹²⁴

The Missouri Assessment Team notes, however, that courts may differ in its determination of whether a judge’s conduct raises a reasonable basis to doubt the judge’s impartiality.¹²⁵ Nonetheless, the Missouri Assessment Team is unable to determine the number of instances, if any, in which judges have recused themselves, and the bases upon which any such recusals have been made. The Team, therefore, is unable to determine compliance with Recommendation #9.

J. Recommendation #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.

¹²⁰ Rules 2-3.6(A) (prohibiting affiliation with discriminatory organizations), 2-2.3(A) cmt. The Code also recommends that judicial candidates consider whether their “conduct may create grounds for recusal for actual bias.” Rule 2-4.2 cmt. 1 (emphasis added). *See also* State v. Kinder, 942 S.W.2d 313, 321 (Mo. banc 1996) (“[O]ur Code of Judicial Conduct . . . provide[s] that a judge should avoid the appearance of impropriety and shall perform judicial duties without bias or prejudice, and . . . which provides that a judge should recuse in a proceeding in which the judge’s impartiality might reasonably be questioned . . .”).

¹²¹ State v. Kinder 942 S.W.2d 313, 321 (Mo. banc 1996); *cf.* Smulls v. State, 10 S.W.3d 497, 499 (Mo. banc 2000) (“Given the definition of a disqualifying bias or prejudice, a particular judge is in the best interest to determine if recusal is necessary.”); Smulls v. State, 71 S.W.3d 138, 145 (Mo. banc 2002).

¹²² Smulls v. State, 71 S.W.3d 138, 145 (Mo. banc 2002).

¹²³ Rule 2-1.2 cmt. 3.

¹²⁴ In re Murchison, 349 U.S. 133, 136 (1955) (emphasis added).

¹²⁵ However, the Supreme Court of Missouri has examined closely the issue of judicial recusal. *See, e.g.,* Smulls v. State, 935 S.W.2d 9 (Mo. banc 1996); State v. Kinder 942 S.W.2d 313 (Mo. banc 1996).

Missouri's strict post-conviction procedural default rules apply to all alleged errors, whether based on constitutional or state law issues. Thus, Missouri does not make any exceptions to general procedural rules for claims of racial discrimination in the imposition of the death penalty.¹²⁶ There is no law or rule permitting Missouri courts to apply a "knowing and intelligent" standard for waivers of claims of constitutional error, like racial discrimination, not properly preserved at trial or on appeal.

Inmates with claims of racial discrimination that were not properly preserved at the trial level, such as claims challenging the state's use of peremptory challenges on the basis of race, are generally procedurally barred from review on direct appeal.¹²⁷ The Supreme Court of Missouri has held that a "defendant's failure to challenge the state's race-neutral explanation in any way waives any future complaint that the state's reasons were racially motivated."¹²⁸ Furthermore, a Missouri inmate who fails to raise a claim that was available on direct appeal is generally barred from raising those claims in a subsequent Rule 24.035 or Rule 29.15 post-conviction motion.¹²⁹ Claims that were raised and rejected on direct appeal are also unavailable for review during post-conviction proceedings.¹³⁰ While an inmate may raise procedurally defaulted claims or claims of trial error in post-trial proceedings "where fundamental fairness requires [but] only in rare and exceptional circumstances,"¹³¹ it does not appear that an inmate may raise a claim of racial discrimination at this stage.¹³² Furthermore, Missouri's state habeas corpus procedure also does not permit death row inmates to raise directly claims of racial discrimination.¹³³

Accordingly, Missouri is not in compliance with Recommendation #10.

¹²⁶ See generally Chapter Eight on Post-conviction Proceedings.

¹²⁷ *State v. Parker*, 836 S.W.2d 930, 934 (Mo. banc 1992) ("[T]he right of criminal defendants to challenge racially motivated strikes by the prosecutor" is "predicated . . . upon the defendant's timely objection . . .") (citing *Batson*, 476 U.S. at 96–99); *State v. Taylor*, 944 S.W.2d 925, 934 (Mo. banc 1997) ("A defendant's failure to challenge the State's race-neutral explanation in any way waives any future complaint that the State's reasons were racially motivated, and leaves nothing for this Court to review.").

¹²⁸ *Taylor*, 944 S.W.2d at 934.

¹²⁹ See *Rodden v. State*, 795 S.W.2d 393, 395 (Mo. banc 1990). "A constitutional claim must be raised at the earliest opportunity and preserved at each step of the judicial process." *Strong v. State*, 263 S.W.3d 636, 646 (Mo. banc 2008) (citing *State v. Sumowski*, 794 S.W.2d 643, 648 (Mo. banc 1990)).

¹³⁰ See *Smulls v. State*, 71 S.W.3d 138, 150 (Mo. 2002) (citing *State v. Smulls*, 935 S.W.2d at 14–16) (the claim that improperly excluded "evidence about an alleged policy of racial discrimination by St. Louis County prosecutors in voir dire" "fails because it was determined in the initial appeal that no error occurred in deciding the merits of the *Batson* challenge.").

¹³¹ *Sidebottom v. State*, 781 S.W.2d 791, 800 (Mo. banc 1989); *State v. Carter*, 955 S.W.2d 548, 555 (Mo. banc 1997).

¹³² See, e.g., *State v. Harris*, 908 S.W.2d 912, 916 (Mo.App. 1995) (stating that counsel's failure to properly preserve a *Batson* claims for review on appeal is not a cognizable issue under Rule 29.15).

¹³³ See *Blair v. Armontrout*, 976 F.2d 1130, 1136 (8th Cir. 1992) (recounting that the death row inmate-petitioner raised his claim of racial discrimination based on the prosecutor's argument through a state writ of habeas corpus, after his state and federal appeals). In *Blair*, the prosecutor at trial had "introduc[ed] . . . racial prejudice into the sentencing process by discussing the race of the defendant and speculating on the victim's fear at seeing 'this black man' with a gun." *Blair v. Armontrout*, 916 F.2d 1310, 1351 (8th Cir. 1990) (Heaney, J., concurring in part and dissenting in part). Furthermore, "[t]here was no objection of any kind to this [race-based] argument at trial." *Blair*, 916 F.2d at 1325.

CHAPTER THIRTEEN

MENTAL RETARDATION AND MENTAL ILLNESS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

The ABA unconditionally opposes the imposition of the death penalty on offenders with mental retardation¹ or on offenders who, at the time of the offense, had significant limitations in their intellectual functioning and adaptive behavior resulting from dementia or traumatic brain injury that made them functionally equivalent to persons with mental retardation. The ABA also opposes execution of persons with severe mental disabilities whose demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability.

Furthermore, given the irreparable consequence that flow from a death row inmate's decision to waive his/her appeals, the ABA also opposes execution of prisoners whose mental disorders or disabilities significantly impair their capacity (1) to make rational decisions with regard to post-conviction proceedings, (2) to assist counsel in those proceedings, or (3) when facing an impending execution, to appreciate the nature and purpose of the punishment or reason for its imposition.

Mental Retardation

While the Supreme Court of the United States prohibited the execution of people with mental retardation in *Atkins v. Virginia*,² this holding does not guarantee that persons with mental retardation will not be executed. *Atkins* did not define the parameters of mental retardation, nor did the decision explain what process capital jurisdictions should employ to determine if a capital defendant or death row inmate is mentally retarded.

In an effort to assist capital jurisdictions in determining who meets the criteria of mental retardation, the ABA adopted a resolution opposing the execution or sentencing to death of any person who, at the time of the offense, "had significant limitation in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or traumatic brain injury."³ The ABA policy

¹ While "intellectual disability" is gaining currency as the preferred term to describe the same condition known as mental retardation, the ABA Assessment Reports will continue to use the term mental retardation until the term "intellectual disability" is more fully integrated into the legal system. See *FAQ on Intellectual Disability*, AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aaid.org/content_104.cfm (last visited Jan. 6, 2012). For example, mental retardation is more commonly used in death penalty jurisprudence in such definitive decisions as *Atkins v. Virginia*, 536 U.S. 304 (2002). ABA policy refers explicitly to mental retardation in its long-standing opposition to the execution of people with this condition, and use of the term mental retardation maintains consistency with previous reports authored by the ABA and its jurisdictional assessment teams on the death penalty.

² *Atkins*, 536 U.S. 304.

³ ABA, RECOMMENDATION 122A, 2006 Ann. Mtg. (adopted Aug. 7–8, 2006), available at http://www2.americanbar.org/sdl/Documents/2006_AM_122A.pdf. See AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, & SYS. OF SUPPORTS 13 (10th ed. 2002); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 49 (text rev. 4th ed. 2000). The American

reflects language adopted by the American Association on Intellectual and Developmental Disabilities (AAIDD) and the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.⁴

Unfortunately, some states do not define mental retardation in accordance with these commonly accepted definitions. Moreover, some states impose upper limits on the intelligence quotient (IQ) score necessary to prove mental retardation that are lower than the range that is commonly accepted in the field (approximately seventy to seventy-five or below). In addition, lack of sufficient knowledge and resources often precludes defense counsel from properly raising and litigating claims of mental retardation. And in some jurisdictions, the burden of proving mental retardation is not only placed on the defendant, but also requires proof greater than a preponderance of the evidence. Accordingly, a great deal of additional work is required to make the *Atkins* holding a reality.

The ABA resolution also encompasses dementia and traumatic brain injury; disabilities functionally equivalent to mental retardation, but that typically manifest after age eighteen. While these disabilities are not expressly covered in *Atkins*, the ABA opposes the application of the death penalty to any person who suffered from significant limitations in intellectual functioning and adaptive behavior at the time of the offense, regardless of the cause of the disability.

Mental Illness

In *Atkins*, the Court held that mentally retarded offenders are less culpable than other offenders because of their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."⁵ This same reasoning must logically extend to persons suffering from a severe mental disability or disorder that significantly impairs their cognitive or volitional functioning at the time of the capital offense.

In 2006, the ABA adopted a policy opposing imposition of the death penalty on persons who, at the time of the offense, suffered from a severe mental disability or disorder that affected (1) their capacity to appreciate the nature, consequences or wrongfulness of their conduct; (2) their ability to exercise rational judgment in relation to their conduct; or (3) their capacity to conform their conduct to the requirements of the law.⁶

Association on Mental Retardation (AAMR) changed its name in 2007 to the American Association on Intellectual and Developmental Disabilities (AAIDD). *FAQ on Intellectual Disability*, *supra* note 1 (last visited Apr. 7, 2011).

⁴ For example, the AAIDD defines mental retardation as "a disability characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior, which covers a range of everyday social and practical skills[, and which] originates before the age of 18." *FAQ on Intellectual Disability*, *supra* note 1. The DSM defines a person as mentally retarded if, before the age of eighteen, s/he exhibits "significantly subaverage intellectual functioning and concurrent deficits or impairments in present adaptive functioning." AM. PSYCHIATRIC ASS'N, *supra* note 3, at 39.

⁵ *Atkins*, 536 U.S. at 318.

⁶ ABA, RECOMMENDATION 122A, 2006 Ann. Mtg. (adopted Aug. 7-8, 2006), available at http://www2.americanbar.org/sdl/Documents/2006_AM_122A.pdf.

Mental Illness after Sentencing

Concerns about a prisoner's mental competence and suitability for execution also arise long after the prisoner has been sentenced to death. Almost 13% of all prisoners executed in the modern death penalty era have been "volunteers," or prisoners who elected to forgo all available appeals.⁷ When a prisoner seeks to forgo or terminate post-conviction proceedings, jurisdictions should implement procedures that will ensure that the prisoner fully understands the consequences of that decision, and that the prisoner's decision is not the product of his/her mental illness or disability.

Irrespective of a state's law on the application of the death penalty to offenders with mental retardation or mental illness, mental disabilities and disorders can affect every stage of a capital trial. Evidence of mental illness is relevant to the defendant's competence to stand trial, it may provide a defense to the murder charge, and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, defense attorney, or jury is misinformed about the nature of mental illness and its relevance to the defendant's culpability and life experience, tragic consequences often follow for the defendant.

Juries often mistakenly treat mental illness as an aggravating circumstance rather than a mitigating factor in capital cases. States, in turn, have often failed to monitor or correct such unintended and unfair results. For example, a state's capital sentencing statute may provide a list of mitigating factors that implicate mental illness, such as whether the defendant was under "extreme mental or emotional disturbance" or whether the defendant had the capacity to "appreciate the criminality (wrongfulness) of his conduct" at the time of the offense; however, these factors are read to jurors without further explanation or without any discussion of their relationship to mental illness.⁸ One study found specifically that jurors' consideration of "extreme mental or emotional disturbance" in capital cases correlated positively with decisions to impose death sentences.

Mental illness particularly weighs against a capital defendant when it is considered in the context of determining "future dangerousness," a criterion for imposing the death penalty in some jurisdictions. One study showed that a judge's instructions on future dangerousness led mock jurors to believe that the death penalty was *mandatory* for mentally ill defendants. This perception unquestionably affects decisions in capital cases. In addition, the medication some mentally ill defendants receive during trial often causes them to appear detached and unremorseful. This, too, can lead jurors to impose a sentence of death.

⁷ John Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 959 (2005).

⁸ State death penalty statutes based upon the Model Penal Code list three mitigating factors that implicate mental illness: (1) whether the defendant was under "extreme mental or emotional disturbance" at the time of the offense; (2) whether "the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;" and (3) whether "the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his conduct." MODEL PENAL CODE § 210.6(1)(f) (1962). In 2009, the American Law Institute formally withdrew all Model Penal Code provisions related to the imposition of capital punishment. Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. TIMES, Jan. 5, 2010, at A11.

I. FACTUAL DISCUSSION: MISSOURI OVERVIEW

A. Admissibility of Mental Illness and Disability Evidence

Missouri statutory law states that “[e]vidence that the [criminal] defendant did or did not suffer from a mental disease or defect” is only admissible under certain circumstances, the following of which are relevant to this Chapter:

- (1) “To determine whether the defendant lacks capacity to understand the proceedings against him or to assist in his own defense”;
- (2) “To determine whether the defendant is criminally responsible”—that is, whether s/he is not guilty by reason of mental disease or defect;
- (3) “To determine whether a person condemned to death [lacks the mental capacity to] be executed . . .”;
- (4) “To determine whether or not the defendant, if found guilty, should be sentenced to death . . .”; and
- (5) “To prove that the defendant did or did not have a state of mind which is an element of the offense”⁹

“Mental disease or defect” is defined by statute as “includ[ing] congenital and traumatic mental conditions as well as disease.”¹⁰ The term specifically excludes “abnormality manifested only by repeated criminal or otherwise antisocial conduct, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder,” as well as “alcoholism without psychosis or drug abuse without psychosis or an abnormality manifested only by criminal sexual psychopathy.”¹¹

B. Mental Retardation in Death Penalty Cases

In 2002, the U.S. Supreme Court held, in *Atkins v. Virginia*, that executing the mentally retarded violates the Eighth Amendment prohibition on cruel and unusual punishment.¹² The Court, however, allowed the individual states to determine the procedure for determining whether an offender is mentally retarded.¹³

The year before *Atkins* was decided, in 2001, the Missouri General Assembly amended its death penalty statute, Section 565.030, to prohibit the application of the death penalty to the mentally retarded.¹⁴ “Mental retardation” is defined in the statute as

a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive

⁹ Section 552.015.2, RSMo 2011.

¹⁰ Section 552.010, RSMo 2011.

¹¹ *Id.*

¹² *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

¹³ *See id.*

¹⁴ Section 565.030.1(4), RSMo 2011. A different subdivision of this statute was held unconstitutional by the Supreme Court of Missouri in *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003). Except where noted, however, that portion of the statute is not relevant to this Chapter.

related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.¹⁵

With the exception of the requirement that the disability be “documented” before age eighteen, this statutory language conformed to the definition endorsed by the American Association on Intellectual and Developmental Disabilities (AAIDD) at the time the statute was drafted.¹⁶

1. Determinations of Mental Retardation at Trial

At the trial level, the mental retardation determination may occur at a pretrial hearing or during the sentencing phase of the capital trial.¹⁷ The determination will only occur pretrial, however, “[u]pon written agreement of the parties and with leave of the court.”¹⁸

If the defendant, prosecution, and trial court do not all agree to hold a pretrial hearing on the issue of mental retardation, or if the trial court found that the defendant was not mentally retarded in a pre-trial hearing, the defendant can present evidence of mental retardation to the jury during the sentencing phase of the trial.¹⁹ The jury then decides whether the defendant is mentally retarded during sentencing phase deliberations.²⁰ If the jury finds the defendant to be mentally retarded, s/he is automatically sentenced to life imprisonment without eligibility for probation, parole, or release except by act of the governor.²¹

The statute provides that the trier of fact must apply a “preponderance of the evidence” standard to determine whether the defendant is mentally retarded. Although the statute does not indicate which party bears this burden, the Supreme Court of Missouri has held that “it is defendant’s burden, not the State’s, to prove to a jury that he is mentally retarded.”²² Missouri’s pattern jury instructions inform the jurors that the defendant will be sentenced to life in prison if they unanimously find that s/he is mentally retarded.²³ Missouri law is unclear, however, as to the outcome when the jury is not unanimous on the mental retardation issue.²⁴

¹⁵ Section 565.030.6, RSMo 2011.

¹⁶ At the time the Missouri statute was drafted, the AAIDD defined mental retardation as follows:

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

AM. ASS’N ON MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS* 5 (9th ed. 1992).

¹⁷ Section 565.030.5, RSMo 2011.

¹⁸ *Id.*

¹⁹ *See* Section 565.030.4–.5, RSMo 2011.

²⁰ Section 565.030.4, RSMo 2011.

²¹ *Id.*

²² *State v. Johnson*, 244 S.W.3d 144, 150 (Mo. banc 2008).

²³ *Id.* at 150.

²⁴ *See* Section 565.030, RSMo 2011.

2. Determinations of Mental Retardation in Post-conviction Proceedings

a. Inmates Sentenced for Offenses Occurring Before August 28, 2001

Missouri's statutory prohibition on the execution of the mentally retarded applies to "offenses committed on or after August 28, 2001."²⁵ This would appear to preclude inmates who committed their crimes prior to this date from raising mental retardation claims in post-conviction proceedings. Subsequent to the *Atkins* decision, however, the Supreme Court of Missouri held that any inmate "that can prove mental retardation by a preponderance of the evidence, as set out in [the Missouri statute], shall not be subject to the death penalty."²⁶

A death-sentenced inmate alleging mental retardation who has not yet exhausted his/her state post-conviction remedies may file a post-conviction motion on the grounds "that the sentence imposed violates the state or federal constitution or that the sentence was in excess of the maximum authorized by law."²⁷ The motion court may deny an evidentiary hearing on the mental retardation issue if the trial record "conclusively refute[s]" a mental retardation claim.²⁸ If the inmate is "able to articulate specific facts indicating" that s/he is mentally retarded, however, the motion court must grant the inmate a new penalty phase hearing.²⁹ If the motion court denies post-conviction relief, the inmate may appeal to the Supreme Court of Missouri, which will reverse if "the findings and conclusions of the motion court are clearly erroneous."³⁰

An inmate sentenced to death for a crime occurring before August 28, 2001 who has exhausted his/her post-conviction remedies may file a petition for a writ of mandamus in the Supreme Court of Missouri to prove that s/he is mentally retarded.³¹ This procedure appears to be the only means to prove mental retardation for a death-sentenced inmate who has exhausted his/her Rule 29.15 and 29.31 post-conviction remedies, as the Supreme Court of Missouri has held that Rule 91 habeas corpus is not the proper procedure for a death-sentenced inmate who committed his/her crime before August 28, 2001 to raise the claim that mental retardation bars his/her execution.³² A mandamus petitioner must "articulate specific facts indicating his mental deficiency."³³ If the state disputes the factual allegations, "the Court will appoint a master"³⁴ who will then review evidence and hear from witnesses presented by both parties to determine whether the inmate is mentally retarded.³⁵ The Supreme Court will sustain the master's findings "unless there is no substantial evidence to support them, they are against the weight of the evidence, or they erroneously declare or apply the law."³⁶ "If the [Supreme] Court [of Missouri] determines the defendant is mentally retarded as defined in [the Missouri statute], it will . . .

²⁵ Section 565.030.7, RSMo 2011.

²⁶ *Johnson v. State*, 102 S.W.3d 535, 540 (Mo. banc 2003).

²⁷ *Id.* at 537.

²⁸ *Goodwin v. State*, 191 S.W.3d 20, 26 (Mo. banc 2006).

²⁹ *Johnson*, 102 S.W.3d at 541.

³⁰ *Johnson*, 102 S.W.3d at 537; Rule 29.15(k).

³¹ *In re Competency of Parkus*, 219 S.W.3d 250, 254 (Mo. banc 2007).

³² *See id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523, 525 (Mo. banc 2010).

³⁶ *Id.* at 526.

resentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor.”³⁷

b. Inmates Sentenced for Offenses Occurring On or After August 28, 2001

It is unclear how an inmate who committed his/her capital offense on or after August 28, 2001 could effectively raise a mental retardation claim in post-conviction.³⁸

Under the Missouri Supreme Court Rules, inmates must file their Rule 29.15 and 24.035 post-conviction motions in the court in which they were sentenced.³⁹ As grounds for relief, an inmate may allege that the “sentence imposed violates the constitution” because, as a mentally retarded person, s/he is ineligible for the death penalty.⁴⁰ The Supreme Court of Missouri has held, however, that an inmate is procedurally barred from raising in post-conviction proceedings those constitutional claims which were available but not raised at trial or on direct appeal.⁴¹ To date, the Court has not decided whether this rule would preclude post-conviction relief for an allegedly mentally retarded inmate who did not raise a mental retardation claim at trial, even if the inmate committed the capital offense on or after August 28, 2001, when the Missouri statute barring the execution of the mentally retarded took effect.

The Supreme Court of Missouri has held that a death-sentenced inmate may be entitled to Rule 91 habeas corpus relief on a claim that would otherwise be procedurally barred if that inmate can demonstrate “manifest injustice.”⁴² To prove that a death sentence was manifestly unjust, the inmate must show that “there was no aggravating circumstance or that some other condition of [death penalty] eligibility had not been met.”⁴³ While the Court has held that Rule 91 does not apply to mental retardation claims made by inmates sentenced to death for crimes committed before August 28, 2001, it has not decided whether this procedure is applicable to death-sentenced inmates who committed their crime on or after this date.⁴⁴

C. *Mental Illness and Disability as a Mitigating Circumstance*

The defendant may submit evidence of other mental illnesses, disabilities, or impairments to the jury during the penalty phase of the trial as mitigating evidence.⁴⁵ Such factors, if proven, will not categorically exclude the defendant from the death penalty, but can be considered by the jury in deciding whether to sentence the defendant to death or life in prison.⁴⁶ Missouri’s death

³⁷ *In re Competency of Parkus*, 219 S.W.3d 250, 254 (Mo. banc 2007) (citing *State v. Whitfield*, 107 S.W.3d 253, 272 (Mo. banc 2003)).

³⁸ When the Supreme Court of Missouri decided the proper procedure for a death-sentenced inmate to raise a mental retardation claim, it noted that “[t]he appropriate procedure to apply to cases arising [on or] after [August 28, 2001,] where the [mental retardation] issue is not otherwise preserved is not before the Court at this time.” *Id.* at 254 n.5.

³⁹ Rules 24.035(a), 29.15(a).

⁴⁰ *See Johnson v. State*, 102 S.W.3d 535, 540 (Mo. banc 2003); Rule 29.15(a).

⁴¹ *Rodden v. State*, 795 S.W.2d 393, 395 (Mo. banc 1990).

⁴² *Clay v. Dormire*, 37 S.W.3d 214, 217 n.1 (Mo. banc 2000).

⁴³ *Id.* at 218 n.1 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 345–47 (1992)).

⁴⁴ *In re Competency of Parkus*, 219 S.W.3d 250, 254 (Mo. banc 2007).

⁴⁵ *See e.g.*, *State v. Richardson*, 923 S.W.2d 301, 326 (Mo. banc 1996).

⁴⁶ *See* Section 565.032, RSMo 2011.

penalty statute includes seven enumerated mitigating circumstances, three of which are relevant to a mental illness or disability: (1) “[t]he murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance”; (2) “[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired”; and (3) “[t]he defendant acted under extreme duress or under the substantial domination of another person.”⁴⁷ If the defendant presents evidence to support the particular statutory mitigating circumstance, the trial court will instruct the jury on that particular circumstance.⁴⁸

Furthermore, the U.S. Supreme Court has held that capital defendants must be permitted to present evidence in support of any relevant mitigating circumstance, in addition to those factors listed in a state’s death penalty statute.⁴⁹ As such, Missouri capital defendants are permitted to present evidence in support of mitigating circumstances related to their mental state which may not conform to the statutory mitigating circumstances.⁵⁰ These are known as “non-statutory mitigating circumstances.”⁵¹ Moreover, despite Missouri’s statutory prohibition on admitting evidence of drug abuse or alcoholism “without psychosis” as evidence of mental disease or defect,⁵² such evidence appears to be admissible as a non-statutory mitigating circumstance.⁵³ The trial court, however, will not instruct the jury on individual non-statutory mitigating circumstances.⁵⁴ Rather, the court will instruct the jurors that they “may also consider any circumstances which you find from the evidence in mitigation of punishment.”⁵⁵

D. Competency

1. Competency to Waive *Miranda* Rights and to Confess

In *Miranda v. Arizona*, the U.S. Supreme Court held that, prior to a custodial interrogation, law enforcement officers must inform a suspect of his/her right to remain silent and right to an attorney.⁵⁶ A suspect may, however, waive these rights and provide a statement to police without an attorney.⁵⁷ For the waiver to be competent and thus valid, it must be made knowingly and intelligently.⁵⁸ Missouri appellate courts have held that a *Miranda* waiver was not knowing and intelligent if “the totality of the circumstances show that a defendant was deprived of a free choice to admit, deny, or refuse to answer, and [] physical or psychological coercion was such that a defendant’s will was overborne when he or she confessed.”⁵⁹ Missouri courts will

⁴⁷ Section 565.032.3, RSMo 2011.

⁴⁸ *Richardson*, 923 S.W.2d at 326.

⁴⁹ *Lockett v. Ohio*, 438 U.S. 586, 608 (1978).

⁵⁰ *Richardson*, 923 S.W.2d at 324.

⁵¹ *See id.*

⁵² Section 552.010, RSMo 2011.

⁵³ *State v. Richardson*, 923 S.W.2d 301, 326 (Mo. banc 1996) (noting that the trial court allowed evidence of defendant’s use of alcohol and marijuana on the evening of the murder).

⁵⁴ *Accord State v. Mease*, 842 S.W.2d 98, 113 (Mo. banc 1992).

⁵⁵ *Richardson*, 923 S.W.2d at 325.

⁵⁶ *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

⁵⁷ *Id.* at 479.

⁵⁸ *Id.*

⁵⁹ *State v. Payne*, 126 S.W.3d 431, 437 (Mo. App. 2004).

consider evidence of a defendant's mental illness or disability as a factor in determining the validity of the *Miranda* waiver.⁶⁰

In addition to the *Miranda* waiver, the confession itself must also be voluntary to be admissible.⁶¹ The U.S. Supreme Court has held that “[c]oercive police activity is a necessary predicate to finding that a confession is not ‘voluntary.’”⁶² If the defendant can establish coercion, the court must consider the totality of the circumstances to determine whether the defendant's statements “were the product of his free and rational choice.”⁶³ In interpreting U.S. Supreme Court precedent, Missouri courts have held that factors such as intelligence, lack of education, and “unusual susceptibility to coercion” are all relevant in determining whether a confession was freely made.⁶⁴

2. Competency to Stand Trial

Missouri statutory law provides that “[n]o person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.”⁶⁵ Missouri appellate courts, in accordance with the U.S. Supreme Court's decision in *Dusky v. United States*, have held that the test for competency to stand trial is “whether the accused had sufficient present ability to consult with his counsel with a reasonable degree of rational understanding and whether he had a rational as well as factual understanding of the proceedings against him.”⁶⁶

The Missouri competency statute states that when the trial court finds “reasonable cause to believe that the accused lacks mental fitness to proceed,” the court shall, on its own motion or the motion of either party, order an examination of the defendant by a mental health professional.⁶⁷ When the competency issue is raised by the defense, defense counsel must typically offer some evidence of incompetency before the court must grant a hearing.⁶⁸ The trial court, however, must order an examination *sua sponte* if it finds reason to doubt the defendant's competency.⁶⁹ The Missouri Court of Appeals has provided a non-exclusive list of factors for

⁶⁰ *Id.* at 437–39.

⁶¹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

⁶² *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

⁶³ *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968).

⁶⁴ *State v. Barriner*, 210 S.W.3d 285, 300 (Mo. App. 2006). *But see* *State v. Goacher*, 376 S.W.2d 97, 103 (Mo. banc 1964) (“The fact, if true, that defendant had a somewhat retarded intellect could not affect the admissibility of his confession upon this evidence”); *State v. Wood*, 128 S.W.3d 913, 916 (Mo. App. 2004) (“A deficient mental condition alone does not render a confession involuntary.”).

⁶⁵ Section 552.020.1, RSMo 2011.

⁶⁶ *Davis v. State*, 517 S.W.2d 97, 103 (Mo. 1974) (citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)).

⁶⁷ Section 552.020.2, RSMo 2011.

⁶⁸ *See, e.g., State v. Antone*, 724 S.W.2d 267 (Mo. App. 1986) (holding that defendant's bizarre letters to the court requesting bond reduction and the fact that he dressed as woman during trial did not require the trial court to order a competency evaluation when defense counsel offered “no supporting affidavits, no evidence of past medical problems or no psychological or psychiatric reports” in support of defendant's incompetency).

⁶⁹ *State v. Tilden*, 988 S.W.2d 568, 577–78 (Mo. App. 1999).

the trial court to consider in determining whether to order an examination: “(1) prior commitments to mental institutions for evaluations; (2) inappropriate behavior and responses on the witness stand; (3) the bizarre circumstances of the criminal activity . . . ; [and] (4) the nature of the prior offenses causing the earlier examinations.”⁷⁰

If the court orders an examination, the psychologist, psychiatrist, or other appointed expert must prepare a report which will include the following:

- (1) Detailed findings;
- (2) An opinion as to whether the accused has a mental disease or defect;
- (3) An opinion based upon a reasonable degree of medical or psychological certainty as to whether the accused, as a result of a mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense;
- (4) A recommendation as to whether the accused should be held in custody in a suitable hospital facility for treatment pending determination, by the court, of mental fitness to proceed; and
- (5) A recommendation as to whether the accused, if found by the court to be mentally fit to proceed, should be detained in such hospital facility pending further proceedings.⁷¹

The defense and prosecution are both entitled to have the expert of their choice examine the defendant, provided such a request is made within ten days of the filing of the above-mentioned report.⁷² If neither the defense nor the prosecution challenges the report, the trial court may choose to make a competency finding based on the report rather than hold a competency hearing.⁷³ The trial court must, however, hold a competency hearing when (1) either party contests the findings of the report, or (2) “where the circumstances at a criminal trial create a ‘bona fide doubt’ of an accused’s fitness to proceed.”⁷⁴

When conducting a hearing on the issue on competency to stand trial, the trial court will make the final determination of competency, but it “may impanel a jury of six persons to assist in making the determination.”⁷⁵ Reports from mental health experts “may be received in evidence . . . but the party contesting any opinion therein shall have the right to summon and to cross-examine the examiner who rendered such opinion and to offer evidence upon the issue.”⁷⁶ The defendant is presumed to be competent, and the burden of proving incompetency is by a preponderance of the evidence.⁷⁷

⁷⁰ *Id.* at 577–78 (quoting *State v. Moon* 602 S.W.2d 828, 835 (Mo. App. 1980)).

⁷¹ Section 552.020.3, RSMo 2011.

⁷² Section 552.020.6, RSMo 2011.

⁷³ Section 552.020.7, RSMo 2011.

⁷⁴ *Id.*; *State v. Mayfield*, 562 S.W.2d 404, 407 (Mo. App. 1978) (citing *Pate v. Robinson*, 383 U.S. 375, 385 (1966); *Harkins v. State*, 494 S.W.2d 7, 13 (Mo. 1973)).

⁷⁵ Section 552.020.7, RSMo 2011.

⁷⁶ *Id.*

⁷⁷ Section 552.020.8, RSMo 2011.

If the trial court finds the defendant incompetent to proceed, “the criminal proceedings shall be suspended and the court shall commit [the defendant] to” the Missouri Department of Mental Health (DMH).⁷⁸ Six months after the defendant is committed, the trial court may order DMH to examine defendant again to determine if s/he is now competent to stand trial.⁷⁹ After this new report is filed, the defense and state are entitled to independent examinations.⁸⁰ If the court-ordered report is contested by either party, the court must hold a hearing and make one of three findings:

- (1) “If the accused is found mentally fit to proceed, the criminal proceedings shall be resumed;”⁸¹
- (2) “If it is found that the accused lacks mental fitness to proceed but there is a substantial probability the accused will be mentally fit to proceed in the reasonably foreseeable future, the court shall continue such commitment for a period not longer than six months, after which the court shall” order another competency examination;⁸²
- (3) “If it is found that the accused lacks mental fitness to proceed and there is no substantial probability that the accused will be mentally fit to proceed in the reasonably foreseeable future, the court shall dismiss the charges without prejudice and the accused shall be discharged,” unless proceedings for involuntary commitment have been properly filed.⁸³

3. Competency to Waive Right to Counsel and Represent Oneself

In *Indiana v. Edwards*, the U.S. Supreme Court held that a trial court may deny a defendant’s request for self-representation and insist upon appointment of counsel for those defendants who “suffer [from] severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”⁸⁴ Under this standard, a defendant’s mental illness or disability may render him/her incompetent to represent him/herself, although s/he may be competent to stand trial.⁸⁵

Missouri statute provides that a defendant may waive counsel and represent him/herself if the waiver is “knowledgeable and intelligent” and “signed before and witnessed by the judge or clerk of the court.”⁸⁶ The court must also ask the defendant a series of questions to determine if s/he understands the nature of the charges and the rights that s/he is relinquishing.⁸⁷ Missouri courts have further held that

⁷⁸ Section 552.020.9, RSMo 2011.

⁷⁹ Section 552.020.11(1), RSMo 2011.

⁸⁰ Section 552.020.11(2), RSMo 2011.

⁸¹ Section 552.020.11(4), RSMo 2011.

⁸² Section 552.020.11(5), RSMo 2011.

⁸³ Section 552.020.11(6), RSMo 2011.

⁸⁴ *Indiana v. Edwards*, 554 U.S. 164, 178 (2008).

⁸⁵ *See id.*

⁸⁶ Section 600.051.1, RSMo 2011.

⁸⁷ *Id.*

[t]he court should make inquiry into the defendant's intellectual capacity to make an intelligent decision: (a) inquiry should be made of his education and familiarity with legal procedures, (b) if there is any question as to the defendant's mental capacity, an inquiry into that subject should be made, (c) defendant should be made aware that he has a right to counsel at no cost if indigent, (d) the court should explore the nature of the proceedings and establish that defendant knows what he is doing and his choice is made with his eyes open, and (e) defendant should be informed that if there is misbehavior or trial disruption, his right of self-representation will be vacated.⁸⁸

4. Competency to Waive Trial and Plead Guilty

In Missouri, a defendant's waiver of right to trial and subsequent guilty plea is only effective if the trial court finds that the defendant is competent to enter the plea, and that the plea is made knowingly and voluntarily.⁸⁹ The court must find that the defendant had "a rational as well as factual understanding of the proceedings against him."⁹⁰

Moreover, when a Missouri capital defendant waives his/her right to a trial and pleads guilty, the case immediately proceeds to a non-jury sentencing hearing where a trial judge will determine whether to sentence the defendant to death or life in prison.⁹¹ Prior to the guilty plea, the trial court must inquire whether the defendant understands that, by waiving his/her right to trial, s/he is also waiving a number of other rights, including the right to a jury determination of sentencing.⁹²

5. Competency to Waive Direct Appeal

A capital defendant is competent to waive his/her right to direct appeal to the Supreme Court of Missouri if s/he was competent to waive other rights at trial, such as the right to counsel.⁹³ The Court's independent proportionality review, however, is mandatory and cannot be waived.⁹⁴

6. Competency to Waive Post-Conviction Proceedings

Missouri Supreme Court Rules state that a death row inmate must initiate the post-conviction relief process him/herself by filing a pro se motion with the court.⁹⁵ This motion must be filed before the court will appoint a Missouri State Public Defender (MSPD) post-conviction attorney.⁹⁶ While MSPD will often informally assist the inmate in filing the pro se motion

⁸⁸ State v. Quinn, 565 S.W.2d 665, 677 (Mo. App. 1978).

⁸⁹ State v. Shafer, 969 S.W.2d 719, 731 (Mo. banc 1998).

⁹⁰ Brown v. State, 485 S.W.2d 424, 429 (Mo. banc 1972) (quoting Dusky v. United States, 362 U.S. 402 (1960) (per curiam)).

⁹¹ See, e.g., Taylor v. Bowersox, 329 F.3d 963, 966 (8th Cir. 2003).

⁹² State v. Shafer, 969 S.W.2d 719, 732 (Mo. banc 1998).

⁹³ Section 565.035.7, RSMo 2011; Franklin v. State, 24 S.W.3d 686, 691 (Mo. banc 2000).

⁹⁴ Section 565.035.7, RSMo 2011.

⁹⁵ Rules 24.035(b); 29.15(b).

⁹⁶ Rules 24.036(a); 29.16(a).

before being appointed, the inmate must initiate the procedure.⁹⁷ If the inmate fails to file the petition within ninety days of the denial of his/her direct appeal, it constitutes a “complete waiver of any claim that could be raised in” post-conviction.⁹⁸ The Supreme Court of Missouri has held that post-conviction filing deadlines cannot be stayed, tolled, or otherwise extended for an inmate who “suffer[s] from a mental illness that interfere[s] with his right to seek post-conviction relief.”⁹⁹

7. Competency to Be Executed

The U.S. Supreme Court has held that it is unconstitutional to execute an inmate “whose mental illness prevents him from comprehending the reasons for the penalty or its implications.”¹⁰⁰ In accordance with this decision, Missouri statute provides that

No person condemned to death shall be executed if as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out.¹⁰¹

To receive a hearing on the issue of competency to be executed, the inmate must show “some new evidence, support or other pragmatic considerations indicating that the petitioner’s mental status has deteriorated substantially since the last determination” of competency.¹⁰² If the inmate can make this showing, both parties must be given an opportunity to conduct an “examination by a physician of their own choosing” before the circuit court holds the competency hearing.¹⁰³ If the court finds that the inmate “lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out,”¹⁰⁴ the execution must be stayed.¹⁰⁵

If, however, the inmate is later certified “as free of a mental disease or defect” that otherwise prevented him/her from understanding the nature and purpose of the death sentence, “the governor shall fix a new date for the execution and shall issue a warrant for the new execution date to the chief administrative officer of the correctional facility, who shall then take charge and custody of the offender and proceed with the execution as ordered in the warrant.”¹⁰⁶

⁹⁷ Email Interview by Rachel Bays with Greg Mermelstein, Appellate/PCR Div. Dir., Mo. State Pub. Defender Sys. (Aug. 20, 2010) (on file with author).

⁹⁸ Rule 29.15(b).

⁹⁹ *Smith v. State*, 21 S.W.3d 830, 831 (Mo. banc 2000).

¹⁰⁰ *Ford v. Wainwright*, 477 U.S. 399, 416–18 (1986).

¹⁰¹ Section 552.060.1, RSMo 2011.

¹⁰² *Shaw v. Delo*, 762 F. Supp. 853, 858 (E.D. Mo. 1991).

¹⁰³ Section 552.060.3, RSMo 2011.

¹⁰⁴ Section 552.060.1, RSMo 2011.

¹⁰⁵ Section 552.060.4, RSMo 2011.

¹⁰⁶ *Id.*

E. Mental Conditions Affecting Criminal Liability

A defendant may argue that s/he is not guilty or that s/he is guilty of a lesser offense than the crime charged because of his/her mental state at the time of the crime. Evidence of mental disease or defect may be used to support these defenses.¹⁰⁷

1. Not Guilty Based on Mental Disease or Defect

By statute, a criminal defendant in Missouri will be found not guilty based on his/her mental disease or defect “if, at the time of [his/her criminal] conduct, as a result of mental disease or defect [s/he] was incapable of knowing and appreciating the nature, quality, or wrongfulness of [his/her] conduct.”¹⁰⁸ The defendant must give notice of his/her intent to use the defense at arraignment or within ten days thereafter.¹⁰⁹ The trial court may permit the defendant to file notice at a later date upon finding “good cause.”¹¹⁰ Missouri appellate courts, however, generally grant the trial court broad discretion to bar defendants from raising the defense if notice is not filed within the statutory time period.¹¹¹ When defense counsel raises this defense, the court must appoint a mental health expert to examine the defendant and prepare a report.¹¹² The report must contain

- (1) Detailed findings;
- (2) An opinion as to whether the accused has a mental disease or defect;
- (3) An opinion based upon a reasonable degree of medical or psychological certainty as to whether the accused, as a result of a mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense;
- (4) A recommendation as to whether the accused should be held in custody in a suitable hospital facility for treatment pending determination, by the court, of mental fitness to proceed . . . ;
- (5) A recommendation as to whether the accused, if found by the court to be mentally fit to proceed, should be detained in such hospital facility pending further proceedings; [and]
. . .
- [(6) A]n opinion as to whether at the time of the alleged criminal conduct the accused, as a result of mental disease or defect, did not know or appreciate the nature, quality, or wrongfulness of his conduct or as a result of mental disease or defect was incapable of conforming his conduct to the requirements of law.¹¹³

¹⁰⁷ Section 552.015.2, RSMo 2011.

¹⁰⁸ Section 552.030.1, RSMo 2011.

¹⁰⁹ Section 552.030.2, RSMo 2011.

¹¹⁰ *Id.*

¹¹¹ *See, e.g.*, State v. Haley, 603 S.W.2d 512, 516 (Mo. banc 1980).

¹¹² Section 552.030.3, RSMo 2011.

¹¹³ Section 552.020.3–4, RSMo, 2011.

Both the defendant and prosecution are also entitled to a court order “granting them an examination of the accused by an examiner” of the party’s choosing, provided that the request for such an order is made within ten days of the filing of the aforementioned report.¹¹⁴

At trial, the question of whether the defendant is not guilty based on mental disease or defect is for the trier of fact, usually the jury.¹¹⁵ The defendant must prove the defense by a preponderance of the evidence.¹¹⁶ Defendants, however, are “presumed to be free of mental disease or defect excluding responsibility for their conduct,” irrespective of any prior adjudications.¹¹⁷ Thus, the trial court is not required to instruct the jury on this defense unless the defendant presents “substantial evidence” of a mental disease or defect.¹¹⁸ Moreover, the trial court must instruct the jury that the defendant is presumed to be free of mental disease or defect if the prosecution requests such an instruction.¹¹⁹

If a defendant is acquitted based on the defense of not guilty based on mental disease or defect, the trial court must issue an order committing him/her to DMH.¹²⁰ S/he will remain in DMH custody until the trial court finds him/her “to be so free of mental disease that [s/he is] no longer dangerous to [him/herself] and others.”¹²¹

2. Diminished Capacity

A defendant whose mental disease or defect does not completely absolve him/her of guilt may instead present evidence that, because of a mental disease or defect, s/he was unable to form the requisite mental state for the specific crime charged.¹²² In the case of a murder prosecution, a defendant who can demonstrate that s/he could not “deliberate” before committing the crime would not be guilty of first-degree murder, as Missouri statutory law defines first-degree murder as “knowingly caus[ing] the death of another person after *deliberation* upon the matter.”¹²³ Such a defendant could be found guilty of second-degree murder, however, because second-degree murder does not require proof of deliberation.¹²⁴ To be convicted of second-degree murder, however, the prosecution would still have to prove that the defendant acted “knowingly.”¹²⁵ Missouri statute defines second-degree murder as “[k]nowingly caus[ing] the death of another person or, with the purpose of causing serious physical injury to another person, caus[ing] the death of another person.”¹²⁶

¹¹⁴ Section 552.030.3, RSMo 2011.

¹¹⁵ Section 552.030.6, RSMo 2011.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *State v. Thomas*, 625 S.W.2d 115, 122 (Mo. banc 1981); Section 552.030.6, RSMo 2011.

¹¹⁹ Section 552.030.6, RSMo 2011.

¹²⁰ Section 552.030.7, RSMo 2011.

¹²¹ *State v. Pertuisot*, 547 S.W.2d 192, 193 (Mo. App. 1977).

¹²² *State v. Walkup*, 220 S.W.3d 748, 754–55 (Mo. banc 2007).

¹²³ *Id.* at 750–51; Section 565.020.1 RSMo, 2011 (emphasis added). Deliberation is “cool reflection for any length of time no matter how brief” prior to the crime. Section 565.002(3), RSMo 2011.

¹²⁴ *Walkup*, 220 S.W.3d at 751; Section 565.021.1(1), RSMo 2011.

¹²⁵ *See* Section 565.021.1(1), RSMo 2011.

¹²⁶ *Id.*

Diminished capacity is defined and recognized by the Supreme Court of Missouri, not by statute.¹²⁷ Moreover, unlike not guilty based on mental disease or defect, diminished capacity is not an affirmative defense that the defendant has the burden to prove.¹²⁸ Rather, it “is intended simply to negate an element of the state’s case—a culpable mental state—which is the state’s burden to prove beyond a reasonable doubt.”¹²⁹ In addition, a defendant does not need to provide notice of intent to present evidence of diminished capacity.¹³⁰

F. Training and Resources

1. Mental Illness and Disability Training and Policies

a. Defense Counsel¹³¹

Missouri capital defense attorneys are not required to receive any training on recognizing, assessing, or litigating mental retardation or mental illness issues.¹³² Some attorneys from the MSPD Capital Division have attended in-house and national capital and criminal defense trainings, which may include sessions on mental retardation and related issues.¹³³ Due to budget constraints, however, MSPD has not offered any in-house training on death penalty issues since 2006.¹³⁴ Some attorneys also have attended national trainings relevant to mental health issues, such as the National Consortium for Capital Defense Training’s Capital Mental Health Training II.¹³⁵ Funding for these trainings has been reduced in recent years as well.¹³⁶

MSPD once provided contract attorneys with funding to attend national and MSPD-sponsored trainings; however, this has been eliminated from MSPD’s budget in recent years.¹³⁷

b. Law Enforcement¹³⁸

Missouri law enforcement officer training is regulated by the Missouri Peace Officer Standards and Training Commission (POST Commission).¹³⁹ The POST Commission’s Mandatory Basic Training Curricula outlines several courses which a prospective officer must complete to obtain

¹²⁷ *Walkup*, 220 S.W.3d at 754.

¹²⁸ *Id.* at 755.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ For a discussion on training of defense counsel in death penalty cases, see Chapter Six on Defense Services.

¹³² Email Interview by Rachel Bays with Karen Kraft, Capital Div. Dir., Mo. State Pub. Defender Sys. (June 7, 2010) (on file with author).

¹³³ See *Training Division, MO. STATE PUB. DEFENDER, available at* <http://www.publicdefender.mo.gov/employment/training.htm> (last visited Oct. 8, 2010).

¹³⁴ Interview by Rachel Bays with Karen Kraft, *supra* note 132.

¹³⁵ *Id.*

¹³⁶ Email Interview by Mark Pickett with Karen Kraft, Capital Div. Dir., Mo. State Pub. Defender Sys. (Apr. 22, 2011) (on file with author).

¹³⁷ Interview by Rachel Bays with Karen Kraft, *supra* note 132.

¹³⁸ For a discussion on training of law enforcement officers, see Chapter Three on Law Enforcement.

¹³⁹ Sections 590.010–590.501, RSMo 2011; *Peace Office Standards and Training*, MO. DEP’T OF PUB. SAFETY, <http://www.dps.mo.gov/dir/programs/post> (last visited Jan. 10, 2012).

his/her officer's license.¹⁴⁰ The course curriculum for constitutional law states that officers must take "special care . . . in giving the [*Miranda*] warning" to "mentally retarded or demented" persons.¹⁴¹ The curricula do not require any other training related to mental disabilities or illnesses.

c. Prison Authorities

Missouri Department of Corrections (DOC) course curricula state that prospective corrections officers must complete a two-hour course called "Special Needs Offenders" as part of pre-service training.¹⁴² The course trains students "to compare and contrast individuals with mild or moderate mental retardation, learning disabilities, and emotional problems," and to "assess the potential problems from these impairments, predict how staff might be affected and learn techniques that facilitate learning and effective communication" with such inmates.¹⁴³

2. Resources Available to Investigate Mental Illness and Disability

a. Defense Counsel Resources¹⁴⁴

The MSPD Capital Division employs its own investigators and mitigation specialists who are members of the defense team who investigate facts surrounding the alleged offense, as well as the defendant's background, in preparation for trial, including facts related to mental illnesses and disabilities.¹⁴⁵ MSPD Investigators are not required to have any training related to mental health issues. MSPD mitigation specialists, however, must have a "[m]aster's degree from an accredited college or university with specialization in psychology, social work, sociology, or closely related field."¹⁴⁶

Missouri statutory law authorizes defense counsel to hire the mental health expert of their choosing when the defendant raises a mental health-related defense.¹⁴⁷ To obtain funding for these experts MSPD defense counsel must receive approval from MSPD.¹⁴⁸ MSPD is typically able to approve funding for these experts at their requested rates.¹⁴⁹

MSPD contract counsel receive funding for investigators, mitigation specialists, experts and by applying for funding to MSPD.¹⁵⁰ The request must be approved by either MSPD General Counsel or Deputy Director.¹⁵¹

¹⁴⁰ MO. POST COMM'N, MANDATORY BASIC TRAINING CURRICULA (2010) (on file with author).

¹⁴¹ *Constitutional Law*, in MANDATORY BASIC TRAINING CURRICULA, *supra* note 140.

¹⁴² MO. DEP'T OF CORR., PRE-SERVICE TRAINING 9 (2009), available at <http://doc.mo.gov/documents/hservice/PreService.pdf> (last visited Jan. 9, 2012).

¹⁴³ *Id.*

¹⁴⁴ For a discussion on defense counsel funding and resources, see Chapter Six on Defense Services.

¹⁴⁵ Interview by Rachel Bays with Karen Kraft, *supra* note 132.

¹⁴⁶ MO. PUB DEFENDER SYS., *Job Description: Mitigation Specialist I* (June 7, 2010) (on file with author).

¹⁴⁷ *E.g.*, Section 552.020.6, RSMo 2011.

¹⁴⁸ Interview by Rachel Bays with Karen Kraft, *supra* note 132.

¹⁴⁹ Interview by Mark Pickett with Karen Kraft, *supra* note 136.

¹⁵⁰ Telephone Interview by Kirstin Ramsay with Peter Sterling, General Counsel, Mo. State Pub. Defender Sys. (Mar. 15, 2011) (on file with author).

¹⁵¹ *Id.*

Pro se indigent defendants in Missouri are not entitled to funding to hire investigators, mitigation specialists, or mental health experts, nor is the trial court required to appoint such experts for them.¹⁵² The Supreme Court of Missouri has held that while represented defendants are entitled to the appointment of experts and investigators, pro se litigants are not so entitled.¹⁵³

b. Missouri Department of Mental Health Evaluations (DMH)

Missouri DMH performs mental health evaluations in criminal cases, such as competency evaluations, when such a request is made by the defense or prosecution and the trial court grants an order for the evaluation.¹⁵⁴ In practice, however, defense counsel do not typically use DMH experts for client evaluations, as MSPD policy states that an attorney should use MSPD resources to “hire a private mental health professional,” rather than obtain a court-ordered DMH evaluation, when the attorney “believes a client may have a legally significant mental disease or defect.”¹⁵⁵ DMH performs one evaluation on the issue ordered by the court at no cost.¹⁵⁶ DMH must complete the evaluation within sixty days of receiving the order, but can receive an extension upon a showing of good cause.¹⁵⁷

¹⁵² See *State v. Davis*, 318 S.W.3d 618, 636 (Mo. banc 2010).

¹⁵³ *Id.*

¹⁵⁴ Email Interview by Mark Pickett with Richard N. Gowdy, Dir. of Forensic Servs., Mo. Dep’t of Mental Health (May 12, 2011) (on file with author).

¹⁵⁵ MO. PUB DEFENDER SYS., *MSPD Policy: Mental Health Evaluations for Public Defender Clients* (Dec. 10, 2005) (on file with author).

¹⁵⁶ Interview with Richard N. Gowdy, *supra* note 154.

¹⁵⁷ *Id.*

II. ANALYSIS: MENTAL RETARDATION

A. Recommendation #1

Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Intellectual and Developmental Disabilities (AAIDD). 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.

The AAIDD defines mental retardation, now referred to as “intellectual disability,” as “a disability characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior, which covers a range of everyday social and practical skills[, and which] originates before the age of 18.”¹⁵⁸

An amendment to Missouri’s death penalty statute, adopted in 2001, prohibits the application of the death penalty to defendants found to be mentally retarded.¹⁵⁹ The statute defines mental retardation as

a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.¹⁶⁰

Intellectual Functioning Component

The AAIDD definition of mental retardation does not require a particular intelligence quotient (IQ) test score to demonstrate a significant limitation in intellectual functioning. While the AAIDD notes that “limitations in intellectual functioning are generally thought to be present if an individual has an IQ test score of approximately 70 or below[,] IQ scores must always be considered in light of the standard error of measurement, appropriateness, and consistency with administration guidelines.”¹⁶¹ Specifically, “[s]ince the standard error of measurement for most IQ tests is approximately 5, the ceiling may go up to 75.”¹⁶² Moreover, evaluation of persons with mental retardation is too complex an issue to rely on a single IQ score.¹⁶³

¹⁵⁸ *FAQ on Intellectual Disability*, *supra* note 1.

¹⁵⁹ Section 565.030.4(1), RSMo 2011.

¹⁶⁰ Section 565.030.6, RSMo 2011.

¹⁶¹ *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aaidd.org/content_185.cfm (last visited Jan. 6, 2012).

¹⁶² *Id.*

¹⁶³ See James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 20 n.22 (2003) (noting that “relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the

Other factors may also decrease the reliability of an individual IQ test score. The Flynn Effect, for instance, is a phenomenon recognized by the AAIDD whereby average scores on an IQ test artificially increase over time.¹⁶⁴ For example, while the average score on an IQ test known as the WAIS-III was 100 when the test was developed in 1995, the average score increased to 103 in 2005.¹⁶⁵ Thus, a person who scored a seventy-three on this test in 2005 might have an actual IQ of seventy.¹⁶⁶ According to the AAIDD, “best practices require recognition of a potential Flynn Effect when older editions of an intelligence test . . . are used in the assessment or interpretation of an IQ score.”¹⁶⁷ Another phenomenon, the practice effect, causes an “artificial increase in IQ scores when the same [test] is readministered within a short time interval.”¹⁶⁸ The AAIDD states that it is “established clinical practice” to “avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee’s true intelligence.”¹⁶⁹ Finally, the AAIDD states that, for an IQ test to be considered a valid measure of intellectual functioning, it must be “an individually administered, standardized instrument,” as opposed to “[s]hort forms of screening tests” or group-administered IQ exam.¹⁷⁰

The Missouri statute defines the intellectual functioning component of mental retardation as “significantly subaverage intellectual functioning.”¹⁷¹ This language is similar to the current AAIDD definition, and is based upon the AAIDD definition of mental retardation that was in effect when Missouri’s mental retardation statute was drafted in 2001.¹⁷² The statute does not require a particular IQ score. Likewise, Missouri case law does not prescribe a particular IQ requirement. While the Supreme Court of Missouri has stated that “[s]ignificantly subaverage intellectual functioning is defined as an IQ of about 70 or below,” it has further noted that, due to

inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation”); AM. ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, & SYSTEMS OF SUPPORTS 5 (9th ed. 1992) (“Mental retardation is characterized by significantly subaverage intellectual capabilities or ‘low intelligence.’ If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below. This upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner.”); AM. ASS’N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed., 8th ed. 1983) (“This upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment.”); AM. PSYCHIATRIC ASS’N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 41 (text rev. 4th ed. 2000) (“[I]t is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.”).

¹⁶⁴ AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, & SYSTEMS OF SUPPORTS 37 (11th ed. 2010) [hereinafter INTELLECTUAL DISABILITY].

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 38.

¹⁶⁹ *Id.*

¹⁷⁰ INTELLECTUAL DISABILITY, *supra* note 164, at 41.

¹⁷¹ Section 565.030.6, RSMo 2011.

¹⁷² *See* AM. ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, & SYSTEMS OF SUPPORTS 5 (9th ed. 1992).

measurement errors, “it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.”¹⁷³

Missouri case law has not yet explicitly accepted or rejected the Flynn Effect or the practice effect.¹⁷⁴ In addition, the Missouri mental retardation statute and subsequent case law do not limit the admissibility of any types of intelligence tests to determine whether a defendant has significantly subaverage intellectual functioning. Thus IQ tests considered unreliable by the AAIDD, such as group-administered IQ tests, are potentially admissible under Missouri law.

Adaptive Behavior Component

In addition to intellectual limitations, the AAIDD definition of mental retardation requires “significant limitations in . . . adaptive behavior, which covers a range of everyday social and practical skills.”¹⁷⁵ Whereas the intellectual functioning component of mental retardation relates to a person’s academic skills, adaptive behavior skills reflect one’s capacity to perform everyday tasks and to conform to social norms.¹⁷⁶ Because adaptive behavior is a separate component of mental retardation, a person with an IQ below seventy might not be considered mentally retarded if s/he does not also exhibit deficiencies in adaptive skills. The current AAIDD definition divides adaptive behavior skills into three categories:

Conceptual skills—language and literacy; money, time, and number concepts; and self-direction

Social skills—interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), social problem solving, and the ability to follow rules, obey laws, and avoid being victimized

Practical skills—activities of daily living (personal care), occupational skills, healthcare, travel/transportation, schedules/routines, safety, use of money, use of the telephone¹⁷⁷

Under AAIDD standards, a person suffers from significant limitations in adaptive behavior if s/he performs “at least 2 standard deviations below the mean of either (a) one of the

¹⁷³ Goodwin v. State, 191 S.W.3d 20, 31 n.7 (Mo. banc 2006) (quoting AM. PSYCHIATRIC ASS’N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 41 (text rev. 4th ed. 2000)) (holding that movant had not demonstrated significantly subaverage intellectual functioning where only one of movant’s eight IQ scores was seventy-five or below).

¹⁷⁴ In one case, the Supreme Court of Missouri noted that a special master, who had been appointed by the court to determine whether the movant was mentally retarded, had not applied the Flynn Effect in his analysis. *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523, 526 n.5 (Mo. banc 2010). The special master concluded that the movant was mentally retarded irrespective of the Flynn Effect, and the Supreme Court agreed. *Id.* at 527. The court never directly considered the validity or admissibility of the Flynn Effect in its opinion.

¹⁷⁵ *FAQ on Intellectual Disability*, *supra* note 1 (last visited Jan. 6, 2012).

¹⁷⁶ INTELLECTUAL DISABILITY, *supra* note 164, at 43–44. For a more detailed explanation of adaptive functioning, see *id.* at 43–55.

¹⁷⁷ *FAQ on Intellectual Disability*, *supra* note 1 (last visited Jan. 6, 2012).

[aforementioned] three types of adaptive behavior . . . , or (b) an overall score on a standardized measure of conceptual, social, and practical skills.”¹⁷⁸

The adaptive behavior portion of the Missouri statute states that the defendant must demonstrate “continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work.”¹⁷⁹ While this statutory language is significantly different from the current AAIDD definition of adaptive behavior limitations, it conforms to the definition used by the AAIDD when the Missouri mental retardation statute was written in 2001.¹⁸⁰ This older AAIDD definition placed adaptive skill areas into the same ten categories as those used in the Missouri statute (communication, self-care, etc.), rather than the three broader categories of conceptual, social, and practical skills that are currently endorsed by the AAIDD.¹⁸¹ As with the Missouri statute, the older AAIDD standard required demonstrative deficits in two of the ten skill areas in order to diagnose mental retardation.¹⁸²

There are no Missouri appellate decisions which directly address the adaptive behavior component of the mental retardation statute. Missouri trial courts, however, appear willing to admit into evidence a wide variety of information relevant to adaptive skills, including expert testimony; school, hospital, and prison records; and testimony from lay witnesses, such as the defendant’s family members and childhood teachers.¹⁸³

Age of Onset Component

With respect to the age of onset requirement, the Missouri mental retardation statute differs from the AAIDD definition. The AAIDD definition of mental retardation states that the disability must “originate[] before the age of 18.”¹⁸⁴ The Missouri statute, however, states that the defendant’s intellectual and behavioral limitations must have been “manifested *and documented* before eighteen years of age.”¹⁸⁵

According to the AAIDD, “[t]he purpose of the age of onset criterion is to distinguish [mental retardation] from other forms of disability that may occur later in life,” such as brain damage due to malnutrition.¹⁸⁶ The Missouri statute, by contrast, states that the disability must have been “documented” before age eighteen.¹⁸⁷ This appears to require the defendant to prove not just that s/he suffered from intellectual and behavioral limitations before age eighteen but that s/he had produced some formal proof of the disability while s/he was still a child. The AAIDD, however, specifically warns that mental retardation “does not necessarily have to have been

¹⁷⁸ *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, *supra* note 161.

¹⁷⁹ Section 565.030.6, RSMo 2011.

¹⁸⁰ AM. ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, & SYSTEMS OF SUPPORTS 5 (9th ed. 1992).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *See, e.g.*, *State v. Johnson*, 244 S.W.3d 144, 152–56 (Mo. banc 2008).

¹⁸⁴ *FAQ on Intellectual Disability*, *supra* note 1.

¹⁸⁵ Section 565.030.6, RSMo 2011 (emphasis added).

¹⁸⁶ INTELLECTUAL DISABILITY, *supra* note 164, at 27.

¹⁸⁷ Section 565.030.6, RSMo 2011.

formally identified” before age eighteen for a diagnosis to be valid.¹⁸⁸ Furthermore, a mentally retarded person from an underprivileged background or from a foreign country might not have access to the mental health screening or educational resources needed to document mental retardation at a young age.¹⁸⁹

It is unclear what sort of documentation the Missouri General Assembly considered necessary when it drafted the mental retardation statute. In *State ex rel. Lyons v. Lombardi*, the Supreme Court of Missouri held that the statute does not require “an IQ test result from prior to age 18” to prove mental retardation.¹⁹⁰ The court reasoned that “[a] purpose of requiring documentation is to diminish the possibility a defendant will fabricate or exaggerate the symptoms of mental retardation to avoid punishment.”¹⁹¹ Because “[t]he records that [inmate] Lyons presented and the testimony received are sufficient . . . to conclude that Lyons’ conditions were not a recent fabrication,” the court held that the documentation requirement was satisfied.¹⁹² In a more recent case, however, the Supreme Court of Missouri upheld a lower court’s finding that the inmate was not mentally retarded, in part, because the expert’s opinion “resulted from a diagnosis of Goodwin when he was 34 years old, but [the mental retardation statute] requires that mental retardation be ‘manifested and documented’ by age 18 years.”¹⁹³

Admissibility of Clinical Judgments of Mental Retardation

While there is limited Missouri case law on the admissibility of clinical judgments of mental retardation, Missouri trial courts appear to have admitted a wide range of evidence related to mental retardation proffered by the defense and prosecution.¹⁹⁴

Missouri courts have, for instance, permitted the introduction of a defendant’s IQ scores from tests administered both before and after the murder the defendant was alleged to have committed.¹⁹⁵ Expert psychologists and psychiatrists also have testified in detail regarding both a defendant’s intellectual functioning and adaptive behavior.¹⁹⁶ This testimony has included specific examples of behavior that the expert believed was relevant to a mental retardation diagnosis.¹⁹⁷ For instance, expert psychologists have testified on the relevance of a defendant’s school records.¹⁹⁸ Further, experts for the prosecution have been permitted to testify that a defendant’s mental retardation-range score on an IQ test was malingered, or faked.¹⁹⁹ Finally, prosecution experts have testified that the murder itself is evidence that the defendant is not

¹⁸⁸ INTELLECTUAL DISABILITY, *supra* note 164, at 27.

¹⁸⁹ John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J. L. & PUB. POL’Y 689, 730 (2009) (noting that such “tests are not performed for charitable reasons, for instance where institutions do not want to stigmatize a child, or financial reasons, if institutions do not want to pay benefits or have responsibility”).

¹⁹⁰ *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523, 527 (Mo. banc 2010).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Johnson v. State*, 333 S.W.3d 459, 464 (Mo. banc 2011).

¹⁹⁴ *See, e.g., State v. Johnson*, 244 S.W.3d 144, 150 (Mo. banc 2008).

¹⁹⁵ *See, e.g., Goodwin v. State*, 191 S.W.3d 20, 30 (Mo. banc 2006).

¹⁹⁶ *See, e.g., Johnson*, 244 S.W.3d at 152–56.

¹⁹⁷ *Id.*

¹⁹⁸ *Goodwin*, 191 S.W.3d at 28.

¹⁹⁹ *Johnson*, 244 S.W.3d at 152–53.

mentally retarded. In one case, for example, the prosecution's expert psychologist interviewed the defendant and "elicited statements from [defendant] that suggested he acted alone in committing the murders, which the state presented as evidence that [defendant] was not mentally disabled."²⁰⁰

In addition, Missouri courts have allowed lay testimony on factors that tend to support or refute a diagnosis of mental retardation. In one case, for instance, the defendant's childhood teacher testified about the defendant's performance in a special education class.²⁰¹ In the same case, the defendant's siblings and a former girlfriend testified regarding his adaptive skills.²⁰²

Conclusion

Missouri is in partial compliance with Recommendation #1. Generally, the Missouri statute's definition of mental retardation mirrors the definition used by the AAIDD at the time the statute was enacted in 2001. The statute does not require a specific IQ score, and courts have admitted scores from tests that were administered both before and after the crime. The requirement that the defendant's mental retardation be "documented" before age eighteen, however, contravenes the AAIDD definition of mental retardation.²⁰³ This language transforms the age of onset component from an element of mental retardation to an evidentiary requirement that may be out of reach for capital defendants and death row inmates who were not IQ-tested before age eighteen, or whose childhood records have been lost or destroyed. While the Supreme Court of Missouri has held that the statute does not require an IQ test score documented before age eighteen, some unspecified childhood documentation is still necessary to support a mental retardation claim.²⁰⁴

We commend Missouri for adopting a mental retardation statute that is largely based on the AAIDD definition. In order to fully conform to the AAIDD definition, Missouri should remove the documentation language from the age of onset requirement. While documentation will likely be at issue in any mental retardation claim, a bright-line documentation requirement should not be tethered to the age of onset component of the disability.

B. Recommendation #2

For cases commencing after the United States Supreme Court's decision in *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.

²⁰⁰ Bailey Brewer, *Death-row Convict Takes Case to Missouri Supreme Court*, COLUMBIA MISSOURIAN, Dec. 7, 2010, <http://www.columbiamissourian.com/stories/2010/12/07/attorneys-go-court-third-appeal-ernest-johnsons-triple-homicide-sentencings> (last visited Jan. 6, 2012).

²⁰¹ *State v. Johnson*, 244 S.W.3d 144, 155 (Mo. banc 2008).

²⁰² *Id.*

²⁰³ Section 565.030.6, RSMo 2011.

²⁰⁴ *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523, 527 (Mo. banc 2010).

The Determination of Mental Retardation in Missouri

The Missouri General Assembly amended the state death penalty statute in 2001 to prohibit the death penalty for persons found to be mentally retarded.²⁰⁵ The statute applies to murders committed on or after August 28, 2001.²⁰⁶

The statute provides that the determination of whether a defendant has mental retardation will only be decided prior to the trial “[u]pon written agreement of the parties and with leave of the court.”²⁰⁷ Thus, under the Missouri statute, the issue of mental retardation will only be decided prior to the guilt/innocence phase of the trial if the prosecution and the trial court agree to a pretrial hearing on the issue. If the defendant is not granted a pretrial hearing on mental retardation, or if s/he is granted such a hearing and the court finds him/her not to be mentally retarded, s/he is entitled to submit the issue to the jury during the penalty phase of the trial.²⁰⁸

Conclusion

Missouri is not in compliance with Recommendation #2.

Missouri law only provides for a pretrial determination of mental retardation upon agreement by the prosecution and the trial court, regardless of the strength of the evidence of mental retardation.²⁰⁹ Otherwise, the jury will make the determination of whether the defendant is mentally retarded at the close of the penalty phase.²¹⁰ Accordingly, Missouri should amend its mental retardation statute so that a defendant charged with capital murder is entitled to a pretrial determination of mental retardation irrespective of agreement by the prosecution, provided that the defendant has presented some credible evidence that s/he suffers from the disability. The State must also devise an appropriate procedural framework through which to enact this Recommendation.

The Assessment Team notes that several jurisdictions have adopted mental retardation determination procedures that grant defendants the right to a pretrial determination of mental retardation.²¹¹ There are clear advantages to determining mental retardation in a pretrial hearing. Such a procedure increases judicial efficiency by identifying mentally retarded defendants early

²⁰⁵ Section 565.030.4(1), RSMo 2011.

²⁰⁶ Section 565.030.7, RSMo 2011.

²⁰⁷ Section 565.030.5, RSMo 2011.

²⁰⁸ *Id.* (stating that the outcome of any pretrial hearing on mental retardation does not “prejudic[e] the defendant’s right to have the issue submitted to the trier of fact”).

²⁰⁹ Section 565.030.5, RSMo 2011.

²¹⁰ *See* Section 565.030.4(1), RSMo 2011.

²¹¹ *See e.g.*, ARIZ. REV. STAT. § 13-753 (2011) (providing that Arizona capital defendants who score seventy-five or below on a pretrial IQ test are entitled to a pretrial hearing on mental retardation); KY. REV. STAT. § 532.135(1)–(2) (2011) (providing that when a Kentucky capital defendant raises the issue of mental retardation, the trial court “shall determine whether or not the defendant is a seriously mentally retarded defendant” at least ten days before the beginning of the trial); *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002) (holding that the question of whether an Ohio capital defendant is mentally retarded should be decided by the trial court “in a manner comparable to a ruling on competency”); FLA. R. CRIM. P. 3.203 (stating that a Florida capital defendant is entitled to a pretrial determination of mental retardation following the proper defense motion and an examination by at least one qualified expert).

in the process, thereby avoiding an unnecessary capital trial for a defendant who is not eligible for the death penalty. Moreover, when the mental retardation issue is resolved pretrial, jurors are not then required to decide the issue in the penalty phase of the trial. Studies have shown that jurors' understanding of mental retardation is often inconsistent with the definition accepted by the AAIDD and mental health experts.²¹² Confusion on mental retardation may be exacerbated when it is presented to jurors in the penalty phase, after having heard evidence related to the crime itself. While trial judges may also be susceptible to error, their experience ruling on mental health issues in other cases will likely aid them in a mental retardation hearing. As discussed in *Mental Retardation and Mental Illness Recommendation #1*, however, the Assessment Team encourages trial judges to receive specific training on issues related to mental retardation and mental illness.²¹³

C. Recommendation #3

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.

Missouri's death penalty statute provides that a capital defendant shall not be subject to the death penalty "[i]f the trier finds by a preponderance of the evidence that the defendant is mentally retarded."²¹⁴ The statute only applies to crimes committed on or after August 28, 2001. The Supreme Court of Missouri has held that, in light of the *Atkins* decision, any defendant or inmate "that can prove mental retardation by a preponderance of the evidence, as set out in [Missouri's death penalty statute], shall not be subject to the death penalty."²¹⁵

Although the statute does not expressly state which party has the burden of proof, the Supreme Court of Missouri has held that "[t]he statute necessarily implies that it is defendant's burden, not the State's, to prove to a jury that he is mentally retarded. It would be illogical for the State to be the proponent."²¹⁶

Accordingly, Missouri is in compliance with Recommendation #3.

D. Recommendation #4

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.

²¹² Marcus T. Boccaccini et al., *Jury Pool Members' Beliefs about the Relation between Potential Impairments in Functioning and Mental Retardation: Implications for Atkins-Type Cases*, 34 LAW & PSYCHOL. REV. 1, 1-2 (2010).

²¹³ See *infra* notes 344-359 and accompanying text.

²¹⁴ Section 565.030.4(1), RSMo 2011.

²¹⁵ *Johnson v. State*, 102 S.W.3d 535, 540 (Mo. banc 2003).

²¹⁶ *State v. Johnson*, 244 S.W.3d 144, 150 (Mo. banc 2008). The statute also is silent on whether the jury's decision must be unanimous. While the Missouri pattern jury instruction states that the defendant will be sentenced to life in prison if the jury returns a unanimous finding of mental retardation, the Supreme Court of Missouri has not determined what happens if the jury hangs on this issue.

The U.S. Supreme Court has noted that mentally retarded capital defendants “face a special risk of wrongful execution” because they are less able “to make a persuasive showing of mitigation in the face of prosecutorial evidence” and “less able to give meaningful assistance to their counsel” at trial.²¹⁷ When a mentally retarded defendant waives his/her rights, such as the right to counsel or the right to present mitigating evidence, these risks are magnified, because his/her poor decision-making and communication skills are no longer buffered by the aid of attorneys. Accordingly, the ABA recommends that mentally retarded defendants be protected against waivers that are the result of their disability.

Right to Counsel

In *Faretta v. California*, the U.S. Supreme Court held that a criminal defendant has the constitutional right to waive his/her right to counsel and proceed pro se, provided the defendant’s waiver is “knowingly and intelligently” made.²¹⁸ The Court held in *Indiana v. Edwards*, however, that a trial court may deny a defendant’s request for self-representation and insist upon appointment of counsel for defendants who “suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”²¹⁹

Missouri statute provides that a defendant may waive counsel if the waiver is “knowledgeable and intelligent” and “signed before and witnessed by the judge or clerk of the court.”²²⁰ The statute also requires the defendant to respond to a series of questions to determine if s/he understands the nature of the charges and the rights that s/he is relinquishing.²²¹ Missouri courts have outlined additional procedures that must be followed before a court permits a defendant to represent him/herself. The “defendant’s invocation of the right must be made unequivocally and in a timely manner, and the corresponding waiver of counsel must be knowing and intelligent.”²²² In addition, “the trial court should engage in a discussion with the defendant” at a hearing to determine whether the defendant is competent to waive counsel:

The court should make inquiry into the defendant’s intellectual capacity to make an intelligent decision: (a) inquiry should be made of his education and familiarity with legal procedures, (b) if there is any question as to the defendant’s mental capacity, an inquiry into that subject should be made, (c) defendant should be made aware that he has a right to counsel at no cost if indigent, (d) the court should explore the nature of the proceedings and establish that defendant knows what he is doing and his choice is made with his eyes open, and (e) defendant should be informed that if there is misbehavior or trial disruption, his right of self-representation will be vacated.²²³

Missouri’s appellate courts have not yet considered the specific issue of whether, or in what circumstances, a mentally retarded defendant can competently and effectively waive his/her right

²¹⁷ *Atkins v. Virginia*, 536 U.S. 320 (2002).

²¹⁸ *Faretta v. California*, 422 U.S. 806, 835 (1975) (internal quotations omitted).

²¹⁹ *Indiana v. Edwards*, 554 U.S. 164, 178 (2008).

²²⁰ Section 600.051.1, RSMo 2011

²²¹ *See id.*

²²² *State v. Black*, 223 S.W.3d 149, 153 (Mo. banc 2007).

²²³ *State v. Quinn*, 565 S.W.2d 665, app. at 677 (Mo. App. 1978).

to counsel. In one case, however, the Supreme Court of Missouri agreed with the trial court's conclusion that a defendant "who had been shot twice in the head, [and] suffered severe mental impacts as a result" was not competent to represent himself.²²⁴

The right to counsel is especially critical under Missouri law because it is connected to the right to expert assistance.²²⁵ As discussed in Mental Retardation and Mental Illness Recommendation #1,²²⁶ indigent defendants in Missouri who represent themselves are not entitled to the appointment of experts or investigators.²²⁷

Right to Trial

In Missouri, a capital defendant may waive his/her right to a trial and plead guilty.²²⁸ Assuming that the plea is not made as part of an agreement with the prosecution, the defendant will then proceed to a non-jury sentencing hearing, where a trial judge will determine whether s/he will be sentenced to death or life in prison.²²⁹

For a guilty plea to be effective, however, the trial court must find that the defendant is competent to enter the plea, and the plea must be knowingly and voluntarily made.²³⁰ The standard is whether the defendant has "a rational as well as factual understanding of the proceedings against him."²³¹ In addition, the defendant must be informed that by waiving his right to trial, he is also waiving a number of other rights, including the right to confront witnesses, the right to a presumption of innocence, and the right to present mitigating evidence to a jury in a sentencing hearing.²³² While the "rational and factual understanding" standard implies that mental retardation is a relevant factor in determining whether a defendant can effectively plead guilty, the Supreme Court of Missouri has held that the fact that "an accused may be mentally retarded in some degree does not automatically render him incapable of standing trial or entering a voluntary plea of guilty."²³³

Right to Have Sentence Determined by a Jury

When a capital defendant waives his/her right to trial by pleading guilty, s/he also waives the right to have a jury determine the mitigating and aggravating circumstances in his/her case and decide whether s/he will be sentenced to death or life in prison.²³⁴ While the trial court will warn the defendant at his/her plea hearing that s/he is also waiving the right to a jury determination of sentencing, the court is not required to inquire whether the defendant understands the nature and

²²⁴ State v. Baumruk, 280 S.W.3d 600, 612 (Mo. banc 2009).

²²⁵ In *Ake v. Oklahoma*, the U.S. Supreme Court held that an indigent criminal defendant has the right to have a mental health expert appointed on his/her behalf. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

²²⁶ See *infra* notes 344–359 and accompanying text.

²²⁷ State v. Davis, 318 S.W.3d 618, 636 (Mo. banc 2010).

²²⁸ See, e.g., Taylor v. Bowersox, 329 F.3d 963, 966 (8th Cir. 2003).

²²⁹ See, e.g., *id.*; see also Section 565.030.4, RSMo 2011.

²³⁰ State v. Shafer, 969 S.W.2d 719, 731 (Mo. banc 1998).

²³¹ Brown v. State, 485 S.W.2d 424, 429 (Mo. banc 1972) (quoting *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)).

²³² *Shafer*, 969 S.W.2d at 732.

²³³ Pulliam v. State, 480 S.W.2d 896, 904 (Mo. 1972).

²³⁴ See, e.g., Taylor v. Bowersox, 329 F.3d 963, 966 (8th Cir. 2003).

possible consequences of this decision.²³⁵ If the defendant pleads guilty, s/he proceeds to a sentencing hearing conducted by a judge, who determines the presence of aggravating and mitigating circumstances and sentences the defendant accordingly.²³⁶

The Supreme Court of Missouri upheld the constitutionality of this procedure in *State v. Nunley*.²³⁷ In 1991, Roderick Nunley pleaded guilty to the murder of a teenage girl and was sentenced to death by a judge.²³⁸ In a 2011 case before the Supreme Court of Missouri, Nunley argued that this judicial capital sentencing procedure violated his Sixth Amendment rights as defined by the U.S. Supreme Court in *Ring v. Arizona*.²³⁹ In *Ring*, the U.S. Supreme Court held that the Sixth Amendment requires a jury, rather than a judge, to find the aggravating circumstances necessary to sentence a defendant to death.²⁴⁰ While Nunley was sentenced before the *Ring* decision, the Supreme Court of Missouri has held that *Ring* applies retroactively.²⁴¹ In *Nunley*, however, the Supreme Court of Missouri held that *Ring* does not apply to cases in which the defendant pleads guilty, because the defendant affirmatively chooses to waive his/her constitutional rights by entering the plea.²⁴²

Because mentally retarded defendants are less likely to understand the purpose and nature of their rights, they may be especially likely to waive their right to a jury determination of sentencing in Missouri. Moreover, by failing to conduct a full inquiry into a defendant's decision to forego jury sentencing, the trial court may be unable to accurately determine whether the defendant understands the nature of his/her decision and whether the choice is a product of his/her disability.

Right to Direct Appeal

The Missouri statute states that, when a defendant is sentenced to death, there “shall be a right of direct appeal of the conviction to the [S]upreme [C]ourt of Missouri.”²⁴³ With the exception of the Supreme Court's mandatory proportionality review, “[t]his right of appeal may be waived by the defendant.”²⁴⁴ The statute does not state what standard the reviewing court must apply in determining whether the waiver was valid.

²³⁵ See *Shafer*, 969 S.W.2d at 732.

²³⁶ See Sections 565.006.2, 565.032.1, RSMo 2011 (stating that “the judge in a jury-waived [capital] trial shall consider” evidence of aggravating and mitigating circumstances and determine the defendant's sentence). In 1985, the Supreme Court of Missouri held that a capital defendant who pleads guilty is statutorily entitled to a jury determination of sentencing unless s/he waives the right to jury sentencing “with unmistakable clarity.” *State v. Bibb*, 702 S.W.2d 462, 466 (Mo. banc 1985). This decision, however, was made under a prior version of Missouri's capital murder statute that was repealed in 1984. *Id.* at 463. The current version of the capital murder statute expressly provides that, when a capital defendant pleads guilty, the sentencing hearing is conducted by a judge without a jury. See Section 565.006.2, RSMo 2011 (“No defendant who pleads guilty to a homicide offense . . . shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state.”).

²³⁷ *State v. Nunley*, 341 S.W.3d 611, 622 (Mo. banc 2011).

²³⁸ *Id.* at 616. Nunley won a new sentencing hearing on appeal, but he was again sentenced to death in a judicial sentencing hearing in 1994. *Id.* at 616–18.

²³⁹ *Ring v. Arizona*, 536 U.S. 584, 609 (2002); *Nunley*, 341 S.W.3d at 618–19.

²⁴⁰ *Ring*, 536 U.S. at 609.

²⁴¹ *State v. Whitfield*, 107 S.W.3d 253, 268–69 (Mo. banc 2003).

²⁴² *Nunley*, 341 S.W.3d at 623.

²⁴³ Section 565.035.7, RSMo 2011.

²⁴⁴ See *id.*

In *State v. Franklin*, the Supreme Court of Missouri considered the validity of a direct appeal waiver in a capital case.²⁴⁵ While the mental health issues at issue in *Franklin* involved allegations of mental illness, rather than mental retardation, the case sheds light on the court's analysis of a defendant's capacity to waive direct appeal. In the direct appeal opinion, the court held that the defendant had effectively waived his appeal when he "unequivocally" advised the court that he did not wish to appeal his case.²⁴⁶ During post-conviction proceedings, the defendant argued that his appellate counsel was ineffective for failing to move the Supreme Court of Missouri to stay his direct appeal pending a determination of whether he was competent to waive that appeal.²⁴⁷ In arguing that his appellate counsel should have recognized that he was not competent to waive his appeal, the defendant focused on the fact he had informed counsel and others that he was waiving his appeal on the advice of his "spirit guide."²⁴⁸ The Supreme Court of Missouri denied the claim, noting that the trial court had found the defendant competent to represent himself at trial, despite knowledge of his reliance on spirit guides.²⁴⁹ It is unclear what standard the Supreme Court of Missouri would apply in a case where the defendant's competency had not previously been determined by the trial court.

Miranda Rights

The defendant's right to waive his/her *Miranda* rights, and thereby confess or provide a statement to law enforcement, is discussed in Mental Retardation and Mental Illness Recommendations #5 and #6.²⁵⁰

Conclusion

Missouri is in partial compliance with Recommendation #4.

Missouri appears to require a thorough inquiry, which includes analysis of the defendant's mental capacity, in determining whether s/he has effectively waived some rights, such as the right to counsel and the right to trial. Missouri law does not, however, adequately protect mentally retarded defendants from waiving their right to a jury determination of sentencing. Because mentally retarded capital defendants face a special risk of misunderstanding the purpose and importance of mitigating evidence, they may not appreciate the significance of their decision to waive the right to present mitigating evidence to a jury in a sentencing hearing.²⁵¹ Current Missouri law requires a waiver of this right when a defendant waives his/her right to a trial by pleading guilty.²⁵² While the trial court must inform the defendant that his/her waiver of the right to trial is also a waiver of the right to present mitigating evidence to a jury, the court need not inquire further into the defendant's understanding of the importance or purpose of

²⁴⁵ *State v. Franklin*, 969 S.W.2d 743 (Mo. banc 1998).

²⁴⁶ *Id.* at 744. The Court did, however, conduct a proportionality review in accordance with Missouri statute. *Id.* at 744-45.

²⁴⁷ *Franklin v. State*, 24 S.W.3d 686, 689 (Mo. banc 2000).

²⁴⁸ *Id.* at 691.

²⁴⁹ *Id.*

²⁵⁰ See *infra* notes 384-419 and accompanying text.

²⁵¹ See *Atkins v. Virginia*, 536 U.S. 320 (2002).

²⁵² Section 565.006.2, RSMo 2011 ("No defendant who pleads guilty to a homicide offense . . . shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state.").

mitigation.²⁵³ Nor is the trial court required to inform the defendant that, by pleading guilty, s/he is also waiving the right to have a jury determine the presence of aggravating circumstances in his/her case.²⁵⁴

Furthermore, Missouri's waiver procedure increases the risk that a potentially mentally retarded defendant will waive his/her rights without understanding the full consequences of his/her actions, initiating a series of waivers which could prevent the jury or court from ever hearing any evidence of mental retardation, even if such evidence exists. This risk is especially great if the defendant chooses to forego the right to counsel and represent him/herself. Even if such a defendant wanted to present mental retardation evidence, s/he would be unable to do so effectively, because under current Missouri law s/he is not entitled to the appointment of investigators and mental health experts to assist with the case.²⁵⁵

We further observe that, although the Supreme Court of Missouri may consider a defendant's competency to waive direct appeal, the Court's ability to assess mental retardation or other mental disabilities in such a defendant may be limited if the defendant waived his/her right to counsel and chose not to present evidence of his/her mental retardation. In such a case, there would likely be no evidence of mental retardation in the trial record for the Supreme Court of Missouri to consider, even if the defendant had previously been diagnosed as mentally retarded.

Thus, the Assessment Team recommends that, before a capital defendant is permitted to waive his/her right to a jury determination of sentencing, the trial court must inquire whether the defendant fully understands his/her actions and the purpose of the right s/he is waiving. Moreover, if the trial court has a good faith belief that a pro se capital defendant is mentally retarded, the court should be empowered to order an examination of the defendant by a psychologist to determine whether s/he is eligible for the death penalty.

²⁵³ State v. Shafer, 969 S.W.2d 719, 732 (Mo. banc 1998).

²⁵⁴ *Id.*

²⁵⁵ State v. Davis, 318 S.W.3d 618, 636 (Mo. banc 2010).

III. ANALYSIS: MENTAL ILLNESS

A. Recommendation #1

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.

In Missouri, trial judges do not appoint or select experts for the state or the defense. Prosecutors choose their experts independently,²⁵⁶ and indigent defense counsel, whether employed by MSPD or working as private contract counsel, select their own expert, subject to funding approval by MSPD.²⁵⁷ Accordingly, the Missouri Assessment Team reviews Missouri's compliance with this recommendation without reference to trial judge appointments.

Prosecution Experts

When the defendant's mental health is at issue in a case, prosecutors and defense counsel can obtain a court-ordered mental health evaluation performed by the Missouri Department of Mental Health (DMH).²⁵⁸ We were unable to obtain sufficient information, however, to determine whether the DMH experts who perform evaluations for prosecutors in criminal cases are selected based on their qualifications and relevant professional experience. We also lack information to accurately assess the qualifications of non-DMH experts hired by prosecutors in Missouri.

Defense Experts

MSPD policy states that an attorney should use MSPD resources to "hire a private mental health professional," rather than obtain a court-ordered DMH evaluation, when the attorney "believes a client may have a legally significant mental disease or defect."²⁵⁹ MSPD typically approves capital defense counsel's request for a mental health expert when there is a mental health issue in the case.²⁶⁰ MSPD allows in-house defense counsel and private contract counsel to select the expert of their choice, although MSPD may recommend an expert based on other attorneys' prior experiences.²⁶¹ While MSPD occasionally may request that an expert reduce his/her hourly fees due to budget constraints, mental health experts are typically compensated for all the work they

²⁵⁶ See, e.g., Section 552.020.6, RSMo 2011.

²⁵⁷ See, e.g., *id.*; Interview by Rachel Bays with Karen Kraft, *supra* note 132.

²⁵⁸ Interview with Richard Gowdy, *supra* note 154.

²⁵⁹ MO. PUB DEFENDER SYS., MSPD POLICY: MENTAL HEALTH EVALUATIONS FOR PUB. DEFENDER CLIENTS (Dec. 10, 2005) (on file with author).

²⁶⁰ Interview by Mark Pickett with Karen Kraft, *supra* note 136.

²⁶¹ *Id.*

do on the case, including witness interviews, consultations with attorneys, traveling, report drafting, and preparation for court testimony.²⁶²

Conclusion

We do not have sufficient information to accurately assess whether Missouri is in full compliance with Recommendation #1.

While MSPD appears to provide adequate funding for defense counsel to hire the qualified mental health experts of their choice, we lack sufficient information regarding the process by which prosecutors and defense counsel select mental health experts to determine whether Missouri is in full compliance with this recommendation.

B. Recommendation #2

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.

MSPD provides funding to both its in-house capital defense counsel and private contract counsel so that mental health experts may be hired in capital cases.²⁶³ Defense counsel are able to select the mental health expert of their choice, and those experts typically are specialists on the relevant issue, such as mental retardation.²⁶⁴ Moreover, experts are usually paid at their requested hourly rate, and they are compensated for all of the necessary work they do on a case, including traveling, consulting with defense counsel, and preparing for testimony.²⁶⁵ We note, however, that due to budget constraints, MSPD is unsure if it will have sufficient funds to provide for all reasonable expert requests through the end of the 2011 fiscal year.²⁶⁶

For the above reasons, Missouri is currently in compliance with Recommendation #2. We encourage MSPD's budget to be maintained such that it can continue to provide criminal defendants with thorough, high-quality evaluations by qualified experts.

C. Recommendation #3

The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social,

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Interview by Mark Pickett with Karen Kraft, *supra* note 136.

and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.

Missouri's death penalty statute prohibits the application of the death penalty to persons found to be mentally retarded.²⁶⁷ The statute defines mental retardation as "a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations [in adaptive behaviors], which conditions are manifested and documented before eighteen years of age."²⁶⁸

Missouri does not, however, prohibit the death penalty for persons whose intellectual disabilities are the product of a disability other than mental retardation, such as dementia or a traumatic brain injury. While the U.S. Supreme Court's decision in *Atkins v. Virginia* only limits the application of the death penalty to the mentally retarded,²⁶⁹ age of onset is the only relevant distinction between mental retardation and certain other disabilities, such as a traumatic brain injury, that cause significant limitations in intellectual functioning and adaptive behavior.²⁷⁰ Thus, because mental retardation must originate before the age of eighteen, a defendant in Missouri who received a traumatic brain injury at a later age would still be eligible for the death penalty, even if s/he otherwise exhibited the same traits that make mentally retarded persons less culpable for their conduct.²⁷¹ Like mentally retarded defendants, defendants who exhibit limitations in intelligence and adaptive functioning due to a traumatic brain injury or dementia are more likely to be wrongfully executed due to a false confession or difficulty assisting defense counsel.²⁷² Yet, these persons are not afforded the same protections as the mentally retarded under Missouri law.

Moreover, the Missouri statute limits the definition of mental retardation to cases in which the condition was "manifested and *documented* before eighteen years of age."²⁷³ The documentation requirement is inconsistent with the clinical definition of mental retardation, which only requires manifestation of the disability before age eighteen.²⁷⁴ Thus, a capital defendant who meets the clinical definition of mental retardation could still be eligible for the death penalty in Missouri if s/he is unable to produce childhood documentation of the disability.

The Missouri Assessment Team further notes that there is currently no prescribed manner to prove mental retardation for a death-sentenced inmate who committed his/her capital offense on or after the Missouri statute banning the execution of the mentally retarded became effective on August 28, 2001, but who did not raise a mental retardation claim at trial.²⁷⁵ The Supreme Court of Missouri has held that an inmate is procedurally barred from raising constitutional claims in Rule 29.15 and 29.31 post-conviction proceedings if those claims were available but not raised at

²⁶⁷ Section 565.030.4(1), RSMo 2011.

²⁶⁸ Section 565.030.6, RSMo 2011.

²⁶⁹ *Atkins v. Virginia*, 536 U.S. 304 (2002).

²⁷⁰ INTELLECTUAL DISABILITY, *supra* note 164, at 27.

²⁷¹ *Id.*

²⁷² *Atkins*, 536 U.S. at 320–21.

²⁷³ Section 565.030.6, RSMo 2011 (emphasis added). The age of onset requirement is discussed in more detail in Recommendation #1 of the section on Mental Retardation, *supra*.

²⁷⁴ See INTELLECTUAL DISABILITY, *supra* note 164, at 27.

²⁷⁵ *In re Competency of Parkus*, 219 S.W.3d 250, 254 (Mo. banc 2007).

trial or on direct appeal.²⁷⁶ This rule would appear to bar death-sentenced inmates from raising mental retardation as a bar to execution during post-conviction proceedings if they could have raised this issue as a defense to the death penalty at trial but did not. If this were the case, the rule would run contrary to Recommendation #3 and the *Atkins* decision, both of which forbid the death penalty for all mentally retarded persons, not just those who raise the issue at trial.²⁷⁷ The Assessment Team further notes, however, that under Missouri law a death-sentenced inmate may be entitled to Rule 91 habeas corpus relief if s/he can prove that his/her death sentence was “manifestly unjust” by showing “that there was no aggravating circumstance or that some other condition of [death penalty] eligibility had not been met.”²⁷⁸ Presumably, this would be the proper procedure for a death-sentenced inmate of the type discussed to raise a mental retardation claim.

Conclusion

Missouri is in partial compliance with Recommendation #3.

Although Missouri prohibits the application of the death penalty to the mentally retarded, the Missouri statute’s definition of mental retardation deviates from the clinical definition by requiring the disability to be documented before age eighteen. In addition, Missouri does not prohibit the death penalty for persons who suffer from dementia or traumatic brain injury.

The diminished culpability of mentally retarded defendants arises from their intellectual and adaptive limitations, not the cause of these limitations.²⁷⁹ Accordingly, the Assessment Team recommends that Missouri prohibit the application of the death penalty to anyone who, at the time of the offense, suffered from significantly subaverage limitations in both their general intellectual functioning and adaptive behavior, whether resulting from mental retardation, dementia, or traumatic brain injury.

D. Recommendation #4

The jurisdiction should 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. [A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this recommendation.]

²⁷⁶ *Rodden v. State*, 795 S.W.2d 393, 395 (Mo. banc 1990) (citing *Cook v. State*, 511 S.W.2d 819, 820 (Mo. 1974)).

²⁷⁷ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that “the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender” (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986))).

²⁷⁸ *Clay v. Dormire*, 37 S.W.3d 214, 217 n.1 (Mo. banc 2000).

²⁷⁹ *Atkins*, 536 U.S. at 318 (holding that mentally retarded defendants’ “deficiencies . . . diminish their personal culpability”).

Missouri statute provides that a person is not guilty based on mental disease or defect “if, at the time of such conduct, as a result of mental disease or defect such person was incapable of knowing and appreciating the nature, quality, or wrongfulness of such person’s conduct.”²⁸⁰ This standard, however, differs significantly from the ABA Recommendation, which only requires the defendant to prove his/her mental disability significantly impaired his/her ability to appreciate the nature, consequences, or wrongfulness of his/her conduct.

Missouri’s death penalty statute does not preclude the application of the death penalty to persons who suffer from mental disorders other than mental retardation.²⁸¹ Moreover, the Supreme Court of Missouri has expressly held that the execution of the severely mentally ill does not violate the Eighth Amendment prohibition on cruel and unusual punishment.²⁸²

Conclusion

Missouri is not in compliance with Recommendation #4, as Missouri law does not forbid the execution of persons who were mentally ill at the time of offense, other than those who are completely absolved of guilt due to a mental disease or defect. The Assessment Team recommends that Missouri implement measures to comply with Recommendation #4.

E. Recommendation #5

To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law (see Recommendations #3–#4 as to when it should do so), 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.

While Missouri law permits jurors to be instructed on mitigating factors related to mental disability and disorder, the Missouri pattern instructions do not include an instruction stating that a mental disorder or disability is a mitigating circumstance, not an aggravating circumstance.²⁸³ Moreover, although future dangerousness is not a statutory aggravating circumstance in Missouri, Missouri case law permits the prosecutor to present evidence of defendant’s future dangerousness to the jury in the punishment phase of the trial.²⁸⁴ For instance, in one case, the prosecution was permitted to argue that the defendant posed a future danger to society because of his/her “anti-social and criminal history.”²⁸⁵ Despite this, jurors are not specifically instructed that they should not rely upon the defendant’s mental disorder or disability to conclude that s/he represents a future danger to society.

²⁸⁰ Section 552.030.1, RSMo 2011. Under this statute, a person found not guilty will be committed to the Missouri Department of Mental Health. Section 552.030.7, RSMo 2011.

²⁸¹ See Section 565.030, RSMo 2011.

²⁸² State v. Johnson, 207 S.W.3d 24, 50–51 (Mo. banc 2006).

²⁸³ See MAI-CR3d 314.30–314.48.

²⁸⁴ Section 565.032.2, RSMo 2011; State v. Bucklew, 973 S.W.2d 83, 96 (Mo. banc 1998).

²⁸⁵ Bucklew, 973 S.W.2d at 96.

Missouri law also does not permit the trial court to instruct the jury on the difference between the affirmative defense of not guilty based on mental disease or defect and subsequent reliance on mental disability as a mitigating factor.²⁸⁶ Not guilty based on mental disease or defect is a complete defense for the crime which, if successful, results in an acquittal.²⁸⁷ Mental disability as a mitigating factor, by contrast, is used to argue that the defendant, while guilty of first-degree murder, does not deserve to be executed for his/her crime.²⁸⁸

The Missouri death penalty statute includes three enumerated mitigating circumstances which allow jurors to consider the capital defendant's mental state: (1) "[t]he murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance"; (2) "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired"; and (3) "[t]he defendant acted under extreme duress or under the substantial domination of another person."²⁸⁹ The trial court will instruct the jury on a statutory mitigating circumstance if it finds there is evidence to support it.²⁹⁰

Jurors also are permitted to consider non-statutory mitigating factors that could, based on the evidence, relate to the defendant's mental illness or disability.²⁹¹ The trial court, however, is only permitted to instruct the jury using the Missouri pattern instruction, which states that jurors "shall also consider any (other) facts or circumstances which you find from the evidence in mitigation of punishment."²⁹² There is no pattern instruction that allows the court to instruct on non-statutory mitigating circumstances proposed by the defendant. Thus, the Supreme Court of Missouri has held, for instance, that a capital defendant was not entitled to have evidence of his mental disability and low IQ submitted to the jury as a mitigating circumstance.²⁹³

Conclusion

Missouri is in partial compliance with Recommendation #5.

Missouri has adopted three statutory mitigating circumstances, on which jurors can be instructed, which relate to mental disabilities and disorders. Missouri's instructions, however, do not allow for the trial court to instruct the jury (1) that a mental disorder or disability is a mitigating circumstance and not an aggravating circumstance; (2) that a mental disorder or disability should not be used to conclude that the defendant represents a future danger to society; or (3) that there is a difference between the defense of insanity and the defendant's subsequent reliance on mental

²⁸⁶ See MAI-CR3d 314.30–314.48.

²⁸⁷ See Section 552.030.1, .7 RSMo 2011.

²⁸⁸ See Section 565.032.3, RSMo 2011.

²⁸⁹ *Id.*

²⁹⁰ *State v. Richardson*, 923 S.W.2d 301, 326 (Mo. banc 1996).

²⁹¹ *Id.* at 324.

²⁹² Rule 29.15(c) ("Whenever there is an MAI-CR instruction or verdict form applicable under the law and Notes On Use, the MAI-CR instruction or verdict form shall be given or used to the exclusion of any other instruction or verdict form."); MAI-CR3d 314.44.

²⁹³ *Richardson*, 923 S.W.2d at 325. *Richardson* was decided before Missouri amended its death penalty statute to preclude application of the death penalty for the mentally retarded. See *id.*

disorder or disability as a mitigating factor. Instructions such as these are critical because, as the U.S. Supreme Court has noted, capital defendants suffering from disabilities such as mental retardation face a special risk of wrongful execution because the disability “can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.”²⁹⁴ Moreover, empirical studies have found that jurors are more likely to impose a death sentence when a defendant is mentally ill or emotionally disturbed, irrespective of whether the evidence of mental illness is offered as a mitigating circumstance.²⁹⁵

The Assessment Team recommends that Missouri adopt capital jury instructions that incorporate the three issues outlined in the previous paragraph. Moreover, the instructions should be modified such that the trial court may instruct the jury on specific non-statutory mitigating circumstances, including circumstances related to mental disorder or disability, when such circumstances are supported by the evidence.

F. Recommendation #6

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 this should not be considered in aggravation.

The U.S. Supreme Court has observed that the courtroom demeanor of capital defendants who have a mental disability such as mental retardation “may create an unwarranted impression of lack of remorse for their crimes,” thereby increasing the chance that they will receive the death penalty.²⁹⁶

Missouri law, however, does not permit capital jurors to be instructed, when the defendant is receiving medication for a mental disorder or disability, that this medication may affect the defendant’s perceived demeanor, nor must capital jurors be instructed that such demeanor should

²⁹⁴ *Atkins*, 536 U.S. at 321.

²⁹⁵ See e.g., David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1688–89 (1998) (noting, in Table 6, that submission of a defendant’s “extreme emotional disturbance” as a mitigating circumstance increased the likelihood of a death sentence in capital cases in Philadelphia between 1983 and 1993). See also Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81 (1984).

²⁹⁶ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Some jurisdictions allow the trial court to instruct the jury that, because of the defendant’s mental condition, s/he is being administered a prescription medication that may affect his/her courtroom demeanor. See, e.g., FLA. BAR, FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.6(c) (7th ed. 2010) (allowing Florida trial courts to instruct that “(Defendant) currently is being administered psychotropic medication under medical supervision for a mental or emotional condition. Psychotropic medication is any drug or compound affecting the mind or behavior, intellectual functions, perception, moods, or emotion and includes anti-psychotic, anti-depressant, anti-manic, and anti-anxiety drugs.”); *State v. Hayes*, 389 A.2d 1379, 1382 (N.H. 1978) (requiring New Hampshire trial courts to instruct jurors “about the facts relating to the defendant’s use of medication” when a criminal defendant is forcibly medicated before trial).

not be considered in aggravation.²⁹⁷ Accordingly, Missouri is not in compliance with Recommendation #6.

G. Recommendation #7

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.

Recommendation #7 is divided into two parts: the first, which is identical to Mental Retardation Recommendation #4,²⁹⁸ relates to the existence of state mechanisms that protect against waivers resulting from an inmate’s mental disability; and the second relates to the specific mechanism of “next friend” petitions when a death row inmate wishes to forego or terminate post-conviction proceedings.

Protection from Waivers Generally

As discussed in Mental Retardation Recommendation #4, Missouri provides some mechanisms to protect mentally ill and disabled inmates from waivers that are the product of their disability.²⁹⁹ Missouri does not meet the full requirements of this portion of the Recommendation, however, because Missouri trial courts are not required to fully explain to a capital defendant entering a guilty plea how that plea also forecloses the opportunity for the defendant to have a jury determine whether s/he should be sentenced to death.³⁰⁰ Without a full explanation of the trial and sentencing rights that a capital defendant waives by pleading guilty, the trial court may be unable to detect whether the defendant’s decision to waive his/her right to a jury determination of sentencing is due to his/her mental illness. Moreover, when a Missouri capital defendant waives his/her right to direct appeal, the Supreme Court of Missouri may not have adequate opportunity to review the case of a defendant who waives his/her appeal due to a mental disorder or disability.³⁰¹

Next Friend Petitions

Next friend petitions provide a means by which to protect a mentally ill or disabled inmate from waiving his/her post-conviction rights. Under federal law, for instance, a third party may have standing as a next friend to file a post-conviction petition for federal habeas corpus relief if the

²⁹⁷ See generally MAI-CR3d (providing no such instructions); Rule 29.15(c) (“Whenever there is an MAI-CR instruction or verdict form applicable under the law and Notes On Use, the MAI-CR instruction or verdict form shall be given or used to the exclusion of any other instruction or verdict form.”).

²⁹⁸ See *supra* notes 217–255 and accompanying text.

²⁹⁹ See, e.g., *supra* notes 220–224 and accompanying text.

³⁰⁰ See *supra* notes 234–242 and accompanying text.

³⁰¹ See *supra* notes 243–249 and accompanying text.

purported next friend can demonstrate that (1) the inmate is incompetent and unable to make a rational decision as to whether to seek post-conviction relief; and (2) s/he is “truly dedicated to the best interests of the person on whose behalf [s/]he seeks to litigate.”³⁰² It is in the federal court’s discretion as to whether a next friend may be appointed to pursue post-conviction relief on behalf of the incompetent death row inmate.³⁰³

The Assessment Team is not aware of any case in which a Missouri court has permitted a next friend to pursue post-conviction remedies on a death row inmate’s behalf.³⁰⁴ Moreover, the Missouri Supreme Court Rules state that a death row inmate must initiate the post-conviction relief process him/herself by filing a pro se motion with the court.³⁰⁵ After this motion is filed and the court finds that the inmate is indigent, the court will appoint a qualified attorney to represent the defendant.³⁰⁶ While MSPD post-conviction attorneys typically will assist inmates in filing their pro se motions before appointment, the law still requires inmates to formally initiate the proceedings.³⁰⁷ If an inmate fails to file the petition in a timely manner, it constitutes a “complete waiver of any claim that could be raised in” post-conviction proceedings.³⁰⁸ Under this rule, it is unlikely that a next friend would be permitted to pursue post-conviction relief on behalf of an inmate who suffers from a mental disorder or defect that impairs the inmate’s ability to make a rational decision.

Conclusion

Missouri is in partial compliance with Recommendation #7.

While Missouri provides mentally ill capital defendants with some protection from waivers that are the product of their disability, those protections are inadequate with respect to the right to a jury determination of sentencing and the right to direct appeal. In addition, Missouri does not appear to allow next friend petitions in capital post-conviction proceedings.

With respect to the first part of the Recommendation, the Assessment Team recommends that, before a capital defendant is permitted to waive his/her right to a jury determination of sentencing, the trial court must inquire whether the defendant fully understands his/her actions and the purpose of the right s/he is waiving. Moreover, if the trial court has a good faith belief that a pro se capital defendant is mentally ill or disabled, the court should be empowered to order

³⁰² See *Whitmore v. Arkansas*, 495 U.S. 149, 164–65 (1990); see also *Harper v. Parker*, 177 F.3d 567, 569 (6th Cir. 1999).

³⁰³ *Whitmore*, 495 U.S. at 166 (“We therefore hold that [a would-be next friend], having failed to establish that [an inmate] is unable to proceed on his own behalf, does not have standing to proceed as “next friend” of [the inmate]”); see also *Rees v. Peyton*, 384 U.S. 312, 314 (1966).

³⁰⁴ The Assessment Team is aware of one case, *State v. Franklin*, in which appellate counsel filed a direct appeal on behalf of a capital defendant who wished to waive his right to direct appeal on the advice of his “spirit guides.” See *State v. Franklin*, 969 S.W.2d 743 (Mo. banc 1998). The Supreme Court of Missouri found that the defendant had effectively waived his appeal and dismissed it accordingly. *Id.* at 744. This case did not treat counsel’s actions as a next friend petition, however, as this was a direct appeal, not a motion for post-conviction relief. *Id.*

³⁰⁵ Rule 29.15(b).

³⁰⁶ Rules 24.036(a), 29.16(a).

³⁰⁷ Interview with Greg Mermelstein, *supra* note 97.

³⁰⁸ Rule 29.15(b).

an examination of the defendant by a psychologist to determine whether s/he is eligible for the death penalty.

Regarding the second part of the Recommendation, the Assessment Team recommends that, in all cases where a death-sentenced inmate has waived his/her right to post-conviction proceedings by failing to timely file a pro se motion, a next friend should have the opportunity to file a petition on that inmate's behalf. The standing requirements for next friend status should be similar to those employed under federal law.³⁰⁹

H. Recommendation #8

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.

Stay of Post-conviction Proceedings

Missouri law does not appear to permit post-conviction proceedings to be stayed, in capital cases or otherwise, for any reason, irrespective of the defendant's mental disorder or disability. Missouri statutory law allows for trial proceedings to be stayed when a defendant is found incompetent to "be tried, convicted or sentenced" for the alleged crime.³¹⁰ Similarly, a death-sentenced inmate's execution must be stayed if the inmate "lacks capacity to understand the nature and purpose of" the death sentence.³¹¹ Missouri does not, however, have an analogous statute or rule that requires a court to stay post-conviction proceedings for a mentally ill or disabled inmate who is unable to assist his/her post-conviction counsel.

In addition, Missouri Supreme Court Rules place strict filing deadlines in post-conviction proceedings, which cannot be tolled for any reason.³¹² An inmate has ninety days following the date the appellate court affirms his/her conviction to file the pro se motion necessary to commence post-conviction proceedings.³¹³ Failure to file this motion constitutes a "complete waiver" of post-conviction rights.³¹⁴ The Supreme Court of Missouri has held that these

³⁰⁹ See *supra* notes 302–303 and accompanying text.

³¹⁰ Section 552.020.1, RSMo 2011.

³¹¹ Section 552.060.1, RSMo 2011.

³¹² See, e.g., *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc 1989) ("The time limitations contained in [post-conviction] Rules 24.035 and 29.15 are valid and mandatory." (emphasis omitted)).

³¹³ Rule 24.035(b); 29.15(b). If the defendant waived his/her direct appeal, s/he must file the pro se motion within 180 days of being "delivered to the custody of the department of corrections." *Id.*

³¹⁴ *Id.*

deadlines cannot be stayed, tolled, excused, or otherwise extended for an inmate who “suffer[s] from a mental illness that interfere[s] with his right to seek post-conviction relief.”³¹⁵

Sentencing Following Stay of Proceedings

Because Missouri law does not permit post-conviction proceedings to be stayed for a mentally incompetent inmate, we are unable to assess how such an inmate would be sentenced when there is no significant likelihood of restoring the prisoner’s capacity to participate in post-conviction proceedings in the foreseeable future.

Conclusion

Missouri is not in compliance with Recommendation #8.

Missouri law does not allow an inmate’s post-conviction proceedings to be stayed, tolled, continued, or otherwise extended for any reason, including reasons related to mental incapacity and disability. The Assessment Team recommends that the Missouri General Assembly enact a statute requiring the motion court to stay post-conviction proceedings for a death-sentenced prisoner whose ability to understand the proceedings or to assist in his/her own defense is significantly impaired. The procedure for making this determination could be based on Section 552.020, which outlines Missouri’s procedure for determining whether a defendant lacks the capacity to stand trial.

I. Recommendation #9

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 case. 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.

Competency to Be Executed

The U.S. Supreme Court has held that it is unconstitutional cruel and unusual punishment to execute a death row inmate who does not have a rational understanding of the reason s/he is to be executed.³¹⁶ Further, an inmate raising such a claim is entitled to a full judicial hearing on the matter.³¹⁷

³¹⁵ Smith v. State, 21 S.W.3d 830, 831–32 (Mo. banc 2000).

³¹⁶ Panetti v. Quarterman, 551 U.S. 930, 959–60 (2007); Ford v. Wainwright, 477 U.S. 399, 409–10 (1986). In 1986, the U.S. Supreme Court held that the Eighth Amendment prohibits the execution of an “insane” offender who is not aware of his/her impending execution and the reasons for it. *Id.* at 409–10. In *Panetti*, the U.S. Supreme Court clarified that a determination of competency to be executed requires an inquiry into whether the death row inmate has a *rational* understanding of the reasons s/he will be executed. *Panetti*, 551 U.S. at 959–60.

³¹⁷ *Panetti*, 551 U.S. at 960–62 (emphasis added).

Missouri statutory law states that a death row inmate found to be incompetent cannot be executed:

No person condemned to death shall be executed if as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out.³¹⁸

Under the statute, if the Director of the Missouri Department of Corrections (DOC) has “reasonable cause to believe that [the] inmate . . . has a mental disease or defect excluding fitness for execution,” s/he must notify the governor, who must then order a stay of execution.³¹⁹ After the State and the inmate have an opportunity to conduct an “examination [of the inmate] by a physician of their own choosing,” the circuit court must hold a competency hearing.³²⁰ If the court finds the inmate competent, the Governor must set a new execution date.³²¹ If, however, the court finds that the inmate “lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out,” the stay of execution remains in effect and s/he is “transfer[red] to a mental hospital.”³²²

To receive a hearing on the issue of competency to be executed, the inmate must show “some new evidence, support or other pragmatic considerations indicating that the petitioner’s mental status has deteriorated substantially since the last determination” of competency.³²³ Therefore, an inmate may be entitled to more than one hearing on the issue if s/he can demonstrate some new evidence of incompetency since the prior determination.³²⁴

The United States Court of Appeals for the Eighth Circuit, interpreting the Missouri statute in light of U.S. Supreme Court precedent, held that “an inmate may be brain damaged” and still be subject to execution if s/he can understand the nature and purpose of the death sentence.³²⁵ The court noted that while the inmate, Bobby Shaw, suffered from brain damage, depression, and borderline intellectual functioning, both parties’ experts agreed that he understood why he was to be executed.³²⁶ Missouri Governor Mel Carnahan, however, later commuted Shaw’s sentence to life in prison after finding that he was mentally retarded.³²⁷

³¹⁸ Section 552.060.1, RSMo 2011.

³¹⁹ Section 552.060.2, RSMo 2011.

³²⁰ Section 552.060.3, RSMo 2011.

³²¹ Section 552.060.4, RSMo 2011.

³²² Section 552.060.1, 552.060.4, RSMo 2011.

³²³ *Shaw v. Delo*, 762 F. Supp. 853, 858 (E.D. Mo. 1991).

³²⁴ *Id.*

³²⁵ *Shaw v. Armontrout*, 900 F.2d 123, 124–25 (8th Cir. 1990).

³²⁶ *Id.* at 125–26.

³²⁷ *Retarded Convict’s Sentence Is Commuted*, N.Y. TIMES, June 4, 1993, at A21.

Sentencing Procedures after a Finding of Incompetency

Missouri statutory law states that, following a circuit court's finding that the inmate is incompetent to be executed, s/he is transferred to a state mental hospital and the stay of execution must remain in effect.³²⁸ If the inmate is later certified "as free of a mental disease or defect" that prevents him/her from understanding the nature and purpose of the death sentence, "the governor shall fix a new date for the execution and shall issue a warrant for the new execution date to the chief administrative officer of the correctional facility, who shall then take charge and custody of the offender and proceed with the execution as ordered in the warrant."³²⁹ Missouri does not have a judicial procedure for resentencing an inmate who is found incompetent to be executed.

In practice, however, no Missouri death row inmate found incompetent to be executed has later been certified as free of mental defect and executed. Thus, while the inmate remains under a death sentence, that sentence is never carried out.

Conclusion

For practical purposes, Missouri is currently in compliance with Recommendation #9.

Missouri statutory law provides a mechanism by which an inmate can be found not competent to be executed. While Missouri does not provide that the inmate's sentence be reduced to life in prison after challenges to the validity of the conviction and the death sentence have been exhausted and execution has been scheduled, no death-sentenced inmate in Missouri has been put to death after being ruled incompetent to be executed. As such, a finding of incompetency appears to function as a de facto prohibition on execution.

J. Recommendation #10

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.

Training

As discussed more extensively in Mental Retardation and Mental Illness Recommendation #1, some of the actors in the Missouri criminal justice system receive training relevant to protecting mentally ill and disabled individuals in the criminal justice system.³³⁰ Missouri DOC requires

³²⁸ Section 552.060.4, RSMo 2011.

³²⁹ *Id.*

³³⁰ See *infra* notes 344–359 and accompanying text.

prospective corrections officers to complete a two-hour course called Special Needs Offenders,” which instructs officers on how to identify mentally disabled inmates.³³¹ In basic training, prospective law enforcement officers are instructed to take “special care” when giving the *Miranda* warning to “[p]ersons with apparent sub-standard intelligence, such as the mentally retarded or demented individuals.”³³² Judges and prosecutors, however, are not required to attend any training on issues related to mental illness, nor have these actors been offered any in-state trainings on these issues in recent years.³³³ We are not aware of any Missouri organizations or agencies which have developed and disseminated models of best practices on ways to protect mentally ill individuals in the criminal justice system.

Services and Programs

The Missouri DOC Office of Behavioral Health Services, with the assistance of the Missouri Department of Mental Health (DMH), screens all inmates for mental illness upon admittance to a Missouri prison.³³⁴ The screening determines whether the inmate requires further treatment during his/her incarceration.³³⁵ As of 2007, 19.7% of Missouri’s prison inmates suffered from some type of mental illness.³³⁶ Mentally ill inmates who require long-term care may be transferred to the Farmington Correctional Center, which includes a 200-bed treatment center.³³⁷ The Potosi Correctional Center includes a separate unit for developmentally disabled inmates.³³⁸ Severely mentally ill inmates may also be admitted to the Biggs Correctional Treatment Unit at Fulton State Hospital, a mental hospital operated by DMH.³³⁹ In a 2011 newspaper article, however, a mental health worker who had worked in the Missouri prison system was highly critical of the mental health services provided by Missouri DOC.³⁴⁰ He stated that inmate counseling sessions typically “last[] less than five minutes, and they are scheduled four to 10 per hour,” adding that “[u]nless [the mentally ill inmates] are unruly or unmanageable, they are left alone by the system.”³⁴¹

We also note that some judicial districts in Missouri offer mental health courts to some offenders as an alternative to standard criminal courts.³⁴² Those districts which have adopted mental health courts, although such courts are not available in violent felony cases, demonstrate a

³³¹ MO. DEP’T OF CORR., PRE-SERVICE TRAINING 9 (2011), available at <http://doc.mo.gov/documents/hservice/PreService.pdf>.

³³² *Constitutional Law*, in MANDATORY BASIC TRAINING CURRICULA, *supra* note 140.

³³³ See *infra* notes 350–356 and accompanying text.

³³⁴ *Division of Offender Rehabilitative Services*, MO. DEP’T OF CORR., http://doc.mo.gov/division_rehab.php (last visited Jan. 4, 2012).

³³⁵ *Id.*

³³⁶ Alonzo Weston, *Budget Cuts Force Jail Time for Mentally Ill*, COLUMBIA MISSOURIAN, Mar. 12, 2011, <http://www.columbiamissourian.com/stories/2011/03/12/budget-cuts-force-jail-time-mentally-ill> (last visited Jan. 4, 2012).

³³⁷ *Division of Offender Rehabilitative Services*, *supra* note 334.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ Weston, *supra* note 336.

³⁴¹ *Id.*

³⁴² *Missouri Treatment Courts*, YOUR MO. COURTS, <http://www.courts.mo.gov/page.jsp?id=250> (last visited Jan. 4, 2012).

commitment to enlisting the assistance of mental health professionals to improve the treatment of the mentally ill in the criminal justice system.³⁴³

Conclusion

Missouri is in partial compliance with Recommendation #10.

Missouri has taken some steps to protect mentally ill and disabled persons within the criminal justice system by training corrections officers to recognize mental health issues, and offering some mental health services to inmates. Missouri has not, however, disseminated models of best practices on the treatment of mentally ill offenders to all actors in the criminal justice system.

³⁴³ *Id.*

IV. ANALYSIS: MENTAL RETARDATION AND MENTAL ILLNESS

A. *Recommendation #1: Mental Retardation*

All actors in the criminal justice system, including police, court officers, defense attorneys, prosecutors, judges, jailers, and prison authorities, should be trained to recognize mental retardation in capital defendants and death row inmates.

Recommendation #2: Mental Illness

All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, jailers, and prison authorities, should be trained to recognize mental illness in capital defendants and death row inmates.

Law Enforcement Officer Training³⁴⁴

Missouri law enforcement officer training is regulated by the Missouri Peace Officer Standards and Training Commission (POST Commission).³⁴⁵ The POST Commission's Mandatory Basic Training Curricula outlines several courses that a prospective officer must complete to obtain his/her officer's license.³⁴⁶ The curricula for the course on constitutional law states that officers must take "special care . . . in giving the [*Miranda*] warning" to "mentally retarded or demented" persons.³⁴⁷ However, the curricula do not appear to require any additional training in mental retardation or mental illness, such as training in recognizing mental disabilities or methods for interrogating mentally ill or retarded suspects. In addition, the three local law enforcement agencies that we surveyed—the St. Louis County, St. Louis Metropolitan, and Kansas City police departments—do not appear to have any policies specifically related to mentally retarded or mentally ill suspects.

Defense Counsel Training³⁴⁸

Defense counsel training is discussed in Mental Retardation and Mental Illness Recommendations #3 and #4.³⁴⁹

Prosecutor Training³⁵⁰

Missouri statutory law requires every prosecutor to complete "twenty hours of classroom instruction each calendar year relating to the operations of the prosecuting attorney's office" in order to receive \$2,000 of his/her annual salary.³⁵¹ The instruction must be sponsored by the

³⁴⁴ For a discussion on the training of law enforcement officers, see Chapter Three on Law Enforcement.

³⁴⁵ Section 590.030, RSMo 2011 ("The POST commission shall establish minimum standards for the basic training of peace officers."). See also *Peace Office Standards and Training*, MO. DEP'T PUB. SAFETY, <http://www.dps.mo.gov/dir/programs/post> (last visited Jan. 3, 2012).

³⁴⁶ MANDATORY BASIC TRAINING CURRICULA, *supra* note 140.

³⁴⁷ *Constitutional Law*, in MANDATORY BASIC TRAINING CURRICULA, *supra* note 140.

³⁴⁸ For a discussion on the training of defense counsel, see Chapter Six on Defense Services.

³⁴⁹ See *infra* notes 360–369 and accompanying text.

³⁵⁰ For a discussion on the training of prosecutors, see Chapter Five on Prosecutorial Professionalism.

³⁵¹ Section 56.265.2, RSMo 2011.

Missouri Office of Prosecution Services, the Missouri Association of Prosecuting Attorneys, the National District Attorneys Association, the National College of District Attorneys, the Missouri Organization of Defense Lawyers, or the Missouri Bar Association.³⁵² While some prosecutors may elect to attend courses in which they are trained to recognize mental retardation or mental illness, such courses are not required under the law.³⁵³ Moreover, in 2010 and 2011, the Missouri Office of Prosecution Services did not offer any trainings related to mental retardation or mental illness.³⁵⁴

Judicial Training

The Missouri Office of State Courts offers several training opportunities for trial judges, including New Judge Orientation and Judge College, a week-long program offered twice annually.³⁵⁵ The office, however, has not offered any trial judge training on issues related to mental retardation or mental illness for at least two years.³⁵⁶

Prison Authority Training

The Missouri Department of Corrections (DOC) requires prospective corrections officers to complete a two-hour course called “Special Needs Offenders,” in which students are trained “to compare and contrast individuals with mild or moderate mental retardation, learning disabilities, and emotional problems.”³⁵⁷ The curriculum states that prospective officers learn to “assess the potential problems from these impairments, predict how staff might be affected and learn techniques that facilitate learning and effective communication” with such inmates.³⁵⁸

Conclusion

Missouri is in partial compliance with Recommendation #1 and Recommendation #2.

Only some actors in the Missouri criminal justice system are trained to recognize mental retardation and mental illness. While we applaud the Missouri DOC for offering training programs on mental disabilities, training for other actors in the criminal justice system is limited or non-existent. Trial judges and prosecutors are not required to receive any training on mental retardation and mental illness, nor have they been offered any training on these matters in recent years. Training on identification of mental retardation is especially important for trial judges and prosecutors in Missouri, as under current law, both of these actors must consent before a capital

³⁵² *Training/Conferences*, MO. OFF. OF PROSECUTION SERVS., <http://mops.mo.gov/TrainingConf.htm> (follow “rule” hyperlink in third paragraph) (last visited Jan. 4, 2012).

³⁵³ See Section 56.265.2, RSMo 2011.

³⁵⁴ See *Trainings/Conferences*, *supra* note 352 (an earlier version of the website included a list of course for 2010 as well as 2011).

³⁵⁵ *Trial Judge Education*, YOUR MO. COURTS, <http://www.courts.mo.gov/page.jsp?id=2481> (last visited Jan. 4, 2012).

³⁵⁶ Telephone Interview by Mark Pickett with Gary Waint, Deputy State Courts Adm’r, Mo. Office of State Courts Adm’r (Apr. 21, 2011) (on file with author).

³⁵⁷ MO. DEP’T OF CORR., PRE-SERVICE TRAINING 9 (2011), *available at* <http://doc.mo.gov/documents/hservice/PreService.pdf> (last visited Jan. 9, 2012).

³⁵⁸ *Id.*

defendant can be granted a pretrial mental retardation hearing.³⁵⁹ Trial judges must also rule on issues that may be affected by mental retardation and mental illness, such as a defendant's capacity to waive the right to counsel and represent him/herself. In addition, although Missouri law enforcement officers receive some training relevant to mental health issues, this training appears limited to the need to alter *Miranda* warnings for mentally retarded and mentally ill suspects, rather than actually recognizing whether a suspect is mentally disabled. Because law enforcement officers typically interact with a suspect prior to prosecutors, trial judges, and other actors in the criminal justice system, it is especially important that they be trained to recognize mentally disabled suspects, so as to obviate the need for trial courts to remedy errors later in the process.

Accordingly, the Assessment Team recommends that the Supreme Court of Missouri require trial judges to be trained to recognize mental retardation and mental illness in defendants, witnesses, and other persons who may appear before them. The Missouri Office of Prosecution Services and other in-state agencies should offer similar trainings to prosecutors. Finally, Missouri POST should modify its curricula such that officers are required to receive training on mental retardation and mental illness issues.

B. Recommendation #3 – Mental Retardation

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 skills deficiencies of a defendant who counsel believes may have mental retardation.

Recommendation #4 – Mental Illness

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 disabilities 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 initial or subsequent 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 disabilities of a defendant who counsel believes may have mental disabilities.

³⁵⁹ Section 565.030.5, RSMo 2011.

Defense Counsel Training³⁶⁰

Missouri capital defense counsel are not required to receive any special training on recognizing, assessing, or litigating mental retardation or mental illness issues.³⁶¹ MSPD Capital Division attorneys have attended in-house and national capital and criminal defense trainings, which may include sessions on mental retardation, mental illness, and related issues.³⁶² Since 2006, however, MSPD has not offered its attorneys any in-house training on death penalty issues.³⁶³ Moreover, MSPD has limited the number of capital defense attorneys permitted to attend national training seminars in recent years. In 2009, for instance, some attorneys attended the National Consortium for Capital Defense Training's Capital Mental Health Training II.³⁶⁴ Due to budget constraints, however, MSPD has been forced to "cut back on the number of conferences [it] send[s] people to and the number of people who can attend."³⁶⁵ Consequently, while many MSPD capital attorneys have received training in mental health issues, MSPD is unable to appoint an attorney with such training and experience to every capital case handled by its office.³⁶⁶

The availability of training has been similar for private contract attorneys assigned to death penalty cases. While MSPD once provided contract attorneys with funding to attend national and MSPD-sponsored trainings, this funding has been eliminated from MSPD's budget in recent years.³⁶⁷

Missouri statutory law requires that at least one attorney representing a death row inmate in state post-conviction proceedings have "attended and successfully completed within two years immediately preceding the appointment" a minimum of twelve hours of training or educational programs on criminal post-conviction and death penalty litigation.³⁶⁸ MSPD provides training seminars or funding for its Appellate/Post-Conviction (Appellate/PCR) Division attorneys to attend national and regional seminars so that they can meet this requirement.³⁶⁹ There is no requirement, however, that these seminars cover topics related to mental retardation or mental illness.

Access to Investigators and Experts³⁷⁰

The MSPD Capital Division employs its own investigators and mitigation specialists to investigate facts surrounding the alleged offense and the defendant's background in preparation for trial, including facts related to mental illnesses and disabilities.³⁷¹ Because mitigation

³⁶⁰ For a discussion on training of defense counsel, see Chapter Six on Defense Services.

³⁶¹ Interview by Rachel Bays with Karen Kraft, *supra* note 132.

³⁶² See *Training Division, MO. STATE PUB. DEFENDER, available at* <http://www.publicdefender.mo.gov/employment/training.htm> (last visited Oct. 8, 2010).

³⁶³ Interview by Rachel Bays with Karen Kraft, *supra* note 132.

³⁶⁴ *Id.*

³⁶⁵ Interview by Mark Pickett with Karen Kraft, *supra* note 136.

³⁶⁶ *Id.*

³⁶⁷ Interview by Rachel Bays with Karen Kraft, *supra* note 132.

³⁶⁸ Section 547.370.2(1), RSMo 2011.

³⁶⁹ Interview with Greg Mermelstein, *supra* note 97.

³⁷⁰ For a discussion on funding and resources for capital defense counsel, see Chapter Six on Defense Services.

³⁷¹ Interview by Rachel Bays with Karen Kraft, *supra* note 132.

specialists are employed in-house, they receive similar training opportunities as MSPD capital attorneys, and thus their access to in-house and national trainings has decreased in recent years.³⁷² However, MSPD’s mitigation specialists likely have some educational experience in mental health, as they must have a “[m]aster’s degree from an accredited college or university with specialization in psychology, social work, sociology, or closely related field.”³⁷³

MSPD policy states that an attorney should use MSPD resources to “hire a private mental health professional,” rather than obtain a court-ordered DMH evaluation, when the attorney “believes a client may have a legally significant mental disease or defect.”³⁷⁴ Requests for mental health experts, such as psychologists and psychiatrists, must be approved by MSPD.³⁷⁵ Typically, capital defense counsel’s request for a mental health expert is approved by MSPD when there is some evidence of mental retardation or mental health issues.³⁷⁶ Funding may be denied, however, if MSPD believes that the request is premature given the stage of the case.³⁷⁷ MSPD does not have any written policies regarding qualifications for experts, including mental health experts.³⁷⁸ MSPD reports, however, that its mental retardation and mental illness experts typically have specific expertise in recognizing and diagnosing the mental disability at issue in a particular case.³⁷⁹ MSPD is able to pay experts at their requested rates “most of the time,” and experts are compensated for the tasks necessary to complete a full diagnosis, including interviews with lay witnesses, report writing, consultation with defense counsel, court testimony, and travel time.³⁸⁰ MSPD contract counsel are similarly able to hire mental health experts and mitigation specialists by submitting a request for funds to the MSPD General Counsel or Deputy Director.³⁸¹

Pro se indigent defendants in Missouri do not receive any funding to hire experts or investigators, including experts on mental retardation and other mental health issues, nor will the court appoint such experts for them.³⁸² In a recent decision, the Supreme Court of Missouri held that while the state is required to provide funds to counsel to secure expert services, it is not required to provide those funds to a pro se litigant.³⁸³

³⁷² Interview by Mark Pickett with Karen Kraft, *supra* note 136.

³⁷³ MO. PUB DEFENDER SYS., *Job Description: Mitigation Specialist I* (June 7, 2010) (on file with author).

³⁷⁴ MO. PUB DEFENDER SYS., *MSPD Policy: Mental Health Evaluations for Public Defender Clients* (Dec. 10, 2005) (on file with author).

³⁷⁵ Interview by Rachel Bays with Karen Kraft, *supra* note 132.

³⁷⁶ Interview by Mark Pickett with Karen Kraft, *supra* note 136.

³⁷⁷ *Id.* Attorneys will typically be allowed to resubmit an expert request at a later stage. *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.* We identified one case in which the Supreme Court of Missouri found that a witness, who was proffered by the defense as an expert on mental retardation, was not actually a qualified expert in this area. *Goodwin v. State*, 191 S.W.3d 20, 33 (Mo. banc 2006). In a later case, however, the court held that this finding was due to the witness’s failure to prepare for the case, and not his general lack of expertise in mental retardation. *Johnson v. State*, 333 S.W.3d 459, 463–64 (Mo. banc 2011).

³⁸⁰ Interview by Mark Pickett with Karen Kraft, *supra* note 136.

³⁸¹ Interview with Peter Sterling, *supra* note 150.

³⁸² *State v. Davis*, 318 S.W.3d 618, 631–32 (Mo. banc 2010).

³⁸³ *Id.*

Conclusion

Missouri is in partial compliance with Recommendation #3 and Recommendation #4.

MSPD appears to provide its capital defense attorneys and private appointed counsel with adequate funding to secure well-qualified mitigation specialists, investigators, and experts. MSPD's capital defense counsel, however, are not required to receive any training in recognizing or litigating mental retardation and mental illness issues, increasing the likelihood that such a disability in a client will be overlooked. Moreover, pro se litigants in Missouri, who are effectively their own attorneys, do not receive any funding for experts or investigators regardless of their level of indigency.

The Assessment Team recommends that MSPD adopt a written policy requiring at least one capital defense attorney assigned to a trial-level, direct appeal, or post-conviction case to have sufficient training on recognizing mental disabilities and mental illnesses in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions," and on their initial or subsequent eligibility for capital punishment. MSPD's funding should be increased such that it is able to provide the training necessary to comply with this Recommendation. To help defray the additional cost of this training, MSPD should solicit contributions from Missouri DMH and other mental health professionals for voluntary training sessions in basic skills relevant to recognizing mental disabilities. In addition, Missouri must permit pro se defendants to apply to MSPD or the court for appointment of investigators and experts so that defendants who choose to exercise their constitutional right to represent themselves are able to present a full defense at trial that includes relevant evidence of mental illness or mental disability.

C. Recommendation #5 – Mental Retardation

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.

Recommendation #6 – Mental Illness

During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

The Risk of False or Coerced Confessions

The U.S. Supreme Court has observed that "[m]entally retarded defendants . . . face a special risk of wrongful execution" because of the possibility that they will confess to crimes they did not commit.³⁸⁴ Social scientific research on the topic confirms this assertion. One study, for instance, found that 50% of mildly mentally retarded study participants "could not correctly paraphrase *any* of the five *Miranda* components," compared to less than 1% of the general

³⁸⁴ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

population.³⁸⁵ Moreover, because mentally retarded persons are more likely to “change accounts in response to suggestive questioning” and “possess less confidence in their own memories and beliefs,” they are more likely to falsely confess to a crime.³⁸⁶ Similarly, the mentally ill face an increased risk of falsely confessing to a crime because they often lack confidence in their own memories and are more susceptible to coercive interrogation tactics.³⁸⁷

This susceptibility to false confessions may have led Johnny Lee Wilson to falsely confess to murder in Aurora, Missouri in 1986.³⁸⁸ Wilson, who was described as a mentally impaired person and who attended special education classes in high school, admitted to a murder after he was interrogated for several hours by officers who repeatedly asked him leading questions.³⁸⁹ In 1988, the actual perpetrator, a convicted murderer, confessed to the crime.³⁹⁰ Wilson, however, was not released until 1995, when Missouri Governor Mel Carnahan granted him a full pardon.³⁹¹

Protection from *Miranda* Waivers

In *Miranda v. Arizona*, the U.S. Supreme Court held that the Fifth Amendment protection from self-incrimination requires law enforcement officers to inform a suspect of his/her right to remain silent and right to an attorney prior to a custodial interrogation.³⁹² A suspect, however, may waive his/her *Miranda* rights if the waiver is knowingly and intelligently made.³⁹³ Under Missouri case law, the test for the validity of a *Miranda* waiver “is whether the totality of the circumstances show that a defendant was deprived of a free choice to admit, deny, or refuse to answer, and whether physical or psychological coercion was such that a defendant’s will was overborne when he or she confessed.”³⁹⁴ Missouri courts will consider evidence of a defendant’s mental retardation or mental illness, including the opinions of expert psychologists, in determining the validity of the *Miranda* waiver.³⁹⁵ Despite a finding of a mental disability, however, a confession may still be admissible if the court finds that the defendant understood his/her *Miranda* rights.³⁹⁶

It can be difficult for a court to determine whether a mentally retarded or mentally ill suspect understood the *Miranda* warning in spite of his/her disability. In *State v. Payne*, for instance, the

³⁸⁵ Saul M. Kasin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 21 (2010) (citing Michael J. O’Connell et al., *Miranda Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility*, 29 LAW & HUM. BEHAV. 359 (2005)).

³⁸⁶ William C. Follette, Deborah Davis & Richard A. Leo, *Mental Health Status and Vulnerability to Police Interrogation Tactics*, 22 CRIM. JUST. 42, 48–49 (2007).

³⁸⁷ *Id.*

³⁸⁸ *Wilson v. Lawrence County*, 260 F.3d 946, 949 (8th Cir. 2001). Wilson’s case is discussed in more detail in Chapter Three, Recommendation #4.

³⁸⁹ *Id.* at 950.

³⁹⁰ Terry Ganey, *Pardoned Man Wants to ‘Pick Up My Life’*, ST. LOUIS POST-DISPATCH, Sept. 30, 1995, at 1A.

³⁹¹ *Wilson*, 260 F.3d at 949.

³⁹² *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

³⁹³ *Id.* at 479.

³⁹⁴ *State v. Payne*, 126 S.W.3d 431, 437 (Mo. App. 2004) (citing *State v. Floyd*, 18 S.W.3d 126, 132 (Mo. App. 2000)).

³⁹⁵ *See, e.g., id.* at 437–39.

³⁹⁶ *See, e.g., id.*

Missouri Court of Appeals considered testimony from two expert psychologists, both of whom testified that the defendant, who was mildly mentally retarded, did not understand his *Miranda* rights; one of the experts further testified that “someone of Defendant’s level of function often answers yes to a question when the answer is actually no or I don’t know.”³⁹⁷ The court, however, held that the trial court correctly denied the defendant’s motion to suppress. The court noted that the detective who interrogated the defendant testified that the defendant did not have any difficulty understanding the *Miranda* rights and gave “appropriate responses” to police questions.³⁹⁸ Moreover, although the defense psychologists ultimately concluded that the defendant did not understand the *Miranda* warning, one of the psychologist’s own tests revealed that the defendant “correctly gave appropriate meanings for each of the *Miranda* warnings” when asked.³⁹⁹

Protection from Coerced Confessions

In addition to the requirement that the defendant’s *Miranda* waiver be knowing and voluntary, the confession itself must be voluntary to be admissible.⁴⁰⁰ The U.S. Supreme Court has held that a court must consider the totality of the circumstances to determine whether the defendant’s statements “were the product of his free and rational choice.”⁴⁰¹ However, “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary.’”⁴⁰² The Missouri Court of Appeals has held that factors such as intelligence, lack of education, and “unusual susceptibility to coercion” are all relevant in determining whether a confession was freely made.⁴⁰³ Missouri courts have repeatedly held, however, that evidence of mental retardation or low IQ, absent police coercion, is insufficient to establish that a confession was involuntary.⁴⁰⁴ The Missouri Court of Appeals has also held that a defendant’s mental illness is just “one of many factors to be considered” in determining whether his/her confession was voluntary.⁴⁰⁵

A Missouri appellate court held that a mentally ill defendant’s confession was involuntary and coerced in *State v. Wood*.⁴⁰⁶ In that case, defendant Wood, who suffered from chronic paranoid schizophrenia, was arrested for murder.⁴⁰⁷ Prior to the interrogation, officers observed Wood “crying, moaning, pacing, and laying on the floor in a fetal position” in his cell.⁴⁰⁸ Wood was then interrogated by an officer who had been “good friends” with Wood’s family for years, had

³⁹⁷ *Id.* at 438.

³⁹⁸ *Id.* (quotations omitted).

³⁹⁹ *Id.*

⁴⁰⁰ *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

⁴⁰¹ *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968).

⁴⁰² *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

⁴⁰³ *State v. Barriner*, 210 S.W.3d 285, 300 (Mo. App. 2006).

⁴⁰⁴ *State v. Goacher*, 376 S.W.2d 97, 103 (Mo. banc 1964) (“The fact, if true, that defendant had a somewhat retarded intellect could not affect the admissibility of his confession upon this evidence”); *State v. Wood*, 128 S.W.3d 913, 916 (Mo. App. 2004) (“A deficient mental condition alone does not render a confession involuntary.”).

⁴⁰⁵ *State v. Harris*, 774 S.W.2d 487, 492 (Mo. App. 1989).

⁴⁰⁶ *Wood*, 128 S.W.3d 913.

⁴⁰⁷ *Id.* at 916.

⁴⁰⁸ *Id.* at 917.

been a minister at Wood’s church, and who had regularly counseled Wood in religious matters.⁴⁰⁹ Following an interrogation during which the officer later admitted that “he had concerns as to whether Mr. Wood understood that he was acting in his capacity as a law enforcement officer rather than as a minister and whether Mr. Wood was in touch with reality,” Wood confessed.⁴¹⁰ The court held that because law enforcement exploited Wood’s mental illness by selecting an interrogating officer with whom he had a “pastoral relationship,” Wood’s confession was not voluntary.⁴¹¹

Law Enforcement Practices

As described in Recommendation #1 and Recommendation #2 of this Section,⁴¹² the Missouri POST Program’s Mandatory Basic Training Curricula requires prospective law enforcement officers to be instructed to take “special care . . . in giving the [*Miranda*] warning” to “mentally retarded or demented” persons.⁴¹³ Missouri law, however, does not require officers to follow any special procedures when interrogating mentally retarded or mentally ill persons.

Moreover, the local Missouri law enforcement agencies we surveyed do not have specific policies on the interrogation of mentally retarded suspects. The St. Louis Metropolitan Police Department, for instance, has no specific policy on identifying mentally retarded or mentally ill suspects prior to an interrogation, the manner in which to instruct such suspects on their *Miranda* rights, or how to ensure that such suspects’ alleged confessions are accurate.⁴¹⁴ The Department only requires the officer “to take the suspect for an evaluation prior to questioning” if the officer is unsure whether the suspect is competent.⁴¹⁵ Department policy, however, does not define competence or provide any instruction on assessing the suspect’s competence or the voluntariness of his/her confession.⁴¹⁶ The St. Louis County and Kansas City police departments also appear to lack specific policies regarding the interrogation of mentally retarded and mentally ill suspects.

Conclusion

Missouri is in partial compliance with Recommendation #5 and Recommendation #6.

Missouri case law provides some measures to protect the *Miranda* rights of mentally retarded and mentally ill suspects and to prevent false or coerced confessions from being admitted as evidence. We note, however, that under current Missouri law, the confession of even a severely mentally retarded or mentally ill person would not be considered involuntary absent evidence of active police coercion.⁴¹⁷ In addition, as discussed in Recommendation #1 and Recommendation

⁴⁰⁹ *Id.* at 917–18 (quotations omitted).

⁴¹⁰ *Id.* at 918.

⁴¹¹ *Id.*

⁴¹² See *supra* notes 344–359 and accompanying text.

⁴¹³ *Constitutional Law, in* MANDATORY BASIC TRAINING CURRICULA, *supra* note 140.

⁴¹⁴ Email Interview by Mark Pickett with Aimee Pierce, Police Planner I, St. Louis Metro. Police Dep’t (Feb. 18, 2011) (on file with author).

⁴¹⁵ *Id.*

⁴¹⁶ ST. LOUIS METRO. POLICE DEP’T, SPECIAL ORDER 8-01 (2010) (on file with author).

⁴¹⁷ *State v. Wood*, 128 S.W.3d 913, 916.

#2 of this Section,⁴¹⁸ Missouri trial judges are not required to receive any training on issues related to mental retardation or mental illness.⁴¹⁹ As such, many trial judges may not be able to accurately determine the affect that a defendant's mental disability has on the voluntariness of a confession or *Miranda* waiver. We further note that Missouri law and local law enforcement policies provide officers with little guidance on assessing mental disabilities in suspects.

Consequently, Missouri should require all law enforcement agencies to adopt policies and procedures to require officers to take steps to identify potentially mentally retarded suspects. If an officer identifies the suspect as mentally retarded, s/he should be required to take extra precautions to ensure that the suspect understands his/her *Miranda* rights and that his/her confession is not false or coerced. For instance, because a mentally retarded person is especially vulnerable to suggestive questioning, such precautions should require officers to refrain from asking leading questions while interrogating a mentally retarded suspect.

⁴¹⁸ See *supra* notes 344–359 and accompanying text.

⁴¹⁹ See *supra* notes 355–356 and accompanying text.

Appendix to Chapter Four: Crime Laboratories and Medical Examiner Offices

I. ASCLD/LAB-LEGACY ACCREDITATION

A. Standards and Criteria

The Legacy Manual contains various standards and criteria, each of which is rated as “Essential,” “Important,” or “Desirable.”¹ In order to obtain accreditation, the “laboratory must achieve 100% of the Essential, 75% of the Important, and 50% of the Desirable criteria.”² Essential criteria contained in the Legacy Manual include

- (1) Clearly written and well understood procedures for handling and preserving the integrity of evidence, laboratory security, preparation, storage, security and disposition of case records and reports, maintenance and calibration of equipment and instruments, and operation of individual characteristic databases;³
- (2) A training program to develop the technical skills of employees in each applicable discipline and sub-discipline;⁴
- (3) A chain of custody record that provides a comprehensive, documented history of each evidence transfer over which the laboratory has control;⁵
- (4) The proper identification and storage of evidence to protect the integrity of the evidence;⁶
- (5) A comprehensive quality manual;⁷
- (6) The performance in an annual review of the laboratory’s quality system;⁸
- (7) The use of scientific procedures that are generally accepted in the field or supported by data gathered and recorded in a scientific manner;⁹
- (8) The performance and documentation of administrative reviews of all reports issued;¹⁰
- (9) The monitoring of the testimony of each examiner at least annually;¹¹ and
- (10) A documented program of proficiency testing, measuring examiners’ capabilities and the reliability of analytical results.¹²

¹ AM. SOC’Y OF CRIME LAB. DIRS., LABORATORY ACCREDITATION BOARD 2008 MANUAL 2 (2008) (on file with author) [hereinafter ASCLD/LAB-LEGACY 2008 MANUAL]. The manual defines “Essential” as “[s]tandards which directly affect and have fundamental impact on the work product of the laboratory or the integrity of the evidence”; “Important” as “[s]tandards which are considered to be key indicators of the overall quality of the laboratory but may not directly affect the work product nor the integrity of the evidence”; and “Desirable” as “[s]tandards which have the least effect on the work product or the integrity of the evidence but which nevertheless enhance the professionalism of the laboratory.” *Id.*

² *Id.* at 2 (emphasis omitted).

³ *Id.* at 14.

⁴ *Id.* at 18.

⁵ *Id.* at 20.

⁶ *Id.* at 20–22.

⁷ ASCLD/LAB-LEGACY 2008 MANUAL, *supra* note 1, at 24–25.

⁸ *Id.* at 28.

⁹ *Id.*

¹⁰ *Id.* at 35.

¹¹ *Id.* at 36.

¹² *Id.* at 37.

The Legacy Manual also contains Essential criteria on personnel qualifications, requiring examiners to have a specialized baccalaureate degree relevant to their crime laboratory specialty, experience and training commensurate with the examinations and testimony provided, and an understanding of the necessary instruments, methods, and procedures.¹³ Additionally, each examiner must successfully complete a competency test prior to assuming casework and proficiency examinations each year.¹⁴

Once the laboratory has assessed its compliance with the ASCLD/LAB criteria and submitted a complete application, the ASCLD/LAB inspection team, led by a team captain, will arrange and conduct an on-site inspection of the laboratory.¹⁵

B. On-site Inspection, Decisions on Accreditation, and the Duration of Accreditation

The on-site inspection consists of three steps: a laboratory tour; interviews with analysts; and a review of technical procedure manuals, training manuals, and case files generated by each analyst, including all notes and data.¹⁶ The inspection team also interviews all trainees to evaluate the laboratory's training program.¹⁷ At the conclusion of the inspection, the team meets with the laboratory director to review the findings and discuss any deficiencies.¹⁸ An ASCLD/LAB "audit committee" will evaluate the draft inspection report, during which time the laboratory may correct any deficiencies identified by the inspection team.¹⁹ Decisions on accreditation are made within twelve months of "the date of the laboratory's first notification of the audit committee's consideration of the draft inspection report."²⁰

The ASCLD/LAB Board of Directors (Board) will vote as to whether to grant full accreditation to the laboratory or accreditation limited to specific disciplines or sub-disciplines.²¹ If the Board grants accreditation to the laboratory, it is effective for five years, "provided that the laboratory continues to meet ASCLD/LAB standards, including completion of the Annual Accreditation Audit Report and participation in prescribed proficiency testing programs."²²

¹³ ASCLD/LAB-LEGACY 2008 MANUAL, *supra* note 1, at 42–54.

¹⁴ *Id.* "Competency testing should include evaluation of knowledge of existing literature, written and/or oral examinations, examination and identification of known and unknown material, and moot court." *Id.* at 54.

¹⁵ *Id.* at 4. The team captain, along with the rest of the team, is selected based on the information provided in the accreditation application and the type of work performed by the laboratory. *Id.* at 5.

¹⁶ *Id.* at 5–7, 85–86, app. 4.

¹⁷ *Id.* at 7.

¹⁸ *Id.*

¹⁹ ASCLD/LAB-LEGACY 2008 MANUAL, *supra* note 1, at 7.

²⁰ *Id.* at 8.

²¹ *Id.*

²² *Id.* at 1. "[L]aboratories seeking renewal are expected to remain in compliance with the accreditation program at all times." *Id.* at 3.

II. ASCLD/LAB-INTERNATIONAL ACCREDITATION

A. Standards and Criteria

In order to be accredited through the *International* program, the forensic laboratory must meet all of the ISO/IEC 17025:2005 requirements as well as the ASCLD/LAB-*International* supplemental requirements applicable to the work conducted at that particular laboratory.²³ The requirements include maintenance of the following:

- (1) A quality manual that details the laboratory's policies, systems, programs, procedures, and instructions to the extent necessary to ensure quality results, as well as a laboratory "quality policy statement;"²⁴
- (2) Document control procedures;²⁵
- (3) A review system for requests, tenders, and contracts;²⁶
- (4) Policies and procedures for handling complaints;²⁷
- (5) Procedures to ensure "quality policy, quality objectives, audit results, analysis of data, corrective and preventative actions, and management review;"²⁸
- (6) Procedures for the "identification, collection, indexing, access, filing, storage, maintenance and disposal of quality and technical records, including reports from both internal audits and management reviews, as well as corrective and preventative action records;"²⁹
- (7) Periodic internal audits to ensure compliance with the requirements of the management system and the ISO/IEC 17025:2005 standards, as well as management reviews of both the laboratory management system, testing and calibration activities to ensure effectiveness;³⁰
- (8) Maintenance of records of relevant competence, education, professional qualifications, training, skills and experience of all staff performing sampling, testing and/or calibration;³¹
- (9) Monitoring, controlling, and recording all environmental conditions that may have an impact on the results of the testing;³²

²³ ASCLD/LAB, ASCLD/LAB-INTERNATIONAL PROGRAM OVERVIEW 4 (2010) (on file with author), available at <http://www.ascl-d-lab.org/documents/AL-PD-3041.pdf> [hereinafter ASCLD/LAB-INTERNATIONAL OVERVIEW]. Additionally, "where applicable, laboratories performing DNA analysis will be assessed in accordance with the requirements of the *Quality Assurance Standards for Forensic DNA Testing Laboratories* and the *Quality Assurance Standards for [Convicted Offender] DNA Databasing Laboratories*." *Id.*

²⁴ ISO/IEC 17025, GENERAL REQUIREMENTS FOR THE COMPETENCE OF TESTING AND CALIBRATION LABORATORIES 3 (2d ed. 2005) (on file with author) [hereinafter ISO/IEC 17025: GENERAL REQUIREMENTS]. The "quality policy statement" includes the laboratory's commitment to good professional practice and quality services, purpose of the management system, requirement that all personnel familiarize him/herself with the quality documentation, and the laboratory's commitment to comply with the ISO/IEC standards. *Id.* at 3-4.

²⁵ *Id.* at 4-5.

²⁶ *Id.* at 5-6.

²⁷ *Id.* at 7.

²⁸ *Id.* at 8.

²⁹ *Id.* at 9-10.

³⁰ ISO/IEC 17025: GENERAL REQUIREMENTS, *supra* note 24, at 9-10.

³¹ *Id.* at 12.

³² *Id.*

- (10) Instructions on the proper use and operation of all relevant equipment, as well as on the handling and preparation of items for testing and calibration; in addition, all instructions, standards, manuals and reference materials should be kept up to date and made available to staff;³³
- (11) Objective evidence and calibration uncertainty measurement procedures;³⁴
- (12) Data control policies, including measurement traceability programs and procedures;³⁵
- (13) Procedures related to the handling of test and calibration items, including “transportation, receipt, handling, protection, storage, retention and/or disposal of test and/or calibration items,” identification of testing and/or calibrated items, as well as procedures for preventing deterioration, loss or damage;³⁶
- (14) Policies for assuring the quality of test and calibration results, including the recording of such results;³⁷ and
- (15) Standards for reporting tested items.³⁸

Once the laboratory has assessed its compliance with the *International* program criteria and submitted a complete application, an ASCLD/LAB-*International* Assessment Team will conduct an on-site inspection of the laboratory.³⁹

B. *On-site Inspection, Decisions on Accreditation, and the Duration of Accreditation*

In addition to the on-site inspection requirements included for *Legacy* accreditation, the *International* accreditation inspection consists of observing demonstrations of specific testing and calibration activities by laboratory personnel.⁴⁰ *International* program assessors also review the entire record of at least one case from each discipline in which the laboratory seeks accreditation, taking into consideration “evidence integrity, quality of reagents used, maintenance and calibration of the specific instruments used, etc.”⁴¹ The assessors also interview support personnel to evaluate the laboratory’s support capabilities.⁴²

At the conclusion of the assessment, the inspection team holds a Summation Conference and provides the laboratory director with a *Summary Assessment Report* and a *Corrective Action Request*.⁴³ These reports list all non-conformities with the ISO/IEC 17025:2005 and ASCLD/LAB-*International Supplemental Requirements* and include the necessary corrective act.⁴⁴ The *International* accreditation requirements are more stringent than the *Legacy* requirements, requiring laboratories to conform to *each* of the program’s requirements, and

³³ *Id.*

³⁴ *Id.* at 14.

³⁵ *Id.* at 15–17.

³⁶ ISO/IEC 17025: GENERAL REQUIREMENTS, *supra* note 24, at 19.

³⁷ *Id.* at 20.

³⁸ *Id.* at 20–23.

³⁹ ASCLD-LAB-*INTERNATIONAL* OVERVIEW, *supra* note 23, at 10.

⁴⁰ *Id.* at 11 (noting that the assessment team will also meet with the administrator such as a sheriff or chief of police, who is in line of command over the laboratory).

⁴¹ *Id.* at 12.

⁴² *Id.*

⁴³ *Id.* at 14–15.

⁴⁴ *Id.* at 15.

laboratories must correct non-conformities either immediately prior to receiving accreditation or, under certain circumstances, within a year of receiving accreditation.⁴⁵

A Final Assessment Report will be presented to the Board for review and determination of accreditation.⁴⁶ If the Board grants the laboratory accreditation, the *International* program accreditation certificate will specify the fields, disciplines, and sub-disciplines in which the laboratory received accreditation.⁴⁷ Accreditation is granted for a period of five years, “provided that the laboratory continues to meet all applicable accreditation standards, submits to scheduled on-site surveillance visits; completes and submits an Annual Accreditation Audit Report; and participates in prescribed proficiency testing programs.”⁴⁸ If the laboratory wishes to maintain accreditation, it must submit a new application every fifth year, and undergo another on-site assessment.⁴⁹

III. FORENSIC QUALITY SERVICES-*INTERNATIONAL* ACCREDITATION

A. *Application Process*

To apply for accreditation through Forensic Quality Services-International (FSQ-I), the laboratory must adhere to FQS-I *General Requirements for Accreditation* (General Requirements),⁵⁰ *Forensic Requirements for Accreditation* (FRA-1), which are supplemental requirements to the General Requirements;⁵¹ and any applicable *Field Specific Requirements for Accreditation*, such as DNA (FRA-2),⁵² for which the laboratory seeks accreditation.⁵³ The applicant laboratory must submit a self-assessment checklist for the General Requirements and the FRA-1, a copy of the laboratory’s quality assurance manual and any relevant associated policies and procedures, and verification that the laboratory has met the pre-assessment proficiency test requirements of FQS-I.⁵⁴

B. *Standards and Criteria*

Similar to ASCLD/LAB-*International* accreditation, laboratories seeking accreditation through FQS-I must meet the requirements of ISO/IEC 17025:2005.⁵⁵ Additionally, an applicant laboratory must comport with FQS-I’s supplemental requirements contained in FRA-1 and any additional field-specific requirements for accreditation in a particular discipline.⁵⁶

⁴⁵ ASCLD-LAB-*INTERNATIONAL* OVERVIEW, *supra* note 23, at 15–16. For more on the requirements of ASCLD/LAB-*INTERNATIONAL* accreditation, please see Chapter Four Analysis Recommendation #1.

⁴⁶ *Id.* at 16.

⁴⁷ *Id.* at 28.

⁴⁸ *Id.* at 19.

⁴⁹ *Id.*

⁵⁰ FQS-I, GENERAL REQUIREMENTS FOR ACCREDITATION 5 (on file with author) [hereinafter FQS-I GRA].

⁵¹ See FQS-I, FORENSIC REQUIREMENTS FOR ACCREDITATION (on file with author)[hereinafter FQS-I FRA-1].

⁵² FQS-I, FORENSIC REQUIREMENTS FOR THOSE LABORATORIES THAT DO DNA TESTING (on file with author) [hereinafter FQS-I FRA-2].

⁵³ FQS-I GRA, *supra* note 50, at 5–6.

⁵⁴ *Id.* at 6.

⁵⁵ See *supra* notes 24–50 and accompanying text on the requirements of ISO/IEC 17025:2005.

⁵⁶ FQS-I GRA, *supra* note 50, at 5.

C. On-site Inspection Decisions on Accreditation and the Duration of Accreditation

FQS-I appoints qualified technical assessors to evaluate material collected from the applicant laboratory and to perform on-site inspections.⁵⁷ At the inspection, the laboratory must have sufficient and appropriate test records and samples available that have been tested in accordance with the policies and procedures established by the laboratory for review by the assessors.⁵⁸

After the assessment, the assessors will meet with laboratory management and present a “draft written or oral report on the conformance of the applicant laboratory with the accreditation requirements.”⁵⁹ The assessors and laboratory management will finalize a draft written report to submit to the FQS-I Manager of Accreditations that will identify (1) “Non-conformance,”—areas where a laboratory does not conform to accreditation standards; (2) “Concerns”—practices thought to have a detrimental effect on the laboratory’s operational effectiveness or quality of its test results, but are not supported by objective evidence of non-conformance; and (3) “Comment[s],”—practices of the laboratory that are commendable or that may present opportunities for improvement.⁶⁰ Prior to an accreditation decision, the laboratory director must provide evidence of successful implementation of measures to resolve all non-conformances identified during the on-site assessment and provide a response to all concerns noted in the assessment report.⁶¹

The final written assessment and laboratory responses to non-conformances and concerns are submitted to the Manager of Accreditations for review and determination of accreditation.⁶² If the Manager grants accreditation, the laboratory will normally remain accredited for twenty-four months. FQS-I will monitor conformance to accreditation standards approximately one year after accreditation is granted.⁶³

⁵⁷ *Id.* at 6.

⁵⁸ *Id.* at 7.

⁵⁹ *Id.*

⁶⁰ *Id.* at 8.

⁶¹ *Id.*

⁶² FQS-I GRA, *supra* note 50, at 8.

⁶³ *Id.* at 9. It is possible for laboratories to receive accreditation for up to five years; however if the laboratory is granted accreditation for more than twenty-four months, FQS may require additional on-site audits. *Id.*

2010-2011

AMERICAN BAR ASSOCIATION**Missouri Assessment Team
on the Death Penalty**740 15th Street, NW
Washington, DC 20005-1022
Tel.: 202/662-1030
Fax: 202/662-1031**MISSOURI ASSESSMENT TEAM
MEMBERS**Stephen C. Thaman, Co-Chair
St. Louis University
School of Law
St. Louis, MOPaul Litton, Co-Chair
University of Missouri
School of Law
Columbia, MOHon. Nanette Laughrey
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Western District of Missouri
Kansas City, MODouglas A. Copeland
Copeland Thompson Farris PC
St. Louis, MORodney Uphoff
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U.S. District Court
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St. Louis, MOHon. Hal Lowenstein
Missouri Court of Appeals
(Retired)
Armstrong Teasdale
Kansas City, MO**PROJECT STAFF**
Washington, DCSarah E. Turberville
Director
Kirstin Ramsay
Senior Staff Attorney
Mark Pickett
Project Attorney
Paula Shapiro
Project Attorney

April 18, 2011

Dear [Prosecuting/Circuit Attorney]:

I am writing to you on behalf of the Missouri Assessment Team for the American Bar Association's Death Penalty Moratorium Implementation Project. The Missouri Assessment Team is comprised of Missouri legal professionals, including two federal judges, a former state appellate court judge, a former president of the Missouri Bar Association, and a former prosecutor. It is the task of the Missouri Assessment Team to conduct a thorough evaluation of Missouri's capital punishment laws and procedures to determine whether the State is in compliance with a series of ABA benchmarks on capital punishment. The Assessment Team will write a report based on this evaluation, which will be released this summer. The ABA has already completed similar reports in eight other states including Tennessee, Indiana, and Florida.

Because Missouri has authorized capital punishment and because the ABA takes no position on capital punishment *per se*; the assessment will focus exclusively on capital punishment laws and processes, and not whether Missouri, as a matter of morality, or penological theory should have the death penalty. Likewise, members of the Missouri Assessment Team are not required to support or oppose the death penalty or a moratorium on executions, and as such, they enter the assessment process with no preconceived notions on the results of the Assessment. The Members of the Missouri Assessment Team are as follows:

- **Professor Stephen C. Thaman**, Co-Chair, St. Louis University
- **Professor Paul Litton**, Co-Chair, University of Missouri – Columbia
- **Mr. Douglas A. Copeland**, Partner, Copeland Thompson Farris PC
- **Ms. Dee Joyce-Hayes**, former Circuit Attorney, City of St. Louis; General Counsel, Bi-State Development Agency, a/k/a “Metro”
- **The Honorable Nanette Laughrey**, U. S. District Court, Western District of Missouri
- **The Honorable Stephen N. Limbaugh**, U. S. District Court, Eastern District of Missouri
- **The Honorable Hal Lowenstein**, Missouri Court of Appeals, Retired; Armstrong Teasdale
- **Professor Rodney Uphoff**, University of Missouri - Columbia

The assessment report will cover a range of issues related to the administration of the death penalty from arrest through execution, including a chapter on prosecutors, entitled Prosecutorial Professionalism. Additional chapters will focus on the other parties involved in capital litigation, such as defense counsel and law enforcement. While our research for each of these chapters will begin with Missouri statutes and case law, we also hope to speak to and gather information from the individuals and entities involved with the administration of the capital punishment system. As such, we are seeking the input of several Missouri prosecutors in order to ensure that the report is as accurate as possible.

The Prosecutorial Professionalism chapter will cover such issues as whether Missouri's prosecutor's officers are adequately funded and the manner in which prosecutors exercise their discretion over capital cases. Attached to this letter you will find a questionnaire addressing these issues and other matters related to the prosecution of capital cases in Missouri. We hope that you will be willing to complete the questionnaire and return it to us, as it will greatly aid us in preparing an accurate report. Alternately, you could contact me via telephone to discuss these matters in more detail. My direct office number is (202) 662-1869.

On behalf of the ABA and the Missouri Assessment Team, I hope that you will assist us with ensuring that the Missouri Assessment Report is as complete and as accurate as possible. Thank you very much for your time and consideration. Please do not hesitate to contact us should you have any questions. We look forward to hearing from you.

Best regards,

A handwritten signature in black ink, appearing to read "Mark Pickett", written in a cursive style.

Mark Pickett
Project Attorney

Enc.

AMERICAN BAR ASSOCIATION

Below is a list of questions related to the provision of prosecutorial services in capital cases in the State of Missouri. Please answer each question as thoroughly and accurately as possible, attaching additional pages if necessary. If you prefer an electronic copy of this survey or would prefer to discuss the questions over the telephone, please email or call Staff Attorney Mark Pickett at mark.pickett@americanbar.org, 202-662-1869. You may also mail your responses to: Mark Pickett, American Bar Association – 9th Floor No. 945, 740 15th Street NW, Washington DC, 20005.

Name: _____

District: _____

Date: _____

Training and Qualifications of Assistant Prosecuting Attorneys who Handle Capital Cases:

1. How do you determine which prosecutors in your office handle capital cases?
 - a. Please describe any necessary minimum qualifications.

 - b. Please list the prosecutors in your office currently screened to handle capital cases, along with the following information: (1) number of years each prosecutor has practiced law; (2) years of experience each has as a prosecutor; and (3) total number of prior capital cases handled by each prosecutor.

2. Are there policies, practices, or procedures governing the caseload of prosecutors in your office who handle capital cases? Please describe these policies, practices, or procedures.
 - a. Are there a minimum number of prosecutors assigned to each capital case? If so, what is that number and what is the procedure for determining whether a capital case receives a second-chair prosecutor?

- b. How many active capital cases is each of your capital prosecutors currently assigned to?
- c. What are the overall caseloads of attorneys in your office who handle capital cases?
- d. What, if any policies limit the number of active *non*-capital cases that your capital prosecutors are assigned to?

3. What is your office's current total budget?

- a. Has your office's budget changed over the last five years? If so, how?
- b. Has there been a difference between the funds your office requested and the funds your office was allocated over the last five years. If so, please explain.
- c. Have budget limitations required you to assign your capital prosecutors higher caseloads than you would prefer? If so, please describe what you believe your capital prosecutors' caseloads *should* be if you had a larger budget.

4. Does your office receive funding specifically earmarked for capital cases?

- a. If so, how much funding has your office received that is specifically earmarked for capital cases each year since you became Prosecuting Attorney and what are the sources of that funding?
- b. If not, how does your office allocate funds to capital cases?

5. What resources does your office use to train prosecutors to handle capital cases?
 - a. Do you feel these resources are adequate? Why or why not?
 - b. What kinds of capital training programs, either in-house or through an outside organization, are offered?
 - c. Are assistant prosecuting attorneys who handle capital cases required to attend these training programs? If not, how do you determine which prosecutors attend the trainings?
 - d. Are there any capital training programs that your prosecutors are no longer able to attend due to budget constraints? If so, please describe.
 - e. Do your prosecutors receive any special training to help them recognize mental retardation, mental illness, and other mental health disorders in defendants, witnesses, or victims? If so, please describe the type of training they receive.

6. What are the current salary scales for attorneys in your office who handle capital cases?
 - a. If your office employs investigators, what are the current salary scales for the investigators in your office?

Notice of Intent to Seek the Death Penalty

1. Please describe your policies, practices, or procedures for determining whether to seek the death penalty in a case.

- a. Does your office require any particular type of evidence be present in the case before deciding to seek the death penalty? For instance, is physical evidence tying the defendant to the crime necessary?

 - b. Does your office consult with the victim's family members before filing a notice of intent to seek the death penalty? If so, how does their opinion factor into your decision?

 - c. Does your office consult with defense counsel before deciding to seek the death penalty?
 - i. If so, does your office typically seek the consultation, or is the consultation at the request of defense counsel?

 - ii. What sort of information does your office seek from defense counsel to help inform its decision (if applicable)?

 - d. Does your office have a written policy that governs the decision making process to seek the death penalty? If so, please provide a copy of that policy.
2. At what point in the case do you generally file the notice of intent to seek the death penalty?
3. Please describe how your office determines whether to withdraw a notice of intent to seek the death penalty. If possible, provide the names and dates of the cases in which you elected to withdraw a notice of intent to seek the death penalty in the last five years and provide an explanation as to why.

Discovery

1. Please describe your office's policies, practices, or procedure on discovery by the defense in capital cases.
 - a. How does your office identify and disclose evidence favorable to the defense?
 - b. Do you provide all prior statements of witnesses to the defense? If so, how long before trial do you do so?
2. How do you ensure that the prosecutors in your office are meeting their discovery obligations?
3. Explain your office's policies, practices, or procedures on providing discovery in capital *post-conviction* cases?
 - a. How long does it generally take your office to comply with a request for discovery in capital post-conviction cases?
 - b. What kind of discovery do you provide to the defense in capital post-conviction cases?
 - c. Do you require defense counsel to request specific discovery or do you accept a general discovery request in capital post-conviction cases?

Plea Agreements

1. What policies, practices, or procedures are in place to determine whether to make a plea offer in capital cases?

- a. Who makes the ultimate decision as to whether to make a plea offer?
 - b. What factors are considered in making this determination?
2. Are there any circumstances in which your office prohibits plea offers? If so, what are those situations?
 - a. What factors are considered in determining whether to prohibit a plea offer?
3. In your judicial district, how many plea bargains were offered in capital cases and how many of those offers were accepted in the last five years?

General Information about the Death Penalty in Your Judicial District

1. In how many cases has your office filed a notice to seek the death penalty since you became the Prosecuting Attorney in your district?
2. How many capital cases are currently pending within your office?
3. How many capital cases have been brought to a capital trial since you became the Prosecuting Attorney?
4. How many capital cases have you personally tried (as first or second chair) in your capacity as Prosecuting Attorney or Assistant Prosecuting Attorney? Please list dates, defendants' name, and disposition.

Additional Information

1. What have been some of the most difficult challenges you or your office have faced in prosecuting capital cases?

2. Are there any other aspects of the capital punishment in Missouri that you believe the Assessment Team should focus on?

Attached, please find a copy of the full ABA Recommendations for the chapter on prosecutors. If you have any additional comments with respect to the recommendations, please feel free to include them.

Please do not hesitate to contact us if you have any questions or need clarification. We always welcome any additional comments or feedback you may have.



TANEY COUNTY PROSECUTING ATTORNEY'S OFFICE
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FORSYTH, MO 65653
www.taneycountyprosecutor.com

June 10, 2011

Mr. Mark Pickett
Project Attorney, Missouri Assessment Team
740 15th Street, NW
Washington, D.C. 20005-1022

RE: ABA Death Penalty Questionnaire

Dear Mr. Pickett,

Please note that the Missouri Association of Prosecuting Attorneys (MAPA) adopts the attached response from Clay County Prosecuting Attorney Dan White as the formal response of Missouri's prosecutors to the ABA Death Penalty Questionnaire. MAPA also offers the following response:

As with any crime, when presented with any particularly heinous murder, the Missouri prosecutor looks at the evidence provided by law enforcement officers and applies Missouri law. Specifically, Chapter 565 of the Revised Statutes of Missouri set forth how first-degree murder and death penalty cases are to be reviewed by prosecutors (Section 565.032 RSMo), tried in courts (Sections 565.030 and 565.032 RSMo), and then reviewed by higher courts in the event a death sentence is the judgment of the jury (Sections 565.035 and 565.040 RSMo).

Because Missouri statutes and court rules have set forth specific rules by which Missouri prosecutors and courts are to adhere, many of the questions posed in the ABA Questionnaire are not applicable, unable to be answered in the format requested.

Thank you for your interest in the criminal justice system in Missouri. Although we are disappointed by the absence of active prosecutors on the ABA's committee, MAPA takes great interest in this project and looks forward to reviewing the final report. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Jeffrey M. Merrell
Chair, Special Committee on the Death Penalty
Missouri Association of Prosecuting Attorneys

Enclosure

cc: Dean Dankelson, President, MAPA
Bob McCulloch, President-elect, MAPA
Dan White, Clay County Prosecuting Attorney

MAIN OFFICE: (417) 546-7260 | FAX: (417) 546-2376
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DANIEL L. WHITE
PROSECUTING ATTORNEY
CLAY COUNTY, MISSOURI

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Check Division
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(816)736-8311 fax

Family Support
(816)736-8350
fax(816)736-8351

June 10, 2011

Mr. Mark Pickett
Project Attorney
Missouri Assessment Team
740 15th Street, NW
Washington, D.C. 20005-1022

Dear Mr. Pickett:

Thank you for the opportunity to provide information in this survey but I must respectfully decline.

The decision to seek the death penalty is not one that comes easy to prosecutors. In my near 20-year career in Clay County in suburban Kansas City, Missouri, I've come across only two cases in which I thought death was an appropriate punishment; one for a man who gunned his 9-year-old son down in front of a parochial school, and the second for a serial offender already on death row. The first resulted in a plea to life without parole, the second is pending.

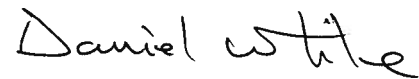
I can't quantify the soul-searching, legal research, fact-finding, and energy expended in first, arriving at the decision to seek the death penalty and second, actually going forward. It's not an easy decision; nor should it be.

Second, in that I am a public official, answering these questions would generate a public document subsequently available to others who may not have justice as their primary mission. There are many questions in the survey the answers of which provide insight into trial strategies, tactics, resources, and the resolve to proceed. I do not wish to embolden enemies of justice by providing ammunition to be used against it.

Last, in that I am a public official, my policies differ from my predecessor and those of my successor will differ from mine. My priorities include prevention efforts but a successor might argue prevention doesn't belong on the prosecutor's plate. I'm involved in filing domestic violence cases because I believe doing so helps to reduce the number of domestic homicides. A successor might disagree with that assessment and have differing policies regarding intimate partner violence.

Answers on this survey may hinder successors who in some future litigation would find themselves having to justify policies of mine they've retained or having to defend their decision to eliminate those policies with which they did not agree. It's a Hobson's choice I do not intend to leave behind for my successors.

Most respectfully,

A handwritten signature in black ink that reads "Daniel White". The signature is written in a cursive, slightly slanted style.

Daniel White
Prosecuting Attorney

DLW:jlr



**CIRCUIT ATTORNEY
CITY OF ST. LOUIS**

JENNIFER M. JOYCE

CIRCUIT ATTORNEY'S OFFICE
1114 Market Street, Room 401
St. Louis, Missouri 63101
(314) 622-4941
FAX: (314) 622-3369
www.circuitattorney.org



June 15, 2011

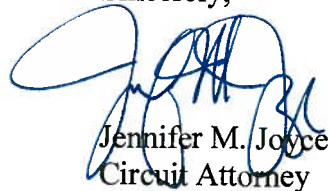
Mr. Mark Pickett
Project Attorney
Missouri Assessment Team
740 15th Street, NW
Washington, D.C. 20005-1022

RE: ABA Death Penalty Questionnaire

Dear Mr. Pickett:

Please find enclosed a copy of the Missouri Association of Prosecuting Attorneys' letter responding to the ABA Death Penalty Questionnaire. I understand the same has been sent to you. Please consider this the Circuit Attorney's response to the same questionnaire.

Sincerely,



Jennifer M. Joyce
Circuit Attorney

2010-2011

AMERICAN BAR ASSOCIATION

**Missouri Assessment Team
on the Death Penalty**
740 15th Street, NW
Washington, DC 20005-1022
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Kirstin Ramsay
Senior Staff Attorney

Mark Pickett
Project Attorney

Paula Shapiro
Project Attorney

July 11, 2011

Mr. Jeffrey M. Merrell
MAPA Special Committee on the Death Penalty
PO Box 849
Forsyth, MO 65653

RE: ABA Assessment Team on the Missouri Death Penalty Questionnaire

Dear Mr. Merrell:

Thank you for considering the questionnaire that was sent to a number of Missouri Prosecuting Attorneys on behalf of the ABA Assessment Team on the Missouri Death Penalty. It is our understanding that your letter and the attached letter from Clay County Prosecuting Attorney Daniel White will serve as the official response to our questionnaire from any prosecuting attorney who wishes to adopt MAPA's position on this matter.

In your letter, you indicate that Missouri prosecutors are unable to respond to questions related to prosecutorial discretion, in particular the questions under the headings "Notice of Intent to Seek the Death Penalty," "Discovery," and "Plea Agreements," because Missouri statutes and court rules set forth the manner by which prosecutors determine whether to seek the death penalty in a particular case. In addition, the attached letter from Mr. White states that answering many of the questions would create a public document on the capital decision-making process, which could be used to undermine future decisions.

Because we want our report to be as accurate and complete as possible, we are writing to ask you to reconsider answering questions that are unrelated to charging decisions and your related concerns. For example, we would still appreciate any information you can provide regarding the questions under "Training and Qualifications," "General Information about the Death Penalty," and "Additional Information." We have been able to obtain similar information from Missouri law enforcement agencies, state medical examiners and crime laboratories, and the Missouri State Public Defender. In addition, our Team has had conversations with St. Louis County Prosecuting Attorney Bob McCulloch and former Callaway County Prosecutor Attorney Bob Sterner for the purpose of gathering information for the report.

We would welcome any information you could provide, even if included in a document separate from the questionnaire. We also welcome any additional information that MAPA or individual prosecutors believe to be relevant to our assessment.

Thank you very much for your time and consideration.

Best Regards,

Professor Paul Litton
Co-Chair, ABA Assessment Team on the Missouri Death Penalty

Professor Stephen C. Thaman
Co-Chair, ABA Assessment Team on the Missouri Death Penalty

Cc: Dan White, Clay County Prosecuting Attorney
Jennifer Joyce, City of St. Louis Circuit Attorney

AMERICAN BAR ASSOCIATION

Below is a list of questions related to the provision of prosecutorial services in capital cases in the State of Missouri. Please answer each question as thoroughly and accurately as possible, attaching additional pages if necessary. If you prefer an electronic copy of this surveyor would prefer to discuss the questions over the telephone, please email or call Senior Staff Attorney Kirstin Ramsay at Kirstin.ramsay@americanbar.org, 202-662-1869. You may also mail your responses to: Kirstin Ramsay, American Bar Association -9th Floor No. 926,740 15th Street NW, Washington DC, 20005.

Name: Missouri Attorney General's Office

Date: October 24, 2011

A. Background on the Attorney General's Involvement in Capital Cases

1. How does the Attorney General's Office become involved in capital cases at the trial level?

The Attorney General's Office becomes involved in a criminal case (capital or non-capital) at the trial level in one of two ways. First, the Attorney General may be directed by the Governor to provide assistance to a local county prosecuting attorney pursuant to Section 27.030, RSMo. This statute provides: "When directed by the governor, the attorney general, or one of his assistants, shall aid any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts and in examinations before grand juries, and when so directed by the trial court, he may sign indictments in lieu of the prosecuting attorney." Traditionally, a local prosecuting attorney will make a request in writing to the Governor requesting the assistance of the Attorney General. Second, a county prosecuting attorney might either recuse herself or be disqualified by the trial court due to a conflict of interest and a circuit or associate circuit judge may then appoint the Attorney General to serve as special prosecutor. See Section 56.110 RSMo. Upon either a directive from the Governor or upon order of a Circuit Judge, the Attorney General may then formally enter the case.

2. At what stage of the proceedings does the Attorney General's Office usually become involved in the capital case?

Please see answer given to the immediately preceding question.

3. Has the Attorney General's Office ever initiated involvement in a capital case? If yes, please explain the circumstances.

We are unaware of the practices of previous administrations. The involvement in criminal cases by this administration is outlined in answer to question number 1 above.

4. When contacted by a local prosecuting attorney, how does the Attorney General's Office decide whether to assist in the capital case?

a. What factors are considered in deciding whether to assist in the case?

The presumption under Missouri law is that the Attorney General's Office will provide appropriate assistance upon request under Section 27.030 RSMo.

b. Who, if anyone, must approve the case before the Attorney General's Office can join the case?

See previous answer.

5. Has the Attorney General's Office ever turned down a request to assist in a capital case? If yes, please explain the circumstances.

This administration has provided assistance in criminal cases when directed by the Governor or upon appointment by the Circuit Court. This includes cases that involve a potential penalty of death. This administration is unaware of the practices of previous administrations.

6. When the Attorney General's Office becomes involved in a capital case, has the local prosecuting attorney already made the decision to seek the death penalty?

Because this office can be asked to assist at any stage of the case, the answer to this question depends on the timing of the request for assistance by a local prosecuting attorney or the timing of the appointment of the Attorney General.

7. Does the Attorney General's Office have any discretion or influence over the decision of whether to seek the death penalty in a specific case? If yes, please complete section B.

The decision on whether to seek the death penalty rests with the local prosecuting attorney unless he/she have recused themselves from the decision or otherwise withdrawn from the case due to a conflict of interest. In those circumstances the decision rests with the appointed special prosecuting attorney/Attorney General.

8. Once involved in the capital case, does the Attorney General's Office have any influence over whether to withdraw the notice of intent to seek the death penalty? If yes, please complete section B, question 3.

Authority over the decision on whether to seek the death penalty rests with the local prosecuting attorney unless he/she has recused themselves or otherwise withdrawn from the case due to a conflict of interest. In those circumstances the decision rests with the appointed special prosecuting attorney/Attorney General.

9. Once involved in a capital case, does the Attorney General's Office have any discretion in offering a plea agreement? If yes, please complete section C.

Authority over the decision to make a plea offer rests with the local prosecuting attorney's office unless he/she has recused themselves or otherwise withdrawn from the case due to a conflict of interest. In those circumstances the decision rests with the special prosecuting attorney/Attorney General.

10. Once the Attorney General's Office is involved in a capital case who handles the investigation, the Attorney General's Office or the local law enforcement agency?

The investigation of any criminal case is performed by law enforcement agencies with jurisdiction over the crime. When directed by an Assistant Attorney General, investigators with the Attorney General's Office may assist local law enforcement.

11. What year did the Attorney General's Office begin assisting local prosecuting attorneys with capital cases?

The answer to this question predates this administration and is not known at this time.

12. Do the same Attorney General's Office attorneys who handle capital trials also handle capital direct appeals?

No. The attorneys who handle the direct appeal in criminal matters are located in the Criminal Division, a separate division from the Public Safety Division which handles criminal matters at the trial level.

13. If the Attorney General's Office prosecuted a capital case at trial, will the Attorney General's office also represent the state on that case in post-conviction proceedings? If yes, is the case handled by the same attorneys who prosecute the capital cases at trial?

In matters in which the Office of Attorney General participated at the trial of a criminal case, it may assist the local prosecuting attorney in post-conviction proceedings. When a request for assistance in a post-conviction proceeding is made, an Assistant Attorney General will be assigned. There is no current rule or policy barring the trial counsel from assisting in the representation of the state in post-conviction proceedings unless a conflict for that attorney exists.

14. Does the Attorney General's Office ever handle capital post-conviction capital cases which it did *not* prosecute at trial? If yes, under what circumstances?

Please see answer to the immediately preceding question.

B. Notice of Intent to Seek the Death Penalty

1. Please describe your policies, practices, or procedures for determining whether to seek the death penalty in a case.

While this decision often rests with the local prosecuting attorney having jurisdiction over the case, this office requires that every capital case in which it is involved meet the applicable provisions of Chapter 565, RSMo. and other relevant state and federal law. This office does consult with the family of victims in all murder cases and follows the statutory requirements outlined in Chapter 595, RSMo. and the Constitutional requirements set forth in Section 32 of Article 1 of the Missouri Constitution as they pertain to the rights of crime victims. To the extent a more specific answer is sought, it is our position that this question seeks information that would divulge work product, strategy, resources and the level of resolve to proceed in capital murder cases, and we respectfully decline to provide a more specific response.

a. Does your office require any particular type of evidence be present in the case before deciding to seek the death penalty? For instance, is physical evidence tying the defendant to the crime necessary?

Please see immediately preceding answer.

b. Does your office consult with the victim's family members before filing a notice of intent to seek the death penalty? If so, how does their opinion factor into your decision?

Please see previous answer.

c. Does your office consult with defense counsel before deciding to seek the death penalty?

Please see previous answer.

i. If so, does your office typically seek the consultation, or is the consultation at the request of defense counsel?

ii. What sort of information does your office seek from defense counsel to help inform its decision (if applicable)?

d. Does your office have a written policy that governs the decision making process to seek the death penalty? If so, please provide a copy of that policy.

Please see previous answer.

2. At what point in the case do you generally file the notice of intent to seek the death penalty?

The filing of a notice to seek the death penalty or the filing of a notice of statutory aggravating circumstances is made at the appropriate time after careful consideration of the evidence available to the state and the law applicable under Chapter 565, RSMo as the interests of justice require.

3. Please describe how your office determines whether to withdraw a notice of intent to seek the death penalty. If possible, provide the names and dates of the cases in which you elected to withdraw a notice of intent to seek the death penalty in the last five years and provide an explanation as to why.

C. Plea Agreements

1. What policies, practices, or procedures are in place to determine whether to make a plea offer in capital cases?

Unless otherwise specifically answered below, it is our position that this section seeks information from this office that would divulge work product, strategy, resources and the level of our resolve to proceed in capital murder cases and we respectfully decline to answer the questions presented.

a. Who makes the ultimate decision as to whether to make a plea offer?

b. What factors are considered in making this determination?

2. Are there any circumstances in which your office prohibits plea offers? If so, what are those situations?

No.

a. What factors are considered in determining whether to prohibit a plea offer?

D. Training and Qualifications of Assistant Attorneys General who Handle Capital Cases:

Unless otherwise answered below, it is our position that this section of questions seeks information from this office that would divulge personal and confidential information about assistant attorneys general, work product, strategy, resources and the level of our resolve to proceed in capital murder cases and we respectfully decline to answer the questions presented.

1. How do you determine which prosecutors in your office handle capital cases?

a. Please describe any necessary minimum qualifications.

b. Please list the attorneys in your office currently screened to handle capital cases, along with the following information: (1) number of years each attorney has practiced law; (2) years of experience each has prosecuting criminal cases; and (3) total number of prior capital cases handled by each attorney.

2. Are there policies, practices, or procedures governing the caseload of attorneys in your office who handle capital cases? Please describe these policies, practices, or procedures.

a. Are there a minimum number of attorneys assigned to each capital case? If so, what is that number and what is the procedure for determining whether a capital case receives a second-chair attorney to prosecute the case?

b. How many active capital cases is each of your assistant attorneys general currently assigned to?

c. What are the overall caseloads of attorneys in your office who handle capital cases?

d. What, if any policies limit the number of active *non-capital* cases that the attorneys in your office who prosecute capital cases are assigned to?

3. What is your office's current total budget?

\$25,410,175

a. Has your office's budget changed over the last five years? If so, how?

Yes, it has decreased due to legislative action.

b. Has there been a difference between the funds your office requested and the funds your office was allocated over the last five years. If so, please explain.

No change in fund sources except for a decrease in the amount received.

c. Have budget limitations required you to assign your capital prosecutors higher caseloads than you would prefer? If so, please describe what you believe your capital caseloads *should* be if you had a larger budget.

4. Does your office receive funding specifically earmarked for capital cases?

No.

a. If so, how much funding has your office received that is specifically earmarked for capital cases each year since you joined the Attorney General's Office as a capital prosecutor and what are the sources of that funding?

Not applicable.

b. If not, how does your office allocate funds to capital cases?

5. Does the Attorney General's Office cover all litigation expenses once it agrees to assist the local prosecuting attorney? If no, please explain how the responsibility for funding is divided.

6. What resources does your office use to train attorneys to prosecute capital cases?

a. Do you feel these resources are adequate? Why or why not?

b. What kinds of capital training programs, either in-house or through an outside organization, are offered?

c. Are assistant attorneys general who handle capital cases required to attend these training programs? If not, how do you determine which attorneys attend the trainings?

d. Are there any capital training programs that your capital attorneys are no longer able to attend due to budget constraints? If so, please describe.

e. Do your capital attorneys receive any special training to help them recognize mental retardation, mental illness, and other mental health disorders in defendants, witnesses, or victims? If so, please describe the type of training they receive.

7. What are the current salary scales for attorneys in your office who handle capital cases?

a. If your office employs investigators, what are the current salary scales for the investigators in your office?

E. Discovery

1. Please describe your office's policies, practices, or procedure on discovery by the defense in capital cases.

The Attorney General's office follows applicable Missouri and Federal law in providing timely and complete discovery to the defense in criminal cases

a. How does your office identify and disclose evidence favorable to the defense?

b. Do you provide all prior statements of witnesses to the defense? If so, how long before trial do you do so?

2. How do you ensure that the attorneys in your office are meeting their discovery obligations?

3. Explain your office's policies, practices, or procedures on providing discovery in capital post-conviction cases?

a. How long does it generally take your office to comply with a request for discovery in capital post-conviction cases?

b. What kind of discovery do you provide to the defense in capital post-conviction cases?

c. Do you require defense counsel to request specific discovery or do you accept a general discovery request in capital post-conviction cases?

4. How is the duty of meeting discovery obligations handled once the Attorney General's Office takes over the case? Does the local prosecutor have any role in the discovery process once the Attorney General's Office is involved?

F. General Information about capital cases handled by the Attorney General's Office

1. In how many capital trial cases has the Attorney General's Office assisted local prosecuting attorneys? Please list the counties and cases. How many capital cases are currently pending in which the Attorney General's Office is assisting local prosecuting attorneys? Please list the cases and counties.

Since the beginning of this administration's term in January, 2009, this office has assisted in the prosecution of a capital murder trial to a jury in three cases: State v. Marshall, Howell County after change of venue from Ripley County (first trial resulted in a hung jury. Local prosecuting attorney waived the death penalty prior to retrial); State v. Shockley, Carter County; State v. Tisius, Boone County after change of venue from Randolph County (penalty phase retrial).

This office is currently assisting local prosecuting attorneys in 9 murder cases where a notice of statutory aggravating circumstances has been filed pursuant to Section 565.032, RSMo.

State v. Blurton – Benton, County

State v. Collings – Barry, County

State v. Spears – Barry, County

State v. Driskell -- Laclede, County
State v. Harris -- Texas, County
State v. Taylor -- Washington, County
State v. Maylee -- Callaway, County
State v. McCoy -- Stoddard, County
State v. McCoy -- Stoddard, County

Additional Information:

1. What have been some of the most difficult challenges you or your office have faced in prosecuting capital cases?
2. Are there any other aspects of the capital punishment in Missouri that you believe the Assessment Team should focus on?

Respectfully submitted,



Wm. Page Bellamy
Assistant Attorney General
Chief Counsel, Public Safety Division